

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

UNITED STATES OF AMERICA

§

§

V.

§

CR. NO. 4:07-cr-434

§

BP PRODUCTS NORTH AMERICA INC.

§

**VICTIMS' JOINT REPLY MEMORANDUM IN OPPOSITION TO**  
**PROPOSED RULE 11(c)(1)(C) PLEA AGREEMENT**

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**INTRODUCTION**

On December 19, 2007, Alisa and Ralph Dean, Tracy Donaie, Tyrone Smith, Ronald Duhan, Mary Ann Duhan, Michael Jordan, Sandra Thomas, Kelly Porter, Calvin Thomas, and Henry and Maria Rivera (hereinafter “the victims”) filed a motion to exercise their rights under the Crime Victims’ Rights Act to be heard in opposition to the proposed “binding” Plea Agreement in this case. Numerous other Victims intervened as well. The Victims warned that the proposed plea would not provide sufficient protection to workers and members of the public who could be harmed by the BP plant. Tragically, less than a month later -- on January 14, 2008 -- their prophecy was fulfilled when the BP plant killed again. William Joseph Gracia, a foreman, long-time employee of the BP Texas City plant, married with two children, was killed while BP employees were restarting the Ultracracker Unit. (Exhibit 1).

This death and its surrounding circumstances tragically crystallize the primary reasons the Court should exercise its discretion and reject the parties’ proposed binding Plea Agreement. First and most important, the binding Agreement fails to put in place sufficient safety protection for workers and the public. In fact, because the Agreement is binding on the Court under Rule

11(c)(1)(C), it would preclude the Court from taking appropriate steps to insure safety, such as putting in place an independent Court Monitor of BP Products' safety efforts.

Second, the proposed Agreement imposes an inadequate fine. While the parties trumpet the provision of a \$50 million fine, they fail to disclose to the Court what the maximum possible fine is. Indeed, BP Products' actually takes the position that the Court would be acting illegally to impose the fine called for in the Plea Agreement. The Government counters that the court has the power to impose this particular fine, but does not explain how it reached this figure or what the maximum is – both seemingly foundational facts for any fair assessment of the proposed fine. An adequate fine must be based on the “gross gain” or “gross loss” from the Defendant's crime, which clearly exceeds one billion dollars. Assessed against that backdrop, the parties' proposed fine is trivial and should be rejected. Moreover, in deriving its proposal, the Government has violated its obligations under the Crime Victims' Rights Act to “confer” with the Victims in this case. (18. U.S.C. § 3771 et. seq.).

Finally, the binding Agreement does not address the “root causes” of the explosion – the refusal of BP Products' parent company to provide necessary resources to comply with mandated safety procedures. Indeed, to the contrary, if accepted, the Plea Agreement would actually *immunize* BP Products' parent – a feature that the parties cannot (and do not attempt to) justify in their pleadings.

If the Court has any thought (based on the current record) that this Plea Agreement might be appropriate, it should at a bare minimum order preparation of a Presentence Report before accepting the Plea Agreement. Rushing to sentencing in this case without the normal Presentence Report would violate the requirement that the Court possess sufficient “information in the record” allowing it “to meaningfully exercise its sentencing authority.” A Presentence Report would permit the court to determine what the maximum possible fine is in this case and

to have full and accurate information about the background of the Defendant before it – both on criminal history and related “compliance issues” (as the parties charitably put it). At a minimum, then, any acceptance of a Plea Agreement in this case should await the ordinary step of preparation of a Presentence Report.

## I.

### **The Court Should Reject the Proposed Plea Because of Its Inadequate Conditions of Probation for Making the Plant Safe**

In their opening submission, the Victims urged the Court to reject the Plea Agreement because it contained inadequate conditions of probation for insuring safety. The Victims noted that the Plea failed to include – and, indeed, because of its binding nature, blocked the Court from including – such appropriate conditions as:

- (1) The specific requirement that the plant be brought into compliance with PSM within a specified period of time;
- (2) A Court-Appointed Monitor to oversee and report to the Court on appropriate progress until completion;
- (3) An arrangement for funding by BP Products or related corporate entities to fund the cost of bringing the plant into compliance with the law; and
- (4) A Court-Supervised Effective Compliance and Ethics Program as defined by USSG §8B2.1. (Victims’ Joint Memorandum in Opposition to Plea Agreement p. 21-32; Hereafter “Victims’ Joint Memo.”).

In response, the parties to the Plea Agreement contend that such conditions are unnecessary. But the proposed Plea requires only a limited set of (already agreed to) safety measures – inadequate measures as attested to by the death of William Gracia. In addition, the proposed Plea Agreement does more harm than simply establish toothless procedures for

“window dressing.” Because it is a binding Plea under Rule 11(c)(1)(C), the Court would be precluded from exercising its traditional discretionary authority in setting conditions of probation. Indeed, the Agreement affirmatively restricts the Court’s traditional authority when responding to continuing or future violations. What remains, insofar as judicial supervision is allowed, is limited to largely empty gestures.

Finally, the most obvious probationary safety measure that the court should consider is a Court-Appointed Environmental Monitor who would ensure that BP is truly complying with environmental laws. While the Victims proposed such a Monitor in their opening submissions, the parties have offered no real objection to its other than to claim that it is some sort of unnecessary “duplication.” At the very least, the Court should reject the proposed Plea because it precludes the Court from even considering whether to undertake this reasonable measure to ensure that the Texas City Plant is safe.

## A.

### **The Plea Agreement Imposes No New Safety Measures Above Those That Have Been Tragically Proven to be Inadequate**

The parties ask the Court to bless the proposed Plea Agreement because it purports to put in place appropriate safety measures. At bottom, however, the Agreement imposes no new obligations on BP Products. Instead, BP Products simply promises, again, to do what it has already promised to do in the past. Thus, the Plea Agreement obligates BP Products “to comply fully with the Settlement Agreement executed between the Defendant and the United States Occupational Health and Safety Administration,” (Plea Agreement, Par.1.c), and with “the Agreed Order executed between the Defendant and the Texas Commission on Environmental Quality.” *Id.* Of course, BP Products is already obligated to comply with these agreements. It has yet to follow through. For example, BP Products has not complied with its agreement with

OSHA to obtain a “comprehensive” PSM audit, or to actually bring the plant into compliance with the law. *Cf.* (Government’s Response to Victims’ Joint Memorandum in Opposition of Plea Agreement p. 8; Hereafter “Gov’t Response”) (“OSHA and BP are engaged in ongoing discussions to ensure compliance with the 2005 settlement...”). Thus, the Plea Agreement adds nothing new to BP’s pre-existing, unfulfilled, obligations.

History has shown that, absent strict oversight and enforcement, the unsafe conditions at the Plant, which endangers workers and the community, will continue. William Gracia’s death at the Texas City plant on January 14, 2008 tragically proves this point. The Victims respectfully, but urgently, submit that he would not have been killed if -- during the intervening three years -- BP had brought its operations into full compliance with the PSM requirements that it admits violating.

The Victims make the following proffer of facts.<sup>1</sup> Mr. Gracia was killed when process equipment blew apart during start up of the Ultracracker Unit; he was struck by pieces of the equipment causing major physical injury as well as chemical burns from the chemical release. Such an event cannot happen in a unit fully compliant with PSM requirements: Equipment which is properly designed and maintained, and used by trained operators following proper operating procedures (all PSM requirements) does not blow apart. Such tragedies usually are caused only by multiple violations of PSM requirements.

Very preliminary information is that the bolts which failed in this case were very old and in poor condition, a finding which directly implicates the same mechanical integrity violations at

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<sup>1</sup> BP Products and the Government presumably have access to relevant information surrounding Mr. Gracia’s death and can correct any errors in the Victims’ proffer. Alternatively, the Court could have the probation office collect the relevant facts on this issue as part of the process of preparing a PSR before accepting any Plea.

issue in this Plea. During the “spot check” audit,<sup>2</sup> the Ultracracker Unit was one unit which *was* audited for mechanical integrity by AcuTech with the dismal results, summarized at p. 28, Items h-m of Victims’ Joint Memorandum.

