No. 14-31299

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

IN RE: DEEPWATER HORIZON

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

Plaintiffs–Appellees

v.

BP EXPLORATION & PRODUCTION, INC.;
BP AMERICA PRODUCTION CO.; BP, P.L.C.,

Defendants–Appellants.

On Appeal From The United States District Court
For The Eastern District Of Louisiana, MDL No. 2179, Civ. No. 12-970

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE AMERICAN TORT REFORM ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Chamber of Commerce of the United States of America (the "Chamber"), the National Association of Manufacturers ("NAM"), and the American Tort Reform

Association ("ATRA"), respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the appellant in the above-captioned case. In support of this motion, *amici* state as follows:

1. The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interest of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. To that end, the Chamber regularly files *amicus* briefs in cases raising issues of vital concern to the nation's business community.

2. NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs nearly twelve million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM serves as the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM regularly participates as *amicus curiae* in cases of particular importance to the manufacturing industry.

3. ATRA, founded in 1986, is a broad-based coalition of more than 170 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote a civil justice system that ensures fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

4. Together, *amici* represent the interests of a large number of businesses that face class actions and mass tort litigation and that often settle those lawsuits, generally because settlement is the economically-rational decision given the cost of mounting a defense and the draconian consequences of an adverse jury verdict. Claims made under these settlements typically are processed and resolved by claims administrators designated by courts and the parties. It is therefore critical to *amici* and their members that settlement administrators perform their duties with integrity—including, when appropriate, disclosing potential biases and conflicts of interest so that any actual partiality, as well as any appearance of partiality, may be identified and addressed through the judicial process.

5. The duties of these claims administrators often involve largely mechanical claims processing—such as reviewing claim forms to ensure that claimants have provided complete information and sending out checks calculated pursuant to a arithmetic formula using that information.

6. However, in other cases (including this one) administrators are endowed with a far more substantial role, making qualitative judgments about the validity of a claim and quantitative judgments about the amount of damages properly awarded under the settlement's terms. A claims administrator exercising that level of discretion is serving an essentially adjudicative function, akin to an arbitrator or master.

7. Longstanding precedent holds that, even when parties agree to resolve their dispute through a third-party tribunal or master, courts are obligated to enforce the basic principle that tribunals authorized by law to decide cases and controversies must avoid even the appearance of partiality. The district court unquestionably had authority to enforce that rule of impartiality here through its supervisory power over the claims administrator.

8. But the district court's decision could be read to create substantial uncertainty over whether the claims administrator is subject to the same standards of impartiality—enforced through either disqualification or disclosure rules—that apply to other adjudicators authorized by law to exercise discretion in resolving cases and controversies. .

9. The district court's rule, if upheld, could have serious consequences for settlement agreements—and in turn, for the dockets of the courts of this Circuit and *amici*'s members. If parties believe that they would have no recourse if a

claims administrator turns out to have undisclosed biases or the appearance thereof, they will be unwilling to structure settlements in a way that cedes *any* discretion to the administrator—forcing the court system to take on adjudicative functions for all claims. That exception to the broadly-applicable prohibition against partiality is unwarranted and it threatens the integrity, and thus usefulness, of claims administrators—ultimately imposing greater costs on the court system, the public at large, and *amici*'s members.

10. Appellants have consented to the filing of the *amicus* brief. The Claims Administrator has stated that he takes no position on this motion. The Plaintiffs Steering Committee has stated that it objects to the motion.

WHEREFORE, *amici* respectfully request that the Court grant their motion for leave to file the attached brief as *amici curiae*.

Respectfully Submitted.

/s/ Carl J. Summers

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CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2014, an electronic copy of the foregoing was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Carl J. Summers
Counsel for *Amici Curiae*

Dated: December 26, 2014

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

No. 14-31299

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Defendants–Appellants.

The undersigned counsel of record certifies that, in addition to the interested persons and entities listed by the parties, the following interested persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in this amicus brief. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. *Amici Curiae*

The Chamber of Commerce of the United States of America
The National Association of Manufacturers
The American Tort Reform Association

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Dated: December 26, 2014

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interest of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. To that end, the Chamber regularly files *amicus* briefs in cases raising issues of vital concern to the nation's business community.[1]

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[1] This brief was not authored in whole or in part by counsel for any party. A party or a party's counsel did not contribute money that was intended to fund preparing or submitting this brief. No person, other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

economy and create jobs across the United States. The NAM regularly participates as *amicus curiae* in cases of particular importance to the manufacturing industry.

The American Tort Reform Association ("ATRA"), founded in 1986, is a broad-based coalition of more than 170 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote a civil justice system that ensures fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

Together, *amici* represent the interests of a large number of businesses that face class actions and mass tort litigation and that often settle those lawsuits, generally because settlement is the economically-rational decision given the cost of mounting a defense and the draconian consequences of an adverse jury verdict. Claims made under these settlements typically are processed and resolved by claims administrators designated by courts and the parties. It is therefore critical to *amici* and their members that settlement administrators perform their duties with integrity—including, when appropriate, disclosing potential biases and conflicts of interest so that any actual partiality, as well as any appearance of partiality, may be identified and addressed through the judicial process.

INTRODUCTION AND SUMMARY OF ARGUMENT

Class action and mass tort settlements often depend on the use of claims administrators to assess who is entitled to receive benefits under the settlement. The duties of these administrators often involve largely mechanical claims processing—such as reviewing claim forms to ensure that claimants have provided complete information and sending out checks calculated pursuant to a arithmetic formula using that information.

However, in other cases (including this one) administrators are endowed with a far more substantial role, making qualitative judgments about the validity of a claim and quantitative judgments about the amount of damages properly awarded under the settlement's terms. A claims administrator exercising that level of discretion is serving an essentially adjudicative function, akin to an arbitrator or master.

Longstanding precedent holds that, even when parties agree to resolve their dispute through a third-party tribunal or master, courts are obligated to enforce the basic principle that tribunals authorized by law to decide cases and controversies must avoid even the appearance of partiality. The district court unquestionably had authority to enforce that rule of impartiality here through its supervisory power over the claims administrator.

But the district court's decision could be read to create substantial uncertainty over whether the claims administrator is subject to the same standards of impartiality—enforced through either disqualification or disclosure rules—that apply to other adjudicators authorized by law to exercise discretion in resolving cases and controversies. It instead carved out an exception to the fundamental rule of impartiality—even when an administrator is playing the same role (for all intents and purposes) as a judge.

The district court's rule, if upheld, could have serious consequences for settlement agreements—and in turn, for the dockets of the courts of this Circuit. If parties believe that they would have no recourse if a claims administrator turns out to have undisclosed biases or the appearance thereof, they will be unwilling to structure settlements in a way that cedes *any* discretion to the administrator—forcing the court system to take on adjudicative functions for all claims. That exception to the broadly-applicable prohibition against partiality is unwarranted and it threatens the integrity, and thus usefulness, of claims administrators—ultimately imposing greater costs on the court system and the public at large.

ARGUMENT

Settlement Administrators Authorized To Exercise Discretion Should Be Subject To The Same Disqualification And Disclosure Standards As Other Adjudicators Who Make Legally-Binding Decisions.

Our legal system operates on "the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968); *see also, e.g.*, *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (explaining, in the context of hearing officers chosen by insurance carriers to resolve claims over Medicare benefits, that "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities"); *Concrete Pipe & Prods. Of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993) (holding that the requirement of impartiality "is no different when a legislature delegates adjudicative functions to a private party").

This "elementary requirement[] of impartiality taken for granted in every judicial proceeding" is ***not*** "suspended" simply because "the parties agree to resolve a dispute" by utilizing a third-party adjudicator. *Commonwealth Coatings*, 393 U.S. at 145. To the contrary, whenever federal courts place their imprimatur on a third-party adjudication—whether by entering judgment to confirm an arbitration award, as in *Commonwealth Coatings*, or by approving a settlement

agreement delegating discretionary decisionmaking authority to a claims administrator—the court can and should enforce the fundamental principle "that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings*, 393 U.S. at 150; *see also, e.g.*, *United States v. Columbia Broad. Sys., Inc.*, 497 F.2d 107, 109 (5th Cir. 1974) ("the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system"); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980) ("This overriding concern with appearances . . . stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence.").

That fundamental principle of impartiality has been applied to:

- Article III judges (*see* 28 U.S.C. § 455 (requiring a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned," including "[w]here in private practice he served as lawyer in the matter in controversy");
- magistrate and bankruptcy judges (*see id.*);
- judicially-appointed masters (see Fed. R. Civ. P. 53(a)(2) (making disqualification standard under Section 455 applicable to masters); and

- privately selected arbitrators (*see, e.g.*, *Commonwealth Coatings*, 393 U.S. at 149-50 (making appearance-of-impartiality requirement judicially enforceable through vacatur of awards under 9 U.S.C. § 10(a)(2), which authorizes vacatur "where there was evident partiality or corruption in the arbitrators, or either of them"); AAA Commercial Arbitration Rules R-17 (requiring disclosure of "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence"); AAA/ABA Code of Ethics for Arbitrators, Canon II(A)(2) (requiring disclosure of "any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties")).

The same conclusion applies here: When a court-appointed settlement administrator is endowed by a court-approved settlement with substantial discretion to determine which claims shall be paid and how much a claimant will receive, and the administrator remains under continuing court supervision, that administrator is performing an adjudicatory function—*i.e.*, he is "try[ing] cases and controversies" (*Commonwealth Coatings*, 393 U.S. at 149-50)—and therefore is subject to the general requirement of impartiality.

Of course, many claims administrators perform only a ministerial role: the settlement agreement authorizes recovery by all class members—subject to verifying basic information—and specifies an arithmetic formula for calculating the amount of recovery. In that context, the administrator's role is confined to sending notices to eligible parties, receiving claim forms and associated documents, and paying out claims in accordance with the pre-set formula. *See, e.g.*, David F. Herr, ANN. MANUAL FOR COMPLEX LIT. § 21.661 (4th ed. 2004). Because such administrators do not exercise discretion, there is no material risk from pre-existing bias and thus no need for the court to undertake a pre-appointment investigation into the administrator's impartiality. (Of course, a party would retain the ability to bring concerns about partiality to the court's attention.)

