

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

**IN RE: KATRINA CANAL BREACHES *
CONSOLIDATED LITIGATION ***

CIVIL ACTION

NUMBER: 05-4182 “K”(2)

JUDGE DUVAL

**PERTAINS TO: MRGO, Robinson *
(No. 06-2268) ***

MAG. WILKINSON

MOTION TO COMPEL DISCOVERY

re: Reliance Materials of Defendant’s Expert Bruce Ebersole

NOW INTO COURT, through undersigned counsel, comes the Plaintiffs Norman Robinson, Kent Lattimore, Lattimore & Associates, Tanya Smith, Anthony Franz, Jr., and Lucielle Franz, who in accordance with the provisions of Fed.R.Civ.P. 37 (a) (1) and (2) (B), respectfully move this Honorable Court for an Order compelling the defendant United States of America to produce its experts’ reliance materials, specifically those of Defendant’s Expert Bruce Ebersole, as set forth by previous court order and repeated requests by the Plaintiffs.

In particular, Mr. Ebersole promised to produce a series of calculations upon which he based his opinions. However, Mr. Ebersole has failed to comply with his assurances that these pertinent calculations would be produced.

WHEREFORE, the Plaintiffs Norman Robinson, Kent Lattimore, Lattimore & Associates, Tanya Smith, Anthony Franz, Jr., and Lucielle Franz pray that this Court grant the Plaintiffs’ Motion to Compel.

Respectfully Submitted,

**APPROVED PLAINTIFFS LIAISON
COUNSEL**

/s/ Joseph M. Bruno
JOSEPH M. BRUNO (La. Bar # 3604)
Law Offices of Joseph M. Bruno
855 Baronne Street
New Orleans, Louisiana 70113
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion to Compel upon all counsel of record by placing same in the United States mail, properly addressed and with first-class postage, or by facsimile or other electronic transmission this 27th day of April, 2009.

/s/ Joseph M. Bruno
Joseph M. Bruno

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(No. 06-2268) ***

MAG. WILKINSON

**MEMORANDUM IN SUPPORT OF THE PLAINTIFFS’ MOTION TO COMPEL
re: Reliance Materials of Defendant’s Expert Bruce Ebersole**

MAY IT PLEASE THE COURT:

NOW INTO COURT, through undersigned counsel, comes the Plaintiffs Norman Robinson, Kent Lattimore, Lattimore & Associates, Tanya Smith, Anthony Franz, Jr., and Lucielle Franz, who in accordance with the provisions of Fed.R.Civ.P. 37 (a) (1) and (2) (B), respectfully move this Honorable Court for an Order compelling the defendant United States of America to produce defendant expert Bruce Ebersole’s reliance materials as specified by previous court orders and as specified in each defense experts’ Notice of Deposition, for the reasons more fully set forth below.

I.

At the heart of the current dispute is Mr. Ebersole’s failure to produce a series of calculations upon which he based his opinions. At deposition, it was pointed out to Mr. Ebersole that there was substantial concern about the validity of his calculations in “modeling” his storm

surge hydrographs. In response, Mr. Ebersole indicated that he would have to “go back and check” his calculations. (See Exhibit 1 - Ebersole Transcript, p. 339, l. 1 through p. 341, l. 8).

Due to time constraints exacerbated by the United States’s steadfast refusal to expand the time to complete Mr. Ebersole’s deposition (even though the defendant United States had refused to produce Mr. Ebersole’s reliance materials prior to the deposition), it was agreed that Mr. Ebersole would produced the calculations at issue sometime after the deposition. (See Exhibit 2 - Ebersole Transcript, p. 646, l. 14 through p. 647, l. 22).

Mr. Ebersole has failed to produce ANY of the calculations at issue.

II.

Upon being informed of the defendant United States’s call order of witnesses at trial, Plaintiffs re-urged their request that Mr. Ebersole produce the series of calculations upon which he based his testimony. (See Exhibit 3 - Email dated Sunday, April 26, 2009).

