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 27, 2003

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

O R D E R

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 Contract Claims, ExxonMobil's opposition thereto, and the record, it appears to the Court that:

1. In its Motion SABIC argues that neither Saudi contract law nor the evidence presented at trial supports a jury verdict in ExxonMobil's favor on its breach

of contract claims. Consequently, argues SABIC, it is entitled to judgment as a matter of law. In support of its Renewed Motion for Judgment as a Matter of Law, SABIC cites five major reasons why a reasonable jury could not have found for ExxonMobil on its contract claims. In the alternative, SABIC argues that this Court should grant a new trial because the great weight of evidence at trial established that the 1980 Unipol® PE Licenses superceded and/or modified the Joint Venture Agreements and the 1987 Letter Agreements released all payment-related claims ExxonMobil could have brought against SABIC. The Court will address SABIC's arguments in the order they are presented.

2. First, SABIC claims that ExxonMobil committed itself to pursuing its *ghasb* claim in order to obtain disgorged profits from SABIC and, consequently, failed to prosecute a traditional breach of contract action. In other words, argues SABIC, ExxonMobil's contract claims were subsumed within the tort of *ghasb* and ExxonMobil is therefore precluded from recovering on a breach of contract claim. According to SABIC, ExxonMobil did not litigate the breach of contract action during trial for strategic reasons. Namely, ExxonMobil wanted to obtain the disgorged profits that could potentially be available as a remedy for *ghasb* but that

are otherwise unavailable under Saudi law for a traditional breach of contract claim.[1] SABIC argues that because ExxonMobil "litigated this matter as strictly one based on the Saudi tort of *ghasb,* and not as a traditional breach of contract claim, the jury's verdict on the breach-of-contract allegations must be vacated and judgment on that claim entered in SABIC's favor as a matter of law."[2] The Court cannot discern the basis for SABIC's argument that ExxonMobil "litigated this matter as strictly one based on the Saudi tort of *ghasb*, and not as a traditional breach of contract claim."[3] It was ExxonMobil, citing Saudi law, who moved for summary judgment on its breach of contract claim in October, 2002, long before trial, and the Court spent many hours reviewing briefs, reviewing expert reports, listening to expert testimony at the Saudi law hearing and deciding the issue of the applicable Saudi rules of contract construction that would be given to the jury at the conclusion of the case. Simply stated, the Court is at a loss to understand how SABIC can characterize ExxonMobil's conduct pretrial and during trial as abandoning its breach of contract claim. The Court finds that this particular argument borders on frivolous and will not

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[1]*See* SABIC's Br. Supp. Renewed Mot. J. Matter Law Alternative New Trial ExxonMobil's Contract Claims at 4 [hereinafter SABIC's Br.].

[2]SABIC's Br. at 6. *See* SABIC's Br. at 5-6.

[3]SABIC Br. at 6.

address it further except to say that the record establishes, unequivocally, that ExxonMobil asserted, and continued to vigorously assert, its breach of contract claim and never stopped litigating this claim. SABIC's tortured reading of Dr. Hallaq's deposition testimony bares no resemblance to the testimony he gave at the Saudi law hearing where he expressly refuted the very inference SABIC now seeks to draw from his testimony.[4]

3. SABIC's next argument is that Article 6.3 of the Joint Venture Agreements, by their plain terms, have no application of the Unipol® PE technology that SABIC licensed to the Joint Ventures. According to SABIC, the language of Article 6.3 applies only to partner-*licensed* polyethylene technology that is then sublicensed to the Joint Ventures, not partner-*owned* polyethylene technology that is licensed to the Joint Ventures. According to SABIC, the parties intended Article 6.1(a) to apply to partner-owned polyethylene technology and Article 6.1(a) does not require a cost pass through, but instead allows the parties to negotiate transaction-specific financial terms. Thus, because SABIC owned the Unipol® PE technology, the provisions of Article 6.3 have no application here and therefore no breach of

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[4]*See* Second Aff. Chad Shandler at Tab 1D, Dep. Wael B. Hallaq. (Dec. 6, 2002) at 133-35, *Saudi Basic Indus. Corp.* (No. 676); Hr'g Tr. (Mar. 7, 2003) at 39-40, *Saudi Basic Indus. Corp.* (No. 533).

