BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: OIL SPILL BY THE OIL RIG "DEEPWATER HORIZON" IN THE GULF OF MEXICO ON APRIL 20, 2010	)	**MDL Docket No. 2179**

INTERESTED PARTY RESPONSE OF PLAINTIFFS JESCO CONSTRUCTION CORPORATION OF DELAWARE, ET AL. TO BP AMERICA INC.'S MOTION AND SUPPORTING BRIEF TO TRANSFER RELATED ACTIONS TO EASTERN DISTRICT OF LOUISIANA FOR INCLUSION IN MDL PROCEEDINGS

Pursuant to Panel Rule 6.2(e), Plaintiff JESCO Construction Corporation of Delaware (hereinafter "JESCO"), represented by Brent Coon & Associates, in conjunction with Plaintiffs Bridget Sprinkle, David Secor, Joseph Cain, Sean Johnson, Tommy G. Cain, William R. Sprinkle, William Clay McClain, Somvang Pakhamma, Kimberly Johnson, and Vannalinh Pakhamma, represented by Taylor • Martino, P.C. (hereinafter "VoO Plaintiffs")[1], respectfully submit this Interested Party Response to BP America Inc.'s Motion and Supporting Brief to Transfer Related Actions to Eastern District of Louisiana for Inclusion in MDL Proceedings, and in support of which would show the Panel the following:

BACKGROUND

1. Plaintiff JESCO Construction Corporation ("JESCO") brought suit against BP America Production Company and BP Exploration & Production, Inc. (collectively "the BP Defendants") in the Texas state court of Harris County on December 2, 2010. **Exhibit 2**, Jesco Construction

[1] Please see **Exhibit 1**, Schedule of Related Actions, for complete party names and case styles.

Corporation of Delaware's Original Petition and Request for Disclosure. Such suit pled State Court causes of action for breach of contract, fraud, negligent misrepresentation, promissory estoppel, estoppel, and quantum meruit. JESCO did not plead nor seek any recovery under any Federal statute or regulations. JESCO did not plead or claim relief under the Outer Continental Shelf Lands Act ("OCSLA").

2. On December 13, 2010, the BP Defendants filed a "Notice of Removal to the United States District Court for the Southern District of Texas," where the action is now pending before the Honorable Sim Lake in C.A. No. 4:10-cv-04964. **Exhibit 3**, Notice of Removal. BP America Production Co. (hereinafter "BP") next identified this case as a potential tag-along action to MDL 2179, "In re: Oil Spill by the Oil Rig 'Deepwater Horizon' in the Gulf of Mexico, on April 20, 2010." **Exhibit 4**, Identification of Potential Tag-Along Action. However, on December 20, 2010, the Joint Panel on Multidistrict Litigation (JPML) issued a text-only docket entry, stating, "The Clerk of the Panel has determined the listed potential tag-along action[s are] *not appropriate* for inclusion in this MDL." **Exhibit 5**, JPML Notice of Electronic Filing, dated December 20, 2010.

3. JESCO files this Interested Party Response to BP's Motion to Transfer with the JPML simultaneously with its Motion to Remand (**Exhibit 6**) and Response to BP's Motion to Stay (**Exhibit 7**) in the Southern District of Texas. JESCO and the VoO Plaintiffs vehemently dispute the application of original federal jurisdiction via the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq*. (hereinafter "OCSLA"). Such application is inappropriate under the "focus-of-the-contract test" adopted by the Fifth Circuit to determine the situs of a contract such as the VoO agreements. *See Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 781 (5th Cir. 2009). If there is no federal jurisdiction, then transfer into MDL 2179 is

inappropriate and a waste of federal judicial resources. Instead, if the VoO cases are consolidated at all, they should be consolidated in each state's MDL system for proper administration of a state court and/or maritime remedy in keeping with the Saving to Suitors clause, as applicable.

ARGUMENT

A. VoO Cases Not Addressed in Pleading Bundles

4. BP asserts that "Judge Barbier has established a specific track, or 'pleading bundle,' to address post-spill clean-up claims in MDL 2179." ECF Doc. 449-1, p.4. However, these "post-spill clean-up claims" identified in PTO 11 encompass only claims for **personal injury** resulting from exposure to crude oil and dispersants during clean-up efforts: "Plaintiffs are citizens of Florida, Alabama, Mississippi, Louisiana, Texas, and other states, who have been exposed to harmful chemicals, odors and emissions during the clean-up following the *Deepwater Horizon* explosion." **Exhibit 8**, Master Complaint of B3 Pleading Bundle, ¶ 21. Such claims arise from a far different set of facts from those of the present Plaintiffs who claim breach of contract and nonpayment for participation in VoO.