Mr. Ebersole’s calculations have yet to be produced.

III.

This dispute arises from a long line of discovery obligation transgressions perpetrated by the defendant United States, beginning with the deadline for it to first produce its expert reports and reliance materials.

IV.

On October 9, 2008, the Court, per the Amended *Robinson* Case Management Order (Rec. Doc No.15841), ordered the defendant United States to produce its expert reports and computer generated evidence on December 22, 2008.

V.

In direct contravention of this order, the United States “produced” their expert reports in an untimely fashion, claiming that their delivery was delayed by inclement weather.¹

Nonetheless, the defendant filed a Notice of Production on December 22, 2008, flaunting the Court’s October 9, 2008 Amended *Robinson* Case Management Order by stating that the Plaintiffs would need to contact defendant’s counsel to obtain the computer generated evidence that the experts relied upon in drafting their reports. (Rec. Doc. 16833).

VI.

Between January 6, 2009 and January 28, 2009, at least six separate requests for reliance materials were sent by the Plaintiffs. The defendant neither produced said evidence nor responded to these request.

VII.

Without either the reliance materials produced or an indication of where said materials could be located (Plaintiffs dispute that there was any such production), Plaintiffs were forced to start noticing the depositions of the defense experts. To address the government’s inert production, Plaintiffs included with the Notice of Deposition, as an exhibit, a list of materials, including reliance materials, regularly produced by experts in conjunction with their deposition.

At deposition, the defense experts consistently appeared at their deposition without *ANY* of the specified information, and in fact Mr. Ebersole testified under oath at deposition that the “government took everything” on his hard drive regarding his expert report. When pressed at the

¹ That the defendant here apparently attests that the U.S. Postal Service cannot operate effectively in a snow storm or that no one at the Department of Justice can upload ten (10) reports electronically to an internet “send space” site should be viewed skeptically by the Court.

deposition by Mr. Bruno when this was produced, defense counsel Rupert Mitsch could only state that he “assumed it had been produced,” but he “personally” didn’t know if it had been.

VIII.

Because of the United States’s contemptuous disregard for its discovery obligations, Plaintiffs were left with no recourse but to seek judicial intervention to enforce the Court’s October 9, 2008 Order, and filed a Motion to Compel on February 4, 2009. (Rec. Doc. 17542).

Instead of producing its experts’ reliance materials, the defendant opposed the Plaintiffs Motion to Compel, the defendant asserted for the first time that the inclusion of Exhibit A to the Notice of Deposition was improper! (See Response (Rec Doc. 17701), pg. 1). Here, the government was either purposefully misleading the court, or was flat out wrong, as Case Management Order No. 4 (“CMO 4”) Sec. (IV) (D)(3), footnote 7, only precluded the use of Rule 30(b)(5) requests for common liability issues fact witnesses (See Rec. Doc. 3299, pg. 35). The provision of CMO 4 addressing expert common liability issues experts contained no such prohibition. The Court will note that the Exhibit A requests were inclusive of those materials specified by FRCP, Rule 26 (a)(2)(B), CMO 4, Sec. (IV) (E)(2), and the Court’s Order of October 9, 2008.

The magistrate acknowledged the obligation of the defendant to produce their experts reliance materials pursuant to Rule 26, as implemented by the court’s previous orders, and found on February 20, 2009 that the government had been “dilatatory in its compliance with its disclosure obligations” and ordered that the government produce “all materials upon which defendant’s experts relied... no later that February 27, 2009.” (Rec. Doc. 17816).

IX.

On February 26, 2009, the defendant filed a Motion for Reconsideration (Rec. Doc. 17915) to further consume the time needed for Plaintiffs to review these materials, citing no legal argument or precedent entitling it to relief it sought, yet arrogantly disregarding the *Pre-Trial and Trial Procedures-Civil Case Section "K"* (Rec. Doc 3408-2) in which this Court recognized that motions for reconsideration were "generally a waste of the Court's time," and "such motions are not even recognized in the Federal Rules of Civil Procedure." As such, it was specified that such a Motion for Reconsideration could be filed only upon seeking leave of Court to file. The defendant United States again utterly disregarded one of the Court's standing orders, and simply filed their Motion for Reconsideration without leave.

X.

At the heart of the current dispute is Mr. Ebersole's assurances that he would produce a series of calculations upon which he based his opinions. Mr. Ebersole has failed to comply with his assurances that these pertinent calculations would be produced, leaving the Plaintiffs no choice but to file the current Motion to Compel.

WHEREFORE, the Plaintiffs Norman Robinson, Kent Lattimore, Lattimore & Associates, Tanya Smith, Anthony Franz, Jr., and Lucielle Franz pray that this Court grant the Plaintiffs' Motion to Compel.

Respectfully Submitted,

**APPROVED PLAINTIFFS LIAISON
COUNSEL**

/s/ Joseph M. Bruno

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I hereby certify that I have served a copy of the above and foregoing upon all counsel of record by placing same in the United States mail, properly addressed and with first-class postage, or by facsimile or other electronic transmission this 27th day of April, 2009.

/s/ Joseph M. Bruno

Joseph M. Bruno

Page 339

1 Q. And I said, all we have to do now is
 2 change that into feet.
 3 A. Right. And there's 3.2 feet per
 4 meter, so I multiplied .00144 times 3.28.
 5 Q. And you get?
 6 A. I got .0047 feet.
 7 Q. Okay. In one half hour.
 8 A. In one half hour. So that would be,
 9 converting it the inches, that's one twentieth
 10 of an inch.
 11 Q. Well, I know it's small, but you
 12 reported .002.
 13 A. Yeah. I have to think about how -- I
 14 may have, um -- I think what I might have done
 15 was assumed that the significant height of 3
 16 represented a time from 2:45 a.m. to 3:15 a.m.
 17 I'd have to go back and check my calculation,
 18 but I think what we can see is, you know, the
 19 cumulative grass cover in these first two
 20 columns, whether it's .002 or .004 our
 21 calculation is .0047, these are tiny, minuscule
 22 values. So if you want to go through the
 23 calculations again and see if we can reproduce
 24 these numbers, we can do that, but these are
 25 minute values, that's the whole point here,

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1 that's the message. These are minute.
 2 Q. Bruce, I'm with you. But again, as I
 3 said, it's not for me to decide, it's for the
 4 third guy to decide. All I wanted to do was
 5 see how you got where you got. And the number
 6 you get is .0047 feet, and you reported
 7 .002 feet. Isn't that true?
 8 A. I'd have to go back and check my
 9 calculations on this.
 10 Q. All right. Well --
 11 A. I think the real point here is that
 12 it's minute.
 13 Q. Listen, I'll give you that option, but
 14 see if this is an accurate --
 15 A. I don't want to get us on the bark of
 16 the tree and lose sight of the forest here, you
 17 know.
 18 Q. I understand. I'm going to mark this
 19 piece of paper as Exhibit Number 6.
 20 A. I guess I would like some more time if
 21 we're going to really start checking
 22 calculations to go do it in a situation where I
 23 don't have to sit here and do it here. But if
 24 we want to, we'll take time and we'll check
 25 them, and I'll do them and we'll check them to

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1 my satisfaction.
 2 Q. We'll let you do that on a break,
 3 because I'm take to accomplish this dep -- but
 4 I'm going to mark this and attach it to your
 5 deposition as Exhibit Number 6.
 6 (Exhibit 6 was marked for
 7 identification and is attached hereto.)
 8 A. Okay.
 9 EXAMINATION BY MR. BRUNO:
 10 Q. All right. Now, let's look --
 11 MR. MITSCH:
 12 This is Mr. Bruno 's writing.
 13 MR. BRUNO:
 14 It's Mr. Bruno's writing, and
 15 you'll see it's consistent with the
 16 record. And if you want to check
 17 whether what I've written down is
 18 consistent with the record we can do
 19 that on your time.
 20 EXAMINATION BY MR. BRUNO:
 21 Q. Let's go to Page 297 of the article.
 22 You see that table there, Figure 6?
 23 A. Figure 6?
 24 Q. Yeah. Page 297.
 25 A. In the journal?

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1 Q. Yes.
 2 A. Okay. When you said table you sort of
 3 threw me.
 4 Q. Figure. I'm sorry. Maximum
 5 permissible duration of wave attack. Can you
 6 help me understand this table?
 7 A. Probably not without going back and
 8 reading this paper. It's probably been a half
 9 a year to a year since I read this paper. It's
 10 not one that I used.
 11 Q. Okay. Does the line represent the
 12 maximum permissible duration of wave attack?
 13 A. I said I can't help you.
 14 Q. You can't help me there.
 15 A. I would have to go back and reread
 16 this paper and understand what this figure is
 17 about and what -- how it was derived and what
 18 they're trying to do with the figure. As I
 19 said, it's not one that I've used in my report.
 20 Q. Okay. All right. In your calculation
 21 did you have a determination of the thickness
 22 of the soil?
 23 A. I don't understand your use of the
 24 word thickness of the soil.
 25 Q. Oh, I'm sorry. The thickness of the

(Pages 339 to 342)



Page 643

1 generate or did you use the Westerink created
 2 figure which I think is at Page 166, Figure
 3 137?
 4 A. No, I had my folks generate these.
 5 Q. They did.
 6 A. Yes.
 7 Q. And did you -- and so despite the fact
 8 that you really don't like to look at these
 9 things, and these computer models have some
 10 possible error in them, you did rely upon this
 11 I guess you'd call it -- what would you call
 12 this?
 13 A. It's a distribution of peak water
 14 level.
 15 Q. You relied on that for this exercise?
 16 A. Yeah. Again, just general shapes of
 17 contour patterns. I didn't -- you know, at the
 18 end I ended up scaling this, looking at some
 19 specific high water marks.
 20 Q. What did the IPET get as a number for
 21 the surge height at Reach 2, what number did
 22 they use?
 23 A. I'm estimating here.
 24 Q. Using the color spatial
 25 distribution --

Page 644

1 A. No, I was using this graph. These are
 2 some time series from some points. My estimate
 3 would be 15-1/2 to 16-1/2 at roughly 7:30,
 4 7:45.
 5 Q. 15-1/2 to -- I'm sorry.
 6 A. 16-1/2.
 7 Q. And you're --
 8 A. 17, that range.
 9 Q. And you're higher by about a foot,
 10 right?
 11 A. The values I'm quoting here don't have
 12 wave setup in them, so we've added wave setup.
 13 Q. Wait. No. The values that we've been
 14 talk about don't include wave setup. All we
 15 did was alter the hydrographs.
 16 A. Okay. I got you.
 17 Q. Let's be fair.
 18 A. I got you.
 19 Q. So your still water heights are about
 20 a foot higher than the IPET.
 21 A. Yeah. These peaks for the SL15 were
 22 roughly 16, and then here -- yes. Looks like a
 23 little bit less than 17, maybe 16.8, maybe
 24 eight tenths of a foot.
 25 Q. And Westerink gets -- my goodness, it

