NO. 16-20028

In the United States Court of Appeals
For the Fifth Circuit

KENNETH W. ABBOTT;
FOOD & WATER WATCH, INCORPORATED,
Plaintiffs-Appellants,

v.

BP EXPLORATION & PRODUCTION, INCORPORATED; BP AMERICA, INCORPORATED; BP PIPE LINE COMPANY; BP PRODUCTS NORTH AMERICA, INCORPORATED; BP GLOBAL,

Defendants-Appellees,

On Appeal from the United States District Court
for the Southern District of Texas
Houston – No. 4:09-cv-01193

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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[1] The case caption incorrectly identifies BP Pipe Line Company and BP Global as Defendants-Appellees. These entities are not proper parties to this suit. The Amended Complaint did not name "BP Pipe Line" as a defendant. (ROA.273, 275-79.) Although the Amended Complaint did name "BP Global," it is not a distinct entity but rather is used as a "common and assumed name" for Defendant-Appellee BP p.l.c. (ROA.275.) On appeal, Plaintiffs refer collectively to three entities as "BP"—BP America, Inc., BP p.l.c., and BP Exploration and Production, Inc. (Br. 4 n.1.) Consistent with the Amended Complaint, this brief is filed on behalf of BP America Inc., BP Exploration and Production Inc., BP Products North America Inc., and BP p.l.c.

/s/ Lynne Liberato
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STATEMENT REGARDING ORAL ARGUMENT

Appellees BP America Inc., BP Exploration and Production Inc., BP Products North America Inc., and BP p.l.c., respectfully request that they be allowed to present oral argument. Although Appellants present no viable challenge to the district court's take-nothing judgment, Appellees recognize that oral argument may aid the Court's resolution of this appeal because it involves an extensive record of over 28,500 pages, and raises a number of issues relating to Plaintiffs' claims under the False Claims Act and the Outer Continental Shelf Lands Act.

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REGULATIONS

GLOSSARY

ABS	American Bureau of Shipping
BOEMRE	DOI's former Bureau of Ocean Energy Management, Regulation and Enforcement
DOI	United States Department of the Interior, • DOI's former Minerals Management Service ("MMS"), • DOI's former Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEMRE"), • DOI's current Bureau of Safety and Environmental Enforcement
DSME	Daewoo Shipbuilding & Marine Engineering
FCA	False Claims Act
INC	Incident of Noncompliance
MMS	DOI's former Minerals Management Service
OCSLA	Outer Continental Shelf Lands Act
OIG	Office of Inspector General, U.S. Department of the Interior
PSS Application	Production Safety System Application
RPE	Registered Professional Engineer
TEPA	Texas Engineering Practices Act

STATEMENT OF THE ISSUES

1. Should the district court's summary judgment on Abbott's False Claims Act (FCA) claim be affirmed on any of the following independent grounds?

    a. The FCA's "public disclosure bar" deprived the court of jurisdiction over Abbott's claim;

    b. The challenged certifications were not false;

    c. Abbott offered no competent evidence of scienter;

    d. Abbott offered no competent evidence that the challenged certifications were material;

    e. A finding of liability based on Abbott's regulatory interpretation would deprive BP of due process because BP did not have fair notice of that interpretation; and

    f. Abbott offered no competent evidence of damages.

2. Should the district court's summary judgment on Plaintiffs' Outer Continental Shelf Lands Act (OCSLA) claim be affirmed on either of the following independent grounds?

    a. Plaintiffs have not met any of the Article III standing requirements; and

    b. The Department of the Interior's application of its regulations and its decision not to shut-in the Atlantis are entitled to deference.

3. To the extent Plaintiffs rely on evidence excluded by the district court in an attempt to raise a fact issue, did Plaintiffs both (1) adequately brief their arguments regarding the admissibility of this evidence, and (2) show that the district court abused its discretion in excluding such evidence?

4. Did Plaintiffs satisfy the high bar needed to warrant assignment of a new judge in the event of a remand?

INTRODUCTION

The technological marvel that is the Atlantis Platform has safely produced hundreds of millions of barrels of oil and generated more than a billion dollars in royalties for the federal government. Before Atlantis began production in 2007 and every year since, the Department of the Interior has inspected and tested Atlantis and it has passed with flying colors.

Despite this sterling safety record, Abbott and FWW sued to shut down Atlantis and Abbott sought $266 billion in damages—a recovery that would dwarf the largest judgment in U.S. history. In support of their claim that Atlantis is unsafe, Plaintiffs do not identify a single component of the platform that was improperly designed, fabricated or installed. Instead, Abbott charges that BP made false claims to the government because BP maintained what he alleged was irregular paperwork: engineering drawings that had no "as-built" or professional engineer's stamps.

After an extensive investigation of Abbott's claims—including a review of thousands of engineering drawings furnished by BP and interviews with dozens of witnesses—DOI concluded that BP had fully complied with applicable regulations, that Abbott's allegations were premised on a "fundamental misreading" of the regulations, and that Atlantis is safe. In the years since, DOI has continued to conduct annual inspections of Atlantis and confirmed its on-going record of safety.

Against this background, the district court granted a take-nothing judgment. The record and the underlying law confirm the validity of this ruling and shed light on why the district court may have been frustrated with Plaintiffs' meritless claims.

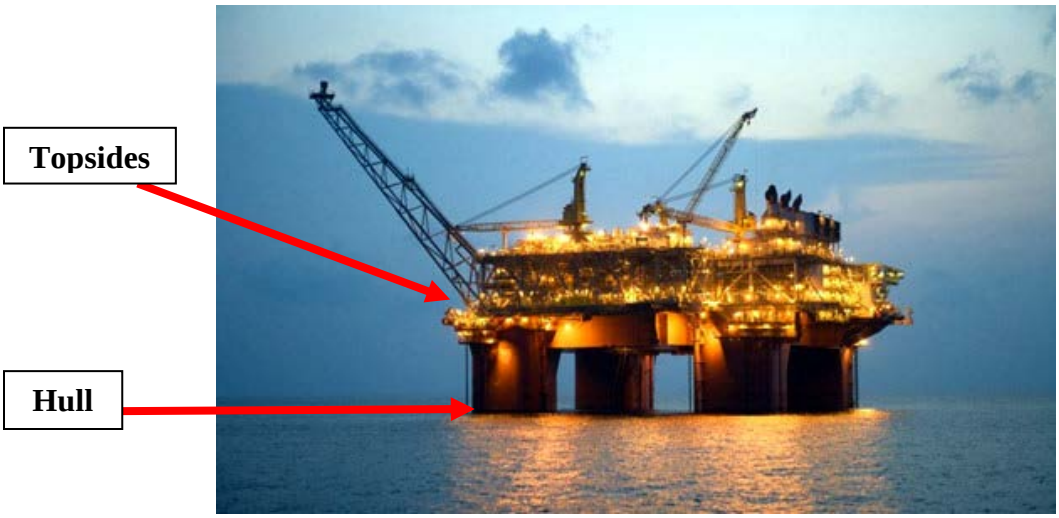
STATEMENT OF THE CASE

A. The Atlantis Platform produces hydrocarbons from offshore leases that DOI granted to BP.

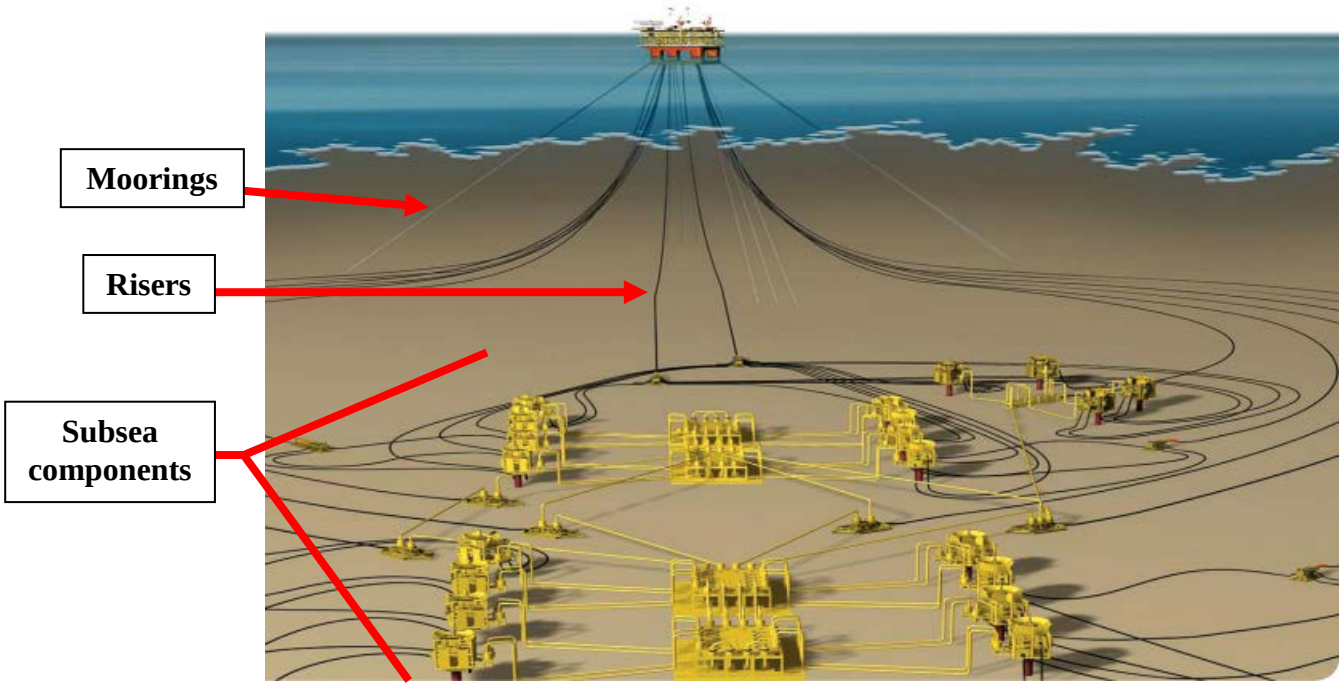
The Atlantis Platform, a semi-submersible floating production facility that began operation in 2007, sits near the Atlantis field in the Gulf of Mexico, 190 miles south of New Orleans. (ROA.280-81.) The Atlantis field encompasses five offshore leases on the Outer Continental Shelf that the Department of the Interior ("DOI") granted to BP and BHP Billiton in 1995.[1] (ROA.21739-805; ROA.5370.)

Atlantis floats in about 7000 feet of water. Its four major parts are: (1) the *topsides* (the deck, hydrocarbon processing facilities, export lines, control room, and living quarters), (2) the *hull* (which allows the platform to float), (3) the *moorings* (which keep the platform at its location), and (4) the *pilings* (which anchor the moorings). (ROA.24853-54; ROA.5370-71.)

[1] "DOI" refers to the Department of the Interior, as well as DOI's former Minerals Management Service ("MMS"), DOI's former Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEMRE"), and DOI's current Bureau of Safety and Environmental Enforcement.



Atlantis also has subsea equipment that facilitates the flow of production from the reservoirs beneath the seafloor through wells and pipelines to a point on the seafloor below Atlantis. (ROA.24854; ROA.6118.) There, the production enters "risers" that carry it up to the platform, where it is processed and measured before entering export pipelines for delivery to shore. (ROA.24853; ROA.5370.)



B. DOI approved the design and installation of Atlantis and its safety system after rigorous review and inspections.

Approval of Platform. The process of obtaining regulatory approval of Atlantis began in September 2002, when BP submitted its 400-plus page Platform Application with DOI. (ROA.21870-22248; ROA.5372-73.) This application included structural drawings of the Atlantis hull, topsides, and risers.

Because the government lacks in-house expertise to verify the design, fabrication and installation of a platform as sophisticated as Atlantis, the government outsources this job to a third party—an independent "Certified Verification Agent." In the Platform Application, BP nominated the American Bureau of Shipping ("ABS") to serve this role. (ROA.21894; ROA.14428.) ABS has established rigorous standards for marine vessels and offshore structures. *See, e.g.*, *United States v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 257 (5th Cir. 2014) (ABS is "an independent organization that develops standards for shipbuilding ...."). The Coast Guard has adopted ABS's standards, *see* 46 C.F.R. §§107.115, 107.205, and DOI has routinely approved ABS to act as a Certified Verification Agent for offshore platforms. (ROA.21913-18.) In December 2002, DOI approved both the submitted plans for Atlantis and BP's nomination of ABS. (ROA.22373; ROA.14428.)

Over several years, ABS independently reviewed and approved the *design* of the platform, and verified that Atlantis was *fabricated* in accordance with the

approved design and *installed* correctly. ABS made these independent verifications directly to DOI through a series of reports issued between 2004 and 2006.[2] These reports were based on careful reviews by ABS's experienced team of registered professional engineers and surveyors. (ROA.982; ROA.5370-73; ROA.14428.)

After installation was completed in September 2006, BP spent more than a year testing the platform and installing the first phases of the subsea infrastructure. (ROA.24854; ROA.5371.) DOI formally approved BP's installation of Atlantis in January 2007, relying on ABS's analysis, inspections, and verification. (ROA.22285.) BP began production in October 2007. (ROA.24854; ROA.5371.)

Approval of Production Safety System. On a separate track from approval of the Platform, BP sought and obtained approval from DOI regarding the Production Safety System, a series of sensors and valves that monitor for unsafe conditions and shut-in production in response to a safety threat.

