IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAUDI BASIC INDUSTRIES CORPORATION,	)	
Plaintiff/Counterclaim Defendant,	)	
v.	)	C.A. No. 00C-07-161-JRJ
MOBIL YANBU PETROCHEMICAL COMPANY, INC. and EXXON CHEMICAL ARABIA, INC.,	)	
Defendants/Counterclaim Plaintiffs.	)	

Date Submitted: June 3, 2003
Date Decided: September 2, 2003

Upon SABIC's Motion for a New Trial - ***DENIED***

ORDER

Upon review of Saudi Basic Industries Corporation's ("SABIC") Motion for a New Trial, ExxonMobil's opposition thereto, and the record, it appears to the Court that:

1. A two week jury trial in this case resulted in a verdict against SABIC in excess of $416 million on March 21, 2003. After trial, SABIC filed several motions

challenging the verdict.[1]

2. After carefully reviewing SABIC's thirty-five page argument in support of its Motion for a New Trial, the Court finds no basis to set aside the jury verdict. Accordingly, for the reasons that follow, SABIC's Motion for a New Trial is **DENIED**. 3. First, SABIC argues this case was improperly tried to a jury. On November 26, 2002, less than four months before trial, SABIC raised with the Court the issue of a bench trial when it filed a Motion to Strike Defendants' Jury Demand.[2] The Court heard oral argument on the motion on December 19, 2002.[3] After considering the briefs submitted by the parties, the arguments, the relevant case law and the record, the Court denied SABIC's motion, finding that ExxonMobil was entitled to a jury trial under the Delaware Constitution. The Court issued a lengthy

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[1]Renewed Mot. J. Matter Law, Alternative New Trial or Remittitur, ExxonMobil's Enhanced Damages, *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. Inc. & Exxon Chemical Arabia, Inc.*, No. 00C-07-161, Jurden, J. (No. 627); Renewed Mot. J. Matter Law, Alternative New Trial ExxonMobil's Contract Claims, *Saudi Basic Indus. Corp*. (No. 629); Mot. J. Matter Law or New Trail Statute Limitations Grounds, *Saudi Basic Indus. Corp.* (No. 631); Renewed Mot. J. Matter Law, Alternative New Trial, ExxonMobil's *Ghasb* Claims, *Saudi Basic Indus. Corp.* (No. 633); Mot. New Trial, *Saudi Basic Indus. Corp.* (No. 635).

[2]SABIC's Mot. Strike ExxonMobil's Jury Demand, *Saudi Basic Indus. Corp.* (No. 305). *See also* SABIC's Br. Supp. Mot. Strike ExxonMobil's Jury Demand, *Saudi Basic Indus. Corp.* (No. 306); SABIC's Reply Br. Supp. Mot. Strike ExxonMobil's Jury Demand, *Saudi Basic Indus. Corp.* (No. 347).

[3]Hr'g Tr. Morning Session (Dec. 19, 2002), *Saudi Basic Indus. Corp.* (No. 374); Hr'g Tr. Afternoon Session (Dec. 19, 2002), *Saudi Basic Indus. Corp.* (No. 376).

bench ruling setting forth in detail the reasons for its ruling.[4] SABIC's post trial motion on this issue raises no new arguments or case law for the Court to consider. After reviewing the transcript of its January 28, 2003 bench ruling, and again reviewing the pertinent case law and the record, the Court is confident that its ruling granting a jury trial to ExxonMobil is correct under Delaware Law. The Court finds SABIC's claim that it was prejudiced by a jury trial is without merit. This Court took unprecedented steps to insure that the empaneled jury would fairly and impartially consider all the evidence and render a fair and just verdict. First, many months before trial, the Court made arrangements with Jury Services to summon an extra large pool of potential jurors. In fact, the Court instructed Jury Services to summon double the number of jurors. Second, to insure ample time for thorough voir dire, the Court set aside two days the week before trial to be dedicated to jury selection in this case. Third, the Court approved, and in fact heartily encouraged, the use of a three page juror questionnaire in order to ferret out individuals with biases and prejudices that would render them unable to be fair or impartial.[5] The jury questionnaire included

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[4]Tr. Bench Ruling (Jan. 28, 2003), *Saudi Basic Indus. Corp.* (No. 433) (holding that ExxonMobil was entitled to a jury trial under the Delaware Constitution).

[5]*See* Tr. Office Conference (Feb. 13, 2003) at 20, *Saudi Basic Indus. Corp.* (No. 488); Questionnaires Of Jurors Actually Selected, *Saudi Basic Indus. Corp.* (No. 613).

such questions as:

4. What are your feelings about someone from the Mideast, someone from an Arab culture (such as someone from Saudi Arabia) or someone of the Islamic (Muslim) faith?

___very positive
___positive
___somewhat positive
___neutral
___somewhat negative
___negative
___very negative

5. Has any relative or friend lost his/her life or been injured as a result of the events of September 11, or any other terrorist attack (for example, attacks on our military or embassies, or in the Palestinian-Israeli conflict?)

___Yes ___No

8. Some of the witnesses in this trial may have an accent or may communicate through an interpreter. Could you give them the same attention you would someone who is fluent in English?

___Yes ___No

Do you have any bias against people who do not speak English as a first language?

___Yes ___No

20. Do you have any negative feelings toward ExxonMobil Corporation or toward Exxon or Mobil before they merged?

___Yes ___No If "yes," please explain:

Do you have any negative feelings toward Saudi Basic Industries Corporation (SABIC)?

___Yes ___No If "yes," please explain:

24. How concerned are you about the impact that petrochemical or oil companies have on the environment?

___Have not given it much thought
___Not concerned
___A little concerned
___Moderately concerned
___Quite concerned
___Extremely concerned
___Neutral

Fourth, before starting the individual voir dire, the Court struck forty-two (42) jurors for cause based solely on answers on the questionnaire that raised the concern of either party or the Court[6]. Fifth, over the course of a day and a half, the Court conducted individual voir dire in the Grand Jury room and, again, liberally struck jurors for cause based on verbal answers given in response to the Court's specific questions in followup to the questionnaire.[7] The Court not only carefully questioned

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[6]*See* Jury Voir Dire Tr. (Feb. 26, 2003) at 28-95, *Saudi Basic Indus. Corp.* (No. 509). The Court along with the parties reviewed the potential jurors' responses to the questions posed on the three (3) page questionnaire. At this time the Court entertained for-cause challenges based on the potential jurors' responses.

