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IN RE OIL SPILL BY THE OIL RIG "DEEPWATER HORIZON"

IN THE GULF OF MEXICO, ON APRIL 20, 2010

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MDL 2179, SECTION J

JUDGE BARBIER; MAGISTRATE JUDGE SHUSHAN

**RESPONSIVE EXPERT REPORT OF**

**PROFESSOR ROBERT DAINES**

September 12, 2014

**HIGHLY CONFIDENTIAL**

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### I. Introduction

I am Professor Robert Daines and I am the Pritzker Professor of Law and Business at Stanford Law School. On August 15, 2014, I submitted an expert report in this case (my "Initial Report") addressing the governance of wholly-owned subsidiaries, including BP Exploration & Production Inc. ("BPXP"), and the policy implications of considering the assets of well-capitalized parents when imposing penalties on subsidiaries.

I understand that the United States has not brought an action against any BP Group entity aside from BPXP under the Clean Water Act ("CWA"), nor has it pursued a veil-piercing claim that would reach the assets of any of BPXP's direct or indirect parents. I further understand that the United States has asserted that BPXP is "the liable party in this proceeding."<sup>1</sup>

My Initial Report contained a summary of my qualifications and a description of my background and experience. My curriculum vitae, which includes a list of my publications and presentations, was attached as Appendix B to my Initial Report, and Appendix C to my Initial Report contains a list of all cases in which I have testified as an expert at trial or by deposition in the previous four years.

On August 15, 2014, the United States filed a number of expert reports addressing various issues. I have been asked by BPXP to review and respond to the Expert Report of Fredric L. Quivik, Ph.D. (the "Quivik Report"). Professor Quivik states that he is an industrial historian, with a specialty in the history of technology.<sup>2</sup> Professor Quivik states that "a particular focus for much of my work as an industrial historian has been on the ways that large extractive

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<sup>1</sup> United States Memorandum in Support of Plaintiff United States' Motion in Limine to Permit Relevant Evidence Concerning BP p.l.c. and Other BP Affiliates, Dkt. 12355-1, at 2. It is also my understanding that the Court held that BP p.l.c. is not liable under general maritime law. Phase One Findings of Fact and Conclusions of Law, Dkt. 13355, at ¶573.

<sup>2</sup> Quivik Report at 5.

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enterprises organize themselves in order to manage their operations.”<sup>3</sup> His conclusions are from the historical perspective, not from the perspective of corporate governance. Professor Quivik therefore does not opine (and would have no basis to opine as explained below) that BPXP’s governance and contracting practices are inconsistent with good corporate governance, harmful, or unusual for large multinational companies generally.

Specifically, Professor Quivik opines that:

- “Although BPXP is the corporate entity that holds BP’s leases in the Gulf of Mexico, BPXP is not an active corporate entity that operates those leases.”<sup>4</sup>
- “Although BP p.l.c. and BPXP are distinct corporate entities, the organizational structure created by BP p.l.c. for its global enterprise has managed and controlled BP’s operations in the Gulf of Mexico, including operations at the Macondo well, from the time BPXP acquired the MC252 lease on which the well was drilled until the Macondo blowout and Deepwater Horizon oil-spill disaster in 2010. BP p.l.c.’s organizational structure has also managed the response to the blowout and oil spill.”<sup>5</sup>

Professor Quivik’s opinions and the evidence cited in the Quivik Report do not affect any of the expert opinions I expressed in my Initial Report. My responses to the Quivik Report are described in the remainder of this report.<sup>6</sup> Professor Quivik provides certain facts relating to the history and characteristics of the BP Group, BP p.l.c., and BPXP, but it is not clear which of these facts drives his opinions.<sup>7</sup> Therefore, I focus on what seem to be the main topics and themes in the Quivik Report. I understand discovery is ongoing, and if Professor Quivik

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<sup>3</sup> Quivik Report at 6.

<sup>4</sup> Quivik Report at 2.

<sup>5</sup> Quivik Report at 2.

<sup>6</sup> In addition to the materials I considered in forming the opinions contained in my Initial Report (attached as Appendix A to my Initial Report), I have attached as Appendix A to this report a supplemental list of materials considered in forming the opinions contained in my responsive report. Defined terms in this report are defined in my Initial Report.

<sup>7</sup> See e.g., Quivik Report at 11-17.

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identifies additional expert opinions or if new evidence becomes available, I may supplement or amend this responsive report.

### II. Summary of Opinions

A summary of my responsive opinions is as follows:

- **Professor Quivik states that BPXP contracts with BP Group affiliates and others in conducting its operations. This is appropriate for a corporate group and consistent with good corporate governance.**
  - Professor Quivik claims that BPXP is not “active,” but he does not define what he means by “active” or what should follow from that characterization.
  - It is appropriate from a corporate governance perspective for corporations, including subsidiaries, to contract with affiliates and third parties for goods and services (including employee services). It is also appropriate from a corporate governance perspective for authorized employees (for whose time BPXP pays) and officers to conduct BPXP operations.
- **Professor Quivik states that the BP Group controls BPXP's operations in the Gulf of Mexico, that the BP p.l.c. Board is different than the BPXP Board, that the BP Group utilizes structures other than subsidiaries (such as “segments” or “functions”) in conducting its operations, and that the BP Group helped BPXP respond to spill. Each of these practices, if true, would be consistent with good corporate governance and a normal parent-subsidiary relationship.**
  - Parental control of a wholly-owned subsidiary is customary and consistent with good corporate governance.
  - The boards and governance of wholly-owned subsidiaries are (and in fact should be) different from the boards and governance of parent companies and public corporations.
  - There are economic reasons, including operational efficiencies, liability protection, regulatory compliance, and efficient tax planning, for multinational corporations to create subsidiaries whose legal organization may not overlap with the way the firm organizes its management and oversight structure. Moreover, the Quivik Report offers no reason why the legal structure of a firm should align with the structure of business units.

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- **If BPXP were to be assessed a higher penalty based on its parent's assets, either (i) because its corporate governance looks different from a public company's corporate governance, or (ii) because it relied upon and paid BP Group affiliates' payroll employees to help manage BPXP operations and respond to the spill, this would have undesirable consequences including:**
  - Less Investment. As I described in my Initial Report, if penalties on a subsidiary are higher because a parent group is well-capitalized, then well-capitalized groups would face higher costs than thinly-capitalized firms. The Quivik Report provides no reason to doubt that well-capitalized firms would be less likely to invest under these circumstances or that this approach would tend to make it harder to respond to future spills, mitigate damage, or provide compensation.
  - Increasing costs. Companies would have an incentive to adopt the kind of internal policies and governance practices the Quivik Report focuses on (e.g., subsidiary boards modeled on public company boards, changing hiring and management practices, decentralized legal/financial/tax functions), which would reduce operational efficiencies and thus increase costs.
  - Questionable benefits. The Quivik Report does not claim that BPXP's governance practices were improper, unsafe, or otherwise harmful, nor does it say why firms should adopt the practices he expects. Therefore, the Quivik Report implies that companies should operate as he suggests but does not describe any benefit that would outweigh the costs of making a subsidiary's corporate governance and board look like that of a public company.
  - Reduced incentives to respond. If the BP Group's involvement in the response is used as a justification to impose a higher penalty on BPXP, parent companies would have less incentive to respond to future spills by committing the full resources of their group.

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**III. Professor Quivik states that BPXP contracts with BP Group affiliates and others in conducting its operations. This is appropriate for a corporate group and consistent with good corporate governance.**

A. Professor Quivik claims that BPXP is not "active," but he does not define what he means by "active" or what should follow from that characterization.

