UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: KATRINA DREDGING LIMITATION ACTIONS CONSOLIDATED LITIGATION — **CIVIL ACTION NO.** [redacted]

PERTAINS TO: — **SECTION** [redacted]
ALL DREDGING LIMITATION ACTIONS
C.A. No. [redacted] **C.A. No.** [redacted]
C.A. No. [redacted] **C.A. No.** [redacted]
C.A. No. [redacted] **C.A. No.** [redacted]
C.A. No. [redacted] **C.A. No.** [redacted]
C.A. No. [redacted]

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO APPOINT CLAIMANTS' INTERIM STEERING COMMITTEE

MAY IT PLEASE THE COURT:

Counselors for a subset of the claimants (Movants) in the above-captioned matters have moved for this Honorable Court to establish and appoint them to a Claimants' Interim Steering Committee.[1] The motion identifies only vague and ambiguous purposes for the committee, and equally vague and ambiguous titles that the counselors wish to be given. Movants' motion does not with any degree of specificity address how the benefits of such a committee might outweigh its costs and conflicts, and in fact does not at all address how such a committee would comport with the highly particularized procedures governing these matters.

Stripped of its dressing, what the Movants have asked this Court to do is open a window to class representation where this Court and all others have closed the door to it. As plaintiffs in limitation or exoneration, [redacted] (hereinafter together referred to as Plaintiffs), respectfully oppose the Motion to Appoint Claimants' Interim Steering Committee for the following important reasons.

[1] All analyses herein apply equally to any claimants' committee, whether considered interim or otherwise.

I. Class-Like Representation is as Incompatible with Rule F Procedure as Pure Class Representation

A. *Bates* and Class-Like Representation by Committee

This Court, and every court before it that has considered whether a class action under Federal Rule of Civil Procedure 23 (FRCP 23) can be maintained within limitation or exoneration matters proceeding under Supplemental Rule F for Admiralty or Maritime Claims (Rule F), has found that the two procedures are incompatible and that, under Rule A(2),[2] Rule F trumps FRCP 23.[3] These courts were compelled to note that "the *entire thrust* of [Rule F] is that *each claimant must appear individually* and this is obviously inconsistent with the class action . . . ."[4] Like the class action, class representation of any kind is fundamentally incompatible with a limitation or exoneration proceeding.[5] A steering committee is class-like in nature.

Steering committees are cumbersome tools contemplated rarely and only by the incompatible procedures for class actions and consolidated multi-district litigation. The only official reference to interim appointments for class-like representation is found in FRCP 23(g)(2)(A).[6] Movants do not and can not explain how their committee would differ from the kind of class representation that *Bates* and all subsequent cases following it expressly disallow in Rule F limitation or exoneration proceedings.

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[2] "The Federal Rules of Civil Procedure also apply to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules."

[3] *See*, *e.g.*, *Lloyd's Leasing Ltd. v. Bates*, 902 F.2d 368, 368-370 (5th Cir. 1990) ("The two rules are inconsistent in numerous fashions. First, the class action interferes with the concursus contemplated by the limitation of liability proceeding . . . Second, the notice requirements of the limitation proceeding are more restrictive than the notice requirements of the class action . . . Third, the entire thrust of Supplemental Rule F is that each claimant must appear individually and this is obviously inconsistent with the class action.").

[4] *Id*. at 370 (emphasis added).

[5] *Id.*

[6] "The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action." Since authority for representation by committee usually comes by way of analysis of the procedures for class actions, the elements of adequate class-like representation by committee necessarily require reference throughout this memorandum to rules and cases treating class action procedures. Citation to such does not evidence the Plaintiffs' agreement to a class-like analysis beyond these isolated points of law, but rather further evidences the incompatibility of concepts common to class-like representation with a limitation or exoneration proceeding.

