UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

In re: ALL AMERICAN OIL & GAS, INCORPORATED, *et al.*, Debtors.	Chapter 11 Case No. 18-bk-52693-rbk Jointly Administered

SECURED CREDITOR KERN CAL OIL 7, LLC'S EMERGENCY MOTION FOR AN ADVERSE INFERENCE ON EQUITY VALUE AND CLAIMS AGAINST DEBTORS OR, ALTERNATIVELY, TO PRECLUDE KATHRYN VAGNEUR'S TESTIMONY

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PRELIMINARY STATEMENT

1. Three AAOG shareholders who claim to own 4.6% of the equity have asked this Court to appoint them as court fiduciaries and to have Debtors—or, in reality, KCO—pay their legal bills.[1] Yet in response to valid discovery requests in connection with that motion, the Ad Hoc Equity Committee has refused to produce any documents about equity value or any communications with other shareholders about their attempt to form an official committee or valuation. The proposed committee has also flatly refused to make available a properly prepared witness in response to a Rule 30(b)(6) deposition notice. Nor are any of the Ad Hoc Equity Committee members willing to be deposed. Instead, they offer fact witness Kathryn Vagneur, who did not sign onto the Ad Hoc Equity Committee's motion. As of this writing, the committee has not served any formal responses or objections, has not produced a single document, and has not moved for—let alone obtained—a protective order.

2. KCOs' discovery requests go to central questions about whether an official committee should be appointed here, given the estates' insolvency, the existence of an Unsecured Creditors Committee, and the fact that Debtors' management holds nearly 50% of the equity. Needless to say, the Ad Hoc Equity Committee's discovery misconduct is prejudicing KCO's ability to prepare for the February 11 hearing. And the Ad Hoc Equity Committee's unwillingness to participate in discovery should give the Court pause about its members' ability to serve as estate fiduciaries in these cases.

3. Under binding Fifth Circuit precedent, the Court should draw an adverse inference against the Ad Hoc Equity Committee because it refuses to produce discovery in

[1] "Ad Hoc Equity Committee" refers to the parties who seek official committee status. "KCO" refers to Kern Cal Oil 7.

response to legitimate inquiries about key issues at the February 11 hearing. Alternatively, the Court should bar the Ad Hoc Equity Committee from proffering any evidence at the hearing on its Motion about enterprise value, claims against Debtors' management, or any other issues on which it will not produce discovery. In any event, if the Court is inclined to allow Ms. Vagneur to testify, it should order her to be deposed on February 6—the date for witness and exhibit lists to be filed in advance of the February 11 hearing—rather than on February 8, the last business day before the hearing.

BACKGROUND

The Ad Hoc Equity Committee consists of three shareholders with 4.6% equity in Debtors.

4. The Ad Hoc Equity Committee is comprised of Howard Golden, Stuart Duckett, and Philip Hopkins. They are three AAOG shareholders who live in Europe. They allege that they cumulatively hold 4.6% of AAOG stock and claim to hold proxies representing an additional 21.7% of the stock. They seek to appoint an official committee to represent their interests on the basis that the Unsecured Creditors Committee or Debtors' management (which holds 44.4% of the equity) does not already represent their interests.

KCO served discovery on the Ad Hoc Equity Committee.

5. On January 26, 2019, KCO served 25 document requests and 3 interrogatories. The Ad Hoc Equity Committee stated that it would not produce any documents in response to the 6 requests seeking materials on valuation and the 4 seeking internal as well as intra-shareholder materials.[2] The proposed committee also would not respond to the valuation interrogatory. On

[2] Exhibit 1, document requests and interrogatories.

January 27, KCO also served a Rule 30(b)(6) notice of deposition, listing 11 topics.[3] The subjects included valuation, alleged mismanagement, and intra-shareholder issues.

6. To be clear, the Ad Hoc Equity Committee has refused:

- to produce a witness in response to a legitimate Rule 30(b)(6) deposition request and, instead of offering one its members, has offered a purported fact witness who is not on the motion papers or even a member of the Ad Hoc Equity Committee;
- to respond to an interrogatory asking for it to place a value on its equity and the basis for that valuation;
- to produce any documents about the value of its equity positions, including any values it has placed on those securities in tax filings, personal income statements, loan requests, or for any other purpose; and
- to produce any communications with other shareholders about forming an official committee or valuation.

