

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

**GEORGE BARISICH, individually and on behalf of
THE UNITED COMMERCIAL FISHERMAN'S
ASSOCIATION, INC.**

Plaintiff

Versus

**BP, P.L.C., BP EXPLORATION & PRODUCTION
INC., and BP AMERICA PRODUCTION COMPANY**

Defendants

Magistrate:

Civil Action Number:

Section:

Jury Demand

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER**

As set forth more fully below the Master Vessel Charter Agreement (the "Agreement") that defendants, BP, plc, BP Exploration & Production Inc., and BP America Production Company (collectively "BP"), are demanding volunteers execute before assisting in clean-up efforts off the Louisiana coast is impermissibly broad and overreaching, is not supported by adequate consideration, and is contrary to public policy. Requiring the volunteer responders, already victims of the oil spill disaster caused by BP, to potentially lose or in any way limit their claims against BP, including claims for potential injury caused by efforts to clean up the catastrophic discharge, is unconscionable.

BP's demanding that Plaintiff – and others, including many, many members of the United Commercial Fisherman's Association, Inc. which Plaintiff represents – execute the Agreement BP drafted to cover its own hide before allowing Plaintiff – and those others – to assist in cleaning up

an environmental disaster of possibly unprecedented scale that BP caused is akin to demanding that a person running into their own burning home sign a release limiting or giving up their claims against the arsonist that caused the fire. Such an Agreement cannot be abided. At best it is an ill-conceived approach to the crisis at hand and has the unforeseen consequences of causing further – and irreparable – injury to the citizens of Louisiana. At worst, it is a dastardly effort to compromise the rights of those citizens when they are at their most vulnerable.

For these reasons, Plaintiff, individually and on behalf of the United Commercial Fisherman's Association, Inc. as President thereof, respectfully requests that his Motion for Temporary Restraining Order be granted to alleviate the risk to him of immediate and irreparable harm before a preliminary injunction hearing may be scheduled to hear all evidence regarding the issues raised in his Motion.

FACTUAL BACKGROUND

The compelling facts supporting the requested relief are detailed in the Verified Complaint for Declaratory and Injunctive Relief. Those facts substantiate that the requirements for injunctive relief are met.

In particular, the DEEPWATER HORIZON was a floating oil rig operated by defendants BP, plc, BP Exploration and Production Inc. and/or BP American Production Company (collectively "BP") approximately 50 miles southeast of Venice, Louisiana in the Gulf of Mexico. At approximately 10 p.m. on April 20, 2010, while the vessel, DEEPWATER HORIZON, was performing drilling operations for crude oil off the coast of Louisiana at its Macondo Prospect, an apparent "blow-out" of the well occurred and a fiery explosion of the rig resulted. Some crewmembers were thrown overboard and it is believed that at least 11 crewmembers aboard the

vessel were killed. The explosion and subsequent fire caused such significant damage to the floating rig structure that it sank in approximately 5,000 feet of water.

With the failure of the well's casing and the concurrent failure of the blow-out preventor mechanism (the "BOP"), the well began to release, leak and/or discharge oil directly into the Gulf of Mexico. The well continues to release, leak and/or discharge at least 210,000 gallons of oil into the Gulf of Mexico on a daily basis, and the plume has expanded to more than 4,000 square miles. The oil that is being released is an extremely hazardous and/or toxic substance which poses a significant risk to the wetlands and marine life in the Louisiana Coastal Zone. A large and expanding mass of oil continues to spread to the Louisiana coastline every day and threatens the nation's largest remaining wetland areas and vulnerable habitat of fish, oysters, crabs, shrimp, birds and other precious wildlife.

In an effort to protect the wetlands and estuaries, the very cradle of their livelihoods and way of life, fishermen in Louisiana – already victims of the catastrophic discharge – have volunteered to assist BP and government agencies in deploying boom material and in other associated clean-up operations. Plaintiff, and the many, many members of the United Commercial Fisherman's Association, Inc. which he represents as President, are among the ever-growing number of brave Louisiana citizens who have volunteered in those efforts.

