ANTHONY HERNANDEZ and REBECCA EADES, individually and on behalf of decedent CAMRON HERNANDEZ, and COLTON HAWKINS	:	**NUMBER 79386**
VERSUS	:	**42ND JUDICIAL DISTRICT COURT**
AETHON FIELD SERVICES, LLC	:	**DESOTO PARISH, LOUISIANA**

PLAINTIFFS' OPPOSITION TO AETHON FIELD SERVICES, LLC'S MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, come Plaintiffs, Anthony Hernandez and Rebecca Eades, individually and on behalf of decedent Camron Hernandez, and Colton Hawkins, who oppose the motion for summary judgment filed by Defendant, Aethon Field Services, LLC (hereafter referred to as "Aethon Field Services" or "Defendant"), for the reasons set forth herein.

INTRODUCTION

Through its motion, Aethon Field Services first argues that its employees were "borrowed employees" of Aethon Energy Operating (an entity that was previously held to be the statutory employer of the decedent and Mr. Hawkins). Thus, according to Aethon Field Services, "[b]ecause AFS' employees were also the borrowed servants and employees of AEO they too are cloaked with co-employee tort immunity." As outlined below, Aethon Field Services is unable to meet its burden of establishing the affirmative defense of "borrowed employee" as there are numerous genuine issues of material fact that preclude summary judgment on the issue. In fact, the entire purported factual basis of Defendant's "borrowed employee" defense – the affidavit of Preston Phillips – is directly contradicted by Phillips' own deposition testimony, by the recent testimony of Aethon Field Services employees, and by the documentary evidence produced in this case.

In addition, Defendant also suggests to the Court that Aethon Field Services' status as a "wholly owned subsidiary" of Aethon Energy Operating is somehow relevant or determinative. Specifically, Defendant suggests, without citing any authority, that its status as a subsidiary entity somehow means that any tort immunity enjoyed by its "parent" company, Aethon Energy

Operating, must also extend to it. In other words, when it is convenient and beneficial to Defendant, it will seek to set aside its separate corporate personality and ask the Court to merge its identity with that of its parent company. As discussed in detail below, what Defendant is proposing flies directly in the face of well-settled Louisiana corporation law as well as the Louisiana Supreme Court's decision in *Smith v. Cotton's Fleet Services, Inc.*, 500 So.2d 759 (La. 1987), which explicitly rejected a similar attempt by a corporate entity to merge its identity with an affiliated company for the purpose of obtaining tort immunity under the Louisiana Workers' Compensation Act.

Finally, Aethon Field Services' alternative argument – that there is no evidence of its fault – is clearly without merit as there is a plethora of evidence in this case establishing the negligence of Aethon Field Servies, including its violation of federal regulations, its failure to follow industry-standard protocol, and its violation of its own safety policies and procedures. Plaintiffs attach the affidavit and expert report of Gregg Perkin, a professional engineer with particular expertise in oilfield operations and safety, who, as outlined below, will testify about Aethon Field Services' actions and ommisions which led to the accident in question.[1]

FACTUAL BACKGROUND

Aethon United BR LP owns certain oil and gas related assets in north Louisiana, including the well-site and production tank in question. Aethon United BR LP and/or its predecessor entity contracted with Aethon Energy Operating, LLC to act as the "operator of record" of these assets.[2] Aethon Energy Operating, in turn, relied on Aethon Field Services to actually "operate the assets on a day-to-day basis."[3]

Aethon Field Services is a limited liability company organized under the laws of the State of Deleware.[4] It is fundamental that the business or operations of any company are defined by the activities of its employees.[5] The employees of Aethon Field Services were at all relevant times engaging in providing oilfield services. Preston Phillips, the Vice President of Aethon

[1] Affidavit of Gregg Perkin and accompanying expert report and CV, attached hereto as Exhibit "A."
[2] Excerpts of Deposition of Preston Phillips, page 14, line 9, attached as Exhibit "B"; *see also* Affidavit of Preston Phillips dated December 21, 2019, attached to Defendant's Motion for Summary Judgment.
[3] *Id.* at p. 14, lines 8-10.
[4] *Id.* at p. 10, lines 6-11.
[5] *See, e.g., Stop & Shop Companies, Inc. v. Federal Ins. Co.*, 136 F.3d 71, 74 (1st Cir. 1998) ("We repeat at the threshold the fundamental premise that, while a corporation does have a noncorporeal and independent existence, it can conducts its affairs *only through its officers and employees.*") (emphasis added).

Field Services, testified that the employees of Aethon Field Services conduct "all of the operations on a day-to-day basis that are normal and customary to operating oil and gas wells" in the field in question.[6] The "labor based services" provided by Aethon Field Services are performed by that company's workforce of approximately 100 employees.[7] The categories of Aethon Field Services' employees include pumpers, plant operators, measurement technicians, production foremen, and HSE (health, safety and environmental) personnel.[8] Notably, Mr. Phillips admitted that Aethon Field Services employed its own "supervisory personnel above those people."[9] Defendant's conclusory statements that Aethon Field Services is a "mere payroll company" that "conducts no operations" is patently inaccurate.

Discovery has revealed that all of the individuals who managed and operated the oilfield in question were employees of Aethon Field Services (and G&D Well Services) – not Aethon Energy Operating.[10] These individuals include, but are not limited to, the following:

- Michael Murray – Aethon Field Services District Foreman;[11]
- James Thad Lowe – Aethon Field Services Production Foreman;[12]
- James Barber – Aethon Field Services Lead Operator/Pumper;[13]
- Stephanie Scruggs – Aethon Field Services Head of Safety;[14]
- Michael Garner – Aethon Field Services HSE Advisor;[15]
- Leon Hooker – Aethon Field Services Pumper III;[16]
- Don Parker – G&D Well Services Supervisor;
- Steven Sharrow – G&D Well Services Contract Lease Operator; and
- Ronnie Kendrick – G&D Well Services Contract Lease Operator.

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[6] *Id.* at p. 14, lines 17-23.
[7] *Id.* at p. 10, lines 19-21.
[8] *Id.* at p. 8, lines 13-14; *see also* employment files *infra*, notes 11-16.
[9] *Id.* at p. 7, lines 12-25; p. 8, lines 1-14.
[10] These individuals were previously misidentified as employees of Aethon Energy Operating.
[11] *See* Mr. Murray's employment contract, produced by Defendant in response to Request for Production of Documents, attached hereto as Exhibit "C."
[12] *See* Mr. Lowe's employment contract, produced by Defendant in response to Request for Production of Documents, attached hereto as Exhibit "D."
[13] *See* Mr. Barber's employment contract, produced by Defendant in response to Request for Production of Documents, attached hereto as Exhibit "E."
[14] *See* excerpts of Ms. Scruggs' deposition, attached hereto as Exhibit "F," at p. 26, line 25; page 27, line 1.
[15] *See* Mr. Garner's employment contract, produced by Defendant in response to Request for Production of Documents, attached hereto as Exhibit "G."
[16] *See* Mr. Hooker's employment contract, produced by Defendant in response to Request for Production of Documents, attached hereto as Exhibit "H."

On or about April 4, 2017, lightning struck a tank containing hydrocarbons located at the W. Johnson 701 well location, a site that the aforementioned Aethon Field Services employees operated and managed. After the lightning strike, Aethon Field Services undertook the job of managing and coordinating the project of decommissioning the damaged tank. In this regard, Aethon Field Services coordinated and communicated separately with three different companies – Key Energy, G&D Well Services, and USFS – assigning specific tasks to each.[17] Specifically, Defendant asked Key Energy to remove hydrocarbons from the tank.[18] Defendant asked G&D Well Services to use heavy equipment to move the tank a safe distance away from the well area (i.e., the containment area) so that it could later be safely cut and decontaminated of NORM (naturally-occurring radioactive material) by USFS.[19] It was during this process of cutting the tank that it exploded, causing the death of Cameron Hernandez and injuries to Colton Hawkins.

Under OSHA regulations found in 29 C.F.R. 1910.252, Aethon Field Services, as manager of the well site, was responsible for ensuring that *all* flammable materials were removed from the tank before hot work commenced. James Barber, Aethon Field Services' Lead Operator, admitted that Aethon was responsible for properly cleaning the tank.[20] Further, Defendant's head of safety, Ms. Scruggs, admits, among other things, that Aethon "absolutely" has to adhere to *1910.252*.[21] Mr. Murray, who was admittedly responsible for safety supervision at the well site, testified that Aethon Field Services in fact intended to "remove any residual tank contents" before the tank was dismantled and removed.[22] Nevertheless, Defendant has made it clear that it failed in this regard as its position is that only instructed Key Energy to remove "liquids" from the tank.

The services that USFS was contracted to perform did not include cleaning or venting the tank to remove flammable materials. In this regard, before the incident in question, Mr. Lowe of Aethon Field Services met with a representative of USFS to discuss USFS' scope of work.[23] Mr.

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[17] Aethon Field Services employees Thad Lowe and/or Mike Murray approved and discussed the scope of work for each company. *See, e.g.*, excerpts of deposition of James Barber, attached hereto as Exhibit "I," at p. 13, lines 5-12.
[18] Excerpts of deposition of Mr. Murray, attached hereto as Exhibit "J," at p. 9, lines 20-24.
[19] *Id.* at p. 20, lines 6-21; *see also* Exhibit "I," at p. 7-10.
[20] Exhibit "I," at p. 9, lines 20-24.
[21] Exhibit "F," at p. 33, lines 6-12.
[22] Exhibit "J," at p. 5, line 24; p. 20, lines 6-15; p. 40, lines 9-17; *see also* Aethon "Pre-Hearing Violation" report dated July 18, 2017 which was attached to the deposition of Mr. Murray and which is attached hereto as Exhibit "K," at p. 4.
[23] Excerpts of deposition of Mr. Lowe, attached hereto as Exhibit "L," at p. 17, lines 3-19.

Lowe confirmed that his understanding of USFS' scope of work after this meeting was that they would be "taking the tanks and cutting them up and getting ready to haul them off."[24] There was no discussion of venting the tank.[25] In fact, Mr. Lowe testified that he believed (mistakenly) that the tank was properly vented.[26]

Further, the written "proposal" prepared by USFS is limited to the following tasks:

- "Mobilize personnel and equipment to perform activities";
- "Remove metal tanks and cat walks decontaminate and send for recycling"; and
- "Complete all paperwork for transportation and disposal"[27]

The proposal also states that an "RSO" (radiation safety officer) would be present and that the work would involve cutting with a "torch set up."[28] It cannot be disputed that Defendant was fully aware that USFS would be cutting the tank. The written proposal does not include any mention of cleaning the tank, ventilation of the tank, or flammable vapor removal/testing.[29] While Defendant offers an *ex post facto* interpretation of the proposal which suggests that "decontaminate" must include removing hazardous vapors, the USFS and Aethon Field Services witnesses testified to having a contrary understanding.

