**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| *In re BP plc Securities Litigation* | ) | MDL 2185<br>Case No. 4:10-md-02185<br><br>**This Document Relates To All Actions With Exceptions Noted In Footnote 1** |

**INDIVIDUAL ACTION PLAINTIFFS' POST-ARGUMENT SUBMISSION REGARDING EXCLUSION FROM THE CLASS ACTION SETTLEMENT**

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Pursuant to this Court's Docket Order of September 20, 2016, entered after the telephonic hearing that day (the "Telephonic Hearing"), the Individual Action Plaintiffs ("Plaintiffs") respectfully submit this Post-Argument Submission regarding their exclusion from the recently-announced, proposed class action settlement (the "Settlement") reached in *In re BP p.l.c. Sec. Litig.*, No. 4:10-MD-02185 (the "Class Action").[1]

## I. OVERVIEW AND PERTINENT PROCEDURAL HISTORY

The Court is well familiar with both the Class Action and Plaintiffs' individual actions. In brief overview, the Class Action encompassed only alleged losses in one type of BP p.l.c. ("BP") security – its American Depository Shares ("ADSs") – related to events preceding and following the *Deepwater Horizon* oil rig explosion on April 20, 2010. Its Third Amended Complaint ("TAC") (MDL Dkt. No. 928) covered a class period of November 8, 2007 through May 28, 2010, pleading only claims under Exchange Act §§10(b) and 20(a) and Rule 10b-5. The TAC alleged misstatements on 22 total dates, out of which 18 were pre-explosion and just ***four*** were post-explosion, with alleged corrective disclosures/events on just ***six*** post-explosion dates. The Class Action plaintiffs were unsuccessful in their bids to certify a pre-explosion class. The Court certified only the class for the significantly shorter post-explosion time period, so the Class Action was litigated through summary judgment with respect to ***only*** its post-explosion substance, *i.e.*, four alleged misstatements in April/May 2010 and six alleged corrective dates in April-June 2010.

By contrast, Plaintiffs are among roughly 135 institutional investors who filed individual actions primarily between 2012 and 2014 to recover trading losses in BP ordinary shares (held by

[1] Excluded from the individual action Plaintiffs on whose behalf this Post-Argument Submission is being filed are those with overlapping representation by Class Action counsel and those in the *Gargoyle Strategic Investments*, *Huff Energy*, and *Peak6 Capital Management* "Tranche 4" cases.

all Plaintiffs) and BP ADSs (held by a minority of Plaintiffs) related to events before and after the *Deepwater Horizon* explosion. Generally, Plaintiffs' operative complaints allege common law claims (deceit, fraudulent concealment and negligent misstatement) and statutory claims (Financial Services and Markets Act of 2000) under ***English*** law with regards to ***both*** ordinary share ***and*** ADS losses, as well as U.S. federal securities claims (Exchange Act §§10(b) and 20(a) and Rule 10b-5) regarding their ADS losses. With some variation, the "Relevant Period" typically at issue in Plaintiffs' complaints runs from late 2006/early 2007 through late June 2010, thus encompassing pre-explosion claims spanning roughly three and one-half years and post-explosion claims spanning several months. While overlapping, Plaintiffs' factual allegations are significantly ***broader*** than those in the Class Action's TAC, encompassing, *inter alia*: (1) a greater number of alleged pre-explosion public record misstatements, (2) a greater number of post-explosion public record misstatements, (3) privately-made misstatements, and (4) a greater number of post-explosion corrective disclosures/events. For instance, the operative complaint in the *Alameda* action, over a "Relevant Period" of November 29, 2006 through June 25, 2010, alleges 33 pre-explosion public record misstatement dates, 20 post-explosion public record misstatement dates, 7 dates on which privately-made misstatements were made, and 16 post-explosion corrective dates. See MDL Dkt. No. 1374. Plaintiffs' legal theories also differ from those at issue in the Class Action, *e.g.*, they seek recoveries of ***both*** ordinary share and ADS losses under English law "holder" claims and/or a theory of consequential loss under English law.

Plaintiffs are active and well-organized, with a Court-appointed Individual Action Plaintiffs Steering Committee (the "Steering Committee") and a Court-appointed Individual Action Plaintiffs Liaison Counsel ("Liaison Counsel") serving as a single-point-of-contact for the Class Action parties and for the Court since 2013. Plaintiffs have diligently litigated their actions

for the past several years, including, *inter alia*, successive rounds of motions to dismiss and non-dispositive motions. Plaintiffs are currently engaged in party discovery, and are awaiting BP's next motion to dismiss their most recently-amended pleadings. Notably, Plaintiffs have successfully fended off Defendants' repeated, zealous, and creative dismissal bids based on, *inter alia*, the Dormant Commerce Clause of the U.S. Constitution, *Morrison v. Nat'l Australia Bank*, 561 U.S. 247 (2010), the *forum non conveniens* doctrine, the Exchange Act's statutes of limitation and repose, and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA").[2]

## II. THE PROPOSED CLASS ACTION SETTLEMENT PROVISIONS

On September 15, 2016, the Class Action plaintiffs filed their Motion for Preliminary Approval (Dkt. No. 1395) ("Preliminary Approval Motion"), their Stipulation and Agreement of Settlement (Dkt Nos. 1395-1; 1399) ("Stipulation"), and its exhibits, including the [Stipulated Proposed] Notice of Proposed Settlement of Class Action ("Notice"), the [Proposed] Order Preliminarily Approving the Settlement ("Preliminary Approval Order"), and the [Proposed] Order Granting Motion for Final Approval of Class Action Settlement ("Final Approval Order").

