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' RESPONSE IN OPPOSITION TO PLAINTIFFS' EQUITABLE RELIEF MEMORANDUM

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Defendants BP Retirement Accumulation Plan (the "Plan" or the "RAP") and BP Corporation North America Inc. ("BPCNA") (collectively "Defendants") file this Brief in opposition to Plaintiffs' May 1, 2024 Equitable Relief Memorandum (Dkt. 520).

I. SUMMARY OF THE ARGUMENT

In their May 1, 2024 brief, Plaintiffs "submit the appropriate form of equitable relief . . . is an order to reform the plan formula . . . to be consistent with the promise made to BP employees during the 1989 plan conversion (i.e. the ultimate benefit paid is not less than what the benefit would have been had the benefit formula not been amended in 1989)." (Dkt. 520 at 4.) The question before the Court, then, is how the Plan can be reformed to provide for a comparison between RAP and ARP benefits, such that class members receive at least the benefits they would have received absent the 1989 amendment. At the same time, the Plan must not be so heavily revised as to provide any participant more than the Court found was promised. ERISA does not provide for such windfall damage awards.

The "reformation" Plaintiffs propose seeks something entirely different than their opening lines suggest. They ask the Court to rewrite the Plan to enhance the benefits it provides, and to revise the pre-amendment 1988 BP America Retirement Plan ("ARP") formula to provide participants enhanced benefits under an alternative pension formula that has never existed. They then ask the Court to require comparisons between a reimagined RAP and a modified ARP, and to order the Plan to pay the greater of the two, plus decades worth of interest at 8.5%. Not only does this approach have no relationship to the Court's findings, it is also based on speculation about what might have happened if

BP had never adopted a cash balance formula. And critically, Plaintiffs' approach would go well beyond reforming the Plan to remedy the issue found by the Court; it would provide class members with a windfall benefit *better* than they would have had if the 1989 amendments never happened. It would also inject into the 1988 ARP the same interest rate "risks" Plaintiffs claim BP America failed to disclose in 1989.

As set out in Defendants' May 1 brief, the evidence does not support any equitable remedy in this case.[1] If the Court disagrees, however, the reformation must follow from the breach of fiduciary duty found by the Court. Plaintiff's proposed remedy does not do so. It is based on fanciful reimagining of what might have happened that has no basis in the trial evidence, logic, law, or thirty-five years of consistent Plan administration.

In its findings of fact and conclusions of law, the Court determined that statements in BP America's 1989 communications campaign regarding amendment of the Plan promised that participants' benefits under the new benefit formula would be as good as or better than the benefits they would have gotten under the formula being replaced. The Court further found that BP America's 1989 communications were inaccurate and/or incomplete, and failed to satisfy ERISA's disclosure requirements, causing participants to work under the "mistaken belief that the benefit they would receive at retirement under the RAP formula would equal the benefit that they would have been provided under the prior ARP formula."[2] Critically, the Court found that BP America failed to warn Plan participants about interest rate risks in the new plan formula that did not exist under the

[1] *See generally* Dkt. 519.
[2] Dkt. 507 at 49 (¶ 48).

prior formula.[3] The Court concluded that class members were "harmed" by being paid a benefit under the RAP that is less than "what the Participant would have earned under the ARP formula."[4]

Defendants disagree with the Court's findings on these (and other) points, including the conclusion that liability can be established against Defendants for putative fiduciary breaches where neither was a fiduciary. That said, the framework for a remedy must fit the breach, and the breach found by the Court dictates a simple remedy encapsulated in the opening lines of Plaintiffs' brief.[5] As suggested there, if the Court decides it must award reformation to enforce the 1989 "promise" supposedly made by BP America, the Court should: (1) require ARP benefits to be calculated under the ARP formula as it existed on December 31, 1988; (2) require the Plan Administrator to compare benefits calculated under the December 31, 1988 ARP formula to the RAP benefits as they were calculated at the participant's benefit commencement date, and (3) require comparison of ARP and RAP benefits on an annuity basis as the participant's benefit commencement date. This simplified approach would track the Court's findings, avoid revisionist history and speculation, avoid injecting unwanted interest rate variability into the ARP formula, and avoid windfall recoveries by the class at the expense of the Plan and its thousands of other participants. Where a participant's actual RAP benefit exceeds the benefit they would have received under the ARP, they are not part of the class certified in this case and would take nothing. If a participant's benefit

[3] *Id.* at 21 (¶¶ 67–68).
[4] *Id.* at 49 (¶ 49).
[5] *See* Dkt. 520 at 4.

under the pre-1989 ARP formula exceeds their actual RAP benefit, the reformed plan would award additional pension benefits equal to the difference between those two amounts.

In place of this straightforward framework, which functionally extends the grandfathering promise made in 1989 to Plan participants over the age of 50 to all Plan participants as of January 1, 1989, Plaintiffs propose a convoluted order that modifies both the ARP formula and administration of the RAP, neither of which has ever been at issue in this case. In an effort to inflate their recovery, Plaintiffs propose to incorporate into the ARP formula amendments made to the RAP in the decades after it was first enacted, and propose that "fixes" be required of certain calculations impacting RAP benefits. The result is not a comparison between RAP benefits actually received and benefits under the pre-1989 formula (i.e., the grandfathering promise); it is a framework for awarding vast sums of damages under a comparison between two plans that never existed: Plaintiffs' revision of RAP benefits and a speculative, modified ARP formula that has never existed. If adopted, Plaintiffs' proposals would give the class a massive windfall by giving class members more than they would have gotten had the 1989 amendment never been adopted, and it would give them more than was promised to the grandfathered group. As shown below, adopting Plaintiffs' approach would result in ballooning damage awards that would be incompatible with ERISA's remedial scheme and with the Court's findings.

Not only is Plaintiffs' proposed remedial order (which they hardly explain in their brief) wholly unnecessary to accomplish the relatively simple remedy called for by the

Court's findings, but it is deeply problematic for other reasons as well. (1) Provisions of the proposed order appear to violate ERISA's anti-alienation rules by requiring portions of class members' pensions to be siphoned off to pay attorneys' fees and unlawful compensatory damage awards to the Named Plaintiffs. (2) Language in Plaintiffs' proposal would make Plaintiffs' expert a fiduciary with discretion to interpret the Plan. (3) And the proposed language would have the Court ordering "remedies" for claims that were not litigated and on which no findings were made. The Court should reject this overreach and limit any remedy to addressing only the "promise" supposedly made in 1989. Further, rather than requiring adoption of specific plan language to effectuate reformation, the Court should—in light of the complex, detailed requirements to maintain qualified status under the Internal Revenue Code—leave the actual amendment of the Plan to BPCNA, who is the Plan Sponsor, and allow for any required reformation to be accomplished in a manner approved by the IRS, and order relief that is consistent with over 35 years of plan administration.

