United States Court of Appeals
for the Fifth Circuit

No. 15-30377

IN RE: DEEPWATER HORIZON

LAKE EUGENIE LAND & DEVELOPMENT, INCORPORATED; BON SECOUR FISHERIES, INCORPORATED; FORT MORGAN REALTY, INCORPORATED; LFBP 1, L.L.C., doing business as GW FINS; PANAMA CITY BEACH DOLPHIN TOURS & MORE, L.L.C.; ZEKES CHARTER FLEET, L.L.C.; WILLIAM SELLERS; KATHLEEN IRWIN; RONALD LUNDY; CORLISS GALLO; JOHN TESVICH; MICHAEL GUIDRY, on behalf of themselves and all others similarly situated; HENRY HUTTO; BRAD FRILOUX; JERRY J. KEE,

Plaintiffs - Appellants

v.

BP EXPLORATION & PRODUCTION, INCORPORATED;
BP AMERICA PRODUCTION COMPANY; BP P.L.C

Defendants – Appellees.

On Appeal from the U.S. District Court for the Eastern District of Louisiana
MDL No. 2179, Civ. Action No. 12-970

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CERTIFICATE OF INTERESTED PERSONS

No. 15-30377

IN RE: DEEPWATER HORIZON

The undersigned counsel of record certify that the following interested persons and entities described in the fourth sentence of Rule 28.8.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. Plaintiffs–Appellants

The underlying class action was originally brought by 15 class representatives: Lake Eugenie Land & Development, Inc.; Bon Secour Fisheries, Inc.; Fort Morgan Realty, Inc.; LFBP #1, LLC d/b/a GW Fins; Panama City Beach Dolphin Tours & More, LLC; Zeke's Charter Fleet, LLC; William Sellers; Kathleen Irwin; Ronald Lundy; Corliss Gallo; John Tesvich; Michael Guidry; Henry Hutto; Brad Friloux; and Jerry J. Kee.

The Economic & Property Damages Settlement Class has been fully and finally certified, with appointed Class Counsel, who are listed below. The absent class members comprise "a large group of persons [who] can be specified by a

generic description, [such that] individual listing is not necessary." 5th Cir. R. 28.2.1.

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II. REQUEST FOR ORAL ARGUMENT

Given the size and complexity of the record, the lengthy procedural history, and the somewhat technical nature of the issues involved, Plaintiffs and Appellants herein believe that oral argument will likely be of assistance to the Court.

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[1] Fifth Cir. Doc. 00513118071.

[2] Fifth Cir. Doc. 00512285581.

V. JURISDICTIONAL STATEMENT

This appeal concerns the core interpretive policy governing Business Economic Loss (BEL) settlement claims. As such, it stands in the identical jurisdictional posture as *Deepwater Horizon I,* in which this Court expansively applied the collateral order doctrine to permit a series of appeals from non-final orders of the district court.[3] Most recently, however, in the *Data Access Appeal,* this Court re-emphasized that the conditions for collateral order jurisdiction are "stringent."[4] Commenting on the previous *Deepwater Horizon* decisions, the Court said: "we determined that the orders at issue were effectively unreviewable at least in part based on their broad ramifications to the administration of the settlement. Appealability was endorsed in *Deepwater Horizon I* because the interpretation affected 'potentially thousands of claimants.'"[5]

While the Class has disputed the jurisdictional bases of many of the appeals to date, it would be highly inequitable to allow BP an appeal from a policy determination concerning BEL calculations while denying the Class an opportunity to challenge a subsequent policy determination controlling the same claims calculations.

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[3] Deepwater Horizon I, 732 F.3d 326, 332 n.3 (5th Cir. 2013). *See also,* In re Deepwater Horizon, 785 F.3d 986, 991-997 (5th Cir. 2015) (permitting appeals from individual claim determinations); In re Deepwater Horizon, 785 F.3d 1003, 1009-1011 (5th Cir. 2015) ("*Non-Profit Decision*").

[4] In re Deepwater Horizon No.14-30823 (5th Cir. July 16, 2015) [Fifth Cir. Doc. 00513118071, at 6] ("*Data Access Appeal*"), at p.6.

[5] *Id.,* at p.10.

VI. ISSUE PRESENTED FOR REVIEW

Whether the District Court erred in approving a Final Matching Policy that allows and in the case of the four specialized frameworks for construction, agricultural, educational and professional services claims requires acceptably recorded revenues to be moved, "smoothed" or otherwise reallocated for Causation and Compensation purposes?

Introduction

Despite the extraordinary appellate history surrounding the *Deepwater Horizon* Economic & Property Damages Settlement in this Court, this is the first time that Class Counsel have appeared as appellants. At all times, the Class has taken the position that interpretive finality over the complicated Settlement Agreement should lie with the District Court and that only the most extraordinary departure from the terms of the agreement should occasion appellate review. Indeed, the Class has challenged the appealability of settlement implementation under the jurisdictional authority of the collateral order doctrine.[1]

The Class is nonetheless compelled to take this appeal because of the difficulty of implementing the many opinions of this Court in terms of revised settlement implementation. The specific issue on appeal is the 89-page policy developed for Business Economic Loss (BEL) Claims in furtherance of this Court's *Deepwater Horizon I* decision. The Final Matching Policy exceeds the scope of this Court's remand order and raises a conflict in interpretation with a subsequent opinion of this Court in the *Non-Profit Decision.*[2] Creating an implementation nightmare, the policy fundamentally alters several aspects of the Settlement Agreement and runs contrary to established accounting principles.

[1] *See, e.g.,* In re Deepwater Horizon No.14-30823 (5th Cir. July 16, 2015) ("*Data Access Appeal*").

[2] In re Deepwater Horizon, 785 F.3d 1003 (5th Cir. 2015) ("*Non-Profit Decision*").

