No. 13-30315
(consolidated with Nos. 13-30329, 13-31220, 13-31316)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: DEEPWATER HORIZON

LAKE EUGENIE LAND & DEVELOPMENT, INC., ET AL., INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs–Appellees,
v.

BP EXPLORATION & PRODUCTION INC., BP AMERICA PRODUCTION COMPANY, and BP P.L.C.,

Defendants–Appellants.

On Appeal from the United States District Court
for the Eastern District of Louisiana
MDL No. 2179, Civ. A. No. 12-970

CLAIMS ADMINISTRATOR PATRICK JUNEAU AND THE SETTLEMENT PROGRAM'S RESPONSE TO BP'S PETITION FOR REHEARING EN BANC

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RESPONSE TO BP'S PETITION FOR REHEARING EN BANC

The Claims Administrator and the Settlement Program, through undersigned counsel, respectfully submit this limited Response to BP's Petition for Rehearing En Banc ("BP's Petition") in No. 13-30315, the "BEL Appeal."

I. Introduction

BP's Petition may leave this Court with a serious misimpression regarding a key aspect of this case. In particular, BP appears to be arguing that, with respect to causation, the Claims Administrator engaged in a "post-approval modification of the settlement" that created new class members and thus permitted recovery by persons who "lacked standing to bring any claim" against BP.[1] BP argues that, to accomplish this, the causation requirement in the Settlement Agreement, as written, was somehow modified by "the post-approval *implementation* of the agreement."[2] As will be set forth herein, BP's argument is fundamentally at odds with the factual record of this case.

One theme of BP's Petition appears to be that the Certification Panel rested its ruling on the Settlement Agreement *as written*, and left to the BEL Panel whether these standards were satisfied during the *implementation* of the agreement. BP, citing Judge Garza's dissent, then argues that the "post-approval *implementation*" of the Settlement Agreement by the Claims Administrator

[1] BP Petition, at 4-5.
[2] *Id.* at 4.

somehow excused the "as written" causation requirements of the Agreement in a manner that expanded the class to include members who could not satisfy causation and thus lacked standing to sue.[3] Later in the Petition, BP cites Judge Clement's dissent to argue that the Claims Administrator had "expanded" the Settlement Agreement in a manner that "raise[d] once again" the issues that Judges Southwick and Dennis held were put to rest by the Certification Panel.[4] The clear implication of BP's argument was to repeat the suggestion that some post-approval action by the Claims Administrator had resurrected the causation issue that the Certification Panel found meritless as of the time the settlement had been approved.

BP then uses these faulty pillars to construct an argument that the BEL Panel's deference to the Certification Panel was flawed, because that panel had declined to analyze issues arising from the interpretation and implementation of the

[3] *Id*. at 4. In particular, BP states in its Petition:

> Judge Garza dissented, explaining that the Claims Administrator had interpreted the agreement to allow the class – *"as actually implemented"* – to "encompass individuals or entities who could never truthfully allege or establish standing, at any stage of the litigation." 739 F.3d at 824 (Garza, J., dissenting). This post-approval modification of the settlement rendered the class invalid under Article III, he maintained, because the class would now include numerous members that lacked standing to bring any claim against BP. *Id.*

[4] *Id.* at 6.

Settlement Agreement that arose "*after* its approval by the district court."[5] The only sensible construction of BP's argument is to suggest to this Court that the Claims Administrator's policy with respect to alternative causation was a surprise move that took place *after* the district court had approved the Settlement Agreement. But that is patently untrue and contrary to the actual timeline of events.

As will be more fully demonstrated below: (1) *before* the Settlement Agreement was approved by the district court, *not afterwards*, the Claims Administrator issued a formal written policy regarding the implementation of the agreement's causation requirements, in which he expressly stated that he would *not consider alternative causes of loss*; (2) BP knew about and readily agreed with that policy and never challenged it; (3) the Claims Administrator did not change its causation analysis "post-approval"; and (4) at all times the Claims Administrator has required each claimant to satisfy the causation standards drafted and agreed to by the parties in Exhibit 4B.