[7]*See* Jury Voir Dire Tr. (Feb. 26, 2003) at 96-198, *Saudi Basic Indus. Corp.* (No. 509); Jury Voir Dire Tr. (Feb. 27, 2003) at 1- 420, *Saudi Basic Indus. Corp.* (No. 512).

each of the jurors who were ultimately empaneled, but scrutinized each during the individual voir dire to see if their facial expressions, demeanor, tone or body language suggested a dislike for either party or their attorneys.[8] After this detailed process, if the Court still had *any* doubt as to a potential juror's ability to be fair and impartial, the Court struck the juror for cause.[9] Sixth, the Court gave each side an unprecedented fifteen (15) peremptory challenges.[10] Notably, although SABIC claims juror prejudice, it did not exercise all of its peremptory challenges.[11]

In sum, the Court is absolutely confident, based on the specialized, extensive, individual voir dire process painstakingly employed under the Court's watchful eye that the jurors who were ultimately empaneled were not prejudiced against SABIC

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[8] *Id.*

[9] *Id.*

[10] Tr. Teleconference (Feb. 10, 2003) at 43-45, *Saudi Basic Indus. Corp.* (No. 467).

[11] SABIC exercised only 10 of its peremptory challenges. *See* Jury Voir Dire Tr. (Feb. 26, 2003) at 96-198, *Saudi Basic Indus. Corp.* (No. 509); Jury Voir Dire Tr. (Feb. 27, 2003) at 1-420, *Saudi Basic Indus. Corp.* (No. 512). The Court notes that twelve (12) jurors were picked; eight (8) alternates were picked; SABIC exercised ten (10) peremptory challenges to jurors and two (2) peremptory challenges to alternates; ExxonMobil exercised nine (9) peremptory challenges to jurors and two (2) peremptory challenges to alternates; fifty-four (54) potential jurors were struck for-cause after voir dire; and a total of ninety-seven (97) potential jurors were voir dired. *See id.*

or ExxonMobil.[12] In light of the extraordinary measures taken, the Court finds SABIC's claim of jury prejudice unfounded. Finally, and notably, the Court cannot understand why, if SABIC truly believed that the events unfolding in Iraq and the Middle East in February and early March of 2003 would affect its right to a fair jury trial in Delaware, SABIC failed to request a continuance of the March 10, 2003 trial date.

4. Next, SABIC argues that Exxon's and Mobil's offer of technology to the Joint Ventures and similar evidence were improperly excluded and/or limited by the Court. The Court carefully considered this exact argument on multiple occasions both before and during the trial. Because discovery failed to show Exxon or Mobil ever actually provided polyethylene technology to the Joint Ventures, and further because considerations by Exxon to do so pre-dated the execution of the Joint Venture Agreement, the Court initially granted ExxonMobil's motion in limine to preclude any testimony that Exxon or Mobil would have profited had Exxon or Mobil provided polyethylene technology to the KEMYA or YANPET Joint Ventures.[13]

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[12]The Court notes that the jury voir dire process employed by the Court in this case was similar to the procedure employed by the Court in examination upon voir dire in capital murder cases. *See* DEL. CODE ANN. tit. 11, § 3301, DEL. SUPER. CT. CRIM. R. 24.

[13]*Saudi Basic Indus. Corp,* Del. Super, C.A. No. 00C-07-161, Jurden, J. (Feb. 21, 2003) (Order).

However, after SABIC pressed the Court to reconsider, and provided more information as to the probative versus prejudicial value of the information sought, the Court reversed its decision over ExxonMobil's objection and permitted SABIC to introduce evidence on this issue at trial.[14] The Court did so reluctantly and limited the evidence because of its continuing concern that the jury might become confused.[15] After conducting the balancing required under Delaware Uniform Rule of Evidence 403, the Court did not permit SABIC to introduce evidence regarding Exxon's *internal* state of mind regarding its *supposed* intentions had Exxon provided the technology to the Joint Ventures. The Court properly refused to allow speculation or conjecture about Exxon's internal state of mind based on draft agreements never executed which pre-dated the Joint Venture Agreement. In the Court's view, the evidence SABIC sought to offer on Exxon's internal state of mind was highly speculative and therefore of minimal probative value. The Court believed at trial and believes now that juror confusion and unfair prejudice were certain to occur if the Court did not limit such evidence.[16] Each time the Court was asked to consider the

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[14]*See* Trial Tr. (Mar. 14, 2003) A.M. Session at 91, *Saudi Basic Indus. Corp.* (No. 555).

[15]*Id.*

[16]Volume One Trial & Hearing Tr. Cited Renewed Mot. J. Matter Law & Mot. New Trial, Hr'g Tr. (Mar. 9, 2003) at 7-30, *Saudi Basic Indus. Corp.* (No. 643).

admissibility of agreements that pre-dated the Joint Ventures or were superceded by Joint Venture Agreements, it conducted the balancing required under Rule 403.[17] The Court has reviewed the transcripts of its Rule 403 rulings and does not believe that it improperly excluded the evidence. To the contrary, the Court is satisfied that by limiting the evidence as noted above certain juror confusion and unfair prejudice were avoided.

5. Third, with respect to SABIC's claim that the Court improperly excluded a Mobil proposal to provide catalyst technology, the Court specifically recalls *its* confusion when SABIC attempted to explain to the Court the relevance of such evidence.[18] The Court's difficulty in understanding the relevance of the proffered evidence, despite its familiarity with the facts of this complex and fact intensive case, illustrates why the evidence was properly excluded.[19] Not only was the catalyst technology never provided by Mobil, but SABIC's witness on the subject testified he did not know Mobil's cost of developing the technology.[20] Without evidence of

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[17]*See e.g.* Trial Tr. (Mar. 18, 2003) A.M. Session at 207-08, *Saudi Basic Indus. Corp.* (No. 575).

[18]Trial Tr. (Mar. 18, 2003) P.M. Session at 39:1-13, *Saudi Basic Indus. Corp.* (No. 576).

[19]*See* Trial Tr. (Mar. 18, 2003) P.M. Session at 38-39, *Saudi Basic Indus. Corp.* (No. 576).

[20]*Id.* at 30.

Mobil's actual cost, SABIC could not establish that Mobil would have realized a profit without engaging in pure speculation. Consequently, introduction of this evidence was highly likely to, at a minimum, confuse the jury, and, at a maximum, unfairly prejudice Mobil, all in violation of Rule 403.