Notably, the accuracy of visual internal and external inspection results was not audited in this Unit. (AcuTech Table 11b, Exhibit 2). Full mechanical integrity compliance might well have prevented Mr. Gracia’s death.

Mr. Gracia was in the Unit at the time of the explosion, although not directly involved in the start-up which was underway. The presence of non-essential personnel in or near a Unit during the danger of a start-up operation is one of the safety violations charged in the Criminal Information (Par.19a). OSHA listed “Safe Location of Personnel in Relation to Hazardous Processes” as the first of its “special emphasis” items to be addressed during the required audit. In response to the audit, BP stated that its procedures require an “Authorization-to-Work” permit for all work inside a unit (AcuTech, 8-16-06, p. 8, Exhibit 3). The audit contains only the vague report (repeated many times on many items) that “BP is addressing this item.” There is no evidence that the problem has ever been actually “addressed” in an effective manner, rather than remaining part of the backlog of PSM work. Again, enforced compliance with OSHA’s “special emphasis” PSM concern at the BP Refinery, instead of relying on BP’s good faith in “addressing” the issue in the future, might well have prevented Mr. Gracia’s death.

In light of the BP practice of considering such PSM issues “closed” when a paper is written requiring the matter to be checked in the future, combined with the continuing backlog of

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<sup>2</sup> BP does not appear to challenge the fact that it obtained only a spot check rather than a “comprehensive” audit of its PSM compliance. It argues, however, that this is acceptable because it was an “industry standard” audit. BP Response p. 26, fn. 28. But the OSHA Agreement clearly and specifically required a “comprehensive” audit. (See Victims’ Joint Memo., p. 26-28 and deposition of BP’s designated Spokesman, Walt Wundrow, Joint Memorandum Exhibit 6). The obvious meaning of “comprehensive” is “covering completely or broadly.” Merriam-Webster’s Collegiate Dictionary (10<sup>th</sup> ed. 1993). A Court-Appointed Expert Monitor would, of course, be in perfect position to ensure that safety audits of sufficient scope are conducted at the Texas City Plant.

overdue PSM work, it is not surprising that yet another tragedy continues the BP record of averaging at least one death per year. In light of all this, the court must scrutinize the safety provisions in the proposed plea with heightened sensitivity to the life-or-death issues at stake. Indeed, with notable understatement, BP Products itself admits that Mr. Gracia’s death “is a powerful reminder that there is more to do . . . .” (BP Products North America Inc.’s Response to Victims’ Joint Memorandum in Opposition to Plea Agreement, p. 1) (Hereafter “BP Response”).

## **B.**

### **The Plea Agreement Prevents the Court From Imposing Traditional Remedies for Safety Violations**

The Plea Agreement should be rejected because it binds the Court to narrower remedies than would traditionally be available in the supervision of other corporate criminals. In their responses to the Victims, the parties argue that the Court will be able to enforce safety standards if BP Products fails to comply with them. (BP Response p. 31; Gov’t Response p. 8). Yet the “breach of the plea agreement” section spells out what happens if BP Products breaches its Agreement. The remedies specifically provided are essentially toothless, but apparently supplant the more powerful remedies that would otherwise be available to the Court.

The proposed Agreement states that BP Products’ failure to follow the Agreement is a breach of the Agreement and then spells out the four available remedies for a breach as follows:

#### **BREACH OF THE PLEA AGREEMENT**

“13. . . . *In the event of such a breach*, (a) the United States will be free from its obligations under this Agreement; (b) the Defendant will not have the right to withdraw the guilty plea; (c) the Defendant shall be subject fully to criminal prosecution for any other crimes which it has committed or might commit, if any, including perjury and obstruction of justice; and (d) the United States will be free to use against the Defendant, directly or indirectly, in any criminal or civil proceeding, all statements made by the Defendant’s employees, except to the

extent that any employee's individual rights might prohibit such use, and any of the information or materials provided by the Defendant, including such statements, information and materials provided pursuant to this Agreement or during the course of any debriefings conducted in anticipation of, or after entry of this Agreement, including the Defendant's statements made during proceedings before the Court pursuant to Federal Rule of Criminal Procedure 11. The determination of whether a violation fits within the category of criminal violations referenced above shall be within the discretion of the Government, and in making this determination, the Government will provide the Defendant an opportunity to present its position to the United States Department of Justice, Environmental Crimes Section, and/or the United States Attorney's Office. The Defendant understands and agrees that the Government shall only be required to prove a breach of this Agreement by a preponderance of the evidence. The Government's position on whether a subsequent violation is an appropriate basis for a probation violation does not bind the United States Probation Office or the Court. . . ." (Plea Agreement, Par. 13).

Each of the four "remedies" is basically illusory. With respect to the first – freeing the United States from its obligations – all this means is that the Government could go back to "Square 1" and start a new criminal case against BP Products. With respect to the second – the Defendant not having a right to withdraw from the Plea – that creates no additional burden or penalties on BP Products. With respect to the third – providing that the Defendant "shall be subject fully to criminal prosecution for any other crimes which it has committed" – of course, it is already "subject" to such prosecution. And with respect to the last – the United States will be free to use information provided by BP Products employees under the Plea Agreement – it is not immediately clear why the United States is not already be able to obtain and use information from the Defendant's employees. Nor is it clear what new information the United States would be obtaining during the Rule 11 guilty plea. Indeed, the entire provision is a curiosity, as one would hope that the United States would be free to use traditional tools, such as investigators and the grand jury, to obtain relevant information and evidence without a "breach" of the Agreement triggering this "remedy."

While the four specific remedies are essentially meaningless, the larger problem is that their listing as the prescribed remedies for breach of the Agreement appears to block the Court from using its traditional remedial powers. The Plea Agreement itself spells out that “[t]his written Agreement constitutes the complete Agreement between the United States, the Defendant, and the Defendant’s counsel.” (Plea Agreement, Par. 14). Thus, under standard principles of Plea Agreement interpretation, spelling out the specific remedies that are available for “breach of the plea agreement” would preclude other remedies. Plea agreements are strictly construed against the Government. *United States v. Fitch*, 282 F.3d 364 (6<sup>th</sup> Cir. 2002) at 366. The rule of lenity normally requires that all doubts about statutory construction and interpretive issue are resolved in favor of the defendant. *United States v. Brown*, 459 F.3d 509 (5<sup>th</sup> Cir. 2006); *Illinois Tool Works v. Independent Ink*, 547 U.S. 28, 126 S.Ct. 1281 at 1296 (2006).

Because of the limitation on remedies, the parties’ arguments on environmental compliance ring hollow. The only new advantage that the Government claims under Plea Agreement is that “if OSHA believes it cannot resolve a dispute with BP Products regarding compliance with a condition of the Settlement Agreement, the Department of Justice may now seek the more serious sanction of a violation of probation.” (Gov’t Response p. 8). Similarly, BP Products argues that if it fails to comply with its OSHA settlements, “it could constitute a violation of the terms of its probation, which would entitle the court to extend the term of the probation, revoke probation, or impose additional, more restrictive terms.” (BP Response p. 31) (citing U.S.S.G. § 8F1.1, p.s.). These arguments assume that the Court would have the traditional powers available to it to sanction a probation violation. Nothing in the proposed

binding Plea Agreement recognizes those powers<sup>3</sup> and, to the contrary, the limitation to specifically described remedies seems to preclude the Court from deploying others.

Indeed, to add insult to injury, the Plea Agreement even goes on, in the guise of adding new remedies, to actually place further, new restrictions on the Government. Thus, the Agreement provides that the Government has discretion to determine whether BP Products has committed a new criminal violation, but only after the Government has “provide[d] the Defendant an opportunity to present its position to the United States Department of Justice, Environmental Crimes Section, and/or the United States Attorney’s Office.” (Plea Agreement, Par.13). Of course, no ordinary convict would have such a right.