This discovery goes to the core questions about whether an official committee should be appointed. As of this writing, the Ad Hoc Equity Committee had not served any formal responses or objections and has not produced even one document. Nor has the Ad Hoc Equity Committee moved for or obtained a protective order.

The Ad Hoc Equity Committee has refused to produce a properly noticed Rule 30(b)(6) witness or to produce any documents on equity value.

7. During meet-and-confer calls on January 30 and February 4, counsel for the Ad Hoc Equity Committee stated that it would not produce a representative for a deposition, would not produce any documents on equity value, and would not elaborate on what claims it seeks to pursue against Debtors or their management. Instead, counsel announced that another alleged shareholder, Kathryn Vagneur, who supposedly owns 0.3% of the stock in AAOG, would be available for a deposition, but not as a Rule 30(b)(6) witness. Moreover, the Ad Hoc Equity

[3] Exhibit 2, Rule 30(b)(6) notice.

Committee has proposed to make her available only on February 8, which is the last business day before the motion hearing on February 11.

ARGUMENT

I. THE COURT SHOULD DRAW AN ADVERSE INFERENCE AGAINST THE AD HOC EQUITY COMMITTEE BECAUSE IT REFUSES TO PRODUCE EVIDENCE IN RESPONSE TO LEGITIMATE DISCOVERY ABOUT CENTRAL ISSUES AT THE FEBRUARY 11 HEARING.

8. The Ad Hoc Equity Committee's "failure to call available witnesses or produce evidence that would clarify or explain disputed facts or issues" supports an adverse inference that the non-produced evidence is unfavorable to it.[4] The Fifth Circuit "has long recognized that a party's failure to call available witnesses or produce evidence that would clarify or explain contested facts can give rise to a presumption that the evidence, if produced, would be unfavorable to that party."[5] Specifically, the Fifth Circuit has more than once held that a court should draw an adverse inference against a party that refuses to produce a properly noticed relevant witness.

9. *Coyle Lines* is instructive here. There, the government's failure to produce employees whose testimony would have been relevant to proving facts on which it relied in a civil libel case gave rise to a "particularly strong" adverse inference.[6] The Fifth Circuit reached the same conclusion in *Wilson*, where the government did not produce witnesses (or documents) showing that it mailed a discovery request within the statute of limitations, thereby tolling the time to bring its claims.[7] The Fifth Circuit held that it was appropriate to draw an adverse

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4 *United States v. Wilson*, 322 F.3d 353 (5th Cir. 2003) (applying adverse inference where party failed to call witness to testify to matters "peculiarly within his knowledge.").

5 *Id.* at 363.

6 *Coyle Lines v. United States*, 195 F.2d 737, 741–42 (5th Cir. 1952) (court applied a "particularly strong" adverse inference from the government's failure to call employee-witnesses who would have supplied direct testimony regarding the subject matter of the lawsuit.).

7 *Wilson*, 322 F.3d at 355.

inference because the government's failure to produce the witnesses was an "implicit acknowledgement that the government could not, and did not, sustain its burden" of proving that it served the discovery request on time to toll the statute of limitations.[8]

10. The same goes for documentary discovery. Where a party does not respond to requests to produce documents on issues that may be relevant to its case, a court should draw an adverse inference about the missing facts. That is what the Fifth Circuit did in *Wilson* by drawing an adverse inference against the government for not producing documents that would have provided circumstantial evidence of its claims.[9]

11. Here, the Ad Hoc Equity Committee has refused to produce documents or a witness about equity value or purported claims against Debtors—issues on which the Ad Hoc Equity Committee has the burden of proof. As KCO argues in the separate opposition to the motion to appoint an equity committee, the Ad Hoc Equity Committee must demonstrate "a substantial likelihood" of receiving a "meaningful distribution in this case."[10] Therefore, the failure to produce relevant documents supports the adverse inference that equityholders are out of the money and that there is no economic basis to appoint an official equity committee. This is particularly so in bankruptcy, where the Ad Hoc Equity Committee seeks to have Debtors—or, really, KCO—pay its legal bills without any evidence that an official committee would deliver any benefit to anyone other than its lawyers.

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8 *Id.* at 364.

9 *Id.* at 360.

