ORAL ARGUMENT – 12/11/02
02-0071
IN RE LEE BASS

GRABLE: The ultimate issue in this case is whether the TC abused its discretion in ordering the Bass defendants and Exxon to produce 3-D seismic data and defendants proprietary interpretations of that data covering a portion of Bass's La Paloma Ranch called the "Erck" tract, which covers some 20,000 acres of the 30,000 plus acre ranch, plus a 1 mile hallo around that acreage to a total of over 30,000 acres of seismic data. Both Bass defendants made proper trade secret objections to plaintiff's discovery requests and filed withholding statements asserting trade secret privilege and proved the trade secret matra of the data at the hearing on the plaintiff's motion to compel.

We contend that plaintiffs did not prove that the data was necessary to the proof of any claim in plaintiff's live pleading at the time of the hearing.

O'NEILL: Presuming this were trade secret, the TC then must weigh the need for the information against the harm by it being revealed. Right?

GRABLE: Yes.

O'NEILL: And that would be a fairly broad discretionary use of the analysis?

GRABLE: Yes. If you get there.

O'NEILL: But how do we get there without disposing of the merits of the claim?

GRABLE: We're not saying that the court needs to dispose of the merits nor even view the merits like the old _____ privilege practice. We are saying, however, that in answering the first prong of the Continental Car test, has the plaintiff proved that the trade secret data is necessary for a fair adjudication of the claim that the plaintiff must first allege a claim. So you look at the pleading. Does it allege a claim, recognize a common law in Texas?

O'NEILL: Which is my question. If there's any authority out there that there might be a claim or if the authority is conflicting, how can the TC abuse its discretion by allowing this discovery?

GRABLE: If you get to a necessity prong. But we say under these pleadings, under these facts there is not even an allegation of a claim. But any fair reading in the broadest possible sense, giving all possible ambiguities to the plaintiff...

O'NEILL: If it did state a claim and if it were a claim that is arguably recognizable, even

if we haven't addressed it substantively, then would you say the TC abused its discretion?

GRABLE: In this case.

O'NEILL: How? Assuming formerly alleged, assuming arguably claimed, how can we then say the TC abused its discretion in balancing the?

GRABLE: In this particular order, he abused his discretion clearly with respect to the interpretative work. Now that part has gone out because the plaintiffs withdrew it.

O'NEILL: But in terms of what we're here for today.

GRABLE: In terms of what we're here for today if this court believes that the plaintiff's petition states a claim recognized at law in this state and....

O'NEILL: Or arguably.

GRABLE: Or arguably, or fair extension or whatever that part of the bad faith, then we get to the issue of whether or not they've proved this is necessary for a proof of a claim. That's getting fairly far down the track. At the hearing on the motion to compel, I did go do in with a witness about weren't you the very same witness for other plaintiffs suing on this ranch and didn't you do a study? All of this information goes to the damages only. None of this information we're seeking goes to liability.

O'NEILL: Are there other means that you claim are available to obtain this same information?

GRABLE: Not this same information, but information from which they could prove a damage case.

O'NEILL: What about liability? There's no liability here unless they can prove their recoverable reserves. Right?

GRABLE: I would disagree with that. I don't think the amount of oil and gas that might be recovered if there is drilling has anything to do with liability. They are alleging in our view nonexistent duty to develop on the part of a mineral owner, on 100% of the minerals. Which we don't believe that duty exists. We believe it does not exist. But if you get into the cases on implied duties, the implied covenant ____ development under oil and gas leases as opposed to conveyances, the plaintiff's burden is to prove what a reasonable prudent operator would do under the same circumstances which has in it proof that a well could be drilled and a reasonable profit made.

O'NEILL: If there arguably is a claim out there how can we say the TC abused its discretion?

GRABLE: It's a closed question.

O'NEILL: Really to rule your way, we have to dispose of the merits of the claim. We have to say there is no such claim.

GRABLE: I don't believe you have to dispose of the merits. I think you have to look at the pleadings and see does this pleading fairly allege a claim recognized at law? The answer to that is no. We never reached the factual - I mean is there a merit. We're just looking at pleadings. It's not that different than what happens on a motion to transfer venue. Those are decided on pleadings and affidavits. This in my view should be decided on pleadings, affidavits and ...

