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: August 26, 2003

Upon SABIC's Renewed Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial, on ExxonMobil's Ghasb Claims - **DENIED**

ORDER

Upon review of SABIC's Renewed Motion for Judgment as a Matter of Law,

or in the Alternative for a New Trial, on ExxonMobil's Ghasb Claims, ExxonMobil's

opposition thereto, and the record, it appears to the Court that:

1. SABIC again asks the Court to enter judgment as a matter of law with

respect to ExxonMobil's ghasb claim "because there is no legally sufficient

evidentiary basis for a reasonable jury to find for Exxon or Mobil."¹ In the alternative, SABIC asks this Court to grant a new trial "because the evidence overwhelmingly supports a verdict in favor of SABIC."²

2. SABIC made a conscious, strategic decision to file this case here rather than in its own backyard. That risky strategy backfired, miserably, and now SABIC cries foul claiming that an American judge cannot possibly adjudicate like a Saudi judge. For the reasons set forth below, the Court finds no basis to alter its decision on the elements of *ghasb* and therefore denies SABIC's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, a New Trial on this issue.

3. Judgment as a matter of law pursuant to Superior Court Civil Rule 50 is appropriate only when "reasonable minds could draw but one inference and that inference is that verdict favorable to plaintiff is not justified."³

In contrast, when considering a motion for a new trial, the court weighs the evidence in order to determine if the verdict is one which a reasonably prudent jury would have reached. Barring exceptional circumstances, the trial judge should set aside a jury verdict pursuant to a Rule 59 motion only when the verdict is manifestly and palpably

 $^{2}Id.$

¹SABIC Br. Supp. Renewed Mot. J. Matter Law, Alternative New Trial ExxonMobil's *Ghasb* Claims at 1 [hereinafter SABIC Opening Br.].

³Burgos v. Hickock, 695 A.2d 1141, 1144 (Del. 1996).

against the weight of the evidence, or for some reason, justice would miscarry if the verdict were allowed to stand. This standard gives recognition to the exclusive province of the jury as established by the Delaware Constitution, while preserving the separate common law function of the motion for a new trial where all of the evidence can be reviewed from the unique viewpoint of the trial judge. A trial judge's determination to grant a new trial is accorded due deference by this Court and will not be disturbed so long as the decision is not unreasonable or capricious.⁴

4. In support of its motion, SABIC argues, *inter alia*, that the *ghasb* verdict

in favor of ExxonMobil is deficient as a matter of law because the Court did not

properly instruct the jury on the elements of ghasb (usurpation) under Saudi law.

5. The Court instructed the jury as follows:

I will now instruct you on the elements of Mobil's and Exxon's claims for usurpation [ghasb]. Mobil and Exxon claim that SABIC is liable for usurping the money that YANPET and KEMYA paid to SABIC for UNIPOL® technology in excess of what SABIC paid to Union Carbide for that technology. SABIC denies that it is liable for usurpation. In order to establish a claim for usurpation, Mobil or Exxon must show, by a preponderance of the evidence, that SABIC wrongfully exercised ownership or possessory rights over the property of another without consent, which means with blatant or reckless disregard for those property rights. The conduct need not be intentional.⁵

⁴Jury Instructions, *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. Inc. & Exxon Chemical Arabia, Inc.,* No. 00C-07-161, Jurden, J. (No. 578); Trial Tr. Afternoon Session (Mar. 20, 2003) at 20-21(No. 592).

⁵Jury Instructions at 19, *Saudi Basic Indus. Corp.* (No. 578).

6. As noted above, the Court instructed the jury that the tort of *ghasb* is comprised of the following elements: (a) the exercise of ownership or possessory rights, (b) over the property of another, (c) without consent, (d) wrongfully.⁶

SABIC vehemently disagrees with the Court's definition of "without consent" and claims that the Court omitted the necessary element of force in its instruction.⁷

7. The jury instruction in question was the culmination of many

months of study, research, discussion and extensive expert testimony on Saudi law. Long before trial, the parties' Saudi law experts disagreed on the proper elements of *ghasb* and the Court was unable to reconcile the parties' experts' opinions. Consequently, the Court determined that it was necessary to hire its own independent expert pursuant to Delaware Uniform Rule of Evidence 706.⁸ The parties agreed. The Court asked each side to submit names of three experts. The Court then permitted each side to comment on the other's proposed experts. After considering all the various objections lodged, the Court decided to locate its own expert.

⁶Trial Tr. Afternoon Session (Mar. 20, 2003) at 20-21, *Saudi Basic Indus. Corp.* (No. 592).

⁷See SABIC Opening Br. at 11; SABIC Reply Br. at 16.

