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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CIVIL DIVISION

BP PRODUCTS NORTH AMERICA  
INC.,

Plaintiff

v.

DISTRICT OF COLUMBIA,

Defendant

Civil Action No.

2011 CVT 10619

Washington, D.C.

Tuesday, April 23, 2013

The above-entitled matter came on for Hearing before the Honorable John Campbell, Associate Judge, in Courtroom Number 51, commencing at 10:30 a.m.

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APPEARANCES:

On behalf of the Plaintiff:

JAMES MCBRIDE, Esquire  
PHILLIP ZANE, Esquire  
Washington DC

On behalf of the Defendant:

DANIEL REZNECK, Esquire  
ELI WOOD, Esquire  
Washington DC

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Official Court Reporter

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1 P R O C E E D I N G S

2 THE DEPUTY CLERK: Calling case number 2011 CVT  
3 10619, in the matter of BP Products North America versus  
4 District of Columbia. All parties in this matter please  
5 step forward and identify yourselves for the record.

6 MR. MCBRIDE: I'm James McBride of the Baker  
7 Donelson firm. With me at counsel table is Mr. Phillip  
8 Zane.

9 THE COURT: Mr. McBride, Mr. Zane.

10 MR. WOOD: Good afternoon your Honor. Eli Wood  
11 for the District of Columbia with Daniel Rezneck.

12 THE COURT: Mr. Wood, Mr. Rezneck, good afternoon.  
13 This is here for argument on the pending motion  
14 for summary judgement, correct?

15 MR. MCBRIDE: That's correct your Honor.

16 THE COURT: Somebody said somebody was setting up  
17 equipment. What is it for?

18 MR. MCBRIDE: Your Honor, I just put some  
19 equipment there so if we needed to, to refer to some charts  
20 so the court could get any understanding of exactly how the  
21 assessment was done in this case. I don't think it's  
22 anything controversial. It's just demonstrative so the  
23 court could get a sense of how this assessment got done.

24 THE COURT: Okay.

25 MR. MCBRIDE: And we may not use it. It just

1 depends on how the argument goes and what your Honor wants  
2 to hear.

3 THE COURT: Well let me -- I'm not sure how you  
4 want to proceed in the argument. But I do have some  
5 questions that I want to make sure that I understand the  
6 answers to. And then I guess you guys can fill in gaps or  
7 if my questions are completely off base you just do the  
8 whole argument.

9 Is your -- does OTR say that there are -- that  
10 there actually are material issues of fact in dispute? I  
11 mean it's sort of asserted. But one of the arguments that  
12 the other guys make -- the petitioners make is that you  
13 haven't presented the facts in any recognizable way for a  
14 summary judgment motion. That is there are no affidavits or  
15 documents or exhibits attached.

16 You make reference in argument to -- in your paper  
17 in your opposition to some facts that are in dispute.  
18 Although that doesn't really seem to be the thrust of your  
19 argument. Do you contend that there are material issues of  
20 fact, anybody?

21 MR. REZNECK: Yes your Honor. We do.

22 MR. REZNECK: Well it's a combination I would say  
23 your Honor. We do have nine exhibits that are attached to  
24 our opposition. So it's not as if they were not documented  
25 before your Honor. There are a lot of them.

1                   Additionally we have a statement of material facts  
2                   in issue which contains a number of points. And also our  
3                   opposition spells it out as well.

4                   THE COURT: All right. Everybody agrees that the  
5                   federal regs here control?

6                   MR. MCBRIDE: Yes your Honor. We do.

7                   THE COURT: What is the standard applying here? I  
8                   mean the statute -- the statute -- the DC statute is worded  
9                   oddly for statutes in that it says whenever in the mayor's  
10                  opinion -- which is an interesting standard -- what is the  
11                  test of -- against which the mayor's opinion is to be  
12                  measured? Is it an APA kind of standard?

13                  MR. MCBRIDE: No, sir. I don't think so. I think  
14                  it's a novo standard. The question really is as a matter of  
15                  law. Because we think this argument today is simply a  
16                  matter of law. And that is whether the methodology being  
17                  used comports with the Section 482 regulations. So this  
18                  court would look at that --

19                  THE COURT: Whether it comports. In other words,  
20                  I mean how do I decide that?

21                  MR. MCBRIDE: You have to decide whether the  
22                  federal regulations permit the kind of analysis that was  
23                  made here in order to make an assessment. And we will go  
24                  into some detail about why that's true. And of course the  
25                  Microsoft case I think went into great detail about why the

1 methodology being used to come up with an assessment in the  
2 Microsoft case which is exactly the same methodology with  
3 the same experts, why it is not allowed by the federal  
4 regulations under Section 482.

5 THE COURT: So is it that the mayor abused his  
6 discretion in selecting that methodology?

7 MR. MCBRIDE: I don't think it's abuse of  
8 discretion. But we certainly argue that it's arbitrary and  
9 capricious because it's not lawful and it's unreasonable.

10 THE COURT: Prohibited by the statute? It's  
11 prohibited by the regulations?

12 MR. MCBRIDE: That's correct. And that's  
13 precisely what the Microsoft case held. And if you look at  
14 -- and a lot of the practical issues you will see why that  
15 has to be true.

16 THE COURT: Okay.

17 MR. REZNECK: Your Honor, I would just like to  
18 direct you to a case in the US Tax Court which I think is  
19 responsive. It's called Altama, A-L-T-A-M-A, 104 Tax Court  
20 424. And I think it says two things which are responsive to  
21 your inquiry. It's clear that the burden is on the taxpayer  
22 here, not on the government. That's at page 458 of the  
23 opinion. It's rather lengthy.

24 -- And second, the test is whether the allocation  
25 proposed by the mayor is unreasonable. And that's at page

1 466. So I think that's the standard. In other words, we're  
2 not dealing with a matter of opinion in saying it's  
3 somebody's opinion. I think it's up to the taxpayer here to  
4 show that the result reached, the assessment is  
5 unreasonable.

6 THE COURT: Okay. Do you disagree with that as  
7 the standard?

8 MR. MCBRIDE: I don't disagree with that. We  
9 never argued we don't have the burden of proof in this case.  
10 And -- but what we do say is if the methodology is not  
11 something that the regulations allow, then the assessment is  
12 unreasonable. And that's exactly what Microsoft held.

13 THE COURT: Let me -- oh, you guys didn't mention  
14 Microsoft. I'm not sure if you think that's -- if that's  
15 because it has no -- obviously it has no binding authority,  
16 correct?