Neither the Steering Committee nor Liaison Counsel were contacted in advance regarding any provision of these documents, which Plaintiffs first saw that day. Yet, these documents

[2] The SLUSA fight offers pertinent context. BP had already filed its motion to dismiss against roughly 90 Plaintiffs in "Tranche 2" when the Court entered its rulings regarding the "Tranche 1" motions to dismiss and ordered a halt to the "Tranche 2" briefing so the parties could confer, apply its "Tranche 1" rulings, and *narrow* the issues. Plaintiffs thereafter engaged in extensive, good faith negotiations with BP to do so, resulting in entry of a lengthy and seemingly innocuous "Conforming Stipulation," which the Court so ordered on December 10, 2013. *See* MDL Dkt. No. 719. ***The next day***, BP filed an amended "Tranche 2" motion to dismiss, seeking dismissal based on Plaintiffs' ***participation*** in drafting the Conforming Stipulation and a proposed application of SLUSA (which is limited by its express terms to U.S. "State" law claims) to Plaintiffs' English law claims, a new argument not previously raised. *See* MDL Dkt. Nos. 717-718.

contain provisions with potentially significant impacts on Plaintiffs' actions,[3] as Liaison Counsel outlined to Class Action parties' counsel that day and to the Court during the Telephonic Hearing soon thereafter. *See* Tr. at 11:13-16:1; 20:7-22:23, 24:2-12; 25:21-27:11; 28:22-30:6; 31:11-37:1.

First, Plaintiffs and a large array of persons affiliated with Plaintiffs appear to be included within the dual definition of "Releasing Plaintiffs"/"Released Plaintiffs." Those terms are jointly defined to include "every Settlement Class Member (regardless of whether that Person actually submits a Proof of Claim, seeks or obtains a distribution from the Net Settlement Fund, is entitled to receive a distribution under the Plan of Allocation approved by the Court, or has objected to the Settlement [or] the Plan of Allocation." *See* Stipulation at 12, Definition §1.(gg)(i) [Dkt. No. 1395-1, PDF page 12]. They also include "any other Person who has the right, ability, standing, or capacity to assert, prosecute, or maintain on behalf of any Settlement Class Member any of the Released Plaintiffs' Claims (or to obtain the proceeds of any recovery therefrom), whether in whole or in part." *Id.*, Definitions, §1.(gg)(v). They also include, *inter alia*, the present and former "members," "trustees," "administrators," "agents," "employees," "officers," "managers," "directors," "general partners," "limited partners," "attorneys," "representatives," and "advisors" of every Settlement Class Member – which in the case of large pension funds like Plaintiffs could potentially encompass hundreds of thousands of individuals (who may not, independently, be Settlement Class Members but who may have traded BP ADSs at relevant times outside the one-month Class Period, giving rise to their own potential claims). *Id.*, Definition §1.(gg)(iv).

"Settlement Class Member," in turn, is defined as "all Persons who, during the period of April 26, 2010 through and including May 28, 2010, inclusive, purchased or otherwise acquired BP ADSs." *See* Stipulation at 14, Definition §1.(ll) [Dkt. No. 1395-1, PDF page 14]. The

[3] Despite the concerns recited herein, Plaintiffs do not concede that the Stipulation's provisions should apply to their cases and expressly reserve the right to argue otherwise in the future.

Stipulation, as re-submitted, appends an "Appendix A" purporting to list "those Persons…who would otherwise be a Settlement Class Member but timely and properly excluded herself, himself, or itself pursuant to the Notice of Pendency approved by the Court on November 18, 2015."[4] *Id.*; *see also* Dkt. No. 1399, PDF page 44. The Class Action parties ***did not ask*** the Steering Committee nor Liaison Counsel for a similar list of Plaintiffs wishing to be excluded, and the Stipulation did not append one. The Stipulation also excludes "any Person who would otherwise be a Settlement Class Member but timely and properly excludes herself, himself, or itself by filing a valid and timely request for exclusion in accordance with the requirements set forth in the Settlement Notice." *Id.* It ***makes no provision*** for exclusion of Plaintiffs, if they so desire, based on their having previously-filed actions. Thus, the Stipulation seeks to include Plaintiffs within the scope of the Settlement, unless the requirements it seeks to impose upon Plaintiffs now are met.

Second, Plaintiffs' claims, litigated before this Court ***for years***, appear vulnerable to dismissal via the Settlement. The term "Released Plaintiffs' Claims" is very broadly defined:

> ***any and all claims***, rights, ***causes of action***, duties, obligations, demands, ***actions***, debts, sums of money, suits, contracts, agreements, promises, damages, and liabilities of every nature and description, including both known claims and Unknown Claims (defined below), ***whether arising under federal***, state, ***foreign*** or ***statutory law***, ***common law*** or administrative law, or any other law, rule or regulation, whether fixed or contingent, accrued or not accrued, matured or unmatured, liquidated or un-liquidated, at law or in equity, whether class or individual in nature, that Lead Plaintiffs or ***any other Settlement Class Member have, had, or may in the future have*** against the Released Defendants ***that relate in any way, directly or indirectly, to the purchase, sale, acquisition, disposition, or holding of BP ADSs during the Class Period*** and (i) were asserted in the TAC, (ii) ***could have been asserted or could in the future be asserted in any court*** or forum ***that arise out of or relate to any of the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth, or referred to in the TAC***, or (iii) ***relate to any written or oral statement, or omission,***

[4] As used herein, all bolded, italicized, and underlined text reflects added emphasis.

> ***by the Released Defendants relating directly or indirectly to the oil spill resulting from the April 20, 2010 Deepwater Horizon disaster***. Released Plaintiffs' Claims include ***all rights of appeal from any prior decision of the Court*** in the Action.