Movants have called upon this Court's equitable power to grant them class-like controls. This prompt should yield no avail because "[t]he incompatibility of Rule 23 flexibility concepts with the rules governing limitation proceedings is precisely why class actions are not appropriate in limitation proceedings."[7] Admiralty limitation and exoneration proceedings are perhaps the most specifically procedurally predefined proceedings in all of American law, and the flexible concepts of class-like representation remain foreign to them for the several reasons discussed herein, not the least of which are those first recognized by the *Bates* court.

B. The Individual Appearance of Claimants, *Sui Generis* Proofs and Class-Like Representation in Mass Tort Cases

Rule F and 46 U.S.C. §181 *et seq*. each contemplate a *pro rata* distribution of the limitation fund among the several claimants in proportion to the amounts of their respective claims (the implications of *pro tanto* offsets for plaintiffs in limitation or exoneration are discussed below).[8] "It is patent that no *pro rata* distribution can be made between the claimants, as required by the statute and the rule, in the absence of a finding as to the amount of their claims which have been proven."[9] Use of a steering committee would be antithetical to the express Rule F requirement that calls upon each claimant to appear individually and "duly prove"[10] any claim made, especially in this case, where each claimant's proof of liability, causation and damage will be *sui generis*.

In addition to the pure incompatibility of class-like representation with Rule F procedures, because this case implicates the kinds of mass tort allegations that are notoriously unsuited to class action practices under FRCP 23, special attention must be given to the efficacy any representation by committee might have. While it would be error to impose class-like

[7] *In re Sause Bros. Ocean Towing*, 1992 WL 220674, *2 (D.Or. 1992).
[8] *See Newton v. Shipman*, 718 F.2d 959, 962 (9th Cir. 1983).
[9] *Rautbord v. Ehmann*, 197 F.2d 323, 325 (7th Cir. 1952).
[10] Rule F(8).

representation in a limitation or exoneration proceeding, it would be doubly erroneous to impose it where the claimants allege a mass tort. There would be no benefit and only costs to class-like representation in this case.

> A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[11]

The *M/V Emily S* case directly addresses these issues in the context of an oil spill. There, claimants sought to pursue a class action where a limitation or exoneration petition was pending. The court astutely noted why class-like representation would "make[] no sense" under the circumstances.[12]

> [F]actors that would go into establishing the fact of injury and the causal link between [any] injury and the spill would be numerous, would change upon complex interactions among variables, and would vary greatly over time, from region-to-region, and from person-to-person.[13]

The same teachings and logic apply here with equal force. Simply substitute water for oil. Again, "it makes no sense" to establish class-like representation of any kind "when to secure relief claimants will be required to file individual claims . . . ."[14]

Due to the nature of the allegations made in this case, a steering committee would not enhance the efficient or just resolution of claims. Rather, quite the opposite is true. The superimposition of an extra layer of complex case management where applicable procedure is notoriously contrary thereto would only engender the duplication of counselors' functions and

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[11] *FRCP Advisory Committee's Notes*, 39 F.R.D. 69, 103 (1966) (citing *Pennsylvania R.R. v. United States*, 111 F.Supp. 80 (D.N.J. 1953)).
[12] *Com. of Puerto Rico v. M/V Emily S*, 158 F.R.D. 9, 16 (D.P.R. 1994).
[13] *Id.* at 13.
[14] *Id.* at 16.

exaggerate the length and expense of litigation.[15]

II. Implementation of Movants' Request Would Create a Web of Conflicts

Before blessing a steering committee, the Court must consider the adequacy of the proposed class-like representation, which not only includes the quality of counselor-appointees but also includes the absence of antagonistic interests between and among counselor-appointees and class members.[16] Implementation of a steering committee here would create three fatal conflicts of interest: (1) the fee interest that the Movants would have in the limitation fund is directly adverse to the claimants' interests in the same fund; (2) by the very nature of concursus, the appointment of any one counselor to a broadly representative role gives the appointee substantially more than the appearance of the ability to advance the interests of a particular client over and above those of other claimants attempting to access the same limited fund; and (3) given the *sui generis* nature of the individual claims, the bundling of weak claims with strong claims through class-like ties will necessarily dilute the rights of some claimants, putting the Movants' desired role at odds with those claimants.