Plaintiffs' prejudgment interest proposal is also designed to provide a massive windfall. While the Fifth Circuit has established that prejudgment interest is available in ERISA cases, such awards must be equitable, not punitive. Plaintiffs' interest proposal ignores that interest rates over the last 35 years (1) have not been static, and (2) were—for a significant period of time—far lower than current market rates. The most logical way to provide for prejudgment interest is to use the RAP's interest crediting rate to compute any interest award.

Finally, the Court should not require any amendment of the Plan be effectuated until after Defendants' appellate rights have been exhausted. Any other result would risk having already created vested rights to benefits under amended Plan terms in the event this Court's findings are later reversed. To that end, Defendants are filing a motion contemporaneously with this brief, requesting that the Court certify its findings of fact and conclusions of law for interlocutory appeal under 28 U.S.C. § 1292(b).

II. ARGUMENT AND AUTHORITIES

A. If Reformation of the Plan is Possible, "Reforming" the Facts Is Not.

While various sources suggest the Court has authority, under certain limited circumstances, to revise the terms of the Plan, no authority permits the Court to reform facts in the name of enhancing participants' potential recovery. In other words, under any reformed version of the Plan, the facts as to each individual participant should remain unchanged. Any comparison between ARP and RAP benefits should be made, to the extent possible, based on the participant's actual age, employment history, benefit commencement date, and compensation history, to ensure consistent treatment of all plan participants, an ERISA requirement.

To the extent Plaintiffs are arguing allowances should be made for how changes in the benefit formula might have changed participant behavior (and as a result, their benefit entitlement), the Court must reject those arguments. First, there is no way to know how any participant might have changed their behavior had different plan terms been in place during their employment. Therefore, any remedy that attempted to do so would be

improperly speculative.[6] Second, the breach the Court found was that BP America led class members to believe the Plan terms provided for the better of ARP or RAP benefits, the same as grandfathered participants received. Thus, to suggest they would have behaved differently had that been a term of the RAP makes no sense. Presumably, Plan participants decided whether and when to take their benefits laboring under a false impression that their benefit was the greater of the RAP or the ARP benefit. Assuming they might have behaved differently under a potential reformed Plan is inconsistent with the basic claim in this case, and establishing causation under that theory would require an individualized and particularized examination of each class member's circumstances, destroying the commonality and typicality findings underlying the class certification order. Third, any attempt to tailor facts to maximize recovery (or to create hypothetical terms that never existed so as to increase benefits beyond what the Plan's actual terms would have provided) relies impermissibly on hindsight. The Court's role in fashioning a remedy is to put Plaintiffs where they would have been but for the breach, not to fashion a remedy that, with the benefit of hindsight, produces the largest possible recovery of damages.[7]

For example, and as the Court is aware, the ARP included an early retirement provision, which provided subsidized benefits to employees who retired after reaching age 55, but before reaching age 65. In their brief, Plaintiffs appear to assert that

[6] *See Carras v. Burns*, 516 F.2d 251, 259 (4th Cir. 1975) (damages should be limited to ascertainable loss, and cannot be speculative).
[7] *See Leister v. Dovetail, Inc.*, 546 F.3d 875, 881 (7th Cir. 2008) (hindsight-based construction of remedy amounted to windfall).

something—though they never explain what—should be done to "address participants who will only receive the lower early retirement subsidy . . . and participants who would not be eligible for early retirement under the ARP."[8] As discussed below, the Court should not, as part of its reformation order, alter the terms of the ARP, and it cannot change the facts about when a participant retired. If a participant retired at an age when they were not eligible for enhanced early retirement under the ARP, that should be the result. Neither a participant's retirement date, nor the terms of the ARP or RAP formulas, should be revised to try to provide them more than they would have gotten had BP America never amended the ARP in the first place.[9]

B. Reformation to Provide Benefits "As Good As Or Better Than" The ARP Should Not Involve Changes to the ARP.

1. Plaintiffs argue, and the Court determined, that BP America promised in 1989 that benefits would be at least as good as under the ARP.

In their operative complaint, Plaintiffs allege that, in 1989, BP America promised to ensure that the monetary retirement benefit paid under the RAP would be at least as much as would have been paid under the ARP.[10] In seeking to certify a class, Plaintiffs proposed to include those participants "whose retirement benefit under the BP America Inc. Retirement Plan (ARP) exceeds the retirement benefit offered (or that will be offered) by the BP America Retirement Accumulation Plan (RAP), as amended on the

[8] Dkt. 520 at 6.
[9] Defendants acknowledge, and have maintained throughout this litigation, that there is likely to be data necessary to perform calculations under the reformed Plan that is, due to the extensive passage of time, unavailable. That said, where data is available, it should control. The Court should not replace known data with speculation in fashioning a remedy.
[10] Dkt. 82 at ¶ 2.

benefit commencement date."[11] In their pretrial memorandum, Plaintiffs argued that BP America "caused participants to reasonably expect RAP benefits to be comparable or better than ARP benefits for career employees," and sought reformation to reflect that "promise" and to "make up the difference" for any participant who was paid a benefit under the RAP less than what they would have been paid under the ARP.[12] Plaintiffs testified at trial that they believed the amended plan was going to be as good or better than what they had before the 1989 amendment.[13] In other words, Plaintiffs' allegations and arguments throughout this case have consistently focused on the assertion that—at least for some participants—benefits under the RAP have turned out to be lower than benefits would have been under the ARP formula in effect as of December 31, 1988.