Page 645

1 looks to me like he gets eleven.
 2 A. Eleven?
 3 Q. Eleven.
 4 A. For the base case?
 5 Q. Am I reading it wrong no?
 6 A. I don't know.
 7 Q. Look, like you said, it could be bad
 8 colors, or it might be my lying eyes, but --
 9 it's green along -- I see green.
 10 A. It looks like around 16, a little bit
 11 more than 16, from this plot.
 12 Q. Okay, 16. That's fine.
 13 A. I don't know how you're getting
 14 eleven.
 15 Q. Like I say, I trust you, man.
 16 A. You and me. I don't like reading
 17 stuff off those color maps.
 18 Q. But 16, and 16 is what you -- I think
 19 Ivor was telling me 16 is what he reports in
 20 his report. So Westerink gets closer to the
 21 IPET surge height, didn't he?
 22 A. Say that again.
 23 Q. Westerink 's surge number for Reach 2
 24 is closer to the IPET result than you are.
 25 A. I'm using Westerink's results.

Page 646

1 Q. Okay. And are you're scaling them up?
 2 Never mind. I'm sorry. Okay.
 3 So is it a foot -- foot and a half or
 4 is it a foot?
 5 A. Is what a foot or a foot and half?
 6 Q. The scaled number. So it's 12 percent
 7 so it's going to be --
 8 A. Roughly a foot and a half to two feet,
 9 as I remember.
 10 Q. So it could be as much as two feet.
 11 A. Okay.
 12 (Brief recess.)
 13 EXAMINATION BY MR. BRUNO:
 14 Q. All right. Bruce, you said that you
 15 would give me -- I'd like for you to give me
 16 for each of the calculations for the 21 points,
 17 so that we can figure out --
 18 A. I said that I would do that at a later
 19 date.
 20 Q. Oh, yeah. Not now. I'm not asking
 21 for you to do it now, but I would is for you to
 22 give it to Rupert and send it to me. Because I
 23 have to tell you, I'm a little confused. When
 24 I multiply the 19 percent times the 15.2, I get
 25 a figure, a then I add that to 15.2 which is

83 (Pages 643 to 646)



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1 the scaled number, I don't get my 18.7, I get
 2 less than that. It seems to me that the right
 3 way to do it would be to divide the difference
 4 by the measured number and then multiply that
 5 result times the computed in order to figure
 6 out -- I'm sorry -- to divide my 3.5 by the
 7 15.2, and I get .23. And then when I add .23
 8 to 15.2 -- it still doesn't come out.
 9 18.7 minus 15.2 is -3.5. Then if I
 10 take the 3.5 and divide it by 15.2 I get
 11 .23 percent. And then if I multiply 23 percent
 12 times -- let's see. If I multiply the 15.2
 13 times my .19, I get 2.888. When I add that to
 14 15.2, I get 18. So I'm seven tenths off. So
 15 maybe I'm doing something wrong.
 16 A. Well, what I'll do is I will provide
 17 you with that, those 21 points, the computed
 18 peaks --
 19 Q. Great.
 20 A. -- and the peaks of the estimated
 21 hydrographs.
 22 Q. All right. Now, let me show you --
 23 I'll mark this as Exhibit Number 13. I'm going
 24 to represent these come from -- and I'm happy
 25 to attach the cover those, but this comes from

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1 Resio 's report.
 2 Have you seen Resio 's report?
 3 (Exhibit 13 was marked for
 4 identification and is attached hereto.)
 5 A. No, I have not.
 6 EXAMINATION BY MR. BRUNO:
 7 Q. Okay. This is a chart in his report
 8 which indicates maximum significant wave
 9 height. Okay?
 10 A. Okay.
 11 Q. Would you look at where the MRGO
 12 should be? You see a series of blobs? Beads?
 13 A. I see the high and low areas.
 14 Q. No, the little round circles.
 15 A. Some kind of -- yeah, some sort of a
 16 modulation in the wave height, goes up a little
 17 bit, down a little bit, up a little bit? Is
 18 that you're describing?
 19 Q. No. I see beads. I see a round thing
 20 and then a round thing and then a round thing
 21 and a round thing.
 22 A. Okay.
 23 Q. I'm calling those beads.
 24 A. The darker colors are a little bit
 25 higher than -- the darker reds are a little bit

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1 higher than the oranges?
 2 Q. No. I'm talking about the round
 3 things. You see those?
 4 A. I think we're talking about the same
 5 thing.
 6 Q. They're all here. These little --
 7 they're round. They're small round circles.
 8 A. Okay.
 9 Q. Okay? And if that's the MRGO, it
 10 should be represented or it should look like
 11 the Mississippi River does, shouldn't it?
 12 A. Could you rephrase the question?
 13 Q. In other words, there should be two
 14 parallel lines. If that's the MRGO --
 15 A. Is this the base case, Case H1?
 16 Q. It's Page 33 of his report, so --
 17 Oh, it's in your report. I'm sorry.
 18 It's also in yours. Sorry.
 19 A. What was the figure?
 20 Q. We shall find it. 33.
 21 A. Page 33?
 22 Q. Page 33, yeah. It's Figure 20, and
 23 yes, it's Figure 20. You see the beads?
 24 A. Okay. I think I understand what
 25 you're calling a bead. That's not a term I use

Page 650

1 a lot. So.
 2 Q. Well, that's where the MRGO channel
 3 is. And you see that represented --
 4 A. Approximately somewhere in there I
 5 would agree. I don't know exactly how you can
 6 determine exactly where the channel is from
 7 this particular image.
 8 Q. Well, I'm doing it by logic.
 9 A. Yeah. It's following the levee, more
 10 or less, so.
 11 Q. And it's also based upon the
 12 resolution of this model, which I know is not
 13 very good at this point, it's six hundred and
 14 some odd feet by six hundred and some odd feet.
 15 So in many instances his grid picks up the
 16 MRGO, and in some instances it doesn't pick up
 17 the MRGO because the MRGO may be on the edge of
 18 one of these six hundred and fifty foot
 19 squares.
 20 A. Okay.
 21 Q. Right? Does that make sense?
 22 A. Well, I know the MRGO in the base case
 23 is -- the bankline is highly irregular.
 24 Q. Sure.
 25 A. Okay?

Scott Joanen

From: Elisa Gilbert [egilbert@gilbert-firm.com]
Sent: Sunday, April 26, 2009 5:35 PM
To: robin.doyle.smith@usdoj.gov
Cc: Joe Bruno; Scott Joanen; brendan obrien
Subject: ebersole calculations
Follow Up Flag: Follow up
Flag Status: Red

Robin:

At teh deposition of Bruce Ebersole he promised to produce a series of calculations upon which he based his opinions.

See, p 340 lns 4-9 and p. 646 ln 14 and 647 ln16. Please produce these immediately as we need them to prepare our cross.

Thank you,
Elisa Gilbert



CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing upon all counsel of record by placing same in the United States mail, properly addressed and with first-class postage, or by facsimile or other electronic transmission this 27th day of April, 2009.

/s/ Joseph M. Bruno

Joseph M. Bruno

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

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JUDGE DUVAL

**PERTAINS TO: MRGO, Robinson *
(No. 06-2268) ***

MAG. WILKINSON

NOTICE OF HEARING re: MOTION TO COMPEL

PLEASE TAKE NOTICE that Plaintiffs Norman Robinson, Kent Lattimore, Lattimore & Associates, Tanya Smith, Anthony Franz, Jr., and Lucielle Franz in the above referenced action, on Wednesday, May 13, 2009 at 9:30 a.m. at the United States District Courthouse, Court Room C352, 500 Camp Street, New Orleans, Louisiana, and before U.S. District Judge Stanwood R. Duval, Jr., will bring on for hearing the Motion to Compel the United States of America to produce defendant expert Bruce Ebersole's reliance materials.

Respectfully Submitted,

**APPROVED PLAINTIFFS LIAISON
COUNSEL**

/s/ Joseph M. Bruno
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/s/ Joseph M. Bruno

Joseph M. Bruno