Specifically, James Barber, Aethon Field Services' Lead Operator, admitted that the NORM decontamination procedure cannot commence until *after* the tank is first cut open.[30] Further, Mr. Murray and Ms. Scruggs understood that the type of "decontamination" to be performed by USFS was "NORM decontamination."[31] NORM decontamination involves removing non-flammable NORM radionuclides, not flammable gas or liquid.[32]

The USFS witnesses also confirmed, based on their discussions with Aethon Field Services personnel, that they understood that the tank would be cleaned and prepared to cut when

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[24] *Id.* at p. 17, lines 14-15.
[25] *Id.*
[26] *Id.* at p. 32, lines 5-10.
[27] USFS, LLC Proposal dated April 4, 2017, which is attached to Mr. Lowe's deposition and is attached hereto as Exhibit "M."
[28] *Id.*
[29] *Id.*
[30] Exhibit "I," at p. 16, lines 13-22; *see also* excerpts of deposition of Barry Stem, attached hereto as Exhibit "N," at p. 69, lines 7-12.
[31] Exhibit "I," at p. 20, lines 16-21; Exhibit "F," at p. 22, lines 12-16.
[32] Exhibit "N," at p. 69, lines 5-6; p. 72, line 14.

they arrived on the date of the accident. In this regard, Drake Williams, the USFS representative who attended the pre-job meeting with Mr. Lowe, testified as follows:

> If we were contracted to clean the tank prior to cutting, there would – the scope would have been different, the charges would have been different. What we expected was the tank to be ready to cut when we arrived on-site.[33]

Further, Mr. Barry Stem of USFS confirmed that USFS' scope of work was limited to cutting the tank, NORM decontamination, and hauling it away.[34] Mr. Stem testified that USFS' scope of work did not include cleaning the tank of all contents.[35] Mr. Stem further confirmed that he was verbally told by Aethon personnel, via telephone conversation, that "the tanks were ready" for the USFS crew to come out and perform its scope.[36]

Mr. Stem also testified that the removal of the tank from the "containment" area, which Aethon Field Services explicitly agreed to complete as per the written job proposal, should never occur absent a thorough cleaning of the tank to remove all flammable materials.[37] Standard oilfield safe practice dictates that the tank should be cleared of all contents and vapors before moving it with heavy equipment.[38]

Thus, it is clear that the entire premise of Defendant's motion – that Plaintiff's employer was contractually responsible for venting and cleaning the tank so thoroughly that it was sure to be free of flammable materials – is not supported by the evidence or, at best, involves major disputed issues of fact. *See, e.g., Hoffman v. Travelers Indem. Co. of Am.*, No. 12-0725 (La. App. 1 Cir. 6/7/13), 121 So.3d 106, n.1 ("Given the weighing of factual evidence generally necessary to determine a party's intent at the time of contracting, such issues are rarely appropriate for resolution by summary."). Notably, the very existence of any dispute, doubt, or confusion concerning the scope of USFS' work is in and of itself evidence of negligence on the part of Defendant, which, as discussed in detail below, had a duty to clearly communicate hazards and coordinate the activities of the various individuals on its well site in a clear manner so that there was no misunderstanding.

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[33] Excerpts of deposition of Drake Williams, attached hereto as Exhibit "O," at p. 28, line 25; p. 29, lines 1-4.
[34] Exhibit "N," p. 70, lines 16-18.
[35] *Id.* at p. 71, lines 1-3.
[36] *Id.* at p. 91, lines 17-20.
[37] *Id.* at p. 86, lines 17-25; p. 87, lines 1-2.
[38] *Id.*

Further, and as outlined below, Defendant – as the "[manager] on whose property cutting and welding is to be performed" – had a non-delegable duty to comply with the very same OSHA regulations that Defendant blames USFS for violating. 29 C.F.R. 1910.252(a). Defendant's request that the Court selectively apply the OSHA regulations is not only completely unequitable but is also completely unsupported by any legal authority. Moreover, Defendant fails to recognize that even if USFS was in violation of a duty, whether imposed by regulations or otherwise, such presents a question of comparative fault for jury determination. *See, e.g., See, e.g., Cunningham v. Northland Ins. Co.*, 00-888 (La. App. 5 Cir. 9/14/00), 769 So.2d 689 ("A determination of what factor(s) caused plaintiff's accident and subsequent injuries, and the apportionment of fault to the factor(s), can only be made by the trier of fact after a full trial on the merits."); *Snearl v. Mercer*, No. 99-1738 (La. App. 1 Cir. 2/16/01), 780 So.2d 563, 582 ("[A]llocation of fault between comparatively negligent parties is a finding of fact.").

LAW AND ANALYSIS

I. Genuine issues of material fact preclude summary judgment on the issue of borrowed employee status.

It is well-settled that tort immunity under the borrowed employee doctrine is an affirmative defense. *See, e.g., Billeaud v. Poledore*, 603 So.2d 754, 755-57 (La. App. 1 Cir. 1992). The party seeking to claim the status of a borrowing employer bears the burden of proof on this issue. *Id.* Courts have recognized that the question of borrowed employee status is inherently factual and should typically be decided by the jury. *Id.* at 756 (noting that the borrowed employee factors "are factual inquiries which should be determined by the jury"). In the summary judgment context, the party invoking the borrowed employee defense "must support his motion with credible evidence that would entitle him to a directed verdict if not controverted at trial." *Hines v. Garrett*, No. 04-0806 (La. 6/25/05), 876 So.2d 764, 766. Because immunity based on the borrowed employee doctrine is in derogation of the general tort rights of victims, the scope of the immunity must be strictly construed. *See, e.g., Sewell v. Doctors Hospital,* 600 So.2d 577 (La.1992).

Louisiana courts have set forth several factors to consider in determining whether an employee is a borrowed servant, none of which is decisive:

(1) first and foremost, who has the right of control over the employee beyond mere suggestion of details or cooperation;

(2) who selected the employee;

(3) who paid the employee's wages;

(4) who had the right to fire the employee;

(5) who furnished the tools and the place to perform the work;

(6) whether the new employment was over a considerable length of time;

(7) whose work was being done at the time of the accident;

(8) whether there was an agreement between the borrowing and lending employers;

(9) whether the employee acquiesced in the new work situation; and

(10) whether the original employer terminated his relationship with or relinquished his control over the employee.

See, e.g., *Billeaud*, 603 So.2d at 56.

Aethon Field Services cannot meet its burden as there is a complete lack of evidence to establish that any Aethon Field Services employee qualifies as a borrowed employee of Aethon Energy Operating. The evidence bearing on each of the borrowed employee factors in this case either does not support a finding of borrowed employee status or implicates significant factual disputes for jury determination.