Rather than limiting itself to a re-examination of variable expenses, as suggested in the original *BEL Opinion,*[3] the Final Matching Policy approved by the District Court directs the Program Accountants to move beyond this Court's ruling and the terms of the Settlement Agreement by "smoothing" revenues in such a way as to undercut the central definitions and frameworks for compensable harm under the settlement.

As a result, this appeal is directed to the erroneous interpretation of the rulings of this Court, something that is reviewable as a matter of law. The reason the Final Matching Policy fails as a matter of law is rooted in the litigation history before this Court. The focus of BP's initial objection with regard to BEL claims, and this Court's decision in *Deepwater Horizon I,* was on the interpretation and application of "corresponding variable expenses" within the Variable Profit calculation.[4] Indeed, this Court specifically rejected BP's belated argument that further measures were necessary to address "uneven cash flows" that might create some inconsistency between the distinct formulas in the Settlement Agreement that define eligibility for compensation and the actual compensation amount.[5]

Under the complex and carefully negotiated terms of the Settlement Agreement, the amount due any claimant is determined by a comparison of the

[3] In re Deepwater Horizon, 732 F.3d 326 (5th Cir. 2013) ("*Deepwater Horizon I*") ("*BEL Opinion*").

[4] Deepwater Horizon I, 732 F.3d at 337.

[5] Deepwater Horizon I, 732 F.3d at 339-340.

objective accounting records of that business during a pre-spill Benchmark Period with the post-spill Compensation Period. If the business suffered a decline and rebound in business activity, (the "V" shaped revenue curve described in *Deepwater Horizon II* and *III*), that is sufficient to establish eligibility for compensation,[6] which is calculated according to a similar, yet distinct, framework. For both Causation and Compensation purposes, the Settlement Agreement deems and presumes that the general experiences and accounting of a given business during the Benchmark Period would be "comparable" for settlement purposes to the general experiences and accounting during those same months of the Compensation Period, "without any complex analysis of what type of business activities took place within those months."[7]

This was confirmed again in May of 2015 by a different panel of this Court, which rejected BP's argument that "extraordinary" or "atypical" revenue experiences during the Benchmark or Compensation Periods should be ignored, adjusted, or moved.[8]

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[6] *See* In re Deepwater Horizon, 739 F.3d 790, 797-798 (5th Cir. 2014) ("*Deepwater Horizon II"*), *rehearing en banc denied,* 756 F.3d 320 (5th Cir. 2014), *cert. denied,* 135 S.Ct. 734 (2014); *and,* In re Deepwater Horizon, 744 F.3d 370, 375 (5th Cir. 2014) ("*Deepwater Horizon III*"), *rehearing denied,* 753 F.3d 509 (5th Cir. 2014), *rehearing en banc denied,* 753 F.3d 516 (5th Cir. 2014).

[7] Deepwater Horizon I, 732 F.3d at 340.

[8] *See* In re Deepwater Horizon, supra, 785 F.3d at 1020-1023.

Nonetheless, the Final Matching Policy allows and in the case of the specialized frameworks for construction, agricultural, educational and professional services claims requires just that.

In addition to this Court's rulings, the policy contradicts BP's post-settlement confirmation and insistence that the BEL Compensation Framework "does not allow for the use of professional judgment or discretion as a substitute for expressly articulated standards or requirements."[9] Rather than accepting the contemporaneous profit and loss statements that are required under the express terms of the Settlement Agreement, the Final Matching Policy asks Program Accountants to apply vague and subjective determinations about when revenues may have been "earned" according to the claimant's underlying business activities. This was never discussed nor agreed to during the settlement negotiations.[10]

Further, from an accounting standpoint, moving revenues properly recognized in one period to another period is considered "unacceptable" for financial reporting purposes,[11] and does not accomplish matching "in any sense recognized in the accounting world, but is merely an allocation formula that artificially moves revenue into months before or after it was earned based on

[9] R.E. 164-165.

[10] R.E. 184-192.

[11] R.E. 175.

variable expenses."[12] Nothing in this Court's many opinions dealing with the *Deepwater Horizon* Settlement compels such an odd result.

For these reasons, and for the reasons further stated below, the orders approving the final matching policy should be vacated and reversed.

VIII. Statement of the Case

A. The Settlement Agreement

The BEL settlement frameworks were negotiated over an eight-month period. Part of a 1,000-plus page Settlement Agreement, the BEL framework includes: Exhibit 4A to the agreement, which governs the Documentation to be submitted;[13] Exhibit 4B, which sets forth the objective criteria that determines whether a loss was Caused by the spill;[14] and Exhibit 4C, a five-page document, which sets forth a uniform Compensation formula for all business loss claims.[15]

The Settlement Agreement calls for contemporaneous monthly profit and loss statements – whether cash or accrual [16] – and directs the Claims Administrator to determine the Variable Profit for optimal Benchmark and Compensation Periods by summing the monthly revenues over the period, and

[12] R.E. 179-180.

[13] ROA.2777-2781.

[14] ROA.2782-2798.

[15] ROA.2799-2806.

[16] *See* Deepwater Horizon I, 732 F.3d at 334 and 338.

subtracting "the corresponding variable expenses from revenue over the same time period."[17]

There were no separate compensation frameworks negotiated or agreed to for construction, agricultural, educational or professional services claims. Indeed, the Agreement specifically provides that the "criteria, documentation, proof, and Compensation Amount provisions of each of the Claims categories shall apply equally to all Claimants."[18]

B. Initial Interpretation and Implementation

As set forth in the briefing associated with the original *BEL Opinion,* the Program Accountants, PricewaterhouseCoopers (PwC) and Postlethwaite & Netterville (P&N), the Claims Administrator, and the District Court, all interpreted the BEL Compensation Framework to mean "that expenses correspond to the time period in which they were recorded."[19]

Before later challenging this interpretation in December of 2012, BP responded to an inquiry from the Claims Administrator in which BP's Counsel explained that "the use of transparent, objective, data-driven methodologies" was

[17] *See* Deepwater Horizon I, 732 F.2d at 330. (Specifically, the "Variable Profit" definition within the BEL Compensation Framework is found at ROA.2801 [Exhibit 4C, p.2].)