⁸Hr'g Tr. Afternoon Session (Dec. 19, 2002) at 219-23, *Saudi Basic Indus. Corp.* (No. 376).

8. The Court located Mr. Herbert Wolfson, and provided his qualifications to the parties for their comment. The Court discussed with the parties at great length what issues it wanted Mr. Wolfson to research. The Court then issued an order appointing Mr. Wolfson and describing his role in the litigation.⁹

9. Mr. Wolfson prepared two reports,¹⁰ and the parties took his deposition.

After reviewing all the experts' reports and their deposition testimony, the Court held a hearing at which all experts testified and were subject to cross examination.¹¹ Following this hearing, the Court ruled on the proper elements of *ghasb*.¹²

10. SABIC claims that the Court erred when it refused to instruct that SABIC must have acted "forcefully" and with the victim's knowledge.¹³ According to SABIC, these two elements preclude any *ghasb* (or usurpation) by secrecy or

⁹Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. Inc. & Exxon Chemical Arabia, Inc., No. 00C-07-161, Jurden, J. (Jan. 30, 2003) (order appointing Herbert S. Wolfson as an independent expert to assist the Court). See DEL. UNIF. R. EVID. 706.

¹⁰Rep. Indep. Expert Herbert S. Wolfson (Feb. 21, 2003), *Saudi Basic Indus. Corp.* (No. 518); Supp. Rep. Indep. Expert Herbert S. Wolfson (Mar. 6, 2003), *Saudi Basic Indus. Corp.* (No. 517).

¹¹Tr. Saudi Law Hr'g Morning Session (Mar. 7, 2003), *Saudi Basic Indus. Corp.* (No. 533); Tr. Saudi Law Hr'g Afternoon Session (Mar. 7, 2003), *Saudi Basic Indus. Corp.* (No. 623).

¹²Tr. Saudi Law Bench Ruling (Mar. 7, 2003), *Saudi Basic Indus. Corp.* (No. 524).

¹³SABIC's Opening Br. at 3-6.

stealth. Further, according to SABIC, because these two elements "were not put to

the jury, the verdict in favor of Exxon and Mobil is unsupportable as a matter of

law."¹⁴

11. In support of this argument, SABIC has submitted, post trial, another

affidavit from its Saudi law expert, Frank E. Vogel.¹⁵ Dr. Vogel justifies the need for

a post-trial affidavit, stating:

It is indeed unfortunate that, despite the tremendous expenditure of time and effort on expert opinions and testimony as to Saudi law, errors of the magnitude one observes in this case could persist. In this report, I hope to reiterate the facts about Saudi law in a clearer fashion than I may have achieved before, in the hopes that these errors might still be rectified.¹⁶

12. The Court notes that SABIC had ample opportunity *before* trial to submit

¹⁶Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-4, ¶ 4, Aff. Frank E. Vogel (April 4, 2003), *Saudi Basic Indus. Corp.* (No. 640).

¹⁴SABIC's Opening Br. at 4.

¹⁵Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-4, Aff. Frank E. Vogel (April 4, 2003), *Saudi Basic Indus. Corp.* (No. 640). The Court was surprised by the submission of such an affidavit *after* trial considering the Saudi law issues were fully briefed (with supporting affidavits), months before trial. In fact, it was SABIC who requested a pretrial determination of Saudi law. *See* SABIC's Mot. Pretrial Determination Saudi Law & Bifurcate Trial Liability & Damages (Dec. 9, 2002), *Saudi Basic Indus. Corp.* (No. 329). The Court is astounded, given the extensive briefing on the Saudi law issues, and the fact that any affidavits pertaining to the interpretation of Saudi law should have been submitted, at the latest, by January 24, 2003, the day SABIC's reply brief on its Saudi law motion was filed, that SABIC is attempting to supplement the record *post trial* in this manner.

full briefing and supporting affidavits from experts on Saudi law and that Dr. Vogel's attempt to "reiterate" Saudi law "in a clear fashion" comes far too late. The parties were to thoroughly research and brief the Saudi law issues in advance of the hearing conducted by the Court on March 7, 2003. The Court held a full one (1) day hearing on the Saudi law issues during which the parties were able to cross examine each other's experts and the Court appointed expert. Now, months after the trial and many more months after the Saudi law hearing, SABIC attempts to supplement the record through Dr. Vogel's new affidavit. The Court is reluctant to consider this affidavit because of its untimeliness, but will do so in the interest of justice. To be fair, the Court will also consider Dr. Hallaq's post trial declaration.

