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

FREDRIC A. GUENTHER, an individual; and WALTON FUJIMOTO, an individual, and LESLIE OWEN, an individual, Plaintiffs v. BP RETIREMENT ACCUMULATION PLAN, by its Plan Administrator, the Senior Vice President of Human Resources of BP CORPORATION NORTH AMERICA INC.; and BP CORPORATION NORTH AMERICA INC., a corporation, Defendants.	§	Civil Action No. 4:16-CV-995

DEFENDANTS' OPENING POST-TRIAL BRIEF
REGARDING EQUITABLE RELIEF

Defendants BP Retirement Accumulation Plan (the "Plan") and BP Corporation North America Inc. ("BPCNA") (collectively "Defendants") file this Opening Post-Trial Brief Regarding Equitable Relief pursuant to this Court's Order dated March 28, 2024.

I. INTRODUCTION

Having found in favor of Plaintiffs on liability, the Court now must evaluate what, if any, remedy to award. While reserving their right to respond to whatever showing Plaintiffs make, Defendants outline below several reasons why no remedy is permitted, or even possible, on the factual record in this case.

More broadly, given the substantial issues at the heart of this case and the need for clarity, Defendants submit that prompt appellate review is in the interest of all parties and the Court. Accordingly, on or before May 15, 2024, Defendants intend to request permission to file an interlocutory appeal of the Court's liability ruling under 28 U.S.C. § 1292(b).

II. NATURE AND STAGE OF PROCEEDING

This case was tried to the bench for 14 days between June 20, 2023, and July 20, 2023. On March 28, 2024, the Court issued Findings of Facts and Conclusions of Law in this matter.[1] The Court found that Plaintiffs are entitled to equitable relief under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), and ordered the parties to file supplemental briefs regarding the appropriate form of that equitable relief on or before May 1, 2024, and response briefs on or before May 15, 2024.[2]

III. STATEMENT OF THE ISSUES TO BE RULED UPON BY THE COURT

1. Whether Plaintiffs can obtain any remedy "typically available in equity" on the facts of this case and against these Defendants?

IV. SUMMARY OF THE ARGUMENT

Defendants respectfully maintain that there is no evidence to support this Court's finding that Plaintiffs are entitled to any form of equitable relief. The only equitable remedies Plaintiffs seek are reformation of the Plan and/or surcharge.[3] First, Plaintiffs are not entitled to reformation because it is not possible to reform the Plan to match

[1] ECF 507.
[2] *Id.* at 57.
[3] ECF 419 at 18, Plaintiff's contested issues 16.

amorphous promises and subjective impressions testified to by Plaintiffs. Second, Plaintiffs are not entitled to other forms of equitable remedies (*e.g.*, surcharge or equitable estoppel) because those remedies are not appropriate mechanisms to remedy the class-wide breaches asserted in this action. Finally, Plaintiffs are not entitled to any equitable remedy because they did not sue the party that committed the alleged breach of fiduciary duty—i.e., the 1989 Plan fiduciary. As such, Plaintiffs have no evidence of a breach of fiduciary duty or any other ERISA violation by Defendants, which is a prerequisite to any relief under Section 502(a)(3).

Defendants reserve their right to respond to Plaintiff's position regarding the appropriate form of equitable relief in their response brief due on or before May 15, 2024.

V. ARGUMENT AND AUTHORITIES

A. Plaintiffs are Not Entitled to Any Equitable Relief.

1. Reformation is Not Possible Based on the Trial Evidence.

To date, Plaintiffs have focused on seeking the remedy of reformation—asking the Court to modify the RAP to match the "promises" they have alleged.[4] In certifying the class in this case, the Court characterized the claims at issue as turning on communications prepared by BP America and the RAP fiduciaries that were "uniformly disseminated to all Sohio heritage plan participants."[5] Thus, Plaintiffs had the burden of showing that the uniformly disseminated communications provided knowingly

[4] ECF 267 at 8. (The Court held that Plaintiffs' claim could be certified under Rule 23(b)(2) because they only sought reformation and did not request any monetary damages whatsoever.)
[5] ECF 267 at 12; see also id. at 13, 14, and 17.