*See* Stipulation at 13, Definition §1.(hh) [Dkt. No. 1395-1, PDF page 13]. While the Stipulation does exclude "claims regarding the sale or purchase of ordinary shares" (*id.*), Plaintiffs' claims regarding their ADSs, both pre- and post-spill, whether under U.S. federal securities law or English law, appear to have been intentionally included within the release.

Third, although the Stipulation sets forth a wide number of *ab initio* exclusions from the "Released Plaintiffs' Claims," some self-serving to the Class Action parties, it failed to provide an equally easy way for Plaintiffs' ADS-related claims to be excluded now. For instance, specifically excluded are the "Pre-Explosion Claims," an unnecessarily defined term limiting itself to "the claims asserted by the Lead Plaintiffs and Ludlow Plaintiffs in the TAC concerning alleged misrepresentations prior to the April 20, 2010 *Deepwater Horizon* disaster." *See* Stipulation at 13, Definition §1.(hh) [Dkt. No. 1395-1, PDF pages 13]. Thus, ***only*** the pre-explosion claims asserted by ***Class Action plaintiffs*** in their TAC were excluded from a settlement of Class Action claims concerning four post-explosion statements. The pre-explosion claims of Plaintiffs, under both the U.S. federal securities laws and English law, involving more alleged misstatements over a broader time period than was at issue in the Class Action, were ***omitted*** from this exclusion (which would not have been the case had the Stipulation simply excluded "pre-explosion claims" as an undefined term). The release also excludes "claims under the Employee Retirement Income Security Act of 1974 on behalf of participants in the BP Employee Savings Plan, BP Capital Accumulation Plan, BP Partnership Savings Plan, and the BP DirectSave Plan relating to the purchase of BP ADSs." Thus, ***BP's employees*** were also granted a simple carve-out from the Settlement.

Fourth, the Settlement's exclusion process, which the Class Action parties have pre-supposed should apply to Plaintiffs even though the Court has not yet granted preliminary approval, would permit Plaintiffs to seek exclusion ***only if*** they "timely and properly exclude [themselves] by filing a valid and timely request for exclusion in accordance with the requirements set forth in the Settlement Notice." *See* Stipulation at 14, Definition §1.(ll) [Dkt. No. 1395-1, PDF page 14]. Section XIII. of the Notice, in turn, states in relevant part, "you ***must*** submit a written request for exclusion" and sets forth all the requirements for doing so:

> The request for exclusion must: (a) state the name, address, and telephone number of the Person requesting exclusion; (b) ***identify each of the purchases or other acquisitions of BP ADSs made during the Settlement Class Period***, including the dates of each purchase or acquisition, the number of shares purchased or acquired, and the price or consideration paid per share for each such purchase or acquisition; (c) identify each of the Person's sales or other disposals of BP ADSs made during the Settlement Class Period, including the dates of each sale or disposal, the number of shares sold or disposed, and the price or consideration received per share for each such sale or disposal; (d) state the number of shares of BP ADSs held immediately before the start of the Settlement Class Period; and (e) state that the Person wishes to be excluded from the Settlement Class.

*See* Notice at 14, §XIII. [Dkt. No. 1395-1, PDF page 61].

Finally, both the Preliminary Approval Order and the Final Approval Order contemplate the dismissal, with prejudice, of the Released Claims. *See* Preliminary Approval Order at 5, ¶6 [Dkt. No. 1395-1, PDF page 85]; Final Approval Order at 4, ¶7 [Dkt. No. 1395-1, PDF page 100]. Thus, the failure of any given Plaintiff to be excluded from the Settlement Class could arguably result in the dismissal, with prejudice, of ***all of that Plaintiffs' claims*** related to BP ADS transactions, whether pre- or post-spill, whether under U.S. federal securities laws or English laws.

## III. THE PARTIES' RESPECTIVE CONCERNS

During the Telephonic Hearing, Liaison Counsel summarized Plaintiffs' various concerns:

- Plaintiffs should be able to secure exclusion from the Settlement now, if they wish, due simply to the fact that they have pursued their own individual actions before this Court for up to four years, without having to engage in the Notice's (as-yet unapproved) exclusion process. *See, e.g.*, Tr. at 14:1-8; 15:21-16:1; 25:21-27:11; 35:6-10.

- Any given Plaintiff might not be able, with 100% certainty, to rule out the possibility that it "purchased or ***otherwise acquired***" a BP ADS within the roughly one-month Settlement Class Period that occurred six and one-half years ago, for any number of reasons (*e.g.*, the fact that an outside investment manager has since been fired or gone defunct). *See* Tr. at 13:21-14:8; 15:10-20; 20:12-23; 26:15-22; 32:23-33:9; 33:14-34:12. Thus, a Plaintiff could be unaware of its status as a Settlement Class Member and would be literally unable to satisfy the Notice's requirements for exclusion. *Id.* That inability would leave Plaintiffs, particularly those who otherwise traded BP ADSs heavily at other times during the four and one-half year "Relevant Period" at issue in their own actions, potentially vulnerable to a dismissal argument for ***all*** their claims related to those ADS trades – pre-spill claims, post-spill claims, claims under the U.S. federal securities laws, claims under English law – if it was later discovered that they "purchased or otherwise acquired" even one BP ADS during that single month. *Id.*

- Plaintiffs are concerned their custodian banks might inadvertently process a proof of claim, notwithstanding their desire to be excluded from the Settlement. *See* Tr. at 14:9-12.

- These concerns are amplified by the "Releasing Plaintiffs"/"Released Plaintiffs" definition's scope, which arguably extends to a large number of individuals (*e.g.*, "members" of a pension fund Plaintiff) who would also be subject to the Stipulation's release provisions if a given Plaintiff was itself deemed to be a non-excluded Settlement Class Member. *See* Tr. at 11:20-12:3.

Even if those related individuals did not themselves trade BP ADSs during the Settlement Class Period, their other trades in BP's ADSs, before and after that period, might face dismissal.