B. Judge Barbier's Rulings Not Dispositive of VoO Plaintiffs' Jurisdictional Arguments

5. In MDL 2179, Judge Barbier has denied one Motion to Remand filed by the State of Louisiana. **Exhibit 9**, Order. The State of Louisiana argued that removal was improper based on the well-pleaded-complaint rule, the Eleventh Amendment to the United States Constitution, and general maritime law, and Judge Barbier rejected these arguments. However, Judge Barbier has only briefly addressed OCSLA's situs requirement[2], and has not at all considered the Fifth

[2] Judge Barbier wrongly determined that the situs requirement of OCSLA § 1333 was unrelated to OCSLA jurisdiction when he stated, "[N]either the Supreme Court nor the Fifth Circuit has held that the situs requirement has to be satisfied for jurisdiction to be proper under § 1349." **Exhibit 9**, n.1. However, the case he cites to for this proposition squarely addresses the situs requirement of OCSLA jurisdiction: "For **OCSLA jurisdictional purposes**,

Circuit's "focus-of-the-contract test" for determining OCSLA jurisdiction over contractual relationships. *See Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 781 (5th Cir. 2009) (establishing the "focus-of-the-contract test" for determining OCSLA jurisdiction). Similarly, Judge Barbier's intradistrict transfer decisions should not unduly influence the JPML's decision whether to transfer the JESCO and the other VoO Plaintiffs' cases into MDL 2179, because the question of OCSLA jurisdiction over contractual disputes from oil spill cleanup operations has not adequately been presented to and ruled on by the Courts.

C. "Focus-Of-The-Contract" – The Test for Determining Applicability of OCSLA in Contract Cases

6. The Supreme Court and the Fifth Circuit have held that § 1333 creates a situs requirement for the application of other sections of the OCSLA. *Landry v. Island Operating Co. Inc.*, Civ. A. No. 09-1051 (W.D.La. Sept. 30, 2009), citing *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 219 (1986); *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 496 (5th Cir. 2002). The Supreme Court observed that "Congress determined that the general scope of OCSLA's coverage… would be determined principally by locale," distinguishing between injuries on the Outer Continental Shelf and injuries sustained on the high seas. *Offshore Logistics, Inc.*, 477 U.S. at 219.

7. The Fifth Circuit has expressly developed a test for determining whether federal OCSLA jurisdiction exists in breach of contract actions, the "focus-of-the-contract test." *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 781 (5th Cir. 2009).

> This test "looks to where the contract contemplates that most of the work will be performed: if a majority of the performance called for by the contract is on stationary platforms on the OCS, that is the situs of the controversy for purposes

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[the Supreme Court and Fifth Circuit] compel the district court to take into account the **location of incidents giving rise to the lawsuit**." *Golden v. Omni Energy Servs. Corp.*, 242 Fed.Appx. 965, 967 (5th Cir. 2007) (unpublished), citing *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 219 (1986); *Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prod. Co., Inc.*, 448 F.3d 760, 774 (5th Cir. 2006).

> of determining whether the law of the adjacent state applies as surrogate federal law [under OCSLA]. **If a majority of the work called for by the contract is aboard vessels on navigable water on the OCS, this is the situs of the controversy. We hold that the focus-of-the-contract test is the appropriate test to apply in determining the situs of the controversy in contract cases, and we adopt that rule for the circuit.**"

Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d at 781.

8. JESCO alleges in its state-court petition:

> "In late June, Mr. Richards [BP employee] indicated to JESCO that BP needed a specific fleet of **vessels** with certain capabilities, and crews for each vessel, to participate in its much-ballyhooed '**Vessels of Opportunity**' (VO) program. This program was intended to provide employment opportunities to **Gulf vessel owners** whose business ground to a halt after the spill, and **recruit such vessels into BP's cleanup and decontamination operations**. … JESCO drew up a **"VO Support Proposal" specifically describing eleven vessels**, training, and crew required…."

Exhibit 1, paragraph 10 (emphasis added).

9. Similarly, the Master Vessel Charter Agreement entered into by the other vessel owners states,

> "During each CHARTER TERM, the **VESSEL** shall be employed exclusively for CHARTERER'S use as a **vessel of opportunity in the carriage of CHARTERER'S employees, contractors, business invitees, equipment and provisions and in the performance of various tasks associated with oil spill response and containment efforts** as directed by CHARTERER (hereinafter referred to as SERVICES). **Such SERVICES shall include, but not be limited to, tending or deploying boom and skimming equipment, skimming operations, recovering oiled debris, collecting garbage, assistance with wildlife operations and towing equipment.**"

Exhibit 10, Master Vessel Charter Agreement, Article 2(A).

10. Clearly, the VoO program was intended to contract vessel owners to perform work "aboard vessels on navigable water on the OCS," as well as in the territorial waters of the coastal states affected by the oil spill. The VoO program was *not* intended to cover work aboard "stationary platforms above the OCS," nor were any of the vessel owners in the instant suits

contracted to perform such work. Therefore, because the situs of "most of the work to be performed" under the contracts is "aboard vessels in the navigable waters above the OCS," the Court should not apply OCSLA in claiming original federal jurisdiction over contractual VoO disputes. *Grand Isle Shipyard*, 589 F.3d at 781.

11. Traditional maritime activities contemplated here include carriage of people and equipment, and towing of supplies. The vessels would also be performing their duties only on the high seas and territorial waters when skimming, deploying boom, or collecting garbage. "An agreement to transport people and supplies in a vessel to and from a well site on navigable waters is clearly a maritime contract." *Laredo*, 754 F.2d at 1231. Accordingly, general maritime law, and not OCSLA, controls here.

12. Because OCSLA does not apply, no federal jurisdiction exists, and transfer into the federal MDL 2179 proceeding is not appropriate.

D. VoO Program Does Not Fall Under OCSLA's Original Jurisdiction over Operations for the "Exploration, Development, or Production of Minerals"

13. Under OCSLA, "the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with… any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals…." 42 U.S.C. § 1349(b)(1). Clearly, JESCO and the VoO Plaintiffs had no part in the "exploration" of minerals at the Macondo Well, as defined in OCSLA § 1331(k), which encompasses only "geophysical surveys" and "drilling." *See* 43 U.S.C. § 1331(k)(1) (explaining the term "geophysical surveys"), (2) (explaining the term "drilling"). Additionally, Plaintiffs' post-spill cleanup efforts do not fall under "development" of minerals as defined in OCSLA § 1331(l), that is, "…those activities which take place following discovery of minerals in paying quantities,

including geophysical drilling, platform construction, and operation of all onshore support facilities, **and which are for the purpose of ultimately producing the minerals discovered**." 43 U.S.C. § 1331(l). JESCO's post-spill activities, including its participation in the VoO program, were solely focused on disaster mitigation, and not on helping BP achieve successful production of the minerals spewing out of the blown-out Macondo well. Likewise, the VoO Plaintiffs' contracts focused solely on services connected to disaster mitigation *only*, not any activity "intimately connected" to the "exploration, development, or production" of the spilled oil.

14. Finally, neither JESCO's contracts nor the VoO Plaintiffs' contracts with the BP Defendants include any "production" activity as defined in OCSLA § 1331(m): "those activities which take place **after the successful completion** of any means for the removal of minerals, including such removal, field operations, transfer of minerals to shore, operation monitoring, maintenance, and work-over drilling." If any part of the Gulf oil disaster can kindly be described as "successful completion," it would be the successful "killing" of the Macondo well on September 19, 2010. **Exhibit 11**, "Blown-Out BP Oil Well Officially Killed at Bottom of Gulf," Sept. 19, 2010. JESCO's contracts with the BP Defendants arose months before this date, and only covered participation in cleanup operations, by way of work on the navigable waters of the Gulf of Mexico. Because JESCO did not participate, and did not contract to participate, in any operation "intimately connected" to the exploration, development, or production of the spilled oil, the Court should not apply OCSLA jurisdiction to the parties' dispute.

E. Only One "Common Question of Fact" Exists Between VoO Cases and MDL 2179

15. The JPML bears the authority to determine whether centralization is appropriate under 28 U.S.C. § 1407(a) by deciding whether there exists "one or more common questions of fact." In

the VoO cases, the only fact Plaintiffs' claims have in common with the vast majority of the MDL 2179 plaintiffs is that, **in April of 2010, an oil spill happened**. From there, the MDL 2179 plaintiffs claim damages arising directly from the spill *itself*, whether such damages be personal injury, property damage, lost profits, etc. The VoO Plaintiffs, however, claim damages for actions taken by BP *subsequent* to the spill, and their claims generally sound in contract, not in tort.

16. Again, and for these additional reasons, OCSLA does not apply; thus, absent federal jurisdiction, transfer to MDL 2179 is not appropriate.

