No. 15-30377

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

IN RE: DEEPWATER HORIZON

LAKE EUGENIE LAND & DEVELOPMENT, INCORPORATED; BON SECOUR FISHERIES, INCORPORATED; FORT MORGAN REALTY, INCORPORATED; LFBP 1, L.L.C., DOING BUSINESS AS GW FINS; PANAMA CITY BEACH DOLPHIN TOURS & MORE, L.L.C.; ZEKES CHARTER FLEET, L.L.C.; WILLIAM SELLERS; KATHLEEN IRWIN; RONALD LUNDY; CORLISS GALLO; JOHN TESVICH; MICHAEL GUIDRY, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; HENRY HUTTO; BRAD FRILOUX; JERRY J. KEE,
Plaintiffs–Appellants,

v.

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

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

PETITION FOR PANEL REHEARING

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

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

[*additional counsel listed on inside cover*]

Lisa S. Blatt
Daniel A. Cantor
Allison B. Rumsey
ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 942-5000

George H. Brown
GIBSON, DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, CA 94304
(650) 849-5339

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

Counsel for Appellees

CERTIFICATE OF INTERESTED PERSONS

No. 15-30377

IN RE: DEEPWATER HORIZON

LAKE EUGENIE LAND & DEVELOPMENT, INCORPORATED; BON SECOUR FISHERIES, INCORPORATED; FORT MORGAN REALTY, INCORPORATED; LFBP 1, L.L.C., DOING BUSINESS AS GW FINS; PANAMA CITY BEACH DOLPHIN TOURS & MORE, L.L.C.; ZEKES CHARTER FLEET, L.L.C.; WILLIAM SELLERS; KATHLEEN IRWIN; RONALD LUNDY; CORLISS GALLO; JOHN TESVICH; MICHAEL GUIDRY, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; HENRY HUTTO; BRAD FRILOUX; JERRY J. KEE,
Plaintiffs–Appellants,

v.

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

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

This action is brought by 15 class representatives: Lake Eugenie Land & Development, Inc.; Bon Secour Fisheries, Inc.; Fort Morgan Realty, Inc.; LFBP #1, LLC d/b/a GW Fins; Panama City Beach Dolphin Tours & More, LLC; Zeke's Charter Fleet, LLC; William Sellers; Kath-

leen 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* Order and Judgment (Dec. 21, 2012) (ROA.11546). The absent class members together compose 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–Appellants

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 Street, 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 Street, 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[1]
WATTS GUERRA CRAFT, LLP
Four Dominion Drive, Building 3, Suite 100
San Antonio, TX 78257
(210) 447-0500

---

[1] Mr. Watts has resigned as counsel for plaintiffs–appellants. In the interest of completeness, however, his prior involvement has been noted here exclusively for purposes of evaluating possible disqualification or recusal.

James B. Irwin, V
Douglas J. Moore
IRWIN FRITCHIE URQUHART & MOORE, LLC
400 Poydras St., Suite 2700
New Orleans, LA 70130
(504) 310-2100

C. Defendants–Appellees

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

D. Attorneys for Defendants–Appellees

Theodore B. Olson
Miguel A. Estrada
Amir C. Tayrani
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

Jeffrey Bossert Clark
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

Lisa S. Blatt
Daniel A. Cantor
Allison B. Rumsey
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 942-5000

/s/ Amir C. Tayrani
Amir C. Tayrani
Counsel for BP Exploration & Production Inc., BP America Production Company, and BP p.l.c.

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF AUTHORITIES ix

INTRODUCTION 1

BACKGROUND 2

REASONS FOR GRANTING REHEARING 9

I. The Panel Erred In Assuming That The Industry-Specific Methodologies Render Claimants' Choice Of Compensation Period Meaningless 9

II. Prudential Considerations Favor Panel Rehearing 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

In re Deepwater Horizon,
732 F.3d 326 (5th Cir. 2013) 3, 4

Rules

Fed. R. App. P. 40 9

INTRODUCTION

The panel's opinion in this case rests on a mistaken premise—that Policy 495's industry-specific methodologies are inconsistent with the settlement agreement because they recognize revenue equally across different months and thereby infringe on claimants' right to select the months comprising their Compensation Period. According to the panel, "June is the same as December, and November is the same as July," so claimants' choice of months does not matter. Op. 7.