- Plaintiffs are concerned at diverting attention and resources to efforts to satisfy the proposed exclusion process while engaged in active litigation, with BP's next 50-page motion to dismiss due this week, discovery underway, and a motion to compel pending. *Id.* at 27:4-6.

By contrast, besides repeatedly stating that the Notice's as-yet-unapproved opt-out process was "standard," when asked by the Court, the Class Action parties identified just ***three*** concerns, all held by ***BP***: (1) BP's desire to "know what claims are outstanding" against them (*see* Tr. at 9:9-17; 19:15-16; 31:6-7); (2) BP's desire to "confirm that an opt-out member is, in fact, a member of the [Settlement] class" (*id.* at 9:18-21); and (3) BP's desire to know the number of ADSs excluded from the Settlement due to relevance to the 'blow provision' (the provision permitting defendants to terminate a settlement if too high a percentage of shares opts out) included in the Class Action parties' side agreement (*id.* at 9:21-25; 19:16-18). Each is addressed in Argument §IV.B. below. *See also* Tr. at 14:13-15:7. (Class Action plaintiffs admitted they "don't necessarily have a dog in the fight," save for defending the release's scope. *See* Tr. at 16:8-10.)

## IV. ARGUMENT

### A. Plaintiffs Who Wish Exclusion *Ab Initio* Should Be Deemed Excluded By The Court Under This Court's Prior Rulings And The Law Of The Case And Collateral Estoppel Doctrines

During the Telephonic Hearing, BP's counsel argued that "the individual plaintiffs shouldn't be given any special treatment" and should "be treated no differently" as compared to other Settlement Class members who have not initiated litigation, such that Plaintiffs should have to satisfy all the requirements that the Class Action parties seek to impose upon them now in order to be excluded from the Settlement. *See* Tr. at 10:18; 23:11-24:1; 28:1-3. This position is wholly inconsistent with prior rulings of this Court and should be rejected.

This Court ***already held*** that the "Tranche 2" Plaintiffs ***had opted out*** of the Class Action by filing their own individual actions. In seeking dismissal of the "Tranche 2" actions, BP argued that these Plaintiffs had forfeited *American Pipe* tolling by choosing to file individual actions before this Court had decided class certification in the Class Action (*see* MDL Dkt. No. 732 at 40-41; MDL Dkt. No. 806 at 33-34) and Plaintiffs opposed (*see* MDL Dkt. No. 781 at 45-48). In siding with Plaintiffs, the Court found that Plaintiffs had ***ceased*** to be members of the Class Action when they filed their own lawsuits and thereby opted out of the Class Action:

> In a well-reasoned 2007 decision, the Second Circuit held that the *American Pipe* doctrine should be accepted at "face value" – *i.e.*, that ***the statute of limitations is tolled for all putative class members until such time as they are no longer members of the putative class***. *See In re WorldCom Sec. Litig.*, 496 F.3d 245, 255 (2d Cir. 2007). This event can be accomplished by some act of the court, such as when class certification is denied. *Id.* ***But it can equally be accomplished by the class member filing its own lawsuit, thereby opting out of the putative class, even if this event predates the court's decision on class certification***. *Id.* The Second Circuit disagreed that *American Pipe* compelled a different result. "The *American Pipe* tolling doctrine was created to protect class members from being *forced* to file individual suits in order to preserve their claims. It was not meant to induce class members to forgo their right to sue individually. *Id.* at 256. …
>
> [Discussion of cases with similar holdings]
>
> ***This Court*** joins this trend and ***adopts the persuasive reasoning set forth in WorldCom*** … .

*In re BP p.l.c. Sec. Litig.*, Nos. 10-md-2185 and 4:13-cv-1393, 2014 WL 4923749, at *3-*4 (S.D. Tex. Sept. 30, 2014) (holding that Exchange Act claims filed while the statute of limitations was tolled under *American Pipe* were not time-barred).

This Court's prior decision is binding upon BP now as the law of the case. "'The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *Fontainebleu Hotel Corp. v. Crossman*, 286 F.2d 926, 928 (5th Cir. 1961); *see also Dulin v. Bd. Of Comm'rs of Greenwood Leflore Hosp.*, 586

Fed. App'x 643, 648 (5th Cir. 2014). "The primary goal of the law of the case doctrine is to 'achieve uniformity of decision, judicial economy, and efficiency.'" *McKay v. Novartis Pharms. Corp.*, 934 F. Supp. 2d 898, 905 (W.D. Tex. 2013) ("Since the adequacy of Novartis' warnings has been previously litigated and decided by the MDL court, it is the law of the case and continues to govern this issue…."). The doctrine applies by "necessary implication" even to issues not explicitly decided, where matters were fully briefed and necessary predicates to the court's ability to address issues specifically discussed. *Dulin*, 586 Fed. App'x at 648 (citation omitted).

Collateral estoppel also prevents BP from relitigating the Court's prior decision within the Class Action now. Collateral estoppel precludes relitigation of issues actually litigated in one action, whether or not it is based on the same causes of action at issue in the other action. *Houston Prof'l Towing Ass'n v. City of Houston*, 812 F.3d 443, 447 (5th Cir. 2016) (citing *Moch v. East Baton Rouge Parish Sch. Bd.*, 548 F.2d 594, 596 (5th Cir. 1977)). Collateral estoppel "preclude[s] relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action." *U.S. v. Safety Nat'l Cas. Corp.*, 782 F. Supp. 2d 420, 423 (S.D. Tex. 2011) (quoting *U.S. v. Stauffer Chem. Co.*, 464 U.S. 165, 170-171 (1984)). "Collateral estoppel prevents a [party] from relitigating issues which he has previously lost in other suits." *Stevens v. Morris*, No. 1:04-cv-751, 2007 WL 4591650, at *4 (S.D. Tex. Dec. 27, 2007). Thus, collateral estoppel "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *U.S. v. Davenport*, 484 F.3d 321, 326 (5th Cir. 2007) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

The sole case BP's counsel referenced during the Telephonic Hearing in support of the position that individual plaintiffs need to "opt out in the normal way" (*see* Tr. at 18:16-19:5) –

*Silvercreek Mgmt., Inc. v. Banc of Am. Secs., LLC*, 534 F.3d 469 (5th Cir. 2008) – is entirely distinguishable and does not necessitate a different outcome.[5]

### B. BP's Stated Concerns Do Not Warrant Imposition Of The Proposed Opt Out Process On Plaintiffs

In light of the foregoing, and given Plaintiffs' substantial concerns (*see* §III., *supra*), BP's three stated reasons for seeking to impose the Settlement's release and opt out provisions upon Plaintiffs are not persuasive and do not justify their imposition.

First, BP's desire to "know what claims are outstanding" (*see* Tr. at 9:9-17; 19:15-16; 31:6-7) is readily satisfied by looking to Plaintiffs' recently-amended pleadings. As of this filing, BP is currently finalizing yet another 50-page motion to dismiss while collaborating with Plaintiffs on detailed, heavily-negotiated pre-motion-to-dismiss orders resolving for each Plaintiff the full set of "old" issues previously addressed by rulings of the Court. Thus, the claims remaining against BP are self-evident and well-understood. *Id.* at 14:13-17; 32:11-19; 35:6-10.

Second, BP said it wants to "confirm that an opt-out member is, in fact, a member of the [Settlement] class" (*See* Tr. at 9:18-21), a desire bordering on the academic. Whether or not they were initially part of the Settlement Class, any Plaintiffs who vigorously seek to be excluded by

[5] In *Silvercreek*, the *Enron* lead plaintiff moved for preliminary approval of a settlement with a bank. *Id.* at 471. Other MDL plaintiffs with lawsuits against the bank, despite receiving notice, missed the deadline for pre-preliminary approval objections; did not attend the preliminary approval hearing; missed the post-notice deadlines for filing objections, opt out notices, and notices to appear at the final approval hearing; did not object in any form to the settlement; and did not attend the final approval hearing. *Id.* at 471-472. After the hearing, they filed an opt-out request and moved to extend the opt-out deadline. *Id.* at 472. The court refused, finding that Silvercreek failed to demonstrate excusable neglect, and the Fifth Circuit affirmed. *Id.* at 472-473. Here, by contrast, Liaison Counsel contacted the Class Action parties to proactively express the concerns herein barely ***three hours*** after their Preliminary Approval Motion and Stipulation were first docketed, contacted the Court ***the next day***, participated in the Telephonic Hearing ***days later***, and authored this brief shortly thereafter – all before preliminary approval has been decided.

the Court now very clearly want out of it. *Id.* at 14:17-20. The relief sought would lead to that outcome, with a minimum of effort by the Court and the parties.

Third, BP's counsel referenced the Settlement's side agreement, specifically its 'blow provision' giving BP the right to terminate if a sufficiently high percentage of Settlement Class members opt out, as a reason to impose the its release and opt out provisions on Plaintiffs. *See* Tr. at 9:21-25; 19:16-18. However, as Liaison Counsel represented to the Court, the number of Plaintiffs seeking exclusion now is "dramatically insufficient" to trigger that provision, whatever its threshold. *See* Tr. at 14:21-15:7; 36:6-15. Indeed, BP's Form 20-F filed with the SEC on March 5, 2010, states that, as of February 18, 2010, there were ***886 million*** ADSs outstanding, held by roughly ***133,000*** ADS holders, and the nearly 1,450 holders with holdings between 10,001 and 1 million ADSs ***altogether*** only accounted for 3.24% of BP ADSs. *See* Form 20-F, available at https://www.sec.gov/Archives/edgar/data/313807/000095012310021364/u08439e20vf.htm). The Preliminary Approval Motion states that the Class Action plaintiffs previously transmitted ***500,000*** notices to Settlement Class members regarding the Court's decision to certify the post-explosion class. *See* Dkt. No. 1395 at 12. By contrast, BP believes the number of Plaintiffs actually in the Settlement Class to be "a minority" of the roughly 135 total Plaintiffs, which aligns with Class Action plaintiffs' counsel's estimate of about 35 Plaintiffs in the Settlement Class. *See* Tr. at 17:1-11; 23:23-24. Plaintiffs are truly a minute fraction of the investors at issue.

Moreover, it has now become entirely clear that the 'blow provision' is in absolutely no danger of being triggered, with or without the exclusion of Plaintiffs. After the Telephonic Hearing, Liaison Counsel asked the Class Action parties to release and disclose the previously-unfiled "Appendix A" to the Stipulation, which purports to list the investors who previously opted out after those 500,000 post-certification notices were sent. Appendix A, since

docketed, lists just ***33 investors who opted out***, and ***23 of them are retail investors***. *See* Dkt. No. 1399, PDF page 44. A Bloomberg search confirms that BP currently has 1,100+ institutional holders of its ADSs. Fewer than 0.01% of them have opted out of the Settlement via the opt out procedures to date.

Thus, BP's arguments are far outweighed by Plaintiffs' concerns outlined herein, and imposition of the Settlement's release and opt out provisions on Plaintiffs is unwarranted.