Before allowing Plaintiff to assist in those efforts, however, BP unilaterally drafted and demanded that he sign the Master Vessel Charter Agreement (the "Agreement") attached as Exhibit A to Plaintiff's Verified Complaint for Declaratory and Injunctive Relief. That Agreement contains several provisions that could severely limit Plaintiff's ability to fully and vigorously pursue any claims he may have against BP and its affiliated entities. Furthermore, upon information and belief,

the unilateral Agreement is proposed by BP to be used by all volunteers who assist in BP's mandatory clean-up obligations. To be clear, execution of the Agreement – and acquiescence to the claim-limiting provisions contained therein – is being demanded of the very volunteers whose livelihoods the BP defendants have put in unprecedented jeopardy.

Article 13(I)(1) of the Agreement provides, in pertinent part:

If VESSEL OWNER has a claim against CHARTERER [BP] or has Notice of any claim(s) for which CHARTERER is or could be accountable;

1. VESSEL OWNER will provide full written Notice to CHARTERER within thirty (30) days of the date VESSEL OWNER learns of the claim.

Article 13(F), in turn, provides as follows:

VESSEL OWNER will defend, indemnify and hold CHARTERER and its respective agents and employees harmless from all claims, losses, actions, liabilities, and expenses for, or related to, any loss of or damage to any property or any injury to or death of any person in connection with or relating in any way to VESSEL OWNER'S performance under the CHARTER or SERVICES provided to the extent attributable to any willful misconduct, gross negligence or negligence by VESSEL OWNER or its crew in the operation of the VESSEL during the CHARTER of the VESSEL.

The Agreement also attaches a Confidentiality Agreement, which requires the vessel owner (fishermen, like the Plaintiff) to keep confidential and not disclose “data” without BP's consent, and includes within the definition of “data” any documents or information “conceived, made, developed or disclosed ... by the undersigned [vessel owners].” And, article 22 of the Agreement provides that:

VESSEL OWNER will not make releases, marketing presentation, or any other public statements this CHARTER, CHARTERER, or the SERVICES performed under this CHARTER without CHARTERER'S prior written approval” and “that such approval is at the sole discretion of CHARTERER.

Finally, Article 13(A) of the Agreement mandates that:

VESSEL OWNER confirm[] that it will maintain in place any insurance policies it is carrying as of the date immediately prior to entering into this CHARTER or that it routinely carries for its usual operations and to the extent it has such coverage, it will either specifically name or shall be deemed to have specifically named CHARTERER as an additional assured.

The irreparable consequences of these provisions are discussed below, but suffice it say here that their impact could change the tide entirely in holding BP accountable to Plaintiff – and others – for the injuries sustained as a consequence of the environmental tragedy BP has wrought upon Louisiana and its citizens.

LAW AND ARGUMENT

The requirements for injunctive relief are well known. Plaintiff must show:

- (1) there is substantial likelihood that he will succeed on the merits of his claim;
- (2) without the injunction, he faces an imminent threat of irreparable harm;
- (3) the threatened harm he seeks to avoid through the injunction outweighs any harm that may befall BP if the injunction is granted; and
- (4) granting the injunction will not disserve the public interest.

Paulson Geophysical Servs., Inc. v. Sigmar, 529 F. 3d 303, 309 (5th Cir. 2008). Each of these requirements is met here.

As a general proposition, requiring the volunteer responders – like Plaintiff and the many, many members of the United Commercial Fisherman’s Association, Inc. who he represents – who are already victims of the oil spill disaster caused by BP, to potentially lose or in any way limit their claims against BP, including claims for potential injury caused by efforts to clean up the catastrophic discharge, is unconscionable.