17 MR. MCBRIDE: That's correct.

18 THE COURT: No binding authority because you think  
19 it has no persuasive authority at all?

20 MR. WOOD: Yes, your Honor. We believe Microsoft  
21 as you pointed out is not binding authority here. We would  
22 expect the court to make its own determination by looking at  
23 the law and applying the facts in this case. Look at those  
24 facts and make its own individual trial court determination  
25 as opposed to relying on decision of a administrative trial

1 court.

2 Mr. Rezneck is prepared to discuss a number of  
3 issues as he has with the decision reached with Microsoft  
4 should the court want that to be addressed. But we prefer  
5 to focus on facts and the law in this case.

6 THE COURT: All right. Well we probably will get  
7 to that then.

8 My question though is you guys don't say that it's  
9 illegal or unreasonable or whatever it is to use the  
10 comparable pricing method, right? Because it's specified in  
11 the federal regulations, right?

12 MR. MCBRIDE: Absolutely not your Honor. But in  
13 order to use it we favor a number of predicates which were  
14 simply not followed in this case. We addressed those in our  
15 brief.

16 THE COURT: Okay. But basically does it come down  
17 to an argument that there was a more narrowly identifiable  
18 business activity? Is that the crux of it?

19 MR. MCBRIDE: That's certainly one of the  
20 arguments your Honor. That the regulations require that you  
21 do this at the most narrowly defined business activity.

22 THE COURT: Or as practical. I mean you have to  
23 --

24 MR. MCBRIDE: As practical. But it also suggest  
25 that -- there are two things in operation here. One is that

1 they have looked at simply the income from the whole series  
2 of comparable/peer companies and their -- the total income.  
3 In a company like Exxon for example, which includes every  
4 business activity that that company has. So it's not  
5 limited to any kind of business activity.

6 The federal regulations don't allow you to  
7 aggregate together those functional businesses in an  
8 analysis. The same thing is true with respect to our  
9 company. While it's not BP TLC Holding Company, it's still  
10 a company that has a number of functions. They put those  
11 all together in violation of aggregation --

12 THE COURT: But if you don't have access to  
13 information that would permit you to disaggregate, aren't  
14 you permitted to use effectively -- I mean this is a proxy  
15 method anyway, right? I mean you're not directly measuring  
16 controlled transactions versus uncontrolled transactions.

17 MR. MCBRIDE: That is correct. But again under  
18 what we call the dash five regulations, the regulations  
19 dealing with the comparable profits method, first of all  
20 you've got to determine what the controlled transaction is.  
21 You've got to look at and see --

22 THE COURT: Well what if you can't. I mean I  
23 think -- isn't that their argument?

24 MR. MCBRIDE: Well of course you can. You can sit  
25 back -- the federal government does it all the time. You

1 can't sit here and say -- which I understand their argument  
2 to be -- look, this is a really big business with a lot of  
3 complex issues. So we're going to lump it all together.  
4 And we can do this real easy. We don't have to do anything  
5 we that we normally do which is function racer-like on what  
6 the control transaction is. You're trying to determine  
7 whether or not it's arm's length or not. What the position  
8 the taxpayer is in in this case.

9           They simply say we're going to take all the income  
10 from a group of companies, and if you don't earn as much as  
11 you should be earning in a certain quartile, we're going to  
12 adjust your income. The way you defend -- the way you  
13 defend a Section 482 case is to show that the controlled  
14 transaction is in fact at arm's length. I don't have a  
15 controlled transaction to say it's not.

16           They could certainly have made an argument -- and  
17 we gave them information in discovery with respect to the  
18 information we gave the federal government. All of our  
19 controlled transactions were the big ones. Nobody ever came  
20 behind that and looked at those.

21           And our position is the regulation under  
22 comparable profits doesn't allow you to start out at the  
23 very beginning and say I'm going to work a full -- it  
24 requires you to go to the most narrowly defined business  
25 activity. And it certainly doesn't permit you to aggregate

1 together a whole lot of different functions which is what  
2 has been done in this case.

3 THE COURT: There's nothing wrong with having  
4 decided they were going to use this one of six possible  
5 methods, right? I mean do you agree with them that there's  
6 no hierarchy?

7 MR. MCBRIDE: Well there is no hierarchy. If this  
8 case were to be tried we would have huge problems with the  
9 choice of profits method as the best way to determine --

10 THE COURT: A sort of a best methods argument?

11 MR. MCBRIDE: Absolutely. I just want to be sure  
12 the court understood. We understand that the comparable  
13 profits method is one of the methods that the regulations  
14 provide for. But it has a number of things that have to be  
15 done. And if you look at all the information with respect  
16 to that, it is focussed laser-like on the controlled  
17 transactions.

18 THE COURT: Well I mean yeah. But it includes all  
19 this language like -- doesn't it say to the extent possible  
20 and you're suppose to select profit level indicators that --

21 MR. MCBRIDE: It does have some language in there.  
22 But there's no showing that these people couldn't determine  
23 what the proper control transaction was here.

24 THE COURT: Isn't this a factual --- I mean sounds  
25 like you're making a straight out factual argument.

1 MR. MCBRIDE: I'm simply suggesting what the court  
2 -- what the court said in Microsoft. They said once it's  
3 been shown -- once it's been shown that you've aggregated  
4 functional lines together and that you have lumped together  
5 controlled and uncontrolled transactions, then it's up to --  
6 it's up to the taxing authority at that point to show why  
7 they had to do that.

8 And I suggest there's nothing in the record here  
9 that suggests that other than the same kind of arguments  
10 that were made in Microsoft; which is gosh the company is  
11 too big and it would be too hard to do it. And that is not  
12 satisfactory under the federal regulations in order to lump  
13 everything together under the regulations with respect to  
14 comparable profits.

15 THE COURT: I can imagine a circumstance where --  
16 I guess I can imagine a circumstance where you say that it's  
17 demonstrated by undisputed facts that the government did not  
18 to the extent possible select the most narrowly defined  
19 business activity. It sounds like -- when you say it, it  
20 sounds like a factual question as to whether they did or  
21 they didn't and whether they should have used this method or  
22 some other method. Whether they should have inquired  
23 further in discovery whether they should have done this or  
24 should have done that. And these all sound to me like  
25 arguments about whether you -- whether you picked the right

1 method or did the right thing under the available facts.  
2 And I'm not sure -- it doesn't sound to me on its face like  
3 a legal standard that's readily applicable.

4 MR. MCBRIDE: And our position is that this is not  
5 a factual argument about whether they should have chosen the  
6 comparable profits method or not. As I said we go to trial  
7 we will have a lot of discussion about that.

