No. 13-30315
(consolidated with No. 13-30329)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN RE: DEEPWATER HORIZON

On Appeals from the United States District Court
for the Eastern District of Louisiana

BRIEF FOR APPELLANTS

Richard C. Godfrey, P.C.
J. Andrew Langan, P.C.
Wendy L. Bloom
Andrew B. Bloomer, P.C.
R. Chris Heck
KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, IL 60654
(312) 862-2000

Jeffrey Bossert Clark
Steven A. Myers
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Theodore B. Olson
Counsel of Record
Miguel A. Estrada
Thomas G. Hungar
Scott P. Martin
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

George H. Brown
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304
(650) 849-5300

Counsel for Appellants
[*additional counsel listed on inside cover*]

Daniel A. Cantor
Andrew T. Karron
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Jeffrey Lennard
DENTONS LLP
233 South Wacker Drive
Suite 7800
Chicago, IL 60606
(312) 876-8000

S. Gene Fendler
Don K. Haycraft
R. Keith Jarrett
LISKOW & LEWIS
701 Poydras Street, Suite 5000
New Orleans, LA 70139
(504) 581-7979

CERTIFICATE OF INTERESTED PERSONS

No. 13-30315

IN RE: DEEPWATER HORIZON

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,
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.

The undersigned counsel of record certifies that the following interested persons and entities described in the fourth sentence of Rule 28.2.1 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–Appellees

This action (the "*Bon Secour*" action) is brought by fifteen 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 class representatives represent the Economic and Property Damages Class that the district court certified, for settlement purposes only, on December 21, 2012. *See* MDL 2179 D.E. 8138, 8139. The absent class members together 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.

B. Attorneys for Plaintiffs–Appellees

Stephen Jay Herman
Soren E. Gisleson
HERMAN HERMAN & KATZ LLP
820 O'Keefe Avenue
New Orleans, LA 70113
(504) 581-4892

James Parkerson Roy
DOMENGEAUX, WRIGHT, ROY & EDWARDS
Suite 500
556 Jefferson Street
Lafayette, LA 70501
(337) 233-3033

Elizabeth Joan Cabraser
LIEFF, CABRASER, HEIMANN & BERNSTEIN
29th Floor
275 Battery Street
San Francisco, CA 94111
(415) 956-1000

Samuel Issacharoff
NEW YORK UNIVERSITY SCHOOL OF LAW
40 Washington Square, S., Suite 411J
New York, NY 10012
(212) 998-6580

Joseph F. Rice
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mount Pleasant, SC 29464
(843) 216-9159

Conrad S.P. "Duke" Williams
WILLIAMS LAW GROUP
435 Corporate Drive, Suite 101
Maison Grand Caillou
Houma, LA 70360
(985) 876-7595

Brian H. Barr
LEVIN, PAPANTONIO, THOMAS, MITCHELL,
ECHSNER & PROCTOR, PA
316 South Baylen St., Suite 600
Pensacola, FL 32502-5996
(850) 435-7045

Robin L. Greenwald
WEITZ & LUXENBERG, PC
700 Broadway
New York, NY 10003
(212) 558-5802

Jeffrey A. Breit
BREIT DRESCHER IMPREVENTO & WALKER, P.C.
999 Waterside Drive, Suite 1000
Norfolk, VA 23510
(757) 670-3888

Rhon E. Jones
BEASLEY, ALLEN, CROW, METHVIN,
PORTIS & MILES, P. C.
218 Commerce St., P.O. Box 4160
Montgomery, AL 36104
(334) 269-2343

Matthew E. Lundy
LUNDY, LUNDY, SOILEAU & SOUTH, LLP
501 Broad Street
Lake Charles, LA 70601
(337) 439-0707

Philip F. Cossich, Jr.
COSSICH, SUMICH, PARSIOLA & TAYLOR
8397 Highway 23, Suite 100
Belle Chasse, LA 70037
(504) 394-9000

Michael C. Palmintier
DEGRAVELLES, PALMINTIER, HOLTHAUS & FRUGÉ
618 Main Street
Baton Rouge, LA 70801-1910
(225) 344-3735

Robert T. Cunningham
CUNNINGHAM BOUNDS, LLC
1601 Dauphin Street, P.O. Box 66705
Mobile, AL 36660
(251) 471-6191

Paul M. Sterbcow
LEWIS, KULLMAN, STERBCOW & ABRAMSON
601 Poydras Street, Suite 2615
New Orleans, LA 70130
(504) 588-1500

Alphonso Michael "Mike" Espy
MORGAN & MORGAN, P.A.
188 East Capitol Street, Suite 777
Jackson, MS 39201
(601) 949-3388

Scott Summy
BARON & BUDD, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, TX 75219
(214) 521-3605

Calvin C. Fayard, Jr.
FAYARD & HONEYCUTT
519 Florida Avenue, SW
Denham Springs, LA 70726
(225) 664-4193

Ervin A. Gonzalez
COLSON HICKS EIDSON
255 Alhambra Circle, Penthouse
Coral Gables, FL 33134
(305) 476-7400

Mikal C. Watts*
WATTS GUERRA CRAFT, LLP
Four Dominion Drive, Building 3, Suite 100
San Antonio, TX 78257
(210) 447-0500

* Mr. Watts has resigned as counsel for Plaintiffs–Appellees. In the interest of completeness, however, his prior involvement has been noted here exclusively for purposes of evaluating possible disqualification or recusal.

C. Defendants–Appellants

BP Exploration & Production Inc.
BP America Production Company
BP p.l.c.

D. Attorneys for Defendants–Appellants

Theodore B. Olson
Miguel A. Estrada
Thomas G. Hungar
Scott P. Martin
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

George H. Brown
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304
(650) 849-5300

Richard C. Godfrey, P.C.
J. Andrew Langan, P.C.
Wendy L. Bloom
Andrew B. Bloomer, P.C.
R. Chris Heck
KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, IL 60654
(312) 862-2000

Jeffrey Bossert Clark
Steven A. Myers
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

S. Gene Fendler
Don K. Haycraft
R. Keith Jarrett
LISKOW & LEWIS
701 Poydras Street, Suite 5000
New Orleans, LA 70139
(504) 581-7979

Robert C. "Mike" Brock
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-5985

Daniel A. Cantor
Andrew T. Karron
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Jeffrey Lennard
Keith Moskowitz
DENTONS LLP
233 South Wacker Drive
Suite 7800
Chicago, IL 60606
(312) 876-8000

James J. Neath
Mark Holstein
BP AMERICA INC.
501 Westlake Park Boulevard
Houston, TX 77079
(281) 366-2000

E. Additional Interested Parties

In addition to the parties to the *Bon Secour* case, the following parties may have a potential interest in the outcome of this litigation: *Deepwater Horizon* Court Supervised Settlement Program; and Patrick A. Juneau (Claims Administrator of the *Deepwater Horizon* Court Supervised Settlement Program).

F. Attorneys for Additional Interested Parties

Attorneys for the Claims Administrator and Court Supervised Settlement Program:

Richard C. Stanley
Jennifer L. Thornton
Gina M. Palermo
Patrick H. Fourroux
STANLEY, REUTER, ROSS, THORNTON & ALFORD, L.L.C.
909 Poydras Street, Suite 2500
New Orleans, LA 70112
(504) 523-1580

/s/ Theodore B. Olson
Theodore B. Olson
Attorney of Record for BP Exploration & Production Inc., BP America Production Company, and BP p.l.c.

CERTIFICATE OF INTERESTED PERSONS

No. 13-30329
(consolidated with No. 13-30315)

IN RE: DEEPWATER HORIZON

BP EXPLORATION & PRODUCTION INC. AND
BP AMERICA PRODUCTION COMPANY,
Plaintiffs–Appellants,

v.

DEEPWATER HORIZON COURT SUPERVISED SETTLEMENT PROGRAM AND
PATRICK A. JUNEAU, IN HIS OFFICIAL CAPACITY AS CLAIMS ADMINISTRATOR
OF THE *DEEPWATER HORIZON* COURT SUPERVISED SETTLEMENT PROGRAM
ADMINISTERING THE *DEEPWATER HORIZON* ECONOMIC AND
PROPERTY DAMAGES SETTLEMENT AGREEMENT, AND IN HIS
OFFICIAL CAPACITY AS TRUSTEE OF THE *DEEPWATER HORIZON*
ECONOMIC AND PROPERTY DAMAGES SETTLEMENT TRUST,
Defendants–Appellees,

and

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,
on behalf of themselves and all others similarly situated,
Defendants/Intervenors–Appellees.

The undersigned counsel of record certifies that the following interested persons and entities described in the fourth sentence of Rule 28.2.1 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

BP Exploration & Production Inc.
BP America Production Company

B. Attorneys for Plaintiffs–Appellants

Attorneys for Plaintiffs–Appellants are listed *supra* at vi-viii.

C. Defendants–Appellees

This action is brought against the *Deepwater Horizon* Court Supervised Settlement Program, and Patrick A. Juneau (Claims Administrator of the *Deepwater Horizon* Court Supervised Settlement Program).

D. Attorneys for Defendants-Appellees

Attorneys for the Claims Administrator and Court Supervised Settlement Program are listed *supra* at viii.

E. Defendants/Intervenors–Appellees

The fifteen class representatives of the *Bon Secour* action intervened as defendants in the district court and are appellees here: 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; Lake Eugenie Land & Development, Inc.; Henry Hutto; Brad Friloux; Jerry J. Kee; John Tesvich; and Michael Guidry.

The class representatives represent the Economic and Property Damages Class that the district court certified, for settlement purposes only, on December 21, 2012. *See* MDL 2179 D.E. 8138, 8139. The absent class members together 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.

F. Attorneys for Defendants/Intervenors–Appellees

Attorneys for Defendants/Intervenors–Appellees are listed *supra* at ii-v.

G. Additional Interested Party

In addition to the parties to the case, the following party may have a financial interest in the outcome of this litigation: BP p.l.c.

H. Attorneys for Additional Interested Party

Attorneys for BP p.l.c. are listed *supra* at vi-viii.

/s/ Theodore B. Olson
Theodore B. Olson
Attorney of Record for BP Exploration & Production Inc. and BP America Production Company

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fifth Circuit Rule 28.2.4, BP Exploration & Production Inc. and BP America Production Company (collectively, "BP") respectfully submit that oral argument will assist the Court in resolving the important issues presented by these consolidated appeals. The appeals arise from a series of related decisions by the district court misinterpreting provisions of the settlement agreement governing claims for business economic losses caused by the *Deepwater Horizon* oil spill. This case has a three-year procedural history, ultimately resulting in a far-reaching class settlement agreement governed by a detailed set of carefully crafted rules for processing claims.

BP has raised several significant challenges to the district court's decisions for which oral argument would be helpful, including arguments based on (1) the district court's failure to adhere to the text of the agreement, (2) its departure from settled principles of contractual interpretation, and (3) its endorsement of excessive and unwarranted consequences—namely, compelling BP to pay hundreds of millions, soon likely to be billions, of dollars in awards for fictitious and inflated "losses." Indeed, the district court's contractual interpretation would jeopardize the class settlement itself, as the class could not be certified if businesses with no losses at all stand to receive a substantial portion of the settlement's benefits.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Rules

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

INTRODUCTION

These appeals arise from the district court's decision to rewrite the settlement agreement between BP Exploration & Production Inc. and BP America Production Company (collectively, "BP") and a class including thousands of businesses in the region surrounding the Gulf of Mexico. The agreement was established to compensate businesses that suffered actual lost profits as a result of the *Deepwater Horizon* oil spill in April 2010. The district court, however, has authorized the Claims Administrator to award substantial sums of money to businesses with no losses at all. Thus, BP has been ordered to pay hundreds of millions of dollars—soon likely to be billions—for fictitious and inflated losses.