The complained-of terms of the Agreement here are unenforceable because they are the epitome of an unconscionable, adhesionary contract under Louisiana law. *See Aguillard v. Auction Management Corp.*, 2004-2804 (La. June 29, 2005), 908 So. 2d 1, 9 (noting that a contract is adhesionary where one party “is in a position stronger than the other’s. The party in the weaker position *is left with no other choice* than to adhere to the terms proposed by the other[.]”) (emphasis added); *LaFleur v. Law Offices of Anthony Buzbee*, 2006-0466 (La. App. 1st Cir. March 23, 2007), 960 So. 2d 105, 112 (observing that adhesionary contracts are “unconscionable” and invalid where of “unduly harsh substance”).

To put a finer point on it:

No section of the Louisiana Civil Code directly addresses, in so many words, the doctrine of unconscionability or the related concept of adhesionary contracts. Nonetheless, Louisiana jurisprudence does recognize that certain contractual terms, especially when contained in dense standard forms that are not negotiated, can be too harsh to justly enforce. The theory of such decisions, often, is that an unconscionable contract or term can be thought of as lacking the free consent that the Code requires of all contracts.

Iberia Credit Bureau, Inc. v. Cellular Wireless, LLC, 379 F.3d 159, 167 (5th Cir. 2004).

Here, Plaintiff and the other Louisiana fishermen like him are clearly in a weaker position with regard to negotiation of their rights in relation to BP. Because of the threat to their very livelihood caused by BP’s own actions in causing the catastrophic oil discharge that Plaintiff and other fishermen are responding to, and because of the expedited nature of the training of Plaintiff and the execution of associated documents, there was neither time nor bargaining position to review the provisions at issue here or to negotiate them. Notably, this Court, acting as an admiralty court, must provide special scrutiny to the release at issue here, and owes special protection to those

fishermen such as Plaintiff, who are to be treated as wards under this Court's special protection. *See Coto v. J. Ray McDermott, S.A.*, 1999-1866 (La. App. 4th Cir. Oct. 25, 2000), 772 So. 2d 828, 830.

Because the scope of the notice provision contained in Article 13(I) of the Agreement is so broadly written as to include any manner of claims against BP (e.g., claims related to the closure of fishing areas, damage to property, and loss of income already caused by the DEEPWATER HORIZON discharge) and to require 30-days' notice of those claims, the Agreement is impermissibly broad and overreaching. The broad language of Article 13(I) could apply to the Plaintiff's claims against BP for damages arising from the DEEPWATER HORIZON discharge and present a trap for the unwary. Presumably, without the 30 days' notice required by Article 13(I) of the Agreement, *any* claims against BP American Production Company are released. Thus, that provision effectively reduces to one month the prescriptive period applicable to the incalculable number and type of claims that will continue to grow out of the environmental disaster now facing the State of Louisiana and its citizens. There exists no direct relationship between the clean-up efforts in which Plaintiff seeks to engage and the notice of claims on which BP seeks to make the Agreement contingent. The disconnect is appalling and smacks of little more than an effort to slip the notice provision in to undercut claims against BP. That provision is also in violation of Louisiana Civil Code article 3471, which provides that "[a] juridical act purporting to exclude prescription, to specify a longer period than that established by law, or to make the requirements of prescription more onerous, is null."

Also, to the extent Article 13(F) of the Agreement purports to restrict the signing fishermen's rights to pursue claims against BP and its affiliates for any claims for future injuries caused by BP's conduct (e.g., claims related to injuries caused by contact with the toxins associated with the

Deepwater Horizon discharges), such a release is a flat-out violation of public policy. *See* La. C.C. art. 3078; *see also Brown v. Drillers, Inc.*, 93-1019 (La. Jan. 14, 1994), 630 So. 2d 741, 754. It is nothing short of reprehensible that BP, which has caused the catastrophic discharge that has already made Plaintiff a victim, in danger of losing his entire livelihood and way of life, would force Plaintiff to then severely limit or potentially waive his ability to fully seek any recompense for injuries he sustains in attempting to protect that livelihood and way of life. Article 13(F) also holds those fishermen to the standard of oil-spill remediation experts with respect to BP when, in fact, they are layman – and victims – volunteering to remediate a crisis BP itself created.