6. Fourth, SABIC claims that it is entitled to a new trial because the Court improperly excluded Ibrahim Bin Salamah's testimony that he told Exxon and Mobil officials that SABIC would charge a margin on the Unipol® PE technology. This argument is unavailing because it was SABIC's conduct during discovery that resulted in the exclusion of this testimony. Simply stated, had SABIC complied in good faith with the letter and spirit of our discovery rules before trial, the Court would probably not have been forced to exclude this portion of Mr. Bin Salamah's testimony. Given the import of the Court's decision to exclude testimony on such a key issue, the Court feels compelled to recite the facts which culminated in the decision to exclude this testimony. First, Dr. Pai, SABIC's 30(b)(6) designee, testified that SABIC never told Exxon, Mobil, KEMYA or YANPET that SABIC always considered charging the Joint Ventures a margin on the Unipol® PE technology. Despite SABIC's arguments to the contrary, the Court held, and continues to hold, that this testimony was within the scope of topics listed on the

30(b)(6) Notice. Indeed, as ExxonMobil correctly points out, SABIC adopted Dr. Pai's testimony in its October 4, 2002 interrogatory answer, expressly for the 30(b)(6) topic regarding "any communications between SABIC and ExxonMobil, KEMYA or YANPET in which ExxonMobil, KEMYA or YANPET were notified that SABIC would incur, on KEMYA's and YANPET's behalf, past, present and future costs to acquire, support or maintain SABIC's ability to license the Unipol® process... as discussed in paragraph 16 of SABIC's Amended Complaint."[21] The Court notes that not once during three separate deposition sessions did Dr. Pai indicate that Mr. Bin Salamah claimed to have told anyone at Exxon, Mobil, KEMYA or YANPET about the margin, although Dr. Pai discussed the Rule 30(b)(6) topics with Mr. Bin Salamah.[22] *After* the conclusion of fact discovery, SABIC suddenly reversed its position on this key point. In SABIC's Reply Brief in Support of its Motion for Summary Judgment on Limitations, SABIC for the first time offered the declaration of Mr. Bin Salamah who, in direct contradiction to SABIC's Rule 30(b)(6) witness testimony and responses to requests for admission, claimed to have told Exxon's Rod

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[21]First Aff. Chad Shandler Ex. 21 at 10, *Saudi Basic Indus. Corp.* (No. 675).

[22]Volume Two Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-12, Dep. Richard A. Pai (July 17, 2002)(Aug. 7, 2002)(Sept. 17, 2002), *Saudi Basic Indus. Corp.* (No. 641)

Grandy, Dick Tickler, and perhaps Nigel Bruce, about SABIC's "expected margin."[23] Based on these events, the Court granted ExxonMobil's motion in limine prohibiting Mr. Bin Salamah from testifying about the supposed expected margin. As the Court held, Mr. Bin Salamah's new testimony was "well after the discovery cut-off" and "[i]t just comes too late."[24] The Court further explained that its decision was "one of fundamental fairness."[25] Given the fact that (1) SABIC failed to disclose the Bin Salamah testimony during the fact discovery period, and (2) Dr. Pai's 30(b)(6) testimony was to the contrary, the Court held that SABIC was obligated to notify ExxonMobil after Dr. Pai's 30(b)(6) deposition what testimony it deemed outside the scope of the 30(b)(6) so that ExxonMobil "could take other discovery or seek another 30(b)(6) or do something differently in their litigation plan."[26] By serving the Bin Salamah affidavit on ExxonMobil after the close of discovery, SABIC not only foreclosed ExxonMobil's right to take discovery of the witnesses named in the

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[23]Ex. SABIC's Reply Br. Renewed Mot. J. Matter Law & Mot. New Trial at T-25, Decl. Ibrahim Bin-Salamah (Nov. 11, 2002), *Saudi Basic Indus. Corp.* (No. 688); ExxonMobil's Br. Opp'n SABIC's Mot. New Trial, *Saudi Basic Indus. Corp.* at 14 (No. 670). *See* SABIC's Reply Br. Support Mot. Summ. J. Limitations, *Saudi Basic Indus. Corp.* (No. 255).

[24]Tr. Office Conference (Mar. 3, 2003) at 15-16, *Saudi Basic Indus. Corp.* (No. 511).

[25]Pretrial Hr'g Tr. (Mar. 5, 2003) A.M. Session at 89-90, *Saudi Basic Indus. Corp.* (No. 538).

[26]*Id* at 90.

affidavit, but completely reversed the position it asserted during discovery through written discovery and Dr. Pai's 30(b)(6) testimony.

SABIC moved for reconsideration of this decision.[27] After considering SABIC's motion for reconsideration, the Court reaffirmed its holding. The Court held that "SABIC had an affirmative duty to speak with Mr. Bin Salamah *before* responding to requests for admissions and before Dr. Pai was deposed at least for the second and third time."[28] As the Court explained:

> So, it's an issue of fairness, and it is an issue of obeying discovery rules and openness and fairness in the discovery process, and I will not allow the evidence from Mr. Bin Salamah that was ascertained well after the discovery cutoff and came as a surprise to ExxonMobil and corrected an admission made by SABIC during the discovery period to come into

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[27]Letter from Kenneth Adamo, to Judge Jurden (Mar. 4, 2003) (requesting that the Court reconsider its bench ruling of March 3, 2003, precluding Mr. Bin Salamah from testifying to the fact that he informed Exxon and Mobil that SABIC would benefit from the licenses in that it would receive a margin on SABIC's licensing of the Unipol® PE technology to the joint ventures).

[28]Tr. Saudi Law Bench Ruling (Mar. 7, 2003) at 10 (emphasis added), *Saudi Basic Indus. Corp.* (524). SABIC makes much of the fact that it identified Bin Salamah several times in response to written discovery as a person "having knowledge" of facts key to the dispute. According to SABIC, because Exxon Mobil failed to depose Bin Salamah after he was identified and offered for deposition, it is ExxonMobil's fault it was surprised by the averments in his Nov. 11, 2002 affidavit. This argument actually works against SABIC. As the Court noted, if, as SABIC claims, Bin Salamah possessed such material information, SABIC had a duty to consult with him before responding to discovery requests, including responses to requests for admissions. Tr. Saudi Law Bench Ruling (Mar. 7, 2003) at 10, *Saudi Basic Indus. Corp.* (524).

evidence.[29]

Given what transpired during discovery, the Court's decision was fair and appropriate. Delaware Superior Court Civil Rule 30(b)(6) requires that a designee testify regarding "matters known or *reasonably available* to the organization." The court in *United States v. Taylor,*[30] interpreting the analogous Federal Rule of Civil Procedure, held that Rule 30(b)(6):

> implicitly requires such persons to review all matters known or reasonably available to it in preparation for the Rule 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and *to prevent the "sandbagging" of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial*. This would totally defeat the purpose of the discovery process.[31]

Courts have recognized within the Rule 30(b)(6) context that it is often the case that employees who have knowledge of events may have left the company. However, "[t]hese problems do not relieve a corporation from preparing its Rule 30(b)(6) designee to the extent matters are reasonably available, whether from documents, *past*

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[29]Tr. Saudi Law Bench Ruling (Mar. 7, 2003) at 10-11, *Saudi Basic Indus. Corp.* (524).

