

APPEAL PANEL *EN BANC* DETERMINATION #2

SEPTEMBER 16, 2013

I. *EN BANC* DETERMINATION

In accordance with Rule 6 of the Appeal Panel Procedures, currently active Appeal Panelists may convene to discuss and vote on issues concerning the proper interpretation and application of the Settlement Agreement. The Appeal Panelists may invite written submissions from BP and Class Counsel ("the Parties") as well as the Claims Administrator as to the issues under consideration. These *en banc* issues are decided by a majority vote of the Appeal Panelists. The Appeal Panelists have reached the following *en banc* determination.

II. TOPIC

BEL Classification of Commissions to Owners and/or Officers

III. DETERMINATION

The second issue considered by the Panelists in en banc session was this: "Are commissions paid to owners and/or officers properly classified as fixed expenses or variable expenses?" Having reviewed all provisions of the Settlement Agreement relating to this issue, and the Parties' respective briefs, the Panelists find that there appears to be an inconsistency within the Agreement concerning this issue.

Exhibit 4C to the Agreement ("Compensation Framework for Business Economic Loss Claims"), states, in pertinent part:

"For purposes of the two step calculation, the parties have agreed to a defined list of fixed and variable expenses as reflected in Attachment A.

"In order to allocate payroll expenses (including Salaries and Wages, Employee Benefits, and, where applicable, 401K Payments, but excluding Owner/Officer Compensation) into fixed and variable components, . . ." (p. 1) (underlining supplied)

"Fixed and Variable Payroll expenses are calculated as follows:

1. Obtain monthly amounts for the following payroll expenses (excluding Owner/Officer Compensation): (a) Salaries & wages; (b) Payroll taxes (including FICA, workers compensation insurance, unemployment tax); (c) Employer costs for employee benefits. Calculations include components of salaries and related expenses included in both Selling, General & Administrative Expenses ("SG&A") and COGS." (p. 3) (underlining supplied)

"Attachment A" referenced in the opening paragraph quoted above, is annexed to the Settlement Agreement as Exhibit 4D. It includes "Commissions" among its catalog of "Variable Costs." At the bottom of that single page exhibit, however, there appears this statement:

"Note: Payroll expenses (including Salaries and Wages, Employee Benefits, Overtime Wages, and, where applicable, 401K Payments, but excluding Owner/Officer Compensation) will be allocated between fixed and variable components based on the agreed-upon payroll methodology."
(underlining supplied)

The Panelists are sensitive to the fact that it is not their prerogative, or within their authority, to rewrite the Settlement Agreement in any way. They conclude that the best approach to dealing with the inconsistency and ambiguity presented is to defer to the discretion of each Panelist to resolve the same under the facts and law of any given case.