[18] ROA.2617 [Settlement Agreement, Section 4.4.7].

[19] Deepwater Horizon I, 732 F.3d at 336. This is also the way in which hundreds of CPAs throughout the Gulf Coast Area interpreted the language contained within Exhibit 4C. *See, e.g.,* R.E. 170 [Panzeca Declaration, ¶16]; R.E. 177-178 [Supp. Carroll Declaration, ¶4].

"one of the cornerstones of the Settlement Agreement," which "does not allow for the use of professional judgment or discretion" or the "use of allocated proxy" as a substitute for the clearly defined and articulated standards set forth in Exhibit 4C.[20]

At the District Court hearing on BP's original motion, BP Counsel not only rejected the notion that accrual-style accounting was required under the Settlement Agreement, but also that BP was seeking to "smooth" revenues.[21]

C. This Court's October 2013 Decision

This Court's original *BEL Opinion* was focused on the treatment of expenses. The question was how to interpret the term "corresponding variable expenses" within part 2 of the Variable Profit definition.[22] The Court posited that "the expenses to be subtracted" were those expenses that corresponded to the revenues earned during the Benchmark or Compensation Period, whichever was being calculated.[23] "In other words, sum the monthly revenue over the [Benchmark or Compensation] period and then subtract *corresponding* expenses over the same [Benchmark or Compensation] time period."[24]

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[20] R.E. 164-165 [Letter from BP Counsel to Claims Administrator (Sept. 28, 2012)].

[21] R.E. 182-183 [Transcript (April 5, 2013) pp.23-24].

[22] ROA.2801.

[23] Deepwater Horizon I, 732 F.3d at 337.

[24] Deepwater Horizon I, 732 F.3d at 337 (emphasis in original).

Where revenues were concerned, the Court, in Section I(D) of the *BEL Opinion,* expressly rejected BP's belated argument regarding "uneven cash flows" in certain types of businesses. Specifically, the Court rejected BP's newly raised argument that the word "comparable" was intended to refer to months in which comparable business "activities" took place.[25] The Court correctly determined, instead, that the terms of the BEL Compensation Framework "clearly indicate that the Benchmark and Compensation periods were referring to months of the same name, without any complex analysis of what type of business activities took place."[26]

With respect to the variable expense issue, the Court could not determine with certainty whether the parties had intended or agreed that a matching principle would apply to cash basis claims, and therefore remanded the matter to the District Court to develop a more complete factual record.[27]

D. Remand on the Issue of Intent

On remand to the District Court, both Class Counsel and BP were provided with the opportunity to make comprehensive evidentiary submissions. The evidence clearly established that the Parties, before signing the Agreement, did not

[25] Deepwater Horizon I, 732 F.3d at 339-340.

[26] Deepwater Horizon I, 732 F.3d at 340.

[27] Deepwater Horizon I, 732 F.3d at 339.

ever directly discuss "the divergent effects of cash- and accrual-basis accounting records on the Exhibit 4C formula."[28] Neither BP nor the Class negotiating team expressed a suggestion or expectation that Program Accountants would make any attempt to move or "match" expenses into or out of the monthly Benchmark or Compensation Periods, or otherwise attempt to determine which particular expenses "corresponded" with the monthly revenues that had been recorded during the relevant Benchmark and Compensation Periods; convert cash-basis profit and loss statements to accrual-basis profit and loss statements; look to the "business activities" of the claiming Entity to attempt to determine what revenues had been "earned" during the Benchmark or Compensation Periods; nor attempt to move, "smooth", or otherwise reallocate revenues according to "revenue attribution criteria".[29]

Class Counsel's evidentiary submissions on remand further established that the Documentation provisions contained within Exhibit 4A and the guidelines relating to the submission and evaluation of Multi-Facility Claims in Exhibit 5 focused on pre-existing monthly profit and loss statements prepared in the ordinary

[28] Deepwater Horizon I, 732 F.3d at 339.

[29] *See generally* ROA.18136-18308 [Class Counsel Submission on Remand of BEL Issue]; *see, in particular, e.g.,* R.E. 184-192 [Herman Declaration, ¶¶10-14, 23, 26-32; Rice Declaration, ¶¶12-17; Scott Declaration, ¶¶5-8]; *see also, e.g.,* R.E. 194-195 [Business Loss Framework Observations from PwC and P&N (April 4, 2012)] (recognizing that matching of expenses to revenues would not occur under the Compensation Framework that had been negotiated).

course of business.[30] Class Counsel additionally pointed out that the purported matching of expenses never came up, as one would have expected had that been the Parties' understanding and intent, during the discussions surrounding the definition of "Contemporaneous" found in Section 38.38 of the Settlement Agreement, nor in the context of the Settlement Program's obligation to maximize the business' compensation under Section 4.3.8.[31]

Not only did BP fail to present any evidence on remand of direct conversations regarding the "matching" of expenses, BP did not refute Class Counsel's evidentiary submission in any meaningful way. BP could not, on remand, point to any draft proposed Compensation Framework that expressly referred to "matching" or "business activities" or "revenue attribution criteria", and admitted that the Accounting Support Compensation requirements were specifically amended to remove the attestation of compliance with GAAP.[32] Finally, BP admitted that it received and reviewed not only the April 4, 2012 PwC suggestion for an alternate compensation framework that would match expenses to

[30] *See* R.E. 198 [Rice Declaration, ¶17]; R.E. 184, 186; ROA.18142-18147 [Herman Declaration, ¶¶7, 11, 17-18, 28-29]; ROA.2778-2779 [Exhibit 4A, ¶4]; ROA.2817-2819 [Exhibit 5].

