

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 15-35234

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CHRISTOPHER MCINTYRE,

Plaintiff/Appellant

vs.

BP EXPLORATION & PRODUCTION, INC., BP AMERICA PRODUCTION  
COMPANY, JOHN DOES 1-20

Defendants/Appellees.

On Appeal from the United States District Court  
for the District of Alaska

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**APPELLANT'S REPLY BRIEF**

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### RULES

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- I. MCINTYRE’S UNIQUE AND NOVEL IDEA(S), DESIGN(S), AND CONCEPT(S) FOR A WELL CAPPING INTERFACE TO USE A “VENTABLE VALVE”, FOR A “SOFT SHUT DOWN”, WITH A 5,000 FEET SUBSEA DISCONNECTION AND RECONNECTION AT A “LANDING SITE”, AT THE RISER, I.E., FLEX JOINT FLANGE, WAS A METHOD UNKNOWN AND UNPRECEDENTED IN THE INDUSTRY TO CAP A WELL BLOWOUT SUBSEA: IT WAS A DEFINITE BENEFIT TO BP, AND IN FACT, IS AN INTEGRAL PART OF BP’S PATENT APPLICATION, WHERE BP DESCRIBED SAME AS UNIQUE, NOVEL, AND ATTEMPTED TO PATENT IT.**
- A. THE DISTRICT COURT MERELY FOCUSED ONLY ON THE VENTABLE VALVE, MISTAKENLY FINDING MCINTYRE HAD NOT CONFERRED A BENEFIT ON BP NOR THAT HIS IDEAS WERE NOVEL, FUNCTIONAL AND “PROPERTY LIKE” [THE COURT MISSED AND MAY HAVE NOT UNDERSTOOD THAT IT WAS THE UNIQUE NOVEL, UNPRECEDENTED IN THE INDUSTRY, USE OF A CAPPING INTERFACE OF A VENTABLE VALVE TO DISCONNECT AND RECONNECT AT THE LANDING SITE OF THE RISER/FLEX JOINT, I.E., USING A SUBSEA RISER AS THE CONNECTION]: AND WHEN ONE ACTUALLY COMPARES MCINTYRE’S DESIGN TO WHAT BP DID, IT IS CLEAR THAT BP USED MCINTYRE’S IDEAS.**

The unique, novel nature of McIntyre’s Idea(s) and its “property like trait” is its non-traditional in the industry, “capping interface” with the wells equipment, at the riser/flex joint site, not as the District Court stated, mere use of a ventable valve<sup>1</sup>. The Flex Joint Flange is specifically designed, for only a Subsea Riser connection between Flex Joint and Surface Rig; the Flex Joint and Riser are not rated for pressures the well can produce. The Subsea Riser is only a pathway allowing travel of a “drilling string” from the Rig, to and through the bore of a

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<sup>1</sup> ER009.

Blowout Preventer (“BOP”) and well. Subsea Risers were never previously intended to be utilized for pressures within the well. Thus capping a well, by “interfacing” with a subsea Riser, to in turn create a pressure controlling system of any nature, much less identical to McIntyre’s, had never been performed prior to the Macondo Event and was novel and unprecedented in the industry.

What McIntyre produced was a new capping method and apparatus, required to allow control of standard equipment (hard RAM shutoff BOPs) initially designed to control blowouts, that had ultimately failed to do so. McIntyre explored and recommended a very unique avenue, that a BP subsea engineer would not identify due to the very nature of subsea riser, and normal intended use. Note Iain Adam of Norwell (44 years experience, expert witness for BP) opined in the Norwell Report (MDL 2179) litigation, i.e., in *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010* that a “Competent Engineer would not identify the flex joint as an attachment point”, and was challenged at MDL 2179 Phase 2 Trial. (Ex. 52 page 549 (lines 1-25), page 550 (lines 1-25). Special Emphasis; testimony recommended be read in its entirety.

Moreover, after envisioning such a unique, novel capping “interface” approach, McIntyre incorporated and designed into the apparatus, interfaced functions to mitigate potential underlying problems, i.e., danger to the well’s

integrity: Thus creating a new avenue, BP would have no choice but to follow, to not make things worse, by attempting potentially catastrophic existing methods.

In the end, the industry was and is well aware, this unique and novel approach would become the new “last line of defense” required to drill offshore, clearly worthy of a patent, certainly “conferring a benefit” to BP and possessing a “property like trait”. BP’s own experts confirm the uniqueness of this novel “interface” and approach in MDL 2179 Phase 2<sup>2</sup> Q. “Was a deepwater capping stack feasible before the Deepwater Horizon incident?” A. “Well, it depends on what you mean by feasible. There was... a piece of the dumb iron was available. By that, I mean the ram-type equipment [BOP’s]... interfaces between the rams and the well, for instance, the BOP’s, was not available. That technology had not been explored at that time.” Q. “Prior to the Deepwater Horizon Even, had you, “[BP Segment Engineering Technical Authority with 36 years experience] “in your entire career in the well control industry, ever seen a document, paper, presentation that suggested that a capping stack could or should be landed on the Flex Joint above the LMRP?” A. “Absolutely not.” “Everything that I had seen in my career up to that point was that it was going to require removal of the LMRP and cap the H-4 connector.”

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<sup>2</sup> Doc 52, Exhibit 54 at 747, line 5-21

BP seeks to control this intellectual property, and cut McIntyre out of the equation. As McIntyre comes forward to claim what is rightfully his, BP now seeks to discourage McIntyre further by claiming the design is not unique, novel, or conferring benefit: At the same time attempting to control intellectual property via a Patent Application. Moreover, as McIntyre comes forward with claims, BP now seeks to devalue McIntyre's design by explaining "it has not resulted in an issued patent", overlooking or trying to cloud the fact that it "saved the day" in an National Emergency, and BP's action on its face to apply for the rights through the U.S. Patent Office, shows the value of its design; nevertheless, BP may still receive the Patent, for technology that BP has already shared, at great profit, with other companies and countries.