The settlement agreement measures harm caused by the spill using a business economic loss ("BEL") framework, which—as the district court previously acknowledged—is "derived from recognized and accepted methodologies applied in evaluating business economic loss claims." USCA5 ("R.") 12158. This framework requires calculating "Variable Profit"—defined as monthly "revenue" less "corresponding … expenses"—for a post-spill period in 2010, and then comparing that amount with Variable Profit for a "comparable" period from the benchmark year (or years) before the spill. Agreement Ex. 4C, at 1-2 (R.4277-78). The difference, if any, equals lost profits to be awarded in compensation to the business claimant.

On January 15, 2013, however, the Claims Administrator announced a policy decision that businesses could establish their "revenue" and "expenses" in a given period based simply on whatever data they happen to have recorded in their monthly bookkeeping systems, even if those data bear no relationship to actual profit measured according to accepted methodologies. This interpretation is directly at odds with the settlement agreement's text, and unmoors the agreement from its stated purpose: compensating those affected by the spill for actual economic damages.

Under the Claims Administrator's interpretation, a company with identical activities and profits throughout 2009 and 2010 will receive windfall compensation awards if the timing of cash receipts in those two years differed by a month—or even, conceivably, a single day. Thus, the Claims Administrator awarded more than $3 million in base compensation to a rice farmer based on a "simple one-month delay in the receipt of 91 percent of the claimant's revenues," because the bulk of the claimant's 2009 revenue was recorded in November while the bulk of its 2010 revenue was recorded in December. R.16171-72 (Charles E. Finch).

More generally, the Claims Administrator's rigid focus on monthly records as originally maintained by claimants, without using the proper definitions of key contractual terms, systematically results in fictitious and inflated awards where those records do not accurately reflect the firm's revenue and corresponding expenses in a given month. Thus, a construction company located in Zone D—the farthest area from the spill—was awarded $4.8 million by the Claims Administrator despite "negative revenue and other obvious revenue misstatements," and even after the claimant had *admitted* that its monthly records "overstat[ed] benchmark year profits by over $1 million." R.16105 (J. Lester Alexander III). The failure to correctly define "revenue" allowed these overstatements to be ignored. And an advertising firm was awarded almost $3 million as a result of a $2.1 million bulk purchase of advertising time in August 2010. Because this advertising purchase was not matched with the revenue to which it corresponded, as required by the agreement, the firm appeared to have an artificial monthly loss in August, followed by artificially high profits when the advertising time was used. The result was that the claimant's profit margin appeared to be *negative* 6725% in August, as compared to its annual profit margin of 32.46%, creating the false impression of lost profits. *See* R.16350 ¶¶33-34 (Xavier Oustalniol). The Claims Administrator's systematic refusal to match corresponding expenses to revenue produced this inflated award, contrary to the plain language of the agreement.

Such "losses" reflect nothing more than arbitrary cash-flow computations or incorrect recording of revenue and expenses—not actual economic performance. Yet the Claims Administrator refuses to evaluate a business claimant's financial data to determine its actual revenue and expenses during the relevant periods—tasks that accountants routinely perform, and that the Claims Administrator's large staff of expert accountants could perform here with ease. Instead, because of the Claims Administrator's interpretation of the settlement agreement, those accountants are being misdirected away from performing accounting analysis and instead are mechanically transcribing whatever data happen to appear in the claimant's monthly records for the selected periods, even if they are contradicted by other data submitted by the claimant and even if they bear no relationship to the relevant inquiries for assessing lost profits—namely, identifying when revenue was earned and corresponding expenses were incurred. The result is that thousands of claimants that suffered no losses are coming forward in ever-increasing numbers, seeking and obtaining outrageous windfalls and making a mockery of what was intended to be a fair and honest court-supervised settlement process.

Confronted with the Claims Administrator's capricious awards to uninjured claimants, BP promptly sought relief from the district court. BP illustrated how bizarre the claims process has become by describing in some detail over 200 of the more than 1,200 questionable awards made by the Claims Administrator as of March 2013. *See* R.16602-24 (Hal Sider supp.). Rather than disciplining the claims process, however, the district court adopted the Claims Administrator's interpretation on March 5, 2013. *See* R.12547-52. The court's order effectively redefined the settlement's key terms, by (i) interpreting "revenue" and "expenses" to mean simply the receipt or disbursement of cash, (ii) deleting the requirement that expenses must be matched with the revenue to which they "correspon[d]," and (iii) replacing the phrase "comparable months" with "same months" in determining the appropriate comparison period. The resulting arbitrary and irrational methodology, untethered to either economic reality or the settlement's actual terms, systematically produces absurd and egregiously inflated payouts, and can easily be manipulated to yield unjust results. These baseless awards were never contemplated by the agreement, and instead rest on a mechanistic computation applying flawed and uncorrected data that do not correspond to when revenue was earned or expenses incurred. Such awards do not compensate for lost profits, but instead unjustly and arbitrarily enrich numerous claimants who have suffered no harm, and provide windfall compensation to other claimants far above any harm that they actually suffered.

The district court's approach ignores basic principles of contractual interpretation and frustrates the purposes of the settlement agreement. In fact, it puts the entire class settlement at risk under Federal Rule of Civil Procedure 23 by injecting fundamental and undisclosed arbitrariness into the award-calculation process. Similarly situated BEL claimants are now being treated vastly differently depending on how they happened to have kept their accounting records. A settlement that produces such irrational and inequitable results is not "fair, reasonable, and adequate," and thus directly violates Rule 23(e)(2).

Unless overturned by this Court, the district court's error will have dire implications far beyond this case. The *Deepwater Horizon* settlement could serve as a positive landmark in American jurisprudence because of its ambitious size, its innovative nature, and the speed with which it was negotiated to compensate injured parties. Instead, it is poised to become an indelible black mark on the American justice system. Plaintiffs' lawyers across the Gulf region are now openly advertising that the settlement is a way for claimants to collect payouts even if they have no losses at all. If this travesty is allowed to continue, BP will be irreparably harmed, and future defendants will be reluctant to settle because they cannot be confident that settlement agreements will be construed textually and fairly. In the interest of justice, and to provide efficient and responsible compensation to businesses actually damaged by the oil spill, this Court should reverse the district court's decisions and correct its misinterpretations of the settlement agreement.

JURISDICTIONAL STATEMENT

The district court has jurisdiction over the admiralty and maritime action brought by the plaintiffs against BP (the "*Bon Secour* action") pursuant to 28 U.S.C. § 1333, 33 U.S.C. § 2717(b), and 46 U.S.C. § 30101. *See* R.3683 ¶¶27-30.

The district court had jurisdiction over the lawsuit by BP against the Claims Administrator and the Settlement Program (the "*Settlement Program* action") pursuant to 28 U.S.C. §§ 1331, 1332, 1333, and 1367; 33 U.S.C. § 2717; and 43 U.S.C. § 1349(b)(1). *See* R.15-17 ¶¶20-22, 25-27 (No. 13-492).

The district court entered its order adopting the Claims Administrator's interpretation of the settlement agreement in the *Bon Secour* action on March 5, 2013. R.12547-52. BP filed a timely notice of appeal on April 3, 2013. R.18471. This Court has jurisdiction to review the March 5 order as a final decision under 28 U.S.C. § 1291, *see Walker* v. *Dep't of Hous. & Urban Dev.*, 912 F.2d 819, 825 (5th Cir. 1990), or an appealable interlocutory decision pursuant to both the collateral order doctrine, *see Montez* v. *Hickenlooper*, 640 F.3d 1126, 1133 (10th Cir. 2011), and 28 U.S.C. § 1292(a)(3).

The district court denied BP's motion for an injunction pending appeal in the *Bon Secour* action on April 5, 2013, and entered a minute entry on April 8, 2013, reflecting the denial. R.18552. BP timely filed a notice of appeal on April 5, 2013 (R.18546), which became effective upon entry of the order. Fed. R. App. P. 4(a)(2). This Court has jurisdiction over the denial of injunctive relief pursuant to 28 U.S.C. § 1292(a)(1) and (a)(3).

Also on April 5, 2013, the district court dismissed the *Settlement Program* action and denied BP's motion for a preliminary injunction as moot; the district court issued a minute order (R.18552) and a separate written judgment (R.18557) embodying these conclusions on April 8, 2013. BP timely filed a notice of appeal on April 5, 2013 (R.18549), which became effective upon entry of the order and judgment. Fed. R. App. P. 4(a)(2). This Court has jurisdiction over the judgment of dismissal pursuant to 28 U.S.C. §§ 1291 and 1292(a)(3). This Court also has appellate jurisdiction over the denial of injunctive relief pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court violated the plain text of the settlement agreement by interpreting it to permit recovery of fictitious and inflated "losses."

2. Whether the district court's contractual interpretation leads to absurd results that contravene the basic purpose of the settlement agreement, which is to compensate for actual lost profits rather than to provide unjustifiable windfalls to uninjured claimants.

STATEMENT OF THE CASE

This case involves an egregious misinterpretation of the Economic and Property Damages Settlement Agreement in the *Bon Secour* action. On January 15, 2013, the Claims Administrator announced his interpretation of the "Variable Profit" component of BEL claims, *see* R.13590-91, which BP promptly challenged in the district court. The district court adopted the Claims Administrator's interpretation on March 5, 2013. *See* R.12547-52 (appeal docketed as No. 13-30315).

BP promptly filed an emergency motion in *Bon Secour* for a preliminary injunction, seeking to prevent the Claims Administrator from paying claims in reliance on his Variable-Profit Decision. *See* R.12760-73. The district court denied that motion on April 5, 2013. *See* R.18552 (appeal docketed as No. 13-30329).

Concurrently, BP filed the *Settlement Program* action against the Claims Administrator and the Settlement Program, also seeking to prevent the Claims Administrator from paying claims based on his Variable-Profit Decision. *See* R.8-40 (No. 13-492). The district court dismissed that lawsuit and denied BP's motion for a preliminary injunction as moot. *See* R.18552 (appeal docketed as part of No. 13-30329).

This Court subsequently consolidated appeals Nos. 13-30315 and 13-30329, and expedited consideration of the consolidated appeals.

STATEMENT OF FACTS

On April 20, 2010, an explosion aboard the Transocean drilling rig *Deepwater Horizon* initiated a significant oil spill into the Gulf of Mexico. *See* R.4013. The spill impacted the economic interests of various businesses and individuals, particularly in the commercial-fishing industry, which experienced decreased profits in the months following the spill. *See*, *e.g.*, R.8582. The magnitude of litigation filed in the wake of this tragic accident was possibly unprecedented, and the Judicial Panel on Multidistrict Litigation quickly established MDL 2179—one of the most complex and intensely litigated multidistrict aggregations of purported class actions and individual complaints in American history. *See* R.1047-51.