[31] *See* R.E. 184; ROA.18142-18144 [Herman Declaration, ¶¶7-8, 11, 16]; ROA.2614 [Section 4.3.8]; ROA.2690 [Section 38.38].

[32] ROA.18670-18672 [Karron Declaration, ¶¶3-10]. (*See also* R.E. 184, 186-187; ROA.18143-18148 [Herman Declaration, ¶¶9, 19-23, 30]; ROA.4014 [Amended Section 4.4.13.4].)

revenue, but also Class Counsel's April 15, 2012 response, ("This is not agreed to").[33]

BP pointed to an early, August 2011 BP Draft BEL Compensation Framework, which referenced "costs that would have been incurred in generating revenue lost as a result of the DH spill"; BP's counsel alleged that this "reflected the concept of matching revenue to expenses" which, BP contends, "carried through subsequent drafts to the final agreement, albeit using different language."[34] However, with respect to this Court's specific question – "whether, before the agreement was signed, the parties discussed the divergent effects of cash- and accrual-basis accounting records on the Exhibit 4C formula"[35] – BP Counsel effectively admitted that no such discussions had taken place.[36]

Rather, BP's argument, and the District Court's conclusion, were premised largely on the fallacy that, because the Parties were seeking class approval under Rule 23, "two jet ski rental shops just down the beach from each other" could not be treated in materially different ways, based solely on whether they maintained their books on a cash-basis method or an accrual-basis method.[37]

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[33] *See* ROA.18650-18651 [Bloom Rebuttal Declaration, ¶13]; ROA.18326-18327, 18397-18401 [Bloom Declaration, ¶28 and Ex. "M"]. (*See also* ROA.18173 [Rice Declaration, ¶56].)

[34] ROA.18319 [Bloom Declaration, ¶16].

[35] Deepwater Horizon I, 732 F.3d at 339.

[36] ROA.18410 [Godfrey Declaration, ¶10].

[37] *See, e.g.,* R.E. 25 [Order and Reasons (Dec. 24, 2013) p.3]; ROA.18316-18317 [Bloom Declaration, ¶10]; ROA.18408 [Godfrey Declaration, ¶7]; ROA.18416 [Sider Declaration, ¶11].

In reality, however, two jet ski rental shops just down the beach from each other would be likely to maintain their books in a similar way. Indeed, BP's complaints primarily centered on groups of similar businesses – *e.g.,* construction, agricultural, and professional services – who all generally tend to keep their books under the same types of accounting methodologies. Secondly, the Parties agreed that, irrespective of whether the class settlement would be fully and finally approved under Rule 23, the same common, objective and transparent frameworks would be uniformly applied to all businesses, based on their contemporaneous records. Finally, it was agreed that, no matter how a class member may have maintained its books in the ordinary course of business, the Program Accountants would maximize the Compensation Amount for each and both jet ski rental businesses, and all other business claimants, under Section 4.3.8 of the Settlement Agreement.[38]

Nevertheless, the District Court concluded that matching was implied under the BEL Compensation Framework, as the interpretation suggested by this Court in *Deepwater Horizon I* would give full meaning to the term "corresponding", and instructed the Claims Administrator to develop a matching policy.[39]

[38] *See generally* R.E. 196-198 [Herman Declaration, ¶¶4-8].

[39] R.E. 25-27.

E. Development of the Final Matching Policy

In developing the matching policy that would be applied to cash basis and perhaps other BEL Claims, both Parties generally agreed that sufficient matching could be achieved by taking the total variable expenses incurred over the course of a year, and re-allocating such expenses to the month-by-month revenues experienced during the months of that year, (which was, incidentally, similar to what the Program Accountants had suggested in April of 2012[40]). This "Annual Variable Margin" or "AVM" approach was adopted by the Claims Administrator within the Final Matching Policy as the general framework for ensuring sufficient matching for the majority of insufficiently matched BEL Claims.[41]

However, at the urging of BP, the Claims Administrator developed four separate specialized frameworks for Construction, Agricultural, Educational and Professional Services Claims.[42] These methodologies admittedly depart from the Compensation Framework found in the Settlement Agreement,[43] and direct the Program Accountants to move, "smooth", or otherwise reallocate revenues – as well as expenses – for both Causation and Compensation purposes.[44]

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[40] R.E. 193-195.

[41] *See* R.E. 81-86. The entire Final Matching Policy, sometimes identified as "Policy No. 495", is found in the Record Excerpts, at R.E.68-156.

[42] *See* R.E. 87-123.

[43] *See* R.E. 199-200 [Draft Policy (Feb. 12, 2014)]; R.E. 201-203 [re Comments by Program Accountants during Meeting on Feb. 20, 2014].

[44] *See* R.E. 71, 82, 88-90, 94, 96, 103, 105, 112, 114, 119.

In addition, (and not clearly understood by Class Counsel at the time Final Policy No. 495 was approved), the Program Accountants also retain discretion to move, "smooth" or otherwise re-allocate revenues, even with respect to BEL Claims subjected to the general AVM methodology.[45]

F. District Court Approval and Denial of Reconsideration

After the District Court formally approved the Final Matching Policy,[46] Class Counsel sought reconsideration.[47] Denying Class Counsel's Motion, the District Court explained that it had initially interpreted this Court's *BEL Opinion* to only imply a change to the evaluation of cash-basis, and not accrual-basis, claims, but that, in practice, it was difficult to identify claims that were strictly "accrual".[48]

With respect to Class Counsel's argument that only expenses should be reallocated under a single AVM Methodology applicable to all unmatched BEL

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[45] *See* R.E. 70 [Policy No. 495, Underlying Issue / Principle No. 7]. During the development stage, Class Counsel believed that this was simply a general preface to the frameworks, and applied specifically to the four specialized Construction, Agricultural, Education and Professional Services Methodologies. It was only after the stay was lifted, and BEL Claims began to be processed again, that Class Counsel understood that the Program Accountants were relying on this "Underlying Principle" to make changes to revenues under the AVM Methodology.