II. The manner in which the Claims Administrator was implementing the Agreement's causation requirements was known to BP well before the Agreement was approved by the district court and did not change post-approval.

As explained in prior briefing, after *preliminary* approval of the Settlement Agreement and after the Settlement Program had begun to review and evaluate

[5] *Id.* at 8 (emphasis added).

actual claims, but months prior to the *final* approval by the district court, the Claims Administrator approached both Parties to clarify whether the Parties intended the Program to apply the objective formulae of the Agreement to determine whether a claimant could recover, even when a subjective analysis might conclude that losses were not spill-related.[6] A review of the actual hypothetical sent by the Claims Administrator's Office ("CAO") to the Parties on September 25, 2012 (*three months before* the settlement was finally approved), sets this matter firmly in context:

> As to BEL claims, once a claimant's financial records satisfy the causation standards set out in Exhibit 4B, does the Settlement Agreement mandate and/or allow the Claims Administrator to separate out losses attributable to the oil spill vs. those that are not? Stated another way, once a claimant passes the causation threshold, is the claimant entitled to recovery of all losses as per the formula set out in Exhibit 4C, or is some consideration to be given so as to exclude those losses clearly unrelated to the spill?
>
> I will give a hypothetical situation to try to illustrate the question we are asking:
>
> Hypo: A small accounting corporation / firm is located in Zone B. They meet the "V-shaped curve" causation test. The explanation for the drop in revenue is that one of the three partners went out on medical leave right around the time of the spill. Their work output, and corresponding income, thus went down by about a third. The income went back up 6 months later when the missing partner returned from medical leave. Applying the compensation formula

[6] Affidavit of Patrick A. Juneau (hereinafter "PAJ Affidavit"), ¶¶ 22-23, R. at 18301-02.

> under Exhibit 4C of the Settlement Agreement, the accounting firm can calculate a fairly substantial loss. Is that full loss recoverable?[7]

BP responded to this query via two separate communications from two of its attorneys, both of which made clear that BP's position was that the claimant in the posed hypothetical would be entitled to full recovery. BP stated:

> If a claimant has submitted the required documentation under the Business Economic Loss ("BEL") Documentation Requirements (Settlement Agreement Ex. 4A), and those documents and any additional detail information the Settlement Facility has determined is necessary to verify the accuracy of the financial data submitted by the claimant establish that the claim satisfies the requirements of the BEL Causation Framework (Ex. 4B), then Claimant Compensation should be calculated pursuant to the provisions of the BEL Compensation Framework, Ex. 4C. ***If the accurate financial data establish that the claimant satisfies the BEL causation requirement, then all losses calculated in accord with Exhibit 4C are presumed to be attributable to the Oil Spill.***
>
> Nothing in the BEL Causation Framework (Ex. 4B) or Compensation Framework (Ex. 4C) provides for an offset where the claimant's firm's revenue decline (and recovery, if applicable) satisfies the causation test ***but extraneous non-financial data indicates that the decline was attributable to a factor wholly unrelated to the Oil Spill. Such "false positives" are an inevitable concomitant of an objective quantitative, data-based test***.[8]

Based on what was the confirmed agreement of the Parties on this issue, therefore, the Claims Administrator issued a Policy Announcement on October 10, 2012 (*two months before* final approval), which stated in part:

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[7] Ex. 2 to PAJ Affidavit, 9/25/12 email from Michael Juneau, R. at 18308-09

[8] Ex. 3 to PAJ Affidavit, 09/28/12 email from Keith Moskowitz, R. at 18310; Ex. 4 to PAJ Affidavit, 09/28/12 letter from Mark Holstein, R. at 18312-17 (emphasis added).