The goal of reformation is to make the plan reflect the representations alleged and found by the Court, and nothing more.[14] The Court found that the combined effect of 1989 disclosure violations and fiduciary breaches caused participants to work under the "mistaken belief that the benefit they would receive at retirement under the RAP formula

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[11] *See* Dkt. 191 at 13, *as modified* Dkt. 221 at 16 n.14.
[12] Dkt. 429 at 7–8.
[13] *See* Tr. 6/20/2023 at 127:6–13, 129:7–10 (W. Fujimoto); Tr. 6/21/2023 AM at 18:11–15, 21:11–18 (W. Fujimoto); Tr. 6/21/2023 AM at 68:13–21, 70:16–22, 71:23–25, 78:5–12 (Owen); Tr. 6/21/2023 PM at 2-18:10–14, 2-50:10–13 (Owen); Tr. 6/26/2023 at 44:20–45:2, 51:14–20 (Guenther); Tr. 6/27/2023 at 35:13–20 (Guenther).
[14] *See Young v. Verizon's Bell Atl. Cash Balance Plan*, 615 F.3d 808, 819 (7th Cir. 2010) ("appropriate equitable relief" under ERISA § 502(a)(3) authorizes reformation of an ERISA plan to ensure written plan terms reflect participants' reasonable expectations of benefits). Even the Court in *Amara*, upon which Plaintiffs principally rely, did not award the kind of gratuitous overreaching remedy sought here. *See Amara v. CIGNA Corp.*, 775 F.3d 510, 525 (2d Cir. 2014) (where reformation is warranted by a party's misrepresentations as to the terms of the written plan, reformation allows the writing to be reformed to reflect the terms as they were represented).

would equal the benefit that they would have been provided under the prior ARP formula."[15] The Court in essence found that BP America's 1989 communications campaign promised the same Plan terms to under-age-50 class members that the Plan document did to over-age-50 grandfathered participants. The Court further found that Plaintiffs and the class were harmed, to the extent they ultimately earned benefits under the RAP that are less than what they would have earned "under the ARP formula."[16] Thus, the only reformation the law of remedies allows is to require payment of the greater of the ARP benefit (under the formula that actually existed in 1988) and the RAP benefit the participant received.[17] The law allows nothing more and for that reason, the Court should reject most of Plaintiffs' arguments.

2. The 1988 ARP plan document must control calculation of ARP benefits.

Again, Defendants respectfully disagree with the Court's conclusions, and continue to dispute Plaintiffs' allegations that they were promised a RAP benefit equal to or greater than the benefit they would have received under the ARP. Still, the steps necessary to assess whether RAP benefits were, in fact, less than ARP benefits for any

[15] Dkt. 507 at 49 (¶ 48).
[16] *Id.* (¶ 49).
[17] *See Whitfield v. Lindemann*, 853 F.2d 1298, 1305–06 (5th Cir. 1988) (vacating damage award as excessive, where it would put the Plan in a better position than it would have occupied had the wrong not occurred; in fashioning equitable remedies "it is hornbook law that only such damages should be awarded as will place the injured party in the situation it would have occupied had the wrong not been committed"); *see also Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 624 (2d Cir. 2006) (Sotomayor, J.) (vacating damage award that exceeded evidence of participants' economic loss; "The aim of ERISA is to make the plaintiffs whole, but not to give them a windfall.").

participant must involve determination of the participant's benefit under the ARP formula that existed in 1988.

ERISA requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument."[18] The principle that contracts should enforced as written is "especially important when enforcing an ERISA Plan."[19] Indeed, the "focus on the written terms of the plan is the linchpin of 'a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'"[20] "The plan, in short, is at the center of ERISA."[21]

Consistent with ERISA's requirement, the terms of the ARP were set out in a written instrument. That written instrument is a standalone document, and was received in evidence at trial.[22] To the extent the Court is fashioning a remedy to ensure RAP participants receive a benefit that is at least equal to the benefit they would have gotten under the ARP (*i.e.*, as though the 1989 RAP amendment and communications guaranteed them, at minimum, the ARP benefit), the size of each participant's ARP benefit should be determined through reference to the 1988 ARP document, without modification. That is the only way to assess whether the participant's ultimate RAP benefit was "as good as or better than" the benefit the participant could have gotten under the ARP.

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[18] 29 U.S.C. § 1102(a)(1)
[19] *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 108 (2013).
[20] *Id.* (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)).
[21] *Id.* (quoting *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 (2013)).
[22] *See* DX923.

3. The Court should not speculatively inject later-enacted RAP amendments into the ARP to enhance ARP benefits.

Defying the commonsense conclusion that benefits under the plan that existed prior to the 1989 RAP amendment should be calculated based on the terms that existed prior to 1989, Plaintiffs' assert that, to ensure participants receive—at a minimum—what they would have received under the ARP, the Court must first resolve how the ARP formula should be changed.[23] In the process, they identify five changes they assert need to be addressed in any reformation order: (1) the appropriate definition of compensation, (2) the question of which conversion rate to use,[24] (3) potential adjustment (or removal) of the service cap that existed under the ARP, (4) actuarial increases for delayed commencement of benefit, and (5) reformation to comply with a legally required minimum lump sum under the ARP.[25]

Before explaining how those changes to the ARP should be made, Plaintiffs begin with the premise that the RAP's grandfathering provision (which explicitly provided those employees who were age 50 or older on January 1, 1989 with the better of benefits under the ARP and RAP) should be expanded to cover all participants as of December

[23] *See* Dkt. 520 at 5–14.
[24] The conversion factor issue is discussed below, in Section II.D.
[25] *See* Dkt. 520 at 5. Plaintiffs assert that the last two of these issues were Plan amendments made in response to required changes in the law. Because the 1989 Plan document provided that the 1988 ARP formula would remain according to its terms, except for amendments required for legal compliance, Defendants agree that Plan amendments required by law should be carried over to the extent a participant is receiving a benefit calculated under the terms of the ARP. It is not clear, however, that the changes Plaintiff described would need to be made to the ARP at all. That said, to the extent they do, the provisions adopted for the RAP to comply with the law should be used in the ARP.

31, 1988.[26] They claim there is evidence to that the Plan Administrator applied post-1989 amendments in parallel to the RAP and ARP formulas.[27] The evidence, however, does not support this suggestion.

While Plaintiffs' expert opined there was evidence that the Plan Administrator applied later amendments to the Plan's conversion factors across both the RAP and ARP formulas, he made no such assertion with respect to the subsequent expansion of the compensation definition or elimination of the service cap.[28] The Plan Administrator at time of trial, Mr. Clifford York, explicitly testified that those amendments were *not* made in parallel; ARP benefits are calculated under the formula and variables as they existed in 1988.[29]

Even if grandfathered participants had been treated more favorably than promised since 1989 (and there is no evidence they were), that treatment does not dictate the treatment of the class. To the extent the Court is seeking to reform the Plan to provide class members the benefits they thought they were getting based on the 1989 communications, the evidence is clear that the class knew they were not promised the grandfathered benefits. Plaintiffs each testified at trial that, in 1989, they were aware of the grandfathering provisions in the RAP, and understood they were not part of the group

[26] *See id.* at 5–6.
[27] *Id.* at 10–11.
[28] *See* PX 425 at ¶¶ 7, 12.
[29] Tr. 7/17/2023 at 108:7–14, 109:7–16 (Plan Administrator, Mr. Clifford York, explaining that 2000 amendment to RAP compensation definition was not made to grandfathered benefits for Sohio heritage participants).

covered by that benefit.[30] To give them that benefit now would award them something in direct conflict with the actual plan terms, and their own understanding of the meaning of those terms. Further, because Plaintiffs were explicitly not part of the grandfathering group, the subsequent administrative treatment of that group should not control how a remedy is implemented here.[31] Thus, to the extent the Plan's grandfather provision has been applied to incorporate all post-1989 amendments, a claim for which there is no evidence and which Defendants vehemently dispute, there is no reason to treat the non-grandfathered class members the same way.