(1) Right of control beyond mere suggestion of details or cooperation.

To establish borrowed employee status of a worker, it must be shown that the purported borrowing employer exercised direct control and supervision over the work while it is being performed. *Id.* "This factor addresses who directly supervises the employee while the work is being performed." *Garrett v. Adcock Const. Co.*, No. 13-0104 (La. App. 4 Cir. 8/14/13), 122 So.3d 1134, 1139-40. While no single factor is determinative, the control element is considered to be the most important. *See, e.g.*, *LeCroy v. Interim Health Care Staffing of North Louisiana, Inc.*, No. 43-080 (La. App. 2 Cir. 4/2/08), 980 So.2d 838, 842.

As evidentiary support for its assertion that the Aethon Field Services employees were controlled (i.e., directly supervised) by Aethon Energy Operating, Defendant offers only the

affidavit of Preston Phillips, an officer of Aethon Field Services. Mr. Phillips offers, without more, the conclusory statement in his affidavit that Aethon Energy Operating exercised "exclusive control over the job duties and work of those individuals employed by Aethon Field Services, LLC." Defendant has put forth zero factual support to in any way substantiate this conclusory statement. More importantly, Mr. Phillips admitted during his deposition that his conclusory statement is not even based on his personal knowledge.

Mr. Phillips testified that he is an office worker.[39] He has never worked in the field with the Aethon Field Services employees.[40] He admitted that his knowledge of the actual job activities of the field employees was "not that granular[] of a level."[41] Concerning the control and supervision of the Aethon Field Services employees, Mr. Phillips testified as follows:

> Q: Do you know who the supervisors were of the individuals who were working in the Johnson field back in 2017?
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> A: I do not.[42]
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> ***
>
> Q: Okay. Is it possible that these folks weren't supervised by anyone on a daily basis?
>
> A: I do not know.[43]
>
> ***
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> Q: ... I'm asking you for specific individuals in the field back in April of 2017, you don't have any personal knowledge of who was supervising them or what the nature and extent of that supervision was, correct?
>
> A: Correct.[44]

As noted by the Louisiana Second Circuit Court of Appeal:

> Regarding the use of affidavits, the requirement of La. C.C.P. art. 967 that "affidavits shall be made on personal knowledge" has been strictly enforced; it is insufficient for an affiant to merely declare that he has "personal knowledge" of a certain fact. The affidavit must affirmatively establish that the affiant is competent to testify to the matters stated by a factual averment showing how he came by such knowledge. *Express Publishing Company, Inc. v. Giani Investment Company, Inc.*, 449 So.2d 145 (La. App. 4th Cir. 1984).
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> ***
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> Personal knowledge means something which a witness actually saw or heard, as distinguished from something a witness learned from some other person or source. *Panameno v. Louisiana Riverboat Gaming Partnership,*

[39] Exhibit "B," at p. 11, lines 7-9.
[40] *Id.* at p. 11, lines 10-12.
[41] *Id.* at p. 12, line 20; p. 15, lines 1-3.
[42] *Id.* at p. 19, lines 20-24
[43] *Id.* at p. 20, lines 9-11.
[44] *Id.* at p. 28, lines 19-24.

36,172 (La. App. 2d Cir. 10/23/02), 830 So.2d 489; *Shelter Insurance Company v. Broan–Nutone, LLC,* 39,625 (La. App. 2d Cir. 2005), 902 So.2d 1146, *writ denied,* 2005–1483 (La.12/16/05), 917 So.2d 1112.

THH Properties Ltd. Partnership v. Hill, No. 41-038 (La. App. 2 Cir. 6/2/06), 930 So.2d 1214, 1219. It is beyond question that the affidavit of Preston Phillips is not competent summary judgment evidence and has no evidentiary value whatsoever.

Perhaps even more important is the fact that Defendant's purported evidence of "control" – Mr. Phillips' conclusory statement which is admittedly not based on personal knowledge – is directly contradicted by the testimony of the actual Aethon Field Services employees who worked in the field in 2017. For instance, Leon Hooker, an Aethon Field Services pumper/lease operator, testified as follows:

Q: … When you'd go to the well, did you have to check in with anyone there?

A: No.

Q: There was no one telling you what do at the well on a daily basis?

A: No.

Q: You did not require any direct supervision?

A: No.

Q: Did not require someone else directly controlling your work or your assignments?

A: No. I could go there first thing or last thing; it didn't matter.

Q: So you didn't have to check in with anybody to get a daily assignment at the well?

A: No.

Q: Someone from Aethon Energy Operating didn't have to be present to tell you what to do?

A: No.

Q: And didn't control the scope of your work.

A: No, sir.[45]

[45] Excerpts of deposition of Leon Hooker, attached hereto as Exhbit "P," at p. 21, lines 2-24.

The documentary evidence in this case also directly contradicts the conclusory statements of Mr. Phillips. The Aethon Field Services employees in the field in question were required to sign written contracts of employment.[46] These contracts explicitly identify their employer as "Aethon Field Services, LLC."[47] Further, each workers' contract specifically identifies the individuals they must "report to" – in each instance another employee of Aethon Field Services. Further, the employment contracts explicitly state that their training will be provided by Aethon Field Services, LLC.[48] Finally, each of the employment contracts state as follows:

> This offer of employment letter agreement and its Appendix A/Confidentiality and Non-Solicitation Agreement constitutes the entire agreement between the parties hereto and supersede any and all prior understandings, whether oral or in writing, with respect to the subject matter hereof, and may not be amended, discharged, or terminated, nor may any of its provisions be waived, except upon the execution of a valid written instrument executed by you and the Company [Aethon Field Services, LLC].[49]

Defendant has failed to provide evidence of any amendments to these contracts of employment that purport to change or terminate Aethon Field Services as the sole employer or alter the aforementioned provisions concerning supervision, training, etc.