The Quivik Report claims that BPXP is "not an active corporate entity,"<sup>8</sup> and states that he has "seen little, if any, evidence that demonstrates that BPXP, as opposed to other BP entities, actually conducted operations at the well or responded to the blowout."<sup>9</sup> Professor Quivik also suggests that BPXP only "holds leases in the Gulf of Mexico."<sup>10</sup>

But Professor Quivik never explains what he means by an "active" corporate entity or what he means by "actually conducted operations." I have therefore focused on several of the themes and examples he stresses.

As an initial matter, I understand that BPXP is active enough to have:

- Been designated by the United States as the "responsible party" under the Oil Pollution Act ("OPA");<sup>11</sup>
- Been named by the United States as the sole defendant in this case;
- Spent approximately \$3.587 billion on capital expenditures and approximately \$1.989 billion on operational expenditures in 2013;<sup>12</sup>
- Paid for the compensation of over 2,000 BP Group employees who conducted BPXP's operations in the Gulf of Mexico;<sup>13</sup>

<sup>8</sup> Quivik Report at 2, 3, 76.

<sup>9</sup> Quivik Report at 3.

<sup>10</sup> Quivik Report at 76.

<sup>11</sup> Letter from US Coast Guard to BPXP, Apr. 28, 2010, HCG374-019497.

<sup>12</sup> BP-HZN-2179MDL09099966, which I understand to contain operating expense data; BP-HZN-2179MDL09099967, which I understand to contain capital expenditures data.

<sup>13</sup> See BP-HZN-2179MDL08714394. I understand this to be a list of individuals who conducted work on BPXP's behalf.



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- Paid between approximately \$800 million and \$1 billion in royalties annually to the government;<sup>14</sup>
- Been considered by the Bureau of Safety and Environmental Enforcement as the current “operator” of six wells in the Gulf of Mexico;<sup>15</sup>
- Been held liable as an operator that “ultimately controlled and directed all operations at Macondo.”<sup>16</sup>

I understand that this proceeding is being held to determine what penalty BXPX should pay for operating a well that—according to the Quivik Report—it did not “actually” operate. The claim that BXPX is not “active” or “actually conducted operations” at the well seems to be based in part on the fact that BXPX does not have its own “payroll” employees. Instead, I understand that BXPX has entered into a General Services Agreement with BP America Production Company (“BPAPC”), and relies on (and pays its affiliates for the time of) over 2,000 BP Group employees used each year to conduct its operations in the Gulf of Mexico.<sup>17</sup> I understand that this work includes creating annual work plans and budgets, business plans, and strategy, and setting performance objectives.<sup>18</sup> It is also my understanding that certain BXPX

<sup>14</sup> BP-HZN-2179MDL07818050.

<sup>15</sup> Bureau of Safety and Environmental Enforcement, Gulf of Mexico Deepwater Information (updated weekly) Current Deepwater Activity, *available at*: [http://www.bsee.gov/uploadedFiles/BSEE/Exploration\\_and\\_Production/Development\\_and\\_Production/Gulf\\_of\\_Mexico\\_Region/Rp\\_Current\\_Deepwater\\_Activity2.pdf](http://www.bsee.gov/uploadedFiles/BSEE/Exploration_and_Production/Development_and_Production/Gulf_of_Mexico_Region/Rp_Current_Deepwater_Activity2.pdf).

<sup>16</sup> Phase One Findings of Fact and Conclusions of Law, Dkt. 13355, at ¶608. The Court also noted that BXPX personnel were aware of and involved in decisions made at the Macondo well, and that BXPX was an “operator” of the facility. *See id.* at ¶¶ 509, 510, 537, 538.

<sup>17</sup> List of Employees paid for by BXPX, BP-HZN-2179MDL08714394. I understand that BXPX is billed for employees that are working on its behalf in the Gulf of Mexico and that these authorized employees are responsible for all ordinary course activities including day-to-day operational activities, including safety as well as looking for and valuing projects in the Gulf of Mexico. *See, e.g.,* Morrison Dep. at 92:5-9 (BXPX is billed for “employees that are working on behalf of BXPX[JP.]”); Dep. Ex. 11969. I understand BP-HZN-2179MDL09099964 contains the job descriptions of the employees BXPX paid for each year from 2009 through 2014, which includes activities such as development, drilling, financial analysis, safety, and appraisals. Robertson Dep. at 181:19-24 (“If a functional person was supporting the Gulf of Mexico assets, those charges would go into BXPX[JP.]”).

<sup>18</sup> I understand that budgeting for BXPX assets is an ordinary course activity and is handled by BXPX management and officers. For example, Steven Bray, the Head of the BP Group Secretariat and

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officers work in the Gulf of Mexico and are employees of BPXP affiliates.<sup>19</sup> Finally, I understand that BPXP also acts through contracts with third parties and affiliates.<sup>20</sup> The Quivik Report's point seems to be, in part, that BPXP is not a "real" or "active" corporation because the employees who perform its work are on a different "payroll."

The Quivik Report's conclusion is incorrect. As a technical matter, corporations do not themselves "act" or "operate." A corporation is a purely legal construct—a fictional legal person created by the state to facilitate investment and to promote economic growth. A corporation cannot act for itself. So when we say that a corporation takes an action (enters into a contract, buys land, provides a service), we are describing the legal consequences of actions taken by its legal representatives.

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Special Counsel, testified at his deposition that management, which includes people acting in the Gulf of Mexico unit on behalf of BPXP, handles ordinary course activities. Bray Dep. at 317:25-318:5 ("[T]he board of directors is involved in nonordinary course activities. Management handles ordinary course activities. And that, I think would be considered to be ordinary course. And in my experience, that's the sort of thing—budgets is what management addresses."); *see also id.* at 317:10-318:23. BPXP Chairman Richard Morrison testified that annual work plans and budgets were set by the chief operating officer for the Gulf of Mexico in conjunction with his subordinates, and that decisions about which leases should be held are made by the exploration team that supports the Gulf of Mexico. Morrison Dep at 30:10-18, 28:20-29:13, 30:4-31:9.

<sup>19</sup> For example, I understand that Steve Bray, an officer of BPXP, signed an Internal Financing Account on behalf of BPXP. *See* IFA between BPXP and NAFCO, BP-HZN-2179MDL07817330. I also understand that officer Brian Smith, the Vice President of Structured Finance for the Western Hemisphere and a Vice president and CFO of BPXP, testified that he "had interactions particularly post-Macondo on a number of issues that were for the benefit of BPXP. For example, the formation of the trust – the 20billion dollar trust." Smith Depo. at 19:20-23, 28:13-20, 30:5-20. I further understand that the BPXP Board appoints officers. I understand that under the BPXP Bylaws, officers "have such powers and duties in the management of the corporation as may be prescribed in a resolution by the Board of Directors and, to the extent not so provided, as generally pertain to their respective offices, subject to the control of the Board of Directors." *See* BPXP Bylaws, Dep. Ex. 12904. I understand that certain of these BPXP officers perform both duties relating to BPXP's Gulf of Mexico business and have duties as officers, although it is not required that officers do both.

<sup>20</sup> Quivik Report at 52; *see also* discussion *infra* at Section III.B.

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I know of no reason to think that BPXP is less “active” or less real because it acts through contracts with third parties and pays for the time of employees of affiliated entities. Corporations always act through delegated authority.

This same confusion about what it means for a corporation to be “active” and the mistaken treatment of the corporation as if it was a living person rather than a legal construct runs throughout the Quivik Report. For instance, the Quivik Report claims that “there is no suggestion in the historical record of BP’s operations in the U.S. that BPAPC, as a corporate entity, possesses knowledge, expertise, and experience. Persons on its payroll may possess such qualities, but BPAPC, as a corporate entity, does not appear to possess or deploy them.”<sup>21</sup> This is a distinction without a difference. I cannot imagine how a corporate entity itself, apart from the individuals who act on its behalf, could conceivably possess skills or expertise of any sort. A corporation is a set of related contracts and any skills and qualities come from people who act on its behalf.