Very significant is the fact this unique and novel capping "interface" was supplied by and through McIntyre's oral and written communications and drawings, of a previously unexplored avenue and approach, between May 11, 2010 and May 14, 2010. BP began installing a first free standing riser collection equipment for long term collection and disposal on May 15, 2010.<sup>3</sup> This is equipment necessary to collect mass quantities of oil and gas from McIntyre's tool. BP would not just be installing that equipment on May 15, if BP had the tool under conception and design, built well prior to that date, as they now claim. BP only

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<sup>3</sup> See Presidential Spill Commission Report Re: Deepwater Horizon Event, and BP "Lessons Learned" (Doc 52, Exhibit 5)

began that, upon conception of the idea itself (May 14). That is a tremendous amount of support equipment needed immediately after BP figured out how to collect all the oil and gas, (beginning May 14<sup>th</sup>).<sup>4</sup>

Remember as of the 13<sup>th</sup> of May, 2010, all BP had been doing regarding resolving the Macondo Well Blowout and Oil Free Flow Problem, involved the traditional removal of the malfunctioned BOP stack (LMRP) to install a BOP stack hydraulically, to “hard shutoff” the Flow.<sup>5</sup> With removal of LMRP, BP would have no riser connector (Flex Joint flange) left, so an option regarding actual disconnect/reconnect with a venable valve at the riser is moot; all BP could do at that point is shut down with the 2 RAM stack. Remember that is all BP “had envisioned prior to May 15, (Sealed Docket 105, Wellings & Turlak Testimony).<sup>6</sup>

McIntyre’s unique, novel approach for full collection, which requires the integral riser connection, is only first seen by BP in their Peer Assist Meeting on May 14, 2010.<sup>7</sup> If BP had a “Transition Spool” riser connection on May 9, like BP claim in their purported May 9 photo (within a May 23 email) as they now suggest, they would not have mitigated risks of removing the LMRP on the 13<sup>th</sup>. The “transition spool” flange, used by BP to cap the well is a mere cut off, of McIntyre’s proposed connection/configuration with an insignificant difference

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<sup>4</sup> Doc 105-1, Doc 121-1.

<sup>5</sup> Doc 105-1.

<sup>6</sup> Doc 105; Wellings and Turlak testimony.

<sup>7</sup> Doc 105-1, Doc 121-1.

(weld/hydraulic connector versus well packing frakers connector), (see Illustration Aids I and II at pages 16-17.<sup>8</sup> Pay close attention to wording in that May 23 email exchange with TransOceans head of Technology (Iain Sneddon).<sup>9</sup>

When one studies closely the May 23 email, regarding the Deepwater Horizon Review<sup>10</sup> (of 5-23-10 with capping option diagrams given to the government) it is clear that the BP transition spool did not exist as another option before May 23, but McIntyre's configuration did (Ian Sneddon recognized same).

**B. IT IS CLEAR FROM CHARACTERISTICS OF EVOLUTION OF THE CONFIGURATION AND DIMENSIONS OF BP PROTOTYPES TO THE FINAL CAPPING DEVICE THAT BP USED MCINTYRE'S IDEAS**

In point of fact, the Record demonstrates, and BP's Opposition Brief and Argument, actually concede:

1. It was actually, a design the same as McIntyre's novel and unique design, i.e., with ventable valve (for a "soft shut off") and disconnect and reconnect at the riser/flex joint interface landing site that was novel and unprecedented and used to cap the Macando well;<sup>11</sup>

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<sup>8</sup> Doc 121-1.

<sup>9</sup> Doc 52, Exhibit 26.

<sup>10</sup> Doc 52, Exhibits 25, 28.

<sup>11</sup> Answering Brief at 15-16.

2. Those unique and novel concept(s) are a central part of BP's patent application;<sup>12</sup>
3. That is, the capping mechanism used by BP was a ventable valve, for "soft shutoff", (connected horizontally at the interface of the riser/flex joint, which ventable valve disconnection/reconnection at riser/flex joint was suggested by McIntyre, with two part connection), to wit, a ventable valve, as one part, connected at the riser/flex joint/ landing site, as the other part;<sup>13</sup>
4. The actual mechanical mechanism for connection of the ventable valve to riser [i.e., hydraulic "connector" actually used by BP (referred to as an H4 hydraulic subsea connector)] versus a well "packing fracker", connection as suggested as one mechanical (not design or concept) possibility by McIntyre] is of no importance.<sup>14</sup>

When one studies McIntyre's drawings, and suggestions to BP and actual mechanism of the "capping solution" (not new design or conceptual "embellishment" by BP), and evolution of BP's prototype(s) to the final Macando capping mechanism, it is clear that McIntyre's central ideas were utilized by BP.

Accordingly, not only is McIntyre's case credible and plausible, but there are substantial disputes regarding material facts as to "first in time", and McIntyre

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<sup>12</sup> Answering Brief at 16.

<sup>13</sup> Answering Brief at 16.

<sup>14</sup> Answering Brief at 13-14.

will prevail before a Jury: i.e., McIntyre provided a “property type benefit” to BP regarding the unprecedented, novel, functional, patentable riser/flex joint/landing site with ventable valve, which they used to cap the runaway Macondo well, have not paid for, are refusing to pay for, are seeking to patent, and as to which BP is unjustly enriched.

BP has never been able to explain (and the District Court never reached the issues as to same, as basis of its Opinion was simply the improper ruling McIntyre had not conferred a benefit to BP as to a unique and novel capping design or concept)<sup>15</sup>, and BP does not and cannot now explain, why certain of their drawings, as to mechanical (not design concept) evolution from their initial prototype, to final capping mechanism, conform precisely to dimensions and configuration McIntyre was suggesting, and were only initially necessary, if Mr. McIntyre’s “well packing fracker” connection/configuration had been utilized, but were not necessary to the configuration, if BP had truly originated the idea.<sup>16</sup>

The fact that the final mechanical connection, between two crucial components (riser/ventable valve) was a weld/bolt and/or “hydraulic connection”, i.e., subsea hydraulic collet connection (referred to as an “H4connector”), as opposed to a “well packing fracker coupler connection”, is irrelevant to the fact McIntyre’s ideas (ventable valve at the top) with the connection to the landing site

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<sup>15</sup> ER007.

<sup>16</sup> See McIntyre’s Opening Brief at 53, et seq.

at the riser/flex joint bottom, via riser pipe, is a crucial part of the capping solution and basis for the patent.<sup>17</sup>

McIntyre's drawing shows a ventable valve, to wit, ball valve, (which everyone in the industry knows is a ventable valve),<sup>18</sup> and his suggestion as to the ball valve designed as a "shut off", i.e., to open with "low vac", clearly means that the ball valve, i.e., "ventable" valve, was to be installed open ("low vac") and could be vented and used as a "soft shutoff" (which is what BP did to cap the well and a crucial part of the basis of their patent application), see Illustrative Aids I and II, page 16-17, *infra*.

McIntyre's drawing which shows a "straight riser", clearly suggests the deformed riser, was to be disconnected mechanically at the flex joint flange, (which is what BP did), then there was to be bolted to the flex joint flange a straight un-deformed new riser to be connected to the ventable valve (which is what BP did).<sup>19</sup> *Id.*

This is what BP did, and sought a patent for, i.e., for the unprecedented, unique, new, novel idea(s) [ McIntyre's idea(s)].<sup>20</sup>

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<sup>17</sup> Doc 121-1, ER034-ER051.