8 What we say is they do not apply to the comparable  
9 profits correctly. And in order to try to do -- first of  
10 all, I don't know of any situation where you would lump  
11 together the entire income of a company the side of BP  
12 Products North America and then compare it to the entire  
13 income of Exxon Mobile, CONOCO, all of these companies.

14 Are there instances where you might be able to  
15 look at some narrowly band of the business activity and mix  
16 together some controlled transactions? That might be. But  
17 there's been no showing by the department or by the Office  
18 of Tax and Revenue that that's necessary. And they don't  
19 even try to do that.

20 Their methodology is to simply say we're going to  
21 use compared profits and we're going to compare it to a  
22 whole lot of -- a whole lot of different companies that we  
23 think are comparable. And we can give you a number Mr.  
24 District of Columbia that you can then give an assessment to  
25 a taxpayer. And we don't have to do an audit. We don't

1 have to look at anything else.

2 THE COURT: And doing that is per se unreasonable?

3 MR. MCBRIDE: That is correct, that is correct.

4 That is per se unreasonable. And in fact they don't make  
5 any bones about it. We cite the deposition testimony of  
6 Glen Groove (phonetic). When I asked him in deposition was  
7 he concerned about the fact that these people never  
8 identified any controlled transactions which they claim to  
9 be on your side. And his testimony was its experts are  
10 attached to our brief. But his testimony was evaluate  
11 essentially we never intended for this to be the real  
12 number. This was a plumber to get people to the table so we  
13 could talk to them and make a settlement.

14 THE COURT: In fact, that's if the expert says  
15 that's true. I don't know.

16 MR. MCBRIDE: Quite frankly that's what was going  
17 on. As a practical matter they almost win in this case if  
18 it turns out their taxpayer got to go to trial in every one  
19 of these cases which believe -- we think in a very shorthand  
20 method come up and assess a taxpayer for a million, two  
21 million seven hundred and seventy thousand dollars. And say  
22 to that taxpayer we will see you in court. And that's the  
23 issue.

24 ~~And quite frankly I know of nothing under the dash~~  
25 five regulations which would suggest you could start out

1 with the totality of total income of a company like BP  
2 Products North America in an attempt to try to find out  
3 whether you can allocate expenses and revenues for  
4 controlled transactions and compare that to the totality of  
5 income of all of these major companies, many of which with  
6 the functions and things have nothing to do --

7 THE COURT: You say that it's an appropriate  
8 screening mechanism or something like that to decide who we  
9 really need to audit?

10 MR. MCBRIDE: Well it certainly could be an  
11 appropriate screening mechanism to do that. And to say  
12 gosh, it looks we ought to audit these folks. But they  
13 don't do that.

14 THE COURT: Right.

15 MR. MCBRIDE: And we show in our papers there was  
16 a very real concern in letting this contract initially as to  
17 whether or not they could do this without doing it right.  
18 But the transfer pricing is a conflict area. I understand  
19 that. And there was always a question of whether or not you  
20 could do this without doing an audit. Without looking at  
21 anything with respect to the taxpayer. And that's what's  
22 been done here.

23 The only thing that's been looked at is the income  
24 information. And a functional analysis questionnaire which  
25 I defy you to look at any make any sense out of. And based

1 on that they issued these very large assessments. And quite  
2 frankly what happens when you go in to talk to them they say  
3 how much will you sell for. And a few taxpayers have said  
4 we're not going to sell.

5 But the question is you can't at the outset as  
6 part of -- as part of a transfer pricing analysis forget  
7 about controlled transactions. The essence -- if you look  
8 at -- if you look at the regulations, I mean the regulations  
9 in the very beginning, the very first sentence of the 482  
10 regulation says the purpose and scope of Section 482 is to  
11 insure that taxpayers' clearly reflect an income  
12 attributable to controlled transactions. And to prevent the  
13 avoidance of taxes with respect to such transactions.

14 Now I will tell you that throughout the  
15 regulations that is the theme that's carried forward. Even  
16 into the regulations dealing with comparative profits.

17 THE COURT: But there are lots of areas in  
18 statistics and science and other areas where you can't --  
19 where instead of measuring X you measure Y because Y is an  
20 effective proxy for measuring X. And it's easier to measure  
21 Y than it is to measure X.

22 MR. MCBRIDE: And I don't know of very many -- I  
23 don't know of any instances which says I can tell you about  
24 whether your controlled transactions are arm's length or not  
25 by looking at the total amount of income you get from your

1 company which includes all the different functions --

2 THE COURT: In theory doesn't the comparable  
3 pricing method do that?

4 MR. MCBRIDE: Only if you've reduced it number one  
5 to start with. You've looked at what the controlled  
6 transaction is that you're trying to determine whether it's  
7 -- and number two, you've limited the tested party to just  
8 that controlled transaction. And similarly you've limited  
9 the comparable profits to that controlled transaction.

10 THE COURT: Well that's a direct comparison isn't  
11 it rather than a profit -- a comparable profit. So the  
12 comparable profit is an indirect measure, no question.

13 MR. MCBRIDE: Well it is an indirect method. But  
14 it's an indirect method for measuring whether or not your  
15 controlled transactions are at arm's length or not. They  
16 don't have a clue of what the controlled transactions are  
17 that this company has. They know there are some and that's  
18 their mantra, you have some.

19 THE COURT: Well you acknowledge that you have  
20 some. Right. Lots of them.

21 MR. MCBRIDE: There's no question about the fact  
22 that we have some. But they certainly have no clue whether  
23 or not their controlled transactions would be large enough  
24 for example in 2008, for them to make a twelve billion five  
25 hundred million dollar adjustment in income. And I suggest

1 that it's just so far behind the -- that it doesn't -- it  
2 makes absolutely no sense.

3 But their position is we don't have to do that.  
4 All we have to do is see where we fall on this interquartile  
5 range.

6 THE COURT: Right.

7 MR. MCBRIDE: And we don't have to look at  
8 controlled transactions. We don't have to let them know  
9 what they are. And we can aggregate them together. And I  
10 would suggest to you when they adjust that income, they are  
11 adjusting income with respect to sales of unrelated  
12 property, unrelated transactions.

13 THE COURT: And you point me to L. J. Handy's  
14 decision -- is that his name Handy?

15 MR. MCBRIDE: Yes.

16 THE COURT: L. J. Handy's decision as an example  
17 of an adjudicator finding that such a methodology on the  
18 facts of some case which -- Microsoft's case is per se kind  
19 of you can't do it this way.

20 MR. MCBRIDE: Absolutely.

21 THE COURT: And your case -- and your facts are --  
22 your company's posture is comparable to Microsoft's?

23 MR. MCBRIDE: It's -- in the words of counsel it's  
24 exactly the same. So the question goes to the methodology.  
25 And yes our facts are comparable.

1 THE COURT: Okay.

2 MR. MCBRIDE: And so -- and that's where we are on  
3 this. This would be a -- the federal government would be  
4 very surprised to learn that they could make a 482  
5 allocation just by looking at it and finding out which  
6 companies fall below a certain quartile. Because that means  
7 those people have a 482 issue. And it's foreordained that  
8 some people are going to end up in this analysis in the --  
9 in the -- in the lower quartiles. And I suggest to you that  
10 has nothing to do in connection with the way they looked at  
11 this. That they haven't looked at controlled transaction  
12 and focussed on it. And I suggest the regulations don't  
13 apply here.

14 THE COURT: Well I mean there may be other things  
15 you want to say but let me hear from the government.

16 MR. REZNECK: Your Honor, I just want to make  
17 three quick points before -- so we won't lose sight of some  
18 of what was said. And then Mr. Wood will make the argument.

19 But on the first one the choice as I think your  
20 Honor had concern, the choice CPM, comparable profits  
21 method, and CUP is a factual issue. It's all of the facts  
22 -- so that alone -- that choice alone is enough to defeat  
23 the summary judgment here.

24 ~~Secondly, on this question about aggregation that~~  
25 they talked about so much that we're not suppose to

1 aggregate, I would like to cite what their own expert  
2 conceded on his deposition. And he said -- and this is in  
3 our Exhibit I, pages 175 and 176. He conceded that all the  
4 purchases of crude oil by the petitioner here from whatever  
5 source are co-mingled to produce the required products for  
6 resale. And likewise he conceded that one hundred percent  
7 of all sales are finished products are attributable to both  
8 controlled and uncontrolled transactions.

9 And the same is true with respect to the other two  
10 types of inner-company agreements that he had access to. I  
11 have a management fee and a cross sharing arrangement among  
12 these various affiliates. And he said on those they are all  
13 either co-mingled or associated with all sales. They are  
14 not separable.

15 So I think on the facts and the fact perhaps  
16 remain to be developed. But there was certainly evidence  
17 emanating even from their own expert to show that  
18 aggregation is proper here. And we're prepared to defend  
19 that. And to show both in terms of what the regulations  
20 provide and what the record so far is and more at trial.

21 The third point on those challenges that they make  
22 to the assessment to the use of comparable companies -- with  
23 other companies, I would point out that our experts were  
24 extremely sensitive to that. And when petitioner raised  
25 that issue as to whether the comparable's were really

1 comparable, our experts went back and took a lengthy look at  
2 that and rendered a whole new second report in which they  
3 reduced the assessment to take account of that. And the  
4 assessment started I think 722,000 and it ended up at about  
5 580,000. In other words, they made substantial adjustments  
6 based on the arguments that were being made.

7 THE COURT: But that's not what's at issue now.  
8 It's the 722 -- the original --

9 MR. REZNECK: The only other point I'd make on  
10 that is that they said consistently that they are number  
11 zero.

12 THE COURT: Right. But you mentioned two numbers.  
13 And the higher number that is now at issue.

14 MR. REZNECK: I was addressing simply this point  
15 about insufficient attention being paid to the differences  
16 of the comparable companies and the petitioner here. And  
17 the point is that our expert took that into account. And  
18 they made some serious and substantial adjustments based on  
19 just that point. So we've been pretty flexible here. Their  
20 number had been zero from the beginning and it hasn't  
21 changed.

22 THE COURT: I'm not sure whether to ask you or Mr.  
23 Wood. But are there any other reported or unreported  
24 decisions where somebody has opined about the  
25 appropriateness of the CPM as far as you guys know?

1 MR. REZNECK: I think we're not aware of any.

2 MR. WOOD: Not aware of any your Honor.

3 THE COURT: Do you agree Mr. McBride?

4 MR. MCBRIDE: I agree.

5 THE COURT: Okay.

6 Somebody, I don't know who I'm asking. But could  
7 you -- they say that what you did was -- whether you did or  
8 you didn't -- could you just say to BP North America or any  
9 other company we're not interested in your -- I'm using the  
10 word disaggregated. But specifics about which were  
11 controlled and which were arm's length transactions. We're  
12 not interested in that. We're going to apply this  
13 controlled -- comparable pricing -- yeah -- profits method  
14 because the regs say we can and frankly it saves us a lot of  
15 work. And, you know, cheaper for the taxpayers. So that's  
16 what we're going to do. No thanks. Could you do that?

17 MR. WOOD: Your Honor, I believe to answer that  
18 question, I think really our point on this is this question  
19 really is not appropriate for summary judgement. It's  
20 really a question at trial. You spoke earlier about to the  
21 extent possible language. And there's other language in the  
22 regulations I would point to.

23 THE COURT: But if -- right. But if -- if it were  
24 -- you tell me whether you dispute this. They say you were  
25 uninterested and did not seek to do any kind of audit. An

1 actual investigation of their controlled versus uncontrolled  
2 prices.

3 MR. WOOD: The District does disagree with that.  
4 We consider this to be an audit. It's not an official audit  
5 they're talking about. It's what was referred to by our  
6 experts as an office audit which was why you deal with the  
7 comparable profits method. So yes we do disagree to that  
8 point your Honor. That --

9 THE COURT: I think it's someplace in your --

10 MR. WOOD: I agree that we did not look or the  
11 District did not look at individual transactions.  
12 Comparable profits method looks at profits.

13 THE COURT: Right.

14 MR. WOOD: Doesn't look at individual  
15 transactions. It looks at aggregated data. And it looks at  
16 the most narrowly -- narrowly identified aggregated data.

17 THE COURT: Did you make an effort to obtain  
18 information about actual controlled transactions?

19 MR. WOOD: Yes, your Honor. The initial  
20 questionnaire that goes out asked BP for -- and that's  
21 attached to our exhibits.

22 THE COURT: That's when they said it would be  
23 voluminous.

24 MR. WOOD: It's Exhibit B. It asked for all sorts  
25 of documentation asked them to either accept or refute some

1 statements of fact and asked for documentation for transfer  
2 pricing. Documents asked for all sorts of documents.

3 THE COURT: What about those CD's that they say  
4 they gave you with a whole bunch of stuff on it?

5 MR. WOOD: There was documentation related to  
6 what's called Section 6662 which I'm not terribly familiar  
7 with your Honor so I can't speak at length about that. It  
8 was documentation our experts looked at. It probably did  
9 help some in their analysis but not -- I guess it's not the  
10 same thing as what we asked for. That's my understanding.

11 THE COURT: Hang on a second.

12 MR. WOOD: And your Honor, we also asked for --  
13 later on some ledger information which is our Exhibit E. We  
14 asked for general ledger information when they came back and  
15 said we did not identify any transactions. We said give us  
16 this information and we'll show you the transaction. And  
17 they rejected that request.

18 THE COURT: Okay. Well -- but there could be a  
19 circumstance -- I mean I hear what you're saying. But do  
20 you think that the law requires you -- the law requires you  
21 as a taxing authority to endeavor to get information  
22 about -- about particular transactions or to segregate  
23 controlled versus uncontrolled transactions? Or are you  
24 entitled at the beginning of the process to say no thanks?  
25 We're not interested in your company's inside data or

1 pricing data or transactions data. We're going to apply --  
2 you know, we're going to compare you to Exxon on profits.

3 MR. WOOD: I think the regulations contemplate  
4 that a inquiry should be the most narrowly identifiable data  
5 possible.

6 THE COURT: Right. So you do have an obligation  
7 because it talks about the most narrow -- what is it?  
8 Narrow about business activity, right?

9 MR. WOOD: Yes, your Honor.

10 THE COURT: Narrowly identifiable business  
11 activity. You have an obligation to attempt to discover  
12 what that is.

13 MR. WOOD: Well based on the information available  
14 you should use the most narrowly identifiable business  
15 activity. But if there's a -- I believe the factual dispute  
16 if there is a question whether we actually did that. To  
17 answer your question the answer is yes. I think you can  
18 state aggregate data and it is incumbent then on the  
19 petitioner or the party come and say to the court no they  
20 did not use the most narrowly identifiable. And show that  
21 there was an error in the analysis.

22 THE COURT: Okay. So your position is we can do  
23 that as our opening move?

24 ~~MR. WOOD: I believe the law allows for us to do~~  
25 it that way. I think we are -- I think it also contemplates

1 that we should use the most -- I guess it's a hard question  
2 to answer. I think there's a very fact-based inquiry there  
3 and it's hard to answer that question directly, your Honor.  
4 Because I think you want to use the most narrowly  
5 identifiable. But I think it also allows you to use  
6 aggregated data. And I don't think that there's  
7 contemplated regulations or requirements to use such -- that  
8 you're talking about.

9 THE COURT: All right. Was there something else  
10 you particularly wanted to say?

11 MR. WOOD: If you have other questions. At the  
12 moment, no.

13 THE COURT: Okay.

14 Mr. McBride, you wanted to respond to something?

15 MR. MCBRIDE: Yeah. Sure. I would like to  
16 respond your Honor. I'm concerned because the nature of  
17 what we're doing here under 482 with respect to transfer  
18 pricing -- and I don't want to beat a dead horse -- but the  
19 only thing that's permitted is the adjustment or allocation  
20 of expenses and revenue with respect to control transaction.

21 THE COURT: Right.

22 MR. MCBRIDE: And the regulations under what we  
23 call dash five which is 26 CFL 1.42-5, that's the specific  
24 regulations dealing with comparable profits.

25 THE COURT: Right.

1 MR. MCBRIDE: It says the comparable profits  
2 method evaluates whether the amount charged in a controlled  
3 transaction is the arm's length -- is arm's length based on  
4 an objective measure of profitability derived from  
5 uncontrolled taxpayers that engage in similar business  
6 activities under the same circumstances. And I understand.  
7 But I want to be sure we're clear that we're talking about  
8 controlled transactions.

9 THE COURT: That's what you're trying to measure.  
10 No question.

11 MR. MCBRIDE: And that's what we're trying to  
12 measure. And I'm telling you that comparing -- comparing BP  
13 Products of North America, comparing their entire profits to  
14 the entire profits of Exxon and CONCO (phonetic), don't tell  
15 us a single thing about controlled transactions. Not a  
16 single thing. As a matter of fact judge, Handy says that  
17 this method is useless in telling us anything about  
18 controlled transactions.

19 THE COURT: Can you tell me why that is true?  
20 What is it about the legal standard that makes that true as  
21 opposed to the factual presentation that tells me these are  
22 completely different kinds of -- they are not, you know,  
23 comparable circumstances or whatever the phrase is.

24 MR. MCBRIDE: Because we start out with the whole  
25 pie. We haven't looked at all the controlled transactions.

1 We don't even know what controlled transactions we're  
2 focussing on.

3 THE COURT: Well that's the purpose isn't it.  
4 That's the purpose.

5 MR. MCBRIDE: The purpose of doing this 482  
6 analysis. The first thing they do is they isolate the  
7 controlled transaction -- a group of controlled  
8 transactions. They understand what those controlled  
9 transactions are. And quite frankly once they understand  
10 it, then they look at what the available data are to  
11 determine what's going to be the best method to use. But  
12 the essence is looking at controlled transactions.

13 THE COURT: Right. Well listen. It seems to me  
14 that the whole purpose of the -- I mean it's kind of obvious  
15 the whole purpose of the comparable profits methodology is  
16 that you're not going to look at individual transactions.  
17 You're not going to necessarily separate out all controlled  
18 for all uncontrolled. You're going to use a proxy, another  
19 method of reaching a way of measuring that.

20 But let me ask you this question. What more  
21 narrowly defined business activities should they have  
22 focussed on, assuming they were going to use this  
23 methodology? What should they have done that was  
24 unreasonable not to do?

25 MR. MCBRIDE: One thing they could have done, you

1 wouldn't do it, it would be the best method because the data  
2 would not be available. In a company like this that deals  
3 and commodities, you would use the profit method.

4 THE COURT: But you said it's not available here.

5 MR. MCBRIDE: It is available here. There's no  
6 reason why it couldn't be used. They didn't do it.

7 THE COURT: Oh I see.

8 MR. MCBRIDE: They didn't try to do it because  
9 their methodology only can use comparable profits because  
10 that's the only thing that gives them the data that they  
11 need on an easy basis to go and look at 10K's. But if you  
12 were a true 482 transfer pricing person and you were going  
13 to measure whether or not that there were some problem with  
14 respect to the purchase accrued or the sale of refined  
15 products. It's a commodity. Those are priced not just  
16 daily, but hourly in the market. And all the contracts both  
17 in terms of related and unrelated go directly to -- to  
18 pricing it at market prices.