Article 6.3 could have occurred. The Court finds SABIC's argument that the evidence presented at trial "overwhelmingly establishes" that Article 6.1(a) of the Joint Venture Agreements and not Article 6.3 governs the terms under which SABIC could sublicense the Unipol® PE technology to the Joint Ventures is wrong. Article 6.1(a) of the Joint Venture Agreements by its express terms applies only to Exxon and Mobil, not to SABIC. Article 6.1(a) of the KEMYA Joint Venture Agreement specifies "ECAI and its affiliates." Article 6.1(a) of the Mobil Joint Venture Agreement specifies "Mobil and/or Mobil affiliates." SABIC argued to the jury that it should rewrite Article 6.1(a) of the Joint Venture Agreements to substitute the name "SABIC" for the names of "Exxon" and "Mobil." Clearly, the jury was not persuaded by this argument. Instead, the jury read Article 6.1(a) as it was written, found it only to apply to Exxon and Mobil, and rejected the suggestion that although the parties expressly stated Exxon and Mobil in those provisions and not SABIC, the parties really meant SABIC and simply failed to get around to changing the language. Based on the evidence presented, a reasonable jury could conclude from the evidence presented that Article 6.1(a) did not apply to SABIC. A reasonable jury could also determine from the evidence that Article 6.3 governed the terms under which SABIC could provide Unipol® PE technology to KEMYA and YANPET. There was ample

evidence in the record from which a reasonable jury could conclude that Article 6.3 applied even if, as SABIC argued, it purchased the Unipol® PE technology. There is ample evidence in the record from which a reasonable jury could conclude that SABIC's agreement with UCC was not a purchase, but a license. Finally, there is ample evidence in the record from which a reasonable jury could conclude that Article 6.3 applied, regardless of the legal relationship between UCC and SABIC or the form of the transaction through which SABIC obtained the right to provide the Unipol® PE technology to the Joint Ventures, because SABIC never disclosed the terms of that transaction to ExxonMobil or the Joint Ventures.

4. With respect to SABIC's argument that SABIC purchased the Unipol® PE technology and therefore Article 6.3 is inapplicable, Article 6.3 contains the term "procures." A reasonable jury could conclude that "procures" includes a "purchase." In fact, there were a number of witnesses at trial who testified that "procures," as it appears in Article 6.3, would include a purchase of technology.[5] SABIC's argument that it purchased the Unipol® PE technology and then licensed it to the Joint Ventures, rather than sublicensed it, rings hollow in light of the great weight of evidence in the form of documents that refer to *sub*licenses. For example, PX3, the UCC-SABIC

[5] *See* ExxonMobil Ans. Br. at 9.

agreement, mentions the right of SABIC to "sublicense." PX4 and PX5 contain over fifty (50) references to the UCC-SABIC agreement as a "primary license agreement." The record is replete with documents referencing the UCC-SABIC transaction as a license and the SABIC Joint Venture transactions as sublicenses. SABIC's witnesses attempted to explain to the jury that while the term "sublicense" may have been used, SABIC "attached no legal meaning" to that term.[6] The overwhelming documentary evidence supports the jury's finding that the true character of the UCC-SABIC agreement was a license, that the agreements with KEMYA and YANPET were sublicenses, and that Article 6.3 applied. Moreover, a reasonable jury could conclude that ExxonMobil reasonably believed that Article 6.3 applied to the sublicensing of the Unipol® PE technology to the Joint Ventures because SABIC never advised Exxon or Mobil that it "purchased" the Unipol® PE technology from UCC and because of the plain language contained in Article 6.3. A reasonable jury could have reached this conclusion even if it had determined that the UCC-SABIC agreement was actually a purchase. The Court notes that at trial ExxonMobil introduced a copy of the Second Amended Complaint for Declaratory Judgment[7] and Article 6.1 of the

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[6]*See* Trial Tr. (Mar. 17, 2003) A.M. Session at 120, *Saudi Basic Indus. Corp.* (No. 573).