ENOCH: The issue is is it relevant to a claim that's alleged? You're arguing that they've alleged their claim but that this claim is not recognized in law, and, therefore, it's not discoverable. Don't we have to conclude that the claim is not recognized as a matter of law before we can say it's not discoverable. And what we're effectively saying is it's not relevant - it's relevant but not to a claim that's recognized at law.

GRABLE: We say that but we say more than that. Let me tell you how plaintiff's counsel characterize their claims at the motion to compel. First in direct questions, this is from page 45 of the transcript of the hearing, direct questioning of their expert. Plaintiff's counsel says Mr. Brown. If my claims in this case are for damages for Mr. Bass's failure to develop the La Paloma acreage and/or discouraging Exxon from exercising their option to lease can you provide me with testimony that evaluates my damages? So he claims if my claims are failure to develop and discouraging Exxon from exercising their option can you give me damage evidence without the 3-d seismic? Now when you go to his closing he says, this is argument to the court after we've argued, look at their 4th amended pleading, there are no claims in there that touch the Erck acreage, all that goes to the Weakly acreage, which involves this 1982 partition and some complicated divisions of that deed. In his closing argument to the court, Mr. Braugh says they said, referring to counsel for Bass and Exxon, that we haven't pled enough to make this data relevant. And that's just false. We have a pleading for breach of fiduciary duty. Very clearly the most latest our amended petition, which I think is the fourth, we state that Mr. Bass on the Erck property, on the La Paloma property has discouraged production and development. Then we get to the causes of action and we plead breach of fiduciary duty. It's been pled. It is relevant.

If you look at their pleading, the breach of fiduciary duty, paragraph 24 says, plaintiffs would show that Exxon and defendants Lee M. Bass, etc., as co-tenants of the mineral estates under the former Weekly property or alternatively as co-tenants of the executive rights concerning tracts A and B, which by definition are all the two tracts of the Weekly property, owed to the plaintiffs fiduciary duties and breached _____ duties and thereby harmed the plaintiffs in an amount greatly in excess of the minimum jurisdiction of the court.

His own pleading expressly limits the fiduciary duty claim to the Weekly property. It does not touch the Erck property. You can read this pleading from now until dark and

you will not find anything in here that implicates the Erck's property except two sentences in the factual allegations that allege a nonexisting duty to develop.

Now our primary position is, it's simply isn't alleged.

ENOCH: So your real objection is the sentence is not relevant?

GRABLE: Yes. He hasn't reached the basic scope of discovery, that it's not relevant to a claim expressed in his live pleading. We say beyond that in trade secrets under the Continental Tire test you have to prove not only that it's relevant but also that it's necessary for the fair adjudication of the claim. We say he never did get over the first hurdle, and we say moreover if you want to torture paragraph 21, which is a factual allegation, the only part of the pleading that talks about Erck at all, and that says plaintiffs also own royalty interest under portions of the La Paloma Ranch excluding the Weekly property, and that's the Erck property, which was included in the geophysical lease option, etc. Upon information and belief Bass unlawfully prevented or discouraged the proper and reasonable exploration, development and/or production of mineral reserves under such property to plaintiff's detriment

Now if that's the search they claim, it's not a claim recognized in Texas law. And so we're saying that a TC in applying rule 507 and this court's opinion in Continental Tire must at least look at the pleading, examine it, does it assert a claim, and then upon proper objection by the person owning the trade secret that if he asserts that the claim pled was something like you know I don't like blonde hair, blue eyed women, and therefore, I've suffered emotional distress, that's not a claim. I mean that's a silly Example. But we say legally that's no less a claim and no more of a claim than what's pled here.

O'NEILL: Some of the evidence you introduced on trade secret status was that this information is only shared within the industry through confidentiality agreements. It's protected by confidentiality agreements.

GRABLE: I don't believe that was part of our proof. We have proof that it's frequently done that way. And this particular agreement between Bass and Exxon had a mutual confidentiality agreement until the Exxon lease option expired after which each of them were joint owners.

O'NEILL: And taking that one step further. If Exxon were to share this with anyone it would only be for a confidentiality agreement. Correct?

GRABLE: Yes. Most of the time. But I don't believe that an express confidentiality agreement is necessary to maintain the trade secret character of the data. It typically is done.

O'NEILL: It shows that you do try to protect it. That that's a typical in the industry. Why is this any different?