Beyond that obvious flaw in their argument, Plaintiffs also ask the Court to order the Plan be amended to provide them a benefit better than the one that the grandfathering provision would have. For example, as part of its benefit formula, the ARP uses a variable called "Final Average Earnings."[32] "Final Average Earnings," in turn, are determined through reference to the term "Normal Basic Earnings."[33] The grandfather provision of the RAP points to the 1988 ARP plan document as the basis of calculation, and that includes these defined terms.

In contrast to the ARP's "Normal Basic Earnings," the RAP formula uses the term "Compensation."[34] Since 1989, the RAP's definition of "Compensation" has been amended, to include additional types of compensation (at a minimum, bonuses and

[30] *See* Tr. 6/21/2023 AM at 27:8–19 (W. Fujimoto); Tr. 6/21/2023 AM at 78:19–79:12 (Owen); Tr. 6/21/2023 PM at 2-30:17–2-31:9 (Owen); Tr. 6/27/2023 at 69:14–23 (Guenther).
[31] *See* Dkt. 520 at 10–11 (pointing to evidence regarding treatment of the grandfathering group in support of argument that Court should enhance ARP benefits as remedy here).
[32] *See* DX 923.23.
[33] *See* DX 923.9.
[34] Tr. 7/19/2023 at 112:7–24.

unscheduled overtime) that were not included under either the 1989 RAP or—more importantly, for present purposes—the 1988 ARP.[35] Plaintiffs argue that, to determine what a participant's benefit would be under the ARP, the Court should "reform" the ARP's definition of "Final Average Earnings" to instead be "Final Average Compensation," and to replace the ARP's definition of eligible compensation in its benefit formula with the one that ultimately applied under the RAP.[36] Doing so would give the class members more than the grandfathered participants, and would do so based on speculation that had the RAP never been adopted, BP America would nonetheless have dramatically enhanced final average pay benefits under the ARP formula. There is no evidence to support Plaintiffs' suggestion, and it make no sense. For example, while expanding the definition of eligible pay under the RAP was a prospective change that applied to the accrual of service credits going forward, a "parallel" amendment to the ARP would have applied retroactively to years worked in the past, and would have been "extremely costly."[37] There is no reason to think that BP would have chosen to dramatically increase benefit costs in this way, especially when the amendments were not adopted in parallel for the grandfathered group.[38]

Incorporating a broader definition of eligible compensation into the ARP would increase the potential payout from a reformed Plan beyond what the unmodified ARP

[35] Tr. 7/17/2023 at 106:10–25.
[36] Dkt. 520 at 11.
[37] Tr. 7/17/2023 at 108:7–21; *see also* Tr. 7/19/2023 at 114:7–17 (Mr. Terry testifying that he is not aware of any employers improving final average pay plans in the "2000-time frame" that the RAP was amended to expand the definition of compensation).
[38] Tr. 7/17/2023 at 108:7–14, 109:7–16.

terms would produce on their own. To the extent those modified ARP terms are then used as the baseline against which Defendants' compliance with a supposed "as good or better" promise is measured, Plaintiffs will be obtaining *more* than they allege they were promised, and more than any grandfathered participant would have ever received. This would be an improper windfall, and is inconsistent with ERISA's purpose.[39]

The same problem arises with Plaintiffs' request to modify the ARP's 35-year service cap.[40] As Plaintiffs concede in their brief, both the 1988 and 1989 formulas had a 35-year cap on service that was used in determining benefits.[41] It is undisputed that the RAP was subsequently amended twice, once to raise the service cap to 37 years, and then again to remove it entirely.[42] Plaintiffs argue that "for consistency" those amendments should be read into the ARP.[43] This is not an argument for consistency; it is an argument for an unsupported windfall. The ARP and the RAP are not "consistent" by design—they are different formulas, and have been for thirty-five years, and those different formulas have been followed with grandfathered participants since 1989. The Court found that BP America's communications established the 1988 ARP terms as a "floor" for participants' RAP benefits. Subsequent action to amend the RAP may have raised the ceiling for RAP benefit calculations, but it did not move the ARP floor. Doing what Plaintiffs suggest

[39] *See Benefits Comm. of Saint–Gobain Corp. v. Key Trust Co. of Ohio*, N.A., 313 F.3d 919, 932 (6th Cir. 2002) ("The purpose of the [ ] ERISA safeguards was not to obtain windfalls for the participants but [to] ensure that the rights promised by a company were fulfilled.").
[40] *See* Dkt. 520 at 13.
[41] *Id.*
[42] *Id.*
[43] *Id.*

would make the Plan pay for a promise that no one suggests was made, and which is—in any event—different than the "promise' the Court decided needs to be remedied.[44]

Plaintiffs' proposal to reform the ARP as part of the remedy in this case is out of line with the "promise" the Court found to warrant a remedy in the first place. The Court found that participants were harmed to the extent they ultimately received benefits lower than they would have had the 1988 plan remained in effect. To identify any such participants, and to fulfill that promise, the 1988 plan must be treated as having remained in effect, without alteration. Plaintiffs are attempting—with the benefit of hindsight—to pick and choose between the 1988 plan terms and those enacted later, based on which versions result in the most advantageous formula. The resulting damages to class members would not be reflective of benefits under the Plan, and would be improper under ERISA. Plaintiffs seek to compare RAP benefits to an unrecognizable version of the ARP, with the guarantee they will then get the better of those two amounts. Neither the law nor the facts support this.

This is not a matter of small and subtle distinctions. Looking at just one example pulled from the available data reveals the massive swing that importing the subsequent compensation and credited service definitions into the ARP formula would produce. As

[44] Indeed, imposing this sort of unanticipated windfall (and liability) on the Plan thirty-five years after the RAP amendment was adopted conflicts with the "primary goal of ERISA, which is to safeguard the financial integrity of qualified plans by shielding them from unanticipated claims." *Auto Owners Ins. Co. v. Thorn Apple Valley, Inc.*, 31 F.3d 371, 375 (6th Cir. 1994). Ensuring the integrity of plans to provide the benefits guaranteed by their written terms is why the "the plain language of an ERISA plan must be enforced in accordance with 'its literal and natural meaning,'" *Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 277–78 (1st Cir. 2000), and why the notion of retroactive revision of the Plan at this stage is such a dramatic remedy to consider.

set out in the following chart, "Participant M" retired from BP on July 8, 2015 at age 59, with 41.1667 years of service. He took lump sum distribution of his RAP benefit on August 1, 2015. At that time, his lump sum RAP benefit was $255,936.70, which equated to an annuity of $16,395.

