EL PASO E&P COMPANY, L.P. f/k/a EL PASO PRODUCTION COMPANY, L.P.	:	**DOCKET NO. 69105**
VERSUS	:	**26TH JUDICIAL DISTRICT COURT**
DCP MIDSTREAM, LP f/k/a DUKE ENERGY FIELD SERVICES, LP, AND DCP ASSETS HOLDING, LP	:	**WEBSTER PARISH, LOUISIANA**

MEMORANDUM IN SUPPORT OF PEREMPTORY EXCEPTION OF *RES JUDICATA* OR IN THE ALTERNATIVE, DECLINATORY EXCEPTION OF *LIS PENDENS* AND MOTION TO STAY

MAY IT PLEASE THE COURT:

Defendants, DCP MIDSTREAM, LP and DCP ASSETS HOLDING, LP (collectively "DCP" or "defendants") respectfully submit this Memorandum in support of their Peremptory Exception of *Res Judicata* or in the Alternative, Declinatory Exception of *Lis Pendens* and Motion to Stay.

I.

Introduction

Since April 4, 1990, plaintiff, EL PASO E&P COMPANY, L.P. ("El Paso" or "plaintiff"), and DCP, or their respective predecessors-in-interest, have been parties to a Gas Gathering, Processing and Purchase Agreement (the "Agreement") pursuant to which DCP gathered gas that El Paso produced in northwest Louisiana and processed the gas at DCP's Minden, Louisiana natural gas processing plant.[1] In 2006, El Paso sued DCP for breach of the Agreement in state court in Houston, Texas, claiming damages from August 2000 through the present arising out of DCP's alleged failure to allocate and account properly for various plant products (the "Texas Suit"). Before trial began, the Texas court granted partial summary judgment to DCP precluding El Paso's recovery of damages for

[1]DCP Assets Holding, LP did not own the Minden, Louisiana natural gas processing plant and related facilities until August 1, 2005.

periods prior to November 2002 on the ground that El Paso's claims related to those periods were barred by the statute of limitations. Although partial summary judgment limited El Paso's potential recovery of damages, the court's ruling did not dispose of El Paso's breach claims against DCP in their entirety. Although El Paso had the right to non-suit its breach claims even after the partial summary judgment had been granted, El Paso chose to proceed to try its breach claims and obtain a judgment on its breach claims in its chosen Texas forum. El Paso certainly could have sued DCP in Louisiana, but instead El Paso elected to file and prosecute its suit in Texas, and El Paso ultimately obtained a Final Judgment against DCP in Texas for over $4.4 million on El Paso's breach of contract claims.

The judgment that El Paso sought and obtained in Texas precludes its present suit in Louisiana. Both Texas and Louisiana prohibit El Paso's attempted claim splitting. Under the law of both states, the doctrine of *res judicata* bars El Paso's relitigation of its claims arising from the same factual circumstances and occurrences alleged in El Paso's Texas Suit.

II.

***Res Judicata* Bars El Paso's Petition in its Entirety**

It is well-settled in Louisiana that the doctrine of *res judicata* precludes re-litigation of claims and issues arising out of the same factual circumstances when there is a valid final judgment.[2] *Avenue Plaza, L.L.C. v. Falgoust*, 96-0173 (La.7/2/96), 676 So.2d 1077, 1079. Likewise in Texas, the doctrine of *res judicata* precludes relitigation of causes of action arising out of the same subject matter as a prior suit. *Compania*

[2]Under the Louisiana *res judicata* statute, the "preclusive effect of a judgment attaches once a final judgment has been rendered by the trial court and would bar any action filed thereafter unless the judgment is reversed on appeal." La. R.S. 13:4231, Comment (d). Similarly, in Texas, a judgment is final for *res judicata* purposes even though the appeal process has not been completed. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).

Financiara Libano, S.A. v. Simmons, 53 S.W.3d 365, 367 (Tex. 2001). Since *res judicata* is designed to promote judicial efficiency and final resolution of disputes, any suit that attempts to relitigate claims that were or could have been raised in a prior suit must be dismissed pursuant to a peremptory exception of *res judicata*. *Id.*; *Avenue Plaza*; LA. CODE CIV. P. arts. 927, 934.

A. <u>The Texas Judgment Is Entitled to Preclusive Effect</u>

Acknowledging that it has previously filed suit in Texas on the claims it asserts in this Louisiana suit, El Paso urges this Court to ignore the Texas judgment, contending that judgment "is not binding on Louisiana Courts under the full faith and credit clause of the United States Constitution." (Louisiana Petition ("La. Pet."), ¶ 13). El Paso's contention is wholly at odds with Louisiana law.