GRABLE: Two answers. First, we believe that it's an abuse of discretion under rule 507 and the Continental Tire opinion to jump to the balancing test and give a protective order, which is clearly what Judge Banales did, before you look at has plaintiffs proved the trade secret is necessary to prove the claim. You don't get to balancing until he's proven necessity.

O'NEILL: Well you balance need verses harm.

GRABLE: Correct. But if need is not proved, as I read your opinion in Continental, you don't get to the balancing test.

O'NEILL: Is there any way in which you claim the confidentiality agreement in this case is insufficient to protect the information?

GRABLE: Yes. We do. Our position at the hearing was at most they're entitled to is the Weekly data. They are barely entitled to that. We think the protective order issue is insufficient.

ENOCH: I'm not sure I'm convinced it's a trade secret. It seems to me the only reason this - this is just information that somebody goes out and scientifically produces this information. The only value it is to your client is the ability to sell it on the market it seems to me. The only value to this is you have to share it with somebody else. So it's not like the Coca Cola formula that only Coca Cola wants it and it's only to be used to produce Coca Cola. It looks to me like it's a marketing deal and the only reason you don't want it to be known generally is because you then lose the economic value of being able to sell it in exchange for getting somebody to do something on the property. If Continental Tire sold its formula for making tires on the market, I could see that it would argue: wait a minute. Don't release this to the public, because then it loses its economic value. But it seems to me they would have less of an argument so long as whoever it was leased to was under an obligation they could not release it to the public so that the market value would still protect them.

GRABLE: On question 1, its worth is more than its ability to be sold. It can be used. Lee M. Bass, Inc. is one of the Bass companies that is actively engaged in oil and gas business itself. Lee M. Bass Inc. participates in wells through ____ and the Bass family. So in the first instance it can be used for self development of the Erck property by Mr. Bass.

ENOCH: But he owns the property so nobody else can develop it based on his information.

GRABLE: True. But it has value. And one of the three points that I intended to cover in my opening presentation today was the nature of a trade secret. What is the legal test of a trade secrets? This court hasn't addressed that issue since 1958. And should the court move to restatement of unfair competition third, §39, which has a very succinct definition of a trade secret: as any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual potential economic advantage over others. And

in comment B expounds and says a trade secret can consist of a compilation of data or other form of economically valued information. Which is precisely what seismic data is. Seismic data is the most important cornerstone of oil and gas exploration. If it's not a trade secret it is big news to the oil and gas industry. And the interpretations of seismic data are the ultra secrets of the oil and gas industry. Those are the most secret of all of the data of all and gas companies.

ENOCH: Don't you ordinarily look at a trade secret as being something that you don't want anybody else to know so that you maintain some sort of _____ advantage. But the value to seismic data is the ability to sell it on the market, to actually share it with somebody else.

GRABLE: Or use it. Mr. Bass can use this to develop his ranch. He drills oil wells. He's drilled oil wells on several of his ranches. He owns this property. He can drill it himself. Lee M. Bass Inc and other Bass companies under the umbrella of ____ Co, and this again is proved in the hearing, are and active, one of the most active and ____ independent producer of oil and gas in this state.

ENOCH: But he owns the property so nobody else can use that data in competition with him on that property.

GRABLE: But an oil and gas lease is a defeasible fee of transfer.

JEFFERSON: Is it true in the lease agreement that although you're intending o keep the data secret that Exxon or Bass without prior notice to the other can release the data?

GRABLE: At this time. It was not the case until Exxon's exclusive lease option expired. Exxon shot this data. There was a term "exclusive option." If they exercised it, it remained mutually confidential. If they did not exercise, then each party retained the data themselves. But that's no different that if somebody owned it exclusively. Let's say Mr. Bass shot this data himself. He would have no confidentiality agreement with someone else. If you own the property exclusively, you may do with it as you want. You can publish it in the New York Times. You can put on the internet, or you can keep it secret. And so the fact that the two people or two companies owned data concurrently and both elect to keep it secret, they don't have to promise each other to keep it secret to maintain the trade secret data. If either of them subsequently makes it public it would be lawful now. It would lose its character. But so long as they don't it remains a trade secret.

HECHT: You got this information from Exxon. And neither you nor Exxon has shared it with anybody to this point.