BP had hired Transocean and was therefore named as a defendant in most of these lawsuits. *See* R.1534, 5307. As an expression of its corporate culture and its desire to promptly compensate injured parties, BP waived its statutory limit of liability and committed to "pay all legitimate claims," even those in excess of the $75 million liability cap under the Oil Pollution Act, 33 U.S.C. § 2704(a)(3). *See* R.1265. Within days of the incident, BP established its own claims process that paid nearly $400 million to individuals and businesses over the several months between the spill and August 23, 2010. *See* R.5094. Thereafter, BP facilitated the transition of payments to the BP-funded Gulf Coast Claims Facility ("GCCF"), which over approximately 18 months paid more than $6.3 billion to individuals and businesses for their claimed spill-related losses. *See* R.5094-95.

In April 2012, BP reached a comprehensive settlement agreement with a class of injured entities and individuals, designed to make them financially whole by compensating them for profits lost as a consequence of the spill. *See* R.2417-2553. Even before the district court had granted final approval to the settlement, BP agreed that the settlement's Claims Administrator could pay claims under the agreement. *See* R.8239. The court granted final approval to the settlement on December 21, 2012. *See* R.12149-288. Consolidated appeals from the December 21 order are pending before this Court in No. 13-30095.

A. The Terms Of The Settlement Agreement

The settlement agreement compensates BEL claimants for "[l]oss of income, earnings or profits suffered" due to the *Deepwater Horizon* incident. Agreement § 1.3.1.2 (R.4071). The agreement defines "Economic Damage," in turn, as "loss of profits, income and/or earnings" allegedly relating to the incident. *Id.* § 38.57 (R.4164-65).

The settlement agreement defines BEL claimants as class members "claiming Economic Damage." Agreement § 38.15 (R.4159); *see also* R.12179 (ruling that the "proposed class in this case consists exclusively of individuals and businesses that have already suffered economic loss and property damage"). Thus, as the notice to potential class members made clear, businesses "may receive money if [they] have been *damaged* by the Deepwater Horizon oil spill," and "[c]laims for economic damage can be made by" class members "that *lost profits or earnings*." R.2153, 2164 (emphases added); *cf.* 33 U.S.C. § 2702(b)(2)(E).

The settlement agreement implements this approach in Exhibit 4C, which provides a "compensation framework for business claimants" that "[c]ompensates [them] for any reduction in profit between the 2010

Compensation Period selected by the claimant and the comparable months of the Benchmark Period." Agreement Ex. 4C, at 1 (R.4277). The Compensation Period is any period of three or more consecutive months chosen by the claimant from May through December 2010. *Ibid.* For the Benchmark Period, the claimant may choose (i) 2009, (ii) the average of 2008 and 2009, or (iii) the average of 2007, 2008, and 2009. *Id.* at 1-2 (R.4277-78).

The BEL framework's critical metric is "Variable Profit," which the settlement agreement calculates as follows:

1. Sum the monthly *revenue* over the period.
2. Subtract the *corresponding variable expenses* from *revenue* over the same time period.

Agreement Ex. 4C, at 2 (emphases added) (R.4278). The BEL framework then compensates claimants for the reduction in Variable Profit, if any, "between the 2010 Compensation Period selected by the claimant and the *comparable months* of the Benchmark Period." *Id.* at 1 (R.4277) (emphasis added).

B. The Claims Administrator's Variable-Profit Decision

Awards for BEL claims under the settlement increased dramatically in October 2012, from 414 claims at the start of the month to 1,558 claims by early November. *See* R.16281 ¶8 (Keith Moskowitz). BP initially had no way of knowing that these awards were based on an improper reading of the agreement by the Claims Administrator, because he had not invoked the "Request for Input" procedure that allows him to obtain the views of BP and class counsel regarding particular interpretive issues. *Id.* at 16279-80 ¶¶4-6.

BP raised questions about the treatment of revenue and expenses in late September 2012 after reviewing the initial awards. *See* R.16280-81 ¶7 (Moskowitz). But it was not until BEL claims-award activity accelerated dramatically in October through December 2012 that BP was able to determine from its review of claim files that the Claims Administrator was not following the proper procedure under the settlement agreement. BP began filing appeals under the agreement at the start of November 2012, and submitted an inquiry to the Claims Administrator on December 5, 2012, questioning what had become clear was his method for approving BEL claims. *See id.* at 16281 ¶¶8-9.

On December 16, 2012, in response to BP's inquiry, class counsel asked the Claims Administrator to issue a "formal Policy Statement" providing that, "[w]hen a business keeps its books on a cash basis, revenue is earned during the month of receipt," and also that "'corresponding variable expenses' associated with monthly revenue are the expenses that are expended or incurred during the Benchmark and Compensation months in question." R.16663.

The Claims Administrator agreed with class counsel and, on January 15, 2013, announced his "policies affecting the administration of claims." R.16672. The Claims Administrator asserted that, "[i]n performing th[e] calculations" required by the settlement agreement, he "will typically consider both revenues and expenses in the periods in which those revenues and expenses were *recorded* at the time," and "will not typically re-allocate such revenues or expenses to different periods." *Id.* at 16673 (emphasis added).

The Claims Administrator forthrightly acknowledged that this interpretation results in awards for certain industries, such as "attorneys, construction companies [and] farming enterprises," that "appear disproportionate when compared to award amounts for claimants in other industries," but explained that he did "not believe it within his authority" to adopt a different interpretation. R.16669.

C. The District Court's March 5 Order Adopting The Claims Administrator's Variable-Profit Decision

On March 5, 2013, the district court adopted the Claims Administrator's interpretation of the settlement agreement in the *Bon Secour* action. *See* R.12547-52. Framing the key issue as "whether variable expenses must correspond to the revenue those expenses produced," the district court held that the "analysis is to be based on revenue and expenses during the relevant periods," and that "expenses" need not "be 'matched' to revenues." *Id.* at 12549-50. The court further held that "the same months of the Compensation Period are to be compared with the months in the Benchmark Period," rather than "months where the claimant engaged in comparable activity." *Id.* at 12549.

The district court did not refer to the dictionary definitions of commonplace words like "corresponding" and "comparable," and did not consider widely accepted accounting and economics literature that defines "revenue," "variable expenses," and "variable profit." Indeed, at no point in its opinion did the court ever define or explain what it understood the words "revenue" and "expenses" to mean. Moreover, the court acknowledged that anomalous awards would "sometimes occur" under its interpretation. R.12551.

D. Improper Awards Under The District Court's Interpretation Of The Settlement Agreement

Businesses use a variety of methods to record transactions from month to month, ranging from simple recording of cash receipts and disbursements ("cash-basis") to more complete and accurate recording of transactions. *See* R.16127 ¶22 (J. Richard Dietrich). For businesses that keep monthly cash-basis records, the district court's interpretation of the settlement agreement treats Variable Profit as functionally equivalent to net cash flows, whether or not those cash flows represent revenue *actually* earned during that period or expenses that *actually* correspond with that revenue. *See ibid.* For businesses that typically have substantial lapses of time between when revenues are *earned* and when payments are received, such as farming, construction, and professional services, the district court's approach necessarily leads to substantial errors in calculating actual lost profits. *See* R.16213 ¶25 (Henry H. Fishkind); R.16475-76 (Hal Sider); *see also* R.12 ¶8, 26 ¶53 (No. 13-492).

In addition, many businesses keep informal monthly records and do not adjust them to correct for proper accounting treatment, instead making any necessary adjustments when the annual financial statements are prepared or at other times during the year. *See* R.16086-87 ¶¶14-16 (Alexander). For these businesses, the district court's interpretation also miscalculates lost profits. *See ibid.* For example, many claimants use a lump-sum, year-end "true up" adjustment to correct misstatements recorded earlier in the year; adjustments made at year end—or any other time of the year—mean that the totals recorded for both the month of the adjustment and prior months will be inaccurate. *See*, *e.g.*, R.16497 ¶40 (Sider). Moreover, businesses that utilize accrual accounting techniques may fail to appropriately measure Variable Profit as defined in the settlement agreement. For example, such firms may record in a single month revenue earned over an extended period of time—an approach that is inconsistent with the settlement agreement's requirements for determining Variable Profit. *See id.* at 16491.

These problems are compounded by claimants' ability to select the time period that generates the largest payment: Claimants inevitably select time periods in which distortions due to the timing of recording receipts and disbursements work together to generate higher compensation. *See* R.16487-90 ¶¶21-28 (Sider). The settlement agreement was intended to offer claimants flexibility to select the compensation period. But the existence of widespread and systematic errors in measuring Variable Profit distorts the agreement's goals by allowing claimants to obtain recovery for fictitious and inflated losses that would be unavailable under a proper measure of revenue and expenses. *See* R.16557-58 ¶¶15-17 & n.7 (Sider supp.). More than two-thirds of large BEL claims—$75,000 or more—appear to be based on fortuitously timed cash inflows and outflows or other data flaws, rather than actual lost profits. *Id.* at 16554-55, 16563 ¶¶8-10 & tbl. 1; *see also* R.25 ¶¶51-52 (No. 13-492). For example, the Claims Administrator has awarded:

- $21 million to a rice mill in Louisiana, approximately 40 miles from the coast, even though that mill earned more revenue in 2010—the year of the spill—than it did in 2007, 2008, or 2009, *see* R.16608 (Sider supp.);

- $9.7 million to a construction company in northern Alabama—200 miles from the coast—that does no business in the Gulf region and experienced better results in 2010 than in its benchmark years, when its variable profit exceeded the benchmark level by 21%, *see id.* at 16602;

- $3.7 million to a digital printing business in Alabama that earned 14 percent more profit in the post-spill period of 2010 than it did in the same period during the benchmark years, *see id.* at 16617; and

- $3.3 million to a law office in central Louisiana, even though its profit in the year of the spill exceeded its benchmark profits by 10 percent, *see id.* at 16612.

These improper awards already amount to hundreds of millions of dollars, and could easily climb into the billions. *See* R.16558-59 ¶¶20-21 (Sider supp.); *see also* R.9 ¶2 (No. 13-492). The industries that are most susceptible to opportunistic timing—sectors such as construction, professional services, and agriculture—had already received, as of early March 2013, $418 million in awards, including 50% of the 100 largest BEL awards. *See id.* ¶¶17, 20. And these amounts will likely grow given advertising efforts by plaintiffs' lawyers inviting uninjured businesses to file claims simply "[i]f the numbers work." R.16719. The awards continue to be issued every business day, and the district court has directed that they must be summarily affirmed and (absent judicial review) promptly paid. *See* R.18597-99.

SUMMARY OF ARGUMENT

The district court's flawed interpretation of the settlement agreement systematically miscalculates "losses" for an entire category of BEL claimants based simply on how claimants happen to have maintained their financial records, resulting in windfall awards that have no basis in the agreement's text or purpose and that contravene basic accounting and economic principles. Moreover, by creating undisclosed gross disparities between similarly situated claimants, the district court's interpretation threatens to undermine approval of the settlement under Rule 23.