[46] R.E. 66-67.

[47] ROA.20206-20223.

[48] R.E. 158.

Claims, the District Court summarily concluded that "Policy No. 495 properly implements the directive of the United States Fifth Circuit Court of Appeals."[49]

IX. Standard of Review

The standard of review is *de novo.* Deepwater Horizon I, 732 F.3d at 332. The Court, having fully and finally approved the settlement,[50] should enforce the agreement as bargained for, and not modify any of its substantive provisions. Evans v. Jeff D., 475 U.S. 717, 726 (1986) ("the power to approve or reject a settlement negotiated by the parties before the trial does not authorize the court to require the parties to accept a settlement to which they have not agreed"); Klier v. Elf Atochem, 658 F.3d 468, 475-476 (5th Cir. 2011) ("Because a district court's authority to administer a class-action settlement derives from Rule 23, the court cannot modify the bargained-for terms of the settlement agreement . . . once approved its terms must be followed by the court and the parties alike.… The terms of the settlement agreement are always to be given controlling effect").

[49] R.E. 160.

[50] *See* Deepwater Horizon II, 739 F.3d 790 (5th Cir. 2014), *rehearing en banc denied,* 756 F.3d 320 (5th Cir. 2014), *cert. denied,* 135 S.Ct. 734 (2014).

X. Summary of the Argument

Consistent with this Court's previous decisions, sufficient matching of expenses can and should be accomplished by the reallocation of variable expenses. The Final Matching Policy approved by the District Court, however, extends this Court's ruling to direct that cash flow be smoothed over long time periods, rather than the specific Benchmark and Compensation time periods defined in the Settlement Agreement. This is precisely what this Court rejected in *Deepwater Horizon I*:

> BP's primary concern seems to be the uneven cash flows of certain types of businesses. We accept this possibility, but we see nothing in the agreement that provides a basis for BP's interpretation. Despite the potential existence of this kind of distortion, the parties may not have considered it, agreed to ignore it, or failed for other reasons to provide clearly for this eventuality. The district court was correct that BP's proposed interpretation is not what the parties agreed.[51]

Accordingly, moving, smoothing or otherwise reallocating revenues is inconsistent with this Court's original *BEL Opinion,* as well as this Court's more recent *Non-Profit Decision.* In that appeal, BP argued once again that revenues needed to be adjusted because a single grant or donation might be atypical, yet form the basis for the comparison of the time periods used to calculate settlement

[51] Deepwater Horizon I, 732 F.2d at 340. *See also, e.g.,* Deepwater Horizon III, 744 F.3d at 377 ("There is nothing fundamentally unreasonable about what BP accepted but now wishes it had not").

awards. This Court rejected that argument, drawing once again on its earlier decisions:

> By seeking to exclude revenue because it is "atypical," BP attempts to circumvent the causation requirements and compensation framework in the Agreement. BP now asks individual claimants to show that any revenue from the pre-spill period was of the type that they could have expected to continue earning after the spill. But that amounts to requiring that Claimants prove that their lost revenue was caused by the spill, which is precisely what we refused to require in *Deepwater Horizon II*. *See* 739 F.3d at 797, 821 (affirming the district court's approval of the Claims Administrator's statement that "the Settlement Agreement does not contemplate that the Claims Administrator will undertake additional analysis of causation issues beyond those criteria that are specifically set out in [Exhibit 4B]").[52]

The specialized frameworks within the Final Matching Policy depart from the actual terms of the Settlement Agreement, and are incompatible with established accounting standards and principles. The reliance upon the discretion of Program Accountants or other "allocated proxy" for revenues is inconsistent with the Parties' discussions, agreement and representations both before and after the Settlement Agreement was executed. And, to the extent that causation under Exhibit 4B is revisited under the Final Matching Policy, it is incompatible with the established law of this case.

As a matter of fact, moreover, the evidentiary record is clear that the Parties did not actually intend or agree that the Program Accountants would attempt to

[52] Deepwater Horizon, 785 F.3d at 1021-1022.

"match" expenses to revenues for cash basis BEL Claims. While the Parties may have expected and generally agreed that similarly situated businesses would be treated the same for Rule 23 purposes, the Parties were generally assuming that similarly situated businesses would maintain their books in a similar way.

For these reasons, and for the reasons further outlined below, the Court should vacate the Final Matching Policy, and instruct the Claims Administrator to re-adopt the approach originally implemented by the Program Accountants, the Claims Administrator, and the District Court. Alternatively, the Claims Administrator should be directed to eliminate the specialized Construction, Agricultural, Educational, and Professional Services Frameworks, and to accomplish sufficient matching solely with the reallocation of variable expenses.

XI. Argument

This case is first and foremost a settlement and, as such, the intent of the parties must govern. The evidence on remand establishes that the Parties to this Settlement Agreement did not, before the agreement was signed, intend or agree to address the potentially "divergent effects of cash- and accrual-basis accounting records on the Exhibit 4C formula"[53] by asking the Program Accountants to move revenues into or out of the contractually defined Benchmark and Compensation

[53] Deepwater Horizon I, 732 F.3d at 339.

Periods.[54] To the extent that the Final Matching Policy allows or directs the Program Accountants to do that, approved Policy No. 495 departs from the Parties' intent, the terms of the Settlement Agreement, and this Court's previous *Deepwater Horizon* decisions.