GRABLE: We have not. We don't know what Exxon has done. But it has not been made public. There are essentially two kinds of seismic data: proprietary data, which this is; there is trade data, which a seismic company shoots and any oil company can come in and lease it and go to input/output and say you got any data on Kennedy county and they will say we've got this, this and

this, and for a fee you can get it. This is proprietary data owned by Exxon and Bass. We don't know frankly what they've done with it. But they haven't done anything that has caused it to become public.

HECHT: If they had, how widely would they have to share it before it cease to become a trade secret or you for that matter?

GRABLE: That I think would present a fact issue. Typically what happens if you want to interest another company you know we've developed a prospect. Come look at our prospect. See if you want to participate in it. Here's our data. Go look at it. If it's done in a manner that keeps it confidential, the fact that you would show it a number of times to others, I think it's still a trade secret. I think until it actually becomes in the public domain somehow it can be a trade secret. But I do think that would be present a fact issue on other facts not present in this case. It's how much sharing has occurred and how much is too much.

O'NEILL: If you had moved for summary judgment and it was denied, you could not bring it here for us to review the merits.

GRABLE: We can not appeal the denial of the summary judgment.

O'NEILL: And aren't you asking us to do really the same thing here through mandamus?

GRABLE: No. We are asking you for a very limited look, under very limited circumstances. Rule 507 does not apply to that much evidence. And we are asking only that the court exercise enough time, patience, and discretion to read the pleading to see if it states a claim. If it does not state a claim for which it's at least relevant it should not be granted. Now that's no different than a typical discovery dispute. There are discovery disputes all the time that don't involve trade secrets. This is discovery dispute enhanced though because it's trade secret, and so even if it's relevant then you get to the next question of necessity. And we are suggesting that it's not too much to ask that even if a pleading states a claim on the face of it, the court at least should take a look if the party owning the trade secret argues the court ought to take a look and see if that is a real claim or a fanciful claim. Is it a fairytale or a real claim. Because trade secrets should not be forcibly disclosed without at least a real claim pled.

O'NEILL: So we would be deciding the merits of the claim?

GRABLE: You wouldn't be _____ the factual merits. You would be looking at whether or not that is a claim. And that's special exception...

ENOCH: But if we decided that issue, if we say this is not discoverable because they have not stated their claim, isn't that the end of that claim?

GRABLE: It's the end of that claim as expressed in that pleading.

O'NEILL: If we say there is no duty, there's no other way it could be expressed in the pleading.

GRABLE: I agree with that as well.

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RESPONDENT

BRAUGH: I think there is a temptation in a case like this on everybody's part, including my own, to assume that something that sounds so technical and important to the oil and gas industry is automatically a trade secret in every case. I don't think we can do that. I don't think it's fair to do that, and I don't think it's right to do that. We have to look at each trade secret case and every case that comes up on mandamus with respect to the evidence that was actually presented to the trial judge.

Judge Banales had a motion to compel with several attachments. He had two responses with an affidavit apiece and he had some live testimony from two witnesses at a hearing. And all that stack of information amounts to this. The briefs are very long and detailed in this case. There have been documents added to briefs to further explain people's positions. And so I think when we look at the standard of review in a discovery mandamus even when it involves a trade secret like this, it's important to focus on exactly what J. Banales saw. It's also important to focus on exactly what the status of the case was. And in this particular case plaintiff's 4th amended petition for example had been on file for quite some time. No special exceptions were filed. That happened after the motion to compel a hearing. Special exceptions were granted. A 5th amended petition was submitted. The actual order that this court is sitting in judgment over today on mandamus is an order that was signed and entered after the 5th amended petition.

On the one hand obviously J. Banales made the decision that this seismic data was discoverable when the 4th amended petition was on file. On the other hand technically and legally the order appealed from is an order that was signed after the 5th amended petition and after certain alleged deficiencies were pointed out to the plaintiffs. In all fairness that's the way it's supposed to happen.

HECHT: What does the 4th amended petition allege?

BRAUGH: This may be a fault of the way that I plead. It starts out with factual resuscitations and allegations of fact. Then it moves into causes of action. And it pleads about 14-15 different causes of action.

HECHT: And you say all of those apply to this property?