That is not how Policy 495's industry-specific methodologies have ever worked, which presumably explains why Class Counsel did not even raise this argument in their briefs. In fact, the policy's own sample calculations provide examples where June is *not* the same as December. *See* ROA.19956; ROA.19982. Moreover, even in those circumstances where revenue for a particular business activity is recognized equally across different months, businesses often engage in more than one activity at a time, so *total* revenue in each month will still be different. Thus, November is not the same as July. And if total revenue is the same across all relevant months for a particular claimant, the claimant's choice of the Compensation Period—which can be anywhere from three to eight months—still affects the amount of compensation received.

Prudential considerations underscore the importance of panel rehearing. Policy 495 was the product of a lengthy development process

designed to ensure compliance with the settlement agreement and reflects extensive input from the parties as well as the considered judgment of the Claims Administrator and his expert accountants. The district court thereafter approved the policy based on its substantial experience overseeing administration of the settlement. The panel's holding upends that carefully calibrated policy and threatens to disrupt claims processing just as the settlement program—which has already processed thousands of claims under Policy 495's industry-specific methodologies—is coming to a close.

Because the panel did not have the benefit of briefing on the interplay between the industry-specific methodologies and claimants' choice of Compensation Period—and therefore inadvertently misunderstood how Policy 495 operates—BP Exploration & Production Inc. and BP America Production Company (collectively, "BP") respectfully request that the Court grant panel rehearing and affirm the district court's approval of Policy 495 in its entirety.

BACKGROUND

1. In 2012, BP entered into a settlement agreement to compensate persons claiming injury from the *Deepwater Horizon* oil spill. Under Exhibit 4C of the agreement, business economic loss ("BEL") claimants may receive compensation for a reduction in "Variable Profit" between a post-spill "Compensation Period" and the "comparable" months in a pre-spill "Benchmark Period." ROA.4336-4338. The Compensation

Period "is selected by the claimant to include three or more consecutive months between May and December 2010." ROA.4336. In each period, Variable Profit is calculated by "sum[ming] the monthly revenue over the period" and then "subtract[ing] the corresponding variable expenses from revenue over the same period." ROA.4337.

2. This Court rejected the Claims Administrator's initial interpretation of the BEL framework, which treated revenue and expenses as synonymous with cash receipts and disbursements as recorded on claimants' financial records. *In re Deepwater Horizon*, 732 F.3d 326, 339 (5th Cir. 2013) ("*Deepwater Horizon I*"). That interpretation led to disparities based on how claimants maintained their records. Specifically, cash-basis claimants record revenue and expenses when cash is received or disbursed, regardless of whether the underlying economic activity occurred in a different month. *Id.* at 330. Accrual-basis claimants, in contrast, "matc[h]" cash receipts and disbursements to the month of the underlying economic activity and thus record revenue and expenses at that time. *See id.* at 333.

In *Deepwater Horizon I*, this Court explained that "subtracting temporally-related revenues and expenses recorded by cash-basis claimants would not result in numbers that could fairly be said to represent economic losses or lost 'variable profits.'" 732 F.3d at 336. Rather, "only matching provides a realistic chance of achieving the ostensible goal of the settlement of compensating claimants for real losses."

Id. at 338. The Court thus concluded that the parties intended to apply an accrual-style framework to claimants who already maintained their records according to those principles. *Id.* at 334-37. And the Court expressed "particularly strong" "doubt" that the parties intended to apply a cash-basis framework to claimants who maintained their records according to cash-basis principles. *Id.* at 338.

Instead, the Court "suggest[ed] a more consistent interpretation" for "both accrual- and cash-basis claims": "[T]he expenses to be subtracted must be those that 'correspond' to the revenue earned." 732 F.3d at 336-37. That interpretation was "amply supported" by the text of the agreement and was "much more consistent with general accounting and economic norms." *Id.* at 337. At bottom, this interpretation "would allow claims administration accountants to process claims in accordance with economic reality." *Id.* at 339.