10 *See In re Williams Commc'n Group, Inc.*, 281 B.R. 216, 223 (Bankr. S.D.N.Y. 2002); *In re Pilgrim's Pride Corp.*, 407 B.R. 211, 217 (Bankr. N.D. Tex. 2009) (including "whether Debtors are likely to prove solvent" and "whether equity is adequately represented" as factors in determining whether equity committee should be appointed); Kern Cal Oil 7 LLC's Objection to Expedited Motion of the Ad Hoc Equity Committee to Appoint an Official Committee of Equity Security Holders for Debtor All American Oil & Gas.

II. ALTERNATIVELY, BECAUSE THE AD HOC EQUITY COMMITTEE HAS REFUSED TO PRODUCE DOCUMENTS OR A RULE 30(b)(6) WITNESS, IT SHOULD BE BARRED FROM PRESENTING ANY EVIDENCE AT THE HEARING ON ITS MOTION.

12. If the Court does not draw an adverse inference against the Ad Hoc Equity Committee about equity value or purported claims against Debtors, it should bar any attempt to present facts on these issues.

A. A party that refuses to produce a noticed witness for a deposition is precluded from offering testimony at trial on any subject about which that witness would have testified.

13. Courts routinely preclude testimony or documents from being introduced into evidence under Federal Rules of Civil Procedure 30(d)(2) and 37 where, as here, a party "impedes, delays, or frustrates the fair examination of the deponent."[11] Unless there is "substantial justification," which the Ad Hoc Equity Committee has not even tried to offer, "preclusion is presumptively automatic" for failing to produce a witness or documents.[12]

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[11] Fed. R. Civ. P. 30(d)(2); *see also* Fed. R. Civ. P. 30(b)(6); Fed. R. Civ. P. 37; *In re Trevino*, 564 B.R. 890, 907 (Bankr. S.D. Tex. 2017) ("the Court could limit a party's ability to present testimony, such as forbidding it from calling witnesses who would offer testimony inconsistent with that given by the one it designated, or by forbidding it from presenting evidence on topics listed in the Rule 30(b)(6) notice on which it did not provide proper discovery."); Fed. R. Civ. P. 37(c) Advisory Committee's Note, 1993 amendments ("This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence."); § 7035:5 Sanctions for refusal to submit to examination, Bankr. Proc. Manual § 7035:5 (2018 ed.) ("Civil Rule 37(b) provides the following sanctions for the failure to submit to an examination: (1) designated facts may be taken as established for purposes of the action; (2) the disobedient party may be prohibited from opposing designated claims or defenses, or from introducing designated matters in evidence; (3) pleadings or parts thereof may be stricken; (4) the proceedings may be stayed until the order is obeyed; or (5) the action may be dismissed or a default judgment rendered.").

[12] *See* Pepe, Persuading the Courts to Impose Sanction on Your Adversary, Litig. at 21, 25 (Winter 2010); *see also Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 728 (7th Cir. 1999) ("As a general rule, if a party fails to disclose information in accordance with Rule 26(a), that party 'shall not, unless such failure is harmless, be permitted to use as evidence at a trial any ... information not so disclosed.' Fed. R. Civ. P. 37(c)(1). This sanction is 'automatic and mandatory' unless the party can show that the violation 'was either justified or harmless.'").

14. Courts within the Fifth Circuit routinely preclude testimony when a party refuses to produce an appropriate witness for deposition:

- *VirnetX Inc. v. Cisco Sys., Inc.*, No. 6:10-cv-417, 2012 WL 7997962 at *6 (E.D. Tex. Aug. 8, 2012) (holding that a party must produce particular witness to finish an improperly terminated deposition, or be precluded from calling the witness at trial).
- *Colbert v. Brennan*, 2012 WL 6026132, *8 (E.D. La. 2012) (prohibiting the testimony of two witnesses who failed to appear for depositions).
- *Kador v. City of New Roads*, 2011 WL 5191189, at *2 (M.D. La. Oct. 28, 2011) (prohibiting witness from testifying at trial where she failed to appear for deposition).

This remedy is just as common in jurisdictions outside the Fifth Circuit, where courts likewise bar testimony for not producing a witness.[13]

15. Because the Ad Hoc Equity Committee refuses to produce a properly noticed Rule 30(b)(6) deponent, under Rules 30(d) and 37, it may not proffer a fact witness of its own choosing to testify at the hearing. In the *VirnetX* case cited above, the court held there that unless the appropriate witness was produced for a deposition, the court would either give an adverse inference instruction to the jury or preclude the witness's testimony at trial. The same applies here.