The BEL framework in the settlement agreement requires the Claims Administrator to assess the difference in Variable Profit between a post-spill Compensation Period and a pre-spill Benchmark Period. Variable Profit is calculated by determining monthly "revenue" and subtracting "corresponding variable expenses." Agreement Ex. 4C, at 2 (R.4278). The Claims Administrator must calculate the difference between Variable Profit in the Compensation Period and in the "comparable months" of the Benchmark Period to determine the base compensation award for the claimant. *See id.* at 3 (R.4279).

The settlement agreement thus adopts a textbook "lost profits" approach—an economic concept that is regularly utilized and well understood by accountants, economists, and the judicial system. *See* R.12158 (district court acknowledgment that the BEL framework is "derived from recognized and accepted methodologies applied in evaluating business economic loss claims"). As the agreement explains, the BEL framework compensates claimants for "reduction in profit," Agreement Ex. 4C, at 1 (R.4277)—that is, for "[*l*]*oss of income earnings or profits* suffered" by claimants. Agreement § 1.3.1.2 (R.4071) (emphasis added). It is designed to produce a reasonably accurate estimation of actual lost profit, and thus to make BEL claimants whole, not to confer arbitrary windfalls on claimants who fortuitously kept their monthly books in a particular way.

The district court, however, radically departed from the plain meaning and purpose of the settlement agreement. The court effectively rewrote the agreement by permitting the Claims Administrator to measure purported losses by looking exclusively to the amounts reported in the claimant's financial records for the relevant months, without any attempt to determine what "revenue" was *actually* earned during the period and the associated (*i.e.*, "corresponding") "expenses" incurred to generate that revenue. R.12549-50. Moreover, the court allowed the Claims Administrator to mechanically use the *same* (rather than "comparable") months to determine the difference in Variable Profit between the Compensation Period and the Benchmark Period. *See id.* at 12550-51. The result is that the Claims Administrator has been issuing—and, absent intervention from this Court, will continue to issue—monetary awards to claimants based on misleading financial data that even claimants themselves acknowledge do not reflect actual losses.

The district court's misinterpretation of the settlement agreement violates the bedrock rule that unambiguous terms in a contract must be "given their plain meaning." *Becker* v. *Tidewater, Inc.*, 586 F.3d 358, 369 (5th Cir. 2009). And by permitting windfall awards that are not based on lost profits, the court also discarded the settled principle that agreements should be interpreted consistent with their purpose, *see*, *e.g.*, *Reliant Energy Servs., Inc.* v. *Enron Can. Corp.*, 349 F.3d 816, 821 (5th Cir. 2003), and to avoid absurd or illogical results, *see*, *e.g.*, *In re Liljeberg Enters., Inc.*, 304 F.3d 410, 442-43 (5th Cir. 2002); *S. Cent. Bell Tel. Co.* v. *Canal Place Ltd. P'ship*, 927 F.2d 867, 869 (5th Cir. 1991). There is no reason to conclude that BP agreed to provide windfalls to BEL claimants, including those who—having suffered no injury—are not even members of the plaintiff class.

The district court's decision threatens to undermine the settlement agreement itself. The district court's approval of the settlement agreement is subject to numerous consolidated appeals currently pending before this Court. *See* No. 13-30095. Yet under the district court's interpretation, similarly situated claimants receive markedly different payments, depending on nothing more than the vagaries of their bookkeeping format. If that were correct, then the agreement would be so arbitrary that it could not be approved consistent with Rule 23. A class settlement agreement should not be construed to preclude Rule 23 approval, thus rendering it self-defeating. The district court's interpretation does so, and accordingly should be reversed.

STANDARD OF REVIEW

The district court's interpretation of a settlement agreement is a question of law reviewed *de novo*. *Waterfowl L.L.C.* v. *United States*, 473 F.3d 135, 141 (5th Cir. 2006). The district court's denial of a preliminary injunction is reviewed for an abuse of discretion. *Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 288 (5th Cir. 2010). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

The district court's dismissal of an action under Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *Priester* v. *JP Morgan Chase Bank, N.A.*, 708 F.3d 667, 672 (5th Cir. 2013) (citation omitted).

ARGUMENT

This Court should reject the district court's indefensibly promiscuous and easily manipulable misinterpretation of the settlement agreement, which systematically mandates awards for nonexistent and grossly inflated "losses." The district court erroneously permitted awards that find no support in the text or purpose of the agreement, deviate wildly from economic reality, and threaten the viability of the settlement itself, which is currently being challenged on appeal to this Court.[2]

---

[2] The district court's misreading of the settlement agreement warrants reversal not only of the March 5 interpretive order, but also of (1) the

[Footnote continued on next page]

I. The Variable-Profit Decision Departs From The Settlement Agreement's Plain Text And Violates Fundamental Principles Of Accounting And Economics.

The district court's interpretation contravenes the unambiguous language of the settlement agreement in three critical respects:

First, the court's ruling violates the settled understanding that "revenue" and "expenses" refer to the inflows and outflows of *net assets* that result from the core business activities of an enterprise. Importantly, mere asset conversions—for example, changing cash into inventory by buying materials—are not inflows or outflows of net assets, and thus do not represent revenue or expenses. The Claims Administrator therefore cannot determine revenue and expenses simply by looking, in the case of businesses using cash-basis accounting, to cash receipts and disbursements recorded in particular months. The Claims Administrator's net-cash-flow approach endorsed by the district court is radically different from the "revenue" minus "corresponding variable expenses" lost-profits approach embodied in the text of the

[Footnote continued from previous page]

April 8 order dismissing the *Settlement Program* action, because the conclusion that the Claims Administrator "cannot … breac[h] the agreement" by following the March 5 order (Apr. 5, 2013 Tr. 64) rests on the assumption that the March 5 order is correct, and (2) the April 8 orders denying preliminary injunctive relief, because a district court "necessarily" abuses its discretion by denying injunctive relief based on legal error, *see Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

settlement agreement, and systematically produces awards that bear no relationship to lost profits.

Second, by freeing the Claims Administrator from any obligation to determine what revenue was actually earned during the period and then match the "corresponding" expenses used to generate that revenue, the district court ignores the term "corresponding." Indeed, the district court's approach would deprive "corresponding" of any meaning in the Variable Profit calculation, effectively writing it out of the agreement. As a result, the Claims Administrator is allowing and paying claims even for businesses whose monthly statements admittedly do not accurately reflect revenue and corresponding expenses.

Third, by looking only to the *same* months in the Compensation and Benchmark Periods, the district court's interpretation ignores the agreement's requirement to use "comparable" months, which are not necessarily the "same" months. The determination of which months are "comparable" inherently and unavoidably requires considering the purposes for which the comparison is being undertaken. In contrast, the district court's erroneous substitution of "same," which is used elsewhere in the agreement, improperly requires identicality without any analysis of what expenses produced what revenue during a comparable period.

A. The Terms "Revenue" And "Expenses" Require Scrutinizing A Claimant's Financial Statements And Do Not Refer Simply To Cash Receipts And Cash Disbursements As Recorded.

Under the district court's interpretation of the settlement agreement, the Claims Administrator looks exclusively to the items that were "recorded at the time" by the claimant. R.13591. There is, however, no basis for concluding that such items actually represent "revenue" and "expenses," absent some effort to evaluate the records using proper definitions of the key terms. And, in fact, the refusal to use proper definitions has allowed the Claims Administrator to ignore demonstrably inaccurate financial statements when issuing awards. For example, the Settlement Program routinely discovers—but usually makes no effort to correct—major errors in monthly financial records submitted by BEL claimants. *See* R.16091-92 ¶¶30-31 (Alexander). By foreswearing any obligation to evaluate the data reported by the claimant, however, the Claims Administrator has ensured that awards will not be based on "revenue" and "expenses," but instead on erroneous information, thus creating the classic problem of "garbage in, garbage out." *E*Trade Fin. Corp.* v. *Deutsche Bank AG*, 374 F. App'x 119, 121 (2d Cir. 2010).

The error in the district court's interpretation is even more pronounced for claimants that are not small retail businesses yet keep their monthly records on a cash basis, in whole or part, such as claimants in construction, agriculture, and professional services. For these claimants, the district court effectively rewrote and misinterpreted the term "revenue" to mean cash receipts that happen to have been "recorded in the Claimant-selected months." R.12550. It similarly rewrote and misinterpreted the term "expenses" to mean, in effect, cash disbursements during the selected period. *Ibid.* Those misinterpretations depart from the well-understood meaning of "revenue" and "expenses," and a court cannot determine lost profits for such businesses by a simple comparison of net cash received and disbursed.

1. The terms "revenue" and "expenses" are routinely used by economists and accountants, and have settled meanings in measuring the performance of a business. *See*, *e.g.*, Roman L. Weil *et al.*, *Financial Accounting: An Introduction to Concepts, Methods, and Uses* 772, 814 (14th ed. 2012); *see also*, *e.g.*, R.16656-60 (Roman L. Weil) (listing definitions). This "uniform business or trade usage of the words" confirms that BP's interpretation is correct. *Cont'l Ins. Co.* v. *Sabine Towing Co.*, 117 F.2d 694, 697 (5th Cir. 1941); *see also*, *e.g.*, *Clardy Mfg. Co.* v. *Marine Midland Bus. Loans Inc.*, 88 F.3d 347, 354 n.9 (5th Cir. 1996) (interpreting contract as a matter of law "in light of … 'what the particular industry considered to be the norm or reasonable or prudent at the time'").

The accounting literature defines revenues as "inflows or other enhancements of assets" that result from "delivering or producing goods, rendering services, or other activities that constitute the entity's ongoing major, or central, operations." J. David Spiceland *et al.*, *Intermediate Accounting* G-7 (7th ed. 2012); *see also* Robert Libby *et al.*, *Financial Accounting* G-4 (7th ed. 2011) ("Increases in assets or settlements of liabilities from ongoing operations"). Expenses, in turn, "measure the outflows of net assets that a firm uses, or consumes, in the process of generating revenues." Clyde P. Stickney & Paul R. Brown, *Financial Reporting and Statement Analysis: A Strategic Perspective* 22 (4th ed. 1999). In other words, expenses are defined as "outflows or other using up of assets or incurrences of liabilities" from "delivering or producing goods, rendering services, or other activities that constitute the entity's ongoing major, or central, operations." Spiceland, *supra*, at G-2; *see also* Libby, *supra*, at G-2 (defining expenses as "[d]ecreases in assets or increases in liabilities from ongoing operations incurred to generate revenues during the period").