[30]166 F.R.D. 356 (M.D.N.C. 1996).

[31]*Id.* at 362 (emphasis added). *See also* ExxonMobil's Mot. in Limine at 7, *Saudi Basic Indus. Corp.* (No. 413) (citing additional cases).

employees or other sources."[32] Here SABIC claims that Mr. Bin Salamah was available for a deposition.[33] SABIC also had Dr. Pai speak to Mr. Bin Salamah in preparation for his third 30(b)(6) deposition. The Court finds that Mr. Bin Salamah was clearly "reasonably available" and SABIC's counsel should have consulted Mr. Bin Salamah in order to prepare Dr. Pai to testify in the Rule 30(b)(6) deposition on behalf of SABIC, and certainly before SABIC responded to requests for admissions.

7. Contrary to SABIC's argument, SABIC is bound by its responses to ExxonMobil's requests for admission. Delaware Superior Court Civil Rule 36(b) states that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of admission." The Third Circuit, discussing the effect of an admission under the comparable Federal Rule,[34] stated that "[a] judicial admission, deliberately drafted by counsel for the express purpose of limiting and defining facts in issue, is traditionally regarded as conclusive,

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[32] *Taylor* 166 F.R.D. at 361 (emphasis added).

[33] SABIC's Br. Support Mot. New Trial at 15, *Saudi Basic Indus. Corp.* (No. 636) [hereinafter SABIC's Opening Br.].

[34] *See Plummer & Co. v. Crisafi*, 1986 WL 5873, at *1-2 (Del. Super.) (relying on Advisory Committee notes to Federal Rule of Civil Procedure 36 to construe Delaware rule).

and an admission under Rule 36 falls into this category."[35]

8. The Court finds SABIC's prejudice arguments[36] unavailing and that any prejudice was largely of its own making. None of the witnesses who testified about SABIC's non-disclosure of the overcharge were identified by Mr. Bin Salamah in his declaration. Consequently, as ExxonMobil points out, Mr. Bin Salamah's testimony would have rebutted nothing. More significantly, at his deposition just days before he testified at trial, Mr. Bin Salamah denied telling anyone at Exxon or Mobil about the margin.[37] As ExxonMobil notes, SABIC fails to disclose this fact in its motion.

Indeed, given all the circumstances, had Mr. Bin Salamah been permitted to testify about the supposed margin, ExxonMobil would have been severely prejudiced. Mr. Grandy is deceased. Mr. Bruce was unavailable for trial and not asked about this issue during his deposition because SABIC did not disclose this information until *after* the discovery cutoff. Had the Court allowed Mr. Bin Salamah to testify on this subject, it would have rewarded SABIC for discovery techniques that do not pass

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[35]*Airco Indus. Gases, Inc. v. The Teamsters Health & Welfare Pension Fund of Philadelphia & Vicinity*, 850 F.2d 1028, 1036 n.9 (3d Cir. 1988) (citations omitted).

[36]SABIC's Opening Br. at 19-20.

[37]*See* First Aff. Chad Shandler Ex.10, Dep. Ibrahim Bin Salamah (Mar. 15, 2003) at 107-09, *Saudi Basic Indus. Corp.* (No. 675).

muster in this Court and would have resulted in a thorough sandbagging of ExxonMobil.

9. Fifth, SABIC claims it is entitled to a new trial because the Court improperly excluded certain evidence relating to the issue of SABIC's "actual costs." Again, the Court's decision to exclude certain evidence was based, in part, on SABIC's discovery tactics. The Court refused to allow SABIC to introduce certain evidence relating to its claimed actual costs because it blatantly and repeatedly violated the Court's discovery rules by failing to produce documentation evidencing or supporting its actual costs before trial. There is no question that SABIC denied ExxonMobil its right before trial to discover and research the amount of SABIC's claimed actual costs. Despite months and months of repeated discovery requests for information about the amounts and types of costs, the dates such alleged costs were incurred, and whether such costs were related to the Unipol® PE technology. SABIC failed to produce responsive information that would enable ExxonMobil to defend against such a claim. The Court simply could not allow SABIC to ambush ExxonMobil at trial. Many months before trial, during one of several hotly contested discovery disputes, it became clear to the Court that SABIC's "actual costs" were an

elusive, moving target.[38] As ExxonMobil notes, during discovery, what began as a set-off defense transformed into a recoupment defense and then into a damages defense. Remarkably, at no point in this case was ExxonMobil ever able to obtain from SABIC a definitive answer on what exact actual costs it claimed to have incurred in connection with providing the Unipol® PE technology to the Joint Ventures.[39] In its May 15, 2002 supplemental response to ExxonMobil's Interrogatory No. 36, SABIC identified documents substantiating approximately $325,000 in costs.[40] Next, SABIC offered its 30(b)(6) witness, Dr. Pai, who was unable to quantify *any* of SABIC's alleged costs.[41] Then, SABIC offered the untimely expert report of Jeffrey Snell, who abandoned virtually all of the categories of costs that SABIC had been claiming throughout discovery, including those identified by Dr. Pai, limiting SABIC's costs to only constructing its R&D facility, setting up its marketing organization and administering the licenses, totaling $43

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[38]Volume One Trial & Hearing Tr. Cited Renewed Mot. J. Matter Law & Mot. New Trial, Hr'g Tr. (Nov. 26, 2003) at 6-7, *Saudi Basic Indus. Corp.* (No. 643). The Court stated, "the amount and character of the costs changed multiple times during the discovery period and to my dismay, after the close of discovery. It was an ever-evolving claim." *Id.* at 7.

[39]*Id.* at 3-11.

[40]First Aff. Chad Shandler Ex. 11, *Saudi Basic Indus. Corp.* (No. 675).