Name	Participant M
Retirement Date	7/8/2015
Service at Retirement	41.1667
Age at Retirement	59.8333
Benefit Commencement Date ("BCD")	8/1/2015
RAP Lump Sum at BCD	$255,936.70
RAP Annuity at BCD	$16,395

Applying the 1988 ARP formula without modification, Participant M's service would be capped at 35 years, and his Final Average Earnings would be $77,850.[45] Based on his age at his retirement and commencement dates, he would have been eligible for the ARP's early retirement subsidy. His ARP annuity, based on those variables, would be $32,910. As compared to his actual RAP benefit, this would have provided Participant M with an additional lump sum benefit of $257,791 on his benefit commencement date.

In contrast, reading the post-1989 amendments into the ARP would remove the cap from Participant M's service time and—by counting his bonuses as eligible

[45] With limited exception, Participant M did not receive overtime compensation, and so can be used as an example without need to resolve the scheduled vs. unscheduled overtime dispute.

compensation—increase his final average earnings to $98,161. The combined result of those changes would be to increase Participant M's ARP annuity from $32,910 under the formula that existed in 1988, to $50,988. As shown in the table below, this would result in a massive $539,997 windfall to Participant M, effectively tripling the amount he received from the Plan (before accounting for interest). Such relief plainly amounts to a prohibited damage award as it bears no resemblance to what Participant M would have gotten pursuant to the alleged promise that is the basis for this case.

	1988 ARP Formula	**ARP Formula, Plus RAP Amendments**
ARP Service Time	35.0000	41.1667
Final Average Earnings	$77,850	$98,161
ARP Annuity at BCD	$32,910	$50,988
Additional Lump Sum Benefit at BCD	$257,791	$539,997

The impacts of Plaintiffs' proposal to speculatively amend the ARP formula is, of course, not limited to Participant M. As Plaintiffs' own expert acknowledged at trial, Plaintiffs' formulation produces an eye-popping billion-dollar enhancement to the class members' ARP benefits,[46] something that plainly was not anticipated in 1989 and that has not been provided to the grandfathered participants. This kind of gratuitous, excessive

[46] *See* Tr. 7/13/2023 at 25:17–25 (estimating that, depending on "how plan is reformed" result would be between $400 million and $1.5 billion in additional benefits to class); *see also* PX 425 at ¶ 301.

payout is not an equitable remedy, the only kind of remedy allowed under ERISA Section 502(a)(3).[47]

C. Any Reformed Plan Should Compare ARP Benefits (Under the ARP Terms) To Actual RAP Benefits, As Calculated by The Plan Administrator.

There is no claim in this case challenging the way the Plan Administrator interpreted the Plan over the course of the last 35 years and now, and the Court made no findings or conclusions that warrant disturbing the determination of any participant's benefit under the RAP formula. None of the Plaintiffs have ever pleaded a claim that the amount of benefits they received was incorrect under the terms of the RAP, or that the check they received upon electing to commence benefits was different than what they were owed under the RAP formula. Still, Plaintiffs' brief argues that, in addition to ordering reformation of the Plan, the Court should mandate certain interpretations of various Plan terms.[48]

Given the Court's findings, this claim is completely unjustified. The only thing that arguably needs to happen is to compare benefits calculated under the 1988 ARP formula to those actually paid out under the RAP. Only those participants whose calculated ARP benefits exceed their RAP benefits calculated at the time of a participant's retirement are part of the class certified here.

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[47] *See Montanile v. Bd. of Trs. National Elev. Indus. Health Ben. Plan*, 577 U.S. 136, 147–48 (2016) (remedies under ERISA Section 502(a)(3) are limited to "'those categories of relief that were typically available in equity' during the days of the divided bench," and cannot include legal relief).

[48] *See, e.g., id.* at 7–10 (arguing the Court should require certain interpretations of plan terms).

The Court specifically found this case did not involve a claim for benefits, but was instead one involving "statutory ERISA rights," and allegations of fiduciary breach.[49] Thus, while the Court may order an equitable remedy to correct the breach it found (i.e., the failure to adhere to the 1989 "promise" that benefits would be as good as or better than 1988 RAP benefits), it should not go so far as to determine what benefit to which any particular employee is entitled. Indeed, to the extent a participant disputes the determination of their benefit made under a reformed plan, that claim should be subject to the Plan's claim and appeal process, to be decided by the Plan Administrator.[50]

As part of the "careful balancing" on which it is based, ERISA permits plan sponsors to "grant primary interpretive authority over an ERISA plan to the plan administrator."[51] This approach helps to promote the required uniformity in interpretation of a specific plan, and also promotes predictability, by allowing a Plan Sponsor to rely on its Plan Administrator's expertise rather than *de novo* judicial interpretation.[52] Even where the Court disagrees with interpretations made by a Plan Administrator in the past—or finds that the Plan Administrator has made a mistake—it should not refuse to

[49] Dkt. 507 at 52 (¶¶ 69–70).
[50] *See Denton v. First Nat'l Bank of Waco, Tex.*, 765 F.2d 1295, 1300 (5th Cir. 1985) ("The primary purposes of the exhaustion requirement are to: (1) uphold Congress' desire that ERISA trustees be responsible for their actions, not the federal courts; (2) provide a sufficiently clear record of administrative action if litigation should ensue; and (3) assure that any judicial review of fiduciary action (or inaction) is made under the arbitrary and capricious standard, not de novo.").
[51] *Conkright v. Frommert*, 559 U.S. 506, 517 (2010).
[52] *Id.*

grant deference to the Plan Administrator where doing so is proper under the Plan terms, something that is not in dispute here.[53]

Both the ARP and RAP give the Plan Administrator the discretionary authority to interpret plan terms.[54] Thus, to the extent it is necessary, under the terms of the reformed Plan, to interpret the terms of the RAP (or the 1988 ARP) to administer benefits, that responsibility lies with the Plan Administrator, or its delegate, and interpretations should not be pre-established and imposed by the Court. And ERISA requires disagreement with respect to matters of plan interpretation be resolved through the Plan claim and appeals process before resorting to judicial review.[55] In other words, if a class member feels their RAP benefit was incorrectly determined under the RAP formula, that claim is not part of this lawsuit and must be subject to administrative exhaustion and internal review by the Plan Administrator. Indeed, catchall claims for equitable relief under § 1132(a)(3) cannot be used to pursue relief available as a claim for benefits under ERISA, 29 U.S.C. § 1132(a)(1)(B).[56]

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[53] *Id.* at 518, 522

[54] *See* DX 923.46 (ARP terms setting out powers and duties of Plan Administrator); DX936.192–193 (RAP plan terms setting out same).