### C. Plaintiffs Should Be Able To Be Excluded From The Settlement Now, Without Having The Proposed Opt Out Procedures Imposed Upon Them As A Pre-Condition

The Court's simple question during the Telephonic Hearing was spot-on: "Is this the kind of problem we can take care of with drafting?" *See* Tr. at 24:14-16. As Liaison Counsel indicated then, the simple answer is "yes." *Id.* at 25:21-27:11. Any one of the following options will provide the relief that Plaintiffs seek, with minimal disruption to the Class Action or Plaintiffs' actions.

Option 1: The Court could simply enter a short-form order, in the form attached, that would list the Plaintiffs who wish to have themselves and their actions excluded from the Settlement. *See* Tr. at 26:3-14; 27:7-11; 29:18-30:6. Such an order is akin to the ones being used across Plaintiffs' actions to resolve pre-motion-to-dismiss issues. Alternatively, if the Court prefers, Plaintiffs could instead submit a short letter listing the Plaintiffs and the actions seeking exclusion from the Settlement, which the Court could sign as so ordered. Either way, as previously proposed by Liaison Counsel, just a short time period of a few weeks would be needed for Plaintiffs' counsel to verify the precise list of Plaintiffs who wish to be so excluded. In the meantime, the Court could grant preliminary approval of the Settlement without any further delay, with the Settlement Papers left untouched, so the Class Action plaintiffs could transmit the Notice.

Option 2: The Court could instead require a revision to the "Appendix A," so it would include a list of the Plaintiffs who wish to be excluded now (as verified by Plaintiffs' Counsel after the same short time period). Only minor contemporaneous revisions would be needed to Stipulation's two references to "Appendix A." "Whereas" clause K. states "Listed on Appendix A are those Persons who properly excluded herself, himself, or itself from the Class by the February 8, 2016 deadline for exclusions" (*see* Stipulation at 4 [Dkt. No. 1395-1, PDF page 4]), which would be revised to state "Listed on Appendix A are those Persons who properly excluded herself, himself, or itself from the Class previously." The Definitions §1.(ll) of "Settlement Class"/"Settlement Class Member" lists exclusions including "those Persons (listed on Appendix A hereto) who would otherwise be a Settlement Class Member but timely and properly excluded herself, himself, or itself pursuant to the Notice of Pendency approved by the Court on November 18, 2015" (*see* Stipulation at 14, Definition §1.(ll)) [Dkt. No. 1395-1, PDF page 14]), which would be revised to state "those Persons (listed on Appendix A hereto) who would otherwise be a Settlement Class Member but timely and properly excluded herself, himself, or itself."

Option 3: The Court could instead require a revision to the definitions of "Settlement Class"/"Settlement Class Member" whereby the following text would be inserted into the list of exclusions from the Settlement Class (*see* Stipulation at 14, Definition §1.(ll)) [Dkt. No. 1395-1, PDF page 14]): "those Persons already pursuing individual actions in MDL 2185 who wished to be excluded from the Settlement Class (listed on Appendix B hereto)" and, at the same time, a list of the Plaintiffs and their actions who wish to be so excluded would be appended as an "Appendix B" (following the same short period for Plaintiffs' Counsel to verify the list). Alternatively, but similarly, the Court could require a revision to the definition of "Released Plaintiffs' Claims" whereby "claims by those Persons already pursuing individual actions in MDL 2185 who wished

to be excluded from the Settlement Class (listed on Appendix B hereto)" would be inserted into the provision's five listed exclusions while the same Appendix B as described above would be appended.

Option 4: If a simple, ironclad exclusion *ab initio* of the sort outlined in any of the three options above is not implemented, Plaintiffs respectfully urge the Court to revise the following release provisions, so that any unintended inclusion of a Plaintiff within the Settlement Class results ***only*** in dismissal of the claims that were ***actually at issue*** or that ***could actually have been brought by Class Plaintiffs within*** the Settlement Class Period:

(1) Definition 1.(z), regarding "Pre-Explosion Claims" (*see* Stipulation at 11, Definition §1.(z)) [Dkt. No. 1395-1, PDF page 11]) should be revised so that the language "means the claims asserted by the Lead Plaintiffs and Ludlow Plaintiffs in the TAC concerning alleged misrepresentations prior to the April 20 *Deepwater Horizon* disaster" is deleted and replaced with "means any claims by any plaintiff concerning alleged facts, misrepresentations, or omissions predating the April 20 *Deepwater Horizon* disaster." This change is particularly appropriate given the Court's ruling that pre-explosion claims could only be pursued individually. *See In re BP p.l.c. Sec. Litig.*, No. 10-md-2185, 2014 WL 2112823, at *12 (S.D. Tex. May 20, 2014) (refusing to certify pre-explosion class due to failure to satisfy Rule 23(b)(3) predominance requirement).

(2) Definition 1.(gg), regarding "Releasing Plaintiffs"/"Released Plaintiffs" (*see* Stipulation at 12, Definition §1.(gg)) [Dkt. No. 1395-1, PDF page 12]) should be revised to delete from subpart (iv) all of the following terms: "trustees," "trusts," "executors," "administrators," "members," "agents," "employees," "managers," "attorneys," "representatives," and "advisors."

(3) Definition 1.(hh), regarding "Released Plaintiffs' Claims" (*see* Stipulation at 13, Definition §1.(hh)) [Dkt. No. 1395-1, PDF page 13]), should be revised so as to delete the

language "that relate in any way, directly or indirectly, to the purchase, sale, acquisition, disposition, or holding of BP ADSs during the Class Period" and replace it with the language "that arise from the purchase, sale, acquisition, disposition, or holding of BP ADSs during the Class Period."

(4) This definition should be revised so that "Released Plaintiffs' Claims include all rights of appeal from any prior decision of the Court in the Action." is modified to read "Released Plaintiffs' Claims include all rights of appeal from any prior decision of the Court in the Action, only to the extent such appeal or such decision concern facts at issue during the Class Period."