2. Critically, revenues and expenses are *not* equivalent to cash received or disbursed. Instead, "[r]evenues represent actual or expected cash inflows (or the equivalent) that have occurred or will eventuate as a result of the entity's ongoing major or central operations." Financial Accounting Standards Board ("FASB"), *Statement of Financial Accounting Concepts No. 6: Elements of Financial Statements* 30-31 ¶79 (1985). Thus, "[t]he assets increased by revenues may be of various kinds—for example, cash, claims against customers or clients, other goods or services received, or increased value of a product resulting from production." *Ibid.* (footnote omitted). For this reason, textbooks and other professional literature embodying well-established accounting principles explain that revenue must not be "confuse[d] with *receipt* of *funds*, which may occur before, when, or after revenue is recognized." Stickney, *supra*, at 904. The same is true of expenses: They should "not [be] confuse[d] with *expenditure* or *disbursement*, which may occur before, when, or after the *firm recognizes* the related expense." *Id.* at 868. Expenses are not the same as expenditures; they include "expected cash outflows" that "will eventuate," and thus expenses can be reflected in assets that "flow out or are used, or … liabilities that are incurred." FASB, *Concepts No. 6*, *supra*, ¶81.[3]

In addition, it is well established that revenue does not exist until it is *earned*: Revenues "are considered to have been earned when the entity has substantially accomplished what it must do to be entitled to the benefits represented by the revenues." FASB, *Statement of Financial Accounting Concepts No. 5: Recognition and Measurement in*

---

[3] Expert declarations tendered by BP confirm that settled principles of accounting and economics require "[r]evenue," which exists "when we deliver goods or render services and get some asset, perhaps not cash, in return," to be distinguished from simple cash receipts. R.16630 (Weil). Similarly, "[a]ccountants distinguish between an *expense* (a gone asset) and an *expenditure* (gone cash)" because "we can have gone cash without having gone assets." *Ibid.*

Financial Statements of Business Enterprises 22 ¶83.b (2008); *see also* R.16656-57. Similarly, expenses are recognized "when an entity's economic benefits are used up in delivering or producing goods, rendering services, or other activities that constitute its ongoing major or central operations." FASB, *Concepts No. 5*, *supra*, 22 ¶85.

These basic concepts are routinely applied by accountants, who "have been learning how to do these procedures from their first weeks of their first accounting courses." R.16636-37 (Weil). And these concepts are fundamental to properly tracking the performance of a business: Although entities might choose to use cash-based accounting methods to maintain their own internal records, it is undisputed that these methods "will not produce reliable measures of earnings, corresponding variable expenses, and variable profit that can be used to compare economic performance in two periods to calculate 'lost profits.'" R.16211 ¶21 (Fishkind). As one of BP's economics experts explained, the "root" of the problem with "basing compensation on net cash received" is that this measure "might not include all of the revenues and costs attributable to the activity over [a given] period; and net cash received might include some of the revenues or costs attributable to business activity in other periods." R.16447 ¶30 (A. Mitchell Polinsky) (emphasis omitted); *see also* R.16123 ¶13 (Dietrich) (relying on cash flows "lead[s] to distorted measures of economic profit or loss").

Consider, for example, a distributor that purchases inventory and then sells it in a later month. If the distributor recorded inventory purchases as an expense in the month of the disbursement, and treated the sale of that same inventory as generating revenue in another month when cash was received, the monthly financial statements would create the illusion of some months with large losses (when inventory was purchased) and other months with large profits (when inventory was sold). The Claims Administrator made an error like this in evaluating the claim of a distributor that recorded revenue in July 2010, when its customer placed and pre-paid for an order, but then recorded expenses in August 2010, when the distributor purchased the inventory. *See* R.16105, 16109 (Alexander); *see also* R.16542-43 (Sider). This created a large artificial profit in July 2010 and a large artificial loss in August 2010. August 2010 was included in the compensation period while July 2010 was excluded, thus generating a significantly inflated award.

Similarly, consider a construction company that performed an identical four-month job between May and August in both 2009 and 2010, for the same price in both years, but received cash in July 2009 as opposed to August 2010. If "revenue" meant simply cash received, as the Claims Administrator asserts, the company would be deemed to have suffered an economic loss between May and July 2010 when compared with the same months of the previous year. *See* R.16227 ¶22 (David A. Hall). Yet it performed identically in both periods.

3. The district court thus erred as a matter of law in permitting the Claims Administrator to treat "revenue" and "expenses" as if they referred to a claimant's cash flows during a given period: The recording of cash received or disbursed does not render the underlying transaction an item of revenue or expense, and accordingly "[a] report showing cash receipts and cash outlays of an enterprise for a short [time] period cannot … indicate whether or to what extent an enterprise is successful or unsuccessful," FASB, *Concepts No. 6*, *supra*, 47 ¶144, *quoted in* R.16123-24 ¶13 (Dietrich). Instead, the Claims Administrator must review each claimant's records to determine what revenue was actually earned in the relevant period and which expenses correspond to that revenue. That is precisely why the agreement's documentation provisions—Exhibit 4A—require a claimant to provide *annual*, as well as monthly, financial reports, and also tax returns and whatever additional financial information the Claims Administrator needs to determine the *actual* revenue and corresponding variable expenses.

That is also why BP is paying for hundreds of Pricewaterhouse-Coopers and other accountants working for the Settlement Program, so that they can accurately determine revenue and corresponding variable expenses. However, as BP's accounting experts explained below, under the Claims Administrator's interpretation of the agreement, the Settlement Program accountants are being reduced to mere data-entry clerks—simply using whatever data were recorded by a claimant, and plugging those data into the compensation formula. *See* R.16087-88, 16091 ¶¶18-19, 30 (Alexander); R.16636 (Weil).

But if a construction company expended cash to purchase lumber during a particular month, and did not use any of that lumber on ongoing construction projects, the expenditure should not be treated as an "expense" for that month; instead, it is an *asset* of the company until the lumber is actually used. Further, if a consulting firm worked for 100 hours on a project during July, but did not receive the cash until September, the firm earned revenue when it performed services in July—not when it received cash. The district court's interpretation mandates upside-down results, producing awards that are based on the fortuity of the timing of cash flows rather than on any actual lost profits.

B. The Term "Corresponding" Requires Matching Expenses With The Revenue Earned During The Relevant Months.

Variable Profit, simply stated, is the difference between the cost to provide a good or service and the selling price of that good or service. This concept was captured in the requirement that Variable Profit be calculated by "[s]ubtract[ing] the *corresponding* variable expenses from revenue over the same time period." Agreement Ex. 4C, at 2 (R.4278) (emphasis added).

The district court explicitly rejected the requirement that "expenses ha[ve] to be 'matched' to revenues," R.12550, but the plain meaning of the word "corresponding" requires precisely that: The Claims Administrator must match the expenses that relate—*i.e.*, "correspon[d]"—to the revenue in order to properly measure Variable Profit. *See Work* v. *Comm. Underwriters Ins. Co.*, 61 F. App'x 120, 2003 WL 342314, at *2 (5th Cir. 2003) ("[V]ariable costs related to lost business opportunities (e.g., labor, utilities, etc.) must be deducted from a gross profit estimate.").

1. The term "correspond" is defined as to "be parallel," *Webster's Third New International Dictionary of the English Language Unabridged* 511 (Philip Babcock Gove ed., 1976), "be the counterpart," *ibid*., or "answer to, agree with, suit," 3 *The Oxford English Dictionary* 965 (2d ed. 1989). The only meaning that "corresponding" can have in the sentence at issue—"subtract the corresponding variable expenses from revenue over the same time period"—is that the variable expenses must "be parallel" and "counterpart" to the revenue. This means, for example, that the cost of lumber used during a period to earn revenue on a construction project is matched to that revenue, while cash paid for lumber held in inventory during the period is not.

The district court's interpretation gives no independent meaning to the word "corresponding." If the Claims Administrator were meant simply to subtract all expenditures *recorded* over a particular time period from all revenues *recorded* in the same time period, the settlement agreement would not have needed the word "corresponding," because "over the same time period" would have sufficed. But the use of the word "corresponding" makes clear that expenses must relate to—or, more simply, "match" with—whatever revenue has been earned during the relevant time period, and is consistent with the lost-profits analysis that forms the foundation of the BEL framework. The district court, in contrast, deleted the word "corresponding" from the agreement, thereby violating the bedrock interpretive canon against treating words as mere surplusage. *See In re Deepwater Horizon*, 710 F.3d 338, 344 (5th Cir. 2013). The Court recently reversed this district court for making *precisely* the same error—conflating "separate and independent" contractual terms, *id.* at 349—just four days before the district court issued the March 5 order under review here.

Other portions of the settlement agreement provide further support for matching corresponding variable expenses to the revenue to which they relate. The definition of Variable Profit expressly requires the variable portion of "Cost of Goods Sold" to be deducted from revenue. *See* Agreement Ex. 4C, at 2 (R.4278). To determine the Costs of Goods Sold, in turn, one must identify the direct costs incurred in providing the goods or services used to generate revenue—an inquiry that is not dependent upon when the cash to purchase the inventory was expended.[4] Similarly, the inclusion of a detailed list of defined variable expenses at Exhibit 4D, with such items as "bad debt expense" and "commissions," requires those expenses to be matched to related revenue, Agreement Ex. 4D (R.4285), and nothing in the agreement limits that requirement to items that were "recorded at the time." Yet the district court's reading would treat the parties as having adopted a completely different approach in determining the "corresponding" expenses.

2. BP's interpretation of "corresponding" is confirmed, moreover, by the same principles of accounting and economics that inform the interpretation of the terms "revenue" and "expenses," and the widespread understanding of lost-profits calculations. The widely accepted understanding that revenue must be *earned* before it can be recognized, *see supra* at 28-29, and that expenses are recognized "when an entity's economic benefits are used up in delivering or producing goods, rendering services, or other activities that constitute its ongoing major or central operations," FASB, *Concepts No. 5*, *supra*, 22 ¶85,

---

[4] *See* FASB, *Accounting Standards Codification—Inventory* § 330-10-10-1 (2012) ("A major objective of accounting for inventories is the proper determination of income through the process of matching appropriate costs against revenues."); *see also*, *e.g.*, Spiceland, *supra*, at G-1 (examining the "cost of the inventory *sold* during the period" (emphasis added)).

comport with the definition of Variable Profits agreed to by the parties and the provision requiring matching of corresponding variable expenses to the revenue those expenses generate.

The two terms are therefore linked: To compare the change in a claimant's financial performance over a given period of time, and thus to measure the change in its profits, one must determine the *revenue earned* during each period, subtract the *expenses that relate to the earning of that revenue*, and then compare the resulting totals. *See Sure-Trip, Inc.* v. *Westinghouse Eng'g*, 47 F.3d 526, 531 (3d Cir. 1995) ("Where plaintiff is seeking to recover lost profits, such damages are equal to the revenue that would have been derived, less additional costs that would have been incurred, in performing the contract."), *cited with approval in Work*, 2003 WL 342314, at *2 n.15.

Thus, consistent with the plain meaning of the term "corresponding," the Claims Administrator must match expenses with revenue, rather than simply subtracting from receipts whatever expenditures happen to have been recorded by a claimant during the relevant period. As a result of the failure to perform this mandatory step, the Claims Administrator has introduced systematic acceptance of inaccurate financial records into the claims award process. One claimant's attorney, for example, admitted to the Settlement Program that $253,659 in revenue earned during September 2008 had erroneously been recorded (as a negative expense) in October 2008 while the related expenses were recorded in September 2008. *See* D.E. 8964-41 (sealed); R.16105 (Alexander). The claimant chose a Benchmark Period that included October but not September, making the Variable Profit in the Benchmark Period artificially high. But no correction was made by the Claims Administrator, leading to an overstatement of Variable Profit in October 2008 (within the benchmark period) and an understatement of variable profit in September 2008 (outside the benchmark period). *See* R.16105, 16111 (Alexander). Proper matching of expenses that correspond to revenue, using the correct definitions of revenue and expenses, would eliminate such fictitious and opportunistic awards.