<sup>18</sup> Thus, it is of no importance he did not specifically say "ventable valve". ER057, ER075.

<sup>19</sup> ER057.

<sup>20</sup> ER295-493.

When BP used McIntyre's ideas, they utilized McIntyre's novel concepts to their benefit (ventable valve at riser landing site with soft shutoff) and used existing mechanical (not design concepts) technology readily known to and available in the industry to do so, to cap the Macondo well (i.e., a new, novel "well capping device"), after mechanically creating McIntyre's ideas into a prototype (the first prototype conforming to McIntyre's configuration/embodiment and dimensions, and the final capping device concepts to McIntyre's ideas) (Illustrative Aids I and II), then seeking to patent the new, novel concept and methods.<sup>21</sup>

As to the ventable valve, they simply adopted McIntyre's concepts and modified the "BOP" from "hard ram shutoff", to "soft shutoff BOP", i.e., reformed to a valve like a "ball valve" or "ventable valve", and no new concepts were utilized by BP, other than McIntyre's, to allow the "hard shutoff" via traditional BOP approach to be modified to soft shutoff.<sup>22</sup>

They disconnected the deformed riser mechanically, and connected a new straight piece of riser by bolting a flange at the BOP flex joint flange.<sup>23</sup>

While McIntyre suggested [merely as one option] a connection between the two parts (ventable valve and riser) by using a "bell" over the riser with "well

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<sup>21</sup> ER051.

<sup>22</sup> ER034-ER050.

<sup>23</sup> Doc 52, Illustrative Aids I and II.

packing frackers”<sup>24</sup>, the means of mechanical connection is irrelevant to the issue of unique concept and methods provided by McIntyre that solved the spill, now subject to BP’s patent application (i.e., benefit to BP).

Note the nature of connection, is not crucial to the capping device or patent.

McIntyre first suggested the unique concept(s) and idea(s), to wit, a connection at the riser landing site (as opposed to the old method of disconnect and reconnect of BOP stack at the well head).<sup>25</sup>

The traditional industry standards, including knowledge and shut down capping methods, were to disconnect the BOP stacks at the well head, which would not have allowed for practical reconnection, and in any event, with “hard shut off” might have breached ocean floor.<sup>26</sup> In oral and/or written communication(s) of May 11, 2010, (referring in part to what is characterized by BP as to a “riser insertion tube tool”), Mr. McIntyre first told BP of the necessity of a connection at the riser/landing site. While that riser insertion tool mechanism, is somewhat different than McIntyre’s suggestion and ideas vis-à-vis ventable valve connected to the riser, this was the first suggestion to BP of the crucial concept of a connection at depth, at the riser, as opposed to traditionally disconnecting BOP stacks at the well head, (which disconnect at the wellhead of the BOP stacks would

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<sup>24</sup> ER263-264.

<sup>25</sup> ER263.

<sup>26</sup> ER259.

have made a reconnect of a capping device 5,000 feet below with the pressure of escaping gas, oil, and compromised components, impossible.<sup>27</sup>

As set out Appellant's Opening Brief at page 53 et seq., it is clear that BP used McIntyre's suggestions and ideas beginning on May 14, especially given dimensions and configurations of BP's mechanical (not conceptual) evolution of the prototype. See Illustrative Aids I and II, *infra*, at pages 16-17.

McIntyre provided for a ventable valve/ball valve to be installed in an open position with a soft shutdown, i.e., connected to the riser, at the riser landing site/riser flex joint flange.<sup>28</sup> BP's first prototype simply welded the smaller pipe (which McIntyre suggested to leave room for the well fracking packers) to the larger riser (with flange at the bottom) by welding a "donut" to bridge the gap between the two diameter pipes.<sup>29</sup>

That was accomplished by cutting the larger pipe, allowing a welder to weld the "doughnut" inside of it, for the "doughnut" in turn to be welded to the smaller pipe, and to reattach via a "seam weld".<sup>30</sup> Significantly the dimensions and configuration, as discussed in McIntyre's Opening Brief conform to McIntyre's suggestions (and were not such to be used if BP had originated the idea), which

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<sup>27</sup> ER260-261.

<sup>28</sup> ER075; Illustrative Aid I at 16, #B.

<sup>29</sup> Doc. 121; ER051; Illustrative Aid I at page 16, #C.

<sup>30</sup> *Id.*, ER081.

shows that BP was following McIntyre's ideas (which BP cannot refute and the District Court never addressed or relied on)<sup>31</sup>.

While BP's evolution was to cut the prototype again, to shorten it up; they did so by cutting the larger pipe below the seam well, and attaching a flange, which would be compatible to connect with an "H4 connection", i.e., a "hydraulic collet connection", that would connect the rise to the ventable valve.<sup>32</sup>

Thus, it is clear BP simply implemented McIntyre's unique, novel ideas and concepts with traditional mechanical technology, well known to the industry; i.e., mechanically utilized well known traditional mechanical specs and drawings the new, novel crucial concepts suggested by McIntyre, to wit, a ventable valve connected at the riser, i.e., a un-deformed new piece of riser bolted to the flex joint with ventable valve installed at an open position, (which they did by using traditional BOP mechanical modifications to serve as a ball valve type of ventable valve), and thus achieve both disconnect and reconnection, i.e., achieving disconnect and reconnection to that new riser/flex joint "interface" at depth, (with traditional mechanisms welding, bolting, and hydraulic collet connection):Thus

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<sup>31</sup> See Appellant's Opening Brief at 57 regarding "center of mass", i.e. "bending moment", issues to demonstrate BP was following McIntyre's specifications regarding a longer pipe.

<sup>32</sup> ER075, Illustrative Aid I at 16, #D.

avoiding LMRP removal and receiving a soft shutoff to avoid broach of ocean floor (results they could not achieve with existing methods).<sup>33</sup>

In doing so, they used prototype(s) that merely mechanically (not design or concept) evolved, as conforming to McIntyre's design and unique and novel subsea disconnect and reconnect at the riser landing site ventable valve concepts, and they cannot refute that fact, telltale and true, which shows they were following McIntyre's lead in creating a new "tool in the tool box". See McIntyre's Opening Brief at page 53, et seq., and Illustrative Aide I and II at pages 16-17, *infra*.