[7]*See* Def.'s Trial Ex. 760. *See also* Def.'s Trial Ex. 759. (First Amended Complaint for Declaratory Judgment.)

Joint Venture Agreements is nowhere mentioned in that complaint. The Court also notes that SABIC witnesses admitted that they never advised anyone at Exxon or Mobil that SABIC believed Article 6.1(a) applied to the provision of Unipol® PE technology to the Joint Ventures. Given all of this, there is more than a sufficient basis from which a reasonable jury could conclude that SABIC's Article 6.1(a) argument was an afterthought, and an unavailing one at that. This Court seriously considered precluding SABIC from presenting its argument that Article 6.1(a) applied to the provision of Unipol® PE technology to the Joint Ventures because of the lack of evidentiary basis supporting such an argument, and because the argument was not asserted until very late in litigation. After noting that the express language of 6.1(a) made that section applicable to only Exxon and Mobil, and characterizing SABIC's claim that 6.1(a) applied as "hanging on by a thread," the Court nonetheless permitted SABIC to argue this to the jury over ExxonMobil's objection. Thus, SABIC had a full and fair opportunity to present this argument to the jury for its consideration. The jury rejected it. While the Court believes that there was a basis to permit the jury to consider SABIC's seemingly last ditch defense under Article 6.1(a), there is no basis to overturn the jury's rejection of that argument. SABIC had the opportunity to make its case and was unable to convince the jury that the terms "Exxon" and "Mobil"

really meant "SABIC."

5. SABIC next argues that, under Saudi rules of contract interpretation, the Joint Venture polyethylene licenses which were entered into in November and October, 1980 "trump" the general provisions of the Joint Venture Agreements, including Article 6.3. In support of this argument, SABIC states that, under Saudi law, partnership agreements like the Joint Venture Agreements are *ja'iz* contracts, which are not prospectively binding on the partners but rather serve as a starting point for later, transaction-specific agreements. The later, transaction-specific contracts are *lazim* agreements which are prospectively binding on the partners and "trump" inconsistent terms of *ja'iz* contracts.[8] According to this argument, the detailed transaction-specific nature of the Unipol® PE technology licenses makes them *lazim* contracts that supercede Article 6.3 of the Joint Venture Agreements. The infirmity of this argument is that there is no evidence in the record to suggest that Exxon or Mobil knew that SABIC was deriving a profit from its provision of the Unipol® PE technology to the Joint Ventures or that Exxon or Mobil knew the financial terms in the UCC-SABIC license. Thus, as a matter of law, the sublicenses cannot possibly modify Article 6.3 of the Joint Venture Agreements. In fact, when ExxonMobil

[8] *See* SABIC's Opening Br. at 1-2.

moved for judgment as a matter of law on SABIC's contract modification argument, the Court pointed out that the parties' Saudi law experts agreed that in order for there to be a modification of an agreement, the partners to the agreement must have conferred on the proposed modification and understood what they were agreeing to. The Court stated:

> Dr. Hallaq and Dr. Vogel... both agree, and the evidence viewed in the light most favorable to SABIC supports this through Mr. Akel's and Mr. Salamah's testimony, that the Partners have to sit down and agree and they have to understand what they're agreeing to in order to modify an agreement. There is no evidence that Exxon or Mobil knew that the terms of the running royalties being paid by the Joint Ventures were different than the terms SABIC had with UCC. The evidence is undisputed that those terms between UCC and SABIC were confidential and were never released. And I find, ... as a matter of Saudi law, that it would be impossible for there to be a modification, ... because Exxon and SABIC never sat down and reached an understanding other than what is contained in 6.3 with respect to actual costs and Mobil and SABIC never sat down and reached an agreement other than what is in 6.3 relating to actual costs.[9]

While the Saudi law experts who testified disagreed on many aspects of Saudi law, they did agree that it was not possible under Saudi law to modify an agreement unless the parties understood they were modifying an agreement and understood the terms of the modification. There is no evidence in the record that Exxon or Mobil knew

[9]Trial Tr. (Mar. 19, 2003) P.M. Session at 95-96, *Saudi Basic Indus. Corp.* (No. 591).