BRAUGH: No. Certain of them the way they were phrased in the 4th amended petition

specifically referenced the Weekly property for example, which is different than the property we're dealing with today. One of the important examples, civil conspiracy does not. Defendants para. 29. Defendants Lee Bass, Lee M. Bass Inc, and Palladian Corp. and Exxon Corp. agreed and conspired to commit fraud, breaches of fiduciary duty, trespass conversion, and to otherwise devalue and disregard plaintiff's executive mineral and royalty rights under the evidence suggested.

Plaintiffs don't own a royalty interest under the Weekly property. They only own royalty interest under the Erck property which is that issue in this case. Was there a cause of action pled against the Erck property? Absolutely.

HECHT: If this were trade secret information, it would be kind of difficult to show that its production were necessary to proving that claim. That's what you have to show right under Continental?

BRAUGH: I do have to show that I have a need for it if it in fact is a trade secret.

HECHT: If it were, you would have to show that it's more than relevant.

BRAUGH: Absolutely.

HECHT: How would you do it with respect to that claim?

BRAUGH: The actual evidence we would submit to J. Banales is as follows: We have Mr. Bass's own hired expert who issues a report that says, I know Mr. ____, plaintiff's expert. I know he previously did work on the La Paloma Ranch or the Erck property and his methodology was flawed. His results were inaccurate. And the trust of the matter is La Paloma has limited oil and gas potential.

Once Mr. Bass gives me access to the seismic data, I intend to prove all that's true. That's Mr. Bass's own expert.

HECHT: That there is limited potential in the Erck property?

BRAUGH: Yes.

HECHT: And so how does this help you?

BRAUGH: If I get the seismic data, and my expert looks at it, he can make an analysis of the data, he can make reserve calculations. Our engineers could come up with numbers that show - if in fact that's false. There are enough limited potentials on the Erck property. So not only is the reliability of my expert's work being challenged, which gives me a need for the data to prove in fact he's right, but also the amount of my damages and what I may have lost over the last 3-4 years when Mr. Bass or his companies were failing or disturbing production in exploration of this property.

O'NEILL: All presuming there's a duty owed to the plaintiffs here?

BRAUGH: All presuming there is at least some type of duty owed.

O'NEILL: So shouldn't we reach that duty question first, because it would be dispositive of the discovery issue?

BRAUGH: The reason you shouldn't reach that duty question first is because as discussed in our brief, you really shouldn't get to the merits of the case in a discovery mandamus for many reason. One of which the record was not developed enough, I don't think, for this judge or the trial judge in this case to decide at that point that summary judgment was not filed and certainly wasn't heard until after the motion to compel...

O'NEILL: But how would a determination of whether there's a duty depend upon record development?

BRAUGH: The question is, did J. Banales clearly abuse his discretion in granting this discovery in this mandamus proceeding? And so how can we say, J. Banales we never even asked you to look at this, but by the way, you were wrong and maybe you should have looked at it even though the defense counsel didn't point this issue out to you, with by way of briefing _____ summary judgment. That's my answer on one part. If we do look at the duty issue at least in some limited context, first of all, I don't think you can avoid - if you decide to look at the duty issue when determining relevance, I don't think this court can avoid saying, you know what, we're going to grant summary judgment.

OWEN: What if you file negligent infliction of emotional distress claim and you ask for a whole lot of discovery. Wouldn't we be within our bounds to say there is no such cause of action and you aren't entitled to any discovery?

BRAUGH: I think in that particular case, first of all, I should probably be sanctioned and have my pleading struck from the beginning _____. Absolutely clear on that point. If for some reason the trial judge refuses to do it, the CA refused to take action and _____ all the way through it, I think that that would certainly bear on plaintiff's need for the data.

O'NEILL: But if we felt that Dancinger satisfied this question, and took care of this question, wouldn't that be the same scenario?

BRAUGH: I think that it could be. But I think it's different. On the one hand, the SC with respect to negligent infliction of emotional distress has been very clear. The Dancinger case doesn't even address our situation. So I think the premise of the hypothetical is flawed in that Dancinger doesn't address that. The truth in Dancinger is that plaintiffs sold the oil company all of their mineral interests. The oil company agreed to pay them $50,000, and $50,000 over time through production to compensate them for that sale. The plaintiffs in that case reserved an overriding

royalty interest. In that case the court held there wasn't a fiduciary duty owed by that reservation of an overriding royalty interest. That case is nothing like this case. It's in essence a land man suing an oil company over how good a job they did developing their prospect.

Here we have a mineral owner, an executive rights owner who has complete control over the financial value of the royalty interest, a nonparticipating royalty interest held by many other people in this family. So it's not just these two plaintiffs. There's actually others. That's a different case than Dancinger.

Maybe if there was a SC case directly on point that said this claim was absolutely frivolous. It has been dismissed time and time again. The law is clear, then maybe you could sit today in this case and say we're not going to allow discovery on that until you get a summary judgment granted against you.

HECHT: Continental has two prongs. One is the person resisting discovery has to show that it's trade secret. So let's say he does that. Everybody agrees, it's a trade secret. Then the second prong under Continental is that the person seeking the discovery has to show that he really does need this, not just relevant, it's necessary to the proving of his case. Now if all he has to do to meet that requirement is say, Judge, I've got a cause of action that nobody has ever said doesn't exist and I'm telling you it's necessary and that's it. There's not much to the second prong of Continental.

BRAUGH: Well that's not the case in this case. I've cited to the court at a minimum 11 cases in Texas that says a mineral executive owner does owe some duty, whether it be fiduciary duty, duty of upmost good faith and fair dealing, or reasonable landowner duty, to his nonparticipating interest owners be they mineral cotenants or royalties.

OWEN: Can you prove damages without 3-D seismic?

BRAUGH: I cannot prove it reliably. I think that that's more of a Robinson question.

OWEN: Do you have 2-d seismic?

BRAUGH: I don't have 2-d seismic actively purchased.

OWEN: Does your expert have it?

BRAUGH: He had it in a previous case. I don't know if he still has it.

OWEN: Can you get it for this case?

BRAUGH: I believe there are some 2-d seismic that lies across this 20,000 acres that may be available for purchase. I don't know the extent of them.

O'NEILL: Am I to understand that opposing counsel's expert is relying on this data to attack your damages?

BRAUGH: Opposing counsel's expert says that my expert who has previously conducted an evaluation in a different case on the same property without the benefit of 3-D seismic data, Bass's expert says 1) Mr. Brown was wrong _____; 2) his opinions weren't reliable and not based upon reliable information; and 3) I intend to prove it by using Bass's 3-D seismic data that he will give me; and 4) I, Bass's expert need to look at the 3-D seismic data in this case in which to do my own job for Bass. So that was one of the reasons we needed the data. There are many other others. We can't quantify the amount of reserves that were there and this is not just a damages issue.

PHILLIPS: He's going to look at the _____ but he hasn't yet?

BRAUGH: That's what he says in his expert report. I assume that if Bass wants to keep this data confidential he can't show it to his expert because he knows then it becomes discoverable.

PHILLIPS: Once this happens then you get to _____.

BRAUGH: That's true. But the point is when we're sitting there in J. Banales's court in the 105th, this is the evidence that's presented to him. Bass's own expert intends to rely on the data to refute expert's previous work and to do his future work in the case.

I think the rules are abundantly clear that you can't both use something against somebody and then withhold it from discovery. And that was an issue we talked about with the interpretations which are no longer an issue.

One of the questions that was asked by the panel of Mr. Grabel was, isn't this really just a damage's issue? Is there really any liability component to it? And the answer to that is absolutely. There is a liability component to this.

The allegations that plaintiffs made and in all fairness, J. Banales was also the judge in the previous case that we've talked about where my expert had done some work. But one of the allegations in the case was that Lee M. Bass, Inc. had actually paid a certain sum of money to an oil company to get them off their lease on their property. So he bought them off of their lease. And that's what a previous lawsuit was about. In our particular case we allege the same thing. That Lee M. Bass, Inc. has attempted to discourage production and development on this particular piece of property. For whatever reason. Be it because it's his ranch and he loves it, or because he wants it to look like a nature preserve, or because he doesn't want the pollution that may be associated with production. That's our allegation and we do have some evidence of that that we've discovered by other means.

So the question becomes in proving my case, how can I show to the jury that

the reason there hasn't been leasing, the reason there hasn't been exploration, the reason there hasn't been production is not because there are limited prospects, but rather because Lee M. Bass, Inc. doesn't want oil and gas drilling.