Therefore, when the Quivik Report objects that BPXP is not “active” because it secures goods, services, and employees through contracts and/or by reimbursing other entities, it is important to remember that everything a corporation does is done for the corporation by other people and entities through delegated authority or contract.

Finally, Professor Quivik does not explain how his definition of an “active” corporation relates to how multinational corporations actually operate or whether wholly-owned subsidiaries would typically be considered “active.” For instance, he argues that BPXP did not do things that “active corporations usually do to conduct operations, like approve annual work plans and

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<sup>21</sup> Quivik Report at 64.

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budgets.”<sup>22</sup> However, he does not explain why annual work plans and budgets should be done by BPXP directly as opposed to employees or executives of BPXP’s direct or indirect parent shareholders or by employees of affiliates for whose time BPXP pays.<sup>23</sup>

For reasons described in my Initial Report, it is common for corporate groups to centrally coordinate activities such as major financial expenditures, tax plans, and operational decisions. As described in a recent Deloitte survey of the financial practices of corporate groups, 84% of the firm’s relationship partners surveyed:

[I]ndicated that their clients have specific approval levels in place where the parent company must approve the actions or spending plans of the subsidiaries. It is usually a part of the regular governance process which often includes capital investments above certain threshold amounts in accord with the group wise capital expenditure policy, treasury operations and contracts. The boards often view the company as one organisation and do not differentiate decision making based on a legal subsidiary structure and hence the approval levels operate throughout the organisation.<sup>24</sup>

- B. It is appropriate from a corporate governance perspective for corporations, including subsidiaries, to contract with affiliates and third parties for goods and services (including employee services). It is also appropriate from a corporate governance perspective for authorized employees (for whose time BPXP pays) and officers to conduct BPXP operations.

The Quivik Report states that BPXP was “not an active corporate entity”<sup>25</sup> and that it did not “actually” conduct operations or respond to the blowout.<sup>26</sup> This statement appears to be based in part on the fact that BPXP relies on “payroll” employees of BPAPC and other entities

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<sup>22</sup> Quivik Report at 3.

<sup>23</sup> As discussed at footnote 18 above, BPXP Chairman Richard Morrison testified that annual work plans and budgets and decisions about leases were made within the Gulf of Mexico unit.

<sup>24</sup> Deloitte, Governance of Subsidiaries: A Survey of Global Companies, September 2013, at 11, available at: [http://www.deloitte.com/assets/Dcom-India/Local%20Assets/Documents/Thoughtware/Tax thoughtpapers Dec 19/Deloitte Global%20Subsidiary%20Governance%20Survey%20Report.pdf](http://www.deloitte.com/assets/Dcom-India/Local%20Assets/Documents/Thoughtware/Tax%20thoughtpapers%20Dec%2019/Deloitte%20Global%20Subsidiary%20Governance%20Survey%20Report.pdf).

<sup>25</sup> Quivik Report at 2.

<sup>26</sup> Quivik Report at 3.

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(for whose time it pays) and that BPXP relies on contracts for its services and operations. But this criticism is both overbroad (corporations act primarily through contracts of one sort or another) and unsupported (the Quivik Report does not discuss why companies must have their own "payroll" employees or how many employees they should have to be considered "active").

1. It is appropriate for wholly-owned subsidiaries to contract with and/or pay affiliates and third parties for goods and services (including employee services).

The Quivik Report repeats the fact that BPXP does not have its own employees, but it does not say why it is inappropriate for BP Group employees to perform operational activities for BPXP and for BPXP to reimburse its affiliates.

In fact, from a corporate governance perspective, it is appropriate for wholly-owned subsidiaries to reimburse affiliates for the services of their employees. As discussed, corporations secure essentially all of their services through contract or payment (either with employees directly or with others who provide the services and charge for them). In fact, as stated in my Initial Report and discussed above, a corporation is a web of contracts between customers, workers, managers, investors, and suppliers (of raw materials or services).<sup>27</sup> From the perspective of corporate organization and corporate governance and the policies behind limited liability, I know of no reason (and Professor Quivik has provided no reason) to consider BPXP to be somehow less real or less active, or to consider the assets of its affiliated entities in

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<sup>27</sup> MICHAEL C. JENSEN, A THEORY OF THE FIRM: GOVERNANCE, RESIDUAL CLAIMS, AND ORGANIZATIONAL FORMS 1-3 (2d ed. 2003).

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assessing a penalty, on the grounds that it reimburses corporate affiliates for the services of their employees.<sup>28</sup>

In addition to the General Services Agreement with BPAPC discussed above, it is also my understanding that BPXP is a party to a number of contracts with non-BP Group entities and affiliates, for example:<sup>29</sup>

- BPXP bid for and was awarded the right to lease MC252;<sup>30</sup>
- BPXP entered into the Joint Operating Agreement with MOEX for the MC252 lease;<sup>31</sup>
- BPXP entered into operating contracts with various parties related to the drilling of the Macondo well;<sup>32</sup>
- BPXP was the party to a number of response contracts after the spill;<sup>33</sup>
- BPXP was also a party to a number of contracts that related to efforts to contain the well;<sup>34</sup> and

<sup>28</sup> Professor Quivik also claims that the fact that certain employees working on BPXP assets were unaware of their roles with BPXP or BPXP's role in the Gulf of Mexico supports his claim regarding the "irrelevance of BP's parent/subsidiary structure to the management structure for BP's operations." Quivik Report at 56. However, he does not claim that this would cause any harm or describe why this would be improper.

<sup>29</sup> I understand that BPXP enters into some contracts itself, and that other global contracts are drafted and negotiated by BP Group affiliates who contract for products or services BPXP requires. *See, e.g.*, Dep. Ex. 12669, Contract with Entrix.

<sup>30</sup> Agreed Stipulations No. 96, Rec. Doc. 5927; *see also* MC-252 Lease Exchange Agreement, BP-HZN-2179MDL03432244.

<sup>31</sup> *See, e.g.*, TREX 1243A; TREX1243B, and TREX1243C.

<sup>32</sup> *See, e.g.*, Amendment No. 03 to Hardware Systems Design and Manufacturing Contract No. BPM-03-01125, August 15, 2007 (BP-HZN-2179MDL00055061-63); Hardware Systems Design and Manufacturing Services Contract Subsea Wellheads between BP America Production Company and Drill-Quip, Inc. (BP-HZN-2179MDL00054687-844); Halliburton Contract, BP-HZN-2179MDL00055567; M-I Swaco Contract, BP-HZN-2179MDL00056402; Weatherford Contract, BP-HZN-2179MDL02884456.

<sup>33</sup> *See, e.g.*, Response contract and bridge agreement with O'Brien's, BP-HZN-2179MDL05848586 and BP-HZN-2179MDL03199070.

<sup>34</sup> *See, e.g.*, Construction Services Contract between BPXP and Chet Morrison Contractors, BP-HZN-2179MDL05226445; Service Contract between BPXP and Swift Spill Separator, BP-HZN-2179MDL04464128; Work Release Against Master Service Contract between BPXP and D&L

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- BPXP was a party to purchase orders, even if it was not a party to the underlying contract.<sup>35</sup>

2. Professor Quivik's comparison of contracts between unaffiliated third parties with contracts between affiliates is not instructive.