[55] *See* 29 U.S.C. § 1133; *Coop. Ben. Adm'rs, Inc. v. Ogden*, 367 F.3d 323, 336 (5th Cir. 2004) ("[C]laimants seeking benefits from an ERISA plan must first exhaust available administrative remedies under the plan before bringing suit to recover benefits."); *Crowell v. Shell Oil Co.*, 481 F. Supp. 2d 797, 808 (S.D. Tex. 2007), aff'd, 541 F.3d 295 (5th Cir. 2008) (excusing plaintiff from administrative exhaustion requirement would "disregard" congressional concern for consistent treatment of benefit claims and suggest incorrectly that "review of Plan terms is within the province of the judiciary"; "Congress clearly did not intend this result, and instead 'intended plan fiduciaries, not the federal courts, to have primary responsibility for claims processing.'").

[56] *Varity Corp. v. Howe*, 516 U.S. 489, 512, 515 (1996) ("[W]here Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate.").

D. Benefits Under The 1988 ARP Formula Should Be Compared to Actual RAP Benefits on An Annuity Basis at the Participant's Benefit Commencement Date.

Plaintiffs argue that, under the reformed Plan, it is necessary to resolve which version of the Plan's lump sum conversion factor should apply to benefits under the ARP.[57] It is not.

Plaintiffs' reformation proposal envisions converting ARP benefits to lump sums to allow for comparison of them to RAP benefits. That is neither necessary nor proper. In his opening expert report in the case, Mr. Deutsch opined that the issue of different conversion factors under the ARP and RAP can be avoided if they are compared on the basis of a life only annuity.[58]

To compare ARP benefits to RAP benefits, the Court does not need to make any changes to either formula. Nor does it need to convert ARP annuities to lump sums. The necessary comparisons can, and should, be done on an annuity basis. ERISA mandates that a defined benefit pension plan generate an accrued benefit that is defined as an annuity.[59] ARP annuity benefits can be calculated as of a participant's benefit commencement date, using the terms set out in the 1988 ARP Plan document. An annuity was the presumptive form of payment under the ARP.[60] Indeed, converting the ARP benefit from an annuity to a lump sum would involve multiplying it by a "conversion

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[57] Dkt. 520 at 12.
[58] *See* PX 276 at ¶ 44(1).
[59] 29 U.S.C. § 1002(23).
[60] *See* DX 923.27–28 (defining default benefit for participant without a spouse as a "Modified Cash Refund Option," which consisted of a monthly benefit for participant's lifetime (i.e., an annuity), modified to guarantee that—in the event of death—the participant's beneficiary would receive any unpaid benefits consisting of participant contribution).

factor" which includes an interest component.[61] As Plaintiffs argue in their brief, changes in the conversion factor will impact the ARP and RAP in different ways, and changes that would tend to cause lump sum RAP benefits to increase would have the opposite effect on lump sum ARP benefits.[62] In its findings of facts and conclusions of law, however, the Court specifically found that, under the ARP, "BP had to buy a retiring employee an annuity that paid a specified sum."[63] The Court further found that the RAP "shifted the risk of a drop in interest rates and other investments risks from BP to its employees."[64] Requiring comparison of ARP and RAP benefits on anything other than an annuity basis would expose those benefits to the sort of "interest rate risk" the Court found did not exist under the 1988 ARP. Plaintiff's proposal to do so simply makes no sense.

Comparing benefits on an annuity basis will also be simpler. As noted, the ARP formula is specifically designed to generate an annuity benefit. Likewise, the RAP is required to define the benefit in terms of an annuity. RAP annuity benefits can simply be calculated under the terms of the RAP Plan document, applying those terms as they existed at the Participant's benefit commencement date. As Mr. Clifford York described, since settling the *Nichols* action in 2001, benefit calculation under the RAP has involved a "whipsaw" calculation.[65] That calculation involves projecting a participant's notional

[61] *See* Tr. 7/12/2023 at 90:18–21 (plaintiffs' expert describing process he used to convert ARP annuity benefit to lump sum).
[62] *See* Dk. 520 at 12.
[63] *See* Dkt. 507 at 3 (¶ 5).
[64] *See id.* at 25 (¶ 85).
[65] Tr. 7/17/2023 at 113:7–17, 129:3–7.

account balance under the RAP out to age 65, and then discounting back to present day.[66] That calculation generally causes RAP benefits to be greater than the notional account balance.[67] In any event, the Plan at all times since 1989 provided the formula by which RAP benefits could be expressed as an annuity, which will allow for a direct comparison of the ARP and RAP benefits, with each determined according to existing Plan terms.

This approach is also consistent with the terms of the Plan, as it has existed since 1989. Those terms show that, where there was need—under the Plan—to compare ARP and RAP benefits, those comparisons were done on an annuity basis.[68]

If the comparison of ARP to RAP benefits shows that a participant actually received less under the RAP than they would have under an unamended version of the 1988 ARP, the reformed plan would award additional pension benefits equal to the excess, if any, of a participant's annuity benefit under the pre-1989 ARP formula over their actual RAP annuity benefit. To pay those additional benefits in an optional form other than the excess single life annuity, Defendants agree with Plaintiffs that the conversion factor applicable to converting that difference into the form elected by the participant should be the RAP conversion factor that was in place when the participant commenced benefits. As Plaintiffs indicate, those conversion factors changed over time to track changes in the law, so using the RAP conversion factors in effect on a

[66] *Id.* at 113:7–17.
[67] Tr. 7/19/2023 at 116:22–117:12.
[68] DX 927 at 927.5 (defining "Accrued Benefit" as annuity); 927.23 (calling for comparison on RAP to ARP benefits on the basis of "Accrued Benefit," in other words, as an annuity); DX 930.80–81 (describing comparing ARP to RAP benefit on assumption that participant elected to receive RAP as a single life annuity benefit).

participant's benefit commencement date will incorporate those required changes.[69] Further, the RAP conversion factors were the ones actually in effect when the class members elected to receive their benefits. To the extent any class member entitled to additional benefit elected to receive their benefit in a form other than the life only annuity, the RAP's terms (as they existed when the participant commenced benefits) should provide for how conversion to the optional form should occur.