The Court nevertheless found the factual record insufficient to reject Class Counsel's assertion that "significant parol evidence" supported the Claims Administrator's interpretation. 732 F.3d at 338-39. The Court therefore held that "Exhibit 4C is ambiguous" and remanded so that the district court could "develop a more complete factual record." *Id.* at 339.

3. On remand, the district court found that "there were no specific discussions" regarding Exhibit 4C "prior to the execution of the" settlement agreement, but that "the parties did discuss and were in

agreement that similarly situated claimants must be treated alike." ROA.19239. The court therefore interpreted the agreement to require that "revenue … be matched with the variable expenses incurred by a claimant in conducting its business." ROA.19241. The court explained that this "does not necessarily coincide with when revenue and variable expenses are recorded." ROA.19241. The court directed the Claims Administrator to develop a policy implementing its interpretation of the settlement agreement. ROA.19241.

4. That process culminated in Policy 495. Under the policy, settlement program accountants first review a claimant's financial records to correct basic accounting mistakes and matching irregularities that can be explained by existing documentation. ROA.19938; ROA.19934. If the records are "sufficiently matched" after that review, they are processed under Exhibit 4C. ROA.19937. But if "significant indicia" show that the records are not sufficiently matched, the accountants apply one of several methodologies to match revenue and expenses more accurately. ROA.19936-37.

In particular, Policy 495 contains methodologies specific to the construction, agriculture, educational, and professional-services industries. ROA.19940. For claimants who do not fall into any of those industries, a more general Annual Variable Margin ("AVM") methodology applies. ROA.19938. These methodologies operate as follows:

- *AVM Methodology*: A claimant's total variable expenses for the year are allocated proportionately to each month based on monthly revenue as a percentage of total annual revenue. ROA.19946-19950.

- *Construction*: "This methodology is premised on the assumption that variable expenses of a construction claimant are more accurately recorded … than are revenues" because expenses reflect the underlying construction work. ROA.19951. Thus, a claimant's total annual revenue is allocated proportionately to each month based on monthly variable expenses as a percentage of total annual variable expenses.[1]

- *Agriculture*: Agriculture claimants earn revenue by growing crops over the crop season. Thus, for a given crop, associated revenue and expenses are allocated equally across the months of the season for that particular crop. ROA.19959. Variable Profit is calculated based on all of the crops grown by the claimant during the relevant period.

- *Educational Institutions*: Tuition payments to educational institutions are recognized equally across the "months covered by the tuition" and are added to non-tuition revenue already recognized in those months. ROA.19968. Variable expenses are "allocated to individual months based on that month's allocated

[1] The construction methodology illustrates why the industry-specific methodologies do not "move" revenue. Op. 8. In the construction industry, firms are generally required to represent to the government and auditors only that their annual financial statements are accurate; as a result, "monthly P&L schedules which accurately match revenues and expenses are not commonly maintained … in the ordinary course of business." ROA.14070. The construction methodology corrects those inaccurate records so that they appear as if they were accurately matched in the first place.

revenue as a percentage of total allocated revenue" for the year. ROA.19969.

- *Professional Services*: Both revenue and expenses resulting from a particular matter are recognized according to "the level of effort expended/hours worked in a given month" when additional documentation (such as billing records) is sufficient to make those determinations. ROA.19977; *see also* ROA.19985. When additional documentation is insufficient, revenue and expenses for a given matter are reflected equally over the duration of the matter. ROA.19977; ROA.19985. The Variable Profit calculation encompasses all matters in the relevant period.

These methodologies all aim to consistently reflect economic reality across similarly situated claimants. To that end, the industry-specific methodologies "address unique factors common to the manner in which certain industries operate and record their financial information." ROA.19940.