As evidence that BPXP is not "a distinct corporate entity that should be considered the sole responsible party"<sup>36</sup> the Quivik Report describes and compares two contracts: one between affiliates (the General Services Agreement between BPXP and BPAPC) and one between BPAPC and a third party (Transocean). The Quivik Report asserts that the contract with Transocean is "instructive for comparing and contrasting"<sup>37</sup> BPXP's contract with its affiliate, BPAPC. The Quivik Report, however, never states why this comparison is instructive, and in fact it is not clear what we are to learn from this comparison.

The Quivik Report describes at length how the contract between BPXP and BPAPC, the General Services Agreement, is sometimes less detailed than the contract with the third party, Transocean. Even assuming this is true, it is not clear what follows from this. Certainly the fact that one contract is more detailed than another does not mean either of the contracts is invalid or suspect. I am aware of no argument that would suggest that BPXP should not be considered a real corporation or distinct corporate entity if its contracts with affiliates contain general terms.

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Salvage, BP-HZN-2179MDL04473037; Release Against Master Services Contract between BPXP and Oceaneering International, BP-HZN-2179MDL05844242.

<sup>35</sup> See, e.g., Purchase Order between Submar, Inc. and BPXP, BP-HZN-2179MDL05013214; Purchase Order between Oceaneering International, Inc. and BPXP, BP-HZN-2179MDL06989486; Purchase Order between Sonardyne Inc. and BPXP, BP-HZN-2179MDL09115028. I understand that BP-HZN-2179MDL09099966 and BP-HZN-2179MDL09099967 contain a list of thousands of vendors whom BPXP has paid for capital expenditures and operational expenditures.

<sup>36</sup> Quivik Report at 62.

<sup>37</sup> Quivik Report at 65.

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The Quivik Report does not say how specific a contract “should” be in order for the corporation to be considered “active.”

In fact, the type of general contractual provisions the Quivik Report describes are commonly adopted, even in arm’s length transactions between sophisticated commercial actors. It is well known that contracts signed by rational and unrelated parties acting at arm’s length are often vague or silent on key terms.<sup>38</sup> Sophisticated parties and parties in long-term relationships often do business without any written contract at all.<sup>39</sup> Therefore, it is not clear what would follow from the conclusion that contracts between affiliates are general—and it would certainly not follow that the contracts were somehow suspect, that corporate entities are not “active,” or that their legal boundaries were not entitled to respect when they entered into contracts with general terms. There is a large literature on whether (and why) contract terms should be general or specific,<sup>40</sup> but I am not aware of any argument that general terms are disfavored by law or less entitled to respect.

Moreover, it would be unsurprising that a third party contract would be more detailed than one with an affiliate. There is a large body of economic literature that shows that firms are created (and that they are vertically integrated) in order to economize on the costs of contracting with third parties<sup>41</sup>—including the costs of spelling out in detail the kinds of things the Quivik Report highlights (the firm’s position in the overall organization chart, the need for a recycling

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<sup>38</sup> See, e.g., George G. Triantis, *The Efficiency of Vague Contract Terms: A Response To The Schwartz-Scott Theory Of U.C.C. Article 2*, 62 LA. L. REV. 1065, 1071-72 (2002); Robert E. Scott and George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 814 (2006).

<sup>39</sup> See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business*, 28 AM. SOC. REV. 1, 9-12 (Feb. 1963).

<sup>40</sup> *Id.*

<sup>41</sup> The canonical cite is Ronald Coase, “The Nature of the Firm,” *Economica*, Vol 4 No 16, November 1937.



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program, the health and safety risks involved in drilling).<sup>42</sup> If the comparison between a contract with a third party and a contract with an affiliate is offered to show that BPXP is vertically integrated with and a wholly-owned subsidiary of BP p.l.c., I understand that those facts are not in dispute.<sup>43</sup>

Thus, although the Quivik Report asserts that the contract with Transocean is “instructive for comparing and contrasting”<sup>44</sup> BPXP’s contract with an affiliate, it is not clear why this is “instructive.” Given the completely different economic setting for the two contracts, it would be surprising if they had similar terms. The Quivik Report does not offer a yardstick for judging how detailed a contract is or should be, does not even claim that the level of specificity is unusual or improper, offers no explanation about why detailed contracts would make a company more “active” or “distinct,” and fails to mention the fact that general terms or unwritten agreements are common between unrelated parties.<sup>45</sup> The comparison between the contracts is therefore inconclusive and unenlightening.

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<sup>42</sup> Quivik Report at 66-69.

<sup>43</sup> There are numerous examples of large, vertically integrated firms, including The Gap, L.L. Bean, HBO, Apple, Oracle, and PepsiCo. See e.g., Noriaki Matsushima & Tomomichi Mizuno, *Why Do Large Firms Tend to Integrate Vertically?*, 64 BULL. ECON. RES. S1 (2012); Dongli Zhang, *The Revival of Vertical Integration: Strategic Choice and Performance Influences*, 4 J. MGMT. & STRATEGY 1 (2013). It is not clear whether Professor Quivik would consider these organizations to be active or real operating firms if their intercompany contracts were not similar to their external or third-party contracts.

<sup>44</sup> Quivik Report at 65.

<sup>45</sup> In addition, it is my understanding that other contracts between BPXP and non-BP Group entities contain specific terms. See, e.g., BPXP Contract with O’Brien’s Response Management, BP-HZN-2179MDL05848586.

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**IV. Professor Quivik states that the BP Group controls BPXP's operations in the Gulf of Mexico, that the BP p.l.c. Board is different than the BPXP Board, that the BP Group utilizes structures other than legal subsidiaries (such as "segments" or "functions") in conducting its operations, and that the BP Group helped BPXP respond to the spill. Each of these claims, if true, would be consistent with good corporate governance and a normal parent-subsidiary relationship.**

**A. Parental control of a wholly-owned subsidiary is customary and consistent with good corporate governance.**

As I discussed in my Initial Report, parental control of a wholly-owned subsidiary demonstrates nothing more than a typical parent-subsidiary relationship. Subsidiaries by definition are controlled by their parents.<sup>46</sup> For example, Delaware corporate law and the United States tax code each describe a subsidiary as controlled by its parent or controlling shareholder.<sup>47</sup>

Just as the United States' claim that "BP p.l.c. and its affiliates have directed and controlled BPXP,"<sup>48</sup> if true, would not demonstrate anything other than a normal parent-subsidiary relationship,<sup>49</sup> neither would Professor Quivik's opinion that "the organizational structure created by BP p.l.c. for its global enterprise has managed and controlled BP's operations in the Gulf of Mexico, including operations at the Macondo well"<sup>50</sup> demonstrate anything other than a normal parent-subsidiary relationship. Such control is customary and

<sup>46</sup> See, e.g., Initial Report at 21. See also *Copperweld Corp. v. Independence Tube Corp.*, 467 US 752, 771 (1984) ("A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate, and their general corporate objectives are guided or determined not by two separate corporate consciousness, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder.").

<sup>47</sup> See Initial Report at 34-35.

<sup>48</sup> United States Memorandum in Support of Plaintiff United States' Motion in Limine to Permit Relevant Evidence Concerning BP p.l.c. and Other BP Affiliates, Dkt. 12355-1, at 4.

<sup>49</sup> See Initial Report at 34.

<sup>50</sup> Quivik Report at 2.

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appropriate as a matter of corporate governance, and the Quivik Report does not provide a basis for ignoring the separateness of legal entities.