19 Let me refer you back to -- you asked the question  
20 about this so-called disk. Under Section 482, in order to  
21 be able to avoid penalties with respect to 482 matters --

22 THE COURT: You're talking about here the federal  
23 scheme where they have this --

24 MR. MCBRIDE: That's correct. That's correct.  
25 Section 6662 requires that taxpayers, big multinational

1 companies like BP maintain contemporaneous documentation  
2 supporting what their controlled transactions are that are  
3 large and showing why they are at arm's length. That's  
4 called 6662 documentation. And every big company that  
5 operates in the US has those.

6 And so in discovery they asked us what we had  
7 about transfer pricing and we sent them a disk of -- I can't  
8 remember now whether it was more than one for all -- for  
9 each of the years under audit that showed precisely what the  
10 controlled transactions were. And while we didn't give them  
11 all the supporting backup, that backup could have been  
12 looked at if they followed through on discovery if they  
13 wanted to. But the notion that you can't figure out what  
14 the controlled transactions of BP Products North America are  
15 is simply not correct. And it's a matter of fact in  
16 discovery. In discovery they got a whole listing of those.

17 THE COURT: So we shouldn't be using -- according  
18 to you we shouldn't be using the comparable profits method  
19 at all. They shouldn't because they have access through  
20 this 6662 documentation to -- to the real stuff.

21 MR. MCBRIDE: Well not only that. If you've got a  
22 taxpayer whose major transactions are in commodities, you  
23 can -- you can look at the uncontrolled prices and see what  
24 they are and see whether the controlled prices are the same.

25 THE COURT: This is very interesting. I mean but

1 isn't it sort of classically a factual question eventually  
2 as to whether or not this was the best method given what  
3 data they were given by you and what they could have done?

4 MR. MCBRIDE: Your Honor, I want to be sure you're  
5 clear. I'm not arguing here before you today -- I hope I  
6 don't have to, but I may have to at some point. I'm not  
7 arguing whether they should have used comparable profits or  
8 not.

9 THE COURT: Okay.

10 MR. MCBRIDE: I think they shouldn't. But I'm  
11 saying as a matter of law they have misapplied the  
12 comparable profits method.

13 THE COURT: What's that got to do with the 6662  
14 documentation?

15 MR. MCBRIDE: I just want to be sure that you  
16 understood because you asked the question about this  
17 documentation.

18 THE COURT: Okay. But that's really part of your  
19 argument as to why they should have done it this way anyhow.

20 MR. MCBRIDE: Right. But that's not -- that's not  
21 what this court has to look at today. The question is  
22 whether or not the District can simply look at some  
23 information from some great big companies and compare the  
24 total income of a large multi-jurisdictional company and  
25 determine that there is a Section 482 violation. And we say

1 the regulations don't permit that.

2 And the only known case I know which looks at  
3 exactly the same issue is Microsoft. And quite frankly this  
4 is a new and novel approach that has been put on. It's been  
5 used in other jurisdictions. Most time taxpayers settle for  
6 small amounts of money because litigating one of these cases  
7 is expensive and time consuming.

8 THE COURT: I understand that argument as a  
9 practical matter. That's why there is summary judgment.  
10 But sometimes summary judgment just isn't available.

11 MR. MCBRIDE: We understand. But the point is if  
12 you look at the regulations, the regulations I think are  
13 clear that you can't simply start out by saying the most  
14 narrowly defined business activity is Exxon Corporation -- I  
15 mean excuse me -- Exxon Mobile Corporation. And that's in  
16 effect what they're doing is they're comparing us to Exxon  
17 Mobile, CONCO.

18 THE COURT: What is your most narrowly  
19 identifiable business activity?

20 MR. MCBRIDE: Well I think that it would probably  
21 be -- probably be a bunch of them. You might look narrowly  
22 at the marketing that we do. You might look carefully at  
23 the refining that we do. You might look carefully at the  
24 purchase of the crude oil that we do. You can look at any  
25 of those and determine whether or not -- and look at

1 companies that fit within that particular framework. But  
2 they don't try to do that. And quite frankly they don't  
3 want to do that.

4 Their position is we want to do it quick and  
5 dirty. We want to go and get information out of 10K's and  
6 give you data where you can make a ten and eleven, twelve  
7 billion dollar adjustment to income and let the taxpayer  
8 right -- and see what you can sell off. And quite frankly  
9 that is so far outside the scope of what Section 482 is  
10 about that it doesn't make any sense whatsoever. But  
11 nobody --

12 THE COURT: Does the feds ever do what you all are  
13 calling the dash -- what do you call it, the dash five?

14 MR. MCBRIDE: That's 26CFR1.482-5.

15 THE COURT: I know. But you were using the  
16 shorthand.

17 MR. MCBRIDE: I'm sorry.

18 THE COURT: I was trying to use the lingo, you  
19 know.

20 MR. MCBRIDE: I'm sorry. I shouldn't do that.

21 THE COURT: That's okay. Dash five, I've got it.

22 MR. MCBRIDE: Those are the specific regulations  
23 dealing with the comparable profits method.

24 THE COURT: Right. And do the feds ever just do  
25 that? Do they ever do that? Do they ever do the dash five

1 evaluations?

2 MR. MCBRIDE: Plenty of times they do. And as a  
3 matter of fact they cite a lot of times their reports --  
4 everybody may say gosh when the federal government does  
5 advanced pricing agreements most of the time they do  
6 comparable profits. Right. The comparable profits method  
7 is easy to use. But the advance pricing agreements is, you  
8 know, it is a collaborative effort between a taxpayer and  
9 Internal Revenue Service when the taxpayer knows he has an  
10 issue. And when he knows he has an issue he can go to the  
11 service -- and actually we told them about this because we  
12 performed one of those with respect to their back office  
13 calls.

14 They can go to the service and say we'd like to  
15 sit down with you and we will pick a method that we would  
16 use and we'll -- to show you that we are in compliance. So  
17 we got this agreement we don't have to worry about this.

18 And the kicker or the main point is when you look  
19 at the guidelines for advance pricing agreement, it lists  
20 about ten different things on which the taxpayer and the  
21 service have to agree. What's the appropriate transaction?  
22 What's the appropriate tested party? What are the  
23 comparables.

24 So sure, it's used because it's really easy to  
25 use. And the taxpayer is in the position where it can focus

1 and say lets talk about my sales of kerosene and see where  
2 my sales of kerosene were. Lets find kerosene sellers and  
3 see how they go.

4 I must tell you I don't know of any situation  
5 where people go in and say I'm going to use comparable  
6 profits to look at the entire income of your company and  
7 compare it to the entire income of -- that's just --

8 THE COURT: It's just not done.

9 MR. MCBRIDE: Well I'm just telling you if you  
10 read the regulations it certainly never suggest that you  
11 would do that.