For all these reasons, the Court should reject the proposed Plea as a usurpation of its traditional powers to impose appropriate remedies for a violation of conditions of probation.

### C.

#### **The Plea Prevents the Court from Imposing an Environmental Monitoring Program**

As the Victims’ argued in their opening Memorandum, (Victims’ Joint Memo. p. 30-32), the most obvious response the Court could make to BP Products’ track record of safety failures at the Texas City plant is to appoint its own Monitor to help insure safety. Yet the Plea Agreement would bar the Court from even considering this possibility. For this reason alone, the Court should reject the proposed Plea.

BP Products objects to the Court considering the possibility of a Monitor with the disingenuous statement that the Victims “do not provide for any authority for the imposition of a

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<sup>3</sup> The “Breach of the Plea Agreement” section does state that “[t]he Government’s position on whether a subsequent violation is an appropriate basis for a probation violation does not bind the United States Probation Office or the Court.” Plea Agreement, Par.13. But this provision does not state what effect that BP’s presentation to the Government explaining its position on whether BP Products has violated its terms of probation violation will have or how it would relate to the four prescribes remedies in the Agreement, and whether BP could cause undue delay.

monitor.” (BP Response p.31). Why BP Products’ carefully phrases this statement, as the “authority” for the Court to impose such a condition, is self-evident: the Court always has the power to impose appropriate conditions of probation – unless (as in this case) the parties have overridden that power by the superseding terms of a Plea Agreement. “Sentencing judges are given wide discretion in setting terms of probation.” *United States v. Schoenrock*, 868 F.2d 289, 291 (8<sup>th</sup> Cir 1989); *United States v. Tonry*, 605 F.2d 144 (5<sup>th</sup> Cir. 1979). For the record, the Court’s authority to impose conditions of probation on probationers it supervises is found in 18 U.S.C. § 3563(b). This statute provides open-ended authority for the Court to impose appropriate conditions of probation:

“The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant . . .  
(22) *satisfy such other conditions as the court may impose.*”

There can be no doubt that a Court-Appointed Safety Monitor would be reasonably related to §3553(a)(1) and (a)(2), as the “circumstances of the offense,” 18 U.S.C. §3553(a)(1), involve a long term (six year) pattern of safety violations and need to “protect the public from further crimes of the defendant,” 18 U.S.C. §3553(a)(2), is established by the urgent safety problems at the Plant.

For the Court to reject the Plea, it need not decide now that a Court-Appointed Safety Monitor is necessary. At this juncture, all that the Court need conclude is that it would like this otherwise-available option to be “on the table.” The Court must take “an active role in evaluating the [proposed binding] plea agreement.” *United States v. Kraus*, 137 F.3d 447, 452 (7<sup>th</sup> Cir. 1998). The Plea Agreement the parties offer to the Court is objectionable not simply because it fails to include the requirement of a Court-Appointed Monitor but more broadly

because it precludes the Court from exercising its traditional discretion in setting appropriate conditions of probation and deciding -- for itself -- whether a Monitor (or some other equivalent approach) is desirable.

If the Court were given the opportunity to exercise its normal authority in setting terms of probation, the case for a Court-Appointed Safety Monitor becomes compelling. In their opening brief, the Victims presented the disturbing track record of BP Products at this plant. Without repeating all the arguments there, it may be useful to highlight the CSB Report's disclosure that major incidents occurred in the years 2002-2004, preceding the 2005 explosion (Victims' Joint Memo. p. 7). This tragedy was foreshadowed but not prevented. While the Victims explained at length the need for the court to have its own safety monitor, the Government has not offered any justification for precluding the court from adopting one. BP Products, too, is unable to mount any real objection. The best it can come up with that the Monitor would impose "unnecessarily duplicative oversight." (BP Response p. 31). This argument would have more force if William Gracia had not died at the plant in the last three weeks in another apparently-preventable tragedy. Enough is enough – the Court should reject the Plea Agreement because it interferes with the Court's traditional authority and fails to provide adequate safety measures.

## **II.**

### **The Court Should Reject the Proposed Plea Because of the Inadequacy of the Fine**

The Court should also reject the proposed binding Plea on the separate and independent basis that the proposed fine is inadequate. The Victims pressed this point at length in their opening brief, drawing two curious – and conflicting - responses from the parties. BP Products says flatly that the \$50 million fine is illegal, contrary to the representations it makes to the court in the proffered Plea Agreement. Apparently, however, it is willing to acquiesce in this illegal

sentence to dispose of the matter. The Government, on the other hand, says that the fine is legal; but it fails to explain how it came up with the \$50 million figure – or what other amounts the court could permissibly consider. Indeed, the Government has failed to explain itself not only to the Court, but also to the Victims, in violation of its obligations under the Crime Victims Rights Act to “confer” with the Victims. In light of the confusing and conflicting responses from the parties, the Court should, at a minimum; issue an opinion holding that the alternative fines provision applies to this case; direct the Government to meet its obligations under the Crime Victims Rights Act to consult with the Victims on the fine; and reject the proposed Plea because the proposed fine is utterly inadequate to a criminal offense of this magnitude.

#### **A.**

#### **BP Products’ Position that the Fine is Illegal**

BP Products’ takes the remarkable position that the largest fine the Court can lawfully impose is \$500,000, as “BP Products believes that the alternative fine provision of §3571(d) would not apply to this case.” (BP Response p. 14 n.14). Yet in the Plea Agreement that its representative has signed (and that it asks the Court to accept), BP Products represents exactly the opposite. The proposed Plea Agreement flatly states that “[t]he maximum penalty for a violation of Title 42, United States Code, Section 7413(c)(1) includes a period of probation of five years, the greater of a fine of \$500,000 or up to twice the gross gain or loss resulting from the offense , and a \$400 mandatory Special Assessment per count of conviction.” (Proposed Plea Agreement, Par. 6). The Court should not tolerate such Janus-faced arguments from BP Products. Either the fines provision applies or it does not. If the Defendant wants to obtain the benefits of this Rule 11(c)(1)(C) plea, the Court, the public, and the Victims are entitled to have the Defendant state clearly that the Court possesses legal authority to impose the sentence the

Plea calls for. For this reason alone, the Court should reject the Plea until BP Products is willing to agree to the representations it makes in the Plea Agreement.<sup>4</sup>

In any event, BP Products' argument is utterly without merit. The alternative fines provision broadly provides for enhanced fines when gross loss or gross gain results from an offense:

**“d) Alternative fine based on gain or loss. –If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.”** (Emphasis added) 18 USC §3571.

The provision is found in a general provision of Title 18, which extends to “a defendant who has been found guilty of an offense.” 18 U.S.C. § 3571(a). The only argument that BP Products can advance for not applying this statute is that the Sentencing Commission determined not to draft a generally-applicable fines guidelines for environmental offenses because “the harm or loss caused or threatened *often* cannot easily be translated into monetary terms [and] the dollar loss may not adequately reflect the societal harm caused by the offense.” (BP Response p.14 n.14) (emphasis added and citations omitted). But an administrative agency's decision not to promulgate a broad rule hardly sweeps off the books an Act of Congress in a particular case. As the Government noted in expressing its “strong[] disagree[ment]” with BP Products' position, “Nowhere does the plain language [of the Sentencing Guidelines] or 18 U.S.C. § 3571 preclude a court from calculating a sentence for an environmental crime under the Alternative Fines Act.” (Gov't Response p.10 n.6).

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<sup>4</sup> There are also practical considerations for requiring the defendant to state that the fine in the plea agreement is lawful. If the fine is illegal, then the court would be imposing an illegal sentence. The enforceability of the plea agreement and its appeal waiver provisions in such circumstances might be called into doubt should a subsequent dispute arise about interpretation of the plea agreement. *Cf. United States v. Del Barrio*, 427 F.3d 280, 282 & nn. 3-4 (5th Cir.2005) (citations omitted) (recognizing that an illegal sentence always constitutes plain error).