One example of parental control over BPXP noted by the Quivik Report is the reliance on centralized functions and common processes. Centralized functions are common and exist for valid economic reasons, and centralized operations are beneficial because they lower costs and create economies of scale.<sup>51</sup> As stated in my Initial Report: "Because corporations are a vehicle for reducing the costs of contracting and for identifying particular pools of assets that back particular ventures, there is no reason to think each corporation should have 'its own' treasury or tax department. This would be wasteful."<sup>52</sup> McKinsey & Company, Deloitte, and Her Majesty's Revenue and Customs (UK) have each noted that it is not uncommon for firms to lower their costs and achieve economies of scale by centralizing important financial and planning functions.<sup>53</sup> Large organizations often centralize important functions. For instance, the Federal Government centralizes certain purchasing and contracting functions through GSA Contracts, which "contain pre-negotiated pricing, terms, and conditions which streamline the government sales process"<sup>54</sup> in order to help companies sell to government buyers.

BP Group Treasurer David Bucknall explained the company's rationale for centralized treasury within the BP Group at his deposition:

[T]he objective of centralizing the cash is to make sure that for all the companies the group owns, there is a professional, well-run, properly managed set of people that are able to do that activity. . . . So the objective is to -- is to concentrate the resources. Those resources belong to the legal entities, but they do need to be managed in one place. You know, rather

<sup>51</sup> See Initial Report at 38-40.

<sup>52</sup> Initial Report at 39.

<sup>53</sup> See Initial Report at 39-40.

<sup>54</sup> Federal Schedules, GSA Contract: An Overview of GSA Contracts, *available at*: <http://gsa.federalschedules.com/gsa-schedule.aspx>.

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than each individual legal entity having its own treasury, its own bank, its own debt issuance, we like to bring that together, and this is what multinational companies do, bring it all together so that we're able to manage that in an effective way.<sup>55</sup>

The BP Group describes its integrated approach to certain functions such as treasury in its annual filings. For example, in its 2009 Annual Report and Form 20-F, the BP Group stated, "Treasury manages the financing of the group centrally, ensuring liquidity sufficient to meet group requirements and manages key financial risks including interest rate, foreign exchange, pension and financial institution credit risk. From locations in the UK, the US and the Asia Pacific region, Treasury provides the interface between BP and the international financial markets and supports the financing of BP's projects around the world."<sup>56</sup>

The Quivik Report notes that BPXP does not have an external bank account.<sup>57</sup> This is logical because the BP Group's treasury function is centralized. Professor Quivik acknowledges, and I noted in my initial report, that BPXP does have an internal bank account (with NAFCO).<sup>58</sup> Furthermore, I have seen no government allegations that the funds of BPXP were not separately accounted for, as distinct from the funds BP p.l.c. or other BP Group entities. To the contrary, it is my understanding that when the internal bank makes a payment to a third party on behalf of BPXP, it simultaneously creates a receivable from BPXP, and the revenues that BPXP receives are used to settle balances.<sup>59</sup> This is consistent with the general principle that financial information should be recorded for separate corporate entities.

<sup>55</sup> Bucknall Dep. at 29:22-30:21.

<sup>56</sup> Dep. Ex. 12764, BP Annual Report and Form 20-F 2009, at 40.

<sup>57</sup> Quivik Report at 85.

<sup>58</sup> See, e.g., Bamfield Dep. at 35:7-12 ("NAFCO operates as a—an in-house bank within the U.S. Group, so it's like BPXP having a bank account with CitiBank; it has it with NAFCO.").

<sup>59</sup> Smith Dep. at 112:8-113:12.

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Professor Quivik also alleges that BP p.l.c. controlled BPXP in the design and implementation of the Organizational Management System ("OMS").<sup>60</sup> Even assuming this is true, it is not surprising that BP p.l.c. would want to standardize processes that it deemed important across the BP Group.<sup>61</sup> Professor Quivik has not provided any reason to think that this is in any way inappropriate or undesirable, gives no reason to doubt that development and implementation of key processes at the subsidiary level would increase the company's costs, and notes no benefits from requiring a subsidiary to develop and implement its own processes.

- B. The boards and governance of wholly-owned subsidiaries are (and in fact should be) different from the boards and governance of parent companies and public corporations.

The Quivik Report criticizes BPXP's governance not by comparing BPXP's Board to other subsidiary boards, but instead by comparing BPXP's Board to that of a publicly held corporation, BP p.l.c. Professor Quivik states: "One way of gauging the extent to which BPXP is, or is not, an operating company, is to compare the actions of its board of directors with the actions of a board of directors in the BP Group that manages operations. For purposes of this exercise, the most appropriate board to compare with the BPXP Board is the BP p.l.c. Board, because it is at the top of the BP Group hierarchy."<sup>62</sup> He does not compare BPXP's Board with the board of another subsidiary, whether outside the BP Group or within it. He relies only on comparisons between BPXP (a wholly-owned, non-public subsidiary) and BP p.l.c. (a public company). Professor Quivik's comparison of BPXP's Board to BP p.l.c.'s Board is therefore not instructive.

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<sup>60</sup> Quivik Report at 71-75.

<sup>61</sup> Professor Quivik notes that the BP Group considered OMS to be "important." Quivik Report at 71.

<sup>62</sup> Quivik Report at 29.

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Professor Quivik does not say why the board “at the top of the BP Group hierarchy” is the most appropriate board for a comparison. Boards of public companies should (and typically do) function entirely differently than boards of subsidiaries. If the goal of the comparison is to shed light on BPXP’s Board, the comparison is inapt, because Professor Quivik makes no comparison between BPXP’s corporate governance and the corporate governance of other subsidiaries.

The Quivik Report criticizes BPXP’s governance by suggesting that its board of directors was insufficiently involved.<sup>63</sup> But Professor Quivik’s assumptions regarding the appropriate activities of subsidiary boards are without support in the corporate governance and organization literature. There is simply no reason to insist that the board-centered governance model, appropriate for a public corporation, is appropriate for a wholly-owned subsidiary. As stated in my Initial Report, governance mechanisms (including boards) are designed to solve particular problems, and public corporations face entirely different problems than subsidiaries do (and especially wholly-owned subsidiaries). Boards of directors are essential in public corporations because there are typically no large shareholders to monitor managers and assure that the firm’s actions serve shareholder interests—therefore, the board of directors must do this.<sup>64</sup>

But a wholly-owned subsidiary is entirely different from a public corporation. The subsidiary’s single shareholder can determine its own preferences, implement its plans, and easily monitor the subsidiary. Therefore, the need for a board to determine and represent the shareholder’s interests is limited. In short, if the parent’s will is clear, there is no governance

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<sup>63</sup> See e.g., Quivik Report at 2, 29, 33, 37, 39, 46-48, 64, 77, 81, 86-88.

<sup>64</sup> Initial Report at 17-21.

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problem that a meeting of the subsidiary's board needs to solve.<sup>65</sup> The activity of the subsidiary can be effectively directed and monitored by the firm's sole shareholder or its designees.

Moreover, Professor Quivik's specific criticisms of the BPXP Board are unconvincing. For instance, the Quivik Report suggests that BPXP was not "active" because BP Group employees (and not the BPXP Board), including but not limited to employees whose time was reimbursed by BPXP, were involved in setting BPXP's operational goals and financial plans. From a corporate governance perspective, this is, however, an appropriate practice.<sup>66</sup>

Similarly, the Quivik Report objects that "I have seen no evidence that either the BPXP Board of Directors or an officer of BPXP, acting in that capacity, was ever informed of the problems arising at the Macondo well in the weeks preceding the blowout, nor was BPXP informed of other operational matters, until 2011."<sup>67</sup> But this criticism incorrectly assumes that the board of directors of a wholly-owned subsidiary should be responsible for management activities, including monitoring of such activities. The Quivik Report provides no reason to think that it is better for BPXP's Board to be involved in such matters than either: (1) the executives or employees of BPXP's direct and indirect parents which exercise control over BPXP; or (2) the payroll employees of BP Group affiliates employees for whose time BPXP pays. BPXP can act through the BP Group Gulf of Mexico employees for whose time it pays and who could do this work on BPXP's behalf.