12 THE COURT: Okay.

13 MR. MCBRIDE: Because the focus is always on  
14 controlled transactions. And if you're looking at the  
15 entire income of BP Products North America and compare it to  
16 the entire income of Exxon, CONCO or Chevron, it really  
17 doesn't tell us very much about whether or not if there is  
18 an arm's length transaction at the control.

19 THE COURT: Yeah. I mean it may be -- your -- it  
20 may be -- I mean it's obviously a blunt instrument of some  
21 sort. But your argument is that it's an illegally blunt  
22 instrument?

23 MR. MCBRIDE: Our argument is that it violates the  
24 regulations under Section 482.

25 THE COURT: Okay. All right.

1           Would somebody tell me why I should not, you know,  
2           learn at the feet of Judge Handy? Why I should not -- he  
3           seems to be the one guy who -- who says doing it this way is  
4           wrong.

5           MR. REZNECK: I will be glad to try to do that for  
6           your Honor. Because the petitioner here seems to rely  
7           almost entirely as far as I can see on the Handy decision in  
8           the Office of Administrative Hearing. But Microsoft is a  
9           different case and a different tribunal and it's full of  
10          factually distinctions and areas of both fact and law. And  
11          I've read it pretty carefully because of this case  
12          obviously. I have identified at least eight distinctions  
13          between Microsoft and this case. And we frankly did not  
14          want to over-paper this case and burden your Honor by  
15          spending a lot of time on it when it is so clearly  
16          inappropriate and in-opposite here.

17          First of all, the regulation Section 5(b)1  
18          provides quote, to the extent possible profit level  
19          indicators to be applied solely to the tested party's  
20          financial data, that it is related to controlled  
21          transactions. That calls for an individualized inquiry  
22          unique to each case. And while the ALJ and Microsoft  
23          mentioned that standard, he cited the regulation. He made  
24          no effort to apply it. And the point is that such an  
25          inquiry in Microsoft given the different nature of the

1 business there would be quite different than the inquiry  
2 here. And I think every case like this has to stand on its  
3 own feet with respect to aggregation versus segmentation.

4 Second point was that he quoted the statement from  
5 the regulations, this is 5(c)3. Quote, is the relevant  
6 business activity is the assembly of components purchased  
7 from both controlled and uncontrolled suppliers. It may not  
8 be possible to apply the profit level indicator solely the  
9 financial data related to the controlled transactions. That  
10 standard which we agree is an applicable standard has  
11 several factual inquiries and issues built into it. He made  
12 no effort to apply that standard. He cited it.

13 But in this case here we have purchases of crude  
14 oil by petitioners from both controlled and uncontrolled  
15 suppliers. They refine it and then they sell refined  
16 products to both controlled and uncontrolled purchasers.  
17 And the intermingling -- the co-mingling is testified to by  
18 their own witness as to both ends of it; at the purchase end  
19 and the sale end. And that's very different from anything  
20 that was in Microsoft. And it means that aggregation was  
21 not only proper. But I think the only proper method that  
22 could be used here in view of the co-mingling which is  
23 admitted to have taken place.

24 ~~Third, Microsoft engaged in seven types of~~  
25 businesses -- different businesses. They had a hundred

1 affiliated businesses involving thousands of transactions in  
2 seven types of business. I won't bother to enumerate them  
3 all but I can because they're not in Microsoft opinion.

4 There are seven of them, OTR, the Office of Tax  
5 and Revenue, tried to have computer software in its entirety  
6 treated as the relevant business. But that was not accepted  
7 here in view of the number of different businesses. We only  
8 have one business here in this case and that's refining  
9 crude petroleum. There are not seven different businesses.

10 And if you're going to talk about segmentation,  
11 just aggregation, it's obviously much more feasible when you  
12 have seven businesses than when you just have one.

13 I want to point out also the flaws -- some of the  
14 flaws both factually and legally in the Microsoft opinion.  
15 Why your Honor should not be tempted to follow it. The  
16 Microsoft opinion mis-cites the key regulations. For  
17 example, it cites Section 482(b)2 for the extent possible  
18 standard that I quoted to you. That's at page 22 of  
19 Microsoft. That's a mis-citation to be forwarding to 5(b)1.

20 The opinion also in Microsoft repeatedly states  
21 that the District experts there who are the same ones as  
22 here, applied a profits to costs ratio as the profit level  
23 indicator. There are 23 references in the Microsoft opinion  
24 to the profits to costs ratio. Every one of them is  
25 incorrect because the experts here applied a profits to

1 sales ratio and that's different. They did it there, they  
2 did it here.

3 With all respect your Honor, the opinion -- the  
4 AOJ opinion in Microsoft is sloppy and it shouldn't be  
5 followed here. Also the AOJ in Microsoft said that the  
6 experts at Microsoft provided no insight into why the entire  
7 income of Microsoft was selected. Whether or not that was  
8 true of Microsoft is not true here. In BP they did. And we  
9 cited numerous citations in our papers to show that they did  
10 explain exactly why they were using the entire income here.

11 As I've indicated the OTR contended in Microsoft  
12 that Microsoft engaged only one business, Computer Software.  
13 But the experts in analyzing it did identify seven different  
14 types of business activities engaged in in Microsoft. And  
15 there wasn't any effort to discuss how each one of those  
16 might apply with respect to this aggregation or  
17 segmentation. But that's a very fundamental difference.  
18 Maybe the most fundamental difference between Microsoft and  
19 this case.

20 Also one final point I might make on this is that  
21 petitioner here claims that over 98 percent of the purchases  
22 of crude oil were from unrelated parties. And 79 percent of  
23 its sales were to unrelated parties. Our experts have  
24 analyzed this and have a substantial problem with that 98  
25 percent figure particularly which is in their papers. This

1 is a perfectly integrated company. The parent is one of the  
2 largest oil producers in the world. But they take the  
3 position that petitioner here bought 98 percent of its  
4 purchases of crude oil from other companies than their  
5 parent. That's an issue that also cries out I think for  
6 dispute and for elaboration here. It just begs common sense  
7 your Honor that a fully vertically integrated company, which  
8 this is, should derive no benefit from vertical integration  
9 at all.

10 But in any event, if that 98 percent figure were  
11 true that 98 percent of the purchases, crude oil was an  
12 uncontrolled companies and only two percent, you can see  
13 that the inquiry about segmentation or just aggregation is a  
14 little bit like looking for a needle in a haystack I think  
15 to try to figure out what the two percent are from the 98  
16 percent.