The reasons why BP Products would like to create some uncertainty on this point is transparent: Having manufactured litigation “risk,” it then hopes to take advantage of that risk to secure Court approval of a charitable Plea Agreement. But the concept of “risk” is simply inappropriate when the issue of a statutory maximum penalty is involved. To even begin to assess the wisdom of the Plea, the court must know what the possible penalties are. Moreover, the public – and the Victims – are entitled to know that the Court is imposing a lawful sentence. Accordingly, if BP Products is truly going to persist in its position that the proposed plea arrangement is illegal, the Court should (if it is inclined to move forward at all) issue an opinion on its power to impose a fine.

## **B.**

### **The Government’s Unexplained Position That Only Its Fine Is Lawful**

The Government’s response to the Victims’ argument on the inadequacy of the fine is equally surprising. It takes the position that its desired \$50 million fine is lawful, but that other larger fines would, for some unexplained reason, not be.

The Government trumpets the fact that its fine would be “the largest fine ever assessed under the Clean Air Act against a single corporation.” (Gov’t Response p.12). The Government then appears to recognize that the size of the fine seems rather modest when assessed against the Victims’ proposal of a possible fine larger than \$1 billion. The Government therefore quickly hastens to add that “[t]he fine amount sought by the victims is simply unlawful.” *Id.*

The Government’s argument might be more persuasive if it would state directly what fine *is* lawful. Apparently, the Government is willing to share its view that *its* proposed fine of \$50 million fine is lawful, as (for reasons not articulated) it falls within what the Government views as permissible boundaries set by “twice the gross gain” to BP Products from not adopting

adequate safety measures or “twice the gross loss” caused by the resulting explosion. 18 USC §3571(d). But for the Court to properly exercise its discretion in accepting a binding Plea it should have at least know where the outside boundaries lie – boundaries that the Government has thus far refused to describe. Because the losses and gains in this case easily exceed \$1 billion (as the Victims will explain shortly), the Government’s proposed fine does not begin to approach the statutory maximum.

### C.

#### **The Government Has Violated Its Obligation to Confer With Victims.**

In deriving its proposed \$50 million fine through an unexplained methodology, the Government has violated its right to Victims under the Crime Victims Rights Act (“CVRA”). The CVRA guarantees Crime Victims, among other rights, “[t]he reasonable right to confer with the attorney for the Government in the case.” 18 U.S.C. § 3771(a)(5). This right was designed to allow Victims access to important information about a case. As one of the Senate co-sponsors explained, “Prosecutors should consider it part of their profession to be available to consult with Crime Victims about concerns the Victims may have which are pertinent to the case, case proceedings or *dispositions*. Under this [right-to-confer] provision, Victims are able to confer with the Government’s attorney about proceedings after charging.” 150 Cong. Rec. S4260, S4268 (statement of Sen. Kyl) (April 22, 2004) (emphasis added). The right to confer is “intended to be expansive” and allow the Victims to “be able to confer with the prosecutor concerning a variety of matters . . . .” 150 Cong. Rec. S10910, S 10911 (Oct. 9, 2004) (statement of Sen. Kyl). Justice Department regulations are equally clear that “Federal prosecutors should be available to consult with victims about major case decisions, such as dismissals, . . . *plea*

*negotiations, and pretrial diversion.*” U.S. Dept. of Justice, Attorney General Guidelines for Victim and Witness Assistance at 29 (May 2005) (emphasis added).<sup>5</sup>

Astonishingly, here the Government does not even appear to be aware that the Crime Victims have protected rights to be consulted during the plea process. At the November 28, 2007, hearing, the following exchange took place:

THE COURT: *You don't have to do anything* [under the Crime Victims' Rights Act] except make sure that notice is given.

MR. DOOHER: *Correct.* And we're doing everything we can in that regard. (Transcript at 16) (emphases added).

The Victims have attempted to confer with the Government on the subject of the Plea in general, and the fine in particular, only to be rebuffed. On December 21, 2007, counsel for the Victims sent a letter to the Government requesting information about the Government's fine calculations (Exhibit 4):

“Dear Mr. DeGabrielle:

I read with interest your statement quoted in the *Houston Chronicle* as follows:

‘The Clean Air Act calculates criminal fines with a mathematical formula that considers how much money a company may have saved by deferring repairs and failing to implement safety measures as well as profits. The formula doesn't account for deaths.’

‘Prosecutors applied that formula to the unit that exploded. They determined that \$50 million was the most they could get in a criminal fine had they taken the case to trial and won, according to U.S. Attorney Don DeGabrielle.’

I would appreciate it very much if you would be so kind to advise me, as Victims' counsel, of the correct citation to this statutory formula, and even more appreciative if you would share the appropriate calculations with me.

Thank you very much for your courtesy and cooperation.”

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<sup>5</sup> The CVRA also gives crime victims the right “to be treated with fairness.” 18 U.S.C. § 3771(a)(8). The Government's refusal to describe to the victims the maximum possible penalties in this case also violates this right. Because the Government's violation of the right to confer is obvious, the Victims will focus on the Government's violation of this right.

Receiving no response to this letter, on January 11, 2008 counsel for the Victims sent a follow-up letter, again asking for information on this subject. (Exhibit 5):

“Dear Mr. DeGabrielle:

I have not yet received your reply to my letter to you of December 21, 2007 (copy enclosed). With the holiday season just past, it is possible that somehow our request was overlooked in your office. We would appreciate the courtesy of your reply to that letter by the end of next week. If no response is forthcoming, we will be forced to conclude that the U.S. Attorney’s office does not actually know of any such statutory formula in the Clean Air Act.

I look forward to hearing from you.”

In light of the Government’s failure to discuss the plea provisions, the Government has plainly failed to discharge its obligation to consult with the victims on the important, specific issue of possible fines in the case. But the Government’s failures run deeper. The Government does not appear to have taken seriously its obligation to “confer” with Victims about the Plea -- to (as the Department’s own regulation put it) “make reasonable efforts to notify identified Victims of, and *consider Victims’ views about*, prospective plea negotiations.” U.S. Dept. of Justice, Attorney General Guidelines for Victim and Witness Assistance, p. 29 (May 2005) (emphasis added).<sup>6</sup>

The Court, too, has obligations to protect Crime Victims’ rights. Under the CVRA, “the court *shall ensure* that the crime victim is afforded the rights described [in the CVRA].” 18 U.S.C. §3771(b) (emphasis added). Because of the Court’s obligations to protect Crime Victims, and because the Government has yet to confer with the Victims (or with the Court) about its

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<sup>6</sup> Counsel for the victims are aware of other mass victim cases in which federal prosecutors have done far more to consult with victims than has been done in this case. In the Oklahoma City bombing case, for example, the prosecution team made regular trips from Denver to Oklahoma City to meet with affected victims. Similarly, in the Trolley Square massacre case (currently underway in Salt Lake City), prosecutors have held meetings with affected victims. Yet in this case, prosecutors appear to be intent on doing little more than mailing out a postcard to a victims’ mailing list. For copies of the generic letter and Victim Impact Form sent before the Status Hearing, of the four-sentence post card, sent afterwards, see Exhibit 6.

views on the permissible size of the fine, the Court should exercise its discretion to reject to proposed binding Plea. At a minimum, the Court should defer accepting any Plea until the Government has taken seriously its obligations to Crime Victims under the Crime Victims Rights Act.

#### **D.**

##### **The Alternative Fines Provision Does Not “Unduly” Prolong Sentencing.**

One other argument from BP Products is worth only a brief mention. BP Products argues that, even if the alternative fines provision applies, a large fine might nonetheless be inappropriate because calculating it might “unduly complicate or prolong the sentencing process.” 18 U.S.C. §3571(d). The key word to consider here is “unduly,” which obviously requires the court to consider the circumstances justifying whether to “prolong” the sentencing process. If the issue is whether to impose a \$100 fine versus a \$1000 fine, even a modest prolongation of the sentencing process might be inappropriate. But, of course, the circumstances here are quite different, involving the question of what would “unduly” delay sentencing for a crime leading to one of the worst industrial disasters in recent American history, which caused the deaths of 15 innocent persons, horrible injuries to many more, and more than a billion dollars in property damage.