HECHT: But don't we first need to know whether that's his call? Don't we first need to know whether a 1.38% or a 2.76% nonparticipating royalty interest can compel the mineral owner to develop the minerals? It seems to me that before we do a whole lot of work on the case, discovered even just routine documents verses trade secret information, you would want to know an answer to that question.

BRAUGH: Several answers to your question. First of all, the 1.38, 2.76 was not in the record before J. Banales. That was added in this court for the first time.

HECHT: Well your brief says it's right.

BRAUGH: Well it is. But the point is if we're judging J. Banales's conduct and whether he clearly abused his discretion.

OWEN: Regardless of the percent he claimed a royalty interest.

BRAUGH: Sure. Absolutely. And we claimed our royalty interest is very valuable. To say it's a 1.38 interest 7 years ago, 8 years ago when production was _____ that 1.38 interest could mean $40,000 a month. It could mean hundreds of thousands of dollars a year. So it's a significant interest.

HECHT: I'm just saying however much money it may be worth and whether it's 2 or 4 or 3, whatever it was it was the same in J. Banales's court is it is here, and you admit that that's what it is. Wouldn't it be good to know whether that interest can compel development of the property before we went to a lot of trouble to discover documents and put on damages?

BRAUGH: I still have three responses to that. One, we never get to that question respectfully if they have not proved this is a trade secret. The evidence was very scant on the subject of trade secret. If it's not a trade secret then we look at Walker v. Packer. We say okay, the judge didn't wrongly compel privilege information. Question No. 2. Is the discovery patently irrelevant? Any claim. And would be unduly burdensome to require production? You can't meet the second prong of Packer by any means by delivering a three dimensional magnetic seismic tape. So if there is no trade secret you don't get there. That's answer no. 1.

Answer no. 2. If these plaintiffs do not have any cause of action against Mr. Bass or his companies for activities on the Erck property is the data still relevant to any other part of the case? And it absolutely is. Plaintiffs presented evidence at the hearing that on the Erck property you have the McGill field, it's an old field up there, it's been producing for a long time. There's a lot of well data. So we can look down these well bores. We can get the data and we can

relate the three dimensional seismic data with that well bore data to actually determine which structures are oil and gas bearing. Which structures are perspective? Which structures are not perspective? So my claims are limited to the Weekly property, which has very limited well control data.

I still need to get out to the West, to the Erck tract, where there is a significant field, and there's a lot of data. And I need to proceed from the known area on the Erck field to the unknown area on the Weekly. And so by doing that that's really the only way that we can make his opinions reliable. So the data is not just relevant. It is also relevant to Weekly.

What you are reviewing is the TC's discretion. And when we look at these cases there are cases saying that duty is owed. And when J. Banales issues an order in calling for production of data that is relevant...

OWEN: Let's suppose my grandfather deeds me 1/16th royalty interest in the family ranch. Can I then sue my grandfather if he decides to turn it into a game preserve and doesn't want to drill ever out there during his lifetime?

BRAUGH: Yes, you could.

OWEN: Let's assume that the property next door was owned by someone that was unrelated to this lawsuit. Can you go and compel them to produce their 3-D seismic under a protective order?

BRAUGH: I think discovery on nonparties like that is an entirely different animal that's governed by a different rule of procedure. I would have to show the need obviously, and if I can show the need and we balance the risk of harm verses the benefit or my need for that data and that balance comes out in my favor, the answer is yes.

OWEN: If this is a trade secret can you prove your damages as to Weekly property without the 3-D seismic?

BRAUGH: I think that's a question that remains to be determined.

JEFFERSON: Wasn't that your burden to present evidence on that at the hearing? Isn't that part of what you had to show?

BRAUGH: Part of what I had to show is my need for the data.

JEFFERSON: Didn't you have to show that it was not available from another source?

BRAUGH: To the extent I did. That has been proven. Both Exxon and Bass put on evidence and testimony that they are the only two who owns this data.

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REBUTTAL

ENOCH: The question was asked of Mr. Braugh, before we get all involved in all this discovery wouldn't it be appropriate to find out if there is even a cause of action here? There are mechanisms for asking the court to address whether or not there is a cause of action existing. Is it appropriate to put the court in a position of addressing that simply in the context of a discovery dispute as opposed to a motion for summary judgment or a motion to the plea of the jurisdiction or any other sort of dilatory plea?