Thus, his Complaint(s) and evidence show that his case is not only credible and plausible, but, (as a jury will so find as to disputed material facts) it was McIntyre that gave the crucial, unprecedented, novel and workable ideas, methods, and designs to disconnect at the riser landing site, i.e., flex joint/flange, and reattach a ventable valve at depth at the riser level/flex joint flange to achieve the soft shutoff, which is what BP did to cap the well, and for which BP is now seeking a patent.

### **C. BP Was Following McIntyre's Ideas**

The "silence is deafening" as to BP's myopic "head in the sand" failure, refusal, and inability to address the telltale similarities between McIntyre's

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<sup>33</sup> ER219-223.

configuration and BP's evolution of their prototypes. See McIntyre's Opening Brief at pg 53, et seq.<sup>34</sup>

Appellant submits the following Illustrative Aids I and II: 1) to more clearly demonstrate, the "benefit" to BP from his unique, novel, functional concepts, which allowed BP to disconnect and reconnect at 5,000 feet sub sea level, at the riser/flex joint landing site and achieve a soft shut off with a ventable valve (modified BOP)<sup>35</sup>; 2) more clearly demonstrate the mechanical (not concept or design) evolution of BP's prototype that BP was using McIntyre's ideas and dimensions in the evolution of the prototype(s), and the final Macando well capping device.

Appellant does so for convenience of this Court.

For the further convenience of the Court, each part of the Illustrative Aids is marked alphabetically ("A", "B", "C", "D"), as to the evolution of the state of the riser/flex joint and prototype, and the corresponding text marked numerically ("1", "2", "3", "4"), and said text is typed below.

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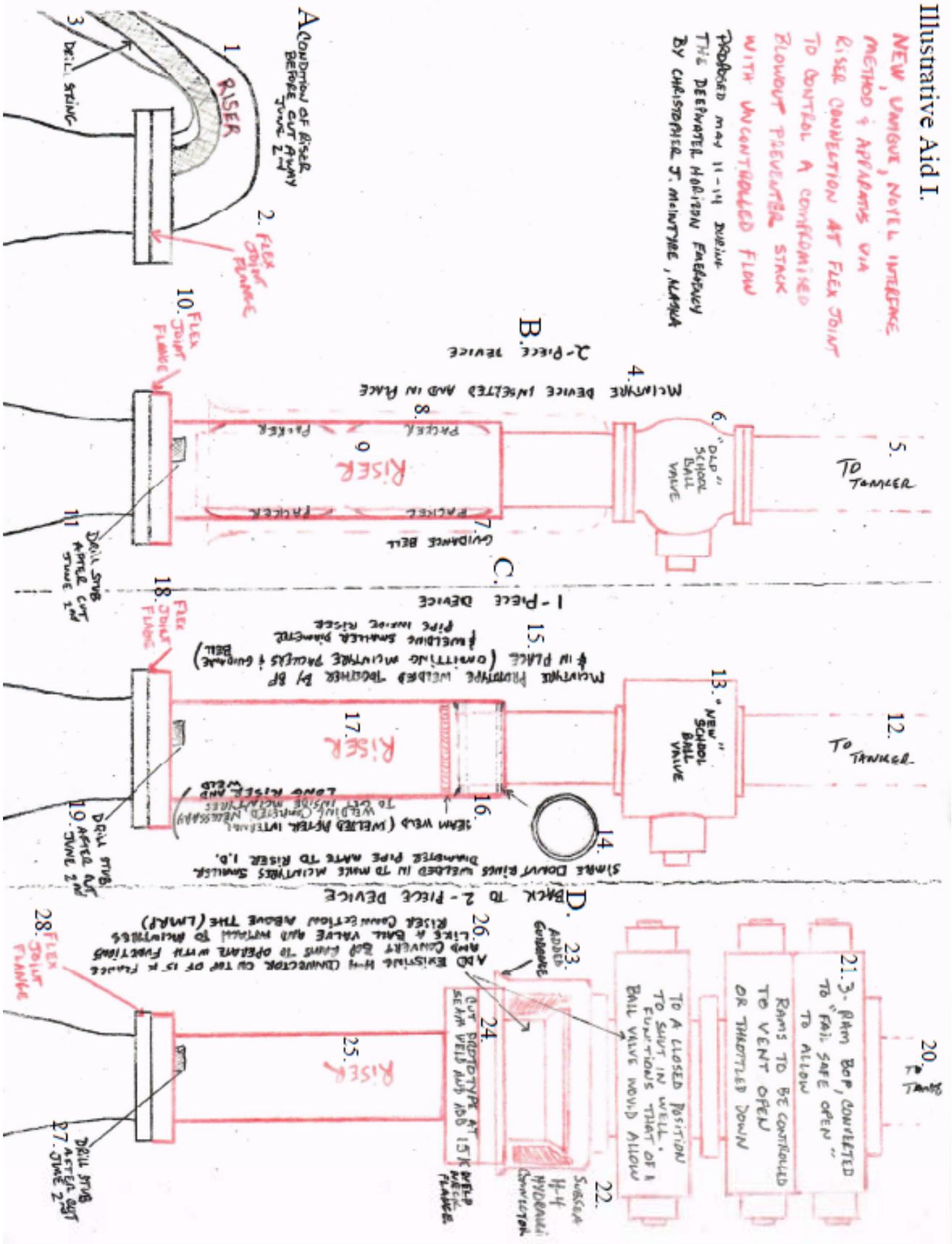
<sup>34</sup> BP cannot refute same and this clearly establishes the "first in time" and "true origin of the design" issues, i.e., that McIntyre was and is the source of the unique, novel, and patentable concepts used by BP to cap the well at which they are now trying to patent.

<sup>35</sup> ER287.

# Illustrative Aid I.

**NEW, UNIQUE, NOVEL INTERLOCK METHOD & APPARATUS VIA RISER CONNECTION AT FLEX JOINT TO CONTROL A CONFIRMED BLOWOUT PREVENTER STACK WITH UNCONTROLLED FLOW**

Proposed May 11-14, 2014  
 THE DEPARTMENT, HARRISON ENERGY  
 BY CHRISTOPHER J. MELNYK, ALASKA



30. - **YOSHIKI COMMITTED ON MAY 11, 2010 AND FINALLY SENT ON MAY 14, 2010 (3:45AM) MULTIPLE REDRESS A NEW CONNECTION METHOD & APPROXIMATE TO ADJUST BOP OR BOP (SOB) AND AVOID RISKS OF SURF, INFLUENCE WELL INTEGRITY ISSUES. HE PROPOSES ATTACHING A NEW SECTION OF PIPER, WITH SMALLER PIPE INSIDE ATTACHED TO LIGHTWEIGHT BALL VALVE TO GO INTO FULL GULF STREAM NODE WITH THE ABILITY TO CLOSE OR THROTTLE DOWN AS NEEDED TO TEST OR QUARANTINE THE WELL AT THE PROPER TIME, WITHOUT DISTURBANCE OF OTHERWISE COMPROMISED BOP VALVES AND THEIR HYDRAULIC CONNECTIONS, THUS AVOIDING MAKING THINGS WORSE**