E. Plaintiffs' Proposed Remedial Order Is Deeply Problematic, and Should Not Be Adopted.

In addition to their arguments about the various ways in which the Court should reform the RAP and the ARP, Plaintiffs propose specific language they would have the Court order as required amendments to the Plan.[70] The Court should not, however, order Defendants to implement any specific Plan language.

Under ERISA, it is the Plan Sponsor's role to, among other things, determine (or amend) Plan language.[71] In making those decisions, sponsors do *not* act as fiduciaries,[72] and have "large leeway" to design plan provisions as they see fit.[73] To the extent the Court determines reformation is warranted here, it should leave the task of drafting amendments of the Plan to the Plan Sponsor, as the party authorized to amend the Plan under the law. While the Court's reformation order can require a specific outcome

[69] Dkt. 520 at 12.
[70] *See* Dkt. 520 at 17–32.
[71] *See Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996).
[72] *Id.*
[73] *Heimeshoff*, 571 U.S. at 108 (quoting *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003)).

through amendment, it should not invade the Plan Sponsor's role of determining the precise Plan language to reach that result.

The Court should favor this approach because—in addition to staying truer to ERISA's underlying principle that Plan Sponsors control the terms of voluntary retirement benefits they offer to employees—it is vitally important that any amended Plan provisions comply with provisions of the Internal Revenue Code. That Code sets out a number of requirements that must be met for the IRS to consider the Plan as "Qualified" under the law.[74] The consequences of failing to meet (or losing) tax-qualified status are severe, and impact participants, the employer, and the pension trust.[75] These consequences could include requiring employees to report pension accruals as income when earned, impacting deductions available to the employer for contributions made, causing the pension trust to owe incomes taxes, preventing participants from rolling their benefits over to IRAs.[76] It could also make participants' retirement benefits subject to seizure in bankruptcy proceedings.[77] It is, therefore, essential to the protection of the participants and the Plan structure that BPCNA retain the ability to adopt any amendments in a manner that maintains the Plan's qualified status.

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[74] *See* 26 U.S.C. § 401.
[75] *See* Internal Revenue Service, Tax Consequences of Plan Disqualification, *https://www.irs.gov/retirement-plans/tax-consequences-of-plan-disqualification*.
[76] *Id.*; *see also Sadberry v. Comm'r*, 153 F. App'x 336, 338 (5th Cir. 2005) (discussing qualification rules as related to tax-free rollovers).
[77] *See, e.g.*, *Matter of Youngblood*, 29 F.3d 225, 228 (5th Cir. 1994) (considering whether debtor's pension benefits were paid from "qualified" retirement plan (and thus qualified for exemption in bankruptcy proceeding), or could be seized to pay creditors).

This is not simply a phantom concern. Although they are unaddressed in Plaintiffs' brief, and their intended purpose is unclear, certain of Plaintiffs' proposed amended terms would jeopardize compliance with ERISA and with the qualification rules. One such rule provides that participants' benefits under the trust must not be "alienable."[78]

Plaintiffs propose the introduction of a "Cost Factor" term, that would be a ratio calculated by reducing a participant's benefit by the amount of any court-approved attorneys' fees, costs, and "Named Plaintiffs' Case Contribution Awards and Administrative Costs."[79] They propose to factor that "Cost Factor" into Plan calculations, presumably so that class counsel can be paid from class members' pension benefits.[80] Such a provision would be unlawful.[81] To the extent reformation of the Plan results in additional benefits to participants under the Plan, the anti-alienation rules preclude class counsel from recovering a portion of participants' benefits to pay their fees.[82]

The suggestion that the Named Plaintiffs may be entitled to "Case Contribution Awards" as part of a reformation order is similarly improper under the relevant law. The remedies under Section 502(a)(3) of ERISA are limited to traditional equitable remedies, and exclude purely legal remedies, including compensatory damages.[83] Thus, while

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[78] *See* 26 U.S.C. § 401(a)(13)(A).
[79] *See* Dkt. 520 at 24.
[80] *See id.* at 28.
[81] *See AT&T Mgmt. Pension Plan v. Tucker*, 902 F. Supp. 1168, 1176 (C.D. Cal. 1995) (court order requiring payment of attorneys' fees from plan assets violated anti-alienation rule).
[82] *Humphrey v. United Way of Texas Gulf Coast*, 802 F. Supp. 2d 847, 862 (S.D. Tex. 2011) (following judgment for plaintiff in ERISA class action, finding anti-alienation rule prevented recovery of attorneys' fees calculated as a percentage of "common fund").
[83] *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255–56 (1993).

ERISA permits the Court to award Plaintiffs a remedy that puts them in the place the would have occupied but for the breach found by the Court, it does not permit relief beyond that, including "Case Contribution Awards." And, for the reasons just discussed, class members' benefits cannot lawfully be diverted (i.e., alienated) to pay damage "awards" to Messrs. Guenther, Fujimoto, and Owen.

Finally, Plaintiffs' proposed order would require that—before benefits can be paid under the reformed Plan—calculations of all benefit amounts will be submitted to Plaintiffs for approval by their expert in this case, Mr. Deutsch.[84] This amounts to a request that Mr. Deutsch be given fiduciary control over the RAP.

ERISA contains a functional definition of fiduciary, that is "liberally construed" to include anyone who acts with discretionary control, authority, or responsibility with respect to disposition of plan assets, or administration of the plan.[85] The suggestion that Mr. Deutsch be given approval authority over Plan benefit calculations would give him direct discretionary control and responsibility over administration of the reformed Plan, and make him a fiduciary.[86] Plaintiffs offer no reason why Mr. Deutsch should be made a Plan fiduciary, and provide no legal support for the suggestion that doing so would be proper under the law.

[84] Dkt. 520 at 31.
[85] *See Bannistor v. Ullman*, 287 F.3d 394, 401 (5th Cir. 2002).
[86] *Reich v. Lancaster*, 55 F.3d 1034, 1046 (5th Cir. 1995) ("claims administrator" with authority to construe plan terms and make decisions as to benefits eligibility was a plan fiduciary).