13. After careful consideration, the Court finds nothing in Dr. Vogel's April 14, 2003 affidavit or Dr. Vogel's June 4, 2003 rebuttal affidavit which would cause the Court to alter its decision on the elements of *ghasb* under Saudi law. Prior to ruling on the elements of *ghasb*, the Court carefully reviewed voluminous expert reports and supporting information, deposition transcripts, appointed an independent expert and presided over a one (1) day hearing at which the Saudi law experts testified. It was clear even before the Saudi law experts testified that there is no single definition of *ghasb* under Saudi law. It was also clear before the Saudi law

experts took the stand that all three differed on the proper elements of a *ghasb* claim. The decision of what elements comprise the tort of *ghasb* under Saudi law was extremely difficult. This difficulty was caused, in large part, by the fact that the concept of *stare decisis* has no place in Saudi law. All the Saudi law experts who testified agreed that the Islamic Legal System in Saudi Arabia is based on "juristic or scholarly opinion, rather than on the precedential authority of court decisions or on extensive legislation or codification."¹⁷ Moreover, Saudi court decisions are not published or open to public inspection.¹⁸ It is not possible to open up law books and read cases to discern the law. Consequently, ascertaining the proper elements of the tort of *ghasb* under Saudi law was an extremely challenging and drawn out process.¹⁹

14. The basic law of Saudi Arabia is Islamic law. It is that law which "determines both the constitution and the general or common law of the Kingdom."²⁰

¹⁷Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-2, ¶5, Aff. Frank E. Vogel (Sept. 16, 2002), *Saudi Basic Indus. Corp.* (No. 640).

¹⁸*See id* ¶9.

¹⁹See Rep. Indep. Expert Herbert S. Wolfson (Feb. 21, 2003) ¶ 14-26, Saudi Basic Indus. Corp. (No. 518).

²⁰Volume One Expert Rep. & Witness Dep. Cited in Renewed Mot. J. Matter of Law & Mot. New Trial at T-2, ¶ 5, Aff. Frank E. Vogel (Sept. 16, 2002), *Saudi Basic Indus. Corp.* (No. 640).

Although there are four schools of Sunni Islamic jurisprudence which set forth the content of Islamic Law, Saudi judges are trained in the Hanbali School and usually follow the majority view of that school.²¹ There can, however, be multiple views on any issue within the Hanbali School.²² And, "despite the instruction to apply Hanbali teachings, Saudi judges can and sometimes do look to the teachings of other guilds."²³

15. The Saudi law experts agreed that the process of *ijtihad* is central to the judges role in the Saudi legal system. The Court's expert, Mr. Wolfson, describes *ijtihad* as the "derivation of legal rules through study, research and analysis."²⁴ Because there is no *stare decisis, ijtihad* must be conducted, from scratch, each time a question requiring a legal ruling is presented.²⁵ According to Mr. Wolfson, efforts to look towards past practice as a guide to possible future outcomes may well be inherently at odds with Islamic law's doctrinal insistence on the use of *ijtihad* to

 $^{^{21}}$ *Id.* ¶ 7.

²²See id.

 $^{^{23}}$ Rep. Indep. Expert Herbert S. Wolfson (Feb. 21, 2003) \P 24, Saudi Basic Indus. Corp. (No. 518).

 $^{^{24}}$ *Id.* ¶ 23.

derive the appropriate legal rule governing each individual case.²⁶ *Ijtihad,* according to Mr. Wolfson, may lead to different scholars reaching different results at different times, even on similar questions. Such different results are viewed as acceptable so long as the proper analytical procedures are followed in reaching the results.²⁷

Mr. Wolfson opined that there is no single binding definition of *ghasb*,
"but rather a range of possibilities."²⁸ Dr. Vogel testified that he agreed with Mr.
Wolfson that there is "no single binding definition of usurpation [or *ghasb*]."²⁹

17. The Court took every measure it could to learn the pertinent Islamic law and to understand how a Saudi judge might apply it to the dispute at hand. When the Court's expert indicated he might be able to offer more assistance on the Saudi law issues presented if he traveled to Saudi Arabia, the Court, after consultation with the parties, authorized Mr. Wolfson to do so. The Court employed the *ijtihad* process as best it could under the circumstances and properly "navigat[ed] within the boundaries

 26 *Id*.

 27 *Id.* ¶ 17.

 28 *Id.* ¶ 52.

