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October 3, 2016

Hon. Keith P. Ellison
United States District Judge
U.S. District Court for the Southern District of Texas
515 Rusk Street
Houston, Texas 77002

VIA ECF

Re: *In re BP p.l.c. Securities Litigation*, No. 4:10-md-02185, United States District Court for the Southern District of Texas

Dear Judge Ellison:

This firm, along with Lowenstein Sandler LLP, represents Plaintiffs in the following three actions that are part of the multi-district litigation, *In re BP p.l.c. Securities Litigation*, No. 4:10-md-02185: (1) *PEAK 6 Capital Management LLC, et al. v. BP, P.L.C., et al.*, No. 4:15-cv-00865; (2) *BP Litigation Recovery I, L.L.C. v. BP PLC et al.*, No. 4:15-cv-01061; and (3) *BPLR, L.L.C. v. BP PLC et al.*, No. 4:15-cv-01059. We write concerning the ongoing dispute between certain individual action plaintiffs and the class plaintiffs concerning the procedures for seeking exclusion from the proposed class settlement presented to the Court for preliminary approval. (See MDL Dkt. Nos. 1402 & 1422.) We respectfully request that, in considering the appropriate procedures for individual plaintiffs to opt out of the class settlement, the Court also implement a procedure for individual plaintiffs to withdraw their prior requests for exclusion and to opt back into the class.

We represent various investment funds and individuals who purchased BP ADS after April 26, 2010 (the "Post-Spill Individual Plaintiffs"). Similar to the class plaintiffs, the Post-Spill Individual Plaintiffs are asserting causes of action under the federal securities laws relating to BP's post-spill misrepresentations concerning the rate of oil flowing from the Macondo well after the Deepwater Horizon disaster. However, the Post-Spill Individual Plaintiffs' claims are broader than the class plaintiffs' claims insofar as they assert additional misrepresentations and corrective disclosures that are not alleged by the class plaintiffs. In April 2015, the Post-Spill Individual Plaintiffs filed individual actions against BP, BP E&P, and certain of their former officers. The Post-Spill Individual Plaintiffs filed their own lawsuits because they suffered significant individual losses unlikely to be recouped in the class action.

Consistent with their filing of individual cases against BP, after this Court certified a class of post-spill purchasers of BP ADSs, each of the Post-Spill Individual Plaintiffs timely filed requests for exclusion in accordance with the Notice of Pendency of Class Action. (MDL Dkt. No. 1284.) At that time, it was not clear if and when they might have another opportunity to opt out of the class action. Thus, they opted out as a prophylactic measure to protect their rights to continue their individual actions should they decide to do so.

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Because they filed requests for exclusion prior to February 8, 2016, in accordance with the Notice of Pendency of Class Action, the Post-Spill Individual Plaintiffs are included on Exhibit A to the proposed class settlement agreement recently submitted to the Court. (MDL Dkt. No. 1395.) According to the proposed class settlement, the plaintiffs listed on Exhibit A will be excluded from the group of settling plaintiffs who are bound by the class settlement. However, plaintiffs who did not previously opt out by February 8, 2016, are being given a second opportunity to seek exclusion from the class.

Since the original opt out deadline of February 8, 2016, there have been material developments in the class action. Specifically, on May 31, 2016, the Court issued its Memorandum and Order concerning cross-motions for summary judgment in the class action. (MDL Dkt. No. 1356.) In that Memorandum and Order, the Court held that news released on several dates in May and June 2010, which were alleged by the class do be corrective disclosures, do not establish loss causation as a matter of law. (*Id.* slip op. at 42.).

For the plaintiffs who did not previously opt out of the class, there will be a second opportunity under the proposed class action settlement to evaluate whether to stay in or leave the class. They will make this decision with the benefit of the Court's summary judgment decision and knowing the full details of the class plaintiffs' settlement with BP. We believe that plaintiffs who complied with the original deadline for opting out should also be given the same opportunity. Accordingly, we ask that the Court provide the Post-Spill Individual Plaintiffs with an opportunity to opt back into the class, and to withdraw their prior requests for exclusion.

Although case law on the issue is scarce, "courts have consistently permitted parties to withdraw requests to opt out of class actions." *In re Urethane Antitrust Litig.*, 04-md-1616, 2008 WL 5215980, *1 (D. Kan. Dec. 12, 2008); *see, e.g., id.* at *3; *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 07-md-1819, 2013 WL 1222690, at *1-2 (N.D. Cal. Mar. 25, 2013); *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 68-69 (N.Y. App. Div. 2006). This is particularly true where, as here, the final opt-out deadline has not yet expired. *See Bailey v. Cost Control Mktg. & Sales Mgmt. of Virginia, Inc.*, 132 F.R.D. 435 (W.D. Va. 1990) ("[A]s long as the party makes its wishes known to the Court prior to the deadline set for requests for exclusion and those wishes are clear and unequivocal, then that party should be able to rescind any prior contrary communication to the Court asking to be excluded from the class."); *Klein*, 28 A.D.3d at 69 (permitting withdrawal of opt-out request that was made prior to second opt-out period).

The Post-Spill Individual Plaintiffs should be afforded the opportunity to withdraw their requests for exclusion and to opt back into the class. Because the settlement has not yet been preliminarily approved and other class members still have the opportunity to opt out, no other class members will be prejudiced by the Post-Spill Individual Plaintiffs being allowed to rejoin the class. Moreover, this is not a situation where the plaintiffs wishing to withdraw their requests for exclusion opted out in an attempt to create leverage in settlement negotiations. The Post-Spill Individual Plaintiffs filed their individual actions more than a year before the proposed class settlement was publicly disclosed, and actively litigated those cases through motion practice. They seek to have the option to opt back into the class because circumstances have

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materially changed as a result of the Court's decision on summary judgment in the class action, and because other plaintiffs who failed to comply with the original opt out date are being given the opportunity to decide whether to exclude themselves from the class in light of important developments in the case that have transpired since the original opt out date. *Cf.* Fed. R. Civ. P. 23, 2003 advisory committee's notes (rule amended to permit a second chance at exclusion at settlement stage because "[a] decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known").

Accordingly, the Post-Spill Individual Plaintiffs respectfully request that the Court allow individual plaintiffs to withdraw their prior requests for exclusion and to opt back into the class.

If Your Honor would prefer that this issue be addressed by motion or formal briefing, we would be happy to do so.

Respectfully submitted,

/s/ Tom M. Dees, III

Tom M. Dees, III

cc: All Counsel of Record (via ECF)