BP first submitted data to DOI concerning the Production Safety System in 2003. (ROA.21055-59.) In February 2005, BP made its initial Production Safety

[2] *See* (1) February 2004 "Interim CVA report on Verification of Mooring Design" (ROA.22491-528); (2) February 2005 "Interim CVA report on verification of the Foundation and Pile Design" (ROA.22531-57); (3) three March 2005 Hull Reports (ROA.22992-98); (4) May 2005 "Interim CVA report on verification of Fabrication of Suction Piles" (ROA.22651-788); (5) July 2005 "Interim CVA report on verification of Topsides Design" (ROA.22560-89); (6) October 2005 "Final Report on the verification of the Hull Structure Design of the Atlantis FOI" (ROA.22591-648); (7) October 2005 "Final Report on the verification of the Topsides and Hull Fabrication" (ROA.22794-947); (8) December 2005 "Interim CVA report on the installation of the Suction Piles Phase A" (ROA.22950-56); (9) January 2006 "Final Report on the installation of the Suction Piles for the Atlantis FOIm Phase B" (ROA.22958-65); and (10) November 2006 "Final CVA report on the Tow-out and Hook-up of the Atlantis PQ" (ROA.22968-75).

System application submission to DOI. (ROA.21861-68; ROA.5372.) During the four-plus years before approval, DOI engineers spent hundreds of hours reviewing both the design and installation of the Production Safety System. (*E.g.*, ROA.21094.)

For example, based on its review of the Production Safety System design documents, DOI sent BP a list of 47 items that required clarification or correction. (ROA.22977-80; ROA.21103-04.) Thereafter, DOI conducted three "pre-production" inspections of Atlantis—two onshore and the third offshore before "first oil." (ROA.21060-72; ROA.22368-71; ROA.22982-89.) The first inspection resulted in an additional "punch list" of 48 technical items requiring resolution. (ROA.22982.) As it worked to resolve these issues, BP revised its Production Safety System application several times, ultimately making eight submissions to DOI in 2005 and 2006 (collectively, the "PSS Application"). (ROA.23399; ROA.21861-68.)

After BP resolved the punch list items and amended its application to reflect changes required by DOI, and after DOI's engineers spent four years scrutinizing design data and the safety system components, DOI approved the design and installation of the Production Safety System in May 2007 with praise for BP's efforts. (ROA.23401.)

C. Plaintiffs filed this lawsuit based on publicly available documents that they misunderstood.

This lawsuit was brought by Kenneth Abbott, who was employed for five months in 2008 by a staffing company at the offices of Technip, a contractor working on certain subsea infrastructure for Atlantis. (ROA.20941-43.) While at Technip, Abbott learned nothing that is essential to his FCA claim. (ROA.20943-45; ROA.23703-04.) He was not responsible for or involved with reviewing any Atlantis engineering, including engineering for the platform, topsides, hull or Production Safety System. (ROA.23704.) Rather, he came into possession of a subsea project closeout spreadsheet created by someone else and several e-mails about the subsea project closeout written by others—documents he misunderstood. (*See* ROA.10353-54; 10359-62; 10368-84; ROA.10414; ROA.23702-04.) From those documents, Abbott speculated that years earlier, BP must have falsely certified that BP had approved engineering designs and associated "as-built" documents related to Atlantis's subsea components. (ROA.55-56.)

Abbott filed his Original Complaint in April 2009, asserting claims under the FCA and OCSLA, and alleging that BP falsely certified compliance with certain federal regulations to obtain the right to produce hydrocarbons from the Atlantis field. (ROA.55-57.) Abbott had no first-hand knowledge regarding the accuracy of his allegations, because he was not working at Technip when BP made the certifications years earlier, and he had no role in any of the permitting for

Atlantis. (ROA.59; ROA.20945; ROA.23704.) Abbott had no idea what certifications BP had made or what words BP had used, nor did he even know what the federal regulations required. (ROA.59; ROA.20945; ROA.10353; ROA.20972.) Similarly, Abbott, who is not an engineer, (1) did not know what designs or drawings BP had at the time it made the certifications, (2) was not aware that BP had previously furnished certain relevant drawings to DOI, and (3) had no idea who had approved the drawings. (ROA.10352-55; ROA.14454; ROA.23703-04.) Based solely on the subsea spreadsheet and e-mails related to a subsea project closeout, Abbott took a chance and hoped he was right.

In June 2009, Abbott's lawyer contacted FWW—an environmental advocacy organization—and began jointly representing both parties. (ROA.21013-18.) Between August 2009 and September 2010, FWW submitted at least four FOIA requests to DOI. (ROA.21035-36; ROA.21836-45.) DOI produced thousands of responsive pages relating to Atlantis. (ROA.21037; ROA.21847-56.) Through this document production, Abbott and FWW obtained the foundation of Abbott's FCA claim: the allegedly false BP certifications and the corresponding designs and drawings. (ROA.21858-59.) Among these documents were three letters sent by Dennis Sustala, BP Atlantis's Regulatory Compliance Coordinator, to DOI's district supervisor. (ROA.11414-15; ROA.11417-18; ROA.11420-21;

ROA.5372; ROA.14428-32.) Each letter bears a stamp indicating that FWW received the letter from DOI in response to a FOIA request. (ROA.21861-68.)

Abbott—joined by FWW—filed an Amended Complaint in September 2010. (ROA.273-99.) In the section titled "Publicly Available Information," Abbott conceded that he had received the Sustala letters in response to FOIA requests. (ROA.282-83.) For the first time, Abbott also alleged that the Sustala letters included BP's false certifications, and that his FCA claim was based on these newly identified certifications. (ROA.282-83.)

As reflected in the Amended Complaint, Abbott's discovery responses, and the parties' summary judgment briefing, and as shaped by unchallenged district court rulings, Abbott's claims boil down to two basic allegations:

- **Registered Professional Engineer ("RPE") Stamps.** Abbott asserts that, in the Platform Application and PSS Application, BP falsely certified that many of the design documents were approved by RPEs. As support, Abbott points to the absence of an RPE stamp on the documents.

- **As-Built Drawings.** Abbott asserts that, in the Platform Application, BP falsely certified that it would maintain a set of "as-built" engineering drawings in its offices after installation of the Platform. As support, Abbott points to the absence of an "as-built" stamp on many of the drawings.

Abbott had originally argued that these certifications also reached Atlantis's subsea components but the district court rejected that argument and he has

abandoned it on appeal.[3] (ROA.10193-94, ROA.16060, n.41; *see also* ROA.5239-47.)

D. DOI investigated and rejected Abbott's allegations.

Even though Abbott purports to sue on behalf of the United States, DOI—the agency that regulates Atlantis and that authored and applies the regulations at issue—fully investigated and rejected Abbott's allegations. (ROA.21396-443.) The government did not intervene in this case.

At Abbott's request and at the direction of Congress, DOI conducted an extensive regulatory enforcement investigation of Atlantis beginning in March 2010. (ROA.21423.) DOI investigated all of Plaintiffs' allegations, as well as other regulatory compliance issues. Eight engineers conducted an in-depth analysis of more than 3,400 engineering drawings and other critical technical documentation. Investigators also interviewed dozens of BP and contractor witnesses, ABS and engineering company representatives, and Abbott and his lead expert. (ROA.21422-23; ROA.5191-93.)

In an exhaustive March 2011 report, DOI concluded that Abbott's allegations had no factual or legal support. (ROA.21396-443.) DOI found that:

[3] The only subsea devices covered by the Production Safety System regulations are three specific safety shut-off valves located within the wellbore and the trees of each well, which are specifically mentioned in the regulations. 30 C.F.R. §§250.801, 250.802(c); (ROA.21087-88; ROA.20884-85; ROA.6116-18.) Abbott conceded that he had no involvement with these valves (ROA.10353; ROA.6118-19) and admitted that he "had nothing to do" with the subject of the certification—the "technical design" of the Production Safety System. (ROA.10354; ROA.23703-04.)

- Abbott's claims are "premised on a fundamental misreading" of the relevant regulations (ROA.21439);

- Abbott's allegations that BP made false submissions to DOI and violated DOI's regulations are legally and factually "unfounded" (ROA.21401, ROA.21440; ROA.21443);

- there are "no grounds for suspending the operations" of Atlantis, and no support for Abbott's claim that BP's continued operation of Atlantis risks immediate harm to life, property or the environment (ROA.21401; ROA.21443); and

- Abbott "was never in a position to directly evaluate the safety" of Atlantis's operations, and lacked first-hand knowledge of the documents and drawings available to the operators of the platform (ROA.21440).

Months later, DOI affirmed that the legal and factual determinations in the DOI Report remain the "best evidence" of the agency's views. (ROA.21721-23; ROA.22304-10; ROA.22364-66.)

E. Atlantis has passed annual safety inspections every year since production commenced.

Since Atlantis began production in 2007, DOI inspectors have inspected and tested hundreds of its components (including the emergency shut-down system and critical safety devices), and Atlantis has passed with high marks. These annual inspections are mandated by OCSLA to ensure compliance with environmental and safety regulations. 43 U.S.C. §1348(c); *see* http://www.bsee.gov/Inspection-and-Enforcement/Inspection-Programs/Inspection-Programs (last visited July 5, 2016).

If inspections uncover regulatory violations, DOI issues an Incident of Noncompliance ("INC") to the operator. Depending on the nature of the violation, DOI may either give the operator an opportunity to correct the violation before shutting-in production or may order a shut-in immediately. DOI may issue civil penalties depending on the nature of the violation and the operator's response.

Between commencing production in 2007 and the filing of the summary judgment motions in 2012, DOI undertook four comprehensive inspections of Atlantis. (ROA.22287-300.) Those inspections resulted in just a single INC issued in 2010, based on the failure of a certain valve to pass a leak test. (ROA.22298.) Within three hours, BP had corrected the problem and the valve passed the test. (ROA.22357-58.) Following the 2011 inspection, conducted in the face of Plaintiffs' allegations, DOI issued an inspection report that concluded: "The facility is very well maintained and [the personnel's] performance in testing all safety devices is greatly commendable." (ROA.22299.) DOI's district manager testified that the 2011 inspection tested the "most valuable components in the safety system" (ROA.21115), and achieved "the best result that you can receive." (ROA.21076.)

Since the summary judgment record closed, Atlantis has continued to pass annual inspections, most recently in March 2016. From 2007 to the present, BP has safely produced hundreds of millions of barrels of oil from Atlantis. From 2007

through February 2011, BP paid the government more than $600 million in royalties on that production (ROA.21739), an amount that now exceeds $1 billion.

F. The district court granted summary judgment in favor of BP.

After exhaustive discovery, BP filed three motions for summary judgment on Abbott's FCA claim, arguing that (1) the FCA's public disclosure bar deprived the court of subject-matter jurisdiction because Abbott's claim was based on publicly disclosed information (ROA.10324-43); (2) Abbott had no evidence of three elements needed to establish FCA liability (ROA.12117-44); and (3) Abbott had no competent evidence of damages (ROA.12146-71).

BP filed two motions on Plaintiffs' OCSLA claim, arguing that (1) Plaintiffs lacked standing (ROA.12173-95), and (2) the claim fails on the merits (ROA.12197-226).

Plaintiffs filed a cross-motion for summary judgment, seeking an award to Abbott of $77.151 billion (reduced from an earlier request for $266 billion) and an injunction shutting down the Atlantis platform. (ROA.16020-146.)

The district court granted summary judgment to BP, denied Plaintiffs' cross-motion, and entered a take-nothing judgment. (ROA.27437-46, ROA.28285.) On the FCA claim, the court held that "(a) it is based on public information, (b) BP complied with the safety regulations, and (c) the United States has not been damaged." (ROA.27443.) The court also found that Abbott failed to raise a fact

issue on scienter or materiality. (ROA.27440-41.) On the OCSLA claim, the court held that Plaintiffs lack standing because they showed no concrete and imminent injury and "have no particular, substantial connection to the Gulf of Mexico." (ROA.27443-45.) The court also sustained BP's objections to Plaintiffs' summary judgment evidence, including *Daubert* challenges to their expert witnesses. (ROA.27499.) This appeal followed.

SUMMARY OF THE ARGUMENT

Plaintiffs' attempt to shut-in Atlantis and obtain a $266 billion recovery in the face of the government's thorough rejection of their claims properly came to a halt via summary judgment.

Summary judgment on the FCA claim should be affirmed on six independent grounds. *First*, the district court correctly held that it lacked jurisdiction over Abbott's FCA claim. The FCA's public disclosure bar mandated dismissal of Abbott's claim because it was based on publicly disclosed information obtained through FOIA requests, and Abbott was not an original source of that information.

Second, Abbott failed to raise a fact issue on *three separate elements* of his claim: falsity, scienter, and materiality. The challenged certifications were accurate. BP maintains a complete set of "as-built" drawings for the Platform at its offices in Houston, as it certified it would do, and as DOI confirmed. BP also

accurately certified that RPEs had approved *design* drawings for the Platform. Abbott's argument rests on drawings prepared as part of the legally distinct *fabrication* process, which is outside the purview of the challenged certification. BP also accurately certified that RPEs had approved the Production Safety System.

Abbott's falsity arguments rest on his flawed interpretation of the applicable regulations, which DOI rejected. Further, there can be no scienter where (1) the government agrees with the defendant's interpretation of a federal regulation, or (2) the regulation is ambiguous and the defendant's interpretation is reasonable.

Nor can there be a finding of materiality here—particularly under the Supreme Court's new "demanding" standard announced last month in *Universal Health Services, Inc. v. United States ex rel. Escobar*—where the government was aware of and investigated Abbott's allegations but allowed BP to continue producing oil and gas. *See* 136 S. Ct. 1989, 2003 (2016).

Third, as Abbott's claims rest on his own interpretation of the DOI regulations (which are contrary to DOI's), a finding of FCA liability would violate BP's due process rights because BP lacked "fair notice" of Abbott's interpretation.

Finally, Abbott's FCA claim fails because he has no evidence of damages. Under the only proper measure, "benefit of the bargain," the government has received the full benefit of its bargain—more than one billion dollars in bonus, rental, and royalty payments from BP. Abbott's damage claim also fails for other

reasons, including the fact that it is based entirely on incompetent expert testimony whose exclusion is not even challenged on appeal.

