

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES )  
CORPORATION, )

Plaintiff, )

v. )

C.A. No. 00C-07-161-JRJ

MOBIL YANBU PETROCHEMICAL )  
COMPANY, INC. and EXXON )  
CHEMICAL ARABIA, INC., )

Defendants. )

Submitted: December 19, 2002

Decided: January 24, 2003

OPINION

*Upon Defendants' Motion to Realign the Order of Proof  
for Trial Presentation - GRANTED.*

Donald E. Reid, Esquire, Morris, Nichols, Arsht & Tunnell, 1201 North Market Street, P.O. Box 1347, Wilmington, Delaware 19899, Kenneth R. Adamo, Esquire, Michael W. Vary, Esquire and Leozino Agozzino, Esquire, Jones, Day, Reavis & Pogue, North Point, 901 Lakeside Avenue, Cleveland, Ohio 22114, Jeffrey W. Lorell, Esquire and Marc C. Singer, Esquire, Saiber, Schlesinger, Satz & Goldstein, LLC, One Gateway Center, 13th Floor, Newark, New Jersey 07102 and Cheryl L. Farine, Esquire, Hudak, Shunk & Farine Co., L.P.A., 2020 Front Street, Suite 307, Cuyahoga Falls, Ohio, 44221, for Plaintiff.

William J. Wade, Esquire, Richards, Layton & Finger, One Rodney Square, P.O. Box 551, Wilmington, Delaware 19899, James W. Quinn, Esquire and David Lender, Esquire, Weil, Gotshal & Manges, LLP, 767 Fifth Avenue, New York, New York 10153, K.C. Johnson, Esquire, Exxon Mobil Corporation, 800 Bell Street, Suite 1686J, Houston, Texas 77002, for Defendants.

**JURDEN, J.**

## INTRODUCTION/BACKGROUND

The issue before this Court in the instant motion is whether or not, in view of the facts of this case and the recognized rules of law and practice, realignment of the order of proof is appropriate.

In simple terms, the main issue in this case is whether SABIC breached certain agreements with Mobil Yanbu Petrochemical Company, Inc. and Exxon Chemical Arabia, Inc. (collectively, "ExxonMobil") by overcharging YANPET and KEMYA (The "Joint Ventures") for their use of Unipol® technology.<sup>1</sup> The Court will not recite the facts underlying this dispute; they are amply set forth in the voluminous pleadings, and memoranda filed in support of this motion and the outstanding summary judgment motions.

However, the procedural history leading up to this motion is critical to its determination. On July 24, 2000, the plaintiff, Saudi Basic Industries Corp. ("SABIC") filed a declaratory judgment action against ExxonMobil in this Court. This filing occurred one business day after the conclusion of mediation in a related case, pending in the United States District Court for the District of New Jersey. ExxonMobil alleges that SABIC wrongfully used information gleaned during that mediation, or settlement discussions, in violation of the parties express agreements, to file this suit "in a blatant attempt to gain a tactical advantage."<sup>2</sup> In short, ExxonMobil accuses

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<sup>1</sup>See *Saudi Basic Indus. Corp. v. ExxonMobil Corp.*, 194 F. Supp. 2d 378, 385 (D.N.J. 2002). As Judge Walls noted: "SABIC's complaint seeks declaratory relief...solely on the issue of whether the royalty charges were proper under the joint venture agreements." *Id.*

<sup>2</sup>Def.'s Mem. Law Supp. Mot. Realign Order Proof Trial Presentation at 3 [hereinafter Def.'s Mem. Law].

SABIC of forum shopping in an effort to “avoid having the trier of fact in New Jersey hear about... [SABIC’s] improper overcharges....”<sup>3</sup>

In response to SABIC’s declaratory judgment action, ExxonMobil filed counterclaims based on the alleged overcharges by SABIC including, *inter alia*, claims for breach of contract, breach of fiduciary duty, unjust enrichment and promissory estoppel. In the motion presently before this Court, ExxonMobil asks the Court to “realign” the order of proof for trial presentation because ExxonMobil “bears the burden of proof on the ultimate issue for trial, and because realignment in this instance promotes the conservation of judicial resources and lessens jury confusion.”<sup>4</sup>

### DISCUSSION

The parties agree that the trial judge has discretion in determining whether or not to depart from the usual order of proof at trial.<sup>5</sup> That discretion is broad.<sup>6</sup> According to Delaware Uniform Rule of Evidence 611(a),

*Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, and (2) avoid needless consumption of time.<sup>7</sup>

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<sup>3</sup>*Id.* at 3, n. 4.

<sup>4</sup>Def.’s Mem. Law at 5.

<sup>5</sup>Hr’g Tr. (Dec. 19, 2002) at 115, 119.

<sup>6</sup>*See Tice v. State*, 624 A.2d 399, 403 (Del. 1993); *Brothers v. McKay*, 544 A.2d 265, 265 (Del. 1988); *Gaston v. State* 234 A.2d 324, 325 (Del. 1967); *Baltimore & O. R. Co. v. Hawke*, 143 A. 27, 31 (Del. 1928).

<sup>7</sup>DEL. UNIF. R. EVID. 611(a).