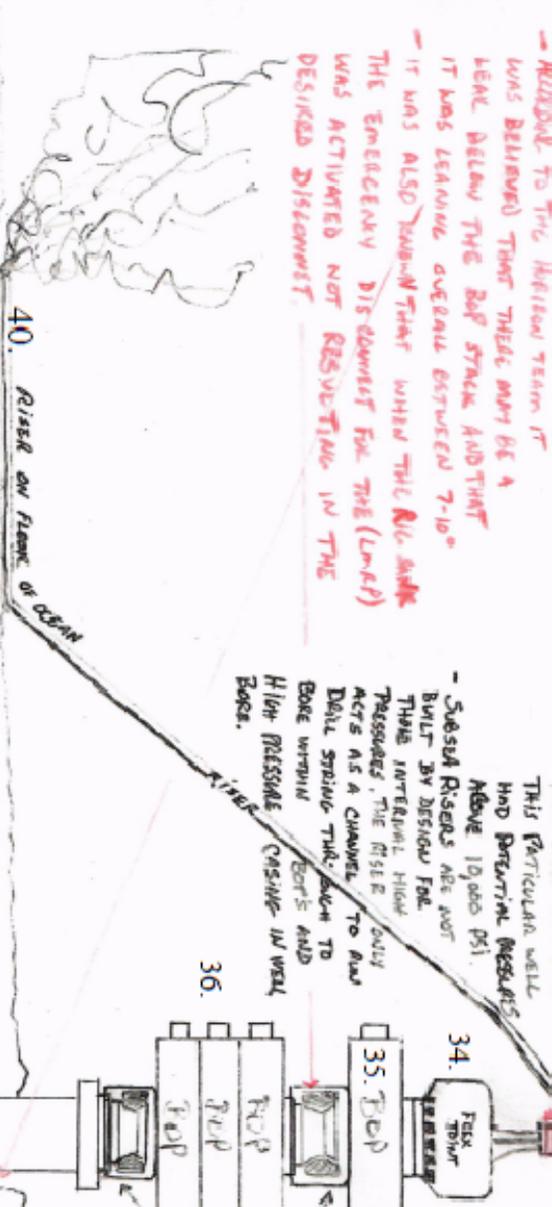
Illustrative Aid II.

29.

- **ACCORDING TO THE HELLISON TEAM IT WAS BELIEVED THAT THERE MAY BE A LEAK BELOW THE BOP STACK AND THAT IT WAS LEAVING OCEAN SURFACE 7-10°**  
 - **IT WAS ALSO THOUGHT THAT WHEN THE RIC STACK THE EMERGENCY DISCONNECT FOR THE (LHRP) WAS ACTIVATED NOT RESISTING IN THE DESIRED DIRECTION.**

31.

- **FLEX JOINT FLANGE (5,000 PSI)**  
 - **BELOW UPPER BOP SYSTEM IS SPECIFICALLY DESIGNED AND BARED TO WITHSTAND INTERNAL PRESSURES THAT WOULD CAUSE PROBLEMS.**  
 - **THIS PARTICULAR WELL HAD PARTICULAR PROBLEMS ABOVE 10,000 PSI.**  
 - **SUSSEA RISERS ARE NOT BUILT BY DESIGN FOR THESE INTERNAL HIGH PRESSURES. THE RISE ONLY ACTS AS A CHANNEL DOLL STRONG THRU-SUCK TO BORE WITHIN BOP'S AND HIGH PRESSURE CASING IN WELL BORE.**



38. **THIS PROCEDURE IS WHAT BP ANTICIPATED THE RISKS FOR ON MAY 13, 2010. ALWAYS RISKS WERE IDENTIFIED (NEAR) THE LESS WAS PLANNED FOR DEPLOYMENT (SPURS) THE FOLLOWING TUESDAY.**

**"BOP ON BOP"**  
 STRAIGHTEN OPERATIONAL PROCEDURE WHEN BOP'S ACTIVATED TO SHEAR AND FALLS AND UPPER AVOIDS FALLS ALSO, IS TO REMOVE (LHRP) VIA HYDRAULIC DISCONNECT AND MOUNT HYDRAULICALLY A NEW BOP AT STACK OF BOP'S TO CAP OR CLOSE THE WELL. THIS WOULD REMOVE YOUR RISERS CONNECTED CORRECTLY.

**ILLUSTRATIVE AID I.**

**A.** New, unique, novel interface method and apparatus via riser connection at flex joint to control a compromised blowout preventer stack with uncontrolled flow proposed May 11-14 during the deepwater horizon emergency by Christopher J. McIntyre, Alaska. Condition of riser before cut away June 2.<sup>36</sup>

1. Riser
2. Flex joint flange
3. Drill string

**B.** 2-Piece Device

4. McIntyre Device Inserted In Place
5. To tanker
6. “old” school ball valve
7. Guidance bell
8. -Packer  
-Packer  
-Packer  
-Packer
9. Riser
10. Flex joint flange

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<sup>36</sup> Excerpt 138.

11. Drill stub after cut June 2

C. 1-Piece Device

12. To tanker

13. “new” school ball valve

14. Simple donut rings welded in to make McIntyre’s smaller diameter pipe mate to riser *i.d.*

15. McIntyre Prototype welded together by BP and in place (omitting McIntyre’s packers and guidance bell) & welding smaller diameter pipe inside riser

16. Seam weld (welder after interval welding completed necessary to get inside McIntyre’s long riser and weld)

17. Riser

18. Flex Joint Flange

19. Drill stub after cut June 2

D. Back to 2-Piece Device

20. To tanker

21. 3-RAM BOP, converted to “fail safe open” to allow RAMS to be controlled to vent open or throttled down to closed position to shut in well. Functions that of a ball valve would allow

22. Subsea H-4 hydraulic connector

23.Added guidance

24.Cut prototype at seam weld and add 15 K weld neck flange

25.Riser

26.Add existing H-4 connector on top of 15 K flange and convert BOP RAMS to operate with functions like a ball valve and attach to McIntyre's riser connection above the (LMRP)

27.Drill stub after cut June 2

28.Flex joint flange

### **ILLUSTRATIVE AID II.**

29. –According to the Horizon team, it was believed that there may be a leak below the BOP Stack and that it was leaning overall between 7-10 degrees<sup>37</sup>

–It was also known that when the rig sank, the emergency disconnect for the (LMRP) was activated not resulting in the desired disconnect

30. –Verbally communicated on May 11, 2010, and finally sent on May 14, 2010, (3:48 a.m.).<sup>38</sup> McIntyre proposes a new connection method and apparatus to advert BOP on BOP (SOP) and avoid risks of such, including well integrity issues. He proposes attaching a new section of riser, with smaller pipe inside attached to lightweight ball valve to go into

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<sup>37</sup> ER262.