The district court also properly granted summary judgment on Plaintiffs' OSCLA claim based on the absence of Article III standing. Abbott cannot establish an injury-in-fact based on generalized and speculative claims of harm, nor on a conjectural theory of causation that is based on his misinterpretation of applicable regulations. Nor can his lawsuit redress a harm that does not exist.

FWW fares no better. Because it lacks members, FWW can establish associational standing only if the individuals on whose behalf it sues have the indicia of membership. FWW did not satisfy that standard. FWW's chosen representatives also lack a direct stake in the outcome of this litigation sufficient to satisfy Article III.

Plaintiffs' OSCLA claims also fail on the merits. Following an exhaustive investigation of Abbott's claims, the DOI, in a 48-page report, concluded that Abbott's allegations of OSCLA violations were legally and factually groundless. In fact, BP met and exceeded DOI's regulatory requirements. This Court should defer to DOI's application of its complex and technical regulations and to its enforcement decision not to shut-in Atlantis.

ARGUMENT

I. The district court properly granted summary judgment on Abbott's FCA claim.

The district court properly granted summary judgment on Abbott's FCA claim on five independent grounds, including that:

- The public disclosure bar deprives the court of jurisdiction;
- Abbott failed to raise a fact issue on the element of falsity;
- Abbott failed to raise a fact issue on the element of scienter;
- Abbott failed to raise a fact issue on the element of materiality; and
- Abbott has no competent evidence of damages.

(ROA.27440-43.) Summary judgment should also be affirmed because a finding of liability based on Abbott's regulatory interpretation would deprive BP of due process.

To obtain a reversal, Abbott must overcome *each* of these grounds. He cannot overcome *any* of them.

A. The district court lacked jurisdiction over Abbott's FCA claim under the public disclosure bar.

Abbott alleged that BP falsely certified its compliance with two federal regulations, 30 C.F.R. §250.901(d) (now §250.905(k)) and 30 C.F.R. §250.802(e). BP's certifications, as well as the related underlying engineering documents, were publicly disclosed through DOI's FOIA responses. BP therefore moved for

summary judgment under the FCA's public disclosure bar, which deprives federal courts of jurisdiction over an action that is "based upon the public disclosure of allegations," unless the "person bringing the action is an original source of the information." 31 U.S.C. §3730(e)(4)(A).[4]

Because BP identified publicly disclosed documents that plausibly contained allegations or transactions on which Abbott's claim was based, Abbott could avoid summary judgment only by raising a fact issue regarding whether (1) his action was based on those public disclosures, or (2) he qualifies as an original source. *United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 327 (5th Cir. 2011). Abbott failed to meet his burden for either requirement. The district court therefore properly dismissed his FCA claim. (ROA.27439-40.)

On appeal, Abbott contends that the public disclosure bar does not apply because he based his FCA claims on his experience and knowledge gained while a temporary employee, not on publicly disclosed documents. Abbott's arguments misinterpret the law and ignore the record.

1. Abbott's claim was based upon publicly disclosed information.

Under the public disclosure bar, a relator's FCA claims are "based upon" publicly disclosed documents if those claims are substantially similar to the public

[4] The public disclosure bar was amended after this suit was filed, but that amendment does not apply retroactively. 31 U.S.C. §3730(e)(4)(A); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 404 n.1 (2011).

documents, even where those documents were not the source of the relator's allegations. A comparison of Abbott's claims to the publicly disclosed documents demonstrates that his FCA claims are based upon those documents.

a. Abbott's claim was based on publicly disclosed documents.

Abbott concedes that responses to FOIA requests "*can* trigger the 'public disclosure' bar." (Br. 20.) He also concedes that the FOIA responses he received from DOI contained the certifications at issue, and that his Amended Complaint set out the details of those certifications. (Br. 16, 19.) Abbott nevertheless argues that the public disclosure bar does not apply because his claim is based "not on the information contained in the FOIA responses," but rather "upon his experience and knowledge gained while working as an insider on the Atlantis Project." (Br. 22; *id.* 16-18.) He is mistaken.

As an initial matter, Abbott confuses the "based upon" inquiry with the "original source" exception to the public disclosure bar. Even if Abbott had derived his allegations from his experiences as a temporary employee—and he did not (*see infra* Part I.A.2.a)—that contention is irrelevant to whether his allegations were based upon the public disclosures. The FCA's "based upon" inquiry does not turn on whether a relator's allegations were actually derived from publicly disclosed information. *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 57 (1st Cir. 2009); *United States ex rel. Colquitt v. Abbott Labs.*, 864 F. Supp.

2d 499, 523 (N.D. Tex. 2012). Rather, an action is based upon publicly disclosed documents if a relator's allegations are "substantially similar" to those documents, even if the documents were *not* the source of the relator's knowledge. *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 910 (7th Cir. 2009); *Stennett v. Premier Rehab., LLC*, 479 F. App'x 631, 634-35 (5th Cir. 2012). The public disclosure bar thus has a "broad scope." *Schindler*, 563 U.S. at 408.

In applying the public disclosure bar, the Court must look to the allegations in the Amended Complaint, not those in the Original Complaint. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473 (2007). Abbott acknowledges this rule, but suggests it would apply only if his theory of liability had changed. (Br. 19 n.11.) *Rockwell* recognized no such limitation. Because the allegations in the Amended Complaint are substantially similar to information in publicly disclosed documents, the court lacked jurisdiction over Abbott's FCA claim. 549 U.S. at 473-74.

(i) Platform Application allegations.

Abbott's first FCA claim, that BP's Platform Application contained misrepresentations regarding the as-built and RPE certification requirements under 30 C.F.R. §250.901(d)(2002),[5] is substantially similar to the information provided in publicly disclosed documents.

[5] (Br. 4; ROA.291; ROA.16045; ROA.16060-61; ROA.1300.)

The allegedly false Section 250.901(d) certification was included in BP's Platform Application (ROA.11425; ROA.11436; ROA.5371-72), which was publicly disclosed through DOI's FOIA responses. (ROA.11401; ROA.10490.) The underlying documents that BP submitted with the Platform Application, including dozens of engineering drawings, were also publicly disclosed. Those drawings did not contain RPE stamps, an omission that Abbott claims is contrary to BP's Section 250.901(d) certification. (ROA.11423-24; ROA.11506-26; ROA.11532-40; ROA.15063-64.)

DOI also publicly disclosed numerous as-built drawings that it had received from BP in 2009 and 2010, none of which contained "as-built" stamps. (ROA.15331-33; ROA.15335-64; ROA.24748-50; ROA.24752-81; ROA.24783-84; ROA.24815-16; ROA.24793-94; ROA.23699 ("Final as-built drawings of the entire platform were issued."); ROA.24154-58; ROA.24837-38; ROA.26995-96; ROA.5191-93 ("MMS requested that BP furnish a set of as-built drawings for the Atlantis Platform; BP complied with this request . . . .").) Abbott's claim that BP falsely certified its compliance with Section 250.901(d) is based upon those publicly disclosed documents.

(ii) PSS Application allegations.

Abbott's second FCA allegation, that BP falsely certified compliance under Section 250.802(e)(5),[6] is also based upon publicly disclosed documents.

Both the Section 250.802(e)(5) certification and the underlying documents were publicly disclosed in DOI's responses to FWW's FOIA requests. (ROA.11389-90; ROA.11392-93; ROA.11395-96; ROA.11398; ROA.11400-04; ROA.11407-09; ROA.10490.) Included in DOI's production were three letters that BP's Dennis Sustala submitted to DOI, which were relevant to BP's Section 250.802(e) Production Safety System certification. (ROA.11414-15; ROA.11417-18; ROA.11420-21.) Abbott set out the contents of those letters for the first time in the Amended Complaint. (ROA.282-83.)[7]

Based on the Sustala letters, Abbott alleged that BP submitted a false Section 250.802(e)(5) certification. Paragraph 5.2(d) of the Amended Complaint alleged that "BP was required to submit a specific certification to its regulatory compliance. Plaintiffs have FOIA requested such certifications from MMS." (ROA.291-92.) The Amended Complaint alleged that the information in those FOIA responses, i.e., the Sustala letters, "contain[ ] 'certification' language similar

[6] (Br. 4; ROA.291-92; ROA.16090; ROA.16092-94; ROA.1300.)

[7] In particular, the February 25, 2005 and August 1, 2005 letters contained the following statement that Abbott claimed to be false: "BP certifies that the designs for the mechanical and electrical systems to be installed were completed under the supervision of registered professional engineers." (ROA.11417; ROA.11421.)

to, but not identical to, the language required pursuant to" Section 250.802(e)(5). (ROA.292.) In those letters, Sustala allegedly "certified that mechanical and electrical designs were complete, and the documents were to be housed at the BP office located in Houston, Texas." (ROA.292.) "These certifications," Abbott continued, "amounted to assurances that BP was in compliance with the regulations required to obtain governmental approval to install production equipment—and ultimately obtain production of oil and gas. . . . *[T]hese letter certifications were false*. BP submitted such false certifications to the Government in order to obtain oil and gas . . . ." (ROA.292 (emphasis added).)

The underlying documents submitted to support BP's certification were also publicly disclosed. (ROA.24517-746; ROA.24748-50; ROA.24752-81; ROA.24480-81.) Several publicly disclosed drawings attached to the PSS Application contained no RPE stamps, an omission that Abbott claims is inconsistent with federal regulations. (ROA.15100-15329; ROA.24518-21; ROA.24672-73; ROA.24819, ROA.24823, ROA.24829-30.)

Abbott's claim that BP falsely certified its compliance with Section 250.802(e) is substantially similar to the publicly disclosed certification and supporting documentation.

b. Abbott's purported knowledge of the alleged document deficiencies is irrelevant.

Abbott nonetheless argues that his claim is not based on the publicly disclosed certifications because those certifications do not reveal the whole story. Abbott contends that he knew those certifications were false because of his awareness of the regulations and his knowledge of the purported errors and omissions in the underlying documentation that rendered BP's certifications untrue. (Br. 21.) This argument should be rejected.

The fact that the underlying documents concerning both certifications (including examples of drawings bearing no RPE stamps or "as-built" labels) were publicly disclosed is fatal to Abbott's argument. Because the certifications and the underlying documents were publicly disclosed, any member of the public could have "produced the substance of the complaint merely by synthesizing" the public disclosures. *McKesson*, 649 F.3d at 331. The Supreme Court in *Schindler* rejected a similar effort to escape the public disclosure bar. There, the relator alleged that his former employer failed to submit certain certifications, and had included false information in those certifications that it did file. The relator claimed to have brought the suit after he became suspicious from his own experiences working at the company, although those allegations were also supported by documents the relator later received through FOIA responses. 563 U.S. at 413. Despite the relator's independent suspicions, the Court explained that the public disclosure bar

may still apply because "anyone could have filed the same FOIA requests and then filed the same suit. Similarly, anyone could identify a few regulatory filing and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a *qui tam* action under the FCA." *Id.* That's what Abbott did here. Purportedly based on his experience and knowledge, he became suspicious about BP's compliance with DOI regulations, submitted FOIA requests to uncover the certifications and the underlying documents, and sought a $266 billion windfall in his *qui tam* action.[8]

It also does not matter that Abbott claims to have recognized the certifications were false in light of his professional experience and knowledge of regulatory requirements. (Br. 18, 21.) First, Abbott had no such knowledge, and indeed admitted he had never read the regulations that govern the Platform or Production Safety System permitting process. (ROA.10353; *see* ROA.23703-04.) Second, even if Abbott had read the regulations, a relator's ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation have been publicly disclosed or that his FCA claim is based upon those public disclosures. *A-1 Ambulance Serv., Inc. v.*

[8] Abbott's reliance on the Supreme Court's remand in *Schindler* and the Second Circuit's later decision is misplaced. (Br. 20 & n.12.) The Supreme Court remanded without analyzing whether the particular claims at issue were "based upon" the publicly disclosed documents. 563 U.S. at 416-17. On remand, the Second Circuit concluded that the publicly disclosed reports did not reveal certain false claims, as the conclusion that the claims were false could be drawn only from the plaintiff's personal knowledge of non-public facts. *United States ex rel. Kirk v. Schindler Elevator Corp.*, 437 F. App'x 13, 18 (2d Cir. 2011).

California, 202 F.3d 1238, 1245 (9th Cir. 2002); *United States ex rel. Findley v. FPC–Boron Employees' Club*, 105 F.3d 675, 688 (D.C. Cir. 1997).

That Abbott claims to have supported his allegations with non-publicly disclosed documents such as e-mails, databases, and internal communications also does not alter the analysis. (Br. 17-18.) The public disclosure bar applies if an FCA claim is "even partly based upon public allegations or transactions." *United States ex rel. Fried v. W. Indep. Sch. Dist.*, 527 F.3d 439, 442 (5th Cir. 2008). That a relator might "uncover[] some nuggets of . . . non-public information" does not change the conclusion that his claims are "based at least in part on allegations already publicly disclosed." *Id.*

2. Abbott was not an original source of the information.

Because Abbott's FCA claim is based upon public disclosures, to escape dismissal he had to prove he was an "original source" of the information on which his allegations were based. 31 U.S.C. §3730(e)(4)(A). Abbott concedes that he was not the original source of information disclosed through FOIA, i.e., the certifications and the supporting documentation. (Br. 22.) The record further confirms that Abbott was not the original source of the information on which his claims were based.

The original source doctrine limits recovery under the FCA to individuals who have "direct knowledge of the alleged false claims that is independent of the

public disclosure," and who have "functioned as a true whistleblower." *United States ex rel. Wright v. Comstock Res., Inc.*, 456 F. App'x 347, 355 (5th Cir. 2011). A relator who claims to be an original source must demonstrate that: (1) he has "direct and independent knowledge of the information on which the allegations are based" and (2) he "voluntarily provided the information to the Government before filing" suit. *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 177 (5th Cir. 2004) (quoting 31 U.S.C. §3730(e)(4)(B)). Abbott did not meet either requirement.

a. Abbott lacked direct and independent knowledge of the information on which his allegations are based.

An individual has direct knowledge if that knowledge is derived from the source without interruption or gained by his own efforts, rather than through the efforts of others. *McKesson*, 649 F.3d at 332. To qualify as independent, the relator's knowledge must not be derived from the public disclosure. *Id*. Relators found to have direct and independent knowledge are those who actually viewed source documents or viewed first-hand the fraudulent activity that is the basis of their claim. *United States ex rel. Lam v. Tenet Healthcare Corp.*, 287 F. App'x 396, 400 (5th Cir. 2008). When a relator's claim is based on knowledge received from other individuals, it is not direct and independent. *Id*. at 400-01; *McKesson*, 649 F.3d at 332.

Abbott did not establish that he had direct and independent knowledge of the certifications or underlying documents at issue. Absent from his brief is any record citation supporting his claims of such knowledge.[9] In fact, the record confirms that Abbott had no direct or independent knowledge of the allegedly false certifications. He conceded in his Original Complaint that he "was not involved with any of the certifications or verifications" because they "would have been filed before [his] employment with BP began." (ROA.59-60; ROA.12403.) Abbott made his certification allegations on "information and belief." (ROA.59.) Because the certifications were made years before Abbott began his employment, he is not an original source. *United States ex rel. Feldstein v. Organon, Inc.*, 364 F. App'x 738, 743 (3d Cir. 2010).

When deposed, Abbott again admitted he had no first-hand knowledge about the certifications, stating: "I don't know who made the certifications, and I don't know when." (ROA.10417.) In his summary judgment pleadings, Abbott conceded that he "did not have direct and independent knowledge of the actual false claims submitted by BP to [DOI]." (ROA.12394.) Only after Abbott and FWW received thousands of documents from DOI was Abbott able to allege that any certification occurred or what the certifications said.

[9] As the relator, Abbott had the burden to "allege specific facts—as opposed to mere conclusions—showing exactly how and when he or she obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and [to] support those allegations with competent proof." *In re Natural Gas Royalties*, 562 F.3d 1032, 1045 (10th Cir. 2009).

On appeal, Abbott does not contend that he was involved with the challenged certifications. Instead, he argues that his allegations were based on his independent knowledge that BP did not have the "critical engineering documents" it had certified it possessed, his understanding that certifying those facts was necessary for production to begin, and his conjecture that BP must have falsely certified its compliance because it had started production. (Br. 21.)

But Abbott could not have had direct and independent knowledge of any "critical engineering documents" related to the Platform or Production Safety System because Abbott was not involved with either area. (ROA.10352-56; ROA.14454.) Instead, Abbott worked only as a temporary employee of a BP contractor on the *subsea* portion of Atlantis. (ROA.60; ROA.10352-56; ROA.14453-54; ROA.282-83; ROA.23703-04.) Even on appeal, Abbott states that he was a "project control supervisor on the *subsea* portions of the BP Atlantis project," and he used his experience to conclude that BP "did not have complete 'as-built' engineering drawings for the *subsea* portions of the BP Atlantis project." (Br. 17 (emphasis added)).

Nor could Abbott have known what certifications regarding the Platform or the Production Safety System were necessary before production could begin, having admitted that he never read the applicable regulations. (ROA.10353.)

At best, Abbott's FCA claims amount to a suspicion that BP falsely certified its compliance with applicable regulations for the Platform and Production Safety System, based on second-hand information regarding components with which he had nothing to do. But, "[a] relator's suspicions cannot substitute for the requirement of direct and independent knowledge." *Tenet Healthcare*, 287 F. App'x at 402. Abbott's numerous concessions preclude him from being an "original source" under the FCA. *Id.*[10]

b. Abbott did not voluntarily provide the information to the government before filing suit.

Abbott's invocation of the original source exception fails for a second reason—he did not provide the government with any information regarding BP's certifications before filing suit. 31 U.S.C. §3730(e)(4)(B)(2).

In one footnote, Abbott contends that he satisfied this obligation through an April 9, 2009 letter and its attachments. (Br. 17 n.9 (citing ROA.17885-ROA.18892).) Yet, the letter and attachments at most discuss Abbott's allegations regarding the subsea project documents, and contain no information regarding Abbott's Platform or Production Safety System allegations. Abbott cannot claim

[10] Abbott contends that he does not need to be an original source of all facts relied upon in the complaint to satisfy the original source requirement. (Br. 22 (citing *Reagan*, 384 F.3d at 179).) *Reagan* held only that a relator could qualify as an original source if his investigative efforts developed additional compelling facts, or demonstrated a new and undisclosed relationship between disclosed facts that put the government on the trail of fraud. *Reagan*, 384 F.3d at 179. Abbott did no such thing here. Any investigation he claims to have conducted did not uncover important information about a false claim, but merely restated what was publicly disclosed.

direct and independent knowledge of information that was not contained in his pre-suit disclosure to the government. *In re Natural Gas Royalties*, 562 F.3d at 1044; *Reagan*, 384 F.3d at 177.

Moreover, Abbott never produced the April 9 letter or its attachments during discovery. (ROA.24481; ROA.24485-515; ROA.24786-88.) He instead listed it on his privilege log and refused BP's repeated production requests. (ROA.24481-82.) Because the letter and attachments were not produced to BP, the district court properly found them inadmissible. (ROA.28297); *see McClure v. Vice President, Human Resources, Union Carbide Corp.*, 2005 WL 1214645, at *7 (S.D. Tex. May 20, 2005); *Mitutoyo Corp. v. Cent. Purchasing, LLC*, 2005 WL 1026710, at **3-4 (N.D. Ill. Apr. 20, 2005). Abbott thus presented no evidence of a pre-suit disclosure.

B. Abbott failed to raise a material fact issue on the elements of falsity, scienter, and materiality.

If this Court reaches the merits of the FCA claim, it should affirm the summary judgment because Abbott failed to raise a material fact issue on three required elements: (1) that BP made a false statement to the government, (2) with the required scienter; (3) that was material to the government's payment decision.

1. There is no evidence of falsity, and Abbott's claim to the contrary rests on a flawed regulatory interpretation that DOI has rejected.

Abbott's contention that BP falsely certified compliance with OCSLA regulations—addressed in two separate sections of his brief (Br. 23-27, 51-58) but together here—was properly rejected below because there is no evidence BP made a false certification and Abbott's contrary argument rests on a flawed interpretation of the DOI regulations.

Abbott's claim is based on two certifications BP made in the Platform Application and one certification it made in the PSS Application. Each certification was truthful.

a. The Platform Application certification was not false.

BP submitted its Platform Application (ROA.21870-22248) under 30 C.F.R. §250.901(d) (2002), which provided:

> (d) The lessee shall have detailed structural plans as called for in paragraph (b)(1)(iii) of this section and specifications for new platforms or other structures and major modifications certified by a registered professional structural engineer or civil engineer specializing in structural design. The lessee shall also sign, date, and submit the following certification: *Lessee certifies that the* ***design of the structure/modification has been certified by a registered professional structural or a civil engineer specializing in structural design****, and the structure/modification will be fabricated, installed, and maintained as described in the application and any approved modification thereto. Certified design and* ***as built plans and specifications will be on file at ____.***

(ROA.22347 (emphasis added).)

Abbott alleged that BP falsely certified that (1) RPEs had certified the detailed structural plans for the Platform, and (2) as-`1built plans would be kept on file in Houston. The district court properly rejected these claims.

(i) Abbott's RPE allegations fail.

Abbott's RPE theory blurs two separate requirements contained in former Section 250.901(d). The first requirement is that the lessee have *detailed structural plans* certified by RPEs, but it does not require a certification by BP to the government. The second requirement—the certification upon which Abbott bases his claim—is that the lessee certify that the *design* (not the *detailed structural plan*) was certified by an RPE. (*Id*.) Contrary to Abbott's argument (Br. 23-24), the design certification is the only relevant certification here.

This distinction is important because DOI's platform regulations distinguish between three phases of the regulatory process for platform approval: the design phase, the fabrication phase, and the installation phase. *See* 30 C.F.R. §250.902(a) (2002) ("These requirements apply to the design, fabrication, and installation of new . . . platforms."); §250.902(b)(2)(2002) (requirements for "Design verification plan"); §250.902(b)(3)(2002) (requirements for "Fabrication verification plan"); §250.902(b)(4) ("requirements for "Installation verification plan"); §250.903(a)(1),

(2), (3)(2002) (maintaining same phase distinctions relating to duties of certified verification agent). (ROA.5274-77.)

While the challenged certification relates only to the design phase, Abbott's factual allegations relate only to the fabrication phase and thus cannot support his false certification claim.

The design of the Atlantis hull (including all elements necessary to ensure the platform's structural integrity and functionality) was the responsibility of GVA Consultants, a world-leading designer of semi-submersible vessels for the offshore industry. (ROA.24154-56; ROA.24834-38; ROA.26986-27006.) Because GVA is a Swedish firm and its engineers are not "registered Professional Engineers" within the United States, BP obtained DOI's approval to depart from the specific certification language required by Section 250.901(d). (ROA.22254-59.) Abbott conceded that, in light of DOI's approval, GVA's design plans cannot support his claim. (ROA.16062-63.)

Instead, Abbott's claim rests entirely on the absence of RPE stamps on documents prepared by Daewoo Shipbuilding & Marine Engineering ("DSME") during part of the *fabrication* phase.[11] DSME, a Korean company and one of the world's leading shipbuilders, did not *design* the hull; rather, it *fabricated* the hull

[11] Abbott says only 8 of 1,154 platform design drawings had an RPE seal (Br. 52). DSME prepared 1,013 of these 1,154 drawings (ROA.18896), illustrating the extent to which Abbott's theory rests on the DSME allegations.

based on GVA's design and with GVA's direct oversight and approval. (ROA.24155-58; ROA.20863-66.) Under the intense supervision of GVA and ABS engineers, DSME prepared drawings necessary to implement GVA's design. (ROA.24155-58; ROA.24834-38; ROA.26970-79; ROA.26986-27006).[12] The roles of GVA and DSME match DOI's regulatory distinction between "design" and "fabrication," and DSME is thus categorically excluded from the reach of the certification required by 30 C.F.R. §250.901(d)(2002). Abbott's allegations about DSME also were debunked in BP's surreply below. (ROA.26967-84.)

Even if Abbott were correct that the platform certification also required RPE approval of "detailed structural plans" and not just design plans, summary judgment still was proper because BP had the correct "detailed structural plans" certified by GVA engineers. (ROA.24154-58; ROA.24833-39; ROA.26986-27006.) Section 250.901(d) describes the "detailed structural plans" as those outlined in "paragraph (b)(1)(iii) of this section." (ROA.22347.) That paragraph, in turn, lists the particular plans as: "Drawings, plats, front and side elevations of the entire platform, and plan views that clearly illustrate essential parts . . . ." 30 C.F.R.

[12] DSME did develop certain "detailed design" drawings as part of the fabrication process, which were necessary to fabricate the hull and generate final as-built drawings. But Abbott mischaracterizes both the purpose of those drawings and GVA's role. The design work done by DSME to prepare these drawings focused on specific aspects that did not impact GVA's structural design—e.g., information concerning the routing of piping, ducts and cabling, as well as the location of equipment skids and foundations, electrical components, vents, doorways, and ladders. In addition, DSME prepared fabrication drawings, showing the step-by-step process of building the hull. (ROA.24157; ROA.24154-58; ROA.24833-39; ROA.26986-27006.)

§250.901(b)(1)(iii)(2002) (ROA.5273.) These detailed plans were largely prepared and certified by GVA, with the remainder prepared by KBR, with RPE approval. (ROA.24158.) In light of DOI's exemption of the RPE certification for GVA, Abbott's FCA claim cannot rest on this theory either.

(ii) Abbott's "as-built" allegations fail.

Abbott also alleges that BP falsely certified in the Platform Application that "as built plans and specifications" will be kept on file at BP's Houston Office. (ROA.24918.) Abbott's argument rests on the assumption that drawings that do not bear as-built stamps or labels cannot be as-built drawings. (Br. 26-27, 55.) Both DOI and the district court have squarely rejected this argument. (ROA.21427 & n.10 ("[T]here is no requirement that such drawings carry the label 'as built.'"); ROA.21438-39; ROA.27411.) On their face, the DOI regulations contain no such as-built labeling requirement, as Abbott's own expert conceded. (ROA.21289-92.)

Moreover, as DOI verified, BP maintains a complete set of as-built drawings for the platform at its Houston offices, as BP certified it would do. (ROA.21423; ROA.21427; ROA.21429; ROA.23576; ROA.23469; ROA.23479; ROA.23495; ROA.23642-43.) In response to DOI's request for copies of the as-built drawings, BP provided more than 3,400 drawings in 2009 and 2010. (ROA.21423; ROA.5191-93.) Upon review, DOI confirmed that these drawings satisfied DOI's regulatory requirements. (ROA.21429.)

BP's briefing (*see, e.g.*, ROA.20872-80) and summary judgment evidence (ROA.23698-700; ROA.23460-95; ROA.23564-76; ROA.24154-58; ROA.24833-38; ROA.26986-27006), explain in detail (1) how the as-built drawings were created from the design and fabrication efforts of GVA, DSME, Mustang Engineering, and KBR, including after the integration of the hull and topsides, as well as (2) the process to complete the as-built drawings before Atlantis was moved to its location in the Gulf of Mexico.

In contrast, Abbott has no evidence that BP's 2002 certification was false, which, at a minimum, would require proof that the as-built drawings do not match the actual build-out of Atlantis, and that BP had no intention, when it made the certification, of maintaining the necessary as-built documents. Neither Abbott nor his "expert" Michael Sawyer has even been to Atlantis, compared any drawings to the actual components on Atlantis, or could identify any component that was installed differently than as depicted on an "as built" drawing. (ROA.19961-62; ROA.20938-39; ROA.20952, ROA.20958; ROA.21245; ROA.21249; ROA.21257-58; ROA.21295-96.)

Abbott therefore resorts to arguments about BP's internal procedures. (Br. 26.) But BP never certified to DOI that it would maintain as-built drawings according to its own internal procedures. BP's certification therefore cannot be false, irrespective of whether BP chose to follow those internal procedures.

Moreover, Abbott's contention that BP had a uniform, absolute requirement that all as-built documents be stamped "as-built" is not supported by the record. (ROA.23457-60; ROA.23465-67; ROA.23477-80; ROA.23569-73; ROA.23637-38.) Rather, BP's practice was to require that the as-built drawings reflect the structure or component as it currently exists, and BP's as-built drawings satisfy that requirement. (ROA.23457; ROA.23463; ROA.23469-70; ROA.23479; ROA.23491-92; ROA.23637-38; ROA.23644-45.) Abbott agrees that the definition of "as-built" means that the drawings reflect the physical equipment at the facility. (Br. 26; ROA.21288.) Given that the regulations do not define "as built plans and specifications," but instead allow the lessee to establish its own "business practice[s]" for complying with this regulation, 70 Fed. Reg. 41556, 41571-72 (July 19, 2005), Abbott cannot establish even a regulatory violation, let alone a violation of the FCA.

b. The PSS Application certification was not false.

Abbott's final theory is that BP falsely certified in the PSS Application that the designs for the mechanical and electrical systems had been approved by RPEs.[13] (ROA.16090.) Abbott's allegations rest on the erroneous premise that,

[13] As noted above, the PSS Application was submitted through a series of letters. The challenged certification, included with the August 1, 2005 letter, provides: "Per the requirements of 30CFR250, Section 250.802(e)(5), this document certifies that the design for the Mechanical and Electrical systems for the Atlantis semi-submersible production unit . . . were reviewed and approved by registered professional engineers licensed in the state of Texas." (ROA.16944.)

given the requirements of the Texas Engineering Practices Act ("TEPA"), the absence of an RPE stamp on a drawing is proof that the required engineering work that is the subject of the certification was not performed. (Br. 24-25, 53, 56-57.) This premise is incorrect, and the record establishes that BP's certification was accurate.

(i) RPE stamps are not required for the Production Safety System design documents.

The applicable regulation required the PSS Application to include a "[c]ertification that the design for the mechanical and electrical systems to be installed were *approved by registered professional engineers*." 30 C.F.R. §250.802(e)(5) (emphasis added) (ROA.5266.)

Nothing in the plain language of this regulation requires RPE stamps on the design drawings, and both DOI and the district court agreed that such stamps are not required. (ROA.21111-12; ROA.21427; ROA.27441.) In fact, DOI contemplated and *rejected* a requirement that plan drawings be affixed with a RPE stamp. (ROA.20857-60); 51 Fed. Reg. 9316, 9389 (Mar. 18, 1986); 53 Fed. Reg. 10596, 10660 (Apr. 1, 1988).

Attempting to circumvent this obstacle, Abbott cites TEPA for the proposition that "[i]f an engineering drawing is missing the seal of a RPE, then that drawing is not a certified design." (Br. 53.) But TEPA does not apply here. OCSLA extends federal law to the outer continental shelf, 43 U.S.C. §1333(a)(1),

and incorporates the "laws of each adjacent state" as surrogate federal law only where (1) it is necessary "to fill a significant void or gap" in federal law, *Nations v. Morris*, 483 F.2d 577, 585 (5th Cir. 1973), and (2) the adjacent state law is not "inconsistent with . . . Federal laws and regulations." 43 U.S.C. §1333(a)(2)(A); *Bartholomew v. CNG Producing Co.*, 862 F.2d 555, 557 (5th Cir. 1989).[14]

There is no "significant void or gap" where, as here, federal regulations govern the certification at issue. DOI concluded that RPE stamps are not required, and DOI considered and rejected the precise requirement Abbott seeks to impose. (ROA.20857-59.) *Cf. Shell Offshore Inc. v. Kirby Exp. Co. of Tex.*, 909 F.2d 811, 815 (5th Cir. 1990) (holding that Louisiana property law did not apply to a lessee's obligation to remove an offshore pipeline because it conflicted with DOI regulatory requirements).

(ii) The Production Safety System design was approved by RPEs, as BP certified.

Abbott also claims to have raised a fact issue regarding whether RPEs approved the mechanical and electrical system of the Production Safety System based on his argument that a *single* professional engineer must approve and stamp the Production Safety System design drawings. His argument rests on application of TEPA (Br. 57), which, as noted above, does not apply. Instead, the applicable

[14] Even if adjacent state law were to apply, it would be the law of Louisiana, because Atlantis is offshore Louisiana. 43 U.S.C. §1333(a)(2)(A).

federal regulation requires only that the designs be "approved by registered professional engineer**s**." 30 C.F.R. §250.802(e)(5) (emphasis added). The record established BP's compliance with this regulation and thus, the accuracy of its certification. (*See, e.g.*, ROA.23699 at ¶¶ 9-10 (listing registered professional engineers who approved the design); ROA.23556-59; ROA.5207-18.)

The process of developing and approving the Production Safety System's design was extensive and involved professional engineers' review and approval at several levels. Teams of Mustang engineers, many of whom were RPEs and who were supervised by RPEs, developed the piping and instrumentation diagrams ("P&IDs") and process flow diagrams for the Production Safety System. (ROA.23414-15; ROA.23423-25; ROA.23427-29.) The drawings also went through "squad checks" in which groups of engineers, including multiple RPEs, reviewed and approved the drawings. BP outlined this process for DOI, and Mustang independently verified BP's description of Mustang's process. (ROA.5207-18; ROA.24140-42.)

After the design process, there was another level of review involving professional engineers. All relevant drawings went through a hazard and operability study process for several weeks, in which a large group that included professional engineers analyzed the drawings from both a safety and operability perspective. (ROA.23413-19; ROA.23421-26.)

In an attempt to create a fact issue, Abbott claims that BP's corporate representative, Frank Ragan, testified that he was unaware of any RPE having approved the mechanical and electrical systems. (Br. 26.) But Ragan said the opposite. He testified, consistent with the group approach at Mustang, that no single engineer approved the drawings. (ROA.23555.) He then explained that the drawings had been approved by a group of engineers that included professional engineers, whom Ragan proceeded to name. (ROA.23556-59.)

In short, the record established that the mechanical and electrical system of the Production Safety System had been "approved by registered professional engineers," as BP certified.

2. There is no evidence of scienter.

Even if Abbott could establish that BP made a false statement, he failed to offer any evidence that BP knowingly cheated the government. *United States ex rel. Taylor–Vick v. Smith*, 513 F.3d 228, 231 (5th Cir. 2008) ("The evidence must demonstrate 'guilty knowledge of a purpose on the part of [the defendant] to cheat the Government,' or 'knowledge or guilty intent."') (internal citations omitted).

Scienter cannot be found where (1) the government agrees with the defendant's interpretation of a rule or regulation, or (2) the rule or regulation is ambiguous and the defendant makes a reasonable but erroneous interpretation. *See, e.g.*, *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287-88 (D.C. Cir.

2015); *United States ex rel. Ketroser v. Mayo Found.*, 729 F.3d 825, 831-32 (8th Cir. 2013); *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 682, 684 (5th Cir. 2003) (en banc) (Jones, J., concurring). This principle makes sense because BP could not have knowingly violated a regulation by interpreting it in the same manner that DOI interprets it, or by failing to anticipate the contrary interpretation Abbott urged years later. (*See infra* Part I.C.)

The scienter evidence showed that BP's employees engaged in careful and thoughtful analysis as they worked to understand and comply with the regulations. (ROA.23679-82; ROA.23601-06; ROA.23609; ROA.23611-14; ROA.23619-23; ROA.23626-28.) BP also sought the advice of third parties, including ABS, to ensure that its certifications were accurate. (ROA.23680.) This conduct does not reflect a "reckless disregard for the truth or falsity" of the certifications. *Taylor–Vick*, 513 F.3d at 230. Abbott failed to raise a fact issue on scienter on any of his theories.

Platform Application—RPE seals. Abbott's allegations relating to the Platform Application rest on his claim that the engineering drawings prepared by DSME during the fabrication phase did not have RPE stamps. (*See supra* note 11 and accompanying text.) Abbott says BP acted with scienter because it knew these drawings could not have been stamped by American RPEs, yet never sought a DOI waiver. (Br. 29.)

Abbott offered no evidence that BP's decision not to seek a DOI waiver for DSME reflected a "guilty intent." After considerable research, including discussions with a regulatory consultant and ABS, BP determined that a waiver was unnecessary because DSME's work fell outside the scope of the regulation. (ROA.23679-80, ROA.23606, ROA.23609, ROA.23611-14.) BP also repeatedly informed DOI that DSME would be building the hull and preparing drawings and that construction would take place in Korea. (*See, e.g.*, ROA.23763; ROA.22841.) Even if BP erred in its reading of the regulation, the evidence showed that BP carefully considered the issue and made its decision in good faith.

Platform Application—"as-built" stamps. BP could not have acted with scienter for failing to have "as-built" stamps on its platform drawings, given DOI's conclusion that there is no requirement in the OCSLA regulations that such engineering drawings "carry the label 'as built' or that they be maintained in a specified manner." (ROA.21427, n.10.) The evidence confirmed that BP believed its certification about as-built drawings to be truthful and correct. (ROA.23677-82; ROA.23619-23; ROA.23637-38; ROA.23469-70; ROA.23469-79; ROA.23483.)

In support of his scienter allegations, Abbott cites to his own declaration attached to his Amended Complaint and certain attached emails and spreadsheets purporting to show BP documentation deficiencies. (Br. 28-29.) This effort fails.

First, by citing to his declaration attached to his Amended Complaint (ROA.300-49) rather than the identical declaration in the summary judgment record (ROA.18996-19045), Abbott seeks to circumvent the district court's unchallenged ruling that struck the cited paragraphs of his declaration. (ROA.24901-05; ROA.27449; *see infra* Part III.) Second, Abbott never cited this evidence in his summary judgment response and cannot rely on it to raise a fact issue now. (ROA.19142-45.) Third, the cited testimony and exhibits relate to Atlantis's subsea components, which Abbott conceded are irrelevant to the certification in the Platform Application (which is why BP successfully objected to their admission). (ROA.16060, n.41.) Finally, DOI reviewed the same documents and determined they do not support Abbott's theory. (ROA.21428-35.)

PSS Application—RPE seals. BP could not have acted with the necessary scienter with respect to Abbott's Production Safety System allegations, in light of DOI's conclusions that (1) such allegations are "premised on a fundamental misreading" of the relevant DOI regulations (ROA.21439), (2) the Production Safety System was "installed consistent with the approved design," and (3) the government's inspections confirmed that the system was "installed correctly, as approved, and that these systems functioned properly." (ROA.21416.)

Sustala, BP's regulatory compliance coordinator who submitted the section Production Safety System certification, testified that he was advised by Ken

DeJohn, the Atlantis Topsides Engineering Manager, that the design of the mechanical and electrical systems had been approved by RPEs. (ROA.23680-81; ROA.23626-28.) DeJohn worked directly with Mustang engineers as they designed the systems (ROA.23681) and testified that Mustang approved the Production Safety System as required by the regulations. (ROA.23452-54; ROA.23488-89.) Mustang's project engineering manager also confirmed that individual stamps were not necessary, that Mustang RPEs approved the design of the Production Safety System systems, and that BP's certification was accurate. (ROA.23513-14; ROA.23527-29; ROA.5207-18.)

Abbott challenges BP to answer how "plans can be certified by a RPE without bearing some indicia of certification." (Br. 30.) That begs the question of what the regulation requires. Under DOI's and BP's interpretation, a party can comply by obtaining the approval of a group of RPEs. (*See supra* Part I.B.1.b.)

Abbott failed to raise a fact issue on scienter regarding *any* of his FCA theories.

3. There is no evidence of materiality.

The district court properly concluded that Abbott failed to raise a fact issue on materiality, observing that even after "reviewing Abbott's claims, Interior continued the lease with BP." (ROA.27441.)

Abbott's primary response is that DOI's decision to maintain the leases is irrelevant under *United States ex rel. Longhi v. Lithium Power Technologies, Inc.*, 575 F.3d 458 (5th Cir. 2009), where this Court rejected the "outcome materiality" test[15] and held that "[a]ll that is required under the test for materiality . . . is that the false or fraudulent statements have the potential to influence the government's decision." *Id.* at 469, 470.

After Abbott's brief was filed, the United States Supreme Court clarified the test for materiality in a way that implicitly overrules *Longhi*. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2004 (2016). The Court emphasized that "[t]he materiality standard is demanding." *Id.* at 2003. It then revived the "outcome materiality" test, explaining:

> [I[f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Id. at 2003-04. The Court also rejected the government's position (and *Longhi*'s) that "any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation." *Id.* at 2004.

[15] That test required proof that the falsehood or misrepresentation "affect[ed] the government's ultimate decision whether to remit funds to the claimant." 575 F.3d at 468-69.

Under *Escobar*, the fact that the government allowed BP to continue producing oil and gas in the face of Abbott's allegations is thus "very strong evidence" that the challenged certifications are not material. *Id.* Indeed, DOI could see for itself that the platform design drawings and Production Safety System drawings did not have RPE stamps and that BP's as-built drawings did not have as-built labels, and yet the absence of these markings did not even result in a temporary suspension of production from Atlantis.

The only evidence that Abbott cites for materiality is DOI's Bryan Domangue's testimony that he would not issue a Production Safety System permit if the application included a false certification. (Br. 33.) But Domangue was not testifying about BP's PSS Application or Abbott's allegations in particular. In fact, he rejected Abbott's theory that BP's PSS Application included a false certification and testified he has never determined the validity of drawings based on the existence of a RPE stamp. (ROA.21129.) Thus, Abbott failed to raise a fact issue on materiality.

C. An FCA claim based on Abbott's regulatory interpretation would deprive BP of due process.

Even if Abbott's regulatory interpretation were correct—and it is not—BP could not be held liable because BP did not receive fair notice of that interpretation from DOI. The Due Process Clause requires that a regulated entity receive fair notice of regulatory requirements, which, if violated, would expose the entity to

civil liability, including penalties. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *cf. Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) ("[A]gencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"). In applying the fair notice doctrine, courts examine whether, "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

Here, BP could not have received fair notice of the regulatory standards on which Abbott bases his FCA claims because DOI expressly rejected Abbott's interpretation. DOI has never required that (1) as-built drawings comply with the regulations only if they bear the words "as-built" on their face, or that (2) designs and drawings approved by RPEs comply with the regulations only if they bear an RPE stamp. The regulatory history instead reveals that DOI considered and rejected such requirements, as confirmed by DOI's rejection of Abbott's interpretation in the DOI Report. (ROA.10871); *see also* 51 Fed. Reg. 9316, 9389 (Mar. 18, 1986); 53 Fed. Reg. 10596, 10660 (Apr. 1, 1988). Accordingly, finding BP liable under Abbott's interpretation would violate BP's due process rights.

D. There is no competent evidence of damages.

Summary judgment on Abbott's FCA claim also should be affirmed because of the absence of competent damages evidence.

Abbott first sought a recovery of more than $266 billion—an amount larger than the market capitalization of all but nine public companies[16]—which reflected the trebled amount of his "expert" Scott Bayley's claim of $88.8 billion in historical and future "economic benefits" associated with Atlantis. (ROA.12155, 19612.) That amount later dropped to $191 billion ($63.7 billion trebled) by the time BP moved for summary judgment (ROA.12155), and to $77.1 billion ($25.7 billion trebled) when Abbott cross-moved for summary judgment. (ROA.16108, 18994.) On BP's motion (ROA.19440-72), the district court struck Bayley's testimony, finding that his "report is a press release, not a serious analytical study." (ROA.27442, ROA.27449.) The court also found that BP had conclusively proved the absence of damages by showing it "has fully paid the United States under the leases—more than $600 million in royalties, bonuses, and rental fees." (ROA.27443.)

On appeal, Abbott does not challenge the district court's exclusion of Bayley's report and testimony on reliability and relevance grounds—the sole

[16] *See* Financial Times, FT 500 2015 Introduction and Methodology, http://www.ft.com/cms/s/2/1fda5794-169f-11e5-b07f-00144feabdc0.html#axzz4DHvUVlme (last visited July 5, 2016).

evidence offered below in support of his damages claim. Instead, Abbott points to three categories of "damages" he claims the court overlooked: (1) the intangible safety and environmental protection benefits promised by BP in connection with its mineral production; (2) the unquantified costs of the government's investigation of Abbott's claims; and (3) civil penalties available under the FCA. These arguments fail.

1. Abbott cannot resuscitate his damages claim by relying on "intangible benefits" cases.

As the district court found (ROA.27442-43), the appropriate measure of damages in an FCA false certification case is the "benefit of the bargain," *i.e.*, the difference between the amount the government bargained to receive and the value of the product or services the government actually received. *Ab-Tech Constr., Inc. v. United States,* 31 Fed. Cl. 429, 434 (Fed. Cl. 1994); *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972); *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1277-79 (D.C. Cir. 2010). The government received exactly what it bargained for—more than $600 million in bonus, rental, and royalty payments from BP (through February 2011), and BP's investment of billions of dollars for exploration and production of hydrocarbons. (ROA.21739.)

Abbott accuses BP of having the "cynical attitude" that "only money matters"—a breathtaking accusation from someone who sought a $266 billion recovery. (Br. 35.) Instead, Abbott argues that the government has been deprived

of intangible "safety and environmental protection benefits," and is thus entitled to all of BP's mineral production from Atlantis, "less the benefits BP has already paid the government." (Br. 35, 38.) Abbott theorizes that but-for BP's alleged false certification, the government would have been free to lease the minerals to someone who would not only have paid the royalties, bonuses, and fees, but also would have provided the safety and environmental protections it bargained for. (Br. 36-37.) The district court properly concluded that Abbott invoked an improper damages measure, one that "would pass cost-free to the government the discovery of the field, producing wells, pipeline networks and costs directly required to produce the oil." (ROA.27443.)

Abbott's reliance on *United States ex rel. Longhi v. Lithium Power Technologies, Inc.*, 575 F.3d 458, 473 (5th Cir. 2009) is misplaced because there the government sought to confer an *intangible* benefit onto *third parties*. Specifically, *Longhi* involved a program in which the government awarded grants to further an intangible social policy—providing eligible small businesses with research funds to help them market their products. *Id.* This Court limited its damages analysis to circumstances "where there is no tangible benefit to the government and the intangible benefit is impossible to calculate." *Id.* It recognized that its decision would not apply to circumstances where the government contracted for a "tangible benefit" as in the case of "standard procurement

contracts." *Id.* Other courts have recognized the limitation of *Longhi* as well. *See, e.g.*, *Science Applications*, 626 F.3d at 1279 (distinguishing category of cases, including *Longhi*, "where the defendant fraudulently sought payments for participating in programs designed to benefit third-parties rather than the government itself"); *United States ex rel. McLain v. Fluor Enterprises, Inc.*, 2015 WL 5321692, at *10 (E.D. La Sept. 11, 2015) (*Longhi* limited to circumstances where government received no tangible benefit and intangible benefit was thwarted).[17]

The BP leases are far more similar to a standard procurement contract than any "intangible benefits" case. The offshore leases are typical of economic transactions between private parties. The government contracted with BP to incur the entire financial risk of exploring for and producing oil and gas in exchange for paying bonuses, rentals, and royalties. The government was not seeking merely to obtain an intangible benefit to society, like when it provides grants to foster research, attaches conditions to funds to support small businesses, or provides subsidies to industries.

[17] Abbott's reliance on *United States v. Thomas*, 709 F.2d 968, 970 (5th Cir. 1983), is similarly misplaced. That case involved subsidies provided to cotton growers for which the defendant had falsely certified its eligibility. No tangible benefits were provided to the government or contemplated in the contract, and the government received no tangible benefits from increased cotton production (in contrast to the royalty payments received here). *Id.* at 972.

Even when the government contracts to receive both tangible benefits and an associated intangible benefit, the measure of damages is predicated on whether the government received the *tangible* benefit for which it bargained, regardless of whether the intangible benefit was realized. *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 916, 922-23 (4th Cir. 2003) (no damages despite false certification of absence of conflict of interest where there was no evidence that cost of prevailing subcontract was greater than it would have been for another firm); *Ab-Tech*, 31 Fed. Cl. at 431-34 & n.7 (no damages despite false certification that contractor was an eligible minority-owned enterprise where the government received the facility it paid for); *see also Science Applications*, 626 F.3d at 1279.

In short, the district court correctly concluded that Plaintiffs' requested damages and related evidence did not comport with the applicable legal standard. Even if the *Longhi* measure were applicable, summary judgment would still be proper because Abbott failed to challenge the district court's exclusion of Bayley's testimony—the only damages evidence proffered.[18]

[18] Plaintiffs' one-sentence reference to the exclusion of Bayley's testimony (Br. 66) does not satisfy Rule 28(a)'s requirements for challenging the district court's ruling, *Spear Mktg., Inc. v. BancorpSouth Bank*, 791 F.3d 586, 602-03 (5th Cir. 2015), which was amply supported by the record. (ROA.19440-72.)

2. Abbott cannot recover the costs of the government's investigation.

Abbott next claims that the government is entitled to recover the costs of its investigation (Br. 39), but he waived this argument by failing to assert it or introduce evidence of such costs below. (ROA.295; ROA.21819-21; ROA.19147-52); *see Nunez v. Allstate Ins. Co.*, 604 F.3d 840, 846 (5th Cir. 2010). In any case, that investigation led to the government rejecting Abbott's claims, and such costs are not an appropriate measure of damages under the "benefit of the bargain" measure. Abbott cites no contrary authority.

3. Statutory penalties are not actual damages.

Finally, Abbott accuses the district court of overlooking statutory "damages," but he references civil penalties, which are *not* damages. *See* 31 U.S.C §3729(a)(1); *Science Applications*, 626 F.3d at 1277-78 (noting distinction between these "two types of liability"). BP's summary judgment motion stated that it "addresse[d] Abbott's request for actual damages, not the claim for civil penalties under the FCA." (ROA.12151, n.2; ROA.12164, n.9.) Thus, even if Abbott were able to overcome all of the other FCA summary judgment grounds, he would be entitled only to a limited remand to prove his entitlement to "a civil penalty of not less than $5,000 and not more than $10,000" for the allegedly false certification. 31 U.S.C. §3729(a)(1)(G).

Under no circumstances could Abbott resuscitate his actual damages theory on remand because he relied on an improper measure of damages and failed to challenge the district court's exclusion of his sole damages evidence. *See United States v. Castillo*, 179 F.3d 321, 326 (5th Cir. 1999) ("The waiver doctrine bars consideration of an issue that a party could have raised in an earlier appeal in the case."); *see also Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011).

II. The district court properly granted summary judgment on Plaintiffs' OCSLA claims.

This Court should affirm the district court's holding that Plaintiffs lacked constitutional standing to bring an OCSLA citizen-suit enforcement action. (ROA.27444-45.) Even if Plaintiffs could overcome this fundamental obstacle, this Court should affirm based on the arguments BP raised on the merits below. (ROA.12197-226.)

A. Plaintiffs did not satisfy Article III's standing requirements.

Abbott and FWW failed to satisfy their burden to prove standing under Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). They have not established: (1) an injury-in-fact—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct; and (3) that it is likely, not merely speculative, that a favorable decision will redress the injury. *Id.* at 560-61.

1. Plaintiffs did not satisfy Article III's injury-in-fact requirement.

Plaintiffs did not demonstrate that they suffered or would suffer an injury-in-fact. Instead, they advanced generalized interests in the Gulf and speculated that a potential future injury from a hypothetical oil spill from Atlantis might impact them. Article III requires far more.

a. Plaintiffs did not demonstrate a concrete and particularized harm.

A plaintiff must demonstrate that his injury is "concrete" and "particularized" to establish an injury-in-fact. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). A "concrete" injury must be real, not abstract—it must "actually exist." *Id.* A "particularized" injury "affect[s] the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560-61 & n.1. Plaintiffs must thus "have a direct stake in the outcome," *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972), greater than that "of concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687 (1973).

Neither Abbott nor the FWW designees established a concrete and particularized injury. Abbott relied on his general recreational and aesthetic interests in the Gulf (Br. 41), but he did not explain how any of his interests would be harmed if there were an incident at Atlantis. (ROA.10385-87.) At best, Abbott

is a concerned bystander who lacks a concrete injury-in-fact. *SCRAP*, 412 U.S. at 687.

The FWW designees—Estay, James, and Boland—likewise failed to establish a concrete and particularized injury, relying on conclusory statements in their declarations that are undermined by their deposition testimony. (Br. 41-42.)[19]

Estay claims an interest in the Gulf based on his shrimping business, but he does not operate near Atlantis, and he could identify no specific harm his business would suffer if there were an incident at Atlantis. Instead, he is merely "concerned about the impact another spill could have on the health of the Gulf." (Br. 42; *see* ROA.10600; ROA.10609-10; ROA.10619; ROA.280-81.)

James claimed a recreational interest in the Gulf, where she observes plants and animals. She does not live on the Gulf, and had rarely been on a boat in the Gulf. (ROA.10652-53.) She, like Estay, presents no evidence that Atlantis poses a threat to her interests, and claims only to be "concerned" about another oil spill on the Gulf. (Br. 42.)

Boland lives and works in California. (ROA.10433; ROA.10437.) Her only interest in the Gulf is a property on South Padre Island, Texas, which she has rented to a third party since 2007. (ROA.10445; ROA.10445-46; ROA.10448.)

[19] Moreover, the district court struck many of the declaration paragraphs on which Plaintiffs rely. (ROA.28297 (striking ROA.19055-57, ¶¶3-8; ROA.19049 ¶¶6, 8-13; ROA.19064-65 ¶¶6-9, 11); ROA.24905-07.) Plaintiffs make no showing that this ruling was erroneous.

Boland was uncertain how a spill would affect the value of her property (which is not on the beach); in fact, she raised the rent on it after Deepwater Horizon. (ROA.10443; ROA.10445-48.)[20]

Plaintiffs contend their injuries are similar to those found to establish standing in *Center for Sustainable Economy v. Jewell*, 779 F.3d 588 (D.C. Cir. 2015) and *Gulf Restoration Network, Inc. v. Salazar*, 683 F.3d 158 (5th Cir. 2012) (Br. 42-43.) But the plaintiffs in those cases, unlike here, established that they had particular connections to the specific environmental areas at issue. *Jewell*, 779 F.3d at 596; *Salazar*, 683 F.3d at 167; *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-82 (2000). These cases instead confirm that Plaintiffs' general recreational interests in the Gulf do not satisfy Article III. Accepting Plaintiffs' claims would confer standing on anyone who lived, visited, or planned to visit the Gulf, virtually eliminating the injury-in-fact requirement. *See Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009).

b. Plaintiffs did not establish an imminent injury.

Plaintiffs also failed to establish that any injury they might suffer is "actual or imminent," rather than "conjectural or hypothetical." *Lujan*, 504 U.S. at 560-61.