²⁹Tr. Saudi Law Hr'g Morning Session (Mar. 7, 2003) at 127, *Saudi Basic Indus. Corp.* (No. 533).

of the Hanbali school."³⁰ In rejecting the "knowledge" and "force" elements, the Court's instruction on *ghasb* is consistent with the classical Hanbali authorities that would be followed by a Saudi judge.³¹

18. ExxonMobil points out that Dr. Vogel's "varying and inconsistent" definitions of *ghasb* only confirm that there is no one correct definition. The Court is inclined to agree. Each time he opined on the subject, Dr. Vogel's definition on *ghasb* seemed to change.³²

19. The Court does not find Dr. Vogel's latest definition of *ghasb* persuasive. Having had the opportunity to watch Dr. Vogel testify, observe his demeanor on the witness stand when his interpretation of Saudi law was challenged, and review his latest affidavit as well as his prior affidavits and deposition testimony, the Court finds he has become (or been exposed as) more of an advocate than an objective scholar of Islamic law. His relentless attacks on Dr. Hallaq's qualifications and expertise further undermine his credibility in the Court's eye. The Court is concerned about Dr. Vogel's objectivity.

³⁰*Id.* at 77-78.

³¹*Id.* at 40-44, 47, 53.

³²See, e.g., ExxonMobil Br. Opp'n at 13-15.

20. What troubles the Court even more is that Dr. Vogel opines that this Court cannot credibly engage in the *ijtihad* process.³³ According to Dr. Vogel, "*ijtihad* requires for its credibility qualifications which, on the very face of things, neither Prof. Hallaq, myself, or, with respect, any US Court possesses."³⁴ If Dr. Vogel is correct, why then did SABIC choose to file this dispute in a United States Court? If Dr. Vogel is correct in that neither he nor Dr. Hallaq possess the qualifications to engage in the *ijtihad* process, then *what* Saudi law "expert" would be able to assist this United States Court in determining the applicable Saudi law?

21. According to Dr. Vogel, this Court was required to "strive to predict what the Saudi legal system would actually routinely do"³⁵ under these particular circumstances. This Court did just that - without the benefit of reported decisions from Saudi Arabia and despite conflicting opinions from well-credentialed Islamic law scholars.

22. It is remarkable that SABIC, having purposely selected this forum

 34 *Id.* ¶ 7.

 35 *Id.* ¶ 8.

³³See Rebuttal Aff. Frank E. Vogel Concerning Mot. J. Matter Law (June 4, 2003), Saudi Basic Indus. Corp. (No. 690).

instead of a Saudi Court,³⁶ knowing the United States legal system is dramatically different than the Saudi legal system, comes forward after a verdict against it to claim that *no* American Judge is qualified to interpret and apply Saudi law. This is particularly incredible in light of SABIC's vehement argument that this case should be tried by a U.S. judge.³⁷

23. Contrary to SABIC's arguments, the verdict in this case was not against the great weight of the evidence. In fact, ExxonMobil introduced ample evidence in support of each element of its *ghasb* claim. Had it not done so, the Court would not have allowed ExxonMobil to introduce evidence of the damages recoverable for *ghasb*.³⁸ As ExxonMobil notes in its Answering Brief, the record is replete with

³⁷See SABIC's Mot. Strike ExxonMobil's Jury Demand, *Saudi Basic Indus. Corp.* (No. 305); 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).

³⁸Tr. Saudi Law Bench Ruling (Mar. 7, 2003) at 8, *Saudi Basic Indus. Corp.* (No. 524). The Court ruled:

I find that ExxonMobil may proceed under the theories set forth in its counterclaim but may not introduce evidence of what its termed "benefit damages," any damages

³⁶SABIC initiated a declaratory judgment suit on July 24, 2000. *See* Initial Complaint, *Saudi Basic Indus. Corp.* (No.1). The Court later reversed the order of proof, thereby making ExxonMobil the plaintiff. *See Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co. Inc.* & *Exxon Chemical Arabia, Inc.*, No. 00C-07-161, Jurden, J. (Jan. 24, 2003) (granting Exx onMobil's motion to realign the order of proof for trial presentation to promote efficiency, conserve the parties' and the Court's resources, insure the orderly and clear presentation of the evidence, and reduce juror confusion).

evidence supporting each element of *ghasb*. The verdict is consistent with that evidence and is the product of a reasonably prudent jury. The Court will not disturb the jury verdict because it is not manifestly and palpably against the great weight of the evidence.

WHEREFORE, for the reasons above, SABIC's Renewed Motion for Judgment as a Matter of Law, or in the Alternative for a New Trial, on ExxonMobil's *ghasb* claims is **DENIED**.

IT IS SO ORDERED

Jan R. Jurden, Judge

over and above the principal amount *until and unless the Court makes a finding at the conclusion of its liability case that ExxonMobil has satisfied the above elements of usurpation as I have determined them to be*, and that is to avoid the problem raised by [SABIC] of not being able to un-ring the bell. I don't want the jury to hear evidence of over \$300 million worth of damages that would not be available if ExxonMobil doesn't satisfy its burden. (Emphasis added.)