> **2. No Analysis of Alternative Causes of Economic Losses.** The Settlement Agreement represents the Parties' negotiated agreement on the criteria to be used in establishing causation. The Settlement Agreement sets out specific criteria that must be satisfied in order for a claimant to establish causation. Once causation is established, the Settlement Agreement further provides specific formulae by which compensation is to be measured. All such matters are negotiated terms that are an integral part of the Settlement Agreement. ***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 the Settlement Agreement.*** Both Class Counsel and BP have in response to the Claims Administrator's inquiry confirmed that this is in fact a correct statement of their intent and of the terms of the Settlement Agreement. The Claims Administrator will thus compensate eligible Business Economic Loss and Individual Economic Loss claimants for all losses payable under the terms of the Economic Loss frameworks in the Settlement Agreement, ***without regard to whether such losses resulted or may have resulted from a cause other than the Deepwater Horizon oil spill provided such claimants have satisfied the specific causation requirements set out in the Settlement Agreement. Further, the Claims Administrator will not evaluate potential alternative causes of the claimant's economic injury***, other than the analysis required by Exhibit 8A of whether an Individual Economic Loss claimant was terminated from a Claiming Job for cause.[9]

BP *did not* object to this Policy Announcement, *did not* request a Claims Administration Panel meeting to address the issue any further, and *never appealed* the policy.[10]

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[9] PAJ Affidavit, ¶ 25, R. at 18302-03; Policy Announcement of 10/10/12, R. at 18318-23 (emphasis added).

[10] PAJ Affidavit, ¶ 26, R. at 18303. The Settlement Agreement sets forth a procedure for resolving any disagreements regarding the Claims Administrator's oversight and administration of the Settlement Agreement. First, the Claims Administrator and other members of the three-person Claims Administration Panel

The Final Fairness Hearing was held before the District Court on November 8, 2012. At or around the time of the hearing, the Settlement Program had already processed more than 79,000 claims and authorized payments of more than $1.3 billion to claimants since the Program's commencement in June 4, 2012.[11] At the hearing, BP did not voice any objection whatsoever to the Program's handling of claims with respect to objective or alternative causation.[12] Moreover, counsel for BP made the following comments:

> We have presumed causation in Zone A. We've presumed causation. ***It's irrebuttable.*** You know as well as I do, Your Honor, how many people come in and think they have got a claim damage for economic loss; but, ***when the facts come out, they had a bad year because they lost their key manager, they had a bad year because the street was being repaired in front of them, whatever reason. We're presuming causation for whole sections of the settlement class depending on where you reside and the nature of your business.*** Our experts say, the joint experts, it exceeds the *Reed* factor.[13]

Shortly after the Fairness Hearing and *before final approval*, BP and Class Counsel also submitted joint proposed findings in support of final approval that stated:

> The Settlement reasonably requires that some business claimants demonstrate that their business was affected by the spill. In many

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consisting of the Claims Administrator, a representative of BP and a representative of Class Counsel, shall attempt to resolve the disagreement unanimously. *See* Agreement, at § 4.3.4, R. at. 4083. If they are unable to do so, the issue or disagreement "will be referred to the Court for resolution." *Id.*

[11] Proposed Findings of Fact and Conclusions of Law, ¶¶ 67, 68, R. at 8542.

[12] PAJ Affidavit, ¶ 30, R. at 18304.

[13] Rec. Doc. 7892 at 68 (emphasis added).

> other cases causation is presumed, which benefits class members. Where class members are required to prove causation, there are multiple reasonable options for doing so. *See* Settlement Agreement Ex. 4B . . . .
>
> ***Where causation is not presumed, the causation tests are reasonable and flexible; they use standardized and transparent approaches.*** The causation tests reflect rational expectations about the economic harm that the spill could have caused businesses. The first option is the V-shaped revenue test, which requires proof of a downturn after the spill followed by a later upturn. Claimants with a less severe V ("Modified V-Shaped Revenue Pattern") or whose business did not experience an upturn in 2011 ("Decline-Only Revenue Pattern") may still recover provided that they can provide certain reasonable additional information. . . .
>
> Once the causation tests are satisfied, all revenue and variable profit declines during the Compensation Period are presumed to be caused entirely by the spill, with ***no analysis of whether such declines were also traceable to other factors unrelated to the spill.***[14]

The Parties' understanding of the implementation of the Agreement's causation frameworks was again addressed in a conference before the Court on December 12, 2012 (*before* final approval of the settlement) and confirmed in Judge Barbier's email following that conference, which stated:

> Counsel for BP and the PSC agree with the Claims Administrator's objective analysis of causation with respect to his evaluation of economic damages Claims, as previously set forth by Mr. Juneau in paragraph 2 of his October 10, 2012 policy announcement.[15]

[14] Proposed Findings of Fact and Conclusions of Law, ¶¶ 116, 124, 126; R. at 8559-62.

[15] Ex. 9 to PAJ Affidavit, 1/30/13 email from Judge Barbier, R. at 18329.

Only then did the district court grant final approval to the settlement on December 21, 2012.[16]

III. The Claims Administrator has faithfully implemented the Agreement's causation criteria.

To the extent that BP's Petition suggests that the Claims Administrator has abandoned the Settlement Agreement and required *no* satisfaction of its causation standards, that too is false. Specifically, Section 5.3.2.3 sets forth the "Causation Requirements For Business Economic Loss Claims Generally" as follows: "Business Economic Loss Claimants, unless causation is presumed, must establish that their loss was due to or resulting from the Deepwater Horizon Incident. The causation requirements for such Claims are set forth in Exhibit 4B."[17] Exhibit 4B of the Settlement Agreement is entitled "Causation Requirements for Businesses Economic Loss Claims." Exhibit 4B is divided into three parts: (I) "Business Claimants for Which There is No Causation Requirement," (II) "Causation Requirement for Zone B and Zone C," and (III) "Causation Requirements for Zone D." Part I lists the Zone A entities that, because of their geographic proximity to the Gulf of Mexico and/or the type of business they conduct, "are not required to provide any evidence of causation."[18] Part II states, "If you are not entitled to a presumption as set forth in (I) above and you are located in Zone B or Zone C then

[16] Order Granting Final Approval of Settlement Agreement, R. at 12149-273.
[17] Settlement Agreement, § 5.3.2.3, R. at 4096.
[18] Settlement Agreement, Exhibit 4B, R. at 4260.

you must satisfy the requirements of one of the following sections A-E below."[19] The five requirements are (A) "V-Shaped Revenue Pattern," (B) "Modified V-Shaped Revenue Pattern," (C) "Decline-Only Revenue Pattern" (D) "Proof of Spill-Related Cancellations," (E) "Causation Proxy Claimant."[20] Part III applies to Zone D claimants and requires claimants to meet one of six tests, five of which are the same or similar to the tests in Part II.[21]

The Claims Administrator was not an author of the Settlement Agreement and did not devise the criteria to be used in deciding whether a claimant does or does not have losses attributable to the Oil Spill. Those standards were negotiated by the Parties and are recorded in Exhibit 4B of the Settlement Agreement. Under the terms of the Settlement Agreement, the Claims Administrator is charged with the duty to "faithfully implement and administer the Settlement, according to its terms and procedures, for the benefit of the Economic Class, consistent with this Agreement, and/or as agreed to by the Parties and/or approved by the Court."[22] With respect to the Agreement's causation criteria set forth in Exhibit 4B, Mr. Juneau and the Settlement Program have done exactly that. The Program's implementation of the Agreement's causation standards, therefore, *did not* change after the Agreement was approved.

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[19] *Id*.
[20] *Id*. at 4260-64.
[21] *Id*. at 4264-69.
[22] Settlement Agreement, § 4.3.1, R. at 4083.

IV. Conclusion

The Claims Administrator takes no position regarding BP's Petition for Rehearing En Banc. Instead, the Claims Administrator submits this response simply to clarify the factual record regarding the issue of alternative causation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2014, an electronic copy of the foregoing was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service has been accomplished electronically and/or by U.S. Mail on the following:

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