F. Transer of the VoO Cases to MDL 2179 Will Not Promote the Purposes of Section 1407

17. The VoO Plaintiffs agree with the BP Defendants that the JPML should apply its previously-used factors for determining whether to centralize related cases into an MDL. JMPL ECF Doc. #449-1, p.5. Namely, centralization "is appropriate where it will (1) avoid the possibility of conflicting pretrial rulings; (2) eliminate or reduce duplicative discovery; and (3) conserve the efforts and resources of the parties, their counsel, witnesses, and the judiciary." *Id*.; *In re Imagitas, Inc. Drivers' Privacy Prot. Act Litig.*, 474 F.Supp.2d 1371, 1372 (J.P.M.L. 2007); *In re National Sec. Agency Telecomms. Records Litig.* 474 F.Supp.2d 1355, 1356 (J.P.M.L. 2007). The VoO Plaintiffs, however, disagree that application of these factors leads to centralizing the VoO cases into the MDL 2179 litigation.

18. First, although most of the VoO Plaintiffs (with the exception of JESCO) are litigating the same contract, the plaintiffs in each case plead causes of action under the state laws of each state. These rulings should only be contradictory to the extent that contract law varies from state to state, and such differences are the expected and appropriate result of the VoO Plaintiffs' initial choice of forum. Additionally, JESCO litigates not only a VoO agreement, but a Master

Services Contract as well. It is appropriate for pretrial rulings in the JESCO case to differ from the other VoO cases, because JESCO is litigating an entirely different contract. The pretrial rulings in JESCO's case will not be "contradictory" but instead tailored to the unique issues raised in that case.

19. Second, the VoO cases require significantly different discovery than the personal injury and economic loss claims brought by the MDL 2179 plaintiffs. In the MDL 2179, discovery has thus far centered around actions taken by numerous defendant companies who may have been responsible for the blowout of the Macondo Well and the resulting Gulf of Mexico oil spill. The Vessels of Opportunity program, however, is a program unique to BP and implemented by BP *in response* to the spill. JESCO agrees that the VoO cases will "require discovery regarding the timing and sequence of BP's post-spill clean-up efforts, the manner in which BP hired and supervised the clean-up workers and charterers, and the terms and conditions of the Master Charter Agreement." JESCO disagrees, however, that these issues figure significantly into the current MDL 2179 discovery. BP's post-spill actions are relevant only to MDL 2179 in that some plaintiffs in MDL 2179 allege personal injury as a consequence of exposure to crude oil, dispersant, or both. It is premature, and may be medically impossible, to distinguish between injuries caused by exposure to *only* crude oil, *only* dispersant, or *both* crude oil and dispersant. For this reason, the MDL cannot separate out personal injuries caused *only* by the spill itself (the crude oil), as opposed to personal injuries caused by BP's actions taken *subsequent to* the spill (the dispersant). In the VoO contract cases, however, the distinction is much simpler. All of the injuries alleged by the VoO Plaintiffs occurred *subsequent to* the oil spill, as a result of various breaches of contract by BP. The VoO Plaintiffs' discovery will revolve around breach-of-contract issues by BP personnel after the spill, and will not involve any determination of liability

for the oil spill itself. Determination of liability for the spill itself among the numerous corporate defendants is one of the main goals of the MDL 2179 litigation; however, it is not a goal, or even relevant, to the claims brought by the VoO Plaintiffs.

20. Finally, transfer of the VoO cases into MDL 2179 may conserve the efforts and resources of BP, but not the rest of the parties, witnesses, counsel and judiciary. As previously stated, the VoO plaintiffs do not believe federal jurisdiction in *any* federal court is appropriate, and it will not be any more appropriate in the Eastern District of Louisiana than any of the federal district courts in which the VoO Plaintiffs' litigation currently pends. Rather, the JPML should refrain from deciding on MDL consolidation on the VoO cases until the current federal courts rule on the existence of federal jurisdiction. In Alabama, federal courts have requested briefing on federal jurisdiction *sua sponte*. JESCO has raised federal subject-matter jurisdiction in its Motion to Remand. Judicial economy is best served by determining the court's jurisdiction before significant discovery and pretrial proceedings occur in the wrong court.

CONCLUSION

21. For the foregoing reasons, Plaintiff JESCO Construction Corporation of Delaware and the VoO Plaintiffs respectfully request that the Panel refrain from ruling on MDL consolidation until the federal courts in which these cases are currently pending may make a timely and thoughtful determination of federal subject-matter jurisdiction over these cases.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing has been served on all counsel of record who have consented to electronic notification via the CM/ECF system, pursuant to Rule 4.1 of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation.

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