[41]Aff. David J. Lender at Tab 1, *Saudi Basic Indus. Corp.* (No. 204).

million.[42] The Court notes that Mr. Snell's report includes costs allegedly incurred *after* the expiration of the Joint Ventures' payment obligations under the Sublicenses. Next, in its February 25, 2003 motion for reconsideration, filed on the eve of trial, SABIC claimed it incurred $130 million in costs.[43] Finally, in the midst of trial, SABIC sought to introduce testimony that it had supposedly incurred $200 million in costs at its R&D Center alone,[44] despite having absolutely no evidentiary basis to support that number other than Mr. Al-Alweet's "top of my head" guess. [45] Despite all of these infirmities, and over ExxonMobil's strenuous objections, the Court did allow SABIC to offer testimony at trial about its alleged costs and how these costs supposedly influenced the amounts it charged KEMYA and YANPET for use of the Unipol® technology.[46] The Court, however, refused to allow Mr. Abdul-Hadi to testify regarding the "rough estimate" of SABIC's expected future R&D costs,

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[42]First Aff. Chad Shandler Ex. 12, Expert Rep. Jeffery Snell (Oct. 22, 2002), *Saudi Basic Indus. Corp.* (No. 675).

[43]*Id.* Ex. 22, Letter from Kenneth R. Adamo, to Judge Jurden (Feb. 25, 2003) (regarding SABIC's costs).

[44]Trial Tr. (Mar. 18, 2003) P.M. Session at 113-20, *Saudi Basic Indus. Corp.* (No. 576).

[45]*See* First Aff. Chad Shandler Ex. 13 at 85-86, Dep. Abdullah Al-Alweet (Mar. 16, 2003), *Saudi Basic Indus. Corp.* (No. 675).

[46]ExxonMobil's Br. Opp'n SABIC's Mot. New Trial at 18-19.

holding:

> This is a classic example of you creating your very own prejudice by SABIC's continued refusal to come up with its costs in this definitive form. It's speculative. There's no foundation. And I'm not going to allow it in. It's highly, highly prejudicial and unfair.[47]

The Court provided a similar rationale for not allowing Mr. Al-Alweett to testify as to his ball-park, "top of my head" guess that SABIC "could" have spent $200 million at its R&D Center.[48] After SABIC's counsel first claimed that Mr. Al-Alweet's $200 million estimate was supported by the documents "if I study up on it,"[49] SABIC's counsel retreated upon further questioning by the Court, and claimed that SABIC could actually only support $100 million.[50] The $200 million and $100 million estimates were different than the numbers SABIC provided in discovery, and far different from the $30 million number offered by SABIC's expert.[51] Based on all of this, the Court held that because SABIC's actual costs were a "moving target" throughout discovery, and even during trial, it would be unfair to ExxonMobil to

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[47]*See* Trial Tr. (Mar. 14, 2003) A.M. Session at 141-42, 148, *Saudi Basic Indus. Corp.* (No. 555).

[48]Trial Tr. (Mar. 14, 2003) P.M. Session at 119-20, *Saudi Basic Indus. Corp.* (No. 576).

[49]*Id.* at 123.

[50]*Id.* at 130.

[51]*Id.* at 129.

allow SABIC to put in this unsubstantiated evidence before the jury. As the Court explained:

> I will not allow trial by ambush on this issue when he intends to throw out a $200 million number with scant back up and no back up on paper for a hundred million of it and a couple pages to back up the other hundred million when ExxonMobil took 30(b)(6), filed discovery and didn't get this number and we still don't know. As the judge on this case, I still do not have any comfort level that the number that you are telling me is there, 200 million or the hundred million, now that I have shaved off a hundred million, can be testified to with any reasonable degree of probability. I'm not going to let you throw out a number to the jury of that magnitude without some sort of back up, without notice to ExxonMobil on what your claim is, it's just not fair.[52]

Despite the Court's ruling, SABIC's witness, Mr. Bin Salamah, injected the $200 million figure into the case during his testimony,[53] forcing the Court to give a curative instruction. Given SABIC's litigation tactics and discovery abuses, the Court's decision to prohibit undisclosed, unsupported and speculative testimony as to SABIC's actual costs at trial was proper.

10. Sixth, SABIC claims the Court should grant a new trial because the Court's "evanescent" rulings regarding SABIC's cost evidence and the R&D fee "dramatically limited SABIC's ability to present its rationales for charging a margin,

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[52] *Id.* at 132.

[53] Trial Tr. (Mar. 19, 2003) A.M. Session at 109-10, *Saudi Basic Indus. Corp.* (No.600).

while improperly expanding ExxonMobil's ability to impugn SABIC's motives."[54] The *American Heritage Dictionary of the English Language* defines "evanescent" as "[v]anishing or likely to vanish; transitory; fleeting...."[55] To the extent SABIC finds the Court's rulings on the admissibility of SABIC's alleged R&D costs defense "transitory," the Court can only note that the factual support provided by SABIC during discovery for its purported R&D costs was "evanescent." As with its "actual costs" defense, the R&D costs were a moving target despite ExxonMobil's repeated attempts to elicit information on these costs through the appropriate discovery tools. Despite ExxonMobil's repeated efforts, and the Court's inquiries, SABIC was never able to provide a definitive, reliable breakdown of its R&D costs. In fact, SABIC failed to provide, even in the midst of trial, sufficient factual support for its alleged R&D costs. Not only was the information it attempted to introduce to the jury unsupported by any documents produced during discovery, it was premised only on the sheer guesstimates and speculation of SABIC's witnesses. The Court determined that there was simply no meaningful way ExxonMobil could cross-examine the witnesses on these guesstimates because none of the documentation produced by

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[54]SABIC's Opening Br. at 20.

[55]AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 453 (1981).

SABIC substantiated such numbers.