(5) This definition should also be revised so that the words "foreign or statutory law" and "common law" are deleted and replaced with "U.S. statutory law" and "U.S. common law," while the list of exclusions is expanded so as to expressly exclude "claims arising under foreign laws, including English law." These changes, removing "foreign" law as an inclusion (while adding it as an exclusion) and limiting "statutory law" and "common law" to only U.S. iterations, is particularly appropriate given this Court's 2012 decision that it ***lacked jurisdiction*** over Class Action plaintiffs' purported English law claims. *See In re BP p.l.c. Sec. Litig.*, 843 F. Supp. 2d 712, 798 (S.D. Tex. 2012). The Settlement's attempted release of such claims is directly at odds.

## V. CONCLUSION

For these reasons, Plaintiffs respectfully request that one of the first three options in §IV. herein be adopted by the Court so as to give effect to its prior ruling that they "are no longer members of the putative class," an outcome each Plaintiff brought about by "filing its own lawsuit, thereby opting out of the putative class, even if this event predates the court's decision on class certification." *In re BP*, 2014 WL 4923749 at *3-*4. Failing that, Plaintiffs respectfully request that the fourth option in §IV. herein be adopted so as to limit the Settlement's release provisions.

Dated: September 26, 2016

**POMERANTZ LLP**
*/s/ Matthew L. Tuccillo*
Marc I. Gross
Jeremy A. Lieberman
Matthew L. Tuccillo
Jessica N. Dell
600 Third Avenue, 20th Floor
New York, NY 10016
(212) 661-1100
(212) 661-8665 (Fax)

***Individual Action Plaintiffs Steering Committee Member and Liaison Counsel; and Attorneys for Plaintiffs in the Alameda, South Yorkshire, Mondrian, Stichting, HESTA, New York City, Nova Scotia, Universities, Merseyside, Bank of America, and IBM Actions***

**AHMAD, ZAVITSANOS, ANAIPAKOS, ALAVI & MENSING P.C.**
*/s/ Sammy Ford IV*
Sammy Ford IV
Federal Bar No. 950682
Texas Bar No. 24061331
1221 McKinney Street
Houston, Texas 77010
(713) 655-1101
(713) 655-0062 (Fax)

***Attorneys for Plaintiffs in the Alameda, South Yorkshire, Mondrian, Stichting, HESTA, New York City, Nova Scotia, Universities, Merseyside, Bank of America, and IBM Actions***

**SPECTOR ROSEMAN KODROFF & WILLIS, P.C.**
Mark S. Willis
1101 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20004
Tel.: (202) 756.3601
Fax: (202) 756.3602

Robert M. Roseman
Andrew D. Abramowitz
Daniel J. Mirarchi
1818 Market Street
Suite 2500
Philadelphia, PA 19103
Tel.: (215) 496.0300
Fax: (215) 496.6611

***Individual Action Plaintiffs Steering Committee Member and Attorneys for the Avalon, Houston, Illinois, and John Hancock Plaintiffs***

**KENDALL LAW GROUP LLP**
By: /s/ *Joe Kendall*
Joe Kendall
3232 McKinney Avenue
Suite 700
Dallas, TX 75204
Tel.: (214) 744.3000
Fax: (214) 744.3015

***Attorneys for the Avalon, Houston, Illinois, and John Hancock Plaintiffs***

**KESSLER TOPAZ MELTZER & CHECK, LLP**
*/s/ Matthew L. Mustokoff*
Matthew L. Mustokoff
Darren J. Check
Gregory M. Castaldo
Michelle M. Newcomer
Margaret E. Onasch
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706
(610) 667-7056 (fax)

***Individual Action Plaintiffs Steering Committee Member and Attorneys for Plaintiffs in the Connecticut Action***

**CALLIER & GARZA, L.L.P.**
*/s/ Bernardo S. Garza*
Bernardo S. Garza
Federal Bar No. 4779
State Bar No. 03663500
4900 Woodway, Suite 700
Houston, TX 77056
(713) 439-0248
(713) 439-1908 (fax)

***Attorneys for Plaintiffs in the Connecticut Action***

**KIRBY MCINERNEY LLP**

*/s/ Daniel M. Hume*
Daniel M. Hume
Ira M. Press
Christopher S. Studebaker
Melissa A. Fortunato
Meghan J. Summers
825 Third Avenue, 16th Floor
New York, NY 10022
Tel: (212) 371-6600
Fax: (212) 699-1194

***Plaintiffs' Steering Committee Member and Attorneys for Plaintiff in the GIC Private Limited Action***

**JOYCE + McFARLAND LLP**

*/s/ Jeff Joyce*
Jeff Joyce
State Bar No. 11035400
Federal ID No. 10762
Benjamin C. Wickert
State Bar No. 24066290
Federal ID No. 973044
John H. McFarland
State Bar No. 00794270
Federal ID No. 19423
712 Main, Suite 1500
Houston, Texas 77002
Tel: (713) 222-1112
Fax: (713) 513-5577

***Attorneys for Plaintiff in the GIC Private Limited Action***

**BRAGAR EAGEL & SQUIRE, P.C.**
*/s/ J. Brandon Walker*
J. Brandon Walker
Jeffrey H. Squire
Lawrence P. Eagel
David J. Stone
Todd H. Henderson
885 Third Avenue, Suite 3040
New York, NY 10022
(212) 308-5858
(212) 486-0462 (Fax)

***Attorneys for Plaintiffs in the KBC and Deutsche Actions***

**JOYCE + McFARLAND LLP**
*/s/ Jeff Joyce*
Jeff Joyce
Federal Bar No. 10762
State Bar No. 11035400
712 Main, Suite 1500
Houston, Texas 77002
(713) 222-1112
(713) 513-5577 (Fax)