ExxonMobil's concerns about conserving judicial resources and lessening jury confusion are well grounded. Having presided over this complicated dispute for over 15 months, and having become very familiar with the salient facts and issues through numerous, hotly contested discovery disputes and extensive motion practice, the Court firmly believes that realignment of the order of proof in this case would (a) result in a far more effective presentation "for the ascertainment of the truth," (b) "avoid needless consumption of time,"<sup>8</sup> and (c) reduce the potential for juror confusion. ExxonMobil argues that, "although SABIC is technically the plaintiff by virtue of winning its race to the courthouse, SABIC's Amended Complaint is merely a compilation of defenses."<sup>9</sup> ExxonMobil correctly points out that:

[r]egardless of what the caption reads, SABIC is in the position of traditional defendant, asserting that it acted correctly. ExxonMobil, on the other hand, is in the position of traditional plaintiff, asserting the affirmative position that SABIC caused it harm by improperly overcharging the joint ventures, and that SABIC is liable for damages for its misconduct.<sup>10</sup>

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<sup>8</sup>See DEL. UNIF. R. EVID. 611(a).

<sup>9</sup>Def.'s Mem. Law at 7.

<sup>10</sup>*Id.*

In reality, SABIC is a “nominal” plaintiff; there is no question that the ultimate issue to be decided by the jury is whether SABIC overcharged the joint ventures. There is also no question that ExxonMobil bears the burden of proof with respect to this ultimate issue.

ExxonMobil further argues that “given the facts surrounding SABIC’s filing, allowing it to have the benefits of being the plaintiff without the attendant burdens is grossly unfair.”<sup>11</sup> Clearly, SABIC did win the race to the Courthouse,<sup>12</sup> and, in doing so, selected the forum in which it desired to have the overcharge issue decided. It is also clear, based on SABIC’s actions, that it did not want the New Jersey District Court to decide the overcharge issue.<sup>13</sup> Given what transpired prior to the filing of this suit, the Court can only conclude that SABIC engaged in preemptive forum shopping when it decided to file a declaratory judgment action in the Delaware Superior Court rather than litigate this issue as a defendant in the New Jersey District Court. That being the case, the Court notes that:

...the use of the device of declaratory judgment to anticipate and soften the impact of an imminent suit elsewhere concerning long past dealings between the parties for the purpose of gaining an affirmative judgment in a favorable forum requires a

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<sup>11</sup>Def.’s Mem. Law at 10.

<sup>12</sup>SABIC filed suit here just ten (10) days before ExxonMobil filed suit in New Jersey District Court on the same overcharge issue.

<sup>13</sup>SABIC argued to the New Jersey District Court that it should abstain from deciding the overcharge claims because SABIC filed this action before ExxonMobil filed the overcharge claims there.

closer look at the deference historically accorded a plaintiff's choice of forum.<sup>14</sup>

While the Court is historically reluctant to deprive a plaintiff of its choice of forum, it is not reluctant to accord less deference to that choice when there is "jockeying for position" by "resort to declaratory judgment for the purpose of defensively establishing priority as to forum."<sup>15</sup> Similarly, the Court is not reluctant to realign the order of proof where a party resorts to a preemptive strike via declaratory judgment for the purpose of securing priority as to forum, when realignment makes clear the true posture of the case.<sup>16</sup> Under the circumstances presented, the Court is compelled to look beyond the pleadings and allocate the burden of proof to the party that must prove the ultimate issue at trial, ExxonMobil.<sup>17</sup>

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<sup>14</sup>*Air Products and Chemicals, Inc. v. The Lummus Co.*, 252 A.2d 545, 547 (Del. Ch. 1968) *rev'd on other grounds*, 252 A.2d 543 (Del. 1969).

<sup>15</sup>*Id.*

<sup>16</sup>*See BASF Corp. v. Symington*, 50 F.3d 555, 557 (8th Cir. 1995) (realigning the parties to reflect actual controversy where plaintiff (BASF) filed declaratory judgment on statute of limitations, but defendant "claims injury by BASF, and is therefore the natural plaintiff"); *St. Paul Mercury Ins. Co. v. Lexington, Ins. Co.*, 888 F. Supp. 1372, 1376 (S.D. Tex. 1995) (realigning parties "to better represent the real claims and interests in the case."); *See also Schwendiman Partners, LLC v. Hurt*, 71 F. Supp. 2d 983, 988 n.4 (D. Neb. 1999) ("In determining the propriety of a declaratory judgment action in circumstances like those presented in this case, the court will realign the parties to reflect the actual controversy underlying the action and determine who is the natural plaintiff.") (citation and quotation omitted).

<sup>17</sup>*See City of Indianapolis v. Chase Nat'l Bank of the City of New York*, 314 U.S. 63, 69 (1941); *Philips v. Liberty Mutual Ins. Co.*, 235 A.2d 835 (Del. 1967); *Bluth v. Bellow*, 1987 WL 9369 (Del. Ch.); *Lutz v. Boas*, 171 A.2d 381, 383 (Del. Ch. 1961).

In its opposition to realignment, SABIC argues that changing the “ordinary order of proofs would be [grossly] unfair to SABIC.”<sup>18</sup> The Court does not agree. The Court’s obligation is to exercise “reasonable control” over the presentation of evidence “so as to...make the presentation effective for the ascertainment of truth...”<sup>19</sup> Under the circumstances presented, there will be no unfairness to SABIC by realigning the order of proof to place the burden of proving the ultimate issue on the party it belongs, thereby making it easier for the jury to understand the presentation of evidence.

### CONCLUSION

In the Court’s view, proceeding with the order of proof in this manner will promote efficiency, conserve the parties’ and the Court’s resources, insure the orderly and clear presentation of the evidence, and reduce juror confusion.

For all these reasons, the Defendants’ Motion to Realign the Order of Proof for Trial Presentation is **GRANTED**.



Jan R. Jurden, Judge

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<sup>18</sup>Pl.’s Br. Opp’n Def.’s Mot. Realign Order Proof Trial Presentation at 10.

<sup>19</sup>DEL. UNIF. R. EVID. 611(a).