In light of these horrendous circumstances, BP Products’ argument is implausible. If the Victims understand BP Products’ argument correctly, it is apparently that the Court might conclude that it was too busy to take the time to determine whether the fine in this case will be \$50 million, or more than \$1 billion. After all, warns BP Products, such a hearing might involve a “battle of experts” whose testimony would be “subject to the searching inquiry required by *Daubert*.” (BP Response p. 17). To avoid the “risk” that the Court might not want to trouble

with all these matters (which are routine in cases of far less import), BP Products asks the Court to impose the low fine. The Victims are confident that the true “risk” the Court would reach such a conclusion is small.<sup>7</sup>

## **E.**

### **A \$50 Million Fine is Inadequate.**

There remains, then, the ultimate issue of adequacy of the fine proposed in the Plea. The Court should assess adequacy in light of the maximum possible fine in this case. Proceeding under either a “gross loss” or “gross gain” approach, 18 U.S.C. § 3572(d), the \$50 million fine is a tiny fraction of the maximum allowed. The fine is the only real punishment the BP Products will suffer in the Plea Agreement. The Court should therefore reject the Plea because of the fine’s inadequacy.

## **1.**

### **Gross Loss**

Gross loss can now be readily calculated. For the first time in its response, BP has provided a direct, positive statement of the minimum amount of the loss caused to others. Arguing that it has covered the losses of the victims in this case, BP states “BP Products has paid more than \$1.6 billion in civil settlements.” (BP Response p.35). Since many cases are not settled, the total gross loss to others is no doubt significantly more than the \$1.6 billion already paid, but we may consider the gross loss to be at least \$1.6 billion. As pointed out in Victims’ Joint Memorandum (and not challenged by BP), such payments to make the Victims whole are not punishment and, thus, are not to be deducted from the profit or loss amount. (Victims’ Joint

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<sup>7</sup> BP Products also alludes to various “*Apprendi* problems” in proving loss or gain to a jury. Of course, *Apprendi* does not apply to fact-finding in a guilty plea context. And, even if the matter were to go to trial, the Government would have little difficulty in proving the facts that the victims rely upon in this memorandum. Indeed, BP Products concedes virtually all of the facts on which the victims rely.

Memo. p. 34, citing USSG Ch. 8, Introductory Comment). Therefore, the maximum fine under 18 U.S.C. § 3571, based on the gross loss caused to others, is at least \$3.2 billion – and the proposed fine in the Plea would be about 1.5% of the statutory maximum.

## 2.

### **Gross Gain**

Starting from a different perspective -- the gross gain perspective – the Court should reach the same conclusion. As the Victims demonstrated in their first pleading, (Victims’ Objections (Docket Entry No. 9), p. 2 and Exhibit 1), BP’s Plant Manager reported that the Plant profit exceeded \$1 billion in the 14 months immediately preceding the explosion, \$145 million more than any other refinery in the BP system. (Exhibit 8).<sup>8</sup> The only dispute is whether this was profit “derive[d] . . . from the offense,” 18 U.S.C. § 3571(d), in the words of the alternative fine provision. Of course, this requires some recognition of what the “offense” is in this case. BP Products would have the Court treat the “offense” as some technical failure to have a risk management plan in place in the ISOM unit on March 23, 2005. See (BP Response p. 20) (discussing “gain from two specific Risk Management Plan violations at the ISOM unit”). But the “offense” in this case is not nearly as limited.

As the Victims explained in their opening Memorandum, (Victims’ Joint Memo. p. 34), the “offense” is described in the Criminal Information in terms much more sweeping than BP Products admits. The Information begins by explaining that “[t]he Texas City refinery covered more than 1200 acres, employed approximately 1800 permanent BP Products staff and approximately 200 contract workers.” (Criminal Information, Par. 2). The Information goes on to note that “[w]ithin the BP Products Texas City Refinery, there were 29 different refining units

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<sup>8</sup> The Victims do not have the profits from earlier years. As the Criminal Information makes clear, however, the relevant time period for looking at gross gain is from “between in or about January 1999 and on or about March 23, 2005.” Criminal Information, Par. 20.

and four chemical units that had the capacity to process 460,000 barrels of crude oil per day into components . . . . “ *Id.*, Par. 3. Having reviewed the Plant in general, the Information then turns to the relevant provisions of the Clean Air Act. The requirements of the Act are summarized in the Information, Par. 8-10. The Information then discusses the specific events leading up to the explosion of March 23, 2005, and recounts the names of those killed and injured. Having done all this, the Information concludes with two criminal offenses, one involving a broad failure to maintain adequate safety procedures over six years and a second involving a specific problem at the ISOM Unit:

“Knowing Violations of Risk Management Practices

20. Between in or about *January 1999 and on or about March 23, 2005*, in Texas City, Texas, within the Southern District of Texas, the defendant, BP PRODUCTS NORTH AMERICA INC., did knowingly violate a requirement promulgated pursuant to the Clean Air Act, Title 42, United States Code, Section 7412(r)(7); specifically, defendant BP PRODUCTS NORTH AMERICA INC. knowingly failed to do the following:

- a. *Establish and implement written procedures to maintain the ongoing mechanical integrity of process equipment, in violation of Title 40, Code of Federal Regulations, Section 68.73(b).*
- b. *Inform contract owners and operators of the known potential fire, explosion, or toxic release hazards related to the contractors occupation of temporary trailers in the vicinity of the ISOM Unit, in violation of Title 40, Code of Federal Regulations, Section 68.87(b)(2).”*

BP Products is proposing to plead guilty to this broad Criminal Information, as the Plea Agreement states specifically that “[t]he Defendant agrees to give up the right to be indicted by a grand jury and agrees to plead guilty to Count One of the Criminal Information . . . in this case . . . .” (Plea Agreement, Par.1<sup>9</sup>). The structure of the Criminal Information makes clear that the

“offense” at issue here is not confined to the tragic problems leading to a catastrophic explosion

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<sup>9</sup> It is arguable that the stipulated “Statement of Facts” between the parties focuses more narrowly on the ISOM Unit. However, even the stipulation discusses the Texas City Plant broadly and covers a six-year time period. In any event, under the Plea Agreement, the defendant is pleading guilty to the one-count Criminal Information, not the Statement of Facts. The fine must therefore be assessed based on the offense described in the Information, as even BP Product’s own cited cases demonstrate. *See* BP Products Opp. to Victims at 21 (*citing United States v. Fright*, 461 F.3d 914, 920 (7<sup>th</sup> Cir. 2006) (“Both [18 U.S.C. §§ 3663 and 3663A refer to restitution to victims of ‘the offense,’ and this language has been interpreted to mean the *offense of conviction*”) (emphasis added)).

at the ISOM unit on March 23, 2005, but rather extends over a six-year period to the “29 different refining units and four chemical units” in the Plant, for which BP Products knowingly failed to “establish and implement written procedures to maintain the ongoing mechanical integrity of process equipment.” The alternative fines provision therefore requires the Court to consider what “gross gain” came from this broad, multi-year “offense”

One way to calculate the “gross gain” that came from this broad offense is to look at the profits that BP Products derived from keeping the decrepit and unsafe Plant up and running (or “available,” as BP Products own representatives admit) in order to take advantage of the windfall of high fuel prices. Repair of the deteriorated physical facilities would have required substantial down time. Although operating the Plant violated the law, BP chose that illegal operation in order to reap the attendant profit, as shown by this excerpt from Don Parus’ email of March 18, 2005 (Exhibit H to Victims’ Objections to Approval of the Proposed Plea Agreement) (Exhibit is re-filed here as Exhibit 7).

“One variable that directly affects those positive numbers, and that everyone here impacts, is availability. It is availability that allows us to take advantage of good market conditions. We ended January with a total site availability score of 95.2% above our plan number of 94.6%. We ended February with an availability score of 97.2%, giving us a number of 96.1% for the site, YTD. Our target for the year is 94.6%, so we are off to an excellent start. Good Job!”