In *Total Minatome Corp. v. Patterson Serv., Inc.*, 1999-0422 (La. App. 1 Cir. 5/12/00), 762 So.2d 175, *writ denied*, 2000-1721 (La. 9/15/00), 769 So.2d 544, the First Circuit Court of Appeal affirmed a peremptory exception of *res judicata* in nearly identical circumstances to those existing in this case. There, like El Paso, plaintiff sued for breach of contract in Harris County, Texas, where it actively pursued its claim. *Id.* at 176. Unlike here, the Texas court in *Total* ultimately dismissed the plaintiff's entire suit as time-barred by the Texas statute of limitations. When Total then re-filed its claim in Louisiana to take advantage of Louisiana's longer prescriptive period, the defendant successfully sought a peremptory exception of *res judicata*. *Id.*

The *Total* court first considered "whether Louisiana courts should apply Texas' or Louisiana's *res judicata* law to determine whether to give estoppel effect to the [Texas] judgment, as it originally dismissed Total's suit as being time barred under a Texas statute of limitations." *Id.* at 176-77. In deciding that issue, the court noted that the Full Faith and Credit Clause, U.S. Constitution art. 4 § 1, mandates that every state must give the public acts, records and proceedings of another state full faith and credit. *Id.* at 177.

Indeed, "[w]ell-settled federal jurisprudence dictates that a forum state is to give a sister state's judgment, at least, the *res judicata* effect that it may have in the rendering sister state." *Id.*, *citing* U.S. Const. art. 4, § 1; *Durfee v. Duke*, 375 U.S. 106 (1963); *Tennessee, ex rel Sizemore v. Surety Bank*, 200 F.3d 373 (5th Cir. 2000). In other words, "the courts of each state must give to the judgments of other states the same conclusive effect between the parties as is given such judgment in the states in which they were rendered." *Id.*, *citing Anderson v. Collins*, 26,142 (La. App. 2 Cir. 1/6/95), 648 So.2d 1371, 1380. Consequently, the court held that "the aforementioned principles mandate that we apply Texas' *res judicata* in order to determine whether our court should give the judgment . . . preclusive effects in the Louisiana litigation." *Id.* at 177.

Having determined that Texas *res judicata* law applied, the *Total* court next considered whether Texas courts would give *res judicata* effect to a judgment dismissing a plaintiff's claims solely on limitations grounds. *Id.* Examining Texas law, the court held that Texas courts would indeed give preclusive effect to a Texas judgment dismissing a suit on a Texas statute of limitations. *Id.* at 177-78.

In reaching this holding, the *Total* court relied upon the Texas case of *Besing v. Vanden Eykel*, 878 S.W.2d 182 (Tex. App.-Dallas 1994, writ denied). *Total*, 762 So.2d at 177. In *Besing*, a client had sued its former attorney for malpractice, and the trial court had dismissed the client's original suit on the ground that the client's claims were barred by limitations. When the Texas Supreme Court later recognized a longer limitations period for malpractice claims, the client filed a second lawsuit. In the second suit, defendant argued that plaintiff's suit was barred by *res judicata*. The trial court agreed; the Texas Court of Appeals affirmed, and the Texas Supreme Court denied writ.

Finding the *Besing* opinion controlling, the *Total* court held that the Texas court's dismissal of Total's claims precluded its attempt to re-litigate the same claims under Louisiana's more favorable limitations statute. *Total*, 762 So.2d at 178. The *Total* court

recognized that Texas law "precludes the relitigation of a finally adjudicated claim or cause of action, regarding matters arising out of the same transaction, which a diligent party could have litigated in the original suit." *Id.* at 178, *citing Barr v. Resolution Trust Corp.*, 837 S.W.2d 627 (Tex. 1992). Relying on *Barr,* the *Total* court held that since the parties in the Louisiana and Texas suits were identical and were asserting identical claims arising under the same operative facts, the Louisiana suit did not assert a claim that could not have been asserted in the Texas suit. Accordingly, under Texas *res judicata* law, the Texas statute of limitations judgment barred the Louisiana suit.

The *Total* opinion should be followed, and DCP's Exception of *Res Judicata* should be granted. Indeed, DCP's exception is even more compelling than that granted in *Total.* There, the court considered a judgment disposing of plaintiff's *entire claim* on statute of limitations grounds. Here, however, the Texas court merely ruled that only a *portion* of El Paso's damages were barred by limitations, and El Paso nonetheless elected to proceed to try its breach of contract claims in Texas. In fact, at El Paso's insistence, the entirety of El Paso's breach claims were submitted to the jury in a single broad-form question without regard to when damages arose. In these circumstances, El Paso cannot cogently argue that the breach claims it seeks to litigate in this Louisiana action were not already determined by the Texas Judgment.

El Paso chose its forum. Indeed, under the Texas Rules of Civil Procedure, El Paso had the unconditional right to non-suit its breach claims at any time before it introduced all of its evidence other than rebuttal evidence. *See* TEX. R. CIV. P. art. 162. El Paso thus could have elected to non-suit its claims that DCP breached the Agreement by failing to account properly for all plant products even after the Texas court granted partial summary judgment and El Paso learned that its recovery would be limited. El Paso, though, chose to pursue its breach claims in Texas, ultimately obtaining a judgment against DCP for more than $4.4 million.