For months, SABIC refused to produce information requested by ExxonMobil relating to R&D costs. Then, at trial, SABIC opened the door to the R&D issue by suggesting to the jury through the cross-examination of ExxonMobil's expert, Vincent Love, that SABIC used the "margin" to pay for the R&D center. The Court gave a curative instruction. It was only after SABIC elicited testimony from several witnesses that the margin was used to cover the R&D center that the Court permitted ExxonMobil to cross-examine Dr. Pai and Mr. Bin Salamah on this issue. In other words, it was only because SABIC ignored the Court's ruling excluding purported evidence of SABIC's R&D costs or inadvertently "opened the door" by eliciting from its witnesses information about such costs that the Court decided to allow ExxonMobil to test the bases for the R&D costs by cross-examining the witnesses on this issue. After conducting the balancing required under Rule 403, the Court determined that it would be extremely prejudicial to ExxonMobil to allow SABIC to elicit testimony that it charged a margin to cover its expected R&D costs, but not allow ExxonMobil a fair opportunity to rebut this argument by attempting to show that SABIC also charged R&D fees to cover these same costs.[56] Once SABIC opened

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[56]Trial Tr. (Mar. 18, 2003) A.M. Session at 10-11, *Saudi Basic Indus. Corp.* (No. 575).

the door and raised the specter that the margin was used to cover costs incurred in connection with the R&D center, the Court was required under Rule 403 to allow ExxonMobil to cross-examine on the R&D fees charged by SABIC. To do otherwise would reward SABIC for discovery abuses and cause extreme unfair prejudice to ExxonMobil. SABIC vehemently denied to the Court that it "double dipped" by applying the margin to R&D costs *and* charging the Joint Ventures an R&D fee, and thus claimed evidence that it charged an R&D fee was irrelevant and prejudicial. But neither the Court nor ExxonMobil (and, therefore, certainly not the jury) could effectively ascertain the truth of this representation because despite multiple discovery requests, SABIC refused to produce documentation proving (or even suggesting) that the R&D fees charged to the Joint Ventures were not allocated to the very same costs SABIC alleged were paid by the margin. The Court's rulings on the R&D costs are the inescapable product of SABIC's lubricious cost defense, sharp litigation tactics, and failure to appreciate the ramifications of its failure to comply with our discovery rules.

In sum, It is ironic that SABIC characterizes the Court's rulings as "evanescent," because throughout discovery and during the trial the Court was unable to obtain from SABIC with any certainty or precision (1) the total amount and the

types of costs it claimed were R&D costs covered by the margin, (2) the time period during which such costs were incurred, (3) whether and what documentation supported such costs, or (4) why such costs were not already covered by the R&D fees. In response to ExxonMobil's and the Court's separate inquiries, SABIC provided little more than self serving guesstimates, not relevant, admissible evidence.

11. Seventh, SABIC claims it is entitled to a new trial because the Court improperly admitted into evidence the Webb memo under Rule 803(5). The Court disagrees. The Rule 803(5) exception to the hearsay rule provides that a "memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly" may be admitted. ExxonMobil established the proper foundation and the Court admitted the exhibit. SABIC alleges that by admitting the Webb memo, it improperly admitted "embedded hearsay."[57] The key inquiry for the Court at the time ExxonMobil sought to introduce the Webb memo was (1) whether the statement Webb attributed to Mr. Bin Salamah was offered by ExxonMobil to prove the truth of the matter asserted, and (2) the

[57]Pl. Trial Ex. 218.

inherent trustworthiness of the Webb memo. After inquiry, the Court was satisfied on both points. The statement by Mr. Bin Salamah was not offered to prove the truth of the matter asserted. Moreover, the Court was satisfied as to the inherent trustworthiness of the disputed statement because Mr. Webb's memo long predated the litigation and both Mr. Webb and Mr. Bin Salamah appeared live at trial and were available to be cross-examined on the contents of the Webb memo in front of the jury. The trustworthiness of the memo was not a concern. For the same reasons, admission of this evidence did not result in unfair prejudice to SABIC. Mr. Bin Salamah denied he made the statement and SABIC had the opportunity to cross-examine Mr. Webb.

12. Eighth, SABIC claims the Court erred by admitting the Fitzpatrick testimony under DRE 805 because it contained hearsay and was untrustworthy. ExxonMobil points out that, over its objection and despite an express provision in the KEMYA Joint Venture Agreement and the YANPET Joint Venture Agreement that a party cannot waive its rights under those agreements,[58] the Court permitted SABIC to present a waiver defense at trial. SABIC pursed this defense solely against Exxon.

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[58]Volume One Trial Ex. Cited SABIC's Renewed Mot. J. Matter Law & Mot. New Trial at PX1, Joint Venture Agreement Between Saudi Basic Industries Corporation and Exxon Chemical Arabia, Inc. Art. 8.2, *Saudi Basic Indus. Corp.* (No. 647); *Id.* at PX2, Joint Venture Agreement Between Saudi Basic Industries Corporation and Mobil Yanbu Petrochemical Company, Inc Art. 8.2.

The Fitzpatrick testimony SABIC challenges was highly probative on the issue of Exxon's state of mind and whether Exxon intentionally relinquished any known rights. The Court determined that Exxon was not attempting to introduce Mr. Fitzpatrick's testimony for the truth of the matter asserted, but rather to show the impact on the listener. Consequently, the Court held that the testimony was not hearsay. The Court then determined that the probative value of this evidence was not substantially outweighed by danger of unfair prejudice to SABIC because the witnesses offered by SABIC to support its waiver defense testified they did not know about the margin or that Exxon intentionally relinquished a know right. Thus, the Fitzpatrick testimony was consistent with the testimony offered by SABIC. Moreover, because Mr. Mubarak testified live at trial and denied he made the statement to Mr. Fitzpatrick, the jury had the ability to assess the weight to give Mr. Fitzpatrick's recollection versus Mr. Mubarak's recollection. SABIC was afforded the opportunity to rebut, through the live testimony of Mr. Mubarak, the statements attributed to Mr. Mubarak by Mr. Fitzpatrick.

13. Ninth, SABIC claims it is entitled to a new trial because the Court improperly admitted Mr. Murphy's statements that Jim Butler told Mr. Murphy that a SABIC employee confirmed there was no margin. The Court found it necessary to

admit Mr. Murphy's statement over SABIC's objection because SABIC created the impression during Mr. Murphy's cross-examination that Mobil never followed up on the issue because there were no writings. SABIC's counsel asked Mr. Murphy, "[n]ow, after that meeting, you didn't follow-up with any writing to SABIC to confirm this supposed statement; right?" Mr. Murphy responded, "[t]hat's correct." SABIC's counsel continued, "[i]n fact, in the 23-year period from 1980 right up to now, you never confirmed any of this pass through stuff with anybody at SABIC; right?" Mr. Murphy responded, "I had no reason to do so. I was not involved."[59] Obviously, because the Court permitted SABIC to present a waiver defense, the issue of Mobil's follow-up or lack thereof was critical. Because the Court found this suggestion misleading and erroneous, and therefore unfairly prejudicial, the Court allowed ExxonMobil to cure it on redirect.[60] ExxonMobil did not attempt to cure through use of hearsay. Rather, it sought to establish only that there was, contrary to SABIC's implication, follow-up by Mobil. The Court permitted this line of inquiry in an attempt to negate the unfair prejudice to ExxonMobil created by SABIC's questioning. 14. Tenth, SABIC claims it is entitled to a new trial because the

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[59]Trial Tr. (Mar. 11, 2003) A.M. Session at 93-94, *Saudi Basic Indus. Corp.* (No. 532).

