UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: OIL SPILL BY THE OIL RIG "DEEPWATER HORIZON" IN THE GULF OF MEXICO ON APRIL 20, 2010	MDL 2179 SECTION "J"
This Document Applies to:	JUDGE BARBIER
No. 12-970. Bon Secour Fisheries, Inc., et al. v. BP Exploration & Production Inc., et al.	MAGISTRATE SHUSHAN

* *

LIONEL SUTTON, III'S MEMORANDUM IN OPPOSITION TO THE REPORT OF SPECIAL MASTER LOUIS FREEH

MAY IT PLEASE THE COURT:

The Freeh Report is "structurally deficient, one-sided, and seemingly advocacy-driven." Moreover, its conclusions, "simply are not credible." Instead, the Freeh Report is "deeply flawed" and "lacking basic indicia of a credible investigation."

The above statement was the finding of Judge Michael Chertoff, former United States Department of Homeland Security Secretary, after reviewing the entirety of a report prepared by Louis Freeh on February 18, 2012. (Chertoff Report attached as Exhibit A)

As will be shown below, Judge Chertoff's description of the Freeh Report above is strikingly applicable to the Freeh Report in the instant litigation.

ARGUMENT

Section 4.3.7 of the Settlement Agreement (SA) provides:

> The Settlement Program, including the Claims Administrator and Claims Administration Vendors, shall work with the Economic Class Members (including individual Economic Class Members' counsel and Class Counsel) to facilitate

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Administration Vendors, shall work with the Economic Class Members (including

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> Economic Class Members' assembly and submission of Claim Forms, including all supporting documentation necessary to process Claim Forms under the applicable Claims Process. The Settlement Program, including the Claims Administrator and Claims Administration Vendors, shall use its best efforts to provide Economic Class Members with assistance, information, opportunities and notice so that the Economic Class Member has the best opportunity to be determined eligible for and receive the Settlement Payment(s) to which the Economic Class Member is entitled under the terms of the Agreement. (emphasis added)

Louis Freeh's Report in this litigation does not identify a single action taken by Sutton regarding the processing of claims that was not mandated by Section 4.3.7 of the SA. Instead, Freeh attempts to tarnish actions that were required by the SA, and provided equally to all claimants, by assuming that those actions were taken solely for Sutton's self-interest. However, Freeh's leap to that baseless assumption ignores two basic facts: One, Sutton performed the actions complained of on hundreds of claims, not only for those in which he allegedly had an interest. Two, a Qualified Claimant's interest and the Claims Administrator's interest are one and the same: **That the claimant receive all that they were entitled to under the Settlement Agreement.**

Freeh concluded that Sutton's employment with the Claims Administration (CA) was a conflict of interest, and that the conflict automatically resulted in Sutton acting in his own self-interest. Freeh's conclusions are based on three facts. One, Sutton received a fee for work done on a single claimant's file prior to Sutton's employment with the CA (Thonn). Two, Sutton held a minority interest in an unrelated business (Crown) and one of the other minority interest holders (Lerner) was a partner in a firm (Andry Lerner) that represented claimants. Three, that Sutton held a non-managerial interest

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in a company that filed a claim (Romeo Papa).

Whether Sutton did have a conflict of interest prohibited by Sutton's Employment Agreement is a matter of dispute. However, the facts are that none of the above relationships are illegal, none of the above relationships were directly prohibited by the SA and, more importantly, **the Special Master did not find any evidence that Sutton directly manipulated the valuation of any claims**.

Webster's Dictionary defines Conflict of Interest as a conflict between the private interest and the official responsibility of a person in a position of trust. Freeh assumed that Sutton's private interests described above conflicted with the responsibilities placed on him by the Settlement Agreement. Although Freeh conducted 80 interviews, reviewed Sutton's bank accounts, email accounts and phone records going back to before there was even an oil spill much less a settlement and whether or not the records had any relevance to Sutton's part time employment with the CA, wrote a 97 page report with 500 exhibits, he still **presented no evidence of a single instance where Sutton acted in any manner contrary to the SA and the duties it imposed on him.**

There is no evidence that Sutton's private interests in any claim resulted in him doing anything different than what was required by Section 4.3.7. The Thonn claim was reviewed by CA Vendors, Internal Auditors, External Auditors, BP and an Appellate Panelist. Crown has not made a claim and has no intention of doing so. The claimants represented by Lerner have had their claims reviewed multiple times with no evidence of improper payments. Romeo Papa filed a claim but did not seek a specific amount and the claim was not even calculated during Sutton's term with the CA. There is no evidence that Sutton had any involvement in calculating the value of any claim, much less one that he allegedly had an interest in.

In concluding that Sutton automatically acted in his own self-interest, Freeh incorrectly

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allegedly had an interest in.

In concluding that Sutton automatically acted in his own self-interest, Freeh incorrectly assumed that the interest of the CA is adverse to the interest of a qualified Claimant. Apparently, Freeh believes that this settlement program is an adversarial process similar to the program run by Kenneth Fineberg. In fact, nothing could be further from the truth. Section 4.3.7 and the very first page of the Court approved website make it abundantly clear:

1) The **Claims Administrator** is **charged** with the **duty** to implement and administer the settlement for the **benefit** of the Economic Class Members.

2) The **Claims Administrator** is **charged** with the **responsibility** to **work with the Claimants** to **facilitate**, **assemble** and **submit** Claim Forms, including all supporting documentation.

3) The **Claims Administrator** is **charged** with the **responsibility** to **provide Claimants** with **assistance, information, opportunities and notice** so that the Claimant has the **best opportunity to receive the payment(s) to which the Claimant is entitled.**

Section 4.3.7 of the SA mandates that the CA consider the best interest of the Claimant at all times. That is the Claims Administrator's "**duty**" and "**responsibility**". Every action taken by Sutton, and complained of by Freeh, was in fulfillment of that requirement.

<u>Thonn</u>

In his report, Freeh stated that Sutton viewed Andry Lerner claims in the DHECC database an unusual number of times. He artfully stated that Sutton viewed various pages of claims 496 times and that in 83 of those views Sutton accessed claims represented by Andry Lerner. What Free failed to state was that Sutton accessed only **FOUR** different Andry Lerner claims during the entire time he was employed by the CA. (DHECC Logs attached as Exhibit B) that is only **.005%** of all claims filed by Andry Lerner. For Freeh to conclude that Andry and Lerner paid Sutton over One Hundred and Sixty Thousand Dollars to find out the status of four claims is absurd. <u>All</u> of the evidence available to Freeh

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clearly showed that status updates was a service provided to claimants and attorneys by multiple claims administration employees thousands and thousands and thousands of times.

Admittedly, Sutton viewed the Thonn claim an unusual number of times, but there were many reasons for the CA's office to access a single claim multiple times. The very first page of the evidence presented by Freeh shows that Sutton accessed the Thonn claim 5 times in 3 minutes on 12/17/12. It also shows that he accessed a claim for an unrelated law firm 4 times in 3 minutes. Those multiple views were the result of a programming issue that required a user to log in repeatedly to look at different pages of the same claim. To claim that each view was a different check on the Thonn claim is inflammatory and ignores the obvious. Sutton and Thonn already testified that Thonn requested that Sutton periodically check the status of the claim because Thonn wanted to make sure that there were no problems caused by an ex-girlfriend working for one of the vendors. Also, like every other claimant, he wanted to know the status of his claim. Additionally, because he was familiar with the claim from the work his firm did on it with the GCCF, Sutton used the Thonn claim to familiarize himself with the computer system he was expected to use, as well as the SA itself. There was absolutely no prohibition on CA attorneys having unlimited access to any claim. Freeh cannot point out a single instance where Sutton did anything to manipulate the Thonn claims in any manner whatsoever.

Furthermore, the evidence produced by Freeh shows that **Sutton never looked at the Thonn claims until after all claims were fully calculated and eligibility notices were issued to the claimant**. Significantly, Freeh neglected to include that the Thonn VOO claim was completed and paid out to Thonn and his attorneys weeks before Sutton even started working for the CA.

Knowing that he could point to no direct wrongdoing by Sutton, Freeh attempted to show that parts of the Thonn claims were improperly calculated. That finding has been shown to be incorrect by

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Brown Greer, Internal Auditors, Class Counsel and BP. Even if the claim was calculated incorrectly, there is no evidence that Sutton had any role at all in those calculations.

Perhaps more significant, while discussing the Thonn claim, Freeh noted that he discovered a second law firm that submitted at least four claims with tax returns more favorable than trip tickets. (The very same issue that he uses with regard to the Thonn claim to accuse Sutton, Andry and Lerner of corruption and the recommendation that each be prevented from representing claimants). In those four claims, Freeh found that the tax returns resulted in pay outs of as much as 114% greater. Unbelievably, Freeh did not identify the second law firm or the claimants, made no allegations of corruption and made no recommendation that the second law firm be prevented from representing claimants. **If the second law firm improperly manipulated data to the benefit of their private clients and to the detriment of their class clients, the possibility that the law firm is a member of the Plaintiff's Steering Committee, mandates disclosure, not cover up.**

With no evidence that Sutton had any influence on the manner in which the Thonn claim was calculated and reviewed, Freeh made another absurd assumption that none of the parties involved could be expected to do their auditing jobs correctly unless they knew that Sutton had an interest in the claim. True to form, and even with an assumption so patently ridiculous, Freeh chose not to disclose all of the evidence.

There is clear evidence in the DHECC database, and in Freeh's own investigative material, that David Odom, CEO of the entire Claims Administration, had knowledge of Sutton's intention to get paid for work that his firm did on the Thonn seafood claim months before Sutton ever received any payment on that claim. If Odom thought that Sutton's request for that fee had even the appearance of a conflict of interest, or was in any manner a violation of the Employment Agreement that Odom drafted,

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Freeh had to admit that he did not find any evidence that Sutton even attempted to influence the Thonn claims. Without such evidence, whether Sutton ultimately received payment for work his firm did on the claims prior to his employment with the CA is irrelevant: The fee was based on *Quantum Meruit* and legal under Louisiana Law, it was condoned by the CEO and, as noted by Class Counsel in its Comments to the Special Master Report, Sutton's fee was likely not a violation of the Louisiana Rules of Professional Conduct. Any perceived conflict was resolved when Sutton resigned. Thonn received the payments to which he was entitled to under the SA. He had no complaints and testified to Freeh that he fully expected Sutton to get paid for the work that was done on his claim before Andry Lerner began representing him. Thonn was a qualified, legitimate claimant. Thonn's interest, his attorneys' interest, Sutton's interest and the CA's interest were the same: For Thonn to receive the Settlement Payment(s) to which he was entitled under the terms of the Agreement. **There was no conflict between Sutton's private interest and his official responsibility.**

<u>Crown</u>

Sutton and Lerner are minority members of a water reclamation company. The company was and more than likely presented to Sutton for signature after he learned of Sutton's fee request, he had a duty to so notify Sutton prior to Sutton's acceptance of the fee. Had Odom advised Sutton that it was his position as CEO that the fee was improper, this entire issue could have been avoided before any payment was made. It can certainly be argued that Odom's knowledge and failure to act signified the CA's acquiescence in the arrangement and reinforces Sutton's belief that his receipt of the fee was in no way improper. Without discovery, Sutton is unable to show when Odom obtained that information, how it was obtained, who it was provided to, when it was provided and why it was withheld from Sutton, Juneau and the Court.

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Sutton and Lerner are minority members of a water reclamation company. The company was formed long before there was an oil spill. Initially there were four members owning 25% each. In early 2012, Lerner negotiated to purchase additional shares from the other three members. By May 2012, six months before Sutton started at the CA's office, it was agreed that the three members, including Sutton, would sell Lerner eight shares each for an agreed upon price to be paid in twelve equal installments beginning June1, 2012. There is no evidence that the payments had any relation to the claims process. The other two members were not lawyers and had no claims. All three selling members, including Sutton, received the same price. All of the above was provided to Freeh through independent testimony and documentation.

Freeh concluded that Sutton's ownership of the company was a "clear conflict of interest" because Lerner also had a partnership interest in Andry Lerner. However, Freeh's conclusion is in direct contrast to the law of this circuit. In *In Re: Placid oil Co.*, 802 F2d &83 (CA 5 1986) the court determined that a Judge serving on the Board of Directors of a small corporation with counsel in the case before him did not warrant recusal unless the corporation itself was the litigant. In fact, the Court found that there was not even the appearance of a conflict. Certainly Sutton's ownership of a minority interest in a company with a lawyer representing clients in a case that has already been settled does not warrant a more stringent conflicts rule than that of a Judge actually deciding a matter before him. Unlike the law firms owned by a number of the appeals panelist lawyers during their employment with the CA, Crown did not file a claim, did not represent any claimants and did not receive any monetary payments from the CA. Unlike the appeals panelists themselves, Sutton did not have the authority to calculate any claims.

Although he improperly concluded that the relationship of Sutton and Lerner presented a conflict of interest, Freeh presented no evidence that Sutton ever acted in any interest other than the

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calculate any claims.

Although he improperly concluded that the relationship of Sutton and Lerner presented a

conflict of interest, Freeh presented no evidence that Sutton ever acted in any interest other than the interest that was required of Sutton as per the SA. Sutton only checked the status of four Andry Lerner claims. The SA mandated that the Claims Administrator consider the best interest of Andry Lerner's clients when processing their claims and provide them with all necessary assistance, information, opportunities and notice.

Freeh was forced to admit that Sutton did not manipulate the valuation of any of Andry Lerner's claims. The evidence presented by Freeh shows that Sutton only looked at four of Andry Lerner's claims during the entire time he was employed by the Claims Administrator. He looked at one of the claims once and made no further inquiries. He looked at another claim three times in one minute and made no further inquiries. One of the claims was the Thonn claim discussed above and the remaining claim was the Talen's claim which will be discussed below.

Andry Lerner submitted **675 claims**. Sutton only looked at **4**. As part of his regular duties, Sutton looked at claims for attorneys, accountants and claimants every day. Freeh's claim that there was something improper and perhaps even illegal about Sutton looking at .005% of Andry Lerner's claims is not only ludicrous but clearly defamatory. When one considers that the request to check the status of the Thonn claim came from Thonn, and the request to look at the Talens claim came from Juneau, Freeh's entire complaint of Sutton and Andry Lerner and their "unclean hands" is that Sutton looked at 2 of their claims for 2 minutes. For a former Director of the United States FBI to conclude that Andry Lerner paid Sutton over $80,000 per minute to "look" at 2 claims for 2 minutes, with no evidence that the claims were manipulated in any manner, is beyond comprehension. Again, unlike the appeals panelists that were allowed to keep their jobs, Sutton did not decide the value of any claims and did not write any opinions.

With no evidence that Sutton manipulated the valuation of Andry Lerner claims, Freeh claimed

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With no evidence that Sutton manipulated the valuation of Andry Lerner claims, Freeh claimed that Sutton expedited the claims. In support of that assertion, Freeh included a quote from an email from Lerner to Sutton wherein Lerner asked Sutton what could be done to get Lerner cases prioritized. However, Freeh failed to include Sutton's response wherein **Sutton advised Lerner that his claims could not be prioritized or expedited.** (Sutton Lerner Emails attached as Exhibit C) Sutton went on to advise Lerner that the only way for Lerner to speed up processing was to make sure claims were filed correctly and incompleteness notices were responded to timely. The information that Sutton did provide was available on the Andry Lerner portal and regularly emailed to all law firms by the CA vendors. Freeh's failure to include Sutton's reply to Lerner's request is inexcusable conduct by a court appointed "independent" Special Master.

Romeo Papa

Freeh also claimed that Sutton's non managerial, partial ownership of Romeo Papa created a conflict of interest. First, there is nothing in the SA that directly prevents a company partially owned by Sutton from filing a claim. As previously acknowledged by the Court, at least two law firms with partners working as appeals panelists, and getting paid by the CA to actually decide the value of claims, filed their own claims in the Settlement Program. Those panelists were not even identified, much less discharged, investigated and publicly accused of corruption. Second, even if there was a conflict of interest, it was cured when Sutton resigned. Third, and most important, there is no evidence that Sutton had any involvement at all in the calculation of the Romeo Papa claim. The Romeo Papa claim was not even processed during Sutton's tenure at the Claims Office.

With no evidence that Sutton acted in his own self-interest, Freeh attempted to manufacture the possibility of a future act by claiming that Sutton was tasked with formulating the guidelines for paying moratoria claims. Putting aside that Sutton resigned before that fantasy could take place, it is evident

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that Sutton expedited the claims. In support of that assertion, Freeh included a quote from an email from Lerner to Sutton wherein Lerner asked Sutton what could be done to get Lerner cases prioritized. However, Freeh failed to include Sutton's response wherein Sutton advised Lerner that his claims could not be prioritized or expedited. (Sutton Lerner Emails attached as Exhibit C) Sutton went on to advise Lerner that the only way for Lerner to speed up processing was to make sure claims were filed correctly and incompleteness notices were responded to timely. The information that Sutton did provide was available on the Andry Lerner portal and regularly emailed to all law firms by the CA vendors. Freeh's failure to include Sutton's reply to Lerner's request is inexcusable conduct by a court appointed "independent" Special Master.

Romeo Papa

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