When the settlement *does* endow the administrator with significant discretion in exercising his authority, however, that administrator should be subject to the same disqualification standard, and the same judicial investigation of potential partiality, as any other adjudicator exercising legally-enforceable authority.[2]

The impartiality principle is appropriately implemented by "the simple requirement that [the third-party adjudicator] disclose to the parties any dealings

[2] There would be serious questions about a court's authority to delegate adjudicatory authority to a third-party administrator in the absence of party agreement (such as in a litigated class action).

that might create an impression of possible bias." *Commonwealth Coatings*, 393 U.S. at 149. Those individuals entrusted by law with the power to decide cases and controversies, even when they are third parties selected in accordance with an agreement between the parties, should "err on the side of disclosure" so that the parties can make an informed decision about whether to entrust them with the power to decide a dispute. *Id.* at 151-52 (White and Marshall, JJ., concurring).

If the required disclosure occurs before selection of the third-party decisionmaker, the impartiality principle can be implemented through the parties' submissions to the court before the selection is made. For example, Federal Rule of Civil Procedure 53, which governs masters, states that a "court must give the parties notice and an opportunity to be heard," and any prospective master must "file[] an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455"; the presence of any such ground precludes appointment unless "the parties, with the court's approval, waive the disqualification." Fed. R. Civ. P. 53(b)(1), (3).

If there is no pre-appointment disclosure, or that disclosure is incomplete, then the parties must be able to proceed by way of disqualification motion in order to vindicate the impartiality principle. As one court has put it in the context of land commissioners under Rule 71.1, applying disqualification standards (whether or not "§ 455 technically applies") makes sense, and "can be applied by this Court

under its inherent authority to select and appoint commissioners, as well as the duty of this Court to review their work." *Rockies Exp. Pipeline, LLC v. 4.895 Acres of Land* . . ., 2010 WL 3001665, at *4 (S.D. Ohio July 30, 2010).

The requirement of impartiality plainly applies to the claims administrator here. A claims administrator endowed with considerable discretion to adjudicate claims under a court-approved settlement (involving multiple billions of dollars), like a potential arbitrator, "not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings*, 393 U.S. at 150.

To the extent the respondent administrator and the district court focused on the narrow question whether the claims administrator is formally subject to removal under 28 U.S.C. § 455, they appeared to lose sight of the broadly-applicable tenet of impartiality. *See* ROA.23731; ROA.21927-21931.

But any determination that Section 455 does not apply appears incorrect even on its own terms: While the ministerial tasks exercised by many claims administrators likely place them outside the scope of the recusal statute, the administrator here appears to satisfy the common test for application of Section 455—whether the role is "adjudicative." *In re Kempthorne*, 449 F.3d 1265, 1269 (D.C. Cir. 2006) (applying Section 455 to masters who perform an adjudicative function before that requirement was added to Fed. R. Civ. P. 53 in 2003). Moreover, because the administrator here was approved by the district court and

serves at the district court's pleasure, he is closely akin to a court-appointed master—a role that unquestionably is within the scope of Section 455. *See, e.g.*, *id.*; Fed. R. Civ. P. 53(a)(2).

Even if the recusal statute's disqualification requirement does not "technically apply," (*Rockies Exp. Pipeline*, 2010 WL 3001665, at *4), the district court unquestionably retains "inherent authority" (*id.*)—as well as authority under the terms of the settlement agreement—to enforce an impartiality requirement analogous to that applicable to arbitrators selected by the parties. *See, e.g.*, ROA.21931 ("[u]nder the Settlement Agreement, Mr. Juneau serves always at the pleasure of the Court"); *see also* ROA.2965 ("The Claims Administrator shall be selected and appointed by the Court, and shall be responsible to the Court, [and] serve as directed by the Court ….").

Whether implemented through a disqualification procedure or through a disclosure requirement followed by submissions from the parties, what is critical is that claims administrators who perform an adjudicative role must operate under the same "premise of impartiality" (*Commonwealth Coatings*, 393 U.S. at 150) as any other adjudicator authorized by law to exercise discretion in resolving cases and controversies. Assurance that there is legal recourse if a claims administrator conceals potentially disqualifying information or otherwise violates the requirement of both actual impartiality and the appearance of impartiality is

essential to preserve the integrity of such adjuncts to the judicial process for appropriate use by courts and litigants.

CONCLUSION

The Court should hold that settlement administrators exercising substantial discretion may be disqualified based on an appearance of impartiality. It should apply that standard here.

Respectfully Submitted.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,428 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

/s/ Carl J. Summers
Counsel for *Amici Curiae*

Dated: December 26, 2014

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I hereby certify that on December 26, 2014, an electronic copy of the foregoing was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

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