[13] *Topliff v. Gross*, No. 94-1415-MLB, 1997 WL 321291 at *2 (D. Kan. May 7, 1997) (striking two witnesses who were not offered for deposition); *Lewis v. City of New York*, 2013 WL 6283507, at *1 (S.D.N.Y. Dec. 4, 2013) (prohibiting witness from testifying at trial where she failed to appear for deposition); *Scozzari v. City of Clare*, No. 08-10997-BC, 2012 WL 1988129 at *2 (E.D. Mich. June 4, 2012) (striking witness from trial because the "court surely can bar the testimony of a witness who refuses to submit to a deposition . . . prior to testifying"); *Lucent Tech., Inc. v. Microsoft Corp.*, No. 06-cv-0684, 2008 WL 755868 at *2 (S.D. Cal. Mar. 18, 2008) (barring a witness who was not made available for a deposition from testifying at trial, except on topics covered in an earlier deposition in a related case); *Desert Palace, Inc. v. Michael*, 2018 WL 401534, *3 (D. Nev. 2018) (precluding testimony for failing to attend deposition); *Johnson v. J.B. Hunt Transport, Inc.*, 280 F.3d 1125 (7th Cir. 2002) (affirming order barring defendant's use of witnesses as discovery sanction for failing to produce witness at deposition).

B. A fact witness may not speak on behalf of the Ad Hoc Equity Committee or respond to a Rule 30(b)(6) deposition notice.

16. Precluding an entity's testimony is particularly important where, as here, it refuses to produce a witness under Rule 30(b)(6). Contrary to the supposed ***fact*** witness the Ad Hoc Equity Committee has offered, a Rule 30(b)(6) representative "testifies as a representative of the entity" and thus his or her "answers bind the entity."[14] As one court observed, "[t]ruth would suffer" if it were otherwise because the noticed party "would be able to deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions."[15]

17. Here, rather than selecting a representative, the Ad Hoc Equity Committee has chosen a purported fact witness—and, indeed, one who did not even sign on to its brief. Ms. Vagneur's testimony would thus not bind the Ad Hoc Equity Committee and would allow it to hide behind "the most convenient answer" at the February 11 hearing. It is beside the point that the Ad Hoc Equity Committee members reside in London or Malta, as London is also where Ms. Vagneur lives.[16] The Ad Hoc Equity Committee members have asked to serve as court fiduciaries, and therefore should be expected to appear in this jurisdiction to fulfill the duties

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[14] *Spectrum Creations, L.P. v. Carolyn Kinder Int'l, LLC*, No. SA-05-CV-750-XR, 2006 WL 8434013, at *4 (W.D. Tex. May 9, 2006); *Resolution Trust Corp. v. Southern Union Co*., 985 F.2d 196, 197 (5th Cir.1993) (The corporation appears vicariously through its designee.); *United States v. Taylor*, 166 F.R.D. 356, 360–61 (M.D.N.C.), *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996) (Rule 30(b)(6) requires the corporation to produce an officer to give "binding answers on behalf of the corporation.").

[15] *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C.), aff'd, 166 F.R.D. 367 (M.D.N.C. 1996);

[16] *Spectrum Creations, L.P. v. Carolyn Kinder Int'l, LLC*, No. SA-05-CV-750-XR, 2006 WL 8434013, at *4 (where an entity produced a witness to speak as both a corporate representative and an individual, but refused to provide enough time to be deposed as a corporate representative, the court compelled the witness to return from abroad and compelled the entity to pay all attorneys' fees associated with the additional deposition.).

they seek to assume. That they are not willing to do so suggests that the three Ad Hoc Equity Committee members are not prepared to assume the responsibility of estate fiduciaries.

C. A party that refuses to produce requested documents in discovery is precluded from offering evidence at trial on any helpful issue that could have been found in those documents.