An analogy may be helpful here. It is as if someone purchased a dilapidated bridge. Rather than spending \$500 to repair the bridge, the new owner simply begins charging a \$1 toll to traffic across the dangerous bridge. Six years later, after the owner has made \$10,000 from the unlawful use of the sub-standard bridge, it collapses, killing the one driver who happens to be on the bridge. The owner wants the fine limited to the \$1 toll paid by the last driver, not the thousands of dollars of profit that resulted from operating the bridge dangerously. Congress did not pass such a narrow limitation. It authorizes a fine based on the “gross gain” from an

“offense.” Where (as here) the offense spans a six-year period of time during which on-going and chronic safety violations occurred, the gain must be assessed over that same time period. Any other conclusion would let the hypothetical bridge owner – and BP Products – derive an economic gain from persisting in illegal safety shortcuts.

### 3.

#### **Guideline Calculation**

In an effort to deflect attention away from the maximum possible penalties, BP Products offers a “Hypothetical Guideline Calculation” in its Brief, which it believes to generate a maximum recommended fine of \$11.2 million. (BP Response, Appx. II). But this calculation is truly hypothetical for two main reasons. First, it does not include the gross gain or gross loss, which obviously is an important part of any calculation. Indeed, it is for precisely this reason that the Sentencing Guidelines Commentary itself provides that this fines provision is not applicable to environmental crime and that, instead, Courts should look to the alternative fines provision. *See* U.S.S.G. § 8C2.1, Commentary; § 8C2.10 (referencing alternative fines provision).

Second, and more important, the calculation that BP Products presents is seriously incomplete in this extraordinary case. In extraordinary cases, the Guidelines themselves call for “departures from the guideline fine range.” U.S.S.G. § 8C4.1, Introduction. Obviously relevant here is the departure provisions for “risk of death” found in U.S.S.G. § 8C4.2:

#### **“Risk of Death or Bodily Injury (Policy Statement)**

If the offense resulted in death or bodily injury, or involved a foreseeable risk of death or bodily injury, an upward departure may be warranted. The extent of any such departure should depend, among other factors, on the nature of the harm and the extent to which the harm was intended or knowingly risked, and the extent to which such harm or risk is taken into account within the applicable guideline fine range.”

This case, of course, resulted in the deaths of fifteen persons and horrible injuries to more than a hundred workers, suggesting a significant upward departure from whatever fine the Guidelines themselves might otherwise suggest.

#### 4.

### **The Ultimate Inadequacy of the Fine**

The ultimate issue for the Court is whether the punishment imposed by the Plea Agreement is unduly lenient. The Fifth Circuit has plainly held that a “sentencing court has the discretion to reject a Plea Agreement on the ground that it is unduly lenient.” *United States v. Crowell*, 60 F.3d 199, 205-06 (5th Cir. 1995).” (Gov’t Response p. 3). The parties never reveal to the Court what they believe the true “gross loss” or “gross gain” is in this case, although they both apparently recognize that there is some gain or loss here. The Court should therefore proceed on the basis of the Victims’ calculations, which demonstrate the “undue leniency” of the proposed fine.

Rather than explain how the proposed fine compares to the maximum possible fine, the parties expend considerable effort congratulating the Government for charging the “highest offense” available; i.e. charging a felony rather than a misdemeanor. This is a red herring. Certainly the Victims believe it is appropriate to charge a felony when supported by the evidence, as it is here. But the real question here is not which Code section to attach to the Criminal Information, but rather what is the punishment for the violation. A Plea Agreement calling for a felony conviction with an inadequate fine is not something that the Court should bless.

Even BP’s windfall profit from running the Plant illegally to reap benefits from the high price of fuel does not match the horrendous loss to the Victims which, by BP’s own admission, is

at least \$1.6 billion, yielding a maximum possible fine of \$3.2 billion. Viewed by either the profit or loss calculation, the maximum fine is in the range of at least \$2.5-3.2 billion. There should be no difficulty in obtaining the precise numbers; BP has both profit amounts and claim payouts readily available. The proposed fine in the Plea Agreement is only 1.5% - 2% of the statutory maximum, unconscionably lenient under these facts.

One last desperate argument by the Government to prove the adequacy of the punishment is worth a brief mention. The Government notes that a little-known business publication (something called the “Annual Corporate Pre-Trial Agreements Update”) has described the proposed plea as an example “of the fact that significant penalties and other reforms can result when an entity pleads guilty.” (Gov’t Response p. 11) (citing Annual Corporate Pre Trial Agreements Update-2007, *Finer and McConnell*, page 10 n.3). Of course, it is hardly surprising that a business publication would find the fine “significant.” But the Court should look beyond the business community in using its “considerable discretion to assess the *wisdom* of [the] plea bargain[.]” *In re Morgan*, 506 F.3d 705, 712 (9th Cir. 2007). If the Government asks the court to consider the reaction of a business publication, the Court should likewise consider the views of an editorial writer for the *Houston Chronicle*:

“It’s like crashing your car into a tree and then telling a judge you’re going to pay to have the brakes fixed.” (Loren Steffy, January 23, 2008).

Indeed, other business publications have recognized the inadequacy of this arrangement.

*Bloomberg News* summarizes BP’s Court history and concludes:

“Instead of bragging about this plea deal, the Justice Department should be ashamed of it.” (December 21, 2007).

A *Motley Fool* writer says:

“So here’s hoping the next sound you hear at BP is a book being fired hard and fast past the company’s corporate ear by a Houston-based judge.” (Articles collected as Exhibit 8).

For all these reasons, the Court should reject the proposed Plea because its fails to impose sufficient punishment.

### **III.**

#### **The Court Should Reject the Proposed Plea Because of its Unjustified Immunity Provision for BP Global**

In their opening Memorandum, the Victims urged the Court to reject the proposed Plea because it would immunize BP Global from criminal prosecution for the March 2005 disaster without justification. (Victims' Joint Memo. p. 21). The Victims noted that the immunity provision in the proposed Plea precludes charges against not only BP Products, but also "any other affiliated or related corporate entity." (Plea Agreement, Par. 5). The parties' responses to this contention are astonishingly unpersuasive.

#### **A.**

#### **The Government's (Non) Response to the Immunity Issue**

The Government's (non) response plays word games. Deigning to respond to this central concern of the victims only in a footnote, the Government offers only: "To the government's knowledge, there is no such entity as 'BP Global,' cited throughout Victims' Joint Memorandum." (Gov't Response p.6 n.3). The Victims thought that they had been sufficiently precise in their opening pleading by referring to the "BP parent company: BP p.l.c, a/k/a BP Global, or BP Group, headquartered in London," and attaching civil discovery answers showing the precise chain of ownership. (Victims' Joint Memo. p. 5 and n.1). In a matter this serious, the Government should not hide behind semantics. The overarching fact is that, when given a chance to publicly defend the immunity provision, the Government declined to do so. For this reason alone, the Court should reject the as-of-yet-unjustified Plea Agreement.

## **B.**

### **BP Products' Response**

BP Products' Response is more extended but ultimately as unpersuasive. As with the Government, BP Products offers no specific justification for an immunity provision in this particular case. Instead, BP Products starts by arguing that this is a provision found in some other corporate Plea Agreements. (BP Response p.7). But the fact that this provision has been used elsewhere is not informative here. Immunity is sometimes appropriate, sometimes not. As the Ninth Circuit recently made clear, evaluation of a Rule 11(c)(1)(C) plea cannot proceed on the basis of "categorical rules." *In re Morgan*, 506 F.3d 705, 710 (9<sup>th</sup> Cir. 2007) (reversing district court for applying categorical rule in deciding to reject plea; district courts "must review individually every charge bargain placed before them") (internal citation omitted).