1. The Final Matching Policy Impermissibly Allows, and in Some Cases Requires, that Acceptably Recorded Revenues be Moved, Reallocated or "Smoothed" for Causation and Compensation Purposes

The 89-page Final Matching Policy exceeds the bounds of the BEL Compensation Framework, the scope of this Court's remand, and established accounting principles, by moving revenues – as opposed to merely expenses – into and out of the agreed-to Benchmark and Compensation Periods.

a. The Final Matching Policy is Inconsistent with This Court's Opinion in Deepwater Horizon I

In the original *BEL Opinion*, this Court addressed two primary issues: First, BP argued that "a claimant's expenses must be 'matched' to corresponding revenue. In addition," BP argued that "the Settlement's requirement that the Administrator measure the difference between Variable Profit in the Compensation Period and the 'comparable months of the Benchmark Period' requires that the Administrator compare Variable Profit in comparable months—in other words,

[54] *See* R.E. 184-195. (*See also, generally,* ROA.18731-18743 [Class Counsel Brief on the BEL Issue].)

when a claimant engaged in similar conduct—not necessarily the 'same' months."[55]

The first issue focused on the treatment of expenses; the second issue focused on the treatment of revenues. On the first issue, this Court embraced BP's position; but BP's argument on the second issue was expressly rejected.

In particular, the Court, in Section I(C) of the *BEL Opinion*, addressed the interpretation of "corresponding variable expenses" within part 2 of the Variable Profit calculation, which

> could be interpreted to mean that the expenses to be subtracted must be those that 'correspond' to the revenue earned and that the 'same time period' refers to the Benchmark period on the one hand, and to the Compensation period on the other, whichever is being calculated. In other words, sum the monthly revenue over the [Benchmark or Compensation] period and then subtract *corresponding* expenses over the same [Benchmark or Compensation] time period.[56]

Clearly, the line item to be adjusted is expense – not revenue.

It was in Part I(D) of the original *BEL Opinion* that this Court addressed BP's arguments regarding revenues:

> BP's primary concern seems to be the uneven cash flows of certain types of businesses. We accept this possibility, but we see nothing in the agreement that provides a basis for BP's interpretation. Despite the potential existence of this kind of distortion, the parties may not have considered it, agreed to

[55] Deepwater Horizon I, 732 F.3d at 331.

[56] Deepwater Horizon I, 732 F.3d at 337 (emphasis in original).

> ignore it, or failed for other reasons to provide clearly for this eventuality. The district court was correct that BP's proposed interpretation is not what the parties agreed.[57]

Indeed, this Court correctly recognized that the Parties, in negotiating the Settlement Agreement, deemed and presumed that the general experiences and accounting of a given business during the Benchmark Period would be "comparable" for settlement purposes to the general experiences and accounting for that same business during those same months of the Compensation Period, "without any complex analysis of what type of business activities took place within those months."[58]

To the extent that the Final Matching Policy requires, or even allows, the Program Accountants to move acceptably recorded revenues into or out of the contractually determined Benchmark and Compensation Periods, it is inconsistent with *Deepwater Horizon I.*[59]

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[57] Deepwater Horizon I, 732 F.3d at 339-340.

[58] Deepwater Horizon I, 732 F.3d 326 at 340. The District Court noted this point upon remand. *See* R.E. 27-28 ("…the Claims Administrator need not consider whether the activity that occurred in the Benchmark Period was similar to that which occurred in the Compensation Period (or vice versa)").

[59] The Final Matching Policy is also inconsistent with the original *BEL Opinion* (as well as the Documentation provisions set forth in Exhibit 4A) in that it allows, and in some cases requires, the Program Accountants to engage in a "complex analysis of what type of business activities took place" not only within the business' Benchmark and Compensation Periods, but also during preceding and subsequent years.

b. The Final Matching Policy is Inconsistent with this Court's Recent May 8, 2015 Decision

On May 8, 2015, this Court handed down a decision in a series of appeals brought by BP which further rejects the notion that an "extraordinary" or "atypical" experience during the Benchmark Period (or Compensation Period) should be excluded from the calculation of "revenues" or otherwise modified.[60]

Rejecting an argument by BP that a *cy pres* award to a BEL Claimant should be excluded from the calculation of revenues, the Court held as follows:

> [D]enying this award because of its size would open the floodgates to a flurry of challenges to nonprofit awards, undermining the aims of the CSSP [Court-Supervised Settlement Program]. As the Appeals Panel noted in reviewing this award, the CSSP calculations look at revenue on a business level, not on a customer or donor level. Reading limitations into the meaning of 'revenue' based on the identity of the donor runs contrary to this agreed-upon framework.[61]

The Court then expressly rejected an argument by BP that a "one-time, extraordinary receipt of grant money" distorted the Claimant's compensation evaluation and bestowed a "windfall" on the business claimant.[62] In explaining its holding, the Court stated as follows:

> **By seeking to exclude revenue because it is "atypical," BP attempts to circumvent the causation requirements and compensation framework in the Agreement.** BP now asks

[60] Deepwater Horizon, supra, 785 F.3d at 1020-1023.

[61] Deepwater Horizon, 785 F.3d at 1021.

[62] Deepwater Horizon, 785 F.3d at 1021.

> individual claimants to show that any revenue from the pre-spill period was of the type that they could have expected to continue earning after the spill. But that amounts to requiring that Claimants prove that their lost revenue was caused by the spill, which is precisely what we refused to require in *Deepwater Horizon II* ….
>
> **The parties agreed on Exhibit 4C's compensation framework to establish what claimants might have expected to earn after the spill. To accept challenges to the types of revenue included in those calculations because the claimants could not have expected to earn similar revenue after the spill defeats the purpose of the compensation framework itself.** [63]

By allowing or directing the Program Accountants to move, smooth or otherwise reallocate revenues simply because they are "atypical" or "extraordinary", the Final Matching Policy similarly circumvents the purpose and intent of the BEL Compensation Framework that the Parties negotiated and agreed to in Exhibit 4C.

c. The Final Matching Policy Admittedly Departs from the Terms of the Settlement Agreement

On February 12, 2014, the Claims Administrator issued an initial draft proposed policy, which evolved into final Policy No. 495. The Claims Administrator expressly acknowledged, with respect to the Agricultural,

[63] Deepwater Horizon, 785 F.3d at 1021-1022, (emphasis supplied).