In sum, Defendant has presented no competent evidence to meet its burden of proving that Aethon Field Services workers were directly supervised or controlled by employees of Aethon Energy Operating. In fact, the aforementioned documentary and testimonial evidence proves the contrary or, at the very least, highlights major genuine issues of material fact for jury determination.

(2) Who selected the employees?

Defendant has presented no evidence to meet its burden of proof on this issue. The aforementioned employment contracts of the Aethon Field Services employees were signed by Gordon Huddleston in his capacity as "Co-president and Partner, Aethon Field Services, LLC."[50] This factor clearly weighs against a finding of borrowed employee status.

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[46] *See* Exhibits C, D, E, G, & H.
[47] *Id.*
[48] *Id.* at Appendix A.
[49] *Id.* at paragraph 9.
[50] *See* Exhibits C, D, E, G, & H.

(3) Who paid the employees' wages?

The employees of Aethon Field Services received paychecks from Aethon Field Services.[51] Further, the contract of employment between Aethon Field Services and its employees explicitly states that Aethon Field Services will pay its employees pursuant to "Company's regular payroll practices."[52] "Company" is defined exclusively as "Aethon Field Services, LLC."[53] Further, the employment contracts also state that the employees are eligible for an annual bonus in an amount to be determined "in the sole and absolute discretion" of "Company" – "Aethon Field Services LLC."[54] This factor obviously weighs against a finding of borrowed employee status.

(4) Who had the right to fire the employee?

Mr. Phillips states in his affidavit that "Aethon Energy Operating, LLC has the right to terminate any individual employed by Aethon Field Services, LLC." As discussed above, this conclusory statement contained in Mr. Phillips' affidavit, like the others contained therein, are not based on his personal knowledge and are thus not competent summary judgment evidence. Perhaps even more importantly, even if the statement were accepted as competent evidence, a question of material fact arises because the statement is directly contradicted by the language of the employment contracts between Aethon Field Services and its employees. Each of those contracts explicitly states that "Company" – defined exclusively as "Aethon Field Services LLC" – "may terminate your employment at any time." The contracts do not say that Aethon Energy Operating can terminate the employment of the workers. Defendant is attempting to read language into the contracts that simply does not exist. Defendant has put forth no evidence showing that the terms of these contracts were altered. In fact, the contract explicitly states that its provisions "supersede any and all prior understandings, whether oral or in writing, with respect to the subject matter hereof, and may not be amended, discharged, or terminated, nor may any of its provisions be waived, except upon the execution of a valid written instrument

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[51] Exhibit "B," at p. 18, lines 10-12.
[52] *See* Exhibits C, D, E, G, & H, at signed "Offer of Employment" letters, at ¶ 2.
[53] *Id.* at introductory paragraph.
[54] *Id.* at signed "Offer of Employment" letters, at ¶ 2; *see also* introductory paragraph of each offer letter.

executed by you and the Company."[55] The contract language governs and is conclusive. There is no question that this factor weighs against a finding of borrowed employee status.

(5) Who furnished the tools and the place to perform the work?

The only purported evidence offered by Defendant concerning this factor is, again, the affidavit of Mr. Phillips, who states that "[i]t is Aethon Energy Operating, LLC which furnishes the necessary tools and place for those individuals employed by Aethon Field Services, LLC to perform work for Aethon Energy Operating, LLC." This conclusory statement has zero evidentiary value as Mr. Phillips – who has never worked in the field and who cannot name a single employee of Aethon Field Services who worked in the field, much less discuss what tools they used – admitted that his affidavit statement amounts to nothing more that pure speculation on his part:

> Q: Okay. But in terms of the particular individuals, what they were using on a daily basis, again, you can only assume that they were using Aethon's tools, correct?
>
> A: I do not know.[56]
>
> ***
>
> Q: Okay. I think I know the answer to this based on any earlier questions, but in terms of pumpers and what they do on a daily basis, are you familiar with what types of tools and equipment they used in the field?
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> A: No, I'm not.[57]

Further, the "place" of employment for the Aethon Field Services employees, if anything, are the oilfield assets owned by Aethon United BR LP.

This factor does not support Defendant's borrowed employee argument.

(6) Whether the new employment was over a considerable length of time.

As a threshold matter, in order to evaluate the length of time of any "new employment," Defendant must first establish that there was in fact some "new employment." Defendant has not made this threshold showing. There is no evidence that the Aethon Field Services were employed by anyone other than Aethon Field Services. As discussed above, there is no evidence that any of the field employees of Aethon Field Services were directed or supervised by Aethon

[55] *Id.* at paragraph 9.
[56] Exhibit "B," at p. 24, lines 1-4.
[57] *Id.* at p. 22, lines 24-25; page 23, lines1-3.

Energy Operating. To the contrary, the employment contracts show, and Mr. Phillips admitted, that Aethon Field Services employed its own "supervisory level" personnel in the field.[58] Thus, this factor is not even implicated under these circumstances. Even if it was, Defendants have failed to present evidence concerning this factor. Indeed, Defendant has failed to identify the workers or discuss how long they worked. Defendant cannot meet its burden.

(7) Whose work was being done at the time of the accident?

A damaged tank owned by Aethon United BR LP was being removed by Plaintiffs' employer pursuant to a contract with the "operator of record," Aethon Energy Operating. This factor is neutral at best.

(8) Whether there was an agreement between the borrowing and lending employers.

The record is completely devoid of evidence of any agreement between Aethon Field Services and Aethon Energy Operating concerning borrowed employees. To the contrary, the employment contracts between Aethon Field Services and its employees contradict any notion that there was an agreement by Aethon Field Services to loan its employees to another entity. This factor weighs against a finding of borrowed employee status.

(9) Whether the employee acquiesced in the new work situation.

Defendant has presented no evidence that any employee of Aethon Field Services was aware of any "new work situation," much less that they acquiesced in same. To the contrary, the written employment contracts show that the employees understood and agreed that their sole employer was Aethon Field Services. This factor weighs against a finding of borrowed employee status.