F. The Court Should Award Pre- and Post-Judgment Interest Based on the RAP's Regular Crediting Rate.

Defendants do not dispute Plaintiffs' suggestion that "[p]rejudgment interest is available in ERISA cases."[87] While the Fifth Circuit has clearly established that principle, it has been equally clear that "[i]t is not awarded as a penalty, but as compensation for the use of funds."[88] Because ERISA does not set a rate or manner for determining the prejudgment interest rate, the Court should look to state law.[89]

Texas law permits an award of "equitable" prejudgment interest.[90] Plaintiffs suggest that, applying a Texas statute for prejudgment interest on a "money judgment," the Court should apply the published prime interest rate, which is currently 8.5%.[91] Of course, this Court has already determined this is *not* an action for money judgment, it is an action seeking equitable remedies, so tying the rate of interest to the cited Texas statute is improper.[92]

Beyond that flaw in Plaintiffs' argument, as the Court is aware from the evidence at trial, interest rates from 1989 to the present have not been static and have often been well below the current 8.5% prime rate. Indeed, there was significant evidence introduced at trial—including testimony from both parties' experts—that the decline in treasury rates after 1989 (such that they stayed below the 8% interest rate projection used in RAP

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[87] *Perez v. Bruister*, 823 F.3d 250, 274 (5th Cir. 2016).
[88] *Id.* (quoting *Whitfield v. Lindemann*, 853 F.2d 1298, 1306 (5th Cir. 1988)).
[89] *Id.*
[90] *Meaux Surface Prot., Inc. v. Fogleman*, 607 F.3d 161, 172 (5th Cir. 2010) ("In the absence of a statutory right to prejudgment interest, Texas law allows for an award of equitable prejudgment interest.").
[91] Dkt. 520 at 16 (citing Tex. Fin. Code § 304.003).
[92] *See* Dkt. 267 at 21 ("The class members also request no monetary damages whatsoever . . . .").

design discussion) was a major contributor to the alleged shortfall in RAP benefits. Given the uncontested evidence that interest rates have varied significantly during the class period, an award of interest at the current interest rate would result in an inequitable windfall. It would not be limited to "compensation" for delayed receipt of the funds, and would instead violate the Fifth Circuit's caution that prejudgment interest should not be a penalty.

Texas law provides that the rate for prejudgment interest can be based on a "rate specified in the contract, which may be a variable rate."[93] While the Plan here admittedly does not set a prejudgment interest rate, it does contain a variable annual interest crediting rate for participant accounts. That rate is a suitable proxy for a contractual interest rate. In other words, if the goal of a reformed Plan would be to put participants in the place they would have occupied had the "promise" BP America supposedly made in 1989 come to fruition, any new benefits under the reformed Plan should be treated like other benefits under the RAP. Just as RAP benefits continued to grow through annual interest credits, so too would additional benefits awarded through plan reformation grow at the variable rate established by the RAP formula for Normal Interest Credits.

As with their proposal to read subsequent RAP amendments into the ARP, Plaintiffs proposal to apply a static 8.5% rate to calculate prejudgment interest rate would massively inflate payouts to class members. Returning to Participant M, applying 8.5% interest to the $539,997 additional lump sum Plaintiffs would seek under their "reformed" ARP, and calculating the sum due since his 8/1/2015 benefit commencement

[93] *See* Tex. Fin. Code § 304.002(1).

date, Participant M would be owed an additional $1,110,080 from the Plan. In contrast, and as discussed above, applying the 1988 ARP formula, he would be entitled to an additional $257,791 in benefits. Calculating prejudgment interest since 8/1/2015 using the RAP's crediting rate increases that amount to $396,679.

Under either approach, the impact on the Plan (and the result for Participant M) is significant. Under Plaintiffs' approach, however, Participant M would receive a $700,000 windfall, representing an expense to the Plan and a payout to which the ARP never would have entitled him. This result does not comport with the notion of an equitable remedy under ERISA, or with the equitable considerations that underlie an award of prejudgment interest. Instead, it produces an unduly harsh result that can be viewed only as an improper attempt to inflict punishment on Defendants.

III. CONCLUSION

To the extent the Court determines that it must reform the Plan to guarantee participants benefits that are "as good as or better than" benefits they would have received under the ARP, it should nonetheless reject the specific reformation proposed by Plaintiffs. Instead, the Court should limit any reformation order to requiring that:

- For each participant who (1) had vested benefits under the BP America Retirement Plan ("ARP") as of December 31, 1988, (2) remained an actively-employed participant of the BP Retirement Accumulation Plan ("RAP") on January 1, 1989, and (3) had not yet reached the age of 50 as of January 1, 1989, the RAP should be amended to provide that such participant's benefit will be equal to the greater of:

    1. Benefits calculated under the terms of the ARP, as they existed on December 31, 1988; or

    2. The actual benefits the participant received under the RAP Plan formula, as amended January 1, 1989, and as subsequently amended thereafter, as of such participant's benefit commencement date.

a. The actual benefits paid to a Participant under the RAP will include any amounts the Participant received under the amended Plan terms adopted as part of the prior class action settlement in the *Nichols v. BP America Retirement Accumulation Plan* (N.D. Ill. No. 1:01-cv-6238), notwithstanding that such amount was not available at the Participant's benefit commencement date.

- In determining whether a Participant's benefit under the 1988 ARP terms is larger than the Participant's actual RAP benefit, the comparison is to be made based on the single-life annuity amount calculated under the ARP formula, as compared to the single-life annuity that was actually available to the Participant under the RAP at the Participant's benefit commencement date.

- The reformed plan would award additional pension benefits equal to the excess, if any, of a participant's annuity benefit under the pre-1989 ARP formula over their actual RAP annuity benefit. Such amounts will be increased from the date of the original RAP benefit commencement date to the date of the supplemental payment using the variable rate established by the RAP formula for Normal Interest Credits.

- Drafting and adoption of the terms of a Plan amendment to effectuate the required reformation shall be the sole responsibility of the Plan Sponsor, and shall be subject to satisfying the requirements of the Internal Revenue Code and obtaining approval of the Internal Revenue Service, as necessary to maintain the Plan's qualified status.

- Interpretation and administration of the Plan shall be governed by the terms of the Plan, and shall not be altered as part of the judgment here.

- The Plan terms shall not be amended in any way to provide for payment of attorney fees from any participant's benefits under the Plan. Any award of attorneys' fees or costs in this matter is reserved, pending submission of a properly supported petition in accordance with ERISA and the Federal Rules of Civil Procedure.

Moreover, the Court should not require any Plan amendment to be adopted before Defendants' appellate rights in this matter are exhausted. Once a Plan amendment is adopted, ERISA's terms would operate to bind Defendants to that amendment. If this Court's decisions were subsequently reversed on appeal, Defendants could nonetheless be constrained in their ability to undo any corrective amendment, by provisions of ERISA

that prevent amendments to take away benefits already existing under the Plan. To facilitate timely appellate review, Defendants are filing contemporaneously with this brief a motion asking the Court to certify its findings of fact and conclusions of law for interlocutory review under 28 U.S.C. § 1292(b).

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Respectfully submitted,

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