The district court adopted Policy 495 after concluding, based on the evidence presented by the parties, that it "fairly implements the directive" of *Deepwater Horizon I*. ROA.20198-20199. The district court denied Class Counsel's motion to amend or alter that order. ROA.22997. In so doing, it reiterated that Policy 495 comports with *Deepwater Horizon I* and the settlement agreement, and emphasized the "recurring problem" that, even on statements that "purported to use accrual accounting," both revenues and expenses could be misrecorded. ROA.22995. Class Counsel appealed. ROA.22998.

5. This Court upheld the district court's approval of the AVM methodology because "Class Counsel ha[d] not presented evidence sufficient" to find any clear error. Op. 5. The panel explained that the parties intended for similarly situated claimants to be treated alike and that "[m]atching unmatched profit and loss statements promotes this goal." Op. 5-6.

But the panel held that the district court erred in approving the industry-specific methodologies. Class Counsel had broadly challenged those methodologies in their briefs, but had not argued that the methodologies somehow undermined each claimant's right under the settlement agreement "to choose his or her Compensation Period, consisting of three or more consecutive months between May and December 2010." Op. 7. According to the panel, however, the industry-specific methodologies "infringe upon that right" by recognizing revenue in a different month than when recorded, such that "the claimant's choice no longer matters. June is the same as December, and November is the same as July." Op. 7-8. The panel therefore remanded with the instruction that the AVM methodology shall apply to "all claimants," while simultaneously emphasizing that the Claims Administrator retained the authority "to match all unmatched profit and loss statements" before application of that methodology. Op. 8.

REASONS FOR GRANTING REHEARING

Panel rehearing is warranted when "the court has overlooked or misapprehended" a "point of law or fact." Fed. R. App. P. 40(a)(2). Here, the panel held that the industry-specific methodologies infringe upon claimants' right to choose three or more consecutive months between May and December 2010 to form the Compensation Period. That holding rests on the erroneous premise that, under those methodologies, "the claimant's choice no longer matters" because revenue will be the same in different months: "June is the same as December, and November is the same as July." Op. 7. The panel should grant rehearing on this issue. Because Class Counsel failed to raise this argument in their briefing, BP did not have occasion to explain that the premise underlying the panel's rejection of the industry-specific methodologies is incorrect. In reality, those methodologies are perfectly compatible with affording claimants a meaningful right to select the months comprising their Compensation Period.

I. The Panel Erred In Assuming That The Industry-Specific Methodologies Render Claimants' Choice Of Compensation Period Meaningless.

There is no inconsistency between Policy 495's industry-specific methodologies and claimants' right under the settlement agreement to select the months of their Compensation Period.

Under the construction methodology, for example, monthly variable expenses are taken at the time they are incurred, and revenue is al-

located proportionately "based on [each] month's variable expenses as a percentage of annual variable expenses." ROA.19952. Thus, if a construction claimant's variable expenses are different in June and December, its allocated revenue will also be different in those months. The example calculation given in Policy 495 bears that out: The sample claimant's variable expenses are $100 in June 2010 and $150 in December 2010. ROA.19956. Applying the construction methodology, the claimant's revenue is $151 in June 2010 and $226 in December 2010. ROA.19956. Thus, revenues in June are not the same as in December.

The other methodologies also preserve claimants' right to select their Compensation Period. Under the professional-services methodology, when the available documentation permits, both annual revenue and expenses are allocated in proportion to "the total effort expended" in a given month. ROA.19986; *see also* ROA.19982. Thus, if an attorney bills fewer hours to a matter in July than in November, a smaller proportion of his or her annual revenue will be allocated to July than to November. The example calculation given in Policy 495 again confirms the point. The sample claimant billed 45 hours to a matter in July 2009 and 50 hours in November 2009. ROA.19982. After application of the professional-services methodology, the claimant's revenue is $11,250 in July 2009 and $12,500 in November 2009. ROA.19982. Revenues in November are therefore not the same as in July.

When documentation is insufficient to allocate revenue according to effort expended, the professional-services methodology operates similarly to the agriculture and educational methodologies, all of which equally preserve claimants' right to make a meaningful selection of the months comprising the Compensation Period. Under each methodology, revenue associated with a particular business activity is allocated equally across the duration of that revenue-generating activity—the span of a legal matter, the crop season for a particular crop, or the academic year covered by a tuition payment.