<sup>38</sup> ER260-263.

full collection mode with the ability to close or throttle down as needed to test or control the well at the proper time, without disturbance of otherwise compromised BOP Valves and their hydraulic connectors, thus avoiding making things worse.<sup>39</sup>

**31.** –Flex joint flange (5,000 PSI)

–Below upper BOP, system is specifically designed and rated to withstand internal pressures that well can produce this particular well had potential pressures above 10,000 PSI

–Subsea risers are not built by design for those internal high pressures.

The riser only acts as a channel to run drill string to and through bore within BOP's and high pressure casing in well bore.

**32.** Upper BOP section (LMRP)

–Lower marine riser package including one annular BOP valve

**33.** To tankers where rig used to be

**34.** Flex Joint

**35.** BOP

**36.** -BOP

-BOP

-BOP

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<sup>39</sup> ER263.

37. Standard hydraulic disconnects

–lower BOP valves including one “shear” RAM valve

38. This procedure is what BP mitigated the risks for, on May 13, 2010.

Many risks were identified, nevertheless was planned for deployment (splash) the following Tuesday.<sup>40</sup>

39. –“BOP on BOP”

Standard operating procedure when BOPs activated to shear and fails and upper annular fails also, is to remove (LMRP) via hydraulic disconnect and mount hydraulically a new BOP or stack of BOPs to cap or close the well. This would remove your risers connection completely.<sup>41</sup>

40. -Riser on floor of ocean

-Riser

**D. Documents Relied Upon By BP To Claim They Were “First In Time” With The Capping Mechanism Actually Defeat BP’s Claims, And In Any Event The District Court Did Not Reach Said Issues And Those Material Fact Disputes Must Be Resolved On Remand, And Are Not Summary Judgment Or 12(B)(6) Issues Regarding “Plausibility”; This Court Should Simply Reverse And Remand On The Issue Of “Benefit”**

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<sup>40</sup> Doc 52, Exhibit 16.

<sup>41</sup> ER259.

Concerning the issues raised as to whether BP can claim that their documents show they first originated the crucial and novel idea(s), and design(s) as early as May 1: Those documents and issues that were not relied on or used by the District Court, are factual issues for the Jury, and not issues to be resolved, at either Summary Judgment, or certainly at a 12(b)(6) level regarding “plausibility”.

BP in their brief, by “sleight of hand” claim McIntyre’s use of certain documents to show that BP used his ideas allegedly, actually “defeat his case”, regarding “first in time”.<sup>42</sup>

BP inaccurately stated “Mr. McIntyre has conceded (sic) that BP already had the idea that was allegedly disclosed in his submission before he submitting it.”<sup>43</sup> BP also stated “the very documents that Mr. McIntyre relies on in his pleading allege that BP used his idea unequivocally established that BP had those ideas before Mr. McIntyre made his submission” (sic).<sup>44</sup>

Moreover, BP twists McIntyre’s words as to “waste of time”. McIntyre was referring only regarding the tube insertion method “(at end of broken riser on the ocean’s floor, i.e., that the conversations early on the phone regarding that were a waste of time. Not the design sent on May 14. BP Knew that, but now, their

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<sup>42</sup> Answering Brief at 15-16.

<sup>43</sup> Answering Brief at 15.

<sup>44</sup> Answering Brief at 16.

attorneys apparently do not understand that or misrepresented the importance of same.<sup>45</sup>

As to May 14 accompanying communication regarding McIntyre's proposal: The wording is only an attempt to be humble.<sup>46</sup>

This confounds the issues, as to the content (not timing) of the documents, which as discussed, *supra* and *infra*, show BP was using McIntyre's ideas, and as to the alleged dates, there are significant material issues of fact, not reached or relied on by the District Court, given inherent contradictions of BP's statements and actions.

BP ridicules McIntyre in their Brief at page 16, as to his "belief" the documents were falsified.

They ignore evidence as to same, including "dimensions provided by Mr. McIntyre", and as "used by BP in their prototype and evolution" discussed and demonstrated above, but more crucially, evolution of the clear cut contradictions between BP's claims and their own timeline. *See*, for instance Trevor Smith's claim BP's first "mule shoe" was designed on May 12, with claims in an "Isolation Report" and drawing of May 11, shows a mule shoe, INTEC SEA drawings showing a mule shoe as of May 4 (also submitted by Smith)<sup>47</sup>. In contrast, there is

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<sup>45</sup> BP's Brief at 6.

<sup>46</sup> ER263.

<sup>47</sup> Doc 121-10.

the purported May 9 picture (which may or may not have been taken by Smith as he flipped/flopped in his testimony as to same)<sup>48</sup>, which was transmitted with the May 23 email<sup>49</sup>, and was initially questioned by the attorneys in the MDL 2179 litigation<sup>50</sup>. The purported May 9 photos (as to a “hydro test”) show a cover for a “mule shoe”; which Smith, in his timeline, states was not designed until May 12.<sup>51</sup>

Moreover, it is very telling, at the May 13 “Peer Assist” meeting (with 20 crucial BP and Government officials present)<sup>52</sup>, the only discussion was as to the traditional BOP on BOP, disconnection and reconnection option, and how to mitigate results of same, i.e., BP was “ready to go on” Tuesday May 18 with the traditional approach<sup>53</sup>. If that option had been pursued, the “disconnect and reconnect” at the riser would not have been available, as the Riser above the BOP stack, would be disconnected and “Mr. McIntyre’s option” for a riser landing site interface lost.

Thus, if BP really had documents they claim are genuine, and they rely on to purportedly show, they had the riser disconnect/reconnect ventable valve on May 1 to 11, 2014, they would not have been preparing to “go with” BOP/BOP/LMRP disconnect and reconnect on May 13, and would have shared “Riser site disconnect

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<sup>48</sup> Doc 52, Exhibit 62.

<sup>49</sup> ER273-276.

<sup>50</sup> ER293; Doc. 52, Exhibit 62.

<sup>51</sup> ER050-051.

<sup>52</sup> ER266; Doc. 52, Exhibit 18.

