

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

IN RE: BP p.l.c. SECURITIES LITIGATION	§ § § § § § §	MDL No. 10-md-2185 Civil Action No. 4:10-cv-4214 HON. KEITH P. ELLISON
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AMENDED MEMORANDUM AND ORDER

Plaintiffs in this derivative / putative class action seek leave to amend their complaint, brought pursuant to the Employment Retirement Income Security Act of 1974 (“ERISA”). They allege that certain corporate entities and individuals associated with the BP Group violated their fiduciary duties to the participants of four employee benefits plans offered before and after the disastrous Deepwater Horizon explosion on April 20, 2010.

Upon consideration of Plaintiffs’ Motion (Doc. Nos. 152, 153), Defendants’ opposition (Doc. Nos. 154, 155), Plaintiffs’ reply (Doc. Nos. 160, 161), Plaintiffs’ notice of recent authority (Doc. No. 162), and Defendants’ sur-reply (Doc. No. 166), and having heard oral argument, the Court **GRANTS IN PART** Plaintiffs’ Motion for Leave to File Amended Complaint (Doc. Nos. 152, 153). At the conclusion of this order, the Court provides guidelines as to the claims which Plaintiffs may replead.

I. BACKGROUND

Plaintiffs are participants in two of four employee benefits plans (the “Plans”) offered by Defendant BP Corporation North America Inc. (“BP North America” or “BPNAI”) between January 16, 2007 and June 24, 2010. (Doc. Nos. 152-1, 153-1 (“CAC”), at ¶¶ 1-2, 29-37, 41-42.) Each Plan featured the option of investing in the “BP Stock Fund,” a fund comprised entirely of

BP American Depository Shares (“ADSs”) with a minimal cash component “to facilitate daily transactions.”¹ (*Id.* ¶ 3.) During the time period in question, the BP Stock Fund comprised approximately one-third of the Plans’ assets. (*Id.* ¶ 106.)

Plaintiffs allege that certain corporate entities and individuals associated with the BP Group violated their fiduciary duties to the Plans during the relevant time period.² The Court has recounted the specifics of Plaintiffs’ allegations in prior written orders and will not repeat itself here. Broadly, however, Plaintiffs assert three theories of liability under ERISA:

- (1) Defendants violated their duties of prudence and loyalty by permitting Plan participants to invest in the BP Stock Fund;
- (2) Defendants violated their duties of prudence and loyalty, as well as their ERISA-based disclosure obligations, by misrepresenting or omitting information relevant to participants’ decisions to invest in the BP Stock Fund; and
- (3) Certain defendants failed to adequately monitor other fiduciaries who engaged in activity which violated their duties of prudence and loyalty.

According to Plaintiffs, Defendants’ actions and/or inaction cost Plan participants hundreds of millions of dollars in losses following the Deepwater Horizon explosion. (CAC ¶ 317.)

On March 30, 2012, the Court dismissed Plaintiffs’ first consolidated pleading—the Consolidated Complaint—in its entirety. (Doc. No. 116 (the “2012 MTD Order”).) The Court ruled that Plaintiffs’ first theory of liability failed, under the so-called “*Moench* presumption of

¹ Because the Plans authorized investment in employer stock, they are Eligible Individual Account Plans (“EIAPs”), as defined in ERISA § 407(d)(3), 29 U.S.C. § 1107(d)(3).

² Defendants in the ERISA action are:

- Three corporate entities (BP North America; BP p.l.c.; and BP America Inc.);
- Two deliberative bodies found within Defendant BP North America (the Board of Directors and the Savings Plan Investment Oversight Committee); and
- Seventeen individuals employed by various corporate entities within the BP Group (Lord John Browne; Corey Correnti; Marvin L. Damsma; Richard J. Dorazil; James Dupree; Patrick Gower; Anthony Hayward; Jeanne M. Johns; Robert A. Malone; Lamar McKay; Patricia H. Miller; Stephanie C. Moore; Stephen J. Riney; Brian D. Smith; Neil Shaw; Thomas L. Taylor; and Gregory T. Williamson).

upon the lack of a “primary” violator who had not been properly monitored. (2012 MTD Order at 42.) This deficiency has been rectified, at least on the face of the amended pleading. Because the Court has allowed Plaintiffs to amend their prudence claims, it cannot accept Defendants’ argument for the futility of their monitoring claims. Leave to amend Count III will be granted, and Defendants may challenge the viability of Plaintiffs’ monitoring allegations through a successive Rule 12 motion, if they so desire.

IV. SECTION 1292(b) CERTIFICATION

For the reasons stated in the Court’s order granting Defendants’ Motion to Certify Interlocutory Appeal (Doc. No. 171), also issued this day, the Court certifies this amended memorandum and order for immediate appeal under 28 U.S.C. § 1292(b). The Court respectfully identifies the following question as appropriate for interlocutory appellate review pursuant to Section 1292(b):

What plausible factual allegations are required to meet the “more harm than good to the fund” pleading standard articulated by the Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2472-73 (2014).

V. CONCLUSION

For the reasons stated above, the Court **DENIES** Plaintiffs’ Motion for Leave to File Amended Complaint (Doc. Nos. 152, 153) insofar as it requests leave to amend Count II, denominated as the “disclosure claims” against all Defendants. In light of Fifth Circuit case law, amendment of Count II would be futile. As to Counts I and III—denominated as the “prudence claims” and “monitoring claims,” respectively—Plaintiffs’ Motion (Doc. Nos. 152, 153) is **GRANTED IN PART**. Plaintiffs have twenty-eight days to file an amended complaint in accordance with this memorandum and order. Defendants may then move to dismiss the

amended complaint within the time allotted by Federal Rule of Civil Procedure 12, but may not raise any arguments addressed and resolved in the course of this order.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the fourth day of March, 2015.

A handwritten signature in black ink, appearing to read "Keith P. Ellison". The signature is written in a cursive style with a large initial "K" and "E".

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE