

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010	*	MDL NO. 2179
	*	
	*	SECTION J
	*	
This document relates to all actions.	*	
	*	Honorable CARL J. BARBIER
	*	
	*	Magistrate Judge SHUSHAN
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**BP'S MOTION FOR LEAVE TO FILE RESPONSE TO
CLASS COUNSEL'S COMMENTS ON THE SPECIAL MASTER'S REPORT**

On September 6, 2013, Special Master Freeh issued a Report demonstrating that conflicts of interest, inadequate anti-fraud controls, and resistance to reform are plaguing the Court Supervised Settlement Program. *See* Rec. Doc. 11287. That same day, the Court issued a show cause order inviting any interested party to file a response by September 20, 2013, *see* Rec. Doc. 11288, a deadline that it subsequently extended to October 18, 2013, *see* Rec. Doc. 11442, November 15, 2013, *see* Rec. Doc. 11664, December 16, 2013, *see* Rec. Doc. 11835, and finally January 17, 2014, *see* Rec. Doc. 11979. BP and Class Counsel each filed their Responses substantially in advance of the Court's extended deadline. *See* Rec. Docs. 11463 (Class Counsel), 11471 (BP).

The Court's initial show cause order provided that other than a "response, or any objection or motion . . . to the Special Master's Report," "[n]o further briefing will be allowed without express leave of Court." Rec. Doc. 11288 at 3-4. In compliance with that order, BP's filing responded exclusively to the Special Master's Report, and did not respond to Class Counsel's filing.

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The Court’s initial show cause order provided that other than a “response, or any objection or motion . . . to the Special Master’s Report,” “[n]o further briefing will be allowed without express leave of Court.” Rec. Doc. 11288 at 3-4. In compliance with that order, BP’s filing responded exclusively to the Special Master’s Report, and did not respond to Class Counsel’s filing.

BP nonetheless submits that a short response to Class Counsel's filing would materially assist the Court's consideration of the Special Master's Report, as well as correct certain statements of Class Counsel that are substantially inaccurate or incomplete. For these reasons, BP respectfully requests leave to file the attached response, of only eight pages, into the record. BP is making this filing today, before the Court's deadline expires, to submit material responsive to the Special Master's Report and the issues raised by Class Counsel in response. No prejudice to any party will result from the Court's accepting this filing.

A proposed order accompanies this request.

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A proposed order accompanies this request.

January 17, 2014

Respectfully submitted,

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***ATTORNEYS FOR BP EXPLORATION & PRODUCTION INC. AND BP AMERICA
PRODUCTION COMPANY***

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing pleading has been served on All Counsel by electronically uploading the same to Lexis Nexis File & Serve in accordance with Pretrial Order No. 12, and that the foregoing was electronically filed with the Clerk of Court of the United States District Court for the Eastern District of Louisiana by using the CM/ECF System, which will send a notice of electronic filing in accordance with the procedures established in MDL 2179, on this 17th day of January, 2014.

/s/ Don K. Haycraft
Don K. Haycraft

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/s/ Don K. Haycraft Don K. Haycraft

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* **Section: J**
*
* **Judge Barbier**
*
* **Magistrate Judge Shushan**
*
*

[PROPOSED] ORDER

IT IS HEREBY ORDERED that BP's Motion for Leave To File Response To Class Counsel's Comments On The Special Master's Report Is GRANTED. The Clerk is respectfully directed to file BP's Response into the record forthwith.

New Orleans, Louisiana, this ____ day of January, 2014.

UNITED STATES DISTRICT JUDGE

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Specifically, BP responds to Class Counsel’s statements as follows:

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1. BP did not waive the \$75 million liability cap that applies under the Oil Pollution Act, *see* 33 U.S.C. § 2704(a)(3), for the reasons that Class Counsel asserts, *i.e.*, because BP allegedly engaged in gross negligence or willful misconduct or because it violated federal safety or operating regulations. *See* Rec. Doc. 11463 (“Cmts.”) ¶ 1. As the Court is aware, BP denies all allegations that it engaged in such conduct. *See generally* Rec. Docs. 10466 (BP’s Phase One Post-Trial Brief), 10467 (BP’s Phase One Proposed Findings of Fact and Conclusions of Law), 10734 (BP’s Phase One Post-Trial Reply), 11268 (BP’s Phase Two Pre-Trial Memorandum (Source Control)), 11349 (BP’s Phase Two Pre-Trial Reply (Source Control)), 12045 (BP’s Phase Two Post-Trial Brief (Source Control)). Moreover, the Court has previously found that the regulations that the United States claimed BP violated are “not the type that would remove OPA’s liability cap.” Rec. Doc. 5809 (February 2012 Summary Judgment Ruling) at 13. As BP explained in its October 2010 statement waiving the cap, “BP and its affiliates are not admitting anything about their conduct and, indeed, specifically deny that they have engaged in any gross negligence in connection with the *Deepwater Horizon* incident and the resulting oil spill.” Rec. Doc. 559 at 1-2. Rather, as Special Master Freeh recognized, BP waived the cap “in an effort to begin to fulfill its obligations under the Oil Pollution Act of 1990,” Special Master Report at 1, *i.e.*, because it decided immediately in the wake of the spill to do the right thing and pay all legitimate claims for legally compensable losses caused by the spill.

2. Class Counsel’s comments regarding the Gulf Coast Claims Facility (“GCCF”) are irrelevant. *See* Cmts. ¶ 2. As Class Counsel admit, the GCCF accepted and paid a wide variety of types of claims, including lost profits, lost wages, removal and cleanup costs, damage to real or personal property, loss of use of subsistence resources, and physical injury or death.

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Id. Whether any particular claim before the GCCF merited payment turned on the specific facts of the claim and is not susceptible to generalizations.

3. Class Counsel note that Louisiana Rule of Professional Conduct 1.5(e) does not specify the time when the client's written consent to a fee-sharing arrangement must be obtained. *See* Cmts. ¶ 3. Yet a practice of obtaining client consent to a shared representation "at different times" after the commencement of the representation would defeat the purpose of Rule 1.5(e) and thus should be strongly discouraged. The obvious aim of Rule 1.5(e) is to protect the client's right to select counsel of his choosing before legal services are provided. The practice of obtaining consent to shared representation at later or different times lends itself to abuse, as the client may not know who is handling his case until well after services have already been provided. In *In re Fewell*, cited by Class Counsel (Cmts. ¶ 3 n.11), the Louisiana Attorney Disciplinary Board stated that "[o]bviously, it is prudent for such writings to occur at the commencement of the representation." No. 12-DB-048 (La. Discip. Bd. Aug. 7, 2013) at 8, *available at* <http://www.ladb.org/new/DR/handler.document.aspx?DocID=8027>. The Disciplinary Board further found that the client had been informed in advance of all lawyers who would represent him and consented to the shared representation. Written consent to the representation by all lawyers in a fee-sharing agreement should be obtained at the outset of the representation and before legal services are provided.

Class Counsel further suggest that express client consent to the share of the fee that each lawyer will receive in a fee-sharing agreement may not be required. *See* Cmts. ¶ 3 n.11. Louisiana Rule 1.5(e)(1), however, provides that fee division is permissible only if "the client agrees in writing to the representation by all of the lawyers involved, and is advised in writing as to the share of the fee that each lawyer will receive." Since the choice of lawyers at all times

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3. Class Counsel note that Louisiana Rule of Professional Conduct 1.5(e) does not specify the time when the client's written consent to a fee-sharing arrangement must be obtained. See Cmts. 3. Yet a practice of obtaining client consent to a shared representation "at different times" after the commencement of the representation would defeat the purpose of Rule 1.5(e) and thus should be strongly discouraged. The obvious aim of Rule 1.5(e) is to protect the client's right to select counsel of his choosing before legal services are provided. The practice of obtaining consent to shared representation at later or different times lends itself to abuse, as the client may not know who is handling his case until well after services have already been provided. In *In re Fewell*, cited by Class Counsel (Cmts. 3 n.11), the Louisiana Attorney Disciplinary Board stated that "[o]bviously, it is prudent for such writings to occur at the commencement of the representation." No. 12-DB-048 (La. Discip. Bd. Aug. 7, 2013) at 8, available at <http://www.ladb.org/new/DR/handler.document.aspx?DocID=8027>. The Disciplinary Board further found that the client had been informed in advance of all lawyers who would represent him and consented to the shared representation. Written consent to the representation by all lawyers in a fee-sharing agreement should be obtained at the outset of the representation and before legal services are provided.