[60]Trial Tr. (Mar. 11, 2003) A.M. Session at 102-03, *Saudi Basic Indus. Corp.* (No. 532).

Court erred in refusing to allow SABIC to put into evidence the day before closing arguments over 100 documents.[61] The basis for this ruling is that the Court was not about to permit SABIC to put over 100 additional documents into the record at the eleventh hour (1) without witnesses to explain their relevance and meaning, (2) without ExxonMobil having a meaningful opportunity to object to their admissibility, (3) without ExxonMobil having a meaningful opportunity to offer rebuttal through other documents or witnesses, (4) because SABIC failed to establish to the satisfaction of the Court how the *entire* contents of *all* 100 plus documents could possibly constitute admissions under DRE 801(d)(2), and (6) because SABIC failed to file a timely motion in limine pursuant to the Case Scheduling Order seeking their admission. By way of background, the Court had instructed SABIC days before that it could not introduce documents without a sponsoring witness.[62] SABIC responded as follows:

> Your Honor, I was going to make a proposal... [ExxonMobil] just asked the question what documents are we talking about. If we had a half hour together maybe we could get past half of them and wouldn't have an issue before the Court.

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[61]Trial Tr. (Mar. 20, 2003) A.M. Session at 7-8, *Saudi Basic Indus. Corp.* (No. 602).

[62]Volume Three Trial & Hr'g Tr. Cited Renewed Mot. J. Matter Law & Mot. New Trial, Hr'g Tr. (Mar. 16, 2003) at 40:1-6, *Saudi Basic Indus. Co.* (No. 645).

The Court agreed with this approach. To the Court's surprise and dismay, four days later, and the day before closing arguments, SABIC still had not identified the 100 plus documents, nor had it conferred with ExxonMobil about the documents to discuss their admissibility. When presented on the afternoon before closings with SABIC's renewed application to put into the record as admissions by a party opponent over 100 documents, the Court asked SABIC to select its "top 10" documents and explain whey they, *in their entirety*, were admissible.[63] Late in the evening on the night before closings, the Court reviewed these documents with counsel for SABIC and ExxonMobil.[64] As the Court anticipated, many of the statements in the documents did not fall within the purview of Rule 801(d)(2) and many of the documents SABIC sought to introduce in their entirety contained irrelevant, highly prejudicial statements and other inadmissible evidence of minimal probative value, and statements certain to cause overwhelming juror confusion. The Court refused to allow SABIC to introduce the documents holding:

> I also think in keeping with the discovery rules and spirit of the discovery rules and in keeping with the idea that trial is not supposed to be by surprise or ambush, that SABIC should have clearly identified

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[63]Trial. Tr. (March 20, 2003) AM Session at 8.

[64]*See* Volume Four Trial & Hr'g Tr. Cited Renewed Mot. J. Matter Law & Mot. New Trial, Hr'g (Mar. 19 2003) P.M. Session, *Saudi Basic Indus. Corp.* (No. 646).

> which portions of the documents it sought to admit under which rules; why they were relevant; why these admissions were not cumulative; whey they were admissions in the first place. That exercise did not happen until I asked it to happen. That was last night about 12 clock or 11.
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> So having said all that, in my role as having to manage the trial and having to make sure that neither side is surprised, there is no unfair prejudice, the only option I see is to exclude those late identified documents.
>
> There was no way for ExxonMobil to reasonably respond. They couldn't contact witnesses at 11 last night to rebut anything in the documents; without such ability to rebut that, the jury would be engaging in gross, unguided speculation.[65]

15. Eleventh, SABIC next argues that it is entitled to a new trial because the Court erroneously precluded evidence and argument regarding the passage of time between the accrual of Exxon's & Mobil's claims and this action, and applied an erroneous standard of proof for SABIC's defense of waiver by conduct and course of dealing. SABIC claims that the Court should not have excluded conduct and course of dealing evidence which "went directly to Exxon's and Mobil's intent - specifically, the evidence of the passage of time between Exxon's, Mobil's and the Joint Ventures' knowledge of the payment differential and their action (or inaction) in response."[66] According to SABIC, the "passage of time" evidence that SABIC sought to introduce

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[65]Trial Tr. (Mar. 20, 2003) A.M. Session at 9-10, *Saudi Basic Indus. Corp.* (No. 602).

[66]ExxonMobil's Br. Opp'n SABIC's Mot. New Trial at 31.

was "substantial and important evidence" that SABIC's actions were in accordance with the parties' agreements. SABIC's arguments ignore the fact that under Saudi Arabian substantive law, property rights are eternal. Applying Saudi substantive law, the Court struck SABIC's statute of limitations defense before trial. Because SABIC's "passage of time" defense smacked of the statute of limitations, and further because the Court was concerned about juror confusion, the Court precluded SABIC from arguing that the passage of time was a defense to ExxonMobil's claim. With respect to waiver, however, the Court permitted SABIC to present this defense over ExxonMobil's objection. The Court instructed the jury in the Elements of Waiver Instruction 5.4, consistent with Saudi law, that:

> Waiver is the voluntary and knowing relinquishment of a known legal right or advantage. The party alleged to have waived a right must have known about the right and intended to give it up. Furthermore, there can be no waiver unless the relinquishment or abandonment of a legal right or advantage was unequivocal in character. A waiver may be expressly made or implied from conduct or other evidence. Mere silence cannot be a basis for a finding of waiver.
>
> Here, SABIC claims that Exxon, but not Mobil, waived its claims through conduct and course of dealing in 1994-95. Exxon denies that its conduct or course of dealing waived any claims. If you find, by clear and convincing evidence, that Exxon waived any rights through conduct and course of dealing in 1994-94, then it is up to you, the jury, to determine the extent and effect of any such waiver on the ability of Exxon to bring a claim for damages for the time period before or after

> any such waiver occurred.
>
> Furthermore, the Court specifically instructs you that there is no statute of limitations or time limit for bringing this lawsuit because these claims do not expire. Passage of time is wholly irrelevant to this defense. The defense based on Exxon's conduct and course of dealing cannot be based on the passage of time, but must be based upon an intentional relinquishment of a known legal right.