Educational and Professional Services Methodologies, that "a deviation from the existing methodology set forth in Exhibit 4C, was deemed necessary."[64]

During a follow-up meeting between and among the Program Accountants, representatives of Class Counsel, and representatives of BP, some of the accountants further verified and elaborated on the ways in which Policy No. 495 departs from what was negotiated and agreed to by the Parties. John Petzold, an accountant with PwC, acknowledged that the Agricultural and Educational Frameworks were not based on the Settlement Agreement, but were "new" methodologies, "which, when using only one benchmark year, effectively eliminates the 'Step Two' Calculation to which the BEL Claimant is entitled under Exhibit 4C."[65]

With respect to the Professional Services Methodology, Ted Martens, another accountant with PwC, confirmed that it is not only a "new" methodology, which is "neither found in nor circumscribed by Exhibit 4C," but also "cannot be found in accepted accounting methodology with respect to (at least) a contingent fee situation, where a fee is not earned unless and until a judgment or settlement is paid."[66]

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[64] R.E. 199-200.

[65] R.E. 203.

[66] R.E. 201, 202.

Based on the language utilized by the Claims Administrator in the draft and final Policy, it appears that the development of these new specialized frameworks likely stemmed from this Court's references to "realistic measure of economic loss" and "economic reality".[67] There is no indication or directive in the *BEL Opinion,* however, that either the Claims Administrator or the District Court should set the Agreement aside, start from scratch, and develop a completely new methodology that would attempt to achieve "a realistic measure of economic loss". Rather, this Court was simply weighing the two proffered interpretations of the term "corresponding" as used in Exhibit 4C, and concluded that, *as between the two,* BP's proffered interpretation seemed *more* in line with "economic reality".[68]

Upon remand, the District Court agreed that the word "corresponding" within the definition of "Variable Profit" should be interpreted to suggest the type of matching of expenses to revenue that one would typically find in accrual-based accounting profit and loss statements.[69]

However, this does not in any way suggest or imply that the entire 4C Compensation Framework should be set aside in favor of some new and unspecified standard of economic loss – particularly in cases where such methodologies would violate established accounting principles and methodologies.

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[67] *See, e.g.,* R.E. 68, 69, 71, 73, 93, 110, 199-201, 203.

[68] *See generally* Deepwater Horizon I, 732 F.3d at 336-339.

[69] R.E. 26-27.

d. The Final Matching Policy is Incompatible with Established Accounting Standards and Principles

The concepts of Generally Accepted Accounting Principles (GAAP) recognition and matching, where utilized, "most often apply to expense recognition, not revenue recognition."[70] Recognized bases of accounting other than GAAP include cash basis, regulatory basis, tax basis, and contractual basis, with "cash basis and tax basis methods [] the most prevalent in accounting practice."[71] But even where GAAP is utilized by a company: "Moving revenue properly recognized in one period under accrual-basis of accounting (GAAP) to another period (for example, in an effort to smooth earnings) is a form of earnings management and is considered *unacceptable* for financial reporting purposes by the accounting profession."[72] Even under accrual accounting principles, "revenue should not be recognized until it is realized or realizable and earned."[73]

As noted by the Louisiana and Alabama Societies of Certified Public Accountants, appearing herein previously as *amici,* Section 446(a) of the Internal Revenue Code provides that taxable income "shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in

[70] R.E. 179 [Supp. Carroll Declaration, ¶10].

[71] R.E. 169 [Panzeca Declaration, ¶14].

[72] R.E. 175 [Kholbeck Declaration, ¶10] (emphasis supplied).

[73] ROA.18125 [Carroll Supp. Declaration (Oct. 24, 2013)]; *see also* R.E. 174 [Kohlbeck Declaration, ¶6]; FASB CONCEPT STATEMENT 5, Paragraphs 83(b) and 84(a); SECURITIES AND EXCHANGE COMMISSION STAFF ACCOUNTING BULLETIN NO. 104 ("SAB 104"), pp.1 and 10; KIESO, WEYGANDT & WARFIELD, *Intermediate Accounting* (14th ed.) p.60.

keeping his books."[74] Simply put, *amici* confirm, "revenue recognition is based on the accounting method used by a business."[75]

BP's proposal to move revenue to match expenses, which was embraced, in part, under the specialized Construction, Agricultural, Educational and Professional Services Frameworks, "is backwards and violates the very concept referred to as matching in BP's out of date textbook."[76] Rather, the reallocation of revenues under Policy No. 495 "is not matching in any sense recognized in the accounting world, but is merely an allocation formula that artificially moves revenue into months before or after it was earned based on variable expenses."[77]

e. The Final Matching Policy is Inconsistent with the Parties' Discussions, Agreement and Representations Both Before and After the Agreement was Executed

The evidentiary submissions on remand make it clear that the Parties, during the negotiations, never expressed a suggestion or expectation that Program Accountants would convert cash-basis profit and loss statements to accrual-basis profit and loss statements; look to the "business activities" of the claiming Entity

[74] *See* 26 U.S.C. §446(a).

[75] BRIEF OF *AMICI CURIAE* CERTIFIED PUBLIC ACCOUNTING SOCIETIES IN SUPPORT OF APPELLEES, No.13-30315 (June 24, 2013), at p.5 [Fifth Cir. Doc. 00512285581, at 12]. *See also* R.E. 174 [Kohlbeck Declaration, ¶4] ("Recognition of revenue and expenses under the cash-basis of accounting are based on when cash is received and paid, respectively").