that the financial terms in the sublicenses were different than the UCC-SABIC license. In fact, the undisputed evidence shows that SABIC and UCC kept the terms of their transaction confidential. Given the facts that were established by a preponderance of the evidence at trial, Exxon and Mobil could not have been aware of a purported modification or "trumping" of the Joint Venture Agreements through execution of the sublicenses because they did not understand that SABIC was charging the Joint Ventures more for the provision the Unipol® PE technology than it was paying to UCC for that same technology. As Dr. Hallaq noted, a "unilateral decision to alter the terms of the partnership can occur only if the other partner accepts the change and is willing to continue the new terms of the partnership."[10] SABIC can point to no set of factual circumstances that suggest Exxon or Mobil understood, much less intended, that the sublicenses modified Article 6.3. The Court also notes that Article 18.2 of the KEMYA Joint Venture Agreement and Article 19.2 of the YANPET Joint Venture Agreement specifically require that any amendment, modification or waiver of any provision of the Joint Venture Agreement be in writing

[10]Second Aff. Chad Shandler at Tab 1C, Second Decl. Wael B. Hallaq (Oct. 16, 2002) ¶7, *Saudi Basic Indus. Corp.* (No. 676). *See also,* Second Aff. Chad Shandler at Tab 2A, Aff. Frank E. Vogel (Sept. 16, 2002) at 12, fn.4, *Saudi Basic Indus. Corp.* (No. 676) ("Note that talking of the change as unilateralk is somewhat artificial. For the partnership legally and in human terms to continue to exist the parties must reach agreement on the changed terms.").

and signed by the partners. Dr. Hallaq testified that these provisions would be honored under Islamic principles of contract law.[11] Because Exxon and Mobil, the partners, never signed the sublicenses, under Article 18.2 and 19.2 the sublicenses cannot possibly supercede or modify the Joint Venture Agreements as a matter of Saudi law. Dr. Vogel's post-trial affidavit cannot overcome the clear and express language of 18.2 and 19.2 and their clear application under these circumstances. On this point, the Court finds the testimony of Dr. Hallaq far more credible and rejects Dr. Vogel's opinion that it would be "an error under Saudi law to attach crucial significance to whether a modification was signed by the partners."[12] The Court is not willing to discard the clear and express language of 18.2 and 19.2, and questions how a party who signed an agreement containing this provision can credibly argue after the fact that the provision is insignificant.

6. Next, SABIC argues that Exxon and Mobil released their contract claims when the Joint Ventures signed separate Letter Agreements with SABIC in 1987. The Court granted ExxonMobil's judgment as a matter of law on the release

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[11]*See id* at Tab 1C, ¶6.

[12]Volume 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) ¶42, *Saudi Basic Indus. Corp.* (No.640).

defense asserted by SABIC because neither Exxon nor Mobil signed the 1987 Letter Agreements and the plain and unambiguous language of the 1987 Letter Agreements limits the effect of any purported "release" to technology-related claims, not payment related claims.[13] As ExxonMobil notes in its post-trial briefing, while either of these reasons would alone suffice, SABIC's release defense is also precluded because the only evidence in the record from a Saudi law expert comes from Dr. Hallaq, who opined that the 1987 Letter Agreements would not affect ExxonMobil's claims as a matter of Saudi law.[14] Dr. Hallaq's opinion on the effect of the 1987 Letter Agreements has not been rebutted by any opinions from SABIC Saudi law experts, including Dr. Vogel's post-trial affidavit filed in support of judgment as a matter of law. For all of the reasons stated above, the Court denies SABIC's Renewed Motion as a Matter of Law, or in the Alternative, for a New Trial on ExxonMobil's Contract Claims.

IT IS SO ORDERED

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[13]Trial Tr. (Mar. 19, 2003) P.M. Session at 92-94, *Saudi Basic Indus. Corp.* (No. 591).

[14]*See* Second Aff. Chad Shandler at Tab 1A, Expert Rep. Wael B. Hallaq. (Sept. 12, 2002) ¶¶ 18-21, *Saudi Basic Indus. Corp.* (No. 676).

Jan R. Jurden, Judge