Furthermore, the overly expansive definition of “data” in the Confidentiality Agreement attached to the Agreement, to include information developed by Plaintiff himself, would severely limit Plaintiff’s ability to pursue his claims against BP and its affiliates arising from the DEEPWATER HORIZON catastrophic discharge. According to the terms of the Confidentiality Agreement, should Plaintiff discover any information regarding the oil discharge while engaged in clean-up activities, he may be precluded under the Agreement from disclosing that information or using it in his claims against BP or its affiliates. On top of that, Article 22’s limitations on Plaintiff’s ability to make public statements without BP’s approval is not only in complete contravention of Plaintiff’s free speech rights but could preclude Plaintiff from sharing that information with the general public, including other victims in this disaster. The impact of these limitation on Plaintiff’s – and others’s – abilities to seek redress for their injuries is harrowing.

In addition to the foregoing provisions, Article 13(A) of the Agreement mandates that “VESSEL OWNER confirm[] that it will maintain in place any insurance policies it is carrying as of the date immediately prior to entering into this CHARTER or that it routinely carries for its usual

operations and to the extent it has such coverage, it will either specifically name or shall be deemed to have specifically named CHARTERER as an additional assured.” Thus, Article 13(A) operates to further insulate BP from what may very well be additional losses and injuries arising out of the clean-up operations – operations which BP is obligated to undertake. Returning to the burning home analogy, this is akin to an arsonist asking if he can be added as an additional insured on someone’s homeowner’s policy. It could also drive up considerably the insurance costs for the fishermen already facing severe financial strain.

Irreparable harm is that which “cannot be remedied merely by monetary or other legal damages.” *Tillman v. Miller*, 917 F. Supp. 799, 801 (N.D. Ga. 1995), *aff’d* 133 F. 3d 1402 (11th Cir. 1998). In light of the impact of the Agreement’s provisions, and absent intervention from this Court, Plaintiff most certainly faces imminent and irreparable harm.

By insisting that Plaintiff execute the Agreement before allowing him to assist in clean-up efforts, BP presented Plaintiff – and likely many others – with the untenable choice of either walking away from the collective efforts to protect his livelihood or limiting – and even signing away – rights to pursue even as of yet unknown remedies for the destruction of his livelihood. Plaintiff is subject to immediate and irreparable injury if he either (1) chooses not to sign the Agreement and therefore not to participate in the cleanup activities and loses his livelihood as a result, or (2) chooses to participate in the cleanup activities to attempt to protect the source of his livelihood but as a consequence of signing the Agreement limits or loses his right to seek remedy for damages caused by BP. That same untenable choice faces every member of the United Commercial Fisherman’s Association, Inc. to whom BP has also demanded execute the Agreement.

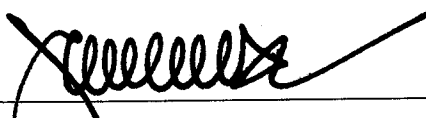
As indicated above, it is believed that it is BP's aim to obtain executed copies of the Agreement from all volunteers who assist in BP's mandatory clean-up obligations. Some of those volunteers are likely people represented by counsel or putative members of one of the several filed, but not yet certified, classes in actions against BP. Thus, the Agreement could irreparably impact and/or tortiously interfere with attorney-client relationships and be in violation of rules of the Louisiana State Bar.

In sum, if the Motion is denied, Plaintiff – and others like him – faces immediate and irreparable harm. On the other hand, if a TRO is issued, BP will be no worse off, nor will granting a TRO disserve the public interest. To the contrary granting a TRO will *serve* the public interest in preserving any claims Plaintiff has against BP for the catastrophic discharge – claims not unlike any number of claims that will continue to grow out of the environmental disaster now facing the State of Louisiana and its citizens.

CONCLUSION

For all of the foregoing reasons, Plaintiff, individually and on behalf of the United Commercial Fisherman's Association, Inc. as President thereof, urges this Court to grant his Emergency Motion for Temporary Restraining Order.

Respectfully submitted,



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