[20] Plaintiffs point to Judge Hoyt's conclusion that their allegations were sufficient to confer standing. (Br. 42.) But "the standard used to establish standing is not constant but becomes gradually stricter . . . as the parties proceed through 'the successive stages of [a] litigation.'" *McCardell v. U.S. Dep't of Hous. & Urban Dev.*, 794 F.3d 510, 516 (5th Cir. 2015) (quoting *Lujan*, 504 U.S. at 560-61). At summary judgment, unlike the dismissal stage, a plaintiff cannot rely on "mere allegations." *Lewis v. Casey*, 518 U.S. 343, 358 (1996).

Where, as here, the likelihood that a feared injury will occur is "extremely remote and speculative, and the time (if ever) when any such accident would occur is entirely uncertain," the plaintiff fails to meet the constitutional requirement that it demonstrate harm that is actual or imminent. *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1293-94 (D.C. Cir. 2007). The threatened injury-in-fact therefore must be "certainly-impending"; allegations of possible future injury are insufficient. *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1147 (2013); *see Crane v. Johnson*, 783 F.3d 244, 251-52 (5th Cir. 2015). An "objectively reasonable likelihood" of injury or a claim of threatened injury that "relies on a highly attenuated chain of possibilities" does not meet this standard. *Clapper*, 133 S. Ct. at 1147-48.

Neither Plaintiffs nor their experts could say how, when, or if there would be an incident at Atlantis. (ROA.10385; ROA.10420; ROA.10740-43; ROA.10811-12; ROA.10667-68; ROA.10692.) As the record reflects, Atlantis has operated without serious incident. That confirms that Plaintiffs' purported injury is "extremely remote and speculative." *Public Citizen*, 489 F.3d at 1293-94.

(i) Plaintiffs' experts did not establish an imminent injury.

Plaintiffs rely on the testimony of Sawyer and Glen Stevick, who they claim establish that it was "almost certain" that a problem at Atlantis will occur and

present an unacceptable risk. (Br. 44.) For several reasons, their reliance is misplaced.

First, the district court sustained BP's *Daubert* and other evidentiary challenges to the reports and testimony of Sawyer and Stevick. (ROA.19951-71; ROA.20370-88; ROA.24897-98; ROA.25214-19; ROA.28297.) Plaintiffs offer no reason to reverse either ruling. (*See infra* Part III.)

Second, both Sawyer and Stevick conceded they had no idea whether an incident might occur. Sawyer could only speculate about a worst-case scenario, or guess about a prediction of any failure that could occur. (ROA.10740-43.) Stevick could not assess the likelihood of any future damage or imminent threat arising from Atlantis. (ROA.10811-12.)[21]

Moreover, Sawyer and Stevick admitted that they had not read the ABS reports or the results of DOI's inspections of Atlantis, had never tested the critical safety devices that DOI has repeatedly tested, and could not identify a single engineering error, let alone one that created an imminent threat. (ROA.10710-13; ROA.10731-33; ROA.10789; ROA.10792-93; ROA.10795; ROA.10797.)

[21] Stevick's inconsistent and conclusory claim that he is "almost certain" that a problem will occur (ROA.10797) does not create a genuine issue of material fact. *Clark v. America's Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997).

(ii) Abbott and the FWW representatives did not establish an imminent injury.

Abbott and the FWW representatives likewise could only speculate about the likelihood of an incident at Atlantis. Abbott provided no specifics about a future "great Atlantis explosion and leak" that he contended would put his economic livelihood at immediate risk. (ROA.10420; ROA.10385.) Boland, Estay, and James also admitted they did not know whether an oil spill from Atlantis is remote or probable. (ROA.10443; ROA.10608; ROA.10646.)

(iii) The Structural Engineers' Report does not establish an imminent injury.

Plaintiffs contend the Structural Engineers' Report establishes a "certainly impending" injury.[22] (Br. 44.) It establishes the contrary. Plaintiffs argue that the Report identified "serious, dangerous, and potentially catastrophic" alleged defects in certain subsea components of Atlantis (Br. 44), but ignore that the components at issue were changed out in BP's previously scheduled 2012 shutdown of Atlantis for subsea maintenance; the Structural Engineers' Report thus no longer reflects

[22] The Structural Engineers' Report was submitted with Plaintiffs' motion for reconsideration, after the district court's summary judgment ruling. (ROA.27551-65; ROA.27793-815.) Although Plaintiffs purport to appeal the district court's denial of reconsideration, they failed to include that ruling in their statement of issues, or identify the appropriate standard of review, or identify any error in the district court's reasoning. *See* Fed. R. App. P. 28(a)(5), (8). Plaintiffs therefore waived the issue. *X Tech., Inc. v. Marvin Test Sys., Inc.*, 719 F.3d 406, 411 n.3 (5th Cir. 2013). Plaintiffs' waiver leaves unchallenged the district court's findings that the "documents, motions, and supplemental motions" Plaintiffs submitted after summary judgment, including the Structural Engineers' Report, "(a) do not present new probative evidence, (b) do not establish an intervening change in the law, or (c) do not show clear error of law or fact." (ROA.28267.)

the current operational integrity of Atlantis. (ROA.27290-344.) The Report has no bearing on the likelihood of a future injury.

(iv) A purported increased "risk" of injury does not establish a certainly impending injury.

Recasting Plaintiffs' "injury" in terms of increased risk fares no better. (Br. 43-45.) Even in cases where, unlike here, small probabilistic injuries are sufficient to confer standing, the risk of injury must nonetheless be real. *Natural Res. Def. Council v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006); *see Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234-35 (D.C. Cir. 1996) (real and quantifiable increased risk of forest fires existed).

In contrast, Plaintiffs presented no evidence of a certain increased risk, only speculation. (ROA.10740-43; ROA.10811-12; ROA.10667-68; ROA.10692.) Their offhand reference to a separate incident, Deepwater Horizon (Br. 45), is irrelevant to their standing and further demonstrates that they lack evidence of an increased risk posed by Atlantis. Were such speculative increased risks sufficient, the requirement of actual or imminent injury would be rendered moot, because all hypothesized, non-imminent injuries could be dressed up as increased risk of future injury. *Natural Res. Def. Council*, 464 F.3d at 6.

(v) Plaintiffs cannot rely on precedent involving certainly impending injuries.

Plaintiffs argue that their case is analogous to this Court's recent decision in *McCardell v. U.S. Department of Housing and Urban Development*, 794 F.3d 510 (5th Cir. 2015), because their purported injury would follow in the "logical course" of events. (Br. 45.) But key to the court's decision was its conclusion that McCardell's injury involved no "unfounded assumptions." 794 F.3d at 520. Her injury would occur if the government approved the already-pending re-development plan and that plan caused the anticipated injury. *Id.* at 515. There was a close relationship between the challenged action and McCardell's injury. The other cases Plaintiffs cite involved similar substantial evidence of a certainly impending injury. *See In re Idaho Conservation League*, 811 F.3d 502, 509 (D.C. Cir. 2016) (plaintiff established a certainly-impending injury from a proposed mine, where he lived near it and presented evidence that the mining company had "concrete plans to proceed"); *Sierra Club v. Jewell*, 764 F.3d 1, 7-8 (D.C. Cir. 2014).

Plaintiffs have no evidence of any existing injury-in-fact or of any certainly-impending threatened injury. *Clapper*, 133 S. Ct. at 1147. They assert a hypothetical chain of causation based on inadmissible expert reports and speculate about an "almost certain" accident. (Br. 45-46.) The district court properly concluded they lacked standing to bring their OCSLA claims. (ROA.27445.)

2. Plaintiffs did not satisfy Article III's causation requirement.

Plaintiffs contend they met their burden to establish causation through the testimony of Stevick, Pierce, and the Structural Engineers' Report. (Br. 46.) Their theory of causation asserts that compliance with regulations reduces the risk of incidents, and that an incident is highly likely to occur absent compliance. (*Id.* (citing ROA.10811, ROA.27810-12).) None of this evidence satisfied Plaintiffs' evidentiary burden.

The Structural Engineers' Report does not state or even suggest that an incident will occur due to any non-compliance, let alone an incident that would cause Plaintiffs any harm.

In his excluded testimony (ROA.28297), Stevick admitted that he had no idea what would happen if there were a discharge at Atlantis. (ROA.10811-12.) He acknowledged that his report failed to identify any personal injuries or environmental disasters that might occur because of an incident at Atlantis. (ROA.10811.)

Pierce's excluded testimony (ROA.20684-95; ROA.25216; ROA.28297) also provides no support for Plaintiffs' theory. He offers general opinions untethered to Atlantis regarding hypothetical problems that could be associated with a speculative oil spill at some unspecified time at an unspecified place from any water-based facility. (ROA.10670-71.) Pierce acknowledged his conclusions

were generic statements based on the literature, none of which is relevant to Atlantis. (ROA.10667; ROA.10691-92.)[23]

Plaintiffs therefore failed to present evidence that their purported injury is "fairly traceable" to BP's alleged actions. *Lujan*, 504 U.S. at 560-61.

3. Plaintiffs did not satisfy Article III's redressability requirement.

Plaintiffs also failed to prove the third element of standing—that their speculative future injury would be redressed by the injunction they sought, which would have required BP to cease all operations at Atlantis until BP fully complied with applicable regulations. (ROA.298.)

A plaintiff seeking injunctive relief must demonstrate it is likely that a favorable judicial decision will prevent the injury. *Summers*, 555 U.S. at 493. Plaintiffs' redressability argument rests on speculation that the purported risk of harm will be reduced if BP's operations are enjoined until it complies with Plaintiffs' interpretation of OCSLA regulations. As discussed above, no evidence establishes that BP's alleged non-compliance with OCSLA regulations will cause potential injury or that any injury would be redressed by the injunction they sought.

[23] Pierce never spoke to Abbott; never read the full complaint in this case; did not investigate the Atlantis subsea controls; did not review any Atlantis drawings, specifications, or schematics; did not study or use BP's oil spill response plan for his analysis; and lacks particular expertise in oil spill response. (ROA.10678; ROA.10669.)

DOI already has investigated plaintiffs' allegations. DOI determined that BP complied with the applicable regulations, Atlantis is safe, BP should continue as the operator, and Atlantis should not be shut-in. (ROA.10844-45; ROA.10854; ROA.10859; ROA.10860; ROA.10883.) DOI confirmed that its Report is the "best evidence" DOI can provide of "the agency's official position on the relevant regulatory interpretations and appropriate enforcement action" regarding Plaintiffs' allegations. (ROA.11163; ROA.11167.)

DOI's Domangue confirmed Atlantis is not a safety threat and is one of the top performers among the 800 offshore platforms in his district. (ROA.10522-23.) After rigorous inspections and investigation, DOI allowed Atlantis to continue to operate because it is in compliance with federal regulations. (ROA.10524; ROA.10527.) DOI continues to monitor Atlantis, and would take enforcement action if it thought Atlantis was operating in violation of the offshore regulations. (ROA.10521; ROA.10524.)[24]

Given this evidence, the requested injunction would merely require BP to do what it is already doing—comply with the relevant regulations. Also, given BP's compliance, and that Atlantis neither caused nor threatens to cause harm, the requested injunction could not redress Plaintiffs' purported future injuries.

[24] Estay testified that if BP could satisfy the government regulators that it had all the as-built drawings, then that would tell him that BP is doing everything that it can do to be safe, and he would have no complaint. (ROA.10609.) DOI regulators are satisfied.

Prospective injunctive relief cannot remove a harm that does not exist. *See Payne v. Travenol Labs. Inc.*, 565 F.2d 895, 898 (5th Cir. 1978). Nothing supports the requested injunctive relief except Plaintiffs' "generalized interest in deterrence, which is insufficient for purposes of Article III." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108-09 (1998).

4. The district court did not give undue weight to the DOI Report.

Plaintiffs try to minimize the importance of the DOI Report, and contend the district court should not have relied on it. (Br. 47-48.) They first argue that the DOI Report had been "significantly undermined" by the Structural Engineers' Report. (Br. 47.) To the contrary, the evidence confirms that DOI management afforded considerable attention to the structural engineers' complaints before finalizing and issuing the DOI Report. The Office of Inspector General ("OIG") conducted exhaustive interviews in which the structural engineers and other DOI personnel provided OIG documents and aired their views. (ROA.27810-15; ROA.27817-18; ROA.27820-987.) The Structural Engineers' Report did not otherwise aid Plaintiffs' efforts to establish Article III's injury-in-fact requirement. The Report identified only certain purported defects that existed more than five years ago, and confirms that Plaintiffs' alleged injuries are not certainly impending. (*See supra* Part II.A.1.b(iii).)

Plaintiffs next contend that the district court was required to "assume" that they would succeed on the merits when evaluating their standing, and could not assume the accuracy of the DOI Report without giving them an opportunity to "demonstrate flaws in the agency's analysis." (Br. 47-48.) Plaintiffs, however, had a full opportunity to challenge the DOI Report, yet they elected not to depose any members of the DOI investigation team (other than Domangue), nor to otherwise develop evidence regarding the DOI's investigation. In any event, the court did not "assume" the accuracy of the DOI Report. Instead, the court considered all of the evidence and concluded that there was no genuine issue of material fact regarding whether Plaintiffs had established standing under Article III.

Finally, Plaintiffs contend that allowing the DOI Report to undercut their lawsuit would "effectively nullify the OSCLA citizen suit provision," because the government could deprive citizens of the right to sue simply by issuing such a report. (Br. 48.) That argument is meritless. The DOI Report did not deprive Plaintiffs of standing; rather, the lack of any evidence to establish an injury-in-fact, causation, or redressability required the dismissal of their claims. Without standing, Plaintiffs cannot sue under OSCLA. *Public Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 119-20 (3d Cir. 1997).[25]

[25] The district court's statement that "this suit can . . . proceed unaffected" even if DOI "determine[s] not to pursue enforcement action against BP," (Br. 48) was made in the context of

5. FWW lacked associational standing.

FWW lacked associational standing because FWW has donors, not members. (ROA.27444.) And as shown above, the chosen FWW representatives did not establish that they had standing to pursue that claim in their own right. *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 827 (5th Cir. 1997). (*See supra* Part II.A.1-4.)