GRABLE: We have filed a motion for summary judgment. It has been submitted. It has sat undecided for over a year.

ENOCH: Did you ask the court to stop discovery until you determine the threshold question or a cause of action?

GRABLE: No. In fact the summary judgment argument occurred after the mandamus was already filed at the Corpus Christi CA.

OWEN: In the TC did you raise this legal no duty issue in the motion to compel?

GRABLE: Yes.

OWEN: What about your expert? Is your expert going to rely on the 3-D data?

GRABLE: No, unless it's compelled to be produced.

OWEN: What was the evidence at the hearing about what your witness said about the 3-D data?

GRABLE: My expert, Mr. Hilte's letter says basically, if and when. But he hasn't done a study yet. If and when he gets the data he'll do the study. But at the time we have not submitted the data to our testifying expert. In fact we have a rule 11 agreement that we will not do so. We will not use the interpretations. And I know that if I give it to my testifying expert I might as well give it to them.

O'NEILL: It presents a tricky situation at trial you would admit when the experts get on the stand, because to the extent you are going to be attacking the reliability of their data, you know if you say well you can't tell from this information whether that's true or you can't tell from that information. You start tearing it down on that basis knowing there is data that you could tell that from doesn't that create a bit of a problem in terms of the necessity?

GRABLE: It creates a dilemma or a decision for the owner of the trade secret: Do I wish

to make it more widely available because I've been sued, or is it so valuable that I want would rather protect it...

O'NEILL: I guess that what I'm asking you is when you take their expert witness on cross-examination it strikes me that if you start attacking the underlying premise or some of their conclusions knowing that you had the information that would allow them to make a stronger conclusion, doesn't that become a problem with the necessity test?

GRABLE: I don't know whether the information would allow their expert to make a stronger conclusion, or whether it would actually refute his conclusions. If my expert hadn't studied it and come up with an opinion based upon it, then neither - it 's like we wound the clock back 15 years and there is no 3-D seismic data and we're doing it on 2-D and well data and subsurface and the way geologist used to do evaluate prospects. And it's our decision and it's one that puts us in a dilemma: which way are we better off. Our clear path now is that we believe this is a trade secret. We believe it is not relevant to any legitimate claim in this case.

O'NEILL: If Dancinger doesn't completely take care of this and the laws a bit unsettled in this area, then how can we say the TC abused its discretion?

GRABLE: I do not think it's unsettled.

O'NEILL: Does your argument depend on us finding that it is not unsettled?

GRABLE: If we consider the 5th amended, which he filed after the order, the first order to compel was on Sept. 7, he files his 5th amended...

O'NEILL: There's nothing between the petitions being filed. It makes the law more or less settled in this area.

GRABLE: The 4th amended doesn't even allege a claim. He hasn't even pled a claim. The 5th amended he does implicate the Erck in some of his pleadings on fiduciary duty and other claims, but if you read it there is no claim. If you read it and just look at some cursory law it's a fanciful claim. And if you look at Dancinger it looks like a lease.

O'NEILL: In order to rule your way on that question, we have to find that Dancinger did take care of it and the law is not unsettled in this area. Or else it would be under a number of the TC's discretion.

GRABLE: I think I would agree. If either you consider the 4th to allege a claim, or you look at the 5th, and so if he has alleged a claim at that point we're saying that in order for him to meet the first prong of the test he's at least got to allege a claim that's recognized at law. And we say there is no duty to develop that Mr. Bass and his...

O'NEILL: And the law's settled on that?

GRABLE: Yes. And Mr. Bass as any owner of 100% of minerals in the surface can choose to drill a well, lease for a well, or not at his election. He has utterly no duty to a fixed and permanent royalty interest...

OWEN: And there's no claim for executive rights whatsoever. Is that correct?

GRABLE: No duty to develop.

OWEN: Is there any claim that they own any executive rights?

GRABLE: No. None. They own zero minerals. On the Erck tract Mr. Bass owns 100% of the mineral estate subject only to these...

OWEN: I thought I saw somewhere in there that they were claiming an executive right.

GRABLE: That's over on the Weekly tract. That's what this lawsuit is really about is the interpretation of the Weekly. We think they are using this as a Trojan horse to get their hands on the seismic data on Erck which is going to lead the third lawsuit.