Importantly, these methodologies do not aggregate a business's *total* annual revenue. When determining whether and how revenue should be allocated, each methodology takes into account the particular economic activity that generated the revenue. For example, the professional-services methodology allocates revenue on a matter-by-matter basis. ROA.19977 ("[R]evenue will be allocated to each month on a straight line basis over the duration of the matter."). The agriculture methodology does so on a per-crop basis. ROA.19959 ("Revenue recorded … will be analyzed to determine the 'crop seasons' to which it relates" and will be "br[oken] out … into the various crop seasons" while "identify[ing] the time period of each 'crop season.'"). And the education methodology allocates only tuition payments, not revenue from a school's athletic teams, bookstore, or cafeteria. ROA.19968 ("Revenue recorded … will be analyzed to determine the months covered by the tu-

ition paid," and will be "br[oken] out … into the various categories of students by payment frequency" while "identify[ing] the time period covered by the tuition.").

Thus, while revenue attributable to a specific legal matter, crop, or tuition payment will be the same in different months, that does not mean that *total* monthly revenue—which, together with corresponding expenses, ultimately determines a claimant's award—will be the same in those months. A lawyer typically has several matters open at a time. Most farmers grow multiple crops with different crop seasons. And a school receives substantial non-tuition revenue. As a result, monthly total revenue will vary across different months even when revenue associated with a particular business activity is the same in those months. The claimant's choice of the Compensation Period therefore still "matters." Op. 7.

Concrete hypotheticals under each industry-specific methodology illustrate that revenue is not the same in each month of the potential Compensation Period:

- *Construction*. A construction company has a busy summer, spending 30% of its total annual expenses in July 2010, 20% in August 2010, and 5% in every other month that year. If the company's total revenue that year is $10 million, $3 million would be allocated to July 2010, $2 million to August 2010, and $500,000 to every other month. *See also supra* n.1.

- *Professional Services (with billing records)*. A lawyer's billing records show that he billed 30 hours to a matter in May 2010,

20 hours to the same matter in June 2010, 40 hours to the matter in July 2010, and 10 hours to the matter in August 2010. The lawyer then receives a contingency fee of $100,000 for the matter in September 2010. Under the professional-services methodology, that fee would be allocated as follows: $30,000 to May 2010; $20,000 to June 2010; $40,000 to July 2010; and $10,000 to August 2010.

- *Professional Services (without billing records).* A lawyer lacks billing records, but handled a trial from May 1, 2010 through November 30, 2010 for which he was paid $210,000. The lawyer also handled an appeal from July 1, 2010 through December 31, 2010, for which he was paid $120,000. Under the professional-services methodology, $30,000 of the lawyer's revenue from the trial would be allocated to each month between May 2010 and November 2010. As for the lawyer's revenue from the appeal, $20,000 would be allocated to each month between July 2010 and December 2010. The lawyer's total monthly revenue would be $30,000 in May and June 2010; $50,000 between July 2010 and November 2010; and $20,000 in December 2010.

- *Education.* A university receives $600,000 in May 2010 for summer-class tuition (May 2010 to July 2010), and $8 million in September 2010 for academic-year tuition (September 2010 to April 2011). For the summer-class tuition, $200,000 would be allocated to each month between May 2010 and July 2010. For the academic-year tuition, $1 million would be allocated to each month between September 2010 and April 2011. The claimant's total monthly revenue during the Compensation Period would be $200,000 in May 2010 through July 2010; $0 in August 2010; and $1 million in September 2010 through December 2010.