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rests in the hands of the client, this rule clearly intends that clients be (a) informed beforehand about representation by multiple lawyers; and (b) informed of proposed fee divisions, precisely so that the client can use the information about the identity of the multiple lawyers and the nature of the fee division to decide whether he or she wants to be represented by those lawyers using that particular fee division. Nothing on the face of the Rule indicates that it deprives clients of their right to use the information concerning the fee division to decide whether they wish to agree to be represented by the lawyers proposing such a fee division.

4. Class Counsel challenge the Special Master's observation that a Business Economic Loss Claimant alleges that "economic harm had been caused to the business as a result of the *Deepwater Horizon* spill." Cmts. ¶ 4 (quoting Special Master Report at 46). But under the terms of the Settlement Agreement, that is precisely what Business Economic Loss Claimant must allege and attest to. *See* Settlement Agreement ¶ 38.60 ("Economic Damage Claimant shall mean an Individual Claimant or Business Claimant who or that claims to have suffered Economic Damage."); *id.* ¶ 38.57 ("Economic Damage shall mean loss of profits, income, and/or earnings . . . allegedly arising out of, due to, resulting from, or relating in any way to, directly or indirectly, the Deepwater Horizon Incident . . ."). BP's position with respect to this issue is set forth in detail in its recent Fifth Circuit filings, and BP incorporates those filings by reference as though fully set forth herein. *See, e.g.*, Renewed Motion of Defendants-Appellants for an Injunction, Fifth Cir. No. 13-30315, Doc. 00512454163 (5th Cir. Dec. 30, 2013); Letter from Ted Olson to Lyle W. Cayce, Fifth Cir. No. 13-30315, Doc. 00512493887 (5th Cir. Jan. 8, 2014); Reply In Supp. of Renewed Motion of Defendants-Appellants For An Injunction, Fifth Cir. No. 13-30315, Doc. 00512496800 (5th Cir. Jan. 10, 2014); *see also* Certification Decision at 16-17 (Settlement Agreement "explicitly limits claims to those based on '[l]oss of income,

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earnings, or profits suffered by Natural Persons or Entities *as a result of* the DEEPWATER HORIZON INCIDENT'") (alteration and emphasis in original).

5. Class Counsel's allegations regarding BP's appeals of claims awards are demonstrably inaccurate. *See* Cmts. ¶ 5. The large majority of BP's appeals have challenged, among other things, the Settlement Program's failure to match revenues and corresponding variable expenses. The United States Court of Appeals for the Fifth Circuit and this Court have confirmed that the Claims Administrator erred and reversed the Claims Administrator's January 15, 2013 policy. *See* BEL Decision. In addition, with regard to other issues, the Appeals Panel has remanded or reversed substantial numbers of the Claims Administrator's awards appealed by BP. Still further, hundreds of claimants have admitted on appeal that the Claims Administrator erred and have accepted in whole or part BP's position on appeal.

In addition, the Claims Administrator's matching ruling was reversed and the causation issue was remanded for further consideration. *See* BEL Decision, 732 F.3d at 345 (Clement, J.) (instructing district court to create a "stay tailored so that those who experienced actual injury traceable to loss from the Deepwater Horizon accident continue to receive recovery but those who did not do not receive their payments."); *id.* at 346 (Southwick, J.) (Judge Clement's analysis is "logical" and causation issue should receive "the attention it deserves" on remand); *see also* BEL Causation Order at 3 ("[T]he issue of causation is once again remanded for expeditious consideration").

This Court responded to the Fifth Circuit's remand of the matching issue on December 24, 2013. "After fully reviewing the additional materials submitted by the parties and the definition of 'Variable Profit,' the Court reverses its earlier ruling and the Claims Administrator's interpretation as set forth in the January 15, 2013 Announcement of Policy

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