(10) Whether the original employer terminated his relationship with or relinquished his control over the employee.

"This factor evaluates the lending employer's relationship with the employee while the borrowing occurs." *Foreman v. Danos and Curole Marine Contractors, Inc.,* No. 97–2038 (La. App. 1 Cir. 9/25/98), 722 So.2d 1, 6. It is clear that Aethon Field Services did not terminate its relationship with or relinquish its control over its employees. The employment contracts explicitly shows that Aethon Field Services alone was the employer. Pursuant to the contracts,

[58] Exhibit "B," at p. 7, lines 12-24; p. 8, lines 1-14).

Aethon Field Services trained its employees. Pursuant to the contracts, the workers were to "report to" other Aethon Field Services employees. Notably, as discussed above, the contract explicitly states that these provisions "supersede any and all prior understandings, whether oral or in writing, with respect to the subject matter hereof, and may not be amended, discharged, or terminated, nor may any of its provisions be waived, except upon the execution of a valid written instrument executed by you and the Company." Defendant has not provided any evidence to the contrary. Even if it did, the language of the employment contracts alone highlights the existence of a genuine issue of material fact for trial. This factor obviously weighs against a finding of borrowed employee status.

II. Defendant's suggestion that it may disregard its own corporate identity is without merit.

Subtly included in its borrowed employee argument is Defendant's suggestion that its status as a "wholly owned subsidiary" of Aethon Energy Operating is somehow relevant or determinative. Specifically, Defendant suggests, without citing any authority, that its status as a subsidiary entity somehow means that any tort immunity enjoyed by its "parent" company, Aethon Energy Operating, must also extend to it. This exact argument was rejected by the Louisiana Supreme Court in *Smith v. Cotton's Fleet Service, Inc.*, 500 So.2d 759 (La. 1987).

In *Smith*, the defendant tortfeasor was a close corporate affiliate of an immune statutory employer of the plaintiff. The tortfeasor sought to "acquire statutory employer status by disregarding the corporate structures of itself and its sibling corporation." *Id.* at 761. The Court stated that "Defendant's objective is to merge itself with its parent, make the parent the actual employer of the plaintiff, and thereby immunize itself and the parent from plaintiff's tort claim." *Id.* at 761-62. In rejecting the defendant's argument, the Court noted as follows:

> The general rule of law is that corporate entity is separate and distinct from the identity of its shareholders … What is due to a corporation is not due to any of the individuals who compose it …
>
> ***
>
> Defendant's arguments imply that efficiency, deterrence and cost spreading would be promoted by charging all accident costs to the whole of an economic enterprise rather than to one of its corporate fragments … It is difficult to entertain defendant's argument on this ground seriously because it attacks a basic policy decision of the legislature that is generally favorable to corporate investors and which defendant without a doubt would have defended strongly had this been a tort suit by a third person seeking to pierce the corporate entities.

Id.

Defendant's status as a wholly-owned subsidiary of Aethon Energy Operating is of no moment.

III. Fault of Aethon Field Services.

At the outset, it should be noted that the only legal authority cited by Defendant in support of its contention that there is no duty owed to Plaintiffs or breach thereof, are cases discussing the "independent contractor defense." Defendant fails to recognize that this defense, when applicable, only bars a claim for *vicarious* liability of a principal based on the actions of its independent contractor. It does not bar a claim for *direct* liability of the defendant for violating independent duties that it owes. *See, e.g., Thomas v. A.P. Green Indus., Inc.*, No. 05-1064 (La. App. 4 Cir. 5/31/06), 933 So.2d 843, 852 ("Although the independent contractor defense is a bar to a vicarious liability claim, it is not a bar to a direct liability claim..."); *see also Shephard v. AIX Energy, Inc., et al.*, 249 So.3d 194 (La. App. 2 Cir. 5/23/18), 51,965, *writ denied*, 701 So.2d 1308 (11/5/18) (rejecting the argument that independent contractor defense governs where there the jury found that the defendant breached its independent duties arising under Louisiana tort law). As discussed below, there is ample evidence of the independent negligence of Aethon Field Services.

Further, Defendant's proposed application of the independent contractor defense presupposes that USFS did in fact contractually undertake the obligation to clean and vent the tank in question. As discussed above, the evidence in this case is to the contrary to this proposition or, at best, disputed.

(a) Duties owed by Aethon Field Services.

Under Louisiana law, "[a]ll persons have a duty to act reasonably under the circumstances." *Smith v. English*, 586 So.2d 583, 589 (La. App. 2 Cir. 1991); *see also* La. Civ. Code arts. 2315, 2316, 2317, 2317.1 and 2318. This general duty of care, as applied to the owner or operator of a facility, includes "the prior discovery of reasonably discoverable conditions of the premises that may be unreasonably dangerous, and correction thereof or a

warning to the invitee of the danger." *Foggin v. General Guarnaty Ins. Co.*, 195 So.2d 636, 641 (La. 1967).

Moreover, Louisiana courts have repeatedly held that "the owner or operator of a facility has the duty of exercising reasonable care for the safety of persons on his premises and the duty of not exposing such persons to unreasonable risks of injury or harm." *Mundy v. Dept. of Health and Human Resources*, 620 So.2d 811 (La. 1993); *see also Donovan v. Jones*, No. 26-883 (La. App. 2 Cir. 6/21/95), 658 So.2d 755, 763-64. It is equally settled that "[t]his duty extends to employees of independent contractors, for whom the owner must take reasonable steps to ensure a safe working environment." *Donovan*, 658 So.2d at 764; *see also Dupre v. Chevron U.S.A.*, Inc., 20 F.3d 154 (5th Cir. 1994)

Likewise, one who undertakes coordinating the activities of multiple contractors on a jobsite "owes a duty to all workers to make the job site reasonably safe under the circumstances." *Montgomery v. Max Foote Const. Co.*, 621 So. 2d 90, 92 (La. App. 2 Cir. 1993).