***Attorneys for Plaintiffs in the KBC and Deutsche Actions***

**LABATON SUCHAROW LLP**

*/s/ Thomas A. Dubbs*
Thomas A. Dubbs
Eric J. Belfi
Thomas G. Hoffman, Jr.
140 Broadway
New York, New York 10005
Tel: (212) 907-0700
Fax: (212) 818-0477

***Attorneys for Plaintiffs in the Virginia and Arkansas Actions***

**MASHAYEKH & CHARGOIS, P.C.**

*/s/ Damon J. Chargois*
Damon J. Chargois
One Riverway, Suite 1700
Houston, Texas 77056
Tel: (713) 840-6313

***Attorneys for Plaintiffs in the Virginia and Arkansas Actions***

**ROBBINS GELLER RUDMAN & DOWD LLP**

*/s/ Trig R. Smith*
Trig R. Smith
Kevin A. Lavelle
655 West Broadway, Suite 1900
San Diego, CA 92101
Tel: (619) 231-1058
Fax: (619) 231-7423

***Attorneys for Plaintiff in the Washington State Investment Board Action***

**EDISON, McDOWELL & HETHERINGTON LLP**

*/s/ Andrew M. Edison*
Andrew M. Edison
Texas Bar No. 00790629
S.D. Texas Bar No. 18207
1001 Fannin Street, Ste 2700
Houston, TX 77022
Tel: (713) 337-5580
Fax: (713) 337-8850

***Attorney for Plaintiff in the Washington State Investment Board Action***

**BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP**

*/s/ Blair A. Nicholas*
Blair A. Nicholas (*pro hac vice*)
Timothy A. DeLange (*pro hac vice*)
Jonathan D. Uslaner (*pro hac vice*)
David R. Kaplan (*pro hac vice*)
Lucas E. Gilmore (*pro hac vice*)
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Tel: (858) 793-0070
Fax: (858) 793-0323

-and-

Jeroen Van Kwawegen
1251 Avenue of the Americas, 44th Floor
New York, NY 10019
Tel: (212) 554-1400
Fax: (212) 554-1444

***Attorneys for Plaintiffs in the Louisiana State Employees' Retirement System Action***

**AJAMIE LLP**

*/s/ Thomas R. Ajamie*
Thomas R. Ajamie
Texas Bar No. 00952400
S.D. Tex. Bar No. 6165
Pennzoil Place – South Tower
711 Louisiana, Suite 2150
Houston, Texas 77002
Tel: (713) 860 1600
Fax: (713) 860-1699

***Attorneys for Plaintiffs in the Louisiana State Employees' Retirement System Action***

**GRANT & EISENHOFER P.A.**

*/s/ Jay W. Eisenhofer*
Jay W. Eisenhofer
Daniel L. Berger
485 Lexington Avenue
New York, NY 10017
Tel: (646) 722-8505
Fax: (646) 722-8501

***Attorneys for Plaintiffs in Deka Investment GmbH Action***

**BIRES SCHAFFER & DEBORDE**

*/s/ Kent A. Schaffer*
Kent A. Schaffer
712 Main Street
Suite 2400
Houston, TX 77002
Tel: (713) 574-9412
Fax: (713) 228-0034

***Attorneys for Plaintiffs in Deka Investment GmbH Action***

**DIAZ REUS & TARG LLP**

*/s/ Alexander Reus*
Alexander Reus
Miami Tower at International Place
100 S.E. Second Street, Suite 3400
Miami, FL 33131
Tel: (786) 235-5000
Fax: (786) 235-5005

***Attorneys for Plaintiffs in Deka Investment GmbH Action***

**CERTIFICATE OF SERVICE**

I hereby certify that on September 26, 2016, a copy of the foregoing was served by me via ECF delivery on the following counsel for the Defendants:

Thomas W. Taylor
Texas State Bar No. 19723875
S.D. Tex. Bar No. 3906
ANDREWS KURTH LLP
600 Travis, Suite 4200
Houston, Texas 77002
Telephone: (713) 220-4200
Facsimile: (713) 220-4285
ttaylor@andrewskurth.com

*Attorney-in-Charge for Defendants BP p.l.c., BP America Inc., BP Exploration & Production Inc., Anthony Hayward, Douglas Suttles, Andrew Inglis, H. Lamar McKay, Robert Dudley, Robert Malone, Lord John Browne, Peter Sutherland, William Castell, and Carl-Henric Svanberg*

Daryl A. Libow (pro hac vice)
SULLIVAN & CROMWELL LLP
1700 New York Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 956-7500
libowd@sullcrom.com
davidoffa@sullcrom.com

Richard C. Pepperman, II (pro hac vice)
Marc De Leeuw (pro hac vice)
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
peppermanr@sullcrom.com
deleeuwm@sullcrom.com

*Attorneys for Defendants BP p.l.c., BP America Inc., BP Exploration & Production Inc., Anthony Hayward, Douglas Suttles, Andrew Inglis, H. Lamar McKay, Robert Dudley, Robert Malone, Lord John Browne, Peter Sutherland, William Castell, and Carl-Henric Svanberg*

Theodore V. Wells, Jr. (pro hac vice)
Roberto Finzi (pro hac vice)
Jaren Janghorbani (pro hac vice)
Patrick J. Somers (pro hac vice)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
Telephone: (212) 373-3000

*Attorneys for Defendant Douglas Suttles*

Reid Weingarten (admitted pro hac vice)
Brian M. Heberlig (admitted pro hac vice)
Patrick F. Linehan (admitted pro hac vice)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 429-3000
rweingarten@steptoe.com
bheberlig@steptoe.com
plinehan@steptoe.com

*Attorneys for Defendant David Rainey*

*/s/ Matthew L. Tuccillo*
Matthew L. Tuccillo, Esq.