misleading or knowingly inaccurate information to participants about the future of their plan. At trial, however, Plaintiffs only pointed to isolated statements contained in various 1989 communications, and characterized them, without any context, as amounting to a promise that the RAP would pay benefits to all participants "as good [as] or better" than what they would have received under the ARP.[6] Plaintiffs further testified that the 1989 communications left them with the impression that benefits could never be lower under the RAP than they would have been under the ARP.[7] The evidence of uniformly disseminated communications clearly contradicts Plaintiffs' impressions.[8] As shown at trial, the 1989 communications materials satisfied ERISA obligations in that they explained how the new formula would work, noted the effect that variables (including interest rates) would have on benefits ultimately paid, and cautioned participants that the new plan design would not always yield greater benefits and would replace the prior design's early retirement incentives with a smoother accrual pattern. Given what was actually told to employees in 1989, reformation simply is not possible. There is no viable way to rewrite the RAP to match alleged promises and subjective impressions that were not part of, and are controverted by, the uniformly distributed communications that are in evidence in this case.[9]

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[6] *See e.g.*, Tr. 6/20/2023 at 56:11-14; 127:6-17; Tr. 6/21/2023 at 18:16-19:2; Tr. 6/26/2023 at 51:14-20; Tr. 6/27/23 at 35:16-20.

[7] Tr. 6/26/2023 at 44:20-45:2; Tr. 6/27/23 at 100:9-101:1.

[8] *See* DX 236 at 64 (During the rollout meetings, BP American and the RAP fiduciaries shows employees a chart demonstrating that a RAP plan participant could receive less benefits under the RAP than the ARP.); *see also* DX at 20 (The Long Brochure specifically stated that "[u]nder the [RAP], certain employees—particularly those in midcareer with shorter periods of service—could receive a lower benefit than they would have under the prior formula.")

[9] *See Mello v. Sara Lee Corp.*, 431 F.3d 440, 446 (5th Cir. 2005); *Bunner v. Dearborn Nat'l Life Ins. Co.*, No. CV H-18-1820, 2021 WL 2119488, at *14 (S.D. Tex. May 25, 2021), *aff'd*, 37 F.4th 267 (5th Cir. 2022). ("A plaintiff's

2. Surcharge is Not Available for This Class Claim.

Surcharge is not an appropriate equitable remedy for the class claim asserted in this action. "[S]urcharge is an imposition of personal liability on a fiduciary for willful or negligent misconduct in the administration of fiduciary duties."[10] Essentially, Plaintiff's request for surcharge is a request for the monetary relief, which the Court specifically found was not at issue when it certified the class in this case.[11] Further, as set forth in a recent Fourth Circuit decision,[12] surcharge is not available in ERISA actions because it is not relief that was "typically" available in equity, that is, when courts were acting with concurrent equitable/legal jurisdiction.

Even if surcharge were available in this case, the elements of a surcharge claim require: "a) the defendant owed the plaintiff a fiduciary duty, b) the defendant breached that duty, c) plaintiff suffered actual harm, and d) defendant's breach of duty was the cause of plaintiff's harm."[13]

Plaintiffs failed to meet both the first and second elements of their surcharge claim because they failed to name a 1989 plan fiduciary as a Defendant in this case. Plaintiffs only sued two Defendants—the Plan and BPCNA—neither of which were 1989

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reliance on informal documents or oral representations 'can seldom, if ever, be reasonable or justifiable if [the documents or representations are] inconsistent with the clear and unambiguous terms of plan documents available or furnished to the [plaintiff].'").

[10] *Barnette v. Sun Life Assurance Co. of Canada*, No. CV 4:15-3720, 2016 WL 1384688, at *5 (S.D. Tex. Apr. 7, 2016) (citations and quotations omitted).