To determine the extent of the duty owned, Louisiana courts have held that "evidence of OSHA provisions and regulations should be considered by the trier of fact in determining the standard of care applicable to a contractor." *Montgomery v. Max Foote Const. Co.*, 621 So. 2d 90, 93 (La. App. 2 Cir. 1993); *see also Dupre*, 20 F.3d at FN 13; *Manchack v. Willamette Indus. Inc.*, 621 So.2d 649, 652 (La. App. 2 Cir. 1993) (noting that a plaintiff "'may properly offer a statute or regulation [such as OSHA] as evidence of a defendant's negligence…'").

In this case, Aethon Field Services argues that USFS was "solely" at fault because it allegedly violated the OSHA regulations contained in 29 C.F.R. 1910.252.[59] In doing so, Defendant is asking the Court to selectively apply the OSHA provisions by finding that they only apply to USFS and not itself. This position is untenable and directly contradicts the statutory language as well as the testimony of Defendant's own safety director.

Sections 1910.252(a)(3)(i)-(ii) provide, in pertinent part:

[59] See page 7-8 of Defendants's brief.

> no welding, cutting, or other work shall be performed on used drums, barrels, tanks or other containers until they have been cleaned so thoroughly or to make absolute certain that there are no flammable materials present or any substances such as greases, tars, acids, or other materials which when subjected to heat, might produce flammable or toxic materials.
>
> ***
>
> All hollow spaces, cavities or containers shall be vented to permit the escape of air or gases before preheating, cutting or welding.

Section 1910.252(a) makes it clear that the regulations apply not only to "welders and cutters [and] their supervisors (including outside contractors)," but also to "those in management on whose property cutting and welding is to be performed." In this regard, Section 1910.252(a)(2)(xiii) provides that "Management shall recognize its responsibility for the safe usage of cutting and welding equipment on its property and ... [shall] designate an individual responsible for authorizing cutting and welding operations in areas not specifically designed for such processes."

Further, section 1910.252(a) further states that the "fire protection and prevention responsibilities" of "those in management on whose property cutting and welding is to be performed" are further set forth in the *Standard for Fire Prevention in Use of Cutting and Welding Processes*, NFPA Standard 51B. This standard, NFPA 51B, which is incorporated into and part of the regulations pursuant to section 1910.6, provides as follows:

- "...all three, the cutter or welder, his supervisor, **and management** **share full responsibility** for the safe use of cutting or welding equipment."[60]
- "Management **shall** recognize its responsibility for the safe usage of cutting and welding equipment **on its property**."[61]
- "Before cutting or welding is permitted, the area **shall** be inspected by the individual responsible for authorizing cutting and welding operations. He shall designate precautions to be followed in granting authorization to proceed, preferably in the form of a written permit."[62]

[60] NFPA 51B, ¶ 3 (1962).
[61] NFPA 51B, ¶ 31 (1962).
[62] NFPA 51B, ¶ 42 (1962).

- "**Management shall** be responsible for the safe operations of hot work activity."[63]
- "**Management shall** designate a permit authorized individual."[64]
- "**Management**, contractors, the PAI, the fire watch, and the operators **shall recognize their mutual responsibility** for safety in hot work."[65]
- "**Management shall** advise all contractors about site specific flammable materials, hazardous processes or conditions, or other potential fire hazards."[66]

That these regulations and standards are directly applicable to Defendant cannot be disputed. In fact, Aethon Field Services' head of safety, Stephanie Scruggs, admitted that Aethon "absolutely" has to adhere to 1910.252.[67] Further, Mike Garner, Aethon Field Services' HSE Advisor, testified that both the contractor **and** owner/operator are responsible for complying with the applicable regulations.[68]

(b) Aethon Field Services' breach of duties.

There can be no real dispute that Defendant breached the aforementioned duties, including the provisions of 1910.252, *et seq*., as well as its duty to make the job site reasonably safe under the circumstances and its duty identify dangerous conditions and warn its invitees. Indeed, Defendant did absolutely nothing to ensure that the tank was properly cleaned even though it had a duty to do so under 1910.252. Defendant completely failed to discuss the actual or potential presence of flammable materials in the tank with the individuals that it invited to become part of its tank decommissioning project. Defendant negligently coordinated and managed the project by completely failing to account for the hazardous vapors that it knew could be present in the tank and it completely failed to properly communicate these hazards to the involved individuals.

Under any interpretation of the aformentioned standards and duties, Defendant was duty-bound to clearly and unambiguously communicate the expectations, roles and responsibilities of

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[63] NFPA 51B, ¶ 4.1 (2019).
[64] NFPA 51B, ¶ 4.1.2 (2019).
[65] NFPA 51B, ¶ 4.6 (2019).
[66] NFPA 51B, ¶ 4.1.7 (2019).
[67] Exhibit "F," p. 33, lines 6-12.
[68] Excerpts of deposition of Mr. Garner, attached hereto as Exhibit "Q," at p. 35, lines 5-9.

the various parties that it involved (in piecemeal fashion) in its tank decommissioning project. Defendant completely failed in this regard. The testimony and evidence outlined above shows that there is a major question of fact concerning the job scope of the respective parties.[69] At best, there was dispute, doubt, or confusion concerning the scope of USFS' work which is in and of itself evidence of negligence on the part of Defendant. *See, e.g.*, 29 C.F.R. 1910.252; *Montgomery*, 621 So. 2d at 92; *Donovan*, 658 So.2d at 764; *Dupre*, 20 F.3d at 154.

Plaintiffs will present the testimony of Gregg Perkin, Plaintiff's expert in the field of engineering and oilfield operations and safety. As outlined in his attached expert report and affidavit,[70] Mr. Perkins opines that the accident was caused and/or contributed to by the failure of Aethon Field Services personnel to follow numerous industry standards, generally-accepted oilfield safety rules and practices, and applicable regulations, including, but not limited to:

- Failure to provide a properly evaluate and effectively communicate hazards and responsibilities with all of the involved parties;
- Failure to properly oversee the contractor bid proposal process;
- Failure to follow ANSI/API owner/operator requirements for cleaning of petroleum storage tanks;
- Failure to participate in tank pre-cleaning meetings with all involved parties to discuss scope of work and/or specific responsibilities;
- Failure to ensure that USFS personnel were aware of all known and potential hazards;
- Failure to ensure that a proper hazard evaluation had been conducted and communicated to the involved parties;
- Failure to authorize a permit for the third party services personnel it contracted to enter a petroleum storage tank with a cutting torch as required by industry standard and regulations;
- Failing to ensure proper planning and execution of hot work as required by 29 C.F.R. 1910.252;
- Failure to follow its own company policies and procedures.

Finally, it is abundantly clear that Aethon Field Services was in violation of its own safety practices and procedures. Indeed, the safety manual applicable to Aethon Field Services employees details their responsibilities under *29 CFR 1910*. The cover page states "For compliance with 29 CFR 1910", and the manual highlights its "culture centered around safety to

[69] *See supra*, notes 23-38.
[70] Exhibit "A."

ensure the collective wellbeing of our employees, contractors and neighbors."[71] The manual contains the following statements:

- "All employees are responsible for identifying, mitigating, and reporting potential hazards." (p. 3)
- "Supervisors are close to the work and have direct responsibility for personnel doing the work." (p. 6)
- "Surveillance for workplace hazards shall be a constant and on-going process." (p. 7)
- "It is the responsibility of everyone to identify, report, and eliminate or mitigate potential hazards. Field employees are particularly important in this process as they are in the best position to identify hazards during their daily operations." (p. 7)
- "Any hazards identified shall be controlled by the hierarchy of engineering controls [and] administrative controls . . ." (p. 9)

Thus, Defendant's own rules mandate its responsibilities - identifying and mitigating hazards; direct supervisory responsibility of personnel doing the work; surveillance for workplace hazards; and hazard control by engineering and administrative controls. The testimony of Aethon Field Services' supervisors and personnel establish that it breached its own rules. Defendant's district foreman Michael Murray admits that he was responsible for safety supervision of the wellsite.[72] Foreman Murray knew that the purpose of the tank was to hold hydrocarbons, and he was aware that the tank contained hazardous materials.[73] Murray confesses that despite the requirements of *29 CFR 1910*, and Defendant's own rules for identifying hazards, and his own wellsite supervisory responsibilities, nobody in Aethon Field Services had the responsibility of supervising the cleaning and removal of the tanks![74] Further, no one with Aethon Field Services was responsible for coordinating inspections of the storage tank at the well site.[75] Foreman Murray admits that Aethon Field Services had no procedures for addressing hazards before cleaning operations, and he does not know how Aethon Field Services made sure that the materials within the storage tanks had been adequately removed or cleaned

[71] Exhibit "R," Cover page, page 2.
[72] Exhibit "J," p. 5, line 24; p. 40, lines 9-17.
[73] *Id.* p. 36, lines 16-20; p. 38, lines 21-23.
[74] *Id.* at p. 10, lines 15-25.
[75] *Id.* at p. 30, lines 8-1.

out[76] With clear supervisory responsibilities in place, but no procedures to ensure safety, Aethon Field Services personnel testify to knowing that if a tank is not thoroughly cleaned of hydrocarbons, "you can blow it up."[77]

Aethon Field Services had in place a clear written procedure to review and eliminate job hazards. That procedure is a safety meeting called a "Job Risk Assessment" ("JRA"). Foreman Murray was aware of the safety meeting procedure. He testifies that in the safety meetings, Aethon Field Services and its contractors review the steps of the job and potential safety hazards.[78] In fact there is a form where Aethon Field Services writes down the job, job steps, and potential safety hazards.[79] The form was contained in the safety manual, and was in effect at the time of the accident.[80] Despite its effectiveness on the date of the accident, Safety Supervisor Scruggs testified to the contrary, that it was not until after this accident that Aethon Field Services was required to review safety forms.[81] Defendant's contradictory statements about the safety meeting and form do not end there. Aethon Field Services personnel prepared a report to the Louisiana State Police about the incident. In the report, the State Police were told that "Aethon reviewed the job scope with USFS and USFS representative onsite."[82] As it turns out, no one with Defendant participated in the safety meeting to cut the steel tank.[83]

In conclusion, there is ample evidence of Defendant's breach of regulatory duties, duties imposed by law, and Defendant's own internal duties. Defendant's argument that its actions did not cause the accident is false. Defendant knew that if the tank was not cleaned of hydrocarbons "you can blow it up." Defendant had supervisory responsibility for making sure it was cleaned. The evidence establishes that cleaning the tank was not the responsibility of USFS. When asked what caused the explosion, Aethon's investigator testified that the cutting torch came in contact

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[76] *Id.* at p. 40, lines 23-25; p. 41, lines 1-2; p. 48, lines 14-16.
[77] Exhibit "L," deposition of Lowe, at p. 46, lines 14-17.
[78] Exhibit "J," p. 22, lines 9-25; p.23, lines 1-10.
[79] *Id.*
[80] *Id.*; *see also* Exhibit "S," Aethon Response to Request for Production Number 3.
[81] Exhibit "F," at p. 15, lines 8-15.
[82] Report to State Police, Exhibit "K."
[83] Exhibit "J," deposition of Murrary, at p. 50-51. Exhibit "L," deposition of Lowe, p. 16.

with an area of gas vapor in the tank.[84] Whether USFS did anything to contribute to the explosion is a question of comparative fault for the jury.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests that Defendant's motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE ON FOLLOWING PAGE

[84] Exhibit "J," p. 51, lines 12-21.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been served on the following counsel of record via:

[ ] Facsimile [X] Email [ ] Hand-Delivery [X] United States First Class Mail

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OF COUNSEL