Allowing El Paso to pursue its Louisiana Petition is to permit El Paso improperly to claim-split in order to seek further recovery. The single action rule in Texas and Louisiana, though, precludes such action. *See* LA. CODE CIV. P. art. 425; *Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50, 59 (Tex. 2006) ("Certainly a contract claim is distinct from one based in tort, but if the claims arise out of the same subject matter and can be brought together they cannot be asserted separately"); *In re Stonebridge Life Ins. Co.*, 2008 WL 2119671 *1, *2-*3 (Tex. App.–Austin, March 21, 2008) ("multiple suits for breach of the same contract 'would not result in any substantial benefit to the plaintiff, but the same would work a serious inconvenience and hardship upon the defendants'"). All of El Paso's claims arise out of the same contract and the same transaction or occurrence, and to the extent that El Paso chose not to bring the entirety of its claims in Texas, it cannot now take another bite from the same apple in this Court.

B. Whether the Claims Were or Only Could Have Been Asserted, El Paso's Claims Are Barred

To the extent that El Paso seeks in this Louisiana litigation to reach back further in time than it did in the Texas litigation, its efforts are irrelevant. Under both Texas and Louisiana law, El Paso was obligated to bring its entire case--all claims and all causes of action arising out the same transaction or occurrence--in one lawsuit. Moreover, both Texas and Louisiana *res judicata* laws prevent a party from relitigating claims that *could have been litigated* in the prior action but were not. *Blanchard v. ABC Ins. Co.*, 38,005 (La. App. 2 Cir. 3/3/04), 867 So.2d 901, 905 (*res judicata* precludes the relitigation of matters that were never litigated but should have been advanced); *Barr v. RTC*, 837 S.W.2d at 631 (*res judicata* bars relitigation of claims arising out of the same subject matter that could have been raised in the first suit). El Paso could have asserted claims as to the February 1999-July 2000 period in the Texas Suit, even if it did not do so. Because El Paso could have brought the February 1999-July 2000 claims, those claims are

likewise barred by *res judicata*. Accordingly, this Court should grant DCP's Exception of *Res Judicata*.

III.

Alternatively, this Court Should Stay this Action until a Final and Non-appealable Judgment in Rendered in the Texas Suit

Only if this Court should conclude that *res judicata* does not bar the Louisiana suit, DCP alternatively asks this Court to exercise its discretion and stay this litigation pursuant to *lis pendens* until the Texas appellate process is complete. Article 532 of the Louisiana Code of Civil Procedure states in pertinent part:

> When a suit is brought in a Louisiana court while another is pending in a court of another state or of the United States on the same transaction or occurrence, between the same parties in the same capacities, on the motion of the defendant or its own motion, the court may stay all proceedings in the second suit until the first has been discontinued or final judgment has been rendered.

Under this article, a successful *lis pendens* motion to stay requires three elements: (1) that the second-filed Louisiana suit be brought while suit is pending in federal court or another state's court; (2) that the two suits are based on the same transaction or occurrence; and (3) that the two suits are between the between the same parties in the same capacities. If these three elements are present, then a Louisiana court has the discretion to stay the Louisiana action "until the . . . suit in the court of another state has either been discontinued or a final judgment has been rendered." *Brooks Well Serv., Inc. v. Cudd Pressure Control, Inc.*, 36,723 (La. App. 2 Cir. 6/27/03), 850 So.2d 1027, 1031. Each of these elements is certainly present here. The Louisiana Suit was filed after the Texas Suit began, and the two suits are based on the same transaction or occurrence and are between the same parties in the same capacities.

El Paso has stated in open court in the Texas Suit that it plans to appeal the Texas court's partial summary judgment ruling. *See* Exhibit D to the Exceptions. On May 8, 2009, El Paso filed its "Plaintiff's Motion to Modify Judgment," a true and correct copy

of which is attached as Exhibit E to the Exceptions. El Paso specifically claims an ongoing entitlement to damages for the period August 2000 to October 2002--part of the very same period for which it is suing in this Louisiana litigation--in the Texas litigation. DCP also plans to appeal the Texas Judgment. Litigating the Louisiana suit before the Texas appellate process is complete would be a waste of judicial resources. This Court should not proceed to the merits of El Paso's claims when the very issues that must be addressed here will be considered by the Texas appellate courts. Therefore, if the Court does not grant DCP's exception of *res judicata*, at a minimum, the parties and the Louisiana courts are best served by staying the Louisiana Suit and awaiting the completion of the Texas appellate process.

IV.

Conclusion

For these reasons, defendants' Peremptory Exception of *Res Judicata* must be sustained and plaintiff's claims should be dismissed at plaintiff's cost.

Alternatively, this Court should sustain defendants' Declinatory Exception of *Lis Pendens* and Motion to Stay, and enter an Order staying this proceeding until a final and non-appealable Judgment is entered in the Texas Suit.

Shreveport, Louisiana, this 11th day of May, 2009.

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