[11] *Compare* ECF 267 at 21 ("The class members also request no monetary damages whatsoever . . . .) *with Perez v. Bruister*, 54 F. Supp. 3d 629, 675-76 (S.D. Miss. 2014), *aff'd as modified*, 823 F. 3d 250 (5th Cir. 2016) (describing surcharge as an equitable remedy that allows court to fashion an "award" for the "amount" of the transaction).

[12] *Rose v. PSA Airlines, Inc.*, 80 F.4th 488, 504-05 (4th Cir. 2023), cert. denied, No. 23-734, 2024 WL 1607769 (U.S. Apr. 15, 2024) (holding surcharge remedy unavailable because it constitutes a legal remedy not typically available in concurrent jurisdiction cases in equity)

[13] *Lauga v. Applied Cleveland Holdings, Inc.*, 2018 WL 3495860, at *3 (E.D. La. 2018).

fiduciaries.[14] Thus, Plaintiff did not prove that the Defendants in this case breached a duty to Plaintiffs.

Moreover, Plaintiffs cannot satisfy the third and fourth elements of a surcharge claim on the record here. Specifically, satisfying those elements here requires individual proof, and would destroy the basis for class certification. To decide if a class member suffered actual harm, the Court would need evidence of each class member's RAP benefit, and a calculation of all participants' benefits under the prior, final average pay benefits. It would then need to identify anyone for whom the RAP was smaller, and fashion an award that restores to each such participant the difference. This is exactly the inquiry that the Court found was *not* appropriate as part of this case when it certified a class.[15]

3. Equitable Estoppel is Not Appropriate under ERISA.

Equitable estoppel is another traditional equitable remedy that has been raised at various points in this case. Equitable estoppel "operates to place the person entitled to its benefit in the same position he would have been in had the representation been true."[16] Equitable estoppel requires proof of detrimental reliance.[17]

Within the Fifth Circuit, the elements of ERISA equitable estoppel are "(1) a material misrepresentation; (2) reasonable and detrimental reliance upon the

[14] *See infra* pp. 8-9.
[15] *See* ECF 267 at 8–9 (rejecting BP's ascertainability arguments; holding individual benefit calculations would be for the plan administrator if, and only if, reformation were ordered).
[16] *Cigna Corp. v. Amara*, 563 U.S. 421, 441 (2013).
[17] *Id.* at 443.

representation; and (3) extraordinary circumstances."[18] Because ERISA requires a plan to be governed by the written terms of a formal plan document, purported oral modifications of a plan's terms do not suffice, as such oral modifications cannot support "reasonable and detrimental reliance."[19] To establish "extraordinary circumstances" a plaintiff generally needs to show "bad faith, attempts to actively conceal a significant change in the plan, the commission of fraud, circumstances where a plaintiff was repeatedly misled, or an especially vulnerable plaintiff."[20]

Here, equitable estoppel is not available because not only is there no evidence of detrimental reliance, but also class-wide proof of reasonable and detrimental reliance is impossible. To award equitable estoppel, the Court would need to decertify the class.

4. Plaintiffs Are Not Entitled to Any Equitable Remedy Against the Defendants in This Case.

To be entitled to reformation or surcharge, Plaintiffs were required to prove a breach of fiduciary duty by a *plan fiduciary*.[21] The requirement to prove a breach against a plan fiduciary emanates from well-established law that "[i]n every case charging breach of ERISA fiduciary duty … the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan's beneficiary's interest, but *whether that person was acting as a fiduciary (that is, was*

[18] *Mello*, 431 F.3d at 444–45; *Bunner*, 2021 WL 2119488, at *14.
[19] *Mello*, 431 F.3d at 446; *Bunner*, 2021 WL 2119488, at *14 ("A plaintiff's reliance on informal documents or oral representations 'can seldom, if ever, be reasonable or justifiable if [the documents or representations are] inconsistent with the clear and unambiguous terms of plan documents available or furnished to the [plaintiff].'").
[20] *Miller v. Federated Mut. Ins. Co.*, 2016 WL 10537608, at *9 (W.D. Tex. 2016).
[21] *Grp. 1 Auto., Inc. v. Aetna Life Ins. Co.*, No. 4:20-CV-1290, 2020 WL 8299592, at *3 (S.D. Tex. Nov. 9, 2020) (citing *Kopp v. Klein*, 894 F.3d 214, 219 (5th Cir. 2018).