Similarly, the Claims Administrator offered compensation to a law firm that recorded a $787,088 negative revenue entry in December 2010. *See* R.16105 (Alexander). When asked by the Claims Administrator's accountants to explain this entry, the claimant admitted that it represented a year-end adjustment to correct for errors in financial data from prior months. *See ibid.* Yet despite learning about this adjustment, the Claims Administrator made no correction for either December or earlier months, leading to an artificial loss in December 2010 and inflating the claimant's award. *See ibid.* Again, the proper alignment of corresponding variable expenses with related revenue, using the correct definitions of those terms, would avoid such systematic errors and opportunistic behavior by claimants and their lawyers.

The record in this case reveals numerous other examples of inaccurate and erroneous monthly financial statements that fail to properly identify corresponding variable expenses and subtract them from revenue in the period in which the revenue was earned. *See*, *e.g.*, R.16224-26 ¶¶17-21 (Hall). Yet the district court nowhere explained how such data could be used without correction to determine "revenue" and "corresponding variable expenses." The district court's ruling is legal error, and has wrenched the interpretation of the settlement agreement out of any recognizable relationship to its language and manifest intent.

3. The district court did not engage in any serious analysis of the term "corresponding," but instead "adopt[ed] Class Counsel's interpretation" because it is supposedly "most in line with the rest of the Settlement Agreement." R.12550. Yet the portions of the agreement discussed by the district court—Exhibit 4A of the BEL framework (concerning documentation) and certain illustrations used in the causation addendum to Exhibit 4C—provide no support at all for such an illogical interpretation.

The court noted that Exhibit 4A requires the BEL claimant to submit its business records for "the claimed Benchmark Period, 2010, and, if applicable, 2011." Agreement Ex. 4A, at 12 ¶4 (R.4255-56). "If expenses had to be 'matched' to revenues," the court reasoned, "then the Settlement Program would potentially need to consider financials that pre-date the Benchmark Period." R.12550. But this reasoning ignores that the agreement also requires claimants to provide *annual* financial reports and tax returns, and the Claims Administrator can request underlying "source documents" for financial statements whenever necessary to comply with the settlement agreement's economic tests. *See* Agreement Ex. 4A, at 1-2 ¶¶3-4 (R.4255-56). The authority to require claimants to submit source documents and the requirement for annual financial statements would not have been necessary, and indeed would be rendered irrelevant, under the district court's interpretation. Moreover, the court's interpretation ignores the parties' decision to engage top accounting firms to analyze claims, rather than relying on clerical data-entry providers. Thus, the documentation requirements in Exhibit 4A do not undermine, but instead support, the text's insistence on subtracting only "corresponding" variable expenses from revenue earned during the relevant period.

The district court also emphasized that "Exhibit 4A does not require that accounting occur on an 'accrual' basis, as opposed to a 'cash' basis." R.12550. But proper measurement of revenue earned, corresponding expenses incurred, and Variable Profit does not depend on how the claimant maintains its records. And even common approaches to accrual accounting do not necessarily result in the proper measurement of revenue earned or expenses incurred. Whatever accounting method is used, the settlement agreement requires proper measurement of a claimant's Variable Profit, and a comparison of Variable Profit between two time periods. The fact that some claimants use cash-based accounting does not bear on the requirement that expenses "correspon[d]" to revenue in the period at issue. Proper measurement of revenue, expenses, and variable profits is what "the professional accountants retained by the Claims Administrator … do," R.16636 (Weil), using the claimant's financial records in whatever form they are originally provided to the accountants. The settlement agreement does not contain an instruction to take BEL claimants' books and records as the Claims Administrator finds them, however wildly inaccurate the resulting lost-profit measurement would be.

Finally, the district court cited three examples from an addendum to Exhibit 4C, which illustrates how to choose the Benchmark Period. *See* Agreement Ex. 4C, at 7-8 (R.4282-83). That addendum explains that the BEL claimant must use the "same years" for the Benchmark Period when assessing whether the causation requirements under Exhibit 4B are met and when performing the compensation calculations under Exhibit 4C, but allows different months to be used. *Id.* at 7 (R.4282). To illustrate these rules, the addendum provides three simplified scenarios, each of which is "based on the expenses and revenues that were recorded in the Claimant-selected months, not expenses and revenues that occurred outside these months." R.12550.

But the district court is simply wrong; on their face, the examples say absolutely nothing about when the expenses at issue were incurred, let alone whether they correspond to revenue in any particular period—indeed, the examples do not discuss revenue or expenses at all. Moreover, even if the examples had used revenues and expenses incurred in the same months, that would not support the district court's interpretation. It will *sometimes* be true that expenses will "correspon[d]" to revenues earned in the same period—for example, when a restaurant purchases supplies and sells them in meals served to customers in the same month—but that fact does not establish that this is *always* (or even typically) the case for most or all businesses. The district court erred in assuming that "illustrative" examples could redefine the agreement in contravention of its plain text. *Becker* v. *Tidewater, Inc.*, 586 F.3d 358, 369-70 (5th Cir. 2009); *see also* Agreement Ex. 4C, at 7 (R.4282) ("The additional examples on the next page *illustrate* these rules." (emphasis added)).

C. The Claims Administrator Must Compare Variable Profit In "Comparable" Months, Not Necessarily The "Same" Months.

The agreement requires the Claims Administrator to determine the difference between Variable Profit in the Compensation Period and the "comparable" months of the Benchmark Period. The district court misinterpreted this language as providing that "the *same months* of the Compensation Period are to be compared with the months in the Benchmark period." R.12549. But "[t]here is no basis" for the "determination that 'comparable' only means equivalent or the same." *Moorehead* v. *Dep't. of Prof'l Regulation*, 550 So. 2d 521, 522 (Fla. Ct. App. 1989). Rather, the "comparable" months are those that "hav[e] enough like characteristics or qualities to make comparison appropriate," and are "suitable for matching, coordinating, or contrasting." *Webster's Third New International Dictionary*, *supra*, at 461. They are the months "[w]orthy of comparison; proper, or fit to be compared." 3 *Oxford English Dictionary*, *supra*, at 590.

In many cases, the same months are also "comparable" months; a beachside restaurant might predictably see increased business in June, July, and August every year. But for other businesses, the "same" months are not "comparable" at all, especially when there is a timing divergence in revenues and expenses. For example, the months in which a farmer buys seeds, pays labor, harvests the crop, and sells it may vary as a result of crop rotation, weather conditions, or other factors. R.16150 ¶7 (Finch); *see also* R.16504 ¶54 (Sider). It is not "appropriate," "suitable," "worthy," "proper," or "fit" to compare September 2009 to September 2010 if the farmer sold his entire 2009 harvest in September, but sold his entire 2010 harvest in October. Such timing differences do not represent actual economic loss and are not compensable under the agreement.

Reading "comparable" to mean "same" fundamentally alters the meaning of the settlement agreement by transforming an apples-to-apples comparison into an apples-to-oranges fallacy. The district court believed that its interpretation was supported by language in the causation addendum to the agreement, quoting three examples in the addendum that employ a comparison of identical months. R.12550. But, as noted above, those examples were illustrating the requirement that a BEL claimant must use the same *years* during the Benchmark Period for both the causation inquiry under Exhibit 4B and the compensation determination under Exhibit 4C. *See supra* at 40-41. Nothing about the examples suggests they were interpreting the word "comparable" as used in the definition of Variable Profit, let alone that they were doing so in a manner fundamentally inconsistent with the plain meaning of the term. The *words* used in a contract define its meaning; *examples* do not, and can be used at most to illustrate the contract's terms. It is backwards to ignore the text and to try to discern meaning by starting and finishing the interpretive process with a subset of inapposite illustrations.

Far more relevant is the fact that the parties repeatedly used the words "same" and "comparable" distinctly throughout the agreement. Exhibit 4B, for example, requires "compar[ing]" three post-spill months to "the *same months* in the Benchmark Period selected by the claimant." Agreement Ex. 4B, at 1 (R.4260) (emphasis added). This confirms that the parties knew how to require use of "same," rather than "comparable," in referring to months when that was intended. *See*, *e.g.*, *Cleere Drilling Co.* v. *Dominion Explor. & Prod., Inc.*, 351 F.3d 642, 651 (5th Cir. 2003) (refusing to construe different contractual terms as equivalent). The district court erred by disregarding the parties' choice of different words for these separate parts of the agreement.

In reaching a contrary conclusion, the district court also improperly relied upon parol evidence—specifically, an e-mail, taken out of context, sent by a BP attorney during the midst of settlement negotiations. *See* R.12549. This reliance was improper, as the plaintiffs' use of this document (*see* R.15798) violates a confidentiality agreement governing the parties' settlement discussions, *see* R.18444, along with the settlement agreement itself, *see* Agreement § 22.1 (R.4151). It is also legally irrelevant, because the settlement agreement's merger and integration clause (Agreement § 26.1 (R.4153)) "negates the legal introduction of parol evidence," *Condrey* v. *SunTrust Bank of Ga.*, 429 F.3d 556, 564 (5th Cir. 2005), and because "evidence … of antecedent understandings and negotiations" cannot be "admitted for the purpose of varying or contradicting the writing," *Har-Win, Inc.* v. *Consol. Grain & Barge Co.*, 794 F.2d 985, 987 (5th Cir. 1986) (internal quotation marks omitted).

In any event, plaintiffs' use of 3 lines from a 249-line e-mail is highly misleading. The e-mail does not relate to the Variable-Profit definition, but rather to a second-step growth factor (not at issue in this appeal) applied *after* making the Variable-Profit calculations. *See*

Agreement Ex. 4C, at 1 (R.4277); *see also* R.15800-01 ¶¶6-7, 9. Moreover, the point of the e-mail was that arbitrarily applying the growth factor to a period of eight months was not "comparable" to a three-month Compensation Period. R.15804 ¶10.E. Significantly, the parties resolved this issue, during further negotiations after the e-mail was sent, by modifying the then-draft agreement to provide that, if the "claimant chose a seven-consecutive-month or eight-consecutive-month period" for calculating Variable Profit, then "that *same* period of identical consecutive months in 2010 shall be used" for calculating the growth factor. Agreement Ex. 4C, at 4 (R.4280) (emphasis added). Thus, even if confidential materials could be considered here, in direct breach of the parties' agreements, they would prove only that the district court's interpretation is flatly wrong—specifically, the parties' final agreement embodies and reflects their understanding that "comparable" has a *different* meaning from "same" or "identical."

II. The District Court's Interpretation Contravenes The Central Purpose Of The Settlement Agreement And Systematically Produces Absurd Results.

The "primary concern" in contract cases is "[d]iscerning the parties' true intent, as expressed in the language of the [contract]." *Deepwater Horizon*, 710 F.3d at 344. The district court's decision abandons this "primary concern," departing from the parties' language and intent in a manner that permits claimants to recover for fictitious and inflated losses attributable to the timing of cash flows and other inaccuracies in financial records, rather than "actual" lost profits. Agreement Ex. 4C, at 1 (R.4277).

A. The Settlement Agreement Was Expressly Designed To Compensate Actual Lost Profits.

The express purpose of the settlement agreement is to compensate "Economic Damage," defined as "[l]oss of income, earnings or profits." Agreement § 1.3.1.2 (R.4071); *see also id.* § 38.57 (R.4164-65). A maritime contract, like any other contract, must be read in light of its purpose. *See Prytania Park Hotel, Ltd.* v. *Gen. Star Indem. Co.*, 179 F.3d 169, 175 (5th Cir. 1999); *Broad* v. *Rockwell Int'l Corp.*, 642 F.2d 929, 946 (5th Cir. Apr. 1981) (en banc).

The agreement expressly provides that BEL claimants must show that they suffered an actual economic loss. The BEL framework measures the "actual profit" earned by the claimant during the Compensation Period and then compensates for "any reduction in profit" between that period and the comparable months of the Benchmark Period. Agreement Ex. 4C, at 1 (R.4277). This focus on "actual" losses (*ibid.*) carries through the agreement's discussion of individual business sectors. Certain tourism and hospitality claimants, for example, could recover losses stemming from cancelled and unreplaced contracts or reservations attributable to the spill. *See id.* Ex. 4E, at 1-2 (R.4287-88). Failed businesses could claim compensation by providing "evidence of customer cancellations or lost contracts related to the [*Deepwater*

Horizon] Spill." *Id.* Ex. 6, at 2 (R.4300). Similarly, failed start-up businesses could recoup "revenue the claimant would have expected to earn" absent the spill. *Id.* Ex. 7, at 1 (R.4315). In the agreement, every category of potential BEL claimant was required to show *actual* loss as a predicate for compensation.

This straightforward understanding of the agreement was repeatedly endorsed by the district court and communicated directly to class members prior to the Variable-Profit Decision. Thus, the district court ruled that the "proposed class in this case consists *exclusively* of individuals and businesses that have already suffered economic loss and property damage." R.12179 (emphasis added). And that interpretation was repeated in the notice provided to class members, who were told that they "may receive money if [they] have been damaged by the Deepwater Horizon oil spill," and that "[c]laims for economic damage can be made by" class members "that *lost profits or earnings*" due to the spill. R.2153, 2164 (emphasis added). The intent of the settlement agreement is clear: to compensate only lost profits, not fictional losses.

B. The District Court's Interpretation Of The Agreement Does Not Remotely Measure Lost Profits And Instead Produces Baseless Windfalls.

The district court's approach "deviate[s] substantially from any reasonable measure of economic loss." R.16128 (Dietrich). Indeed, the "divergence" between the economic loss suffered by BEL claimants and the amount measured under the Variable-Profit Decision is "so extreme as to render the results absurd." *Ibid.* This is true for at least two reasons. *First*, for claimants with cash-basis financial statements, allowing the Claims Administrator simply to use the amounts "recorded at the time" (R.13591) measures changes in short-term net cash flow, rather than lost profits. *Second*, even for claimants whose financial records attempt to reflect actual revenue and expenses, rather than just cash received or disbursed, the amounts "recorded at the time" often do not accurately reflect lost profits.

1. The district court's use of a "net cash flow analysis to determine lost profits" is "not a standard methodology," is "contrary to well-established norms in accounting and in calculating lost profits," and "will result in systematic payment of artificial losses to BEL claimants." R.16270-71, 16272-73 ¶¶10, 14 (James L. Henley, Jr.). In fact, the uncontested evidence in the record below—from multiple accounting and economic experts—shows that the district court's interpretation cannot measure financial performance and is inherently unable to determine lost profits for every claimant. *See*, *e.g.*, R.16632 (Weil) (district court's approach "leads to nonsense").[5]

---

[5] R.16158 ¶28 (Finch) ("a cash basis approach to calculating monthly variable profit does not yield an accurate [financial] picture of the business of a farm"); R.16185 ¶11 (Finch supp.) ("I have done lost

[Footnote continued on next page]

Using financial information where expenses are not matched with related revenue, one of BP's economic experts explained below, "will reflect only cash flow during the relevant months, so that a comparison of the two periods will compare cash flow, not profit." R.16211 ¶21 (Fishkind). This approach, however, is "not a recognized measure of 'lost profits' damages," and is "not consistent with professional practice in calculating lost profits in a legal dispute." *Ibid.* Tellingly, although the plaintiffs have repeatedly insisted that there is nothing wrong with a business maintaining its books using cash-based accounting, they have never disputed that such an approach "lead[s] to distorted measures of economic profit or loss," and thus cannot "provide an *accurate and faithful representation* of economic performance." R.16123 ¶13 (Dietrich) (emphasis added). Indeed, even the Claims

[Footnote continued from previous page]

profit analyses for over 20 years, and no court would upheld a lost profits analysis done" as the district court has directed); R.16448 ¶33 (Polinsky) (noting erroneous awards would result where "net cash received over a designated oil-spill period may be less than economic profits over that period"); R.16465 ¶6 (Jeffrey O. Rose) ("Cash basis financial statements are maintained for purposes of monitoring a firm's current cash position not for determining profitability."); R.16748 ¶11 (James A. Richardson) ("The complete reliance on monthly cash inflows and outflows leads to a cash flow estimate for a period of time, not an estimate of the loss of variable profits … ."); R.16782 ¶2 (Holly Sharp) ("This is not an accepted method for calculating lost profits ….").

Administrator has admitted that the use of cash-basis accounting can produce invalid results. On October 8, 2012, in response to class counsel's request to allow business claimants to restate their profit and loss statements for a given year from an accrual basis to a cash basis, the Claims Administrator rejected the request, stating that "such restatement could result in a loss or a greater loss not related to the Spill but *instead is a result only of the timing of cash received.*" R.14906 (emphasis added). Yet the Claims Administrator and the district court are systematically compelling the Settlement Program's accountants to calculate and award precisely such fictitious and inflated losses for thousands of claimants that happen to keep their monthly records on a cash basis, based solely on the "timing of cash received"—not upon whether they had a loss.

2. The district court's approach further departs from any accurate measure of lost profits by accepting financial data that, in many circumstances, incorrectly report the claimant's monthly revenue and expenses over the relevant periods. A review of the claim files reveals numerous and routine instances where financial data accepted by the Claims Administrator are plagued by "negative revenue, negative expenses," and other "inaccuracies." R.16092 ¶31 (Alexander); *see also*, *e.g.*, R.16496-98 ¶40 (Sider). These records include "year-end correcting entries recorded in the last month of the year instead of the month of the error," R.16092 ¶31 (Alexander), meaning that the claimant's profitability was either over- or under-stated in its monthly books. Yet the Settlement Program is systematically refusing to make adjustments to address such entries. *See id.* at 16087-88, 16091-92 ¶¶18-19, 30; *see also*, *e.g.*, R.16636 (Weil).

This problem is particularly pronounced in the construction industry. Although contractors' *annual* financial statements generally match revenue with corresponding expenses, "*monthly* P&L schedules which accurately match revenues and expenses are not commonly maintained by contractors in the ordinary course of business." R.16224 ¶17 (Hall) (emphasis added). Because they are required to represent to auditors and the government only that the annual statements are accurate, contractors often "calculate and record percentage-of-completion entries," which are used to account for project activity, "only at year end." *Id.* at 16225 ¶19; *see also* R.16255-56 ¶3 (Hall supp.) ("Many construction firms 'true up' using large lump sum entries to correct errors in prior months' financial statements.").

One contractor, for example, overstated construction revenues by more than $2 million over the course of 2007; the claimant made a single adjustment in December 2007, which artificially reduced the revenue in that month from positive to overwhelmingly negative while also leaving revenue overstated in the preceding months' records. As this example illustrates, the district court's narrow focus on the revenue and expenses *recorded* in the relevant months ignores that these reports may not "capture" the full data, which "distorts monthly variable profit." R.16225-26 ¶19 (Hall); *see also*, *e.g.*, R.16497 ¶40 (Sider) ("including cumulative 'true up' corrections in a single month yields erroneous measures of month-specific variable profit"). The result is an array of "inaccurate and fictitious results," such as a $9.7 million award to an asphalt and road pavement contractor in Zone D based on artificially "large monthly swings in the claimant's variable profit margin," R.16228 ¶25 (Hall), and an award of more than $750,000 to an electrical contractor driven largely by a "large material cost" in a particular month that was "not being properly matched" with revenue, *id.* at 16245.

*   *   *

In short, the district court's interpretation rewrites the contract to produce results that are unrecognizable and unintelligible to economists and accountants—or rational actors of any sort—as a measure of lost profits. And these arbitrary results are transformed into systematic overcompensation for non-existent, fictitious losses by the ability of claimants to choose their Benchmark and Compensation Periods. To be sure, the settlement agreement was intended to provide claimants with flexibility in choosing the damage period, in recognition of the fact that specific periods of actual damage could differ between claimants. But the pervasive errors in the Claims Administrator's calculations of Variable Profit have transformed this flexibility into a mechanism that systematically produces windfall compensation unrelated to any losses incurred.

The district court's interpretation of "revenue" and "expenses" does not comport with any accepted accounting or economic definition and, for many businesses, cannot result in the measurement of lost profits required by the settlement agreement's BEL framework. *See* R.16447 ¶30 (Polinsky); R.16207-09 ¶¶11-14 (Fishkind). The correct construction of "revenue" and corresponding "expenses," advanced here by BP, fully comports with the language of the agreement and the relevant literature, is the only reasonable definition, and provides the only interpretive approach that fulfills the settlement's purpose of compensating solely those with actual losses.

C. The District Court's Interpretation Leads To Absurd Results.

It should therefore not be surprising that awards for fictitious losses—pure "windfall" awards—are already systematically emerging from the flawed Variable-Profit Decision. *See* R.16558-59 ¶¶20-21 (Sider supp.). The absurd results flowing from this faulty contract interpretation are highlighted by trends in the claimant pool showing that the Variable-Profit Decision, rather than actual losses, is driving new claims.

1. More than half of the largest BEL claim awards by the Claims Administrator have been in those sectors—such as construction, agriculture, and professional services—most likely to generate fictitious losses due to the Variable-Profit decision; these claims account for nearly 40 percent of the total of all BEL claim awards. *See* R.16558 ¶20 (Sider supp.); *see also* R.16091-92 ¶¶30-31 (Alexander); R.16224-26 ¶¶17-21 (Hall); R.16257-60 ¶¶6-13 (Hall supp.). As compared to claimants in the sectors more affected by the spill—such as tourism, seafood processing, and retail—relatively few of these construction, farming, professional services, and similar claimants even filed complaints or short-form joinders in the multi-district litigation, suggesting that these claimants previously lacked any belief that they had suffered an injury. *See* R.16483-84 ¶¶14-16 (Sider). Similarly, the number of new claimants from the construction, agriculture, and professional services sectors who never previously sought compensation from the GCCF process has increased sharply in recent months, even as claims from those who had previously requested compensation have steadily tailed off. *See id.* at 16485-86 ¶¶18-19. Claims from these industries accelerated markedly *after* it became clear that the Claims Administrator would process BEL claims in a manner that does not comport with the settlement agreement. *See id.* at 16485 ¶18.

It is, moreover, no secret that the Variable-Profit Decision results in awards that bear little or no resemblance to reality. Indeed, a large cottage industry has developed, available to anyone who wishes to visit the Internet, in which plaintiffs' attorneys are *advertising* for businesses that never believed they had suffered any losses to file claims "[i]f the numbers work." R.16719. The Web page for one law firm describes the example of a bicycle retailer located in Florida that experienced "[a]n increase of over $500k" in revenue between 2009 and 2010, but for which they nonetheless "were able to file a claim for almost one million dollars." *Id.* at 16718. And another firm bragged that a business could qualify for payment despite having "made more money in 2010." *Id.* at 16720.

2. Thus, despite the settlement agreement's clear purpose to limit compensation to actual losses, the district court's interpretation permits recovery for fictitious losses created solely as a result of the timing of cash flows or incorrectly reported data, and thus violates the settled rule that "construction of a maritime contract should not 'lead … to … absurd consequences.'" *In re Fitzgerald Marine & Repair, Inc.*, 619 F.3d 851, 861-62 (8th Cir. 2010) (quoting *Chembulk Trading LLC* v. *Chemex Ltd.*, 393 F.3d 550, 555 n.6 (5th Cir. 2004)); *see also In re Liljeberg Enters. Inc.*, 304 F.3d 410, 443 (5th Cir. 2002). Indeed, even if the settlement agreement could literally be read to require the absurd results reached by the district court—and it plainly cannot—ample precedent provides that a contract "'will not bear a literal interpretation if this leads to an absurd result or thwarts the manifest intention of the parties.'" *Fantastic Fakes, Inc.* v. *Pickwick Int'l, Inc.*, 661 F.2d 479, 485

(5th Cir. Unit B 1981) (quoting 4 *Williston on Contracts* § 610B (3d ed.)).

The district court, for its part, acknowledged that "false positives" or "absurd" results would "sometimes occur" under its interpretation. R.12551. The court asserted, however, that these were "all consequences" that BP purportedly "accepted when it decided to buy peace through a global, class-wide resolution." *Ibid.* But this reasoning is entirely question-begging. It is true that the parties to a settlement agreement might accept an approach under which "class settlement payments do not *always* perfectly match economic losses in *every* instance." *Ibid.* (emphases added). Indeed, BP agreed to pay "risk transfer premiums" (R.12156) in exchange for the "global, class-wide resolution" identified by the district court. But it is quite another thing to conclude that BP would have agreed to *systematically* award huge windfalls to claimants who suffered no losses whatsoever—and thus are not even members of the class—or to compensate claimants whose losses are grossly inflated by improper calculation methods that ignore economic reality or use demonstrably inaccurate financial data.

There is no reason for a defendant in BP's position to enter into a settlement agreement that would provide windfall compensation to thousands of businesses that could never have hoped to recover a penny in litigation. *See*, *e.g.*, R.16444 ¶15 (Polinsky) ("I would not expect the BEL Framework to provide compensation that would result in substantial windfalls to claimants—it would have been economically irrational for BP to have consented to such an outcome.”). Rational actors do not agree to pay windfall claims on a massive scale, allowing a raid on their coffers to the tune of hundreds of millions or billions of dollars, and it is absurd to suggest that BP did so here.

Moreover, the magnitude of the harm that BP will suffer under the district court’s interpretation cannot be reconciled with the court’s view that BP—or any rational economic actor in the litigation system—would have accepted that millstone in exchange for administrative convenience. The issue here is not that a smattering of claimants are receiving slightly inflated awards, but rather that thousands of claimants are systematically receiving absurd awards, with the total consequences potentially reaching into *billions* of dollars in fictitious and unwarranted awards. *See* R.16558-59 ¶¶20-21 (Sider supp.). Although it is impossible to determine the precise amount of such awards with certainty, *68%* of large BEL awards (those above $75,000) raise warning flags for “flawed or incomplete financial data.” *Id.* at 16554-55 ¶¶8-10. The absurdity doctrine applies when the interpretation offered would be inconsistent with the terms that any rational actor would accept; that is certainly the case here. *See* R.16443-45 ¶¶12-16 (Polinsky).

III. The Variable-Profit Decision Endangers Final Approval Of The Settlement Agreement By Treating Similarly Situated Claimants Differently.

Not only does the Variable-Profit Decision achieve absurd results divorced from any reasonable measure of lost profits, it also endangers final resolution of this suit by treating "similarly situated claimants" differently "based solely on differences used by claimants to prepare their financial statements." R.16133 ¶36 (Dietrich). And it does so without any advance notice of that disparity to the class.

Under Federal Rule of Civil Procedure 23(e), not every settlement may be approved, but only those that are "fair, reasonable, and adequate." The purpose of Rule 23(e) is "'to protect the nonparty members of the class from unjust or unfair settlements affecting their rights.'" *Wilson* v. *Sw. Airlines, Inc.*, 880 F.2d 807, 818 (5th Cir. 1989) (quoting *Piambino* v. *Bailey*, 610 F.2d 1306, 1327 (5th Cir. 1980)).

To be sure, a settlement may be approved as fair, reasonable, and adequate notwithstanding the fact that it offers different benefits to different members of the class. To permit such differentiation, however, the benefits provided to class members must correspond to the strength of the class member's claims. As the district court correctly explained in approving the settlement, "[i]t is perfectly fair and reasonable, and indeed common and accepted, for settlement benefits to turn on the strength of class members' claims." R.12235; *see also ibid.* ("'A class action settlement is not objectionable merely because it draws lines, as long as the distinctions made reflect an informed effort to allocate settlement benefits across class members *in reasonable proportion to their damages and the strength of their claims*.'" (emphasis added)).

But if similarly situated members of the class receive materially different compensation solely as a result of an arbitrary factor that bears no relationship to the strength of their claims or the extent of their injuries—here, the method by which they maintain their financial records—then a powerful disparity in treatment saps the rationale for the class and raises serious issues about the settlement's fairness. *See In re Prudential Ins. Co. Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 323 n.73 (3d Cir. 1998) (recognizing that one factor to be considered in considering a proposed class settlement is "[w]hether persons with similar claims will receive similar treatment"); *Gates* v. *Rohm & Haas Co.*, No. 06-1743, 2008 WL 4078456, at *3 (E.D. Pa. Aug. 22, 2008) (same). And the disparities here are particularly troubling because an arbitrary group of uninjured businesses, purporting to be comprised of class members, will receive *substantially* more relief than true class members with actual lost profits. *See*, *e.g.*, *Staton* v. *Boeing Co*., 327 F.3d 938, 978 (9th Cir. 2003); *Franks* v. *Kroger Co.*, 649 F.2d 1216, 1225 (6th Cir. 1981); *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 712 (E.D. Mo. 2002). The error committed by the district court is exceptionally perverse, as it has the effect of yielding the highest awards to the claimants who keep their financial records with the least precision. *See* R.16488-89 ¶24 (Sider).[6]

In a similar vein, courts have declined to approve settlements or certify classes where there is insufficient commonality among class members because different rules of decision affect their substantive rights. *See*, *e.g.*, *Fotta* v. *Trs. of United Mine Workers of Am.*, 319 F.3d 612, 618-19 (3d Cir. 2003); *Indianer* v. *Franklin Life Ins. Co.*, 113 F.R.D. 595, 606 (S.D. Fla. 1986); *Elster* v. *Alexander*, 76 F.R.D. 440, 442 (N.D. Ga. 1977). Such a problem surely exists under the district court's interpretation, where class members are eligible for wildly different awards based on pure happenstance.

By systematically providing windfalls to claimants who have suffered no actual loss, or to claimants whose losses are grossly overstated by the Variable-Profit Decision, the Claims Administrator has cast into serious doubt the fairness of this settlement under Rule 23, and substantially impaired its chances of surviving an appeal on that

---

[6] The Claims Administrator himself recognized the importance of uniform treatment in a class-action settlement when he testified at the fairness hearing in this matter, noting that "the concept was … to get things so we get some standardization in what we are doing. So if we have ten people who have ten identical claims, they should get an identical amount of money." R.8272. But under the district court's ill-conceived interpretation of the agreement, that manifestly will not happen.

ground. There is no basis for approving a settlement agreement that selects one set of class members for heightened and unjustified windfall compensation, while leaving the remaining class members to a more modest—if also more justified—award. And there is particularly no reason to approve a class settlement agreement that results in awards to certain privileged entities that have not been injured at all, and thus are not even members of the class whose claims are being settled. The Variable-Profit Decision should be rejected, if for no other reason than to effectuate the parties' undisputed intent to reach a settlement agreement that could be approved by this Court. *See* Agreement §§ 16-17 (R.4147).

Finally, the Variable-Profit Decision violates fundamental rules of class action practice. The compensation method now being applied by the district court and the Claims Administrator was nowhere disclosed to the Class—not in the class notice, not at the fairness hearing, and not in any brief prior to the district court's approval of the settlement. To the contrary, the parties submitted, and the district court found, that the compensation methodology was "derived from recognized and accepted methodologies applied in evaluating business economic loss claims." R.12158. Yet the Variable-Profit Decision fundamentally changes this damages methodology—and indeed redefines the class, *sub silentio*, to include those who have no losses at all. The Variable-Profit Decision thus violates the settled rule that class members must be notified about matters that affect significant rights. *See*, *e.g.*, *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1099-00 (5th Cir. 1977); *Johnson* v. *Gen. Motors Corp.*, 598 F.2d 432, 437 (5th Cir. 1979). For this reason, the settlement could never be approved under Rule 23—and yet, this is the inevitable result of the Variable-Profit Decision.[7]

CONCLUSION

The district court, in adopting the Claims Administrator's reading of the settlement agreement, has improperly rewritten the agreement. The Variable-Profit Decision contradicts the plain language of the agreement and thwarts the purpose of the settlement by allowing claims based purely on net-cash-flow differences and related distortions that have no bearing on actual lost profits. For the foregoing reasons, this Court should reverse the three relevant orders below and remand with directions for the district court to instruct the Claims Administrator to apply the BEL framework of the settlement agreement in accordance with its plain terms.

---

[7] The discussion in text establishes that the agreement's purpose was to settle class claims with finality, and that the district court's interpretation must be rejected as implausible because it would frustrate that undisputed purpose. Direct review of the validity of the settlement, however, is not at issue in this appeal, but is instead reserved for No. 13-30095.

May 3, 2013

Respectfully submitted,

/s/ Theodore B. Olson

Theodore B. Olson
Counsel of Record
Miguel A. Estrada
Thomas G. Hungar
Scott P. Martin
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

George H. Brown
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304
(650) 849-5300

S. Gene Fendler
Don K. Haycraft
R. Keith Jarrett
LISKOW & LEWIS
701 Poydras Street, Suite 5000
New Orleans, LA 70139
(504) 581-7979

Richard C. Godfrey, P.C.
J. Andrew Langan, P.C.
Wendy L. Bloom
Andrew B. Bloomer, P.C.
R. Chris Heck
KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, IL 60654
(312) 862-2000

Jeffrey Bossert Clark
Steven A. Myers
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Daniel A. Cantor
Andrew T. Karron
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Jeffrey Lennard
DENTONS LLP
233 South Wacker Drive
Suite 7800
Chicago, IL 60606
(312) 876-8000

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2013, an electronic copy of the foregoing Brief for Appellants 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 will be accomplished by the appellate CM/ECF system.

/s/ Theodore B. Olson

Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

`

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

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(A) because it contains 13,986 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.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point New Century Schoolbook LT font.

/s/ Theodore B. Olson
Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that that, on May 3, 2013, this Brief for Appellants was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov. I further 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 Microsoft Forefront Endpoint Protection and is free of viruses.

/s/ Theodore B. Olson
Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500