First, further to the exaggerated expense a steering committee would impose on claimants, the confection of class-like representation is particularly antithetical to proceedings in limitation or exoneration under Rule F because the fund that may be made available to claimants if liability is proven is limited to a fraction of their claims. The counselors seeking committee appointments here would ask to be paid out of the limitation fund common to all claimants if the committee procured a favorable result.[17] Counselors' proprietary interests in cases are often the

[15] *See Manual for Complex Litigation, Third*, at 27 (1995) ("Because the appointment of committees of counsel can lead to substantially increased costs, they should not be made unless needed . . . Great care must be taken [ ] to avoid unnecessary duplication of efforts and to control fees and expenses.").

[16] *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-626 n. 20 (1997) (Under FRCP 23 "[t]he adequacy inquiry . . . serves to uncover conflicts of interest between named parties and the class they seek to represent . . . [and the] adequacy heading also factors in competency and conflicts of class counsel.").

[17] This concept is referred to in case law as the "equitable fund doctrine." *See Trist v. First Federal Sav. & Loan*

subject of conflict and ethics analyses.[18] But the potential for conflict is only magnified where the funds available, in the event the satisfaction of a favorable judgment becomes necessary, are limited before trial even begins.

Second, claimants in concursus have directly adverse interests. A limitation or exoneration proceeding "partakes in a way of features of a bill to enjoin a multiplicity of suits, a bill in the nature of interpleader, and a creditor's bill. It looks to a complete and just disposition of a many-cornered controversy . . . ."[19] Addressing the adverse posture of claimants in limitation or exoneration proceedings in *Petition of Trinidad Corporation*, 229 F.2d 423 (2nd Cir. 1955), the United States Court of Appeals, Second Circuit, identified a fundamental characteristic—competition among claimants—and the conflicts it might create.

> It is, of course, true that in limitation cases in which the sum total of the damages as liquidated may exceed the fund available for the payment of claims, the concourse of all claimants in the limitation proceeding is a technique indispensable to the statutory objective, *viz.*, a marshalling of claims. *For in such a case, each claimant has an interest not only to enhance his own damages but also to hold to a minimum the damages allowed on competing claims*: the greater the damages proved for a competing claim the less will be the proportionate share of the fund actually payable to another claimant under 46 U.S.C.A. §184 . . . In such cases, on the issues of the owner's liability and of its right to a limitation, the claimants have a common interest based largely on the same facts: but on the issue of their respective damages *their interests are competing*.[20]

Representation of directly adverse interests in the same case is perhaps the most obvious conflict known to the law. Here, class-like control and common representation threatens to

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Ass'n of Chester, 89 F.R.D. 8, 11 (E.D.Pa. 1980) ("[T]he equitable fund doctrine . . . permits class counsel to recover a fee from a fund recovered for the benefit of the class.").

[18] *See, e.g., In re Agent Orange Product Liability Litigation*, 818 F.2d 216 (2nd Cir. 1987) (analysis of how a particular fee arrangement for a plaintiffs' committee created a conflict of interest between counselors and class members).

[19] *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207, 216 (1927).

[20] 229 F.2d at 428 (emphasis added). It should be noted that the mass tort nature of the allegations made in this case create the same competition with respect to issues of liability and causation, as addressed in Section I(B), *supra*, and just below.

engender that kind of conflict. Furthermore, whether or not manifested, the mere appearance of impropriety that an appointment might create is unacceptable in such a high profile case. The Movants could be seen as wielding an unfair advantage in the prosecution of claims on behalf of their original pre-consolidation clients when, in theory, they would be accepting a responsibility to serve the interests of all claimants. As noted above, *any* advantage, however slight, that is given to a claimant in concursus is a direct disadvantage dealt to all other claimants so joined. Limitation or exoneration proceedings are zero-sum.

Third, while Plaintiffs in limitation or exoneration continue to adamantly maintain their freedom from fault, privity, knowledge, or any other kind of liability to claimants, should the Court deny the Plaintiffs' right to exoneration a more subtle though similar conflict could arise, again due to the mass tort nature of the allegations. The *M/V Emily S* case is therefore again on point.

> [A]ny such injuries would necessarily be of different severity, which would lead to contrary incentives that would preclude any class-wide 'adequate representation.' Assuming that injury could occur, the evidence shows that some persons might have comparatively strong claims based on exposure, while others might have suffered only minor annoyance. The former would have an interest in vigorously litigating to secure a significant recovery, while the latter would have the incentive to reach a prompt settlement that maximizes the value of a small recovery. *Any attempt to develop a uniform class approach to the litigation enhances the risk of failure on the merits*. Similarly, a representative with a weak claim would likely develop a litigation approach that dilutes the value of strong claims. *Any compromise among the approaches is prejudicial to each*.[21]

These conflicts between class-like representatives and claimants—arising in three distinct and important ways—comprise just one good reason not to arrange a committee that risks the conflation of dispositive issues that are only properly procedurally and ethically resolved

[21] *M/V Emily S*, 158 F.R.D. at 14-15 (citing *In re Agent Orange*, 818 F.2d at 165-66) (internal citation omitted) (emphasis added).

separate and apart from each other.

III. The Orderly Administration of these Limitation or Exoneration Proceedings Requires that Plaintiffs' Rights to Settle with Individual Claimants and Obtain a *Pro Tanto* Offset From the Limitation Fund Must be Left Entirely Uninhibited by Unnecessary Layers of Class-Like Representation and Case Management

While the Plaintiffs in limitation or exoneration continue to adamantly maintain their freedom from fault, privity, knowledge, or any other kind of liability to claimants, there may come a time in this case, as there may come in any case, when settlement negotiations become sensible. Compounding the concerns addressed above is the operation of settlement in a limitation or exoneration proceeding.

Under Rule F and 46 U.S.C. §181 *et seq*., settlements between vessel interests and individual claimants are offset from the limitation fund *pro tanto*.[22] A steering committee would inhibit the Plaintiffs' rights to these offsets by unjustifiably complicating, if not completely hindering the Plaintiffs' ability to negotiate individual settlements with individual claimants. Conversely, individual claimants' rights to directly contest the validity of a settlement that subjects the limitation fund to an offset also must not be impeded by an extra layer of management.[23]

Settlement issues also dovetail with the necessarily *sui generis* nature of proofs and the conflict of interest issues addressed above. On this score, individual claimants must retain the capacity to deal directly with the Plaintiffs in limitation or exoneration if they are to duly prove their claims and repel the conflicts of interest inherent in any class-like representation of mass tort claimants or in concursus proceedings.

IV. Conclusion

The administration of these proceedings requires nothing less than strictly proper form.

[22] *See Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 945 n. 1 (3rd Cir. 1985).
[23] *See Trinidad*, 229 F.2d at 429.

The procedure for limitation or exoneration was carefully calculated at its outset and has been further calibrated by over 150 years of practice, consistently to the exclusion of imported concepts that would disrupt its order. While sitting on the United States Court of Appeals, Fifth Circuit, Judge John R. Brown, one of the nation's most respected authorities on admiralty law, aptly noted that the court to which virtually exclusive responsibility for the operation of limitation or exoneration proceedings is committed "has ample resources to assure, as appropriate, that such court retains exclusive control and power over competing claimants."[24] There is simply no need, reason or justification to muddy the waters with a steering committee, and certainly no benefit to one that outweighs its costs.

WHEREFORE, Plaintiffs pray that this Honorable Court deny the Motion to Appoint Claimants' Interim Steering Committee.

Respectfully submitted,

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[24] *Guillot v. Cenac Towing Company*, 366 F.2d 898, 904 (5th Cir. 1966) (discussing the propriety of staying certain matters during limitation proceedings).