An organization that claims associational standing must establish that "its members would otherwise have standing to sue in their own right." *Assoc. of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010). But FWW has no members. (ROA.27444.) Although its bylaws call donors "supporting members" (Br. 49), FWW's articles of incorporation provide that FWW "shall not have members," and affirm that the term "supporting members" is merely a "title" given to donors. (ROA.11171; ROA.23397.) A non-profit corporation's articles of incorporation control whether the corporation will have members. D.C. Code §29-402.02(a)(5). Corporate bylaws cannot be inconsistent with the articles of incorporation. D.C. Code §29-402.06(b). If FWW's articles of incorporation and bylaws are inconsistent, the articles of incorporation control.

FWW relies on *Center for Sustainable Economy v. Jewell*, 779 F.3d 588 (D.C. Cir. 2015), but there the association's current members were "voting

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the court's determination that DOI was not a necessary party under Rule 19(a), not standing. (ROA.1305-06.)

members entitled to elect its Board," no new voting members were allowed to join without approval of the existing members, and its members actively participated in the association's ongoing operations. *Id.* at 598. There are no similar facts here.

FWW nevertheless argues that it has associational standing because its donors have sufficient "indicia of membership." (Br. 50-51 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 344-45 (1977).) That argument is inconsistent with the law and the record.

The indicia of membership test requires "some very substantial nexus between the organization and the parties it purports to represent." *Health Research Grp. v. Kennedy*, 82 F.R.D. 21, 26 (D.D.C. 1979); *see Hunt*, 432 U.S. at 344-45; *Funeral Consumers Alliance, Inc. v. Service Corp. Int'l*, 695 F.3d 330, 344 n.9 (5th Cir. 2012). FWW's donors serve none of the roles that the Supreme Court has considered relevant to the indicia of membership test. *See Hunt*, 432 U.S. at 344. They do not elect the governing body of the organization, manage the organization, serve on its board, finance its activities, vote on corporate matters or the FWW's activities, or otherwise exhibit any substantial influence and control over the organization. (ROA.10480-81; ROA.10482-83; ROA.10484.) They do not pay membership dues, have a membership committee, hold membership meetings, or have to satisfy any written membership criteria. (ROA.10483-84; ROA.10491.) As

FWW admits, "all it means" for one to be called a "member" of FWW is that one has made a donation to FWW at some point. (ROA.10483; ROA.10487.)

The shared goals of FWW donors does not confer associational standing. (Br. 50-51.) If it did, the "indicia of membership" test would be meaningless. *See Morton*, 405 U.S. at 739. Nor do the individual donors significantly fund FWW's activities. (ROA.19379.)

FWW's donors lack the indicia of membership, and FWW cannot establish associational standing.

B. Plaintiffs' OCSLA claim fails on the merits.

Even if Plaintiffs had standing, this Court should affirm on the merits. (ROA.12197-225.)

1. BP did not violate any OCSLA regulations.

BP explained above why Plaintiffs' allegations of OCSLA violations in connection with the Platform and Production Safety System certifications fail. (*See supra* Part I.B.1.)

Plaintiffs also assert BP violated other regulations concerning pressure relief valves and electro-mechanical controls systems (Br. 58-59), but they rely entirely on their "expert" Sawyer's testimony. Because the district court struck Sawyer's opinions, and Plaintiffs do not argue that the exclusion was improper, their argument fails. (ROA.24897; ROA.27449; ROA.19951-71.) Moreover, in contrast

to Sawyer's incompetent testimony, BP provided uncontradicted testimony of engineers with firsthand knowledge of the facts establishing that BP's installation of valves and control equipment exceeded regulatory requirements and that BP kept DOI apprised of any problems with these components. (ROA.23689-91; ROA.23693-96; ROA.23698-23700; ROA.23707-09; ROA.24878-82.)

2. The court should defer to DOI's application of its regulations and its decision not to shut-in Atlantis.

Plaintiffs' OCSLA claim also fails because DOI's application of its regulations and its determination that Atlantis should not be shut-in are entitled to deference.

Where, as here, an agency has adopted regulations under a general grant of authority, *see* 43 U.S.C. §1334(a), and where the regulations are part of a highly technical regulatory program that requires expertise to administer, courts must defer to the agency's administration of its regulatory program. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

For example, in *Brown v. Offshore Specialty Fabricators, Inc.*, 663 F.3d 759 (5th Cir. 2011), a RICO and OCSLA citizen suit action against certain companies, this Court deferred to the Coast Guard's application of its "foreign control exemption" to OCSLA's foreign worker limitations. *Id.* at 763-66. The plaintiffs in *Brown* accused the defendants of fraudulently deceiving the Coast Guard to obtain that exemption. This Court rejected that argument and affirmed summary judgment

for the defendants because it was "loathe to second-guess the Coast Guard's judgment in issuing foreign control exemptions, especially in light of the deference we owe to agency determinations made pursuant to statutory authority." *Id.* at 766; *see also Moreno v. Summit Mortg. Corp.*, 364 F.3d 574, 577 (5th Cir. 2004) (deferring to agency interpretation of regulation in consumer suit against bank).

Deference to DOI is similarly appropriate here. DOI's regulations are complex. Indeed, it is difficult to conceive of a regulatory program more highly technical and complex than DOI's regulation of offshore platforms, production safety systems, and related components. (ROA.12219-22); *cf. Citation Oil & Gas Corp. v. U.S. Dep't of the Interior*, 448 F. App'x 441, 444-46 (5th Cir. 2011) (deferring to DOI's application of its "highly technical" royalty valuation regulations). Given the voluminous record of engineering data, the highly technical subject matter, and the agency's hands-on application of regulations that it wrote, it simply is not realistic or appropriate to expect the district court to function as a super-offshore-engineering authority and to second-guess the considered judgments of the professionals selected by Congress to regulate deepwater oil and gas production.[26]

[26] In essence, Plaintiffs asked the district court (1) to decide that DOI erred in determining that Atlantis components meet certain technical specifications; (2) to question ABS's verification of design, materials, fabrication, and installation of the Platform; (3) to review the same 3400+ drawings that the DOI investigative team reviewed; and (4) to decide that DOI erred in its inspection and testing of hundreds of Atlantis production components, including critical safety valves. These requests profoundly illustrate why courts defer to agencies.

Applying its regulations, DOI has repeatedly concluded that BP is operating Atlantis safely and in compliance with the law. DOI based this decision on (1) ABS's independent review and approval of the design, fabrication and installation of the Platform, (2) DOI's expansive investigation into Plaintiffs' allegations, (3) DOI's established interpretation of regulations concerning as-built drawings and engineering approval of critical designs; and (4) its annual comprehensive safety inspections, which Atlantis continues to pass with flying colors. (*See supra* Statement of the Case, Parts B, D, E.)

Deference to the agency's determination also maintains uniform application of DOI's regulations. If this Court were to adopt Abbott's interpretation of DOI's regulations over DOI's own interpretation, that decision would affect not only Atlantis but thousands of platforms in federal waters, including the Gulf of Mexico and Pacific Ocean. Such a decision would require platform operators to conform to Abbott's adopted view over DOI's consistent position. Even those operators located outside this Court's jurisdiction would have to choose between DOI's regulatory interpretation and the contrary position of a federal appellate court. Deference to DOI's interpretation of its regulations furthers consistency and uniformity of enforcement. *Cf. Muratore v. U.S. Office of Personnel Mgmt.*, 222 F.3d 918, 923 (11th Cir. 2000) (recognizing that federal agency "has the ability to

take a broad, national view . . . which serves the function of ensuring consistent, nationwide application").

III. Plaintiffs' challenge to the district court's evidentiary rulings should be rejected.

As noted elsewhere, Plaintiffs continue to rely on evidence that was stricken by the district court. (*See, e.g.*, *supra* at pp. 31, 44-45, 54 & n.18, 58 & n.19, 60-62 & n.22, 65-66, 72). Their cursory challenge to these evidentiary rulings fails.

First, the district court did not abuse its discretion by failing to explain its evidentiary rulings. (Br. 63-64.) Neither case Plaintiffs cite requires that a court explain its evidentiary rulings. *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 390 (5th Cir. 2001) (reasons required for "a discretionary, nonmerits dismissal of a declaratory judgment"); *Schwarz v. Folloder*, 767 F.2d 125, 131-33 (5th Cir. 1985) (reasons required for denying attorneys' fees under Rule 54(b)). BP has located no authority requiring such an explanation.

Second, Plaintiffs waived their evidentiary challenges by failing to properly brief them. A brief that provides only conclusory statements and citations to district court briefing does not preserve an argument on appeal. *Spear Mktg., Inc. v. BancorpSouth Bank*, 791 F.3d 586, 602-03 (5th Cir. 2015). Plaintiffs provide nothing more than conclusions and citations to their district court briefs; they do not even cite the evidence they contend was wrongly excluded. For a subset of the stricken evidence, they conclusorily assert that the evidence was admissible, and

then cite to briefing below for this Court to ascertain (1) BP's grounds for objecting, (2) Plaintiffs' attempted rebuttal, (3) whether Plaintiffs' assertions have any merit.[27] (Br. 64-67.)

Plaintiffs' evidentiary arguments would fail regardless because the district court properly excluded evidence that was irrelevant, unauthenticated, speculative, hearsay, improper opinion testimony, or otherwise inadmissible. (ROA.24883-910.) None of the stricken evidence can be used to demonstrate the existence of a fact issue.

IV. The Court should not reassign this case to another judge in the event of a remand.

If remand is somehow necessary, Plaintiffs' request for reassignment to another judge should be rejected.

This Court's power to reassign a case upon remand is an "extraordinary" one that is "rarely invoked." *In re DaimlerChrysler Corp.*, 294 F.3d 697, 700 (5th Cir. 2002). The Court should exercise this power with the "greatest reluctance," and only upon a showing of "bias or antagonism indicating that the judge would refuse impartially to weigh evidence or make objective decisions on remand." *United*

[27] For example, Plaintiffs argue that BP's objections to the admissibility of its internal procedures are "patently unmeritorious." (Br. 64-65.) They assert only that "[t]hey are not," and cite the briefing below. (*Id.*) They ignore BP's showing that "most of the policies plaintiffs cite are not relevant because they do not apply to Atlantis" (ROA.24888-90), and that the procedures would be confusing and unduly prejudicial because the issue is whether BP falsely certified its compliance with OCSLA regulations, not its internal procedures. (ROA.24890.)

States v. Andrews, 390 F.3d 840, 851 (5th Cir. 2004). None of the reasons Plaintiffs provide justify reassignment.

The statements Plaintiffs identify as evidencing bias are, in fact, correct conclusions. For example, Abbott is a "temporary clerk." (Br. 67.) He was an employee of a temporary employment company who worked only five months at a contractor's offices. (ROA.10353.) He was a "disgruntled layman," (Br. 67) whose primary experience was as a projects controls manager, scheduler, and cost monitor. He is not an engineer, lacked knowledge of the relevant governmental regulations, and was not involved in the certifications underlying his suit. (*See supra* Part I.A.2.a.) He was terminated in what he claims was a "retaliatory discharge." (ROA.327.)

Nor did the court "dismiss[ ] the legitimacy" of Abbott's concerns regarding the potential impact on his "interest in swimming, boating, and fishing in the Gulf of Mexico." (Br. 67-68.) The court instead determined that such abstract interests, however valid, were insufficient to confer standing. (ROA.27444.) The same is true of FWW designees. The court merely acknowledged that their connections to the Gulf were too attenuated to confer standing. (ROA.27444-45.) Those conclusions were correct. (*See supra* Part II.A.1.a)

Plaintiffs' challenge to the district court's opinions as "broad, conclusory, and unsupported by the summary judgment record or the law" (Br. 68) also is

unavailing, as discussed herein. In any event, "judicial rulings alone almost never constitute a valid basis" for finding bias or partiality. *Liteky v. United States*, 510 U.S. 540, 555 (1994).

Nor should this Court assume that the district judge, if reversed, would be unable to put aside his previous conclusions. (Br. 69-70.) Even in the face of repeated reversals, this Court has rejected requests for reassignment and expressed confidence that a district court will continue to perform its duty on remand. *See, e.g.*, *United States v. Winters*, 174 F.3d 478, 488 (5th Cir. 1999).

Finally, the fact that Plaintiffs find some of the district court's language insulting or hostile also does not warrant reassignment. (Br. 68.) Judicial statements "that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky*, 510 U.S. at 555. As such, "expressions of impatience, dissatisfaction, annoyance, and even anger" towards a party are insufficient to warrant reassignment. *Id.* at 555-56. Given the extreme remedies Plaintiffs sought and the numerous substantive and procedural flaws with their lawsuit, the tenor of the judge's order is hardly surprising, and does not warrant invocation of the "extraordinary" power to reassign this case.

CONCLUSION

BP requests that this Court affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this July 6, 2016, a copy of the attached *Brief of Appellees* was electronically transmitted to the United States Court of Appeals for the Fifth Circuit using the Court's ECF filing system and was served on the following parties via (i) electronic notice pursuant to the Court's ECF filing system, or (ii) by United States first class mail, postage prepaid, to the persons who do not receive electronic notice pursuant to the Court's ECF filing system:

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ECF CERTIFICATION

I hereby certify that (i) the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; (ii) this electronic submission is an exact copy of the paper document pursuant to 5th Cir. R. 25.2.1; (iii) this document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses; (iv) the original paper document was signed by the attorney of record and will be maintained for a period of three years after mandate or order closing the case issues, pursuant to 5th Cir. R. 25.2.9.

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CERTIFICATE OF COMPLIANCE
FED. R. APP. P. 32(a)

1. This brief contains **17,825** words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii). BP has filed an unopposed motion to file an oversized brief.

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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

Dated: July 6, 2016.

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