<sup>53</sup> ER266.

information” with the 20 BP Government Officials at the peer assist meeting of May 13.<sup>54</sup> However, it was only after McIntyre’s suggestion on May 14, as to riser disconnect/reconnect/ventable valve, that they went to the May 14 peer assist meeting (with 7 pared down private in-house BP participants) to consider same.<sup>55</sup>

The fact that many questioned documents were not directly challenged in the MDL 2179 litigation is irrelevant, as the government lawyers therein were only attempting to show BP had the ultimate solution earlier, i.e., before the top kill on May 26 [and BP claimed in that litigation they did not even begin contemplating same as to the riser/flex joint/disconnect/connect until May 15], i.e., the Government lawyers were claiming BP “fiddled while Rome burned”, i.e., “delayed while they had the solution”, and “let the well blow”, i.e. with the botched “topkill” and a “junk shot”, which BP denied.

To fully understand why the documents BP relies on to claim they were (“first in time”), must be closely examined, the Court needs to examine the sealed documents<sup>56</sup>, and in any event, the Documents demonstrate Summary Judgment and/or Trial issues, not lack of plausibility issues as to a 12(b)(6) Motion/Dismissal.

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<sup>54</sup> ER266; Doc 52, Exhibit 18.

<sup>55</sup> ER266; Doc 52, Exhibit 18.

<sup>56</sup> As discussed in Doc 121, Appellant’s Brief at 54-58.

Furthermore, there is evidence in the email dated May 23, between Trevor Smith and Ian Sneddon, Head of Technology for TransOcean, that BP is planning to “cut up” their “prototype”, i.e., the prototype, that conformed to McIntyre’s idea(s), as a “trial run of the diamond saw”. Sneddon makes it clear to Smith “if we butcher either of the assemblies shown”, then “we lose the ability to quickly make up the transition spool<sup>57</sup> to the dual rams.” This demonstrates, as far as TransOcean was concerned, no such transition spool (i.e., the alleged configuration in the alleged May 9<sup>th</sup> photo) had been yet produced.<sup>58</sup>

Significantly, BP’s “Lesson Learned Report”<sup>59</sup> shows “from inception to deployment”, of the actual capping mechanism and support equipment, was approximately eight (8) weeks. The well was capped on July 15, i.e., “deployment”. Eight (8) weeks prior is May 15, for conception/inception (i.e., after McIntyre’s May 14, 2010, notice to BP).

## **II. ALL THEORIES OF FRAUD WERE PLEAD BELOW**

As to Fraud, the Complaint(s) were sufficient to allege the multi-fold fraud by BP:

- 1) Telling McIntyre his idea(s) will not work;<sup>60</sup>

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<sup>57</sup> The “transition spool” is BP’s name for the final capping mechanism interface used by BP attached to the riser flex joint flange.

<sup>58</sup> ER273; Doc 52, Exhibit 26.

<sup>59</sup> Doc 52, Exhibit 5.

<sup>60</sup> ER251-294.

2) Telling McIntyre they had another idea (not his) that was being individually considered;<sup>61</sup>

3) BP's refusal to pay McIntyre and benefiting unjustly;<sup>62</sup>

4) BP's discouraging McIntyre from patenting his idea and fraudulently claiming they were not patentable.

BP's rejection of idea was to discourage McIntyre. "inducing Appellant to be recalcitrant as to seeking patent"<sup>63</sup>

BP's attorneys claimed McIntyre "failed to provide any citation to the record" of such.<sup>64</sup> The emails are on record.<sup>65</sup> BP wishes to distract attention from two emails sent to McIntyre on May 26, 2010.<sup>66</sup> It is well known publically that engineers felt too much drilling mud was escaping into seawater early, in failed "top kill" procedure on the 26<sup>th</sup> of May, and halted pumping. (Note the non-similar wording in emails to McIntyre 26<sup>th</sup> of May! Note the timing!) The difference in the two emails show BP recognized they may have to implement McIntyre approach to a national emergency.

**A. FRAUD CLAIMS WERE PROPERLY PLED IN THE 2<sup>ND</sup> AMENDED COMPLAINT AND THE 3<sup>RD</sup> AMENDED COMPLAINT SHOULD**

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<sup>61</sup> ER278, ER061.

<sup>62</sup> ER286, ER232-233.

<sup>63</sup> Answering Brief at 25.

<sup>64</sup> Answering Brief at 25.

<sup>65</sup> ER052-074.

<sup>66</sup> ER503-504, ER277-278, ER088-089.

**HAVE BEEN ALLOWED, TO SET OUT AND PLEAD WITH MORE SPECIFICALLY THE OTHER CLAIMS.**

McIntyre specifically alleged culpable fraudulent conduct of BP, in not paying him for his significant unique and new contributions to BP capping the well, and then falsely telling him the idea was not workable and BP would not be using same, and then BP seeking to patent same.<sup>67</sup> Thus, he specifically and properly alleged both types of fraud, and detrimental reliance by McIntyre of BP falsely telling him that his ideas were unworkable, would not be used, and thus that they were un-patentable, and BP would not use them or seek to patent them.

**III. BP'S ATTEMPT TO PREJUDICE MCINTYRE WITH REFERENCE TO OTHER CLAIMANTS SHOULD BE DISREGARDED**

At pages 1 and 11 of their Opposition Brief, BP's attempts to "tar and feather" McIntyre by referring to other unspecified claims by different persons as to the Macondo well spill.

That blatant attempt to prejudice McIntyre, is not worthy of argument and should be disregarded by the Court. Whoever the other claimants may be, (or the nature of their claims), Mr. McIntyre's case is precise and of merit, as he has overwhelming evidence that he originated the unique novel, actually patentable concept of a new capping approach, or interface, at subsea level, a disconnect/reconnect at the flex/flex joint/ventable valve/capping method, which

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<sup>67</sup> ER202-249.

was novel/unprecedented in the industry, and which never was previously conceived of or used by BP or its engineers, prior to McIntyre's designs and suggestions (and was in fact used by BP to cap the Macondo well).

McIntyre's novel approach was directly contrary to the traditional application of disconnecting the hard shutoff BOP stacks at the well head, which would have not allowed reconnection of a capping device, subsea level at 5,000 feet, especially given the pressures at issue, plus compromise of stack components and would have led to further catastrophe, total uncontrolled flow of hydrocarbons into the Gulf, at the well, and/or breach of ocean floor.<sup>68</sup>

**IV. DISTRICT COURT'S DECISION WAS BASED PRIMARILY ON A MISUNDERSTANDING AND INCORRECT FINDINGS REGARDING "BENEFIT" AND DID NOT RELY ON OR RESOLVE THE "FIRST IN TIME" ISSUES: THE COURT SHOULD SIMPLY REMAND TO THE DISTRICT COURT TO RECONSIDER THE "BENEFIT" ISSUE; THE DISTRICT COURT NEVER REACHED THE ISSUES REGARDING THE DOCUMENTS AND BP'S CLAIMS THAT THEY WERE "FIRST IN TIME", THOSE ISSUES ARE TO BE CONSIDERED ON REMAND**

Although BP, at somewhat length in their Brief, continue to claim the document(s) of record show they were "first in time", as discussed *supra*, there is overwhelming evidence showing dispute of fact as to same.