Thus, when it comes to monitoring the blowout and directing the response to the accident, the Quivik Report provides no reason to think that BPXP Board action was necessary, preferable, or even helpful. Additionally, the Quivik Report identifies no benefit to BPXP or to

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<sup>65</sup> Initial Report at 35.

<sup>66</sup> See *supra* Section IIIA.

<sup>67</sup> Quivik Report at 29.

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the response that would have come from the involvement of the BPXP Board in such operational or managerial matters.

- C. There are economic reasons, including operational efficiencies, liability protection, regulatory compliance, and efficient tax planning, for multinational corporations to create subsidiaries whose legal organization may not overlap with the way the firm organizes its management and oversight structure. Moreover, the Quivik Report offers no reason why the legal structure of a firm should align with the structure of business units.

The Quivik Report repeats the theme that, alongside the BP Group's structure of legal entities, there is a "parallel and seemingly unconnected organizational structure" that manages its business operations.<sup>68</sup> The Quivik Report alleges that "the lines of authority and direction in BP's organizational structure for managing BP's operations generally function without reference to the legal entities BP owns."<sup>69</sup>

From the perspective of corporate governance and firm organization, this is consistent with what one would expect in a parent-subsidiary relationship. Professor Quivik provides no reason to think it would be inappropriate for a multinational corporation to on the one hand create legal "subsidiaries" and at the same time to create "segments" or "functions" that are not legal subsidiaries.<sup>70</sup> The two structures (the hierarchy of legal entities and the organization of

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<sup>68</sup> Quivik Report at 82.

<sup>69</sup> Quivik Report at 2.

<sup>70</sup> See, e.g., J. Strikwerda, *How to Combine a Group Strategy with Subsidiary Governance*, at 3 (Universiteit van Amsterdam, Working Paper 2009) ("More common is that in multinational corporations (MNC's) the legal organization and the business organization are completely disjointed because no international corporate law exists, incorporation is on basis of national jurisdiction, and many markets served by divisions are transnational or global."). See also Deloitte, *Governance of Subsidiaries: A Survey of Global Companies*, September 2013, available at: [http://www.deloitte.com/assets/Dcom-India/Local%20Assets/Documents/Thoughtware/Tax\\_thoughtpapers\\_Dec\\_19/Deloitte\\_Global%20Subsidiary%20Governance%20Survey%20Report.pdf](http://www.deloitte.com/assets/Dcom-India/Local%20Assets/Documents/Thoughtware/Tax_thoughtpapers_Dec_19/Deloitte_Global%20Subsidiary%20Governance%20Survey%20Report.pdf) ("Although many parent company boards view the company as one organization and do not differentiate decision-making based on a legal subsidiary structure, factors such as the group management philosophy, the size and holding structure (including



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business segments or functions) are organized with different goals in mind. As I described in my Initial Report, subsidiaries are generally created to allocate the parent's capital, reduce uncertainty and creditors' monitoring costs, to invest in or engage in enterprises that are uncertain or involve a risk of loss, to comply with regulation, and to facilitate business planning including tax planning.<sup>71</sup> Business segments and functions are organized in a way to improve the firm's operations and focus, and these organizational "segments" or "functions" can exist either inside or outside of a legal subsidiary.<sup>72</sup> The corporation is free to manage the activities of the "legal subsidiary" in the manner that the corporation believes is the most efficient.

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listing on exchanges) of subsidiaries determine the time spent by the parent board on their oversight.") (emphasis added); PETRI MÄNTYSAARI, COMPARATIVE CORPORATE GOVERNANCE 24-25 (2005) ("In company groups, the economic and legal units of business do not necessarily coincide; each legal unit of business operates to some extent in the interests of one or more other legal units or the corporate group as a whole.... The firm normally ends up with a multidivisional structure. In company groups, divisionalisation means that the operating functions of many legally separate subsidiaries are performed with one subunit of the firm, and separate operating functions are organized within separate subunits of the firm.").

<sup>71</sup> See e.g., Initial Report at 5, 25-26. See also George G. Triantis, *The Personification and Property of Legal Entities*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW (2011) (discussing the justification for firm ownership of property and the efficient division of assets among legal entities); Edward M. Iacobucci & George G. Triantis, *The Economic and Legal Boundaries of Firms*, 93 VA. L. REV. 515 (2007) (discussing the benefits and costs associated with economic integration of assets within a firm or between firms); Leslie Robinson, *Internal Ownership Structures of Multinational Firms*, NYU Colloquium on Tax Policy and Public Finance (2013), available at [http://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_075236.pdf](http://www.law.nyu.edu/sites/default/files/ECM_PRO_075236.pdf) (examining a sample of 1,352 major U.S. multinational firms and their 47,965 foreign subsidiaries and concluding that the creation and organization of subsidiaries is driven by taxes, legal compliance, risk limitation and other factors); Salvador Barrios, Harry Huizinga, Luc Laeven and Gaetan Nicodeme, *Taxation Papers, European Economy: International Taxation and multinational Firm Location Decisions*, (European Communities), January 2009. Available at: [http://ec.europa.eu/economy\\_finance/publications/publication14169\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication14169_en.pdf) (finding that tax considerations shape the legal structure of a multinational firm).

<sup>72</sup> See e.g., JOHN B. CULLEN & K. PRAVEEN PARBOTEEAH, *MULTINATIONAL MANAGEMENT* 307 (6th ed. 2014) ("Organizations choose a functional structure primarily for efficiency. The functional structure gets its efficiency from economies of scale in each function because there are cost savings when a large number of people do the same job in the same place."). See also JOHN ROBERTS, *THE MODERN FIRM: ORGANIZATIONAL DESIGN FOR PERFORMANCE AND GROWTH* 180 (2004) ("The key idea is to design the organization to provide as focused, intense incentives as possible within the constraints implied by the corporate form and the interdependencies that it both creates and is meant to control. Doing so necessitates a variety of choices of architecture and routines, supported by cultural changes,

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It may be efficient, for example, for a multinational parent to have a single, centrally-organized legal department, rather than a separate legal department for each of hundreds of subsidiaries. And such a centralized organization would be wholly appropriate from a corporate governance perspective. The same may be true for treasury functions, tax functions, payroll functions, other functions, and other ways of organizing management efforts, such as “upstream” or “downstream.” Moreover, multinational corporations are subject to a host of regulatory and tax regimes and organize their businesses to operate within such frameworks in the most efficient manner.

Professor Quivik’s discussion implies that a subsidiary must contain certain key functions or align with the hierarchy of legal entities. But this could dramatically increase firms’ costs and could imply that many large corporations do not have active or valid subsidiaries. For example, as set forth in Exhibit 1 to my Initial Report, BP p.l.c.’s supermajor peers (Exxon Mobil, Chevron, Royal Dutch Shell, Total, and ConocoPhillips) each have more than 100 subsidiaries.<sup>73</sup> Professor Quivik’s analysis suggests that, if these subsidiaries are to be considered “active” or actually operating a business, each of these hundreds of subsidiaries must have a separate legal department, a separate tax function, and a separate treasury department. Additionally, as also set forth in Exhibit 1 to my Initial Report, BP p.l.c.’s peers each also have several reportable business segments. Professor Quivik’s analysis would similarly suggest that

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that together can be called *disaggregation*. The key architectural elements involve redrawing the horizontal and vertical boundaries of the firm to increase strategic focus; creating relatively small subunits within the organization in which significant decision rights are lodged; and decreasing the number of layers of management and the extent of central staff.”).

<sup>73</sup> One study of 1,352 major US multinational firms found that they had 47,965 foreign subsidiaries. See Leslie Robinson, *Internal Ownership Structures of Multinational Firms*, NYU Colloquium on Tax Policy and Public Finance (2013), available at: [http://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_075236.pdf](http://www.law.nyu.edu/sites/default/files/ECM_PRO_075236.pdf).

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the “reportable business segments” under these peers must correspond one-to-one with the hundreds of legal subsidiaries under those peers in order for the parent-subsidiary distinctions to have meaning. The Quivik Report does not discuss why Professor’s Quivik’s claims are relevant or consider their implications.

- V. **If BPXP were to be assessed a higher penalty based on its parent’s assets, either (i) because its corporate governance looks different from a public company’s corporate governance, or (ii) because it relied upon and paid BP Group affiliates’ payroll employees to help manage BPXP operations and respond to the spill, this would have undesirable consequences.**

The Quivik Report describes a number of corporate governance and contracting practices, including reliance on work performed by payroll employees of affiliates, centralized financial planning, reduced monitoring and planning roles for subsidiary boards, parental control of subsidiary actions or direct parental involvement in important projects (such as spill response). As discussed above, the Quivik Report is ambiguous about whether corporate entities are “active” if they adopt these practices and what should follow as a result. In any event, the Quivik Report does not claim that these practices are inappropriate, unsafe, harmful or unusual for multinational corporations. In my opinion, if subsidiaries were to face higher penalties because they adopted these practices, several harmful consequences would follow. I discuss these below.

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A. Tending to discourage investment by well-capitalized parents in activities with the risk of financial loss.

My Initial Report described why well-capitalized parent shareholders may be reluctant to invest if their subsidiaries face higher penalties because the parent group is well-capitalized.<sup>74</sup> In such circumstances, well-capitalized companies would face higher expected penalties than thinly-capitalized companies, other things equal. As a result, thinly-capitalized companies would be more likely than well-capitalized firms to invest in activities with a risk of such penalties (like deepwater drilling) because they would have lower costs due to lower expected penalties in the event of an incident. If relatively thinly-capitalized firms had such a cost advantage, they would tend to prevail in activities with a risk of such financial loss like deepwater drilling, but less-well-capitalized firms would also likely be less able than better-capitalized firms to prevent or respond to future oil spills, to mitigate damage, and to compensate victims.<sup>75</sup>

B. Increasing costs.

As discussed above, for profit firms have an incentive to establish practices such as centralized treasury, payroll, tax, and legal departments because these are economically efficient and reduce costs. The Quivik Report implies that BPXP's governance and contracting practices, organization, and reliance on centralized services make it less "active." If this criticism were used to justify a higher penalty on BPXP, companies would have an incentive to change these

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<sup>74</sup> Initial Report at 41-42. I also reviewed (on pages 24 & 25) the fundamental principle and expectation of limited liability: the principle that a shareholder's losses are limited to the investment that the shareholder makes (absent veil-piercing or a theory under which the parent shareholder is directly liable, neither of which I understand to be alleged here).

<sup>75</sup> See generally A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 942-944 (1998) (discussing the incentives of well-capitalized firms to hire less-well-capitalized independent contractors to undertake risky activities).

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practices to avoid a future penalty and to instead adopt higher cost methods.<sup>76</sup> For example, the multinational corporations set forth on Exhibit 2 of my Initial Report would likely face significant financial consequences if they were required to have wholly separate legal, tax, payroll, and treasury operations for each of their hundreds of subsidiaries, or if they were encouraged to model the boards of their subsidiaries after the boards of publicly held companies.

### C. Questionable benefits.

It is one thing to increase costs if this is the necessary price of some desired benefit. But the Quivik Report does not identify any benefits that would come from encouraging firms to incur these higher costs of changing their corporate governance, contracting policies, and organization. The Quivik Report also does not claim that BPXP's governance practices were unsafe, improper, or harmful, and does not argue that these somehow caused the spill or that these inhibited BPXP's mitigation efforts in any way.

Thus, if subsidiaries faced higher penalties for adopting the corporate governance and other policies that the Quivik Report implies are improper, they would have an incentive to incur the costs of adopting alternative policies, but the Quivik Report provides no reason to think that there would be compensating benefits.

### D. Reduced incentives to respond.

The Quivik Report also describes at length how the BP Group helped respond to the spill.<sup>77</sup> As an initial matter, as stated at page 12 of my Initial Report, I understand that BPXP

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<sup>76</sup> See discussion of the benefits of centralized functions, *supra* at Section IV.A.

<sup>77</sup> Professor Quivik discusses the involvement of the Gulf of Mexico Committee of the BP p.l.c. Board. It is my understanding that the Gulf of Mexico Committee, which is part of the BP p.l.c. legal entity, is engaged in oversight. In other words, "it understands and it gets information and asks questions . . . on

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itself incurred over \$14 billion in response costs. I further understand that, as other BP Group entities assisted in the response, those entities were generally reimbursed by BPXP.<sup>78</sup> In any event, if the BP Group's involvement in the response were now used to justify a higher penalty on BPXP, corporate parents would have less reason to respond to future spills by committing the full resources of their group. This would be counterproductive when the parents have expertise or additional resources that can reduce the harm from an incident and when parental involvement in subsidiary response actions should therefore be encouraged.

*Rob Daines*

Robert Daines  
September 12, 2014

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behalf of BP p.l.c. But it doesn't execute anything or authorize anything." Bray Dep. at 313:17-21. For example, the Gulf of Mexico Committee cannot issue dividends from BPXP to BPXP's parents, appoint officers of BPXP, or settle litigation on behalf of BPXP. Bray Dep. at 314:15-315:9.

<sup>78</sup> I understand that other BP Group entities have collectively incurred approximately \$1.3 billion for their own *Deepwater Horizon*-related liabilities. See 2Q14 Provision Continuity Schedule, BP-HZN-2179MDL09099961 at tab "Recon." (I understand that the rows labeled "SEC Charge," "Jupiter Self Ins - UK Charge," and "BPXP Legal Costs Re-Charge to UK" were liabilities charged to non-BPXP entities.)