This instruction was legally sound and necessary to avoid juror confusion.[67] The Court notes that despite its clear ruling excluding the passage of time evidence, SABIC still injected this concept into the case during its closing argument.[68]

16. With respect to SABIC's claim that the standard of proof for waiver is preponderance of the evidence and not clear and convincing, SABIC again ignores Saudi law which requires a "higher standard of proof" with respect to waiver, particularly when the written agreements at issue contain "no waiver" provisions. After considering, among other things, the Saudi law experts' testimony, the Court decided that the jury should not consider the waiver defense unless the evidence of

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[67]The Court was concerned that without such a curative, the jury would blur the distinction between the elements of "waiver" and the mere passage of time. Trial Tr. (Mar. 17, 2003) A.M. Session at 18, *Saudi Basic Indus. Corp.* (No. 573).

[68]Trial Tr. (Mar. 20, 2003) P.M. Session at 139-40, *Saudi Basic Indus. Corp.* (No. 592).

waiver constituted *bayinna* ["clear evidence"].[69] The Court's ruling is appropriate and consistent with Saudi law.

17. Twelfth, SABIC alleges the Court improperly denied its motion for mistrial based on statements made by ExxonMobil's accounting and finance expert, Vincent Love. During his direct testimony, Mr. Love stated that he was a certified fraud examiner and had experience in investigating fraud. He then testified that "[t]he only reason" why a company would spread out its costs over 20 years as SABIC did "is so... it wouldn't be transparent."[70] Mr. Love went on to testify:

> Q. As an accountant, what conclusion would you draw from a situation like this, one where the money is being spread out over 20 years?
> A. From my experience as an accountant and certified fraud examiner and investigating frauds, it doesn't mean that that's the intent here at all. I want to make that clear as well. But you see this similar type of thing happening when a company has a reserve on their books. And, Cendant, one of the companies having problems recently doing this, they set up reserves, and they bled the reserves in slowly so it wouldn't pop up and be seen. And this is one of the reasons why there were lawsuits and everything else with Cendant. I want to make it clear, though, that that doesn't necessarily mean was happening.
> Q. Fair enough.

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[69]Second Aff. Chad Shandler at Tab 2A, Aff. Frank E. Vogel (Sept. 16, 2002) ¶ 20, *Saudi Basic Indus. Corp.* (No. 676); *Id.* at Tab 1A-1D, Expert Rep., Declaration, Second Declaration, Dep. of Wael B. Hallaq, *Saudi Basic Indus. Corp.* (No. 676).

[70]Trial Tr. (Mar. 13, 2003) A.M. Session at 57:3-8, *Saudi Basic Indus. Corp.* (No. 541).

At this point, the Court summoned counsel to sidebar. At sidebar the Court stated:

> I'm concerned about that last opinion because of the issue of fraud. While he says that's not necessarily what it means, and I'm not saying that's what it means, this is consistent with fraud. And that's not anywhere in his report. He has now gone beyond his report. I thought that he was going to say this is consistent with not wanting to treat something as a profit.[71]

In response to the Court's comment, "we have a problem," counsel for SABIC stated "Your Honor, I agree. I had no notice it was coming. I'm going -- we need a very strong curative instruction or I'm going to have to move for a mistrial."[72] The Court responded "I think that it can be cured. I'm sure if you put your heads together, you can come up with a curative. So I'm going to give the jury a recess, and you can work on that."[73] Following the recess, counsel for SABIC requested a mistrial. Counsel for SABIC explained that he had drafted a curative instruction but "this bell cannot be unrung." The Court then discussed the proposed curative at length with counsel for SABIC and ExxonMobil.[74] The Court reviewed *Taylor v. State* which

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[71]Trial Tr. (Mar. 13, 2003) A.M. Session at 58, *Saudi Basic Indus. Corp.* (No. 541).

[72]*Id.* at 58-59.

[73]*Id.* at 59.

[74]*See* Trial Tr. (Mar. 13, 2003) A.M. Session at 61-68, *Saudi Basic Indus. Corp.* (No. 542).

sets forth the standard for a mistrial and after analyzing each factor concluded that a mistrial would be inappropriate. The Court stated:

> Well, I'm going to deny the motion for a mistrial because, although I am concerned that the jury is thinking about fraud, I think I can give a curative, a very strongly-worded curative in a format that SABIC has drafted. And, I think, based on what I have observed from this jury, they're paying rapt attention. They are acknowledging when I ask them if they've understood something. They are attentive, and I think they're trying to be diligent in the fulfillment of their duties. We've certainly harped on them enough about their role as jurors. So I think if I give them a curative and tell them to disregard it, I think they will do that. I don't find that the nature or persistency or frequency of this conduct is that compelling to grant a mistrial, because yesterday the circumstances were quite different. So I don't take this as a continuous course of conduct.[75]

With respect to Mr. Love's testimony given the day before which SABIC argued exceeded the scope of his expert report, the Court noted that:

> Yesterday he opined conclusively and beyond the scope of his report that SABIC made a profit, and when I spoke to him about that, his remorse was genuine, and I assessed his credibility three inches from his face in the hallway outside of the lockup. So as the trial judge, I made a determination that that was in no way other than inadvertent, a little nervousness, a little excitement, and I corrected that... I saw the jury nodding when I gave the curative.[76]

As soon as Mr. Love made the prejudicial statement about fraud and Cendant, the

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[75] *Id.* at 71-72.

[76] *Id.* at 68.

Court, *sua sponte*, interrupted the questioning of Mr. Love to speak with counsel and then, as soon as practical thereafter, gave the jury a curative instruction drafted by SABIC, the objecting party. In fact, the Court gave the exact curative SABIC had drafted over ExxonMobil's objections.[77] The Court was satisfied given the clear curative instruction and the force with which it was delivered by the trial judge, and seeing the jury's reaction to that curative, that SABIC was not unfairly prejudiced by Mr. Love's inappropriate inflammatory comments about fraud and Cendant. If the trial judge had any concern or lingering doubt following the curative as to the effectiveness of the curative in "unringing the bell," it would have held further discussion with counsel to discuss the appropriate next step. The Court is very confident in the given manner in which the events unfolded and its prompt action in providing a curative worded by SABIC that no unfair prejudice resulted from Mr. Love's comments.

CONCLUSION

For all of the reasons set forth above, SABIC's Motion for a New Trial is **DENIED**.

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[77]Trial Tr. (Mar. 13, 2003) A.M. Session at 74-76, *Saudi Basic Indus. Corp.* (No. 542).

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Jan R. Jurden, Judge