performing a fiduciary function) when taking the action subject to complaint[.]"[22] The evidence is clear and unrefuted that only BP America, Inc., the 1989 Plan Sponsor and employer of the class members, and the Vice President of Human Resources for BP America, Inc., the 1989 Plan Administrator, were involved in amending the Plan and communicating that amendment to employees *in 1989*.[23]

Plaintiffs only sued two Defendants—the Plan and BPCNA. Plaintiffs did not sue BP America or the 1989 Vice President of Human Resources for BP America, Inc. nor did they sue any current Plan fiduciary.[24] The text of ERISA establishes that neither named Defendant can be deemed a 1989 fiduciary, and the Plan certainly cannot be its own fiduciary since the Plan is not capable of meeting the statutory definition of fiduciary.[25] BPCNA cannot be deemed a 1989 fiduciary because it did not exist in 1989.[26] Thus, by operation of statute, BPCNA cannot be liable to fiduciary conduct that occurred in 1989.[27] As such, Plaintiffs cannot establish breach of fiduciary duty against Defendants and are thus not entitled to reformation.

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[22] *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000) (emphasis added).
[23] DX 927.6 (defining the "Company" as BP America, Inc.); Tr. 6/21 AM at 36:23-24 (Plaintiff Fujimoto acknowledged RAP statements were from BP America); Tr. 6/21 PM at 2-83:24-2-84:6 (Plaintiff Owen identified BP America as his employer from 1987 to 1999); DX 927 at 6, 11; DX 6(the Ross letter); DX 247 (the Short Brochure); DX 20 (the slide presentation); DX 257 (the Long Brochure) (the Ross letter, Short Brochure, slide presentation, and Long Brochure all had BP America's name and/or insignia printed on them.)
[24] The current Plan fiduciaries include the Plan Administrator (the Head of Pension and Benefits, Americas, for BP Corporation North America, Inc.), and the Investment Committee. DX 298 at 42-48 (Section 8.2); DX 928.37.
[25] *See* 29 U.S.C. § 1002(21); *see also Acosta v. Pac. Enterprises*, 950 F.2d 611, 618 (9th Cir. 1991), *as amended on reh'g* (Jan. 23, 1992) ("[A] plan itself cannot be sued for breach of fiduciary duty.").
[26] Cargill Dep. 42:18-43:18, 44:14-16).
[27] *See* 29 U.S.C. § 1109(b) ("No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary."); *see also Bannistor v. Ullman*, 287 F.3d 394, 405 (5th Cir. 2002) (Holding that appellants cannot be liable for breach of a fiduciary duty that occurred when they had no fiduciary duty and assumed their duties long after the loan at issue was implemented.)

B. Defendants Intend to Seek Permission to File an Interlocutory Appeal of the Court's Liability Ruling and Request Expeditious Remedial Proceedings at a Minimum.

This case has been pending for over seven years. And even after the Court's recent liability ruling, potentially prolonged remedial proceedings remain. Yet under the longstanding "final judgment rule," the parties cannot proceed to appellate review by the Fifth Circuit until this Court has ruled on both liability and remedy. Respectfully, it makes little sense for this Court and the parties to expend significant time and resources litigating remedy when the Fifth Circuit could vacate or reverse the Court's liability holding. The far more sensible course is to give the Fifth Circuit an opportunity to review the Court's liability ruling before proceeding with any remedial proceedings. Accordingly, on or before May 15, 2024, Defendants intend to request permission to file an interlocutory appeal of the Court's liability ruling under 28 U.S.C. § 1292(b).

Dated: May 1, 2024

Respectfully submitted,

By: */s/ Ian H. Morrison*

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CERTIFICATE OF SERVICE

I hereby certify that I served this document on all counsel of record via ECF filing on May 1, 2024, to:

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