18. The Ad Hoc Equity Committee has also failed to produce documents in response to properly served discovery requests. Both the Rules and case law address such conduct in the same way that they address a party's failure to produce witnesses. By refusing to produce documents, the Ad Hoc Equity Committee "is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial."[17] In *McCown*, as here, a party did not timely produce "necessary information" that a witness was "required to provide" in response to discovery requests.[18] As a result, the court prohibited the party from adducing evidence at trial on issues on which the party refused to produce discovery.[19]

19. The Ad Hoc Equity Committee did not even seek a protective order from this Court, much less obtain one. It simply arrogated to itself the non-existent right to withhold documents and a witness. Therefore, the Ad Hoc Equity Committee should be barred from

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[17] *Hooper v. Lockheed Martin Corp.*, 640 Fed. Appx. 633 (9th Cir. 2016); *Gianola v. Ardoin*, 1995 WL 248049 (Tex. App. Dallas 1995) (holding that exclusion is "automatic and mandatory," absent good cause for failing to answer interrogatories fully); *Ostrander v. PCB Piezotronics, Inc.*, 2014 WL 1660588 (W.D. N.Y. 2014) (precluding plaintiff in an employment discrimination suit from seeking back pay or front pay for failing to respond and responding incompletely to discovery requests); *James v. National Financial LLC*, 2014 WL 6845560 (Del. Ch. 2014) (ordering that matters withheld during discovery be conclusively established at trial); *McNiece v. Town of Waterford*, 2014 WL 4922224 (Conn. Super. Ct. 2014) (prohibiting party from offering dollar damages evidence as a sanction for failing to answer interrogatory concerning damages).

[18] *McCown v. US Pers., Inc.*, No. 3:05-CV-1582-M, 2006 WL 8437555, at *2–3 (N.D. Tex. June 2, 2006).

[19] *Id.* at *2–3.

putting on evidence at the February 11 hearing about enterprise value and supposed claims against Debtors or their directors and officers.[20]

III. IF THE AD HOC EQUITY COMMITTEE IS GOING TO OFFER MS. VAGNEUR AT THE HEARING ON ITS MOTION, THEN SHE MUST BE DEPOSED BY FEBRUARY 6.

20. In addition to Ms. Vagneur being an inappropriate witness to testify about the subjects in the Rule 30(b)(6) deposition notice, the Ad Hoc Equity Committee refuses to produce her in a reasonable time before the hearing. The Ad Hoc Equity Committee has offered her on February 8, the last business day before the hearing on February 11, and two days after witness and exhibit lists are due under the local rules. As many courts hold, this is simply not enough time for the parties to prepare for both the evidentiary hearing and for her deposition.[21] At least two district courts in the Fifth Circuit have precluded testimony because a party offered a witness for deposition too close to trial, with one court reasoning that "obliging parties to take discovery depositions in the waning days before trial may be counter-productive to effective trial preparation."[22] In fact, there is a good chance a transcript of the deposition will not be available before the hearing, thus making the deposition useless for cross-examination purposes.

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[20] *In re Kilby*, 196 B.R. 627, 35 Collier Bankr. Cas. 2d (MB) 1511 (Bankr. M.D. Fla. 1996).

[21] *Lewis v. City of New York*, No. 12 CIV. 4433 JMF, 2013 WL 6283507, at *2 (S.D.N.Y. Dec. 4, 2013) ("[A]llowing Defendants to depose [a witness] before or even during trial . . . is no remedy at all.").

[22] *Jindal v. U.S. Dep't of Educ*., No. CIV.A. 14-534-SDD-RL, 2015 WL 2405950, at *3 (M.D. La. May 18, 2015); *LeBeouf v. Manning*, No. CV 12-2583, 2016 WL 692051, at *2 (E.D. La. Feb. 22, 2016) (excluding witness testimony because the party would have offered the witness for deposition "only two business days before trial," which "substantially prejudices defendant.").

21. If the Court is inclined to allow Ms. Vagneur to testify, it should order her to do so on February 6 (in New York City or Dallas). Of course, the Court could and should avoid all this trouble for the reasons above. She is not the noticed witness.

CONCLUSION

22. For the above reasons, the Court should draw an adverse inference about equity value and claims against Debtors or, alternatively, preclude Ms. Vagneur from testifying. If the Court is inclined to indulge the Ad Hoc Equity Committee and allow here to testify, it should order her to appear on February 6 in New York City or Dallas.

Dated: February 4, 2019

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

This is to certify on January 30 and February 4, 2019, I conferred with Matt Ferris, Counsel for the Ad Hoc Equity Committee, and he is opposed to the relief requested. Therefore, this matter is ripe for the Court's determination.

/s/ *Gary Svirsky*
Gary Svirsky

CERTIFICATE OF SERVICE

I certify that on February 4, 2019, a true and correct copy of the foregoing motion was served by CM/ECF to all parties entitled to receive such notice.

/s/ Heather K. Hatfield
Heather K. Hatfield