Here the immunity provision is simply inappropriate. For starters, this case arises out of one of the deadliest industrial tragedies in recent American history – not a run-of-the-mill corporate crime. More important, the parties themselves recognize that the immunity provision would block prosecution for the "root cause" of the disaster. The Government asks that the Court proceed on the basis of the facts contained in the U.S. Chemical Safety and Hazard Investigation Board (CSB) Report, saying this would only be duplicated by a Presentence Report ("PSR") (Gov't Response, p. 6). The BP Response (p. 23 and n. 23) quotes reasons for the explosion, all from the CSB Report, and all the fault of the Defendant and/or its corporate owner. The CSB Report itself identifies, as the very first "root cause[]", that the "BP Group Board<sup>10</sup> did not provide effective oversight of the company's safety culture and major accident prevention programs." (CSB Report at section 12.1 at p. 205). Remarkably, then, the parties ask the court to simultaneously accept as a fact that BP Global was a "root cause" of the blast and then turn

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<sup>10</sup> By this term, the CSB Report means the Board managing the conglomerate referred to here as BP Global.

around and bless a binding Plea Agreement that immunizes BP Global from criminal prosecution for the crime. How this can all be squared with the Court's obligation to ensure that a binding Plea Agreement is "in the public interest," *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985), is not explained.

BP Products next argues that, because it is "the sole defendant in the case," this Court should not even consider other crimes and actions of the controlling corporate entity, BP Global. Whatever validity this limitation might have in other contexts such as sentencing, it has no application to the Court's discretionary decision about whether to approve a Rule 11(c)(1)(C) Plea Agreement. The Court is being asked to give its imprimatur to an arrangement that will bar any criminal prosecution of BP Global for the events surrounding the March 2005 disaster. The Court must "take an active role" in evaluating that immunity grant, *United States v. Crowell*, 60 F.3d 199, 203 (5<sup>th</sup> Cir. 1996) (internal quotation omitted), and use its "considerable discretion to assess the *wisdom* of [the] plea bargain[]." *In re Morgan*, 506 F.3d 705, 712 (9th Cir. 2007). The immunity cannot be justified in light of the facts of this case.

Before turning to the specific facts here, a quick analogy may be helpful. If the Court was asked to approve a binding Plea Agreement in which a drug runner was to plead guilty to a felony and the kingpin of the organization was given immunity from further prosecution, the Court would naturally wonder about the "wisdom" of that immunity. There might be good reasons for such immunity – cooperation from the kingpin and the like<sup>11</sup> – but the Court would no doubt expect to see at least *some* explanation based on the facts and circumstances of the case. Here, however, neither Government nor the Defendant have done so.

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<sup>11</sup> Curiously the Plea Agreement here requires cooperation only from BP Products, not from BP Global. See Plea Agreement, Par. 3 ("the Defendant agrees to provide cooperation...") (emphasis added).

The reason they have failed to provide a case-specific explanation for the immunity is that this case cries out against immunity. Defendant BP Products is a wholly-owned subsidiary of BP Global.<sup>12</sup> Thus, unlike the main case relied upon by the Defendant,<sup>13</sup> BP Global is ultimately accountable for the crimes of its subsidiary entity. Indeed, BP Products appears to concede as much when it writes: “a corporation has no reason to plead guilty when its parents or subsidiary corporation could potentially be charged for the same conduct.” (BP Response p. 8).

## C.

### **BP Global’s Culpability**

BP Global is a “parent with worldwide compliance issues,” as the Government charitably puts it. (Gov’t Response p. 4). But the true situation is far more damning. BP Products does not deny the facts (found by the CSB) that BP Global knowingly denied its subsidiary running the local plant appropriate funds to make needed repairs to the deteriorated physical facilities. Indeed, BP Global cut budgets which forced cutting safety programs, all of which tended to perpetuate the illegal operation of the Plant. It does not deny that local Plant Management sought additional funds to make needed repairs, which were denied. It does not deny that BP Global was fully informed about the unsafe condition of the Texas City Refinery. It does not deny that, in effect, BP Global directed, controlled, profited from and perpetuated the crime to which its subsidiary agrees to plead guilty. It does not deny that the long list of thirty cases

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<sup>12</sup> BP, perhaps unintentionally, implied that BP Products is partially owned outside the BP organization when it recited the ownership of BP Products as including Standard Oil, BP Response, p. 2, fn. 1. Standard Oil is also a wholly-owned subsidiary of BP Global. See Victims’ JM, Ex. 4 which details the chain of ownership.

<sup>13</sup> In *United States v. Ashland, Inc.*, 356 F.3d 871 (8<sup>th</sup> Cir. 2004), the Eighth Circuit struck down a special condition of probation that applied to not only the defendant but also to a separate corporate entity that was not controlled by the defendant. See 356 F.3d at 874. The Circuit was clear that its holding rested on the fact that the corporate entity was “a third party not subject to [the defendant’s] control.” *Id.* Here, of course, BP Global ultimately controls BP Products. The Eighth Circuit’s holding would thus require some stretching to fit the facts of this case.

provided by Victims' counsel reflect various safety and environmental violations for which various BP subsidiaries have paid criminal, civil or administrative fines and/or restitution.

## D.

### BP Products' "Criminal History"

In response to BP Global's culpability, BP Products interposes the technical argument that, as a separate corporate entity, it "has no criminal history." That may depend on how tightly one defines "criminal history." Perhaps if one takes the most restrictive possible interpretation of this term, BP Products is technically correct. But the larger point – and the point that should have been disclosed to the Court – is that BP Products has undoubtedly done things that appear to be highly material to the Court's decision of whether to accept the proposed binding Plea.

Congress has directed that a sentencing judge must consider the "*history and characteristics of the defendant.*" 18 U.S.C. § 3553(a)(1) (emphasis added). BP Products has extensive "history and characteristics" germane to the sentencing issue. In particular, the Indiana Consent Decree is based on allegations of Clean Air Act violations at the Texas City Plant (among other BP plants):

"WHEREAS, the United States further alleges that defendant Amoco Oil Company ("Amoco") has violated and continues to violate the requirements of the Clean Air Act and the regulations promulgated there under at the petroleum refineries it owns and operates at Mandan, North Dakota; Salt Lake City, Utah; **Texas City, Texas**; Whiting, Indiana; and Yorktown, Virginia;" (emphasis added; Consent Decree, *USA, et al. v. BP Exploration & Oil Co., et al.*, Civil No. 2:96 CV 095 RL, USDC Northern D. Indiana, Hammond Div. (2001), Exhibit 9, p. 1).

The Texas City Refinery (whatever the current corporate name of its operator) is subject to the obligations of the Consent Decree. While this is admittedly a civil action for a Consent Decree rather than a criminal prosecution, it is highly germane to the court's decision whether to reject the proposed Plea.

In addition, Defendant BP Products is one of the “BP Entities” subject to the Deferred Prosecution Agreement entered late last year for fraud and conspiracy involving the propane market. (Exhibit 10, p. 1, Deferred Prosecution Agreement, *USA v. BP America Inc.*, No. 70 CR 683; USDC Northern Dist. Ill., E. Div. (2007).) Thus, the relevant “history and characteristics” of Defendant BP Products includes, in addition to the present felony, the propane fraud case in 2007 and the Consent Decree for Clean Air Act violations in 2001.

More broadly, however, the Court is required to consider the past conduct of BP Global before giving its blessing to the immunity provision. Just as it would not make sense for the Court to immunize a drug trafficking kingpin in the course of accepting a Plea from a “mule,” it does not make sense here for the Court to make a discretionary judgment call to immunize the “root cause” of the tragedy.

## **E.**

### **The Public Interest**

In accepting or rejecting the plea bargain pursuant to Rule 11, the Court is obligated to consider the public interest; "Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise *not in the public interest.*" *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985)). Accordingly, the Court should consider each of the following:

- Is it in the public interest to give such immunity from prosecution to the parent company which caused or directed, tolerated and profited from the crime?
- Is it in the public interest to give such immunity from prosecution to the parent company which caused or directed, tolerated and profited from the many other, repetitive environmental and safety violations?