[76] R.E. 180 [Supp. Carroll Declaration, ¶13]. (*See* R.E. 174-175 [Kohlbeck Declartion, ¶8] regarding the outdated version of the Kieso textbook previously relied upon by BP.)

[77] R.E. 180 [Supp. Carroll Declaration, ¶14].

to attempt to determine what revenues had been "earned" during the Benchmark or Compensation Periods; nor attempt to move, smooth, or otherwise reallocate revenues according to "revenue attribution criteria".[78]

During the implementation process, moreover, BP responded to an inquiry from the Claims Administrator in which BP's Counsel explained that "the use of transparent, objective, data-driven methodologies" was "one of the cornerstones of the Settlement Agreement," which "does not allow for the use of professional judgment or discretion" or the "use of allocated proxy" as a substitute for the clearly defined and articulated standards set forth in Exhibit 4C.[79]

In a second letter, dated that same day, addressing the issue of causation under Exhibit 4B, Counsel for BP similarly confirmed that "all losses calculated in accord with Exhibit 4C" are compensable where causation is established by "accurate financial data"; some "'false positives'" BP Counsel noted, "are an inevitable concomitant of an objective quantitative, data-based test."[80]

After the settlement was approved, however, BP started to argue for the exercise of professional judgment by Program Accountants and other "allocated

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[78] *See generally* ROA.18136-18308 [Class Counsel Submission on Remand of BEL Issue]; *see, in particular, e.g.,* R.E. 184-192 [Herman Declaration, ¶¶10-14, 23, 26-32; Rice Declaration, ¶¶12-17; Scott Declaration, ¶¶5-8].

[79] R.E. 164-165 [Letter from BP Counsel to Claims Administrator re Contemporaneous P&Ls (Sept. 28, 2012)].

[80] ROA.14860-14862 [BP Counsel Letter to Claims Administrator re Causation (Sept. 28, 2012)].

proxy" to alter the revenues that had been contemporaneously recorded under recognized accounting methodologies. Some of these newfound arguments were accepted in Policy No. 495, despite concerns about the injection of considerable professional judgment, uncertainty, inconsistency and subjectivity expressed by CPAs familiar with the Settlement Agreement and the submission of BEL Claims to the Settlement Program.[81]

f. To the Extent that Causation is Revisited under the Final Matching Policy, it is Incompatible with this Court's Decisions in Deepwater Horizon II and Deepwater Horizon III

As Judge Southwick recognized in the original *BEL Opinion*, the test for Causation under Exhibit 4B and the test for Compensation under Exhibit 4C are two completely separate and distinct inquiries for businesses asserting BEL Claims under the Settlement Agreement.[82]

The BEL Causation Framework contained within Exhibit 4B was affirmed by this Court in *Deepwater Horizon II*[83] and *Deepwater Horizon III.*[84] And a

[81] *See, e.g.,* R.E. 170-173 [Panzeca Declaration, ¶¶17, 18, 28]; R.E. 178 [Supp. Carroll Declaration, ¶6(a) and (e)].

[82] *See* Deepwater Horizon I, 732 F.3d at 347 (Southwick, J., concurring) ("No one on appeal is challenging Exhibit 4B").

[83] Deepwater Horizon II, 739 F.3d 790 (5th Cir. 2014), *rehearing en banc denied,* 756 F.3d 320 (5th Cir. 2014), *cert. denied,* 135 S.Ct. 734 (2014).

[84] Deepwater Horizon III, 744 F.3d 370 (5th Cir. 2014), *rehearing denied,* 753 F.3d 509 (5th Cir. 2014), *rehearing en banc denied,* 753 F.3d 516 (5th Cir. 2014).

different panel of this Court recently reaffirmed the original interpretation and application of Exhibit 4B in one of the May 2015 decisions.[85]

By altering the methodology under which causation for BEL Claims is determined, the Final Matching Policy is contrary to the law of this case.

As Judge Southwick noted in *Deepwater Horizon III*: "There is nothing fundamentally unreasonable about what BP accepted but now wishes it had not."[86]

[85] Deepwater Horizon, supra, 785 F.3d at 1001-1002 (affirming categorical exclusion of appeals premised on alleged alternative causation).

[86] Deepwater Horizon III, 744 F.3d at 377.

Conclusion

For the above and foregoing reasons, the Court should vacate the Final Matching Policy, and instruct the Claims Administrator to re-adopt its initial interpretation of the Settlement Agreement; or, in the alternative, to eliminate the specialized Construction, Agricultural, Educational, and Professional Services Frameworks from Policy 495, and to accomplish sufficient matching, where necessary, solely with the reallocation of variable expenses under the AVM approach.

This 20th day of July, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(A), because it contains 7,364 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Fifth Circuit Rule 32.2.

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This 20th day of July, 2015.

/s/ Stephen J. Herman and James Parkerson Roy
Co-Lead Class Counsel, for Appellants

CERTIFICATE OF ELECTRONIC COMPLIANCE

We hereby certify that: (1) required privacy redactions have been made pursuant to this Court's Rule 25.2.13, (2) the electronic submission is an exact copy of the paper document pursuant to this Court's Rule 25.2.1, and (3) the document has been scanned with the most recent version of Macafee's MXlogix and is free of viruses.

This 20th day of July, 2015.

/s/ Stephen J. Herman and James Parkerson Roy
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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing Appeal Brief will be filed electronically on July 20, 2015, and will thereby be served electronically on all appeal counsel through the Clerk's Notice of Docketing Activity. A courtesy copy of the brief will also be served on BP Appeal Counsel *via* e-mail, and the brief will further be served on all counsel of record in MDL No. 2179 *via* Lexis-Nexis File & Serve pursuant to Pre-Trial Order No. 12.

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