# Appendix A: Robert Daines Responsive Report Supplemental Consideration List

Beg Bates	End Bates	Exhibit Number	Document Title / Description
N/A	N/A		August 15, 2014 Expert Report of Fredric L. Quirk and Reliance Materials
N/A	N/A		Phase One Findings of Fact and Conclusions of Law. In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010. MDL 2179. Dkt. 13355, September 4, 2014.
N/A	N/A		Agreed Stipulations. In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010. No. 96. Dkt. 5927. MDL 2179. February 29, 2012.
ANA-MDL-000030610	ANA-MDL-000030612	TREX-01243A	Ratification and Joinder of Operating Agreement Macondo Prospect
BP-HZN-2179MDL00273290	BP-HZN-2179MDL00273445	TREX-01243B	Macondo Prospect Offshore Deepwater Operating Agreement
ANA-MDL-000030524	ANA-MDL-000030609	TREX-01243C	Attached Exhibits of Operating Agreement dated October 1, 2009 by and between BPXP and MOEX Offshore 2007 LLC
BP-HZN-2179MDL07818050	BP-HZN-2179MDL07818050	Dep. Ex. 011970	Royalty and Tax Payment Scorecard
BP-HZN-2179MDL05846245	BP-HZN-2179MDL05846248	Dep. Ex. 12669	Work Release: HOU-VL 40043-002, Entix
BP-HZN-2179MDL00055061	BP-HZN-2179MDL00055063		Amendment No. 03 to Hardware Systems Design and Manufacturing Contract No. BPM-03-01125, August 15, 2007
BP-HZN-2179MDL00054687	BP-HZN-2179MDL00054844		Hardware Systems Design and Manufacturing Services Contract Subsea Wellheads between BP America Production Company and Drill-Quip, Inc.
BP-HZN-2179MDL00055567	BP-HZN-2179MDL00056112		Contract for Gulf of Mexico Strategic Performance Unit Offshore Well Services Between BP Exploration and Production, Inc. and Halliburton Energy Services, Inc., BPM-09-00255
BP-HZN-2179MDL00056402	BP-HZN-2179MDL00056557		Contract for Gulf of Mexico Strategic Performance Unit Offshore Well Services Between BP Exploration and Production, Inc. and M-I L.L.C., BPM-09-00209
BP-HZN-2179MDL02884456	BP-HZN-2179MDL02884768		Contract for Gulf of Mexico Strategic Performance Unit Offshore Well Services Between BP Exploration and Production, Inc. and Weatherford U.S., L.P., BPM-09-00260
BP-HZN-2179MDL05848586	BP-HZN-2179MDL05848607		Service Contract, BPO-10-01655 between BP America Production Company and BP Exploration & Production Inc. and O'Brien's Response Management Inc., April 20, 2010
BP-HZN-2179MDL03199070	BP-HZN-2179MDL03199088		Bridge Agreement, HOU-VL 4-3066 between BP America Production Company and BP Exploration & Production Inc., and O'Brien's Response Management Inc., June 1, 2010
BP-HZN-2179MDL05226445	BP-HZN-2179MDL05226502		Construction Services Contract between BP Exploration and Production Inc. and Chel Morrison Contractors, LLC, Mississippi Canyon 252 (MC252) Project, Contract No. HOU-VL 4-3307
BP-HZN-2179MDL04464128	BP-HZN-2179MDL04464167		Service Contract between BP Exploration & Production Inc. and Swift Spill Separator, LLC, MC 252 Oil Spill Response, Contract No. HOU-VL 4-3266



# Appendix A: Robert Daines Responsive Report Supplemental Consideration List

Beg Bates	End Bates	Exhibit Number	Document Title / Description
BP-HZN-2179MDL04473037	BP-HZN-2179MDL04473040		Work Release Against Master Service Contract, May 20, 2010.
BP-HZN-2179MDL05844242	BP-HZN-2179MDL05844243		Release for Work requested by: Richard Morrison
BP-HZN-2179MDL03432244	BP-HZN-2179MDL03432268		Release Against Master Services Contract. BPM-03-00812. June 11, 2010. Release for Work requested by: Mark Kerkenmeyer
BP-HZN-2179MDL05013214	BP-HZN-2179MDL05013229		Lease Exchange Agreement, November 18, 2009 between BP Exploration & Production Inc. and MOEX Offshore 2007 LLC
BP-HZN-2179MDL06989486	BP-HZN-2179MDL06989501		Purchase Order from Seller: Submar, Inc. to Buyer: Bill King. BP Exploration & Production Inc., April 30, 2010
			Purchase Order from Seller: Daniel Scoville, Oceanengineering International, Inc. to Buyer: Mike Jones, BP Exploration & Production Inc.
BP-HZN-2179MDL09115026	BP-HZN-2179MDL09115044		Sonardyne, Inc. Invoice No. 25261, October 19, 2010
TBD	TBD		BPXP Power of Attorney, dated November 18, 2013
TBD	TBD		BPXP Power of Attorney, dated March 10, 2014
N/A	N/A		BPXP Power of Attorney, dated April 8, 2014
			Salvador Barros, Harry Huizinga, Luc Laeven and Gaetan Nicodeme, Taxation Papers, European Economy: International Taxation and multinational Firm Location Decisions. (European Communities), January 2009. Available at: <a href="http://ec.europa.eu/economy_finance/publications/publication14169_en.pdf">http://ec.europa.eu/economy_finance/publications/publication14169_en.pdf</a>
N/A	N/A		Ronald Coase, <i>The Nature of the Firm</i> , <i>Economica</i> , Vol 4 No 16, November 1937
N/A	N/A		John B. Cullen & K. Praveen Parboteeah, <i>Multinational Management</i> (6th ed. 2014)
N/A	N/A		Edward M. Iacobucci & George G. Trianitis, <i>The Economic and Legal Boundaries of Firms</i> , 93 VA. L. REV. 515 (2007)
N/A	N/A		Stewart Macaulay, <i>Non-Contractual Relations in Business</i> , 28 Am. Soc. Rev. 1, 9-12 (Feb. 1963)
N/A	N/A		Petri Mäntysaari, <i>Comparative Corporate Governance: Shareholders as a Rule-Maker</i> (2005)
			A. Mitchell Polinsky & Steven Shavell, <i>Punitive Damages: An Economic Analysis</i> , 111 HARV. L. REV. 869 (1998)
N/A	N/A		John Roberts, <i>The Modern Firm: Organizational Design for Performance and Growth</i> (2004)
N/A	N/A		Leslie Robinson, <i>Internal Ownership Structures of Multinational Firms</i> , NYU Colloquium on Tax Policy and Public Finance (2013). Available at: <a href="http://www.law.nyu.edu/sites/default/files/ECM_PRO_075236.pdf">http://www.law.nyu.edu/sites/default/files/ECM_PRO_075236.pdf</a>
N/A	N/A		Nonaka Matsushima & Tomomichi Mizuno, <i>Why Do Large Firms Tend to Integrate Vertically?</i> , 64 Bull. Econ. Res. S1 (2012)



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Beg Bates	End Bates	Exhibit Number	Document Title / Description
N/A	N/A		Robert E. Scott and George G. Triantis, <i>Anticipating Litigation in Contract Design</i> , 115 Yale L.J. 814 (2006)
N/A	N/A		J. Strikwerda, <i>How to Combine a Group Strategy with Subsidiary Governance</i> , (Universiteit van Amsterdam, Working Paper 2009)
N/A	N/A		George G. Triantis, <i>The Efficiency of Vague Contract Terms: A Response To The Schwartz-Scott Theory Of U.C.C. Article 2</i> , 62 La. L. Rev. 1065 (2002)
N/A	N/A		George G. Triantis, <i>The Personification and Property of Legal Entities</i> , in Research Handbook on the Economics of Property Law (2011)
N/A	N/A		Dongli Zhang, <i>The Revival of Vertical Integration: Strategic Choice and Performance Influences</i> , 4 J. Mgmt. & Strategy 1 (2013)
N/A	N/A		Bureau of Safety and Environmental Enforcement, Gulf of Mexico Deepwater Information Current Deepwater Activity. Available at: <a href="http://www.bsee.gov/uploadedfiles/BSEE/Exploration_and_ProductionDevelopment_and_Production/Gulf_of_Mexico_Region/Rp_CurrentDeepwater_Activity2.pdf">http://www.bsee.gov/uploadedfiles/BSEE/Exploration_and_ProductionDevelopment_and_Production/Gulf_of_Mexico_Region/Rp_CurrentDeepwater_Activity2.pdf</a>
N/A	N/A		Copperweld Corp. v. Independence Tube Corp., 467 US 752 (1984)
N/A	N/A		Federal Schedules, GSA Contract: An Overview of GSA Contracts. Available at: <a href="http://gsa.federalschedules.com/gsa-schedule.aspx">http://gsa.federalschedules.com/gsa-schedule.aspx</a>
N/A	N/A		Model Business Corporation Act Available at: <a href="https://users.wfu.edu/palmar/IBC/BCorporations-Companion/Conexus/ModelBusinessCorporationAct.pdf">https://users.wfu.edu/palmar/IBC/BCorporations-Companion/Conexus/ModelBusinessCorporationAct.pdf</a>