The District Court based its decision on a mistaken and incorrect finding that McIntyre's ideas conceptually did not provide "benefit" to BP, the District Court

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<sup>68</sup> ER259.

focused on the mere use of the ventable valve including comparing same to a “garden hose” etc., and that McIntyre’s design improperly omitted precise dimensions, specification, operation limits, which were purportedly necessary to build the solution; which were not in fact necessary, as there was mechanical specifications and dimensions well known in the industry.<sup>69</sup>

BP did not need dimensions, operations limits, specs, or other engineering details to advance work on McIntyre’s prototype. Oil and gas engineers do not need to have components that they work with everyday labeled for them, as BP attorneys would inappropriately suggest. Certainly BP knew the size of their flanges and diameter of pipe being utilized and their operating limits. The mere fact that McIntyre’s prototype was easily built by BP (before “butchering”) conforming to McIntyre’s designs, proves that.<sup>70</sup>

Thus, the Court misunderstood the real benefit of Mr. McIntyre’s novel, unique ideas and approach to a new unprecedented capping interface, which was unprecedented in the industry, to disconnect and reconnect at the riser landing site, (which BP did, and thus, used a ventable valve at that site), is a crucial part of the patent.

Moreover, the District Court did not recognize the evolution of BPs mechanical use of McIntyre’s design, which as likewise discussed, *supra*, shows

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<sup>69</sup> ER009-10.

<sup>70</sup> ER051.

they were using McIntyre's concepts and (with McIntyre's initial dimensions and configuration) mechanically altering them with known existing technology, which was still copied "embodiment" (of McIntyre's ideas), to wit, an embodiment as described in the patent application.

**V. REEVES V. ALYESKA PIPELINE SERVICE CO., 926 P.2D 1130 (AK 1996) IN NO WAY BARS MCINTYRE'S CLAIMS.**

*Reeves v. Alyeska Pipeline Service Co.*, 926 p.2d 1130 (AK 1996) was improperly relied upon by the District Court<sup>71</sup> and is improperly relied on by BP in its briefing. BP argues at page 18:

Here, the District Court properly (sic) found, that Mr. McIntyre did not plausibly allege that his idea was novel and unique, the only similarity between his submission and the capping method was the general idea of using a valve. (sic) ER 009

Unlike Reeves, McIntyre used a new, unique and novel to the industry capping method, i.e., a subsea invention/interface for an unprecedented landing site at the riser with a ventable valve (soft shutoff versus hard shutoff), which is a new and unique capping mechanism.

McIntyre did not merely suggest the general idea of using a valve, but made specific suggestion as to the unique and unprecedented interface, i.e., landing site at the riser/flex joint flange via riser.<sup>72</sup> This is a crucial part of the patent, as it was and is an unprecedented approach in the industry, regarding capping of a blownout

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<sup>71</sup> ER008.

<sup>72</sup> ER263.

well, i.e., a disconnect and reconnect at the riser/flex joint flange via riser with a soft shutoff as opposed to the traditional method, to connect and reconnect at the wellhead at the BOP stack with a hard shutoff, which would be unworkable and catastrophic.<sup>73</sup> In BP's Brief at page 19, they claim that "Appellant ignores McIntyre's acknowledgement that BP did not use many aspects of his alleged idea [proposed inflatable bag packing system and guidance bell".

The mere fact that BP eventually welded the ventable valve configuration to the riser for a hydraulic connector (as opposed to well packing frackers connection) is irrelevant to the crucial concept to the unique and novel idea to the ventable valve at the riser landing site.

Accordingly, Mr. McIntyre clearly had a patentable property interest in his unique and novel ideas and concepts, which BP received as a benefit and were unjustly enriched; misappropriated and as to which he can still assert his rights and should be compensated.

McIntyre has not waived his rights as to his other claims. As discussed *supra*, the real basis of the District Court decisions, and thus its error, were incorrect findings as to "benefit". Concerning dismissal of the other McIntyre claims, those can be revisited below once this Court reverses as to the "novel and

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<sup>73</sup> ER295-493.

unique”, “benefit” and “fraud” issues, and allow those claims to be more specifically litigated on remand in a more thorough fashion.

McIntyre should have been permitted to file a Third Amended Complaint. There was no unreasonable delay in seeking to amend, and no real prejudice to BP. BP has fair notice of the claims against it. There is no change of course in the litigation, and BP is not required to alter its strategy. See, e.g., *Moronogo Band of Mission Indians v. Rose*, 893 F.2d 1074 (9th Cir. 1990).

### **SUMMARY AND CONCLUSION**

The central issue, is the fact that McIntyre plausibility plead, alleged and demonstrated evidence to show material disputes of fact as to same, i.e., it was his unique and novel (and patentable) design and idea for an industry unprecedented subsea disconnect and reconnect capping interface with ventable valve at the riser/flex joint landing site (with a “soft shutoff”), that was previously unknown, un-conceived, unprecedented in the U.S. oil industry versus the traditional approach to the LMRP/BOP stacks disconnect and reconnect and with “hard shutoff”. This benefited BP, and enabled them to build the capping device with well known mechanical practices and techniques, “safely” cap the well, and unjustly enriched them, and they fraudulently told McIntyre his idea(s) would not work, and they are improperly now trying to refuse to pay him, and patent same, as their own invention.

Issues as to who was “first in time” are material fact issues, not addressed or relied on by the District Court and must be resolved on remand.

A 12(b)(6) Dismissal was not warranted, and therefore there should be a remand to the District Court, to fully consider the benefit McIntyre provided to BP, and the origin and timing of same (which are Jury issues) by which BP was unjustly enriched, so McIntyre may enjoy his day in Court, as a matter of basic due process rights.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of November, 2015.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached response brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,987 typed words.

**WEIDNER & ASSOCIATES**  
Attorneys for Appellant

Date: 11/16/2015

/s/ Phillip Paul Weidner

**CERTIFICATE OF SERVICE**

I hereby certify that on November 16, 2015, a copy of the foregoing was served electronically on Defendants/Appellants through the Court's electronic filing system.

s/ Phillip Paul Weidner  
ABA 7305032