- Is it in the public interest to give such immunity when BP Global gives nothing in return -- no agreement to bring the plant into compliance; no guarantee of needed funding for compliance.
- Does such an agreement promote respect for the law -- either by the BP entities or the public?
- Does such an agreement secure the benefit of eliminating the risk of repeat tragedies?

BP Products argues that this Court may not impose conditions of probation on BP Global because it is not a charged Defendant. That is not the issue. Rather, the issue is whether the Court will make its own discretionary judgment to bless and accept a “binding” Plea Agreement in which the Government and federal judicial system provide the benefit of immunity to BP Global and receive nothing in return.

Finally, in their opening submission, the Victims explained their concern that the Plea Agreement would be read to give immunity from prosecution for tragedies that occurred after the March 2005 explosion – tragedies like the one that recently took the life of William Gracia. Pressed on this point, BP Products states directly that its “reasonable understanding of the plea agreement is that it [only] precludes prosecution for any additional completed criminal offenses known to the government at the time of the agreement that may have occurred in connection with the March 23, 2005 explosion.” (BP Response p. 7). On the surface, this seems reasonable enough – until one recognizes that the BP Products never states directly whether its understanding of the Agreement is that a prosecution for the continuing criminal offense, which resulted in the death of William Gracia, for example, is precluded. The Court should therefore also reject the Plea Agreement on the basis that this provision is not sufficiently clear.

#### IV.

### **If the Court Is Considering Accepting the Plea, It Should At Least Order a Presentence Report**

For all the reasons the Victims have just given, the Court should squarely and immediately reject the proposed binding Plea Agreement. If, however, the Court is uncertain about whether to accept the Plea, at a minimum it should order the normal Presentence Report before making a final decision and imposing sentence. (*See* Victims' Joint Memo. p. 20). Preparation of a Presentence Report is, of course, the ordinary procedure when sentencing any Defendant. There is no good reason for short-circuiting that standard process here, particularly given the horrendous nature of the event, the massive public interest in its outcome, and the incomplete disclosures made by the parties.

The Court can dispense with a Presentence Report only if “the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.” Fed. R. Crim. P. 32(c)(1)(A)(ii). The Court cannot “meaningfully exercise” its sentencing authority until that authority has been finally determined. The parties have yet to reveal to the Court such basic information as, for example, what the maximum permissible fine is in this case. Rule 32(d)(1)(C) requires the Presentence Report to include the “kinds of sentences available.” Allowing preparation of a Presentence Report to move forward in the normal course would allow the Probation Office to collect information on (among other things) the gross gain and gross loss involved in this case. That information would then be presented it to the parties – and to the Victims<sup>14</sup> – for resolution

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<sup>14</sup> If the Court orders preparation of a Presentence Report, the Victims will file an appropriate motion to obtain access to relevant parts of it. *See In re Kenna*, 453 F.3d 1136 (9<sup>th</sup> Cir. 2006) (denying Victims' motion for access to an entire PSR, but noting that the Victims had not sought access to relevant parts of it). *See generally* Note, Matthew B. Riley, *Victim Participation in the Criminal Justice System: In re Kenna and Victim Access to*

of any resulting factual disputes. *See* Fed. R. Crim. P. 32(f) (spelling out procedures for objections to a PSR and resolution of those objections). A PSR might also usefully assist the Court in determining such things as the connection between the death of William Gracia and the safety failures at issue in this case and the usefulness of an independent Court-Appointed Safety Monitor. Finally, a Presentence Report could fully outline not only BP Products “criminal history” but also its “history and characteristics.” For all these reasons, a PSR is required *before* the Court decides whether to accept the parties’ proffered Plea.

A PSR is also required to insure that the Court has all appropriate victim impact information. While the Victims represented by undersigned counsel have been heard through this pleading, there may be other Victims of BP Products’ crime that wish to be heard – either in Court or by filing a Victim Impact Statement with the Probation Office. The compliance by the Government with the Crime Victims Rights Act in this case has been incomplete. Allowing the Probation Office to follow its ordinary procedures for collecting victim impact information would insure that the Court has complete information on “the financial, social, psychological, and medical impact” of the Defendant’s crime on Victims. Fed. R. Crim. P. 32(d)(2)(B). Moreover, to proceed without that information would violate the Crime Victims' Rights Act, which guarantees victims of crime the right to be treated "with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. sec. 3771(a)(8). It cannot possibly be fair to Victims to proceed to sentencing in this case without the Court having all the information from Victims that would ordinarily be found in a Presentence Report for any other felony crime.

For all these reasons, the court should order a Presentence Report before determining whether to accept a Plea.

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*Presentence Reports*, 2007 UTAH L. REV. 235 (explaining circumstances in which victims should obtain access to relevant parts of a PSR).

## V.

### **The Court Should Publish Its Decision**

The Court should publish its opinion on the issues raised here. The issues presented in this Reply are important ones that are likely to recur in this Court and elsewhere. The methodology that a district court should employ when considering whether to approve a “binding” Plea Agreement offered by a subsidiary, and which protects or insulates a multi-national parent corporation, has not been fully articulated. Many important questions can be answered.

A published opinion is particularly important here because there is scant case law on the subject of how the CVRA applies in the context of Victims objecting to a Rule 11(c)(1)(C) plea bargain. Indeed, the CVRA is *terra incognita* in this Court; the Victims have been unable to locate a single published decision in the Fifth Circuit, at either the trial or appellate court levels, interpreting the CVRA. Crime Victims only rarely are able to secure legal counsel to protect their rights. Because they have counsel in this matter, the issues regarding their role have been fully and fairly briefed. A published opinion would be beneficial for future Crime Victims who are without counsel and who are attempting to understand their rights.

### **RELIEF REQUESTED**

The Victims respectfully urge the Court to reject the Rule 11(c)(1)(C) Plea Agreement now proposed.

The Victims also ask that the Court, in discharging its duty to make inquiry about the Agreement, and when stating reasons for its rejection, to state the Court’s concern and interest in the following:

1. A Presentence Report, unless the Plea Agreement is rejected on the pleadings and exhibits;
2. A complete list of past and present government investigations of BP, civil and criminal, in the United States and other countries, including all disposition or status;
3. A stipulation between the Government and the Defendant expressly stating that their Agreement does not limit the Court's discretion to include other conditions of probation, and including:
  - a. Compliance with all applicable laws and regulations during the period of probation;
  - b. An effective Ethics and Compliance Program, including full PSM compliance in the Texas City refinery;
  - c. A Court-Approved Monitor that has no fiduciary or administrative loyalties to BP.
4. Contractual assurance that BP Global will provide BP Products North America, Inc. sufficient funding to comply with the conditions of probation; and
5. Such other relief as the Court may decide is appropriate.

Respectfully submitted,

/S/ David L. Perry

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### CERTIFICATE OF SERVICE

I hereby certify that on this the 31<sup>st</sup> day of January 2008, a copy of the Victims' Joint Reply Memorandum in Opposition to Proposed Rule 11(c)(1)(C) Plea Agreement was served upon all counsel of record using the Court's CM/ECF system of the United States District Court for the Southern District of Texas.

/S/ David L. Perry

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David L. Perry

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

UNITED STATES OF AMERICA  
V.  
BP PRODUCTS NORTH AMERICA INC.

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§  
§  
§

CR. NO. 4:07-cr-434

**APPENDIX**

- Exhibit 1: Death of William Joseph Gracia, Under Investigation (2 Articles)
- Exhibit 2: AcuTech Chart
- Exhibit 3: AcuTech Audit
- Exhibit 4: Correspondence to U.S. Attorney (12/21/07)
- Exhibit 5: Correspondence to U.S. Attorney (01/11/08)
- Exhibit 6: Notifications to Victims
- Exhibit 7: Internal Emails from BP Plant Manager
- Exhibit 8: Publications, Editorial Opinion (3 Articles)
- Exhibit 9: N.D. Indiana, Consent Decree
- Exhibit 10: Deferred Prosecution Agreement, E.D. Illinois (Pages 1-2)