- *Agriculture.* A farmer receives $12,000 in October 2010 for his soybean crop, with a crop season from April 1, 2010 to September 30, 2010. The farmer also receives $4,000 in September 2010 for his corn crop, with a crop season from May 1, 2010 to

August 31, 2010. Under the agriculture methodology, $2,000 of the farmer's soybean revenue would be allocated to each month between April 2010 and September 2010. Meanwhile, $1,000 of the farmer's corn revenue would be allocated to each month between May 2010 and August 2010. The farmer's total monthly revenue would be $2,000 in April 2010 and September 2010, but $3,000 between May 2010 and August 2010.[2]

These hypotheticals make clear that claimants' selection of the months comprising their Compensation Period retains substantial significance under the industry-specific methodologies because the methodologies do not render revenue in each month the same. The hypotheticals also illustrate that, contrary to the panel's understanding, Policy 495 does not "move, smooth, or otherwise reallocate revenue." Op. 8. Rather, the methodologies take into account the particular revenue-generating activities of four specific industries to recognize revenue when earned, which is an essential feature of the accrual-style framework that the parties intended to apply in the settlement agreement.

Moreover, even if total monthly revenue were the same throughout the Compensation Period for a particular claimant under an indus-

---

[2] Policy 495 includes sample calculations for the agriculture methodology that, for illustrative purposes only, show revenue as the same from month-to-month during the crop season. *See* ROA.19965. But, even in those sample calculations, revenue is not the same for every month in the Compensation Period, which is not coextensive with the crop season in the example. In any event, the sample calculations' assumption that, for the sake of simplicity, a farmer will have only one crop season is frequently not the case in reality.

try-specific methodology, the claimant's choice of the Compensation Period would still matter for purposes of determining the total amount of compensation owed. For example, where application of an industry-specific methodology would produce the same amount of lost profit for each month of the Compensation Period, the claimants' awards will be largest if they select an eight-month Compensation Period rather than a shorter period.

It is thus simply not the case that Policy 495's industry-specific methodologies undermine claimants' right to make a meaningful selection of the months that will comprise their Compensation Period.

II. Prudential Considerations Favor Panel Rehearing.

Several jurisprudential and pragmatic considerations make panel rehearing particularly appropriate in this case to correct the erroneous rejection of Policy 495's industry-specific methodologies.

It is especially significant that Class Counsel never even argued in their briefs that Policy 495 was flawed because the industry-specific methodologies supposedly deprive claimants of a meaningful selection of the months comprising the Compensation Period. BP therefore had no opportunity to demonstrate to the panel prior to oral argument that the industry-specific methodologies are fully compatible with claimants' right to select a Compensation Period.

It is also relevant that Policy 495 was the product of an extensive deliberative process involving the parties, the Claims Administrator,

and the district court. After that prolonged, iterative process—which the district court described as "difficult and time-consuming … with many permutations and obstacles," ROA.22994—the district court applied its considerable expertise and experience in this matter to conclude that Policy 495 comports with the settlement agreement. ROA.22997. That conclusion was the same one reached by the Claims Administrator and his expert accounting vendors earlier in the process.

The Claims Administrator has used Policy 495's industry-specific methodologies to resolve thousands of claims and, before the panel's opinion, the claims process was on pace to wind down in the coming months. It would be imprudent to overturn the district court's decision and unsettle the claims-administration process based on an argument that Class Counsel did not raise and BP did not have a full opportunity to rebut.

CONCLUSION

The panel's opinion overrides the considered judgment of the district court and upends the claims process just as it was nearing completion—all on the basis of an argument that was not briefed by Class Counsel and that misapprehends the operation of Policy 495. This Court should grant panel rehearing and affirm the district court's orders approving Policy 495 in its entirety.

June 5, 2017

Respectfully submitted,

/s/ Amir C. Tayrani

Theodore B. Olson
Miguel A. Estrada
Amir C. Tayrani
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) 849-5339

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

Lisa S. Blatt
Daniel A. Cantor
Allison B. Rumsey
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 942-5000

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

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2017, an electronic copy of the foregoing Petition for Panel Rehearing 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/ Amir C. Tayrani

Amir C. Tayrani
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 petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 40(b)(1) because it contains 3,638 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This petition 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 2016 in 14-point New Century Schoolbook font.

/s/ Amir C. Tayrani

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

CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that, on June 5, 2017, this Petition for Panel Rehearing 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/ Amir C. Tayrani
Amir C. Tayrani
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500