17 So for all of those reasons we just don't think  
18 that Microsoft can control here.

19 THE COURT: All right. You wanted to respond?

20 MR. MCBRIDE: I just want to make a couple of  
21 points. First of all, I wondered why if those issues were  
22 there nothing was said.

23 THE COURT: It is unusual.

24 ~~MR. MCBRIDE: Any of the papers in this case about~~  
25 that I would have been happy to reply to respond to those.

1 But there's not a mention, not a breath of Microsoft in any  
2 of the papers filed by OPR.

3 And second, if in fact that case is wrong, why did  
4 they dismiss their appeal in that case? That case had been  
5 appealed to the Court of Appeals I understand. It boggles  
6 the mind. But if that case is wrong in so many ways and  
7 it's not, I think none of those are showing anything wrong  
8 with the opinion. Certainly with the reasoning. The fact  
9 that some section of the reg was mis-cited.

10 But our position is that Microsoft is correctly  
11 decided. It's there for the court to use. We certainly  
12 don't rely on it completely. We rely on regulations and our  
13 position.

14 Let me just make one more quick point and then I  
15 will sit down your Honor. Where we are is the situation  
16 that they simply say we don't have to tell you anything  
17 about controlled transactions. We don't have to look at it.  
18 We can look at the whole ball of wax. And one of the things  
19 with respect to transfer pricing is that it's a zero some  
20 game. The commissioner of revenue or the mayor in its  
21 corollary to this case -- the only thing they can do is  
22 allocate revenue and expenses among the affiliated parties.  
23 And so when you allocate revenue or take away expenses from  
24 a District company, you have created a --- you know --- a  
25 situation where you have to make a adjustment to another

1 taxpayer. If you can do what they claim they can do, and  
2 the regulations require that when you increase the income of  
3 one member of the affiliated group with the IRS, you have to  
4 decrease the income of the company with whom the non arm's  
5 length transaction took place.

6 THE COURT: Which poses a problem for, you know,  
7 taxes or somewhere.

8 MR. MCBRIDE: Or the District. We have a sister  
9 company that pays taxes in the District. And that's  
10 admitted in this case. And I would submit to you that they  
11 have no idea whether or not there would have be to be a  
12 correlative adjustment for that sister company. Because the  
13 methodology that they used doesn't tell us anything about  
14 what's the issue here and the core of this which is looking  
15 at the controlled transactions.

16 THE COURT: Okay. All right. Thank you.  
17 Anything else anybody wants to say or do about this?

18 MR. MCBRIDE: I don't your Honor.

19 THE COURT: All right. Well it's the sort of  
20 thing that is going to require writing. I wouldn't -- I am  
21 having trouble concluding that this is an issue susceptible  
22 to summary judgment. I'm having trouble concluding that  
23 this is a question of law that can be resolved at this stage  
24 of the record.

25 It does not seem to me -- it seems to me that the

1 questions you're raising about whether they should have done  
2 it this way are quintessentially factual questions that may  
3 even turn on questions about what was available during  
4 discovery and the interaction between the parties that was  
5 part of the discovery. And that it really is going to come  
6 down to was this the best method. Was this the right way to  
7 do it, the best method. And did they do this method having  
8 chosen it assuming it was acceptable, did they do it right.

9 And, you know, with all respect I don't think that  
10 the Microsoft case, that decision is going to control this  
11 decision. I hear what you're saying that at least it's some  
12 guidance. And I agree in an area where there isn't any it's  
13 something. But sometimes guidance just helps to illustrate  
14 what the issues are rather than what the proper resolution  
15 of them is. And I think that's the way it's going to go.

16 But I will issue a written opinion. And where are  
17 we otherwise in this matter?

18 MR. MCBRIDE: I think your Honor, if your Honor  
19 rules the way your inclination is now, we're ready to get a  
20 trial date.

21 THE COURT: Discovery is done?

22 MR. MCBRIDE: Discovery is done. As a matter of  
23 fact, that's why we objected to the motion for stay in the  
24 case because we wanted to complete discovery. But discovery  
25 is completed in the case and so we would be in a position of

1 setting a trial date. It would be a bench trial before your  
2 Honor.

3 MR. WOOD: Yes, your Honor. I would agree that --  
4 I don't know -- I don't want to set a pretrial date now. I  
5 don't know if you have an idea of how long it will take to  
6 issue a written order.

7 THE COURT: I'm happy to set a date for a -- well  
8 we can do whatever you guys want. We can set on the  
9 assumption that I'm going to deny this motion which I think  
10 is a reasonable assumption. We can set both a pretrial and  
11 a trial date or we can just set a pretrial date and sort of  
12 see what happens, whichever you prefer.

13 MR. MCBRIDE: Why don't we start with just a  
14 pretrial.

15 THE COURT: Okay. Assuming again that the motion  
16 is denied how long will it take to get a pretrial statement  
17 together? That should be fairly straightforward.

18 MR. MCBRIDE: No long.

19 THE COURT: I'm going to give it about 30 days all  
20 right, before pretrial if that's okay, unless you want me to  
21 just set an immediate pretrial.

22 MR. MCBRIDE: No, no. Thirty days from the date  
23 that you finish your --

24 THE COURT: No. I was going to set it thirty days  
25 from now --

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MR. MCBRIDE: Okay.

THE COURT: -- and try to force my own hand. How about May 24th which is a Friday. Now that's the Friday before the holiday weekend. I don't know how people feel about that.

MR. WOOD: I'm scheduled to be out of town that weekend.

THE COURT: Okay. So you're not going to be here. The 31st, the following Friday?

MR. WOOD: Good for the District.

THE COURT: Lets say 2:30 on that day, May 31st. All right. 2:30 on the 31st of May for a pretrial. Okay.

MR. MCBRIDE: Thank you.

THE COURT: Okay. I'd like the joint pretrial statement by the -- actually by Tuesday of that week that should be fine. Tuesday the 28th. Yeah. That's the day after the holiday but do it sooner. All right. Okay. Thanks.

MR. WOOD: Thank you your Honor.

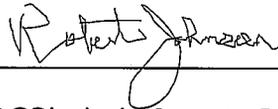
THE COURT: You all are excused. Thank you.

CERTIFICATE

I, Robert A. Johnson, an Official Court Reporter for the District of Columbia Courts, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced, upon the trial in the case of BP PRODUCTS NORTH AMERICA INC. V DISTRICT OF COLUMBIA, Civil Case Number 2011 CVT 10619, in said Court, on the 23rd day of April, 2013.

I further certify that I have transcribed the foregoing 44 pages from said machine shorthand notes and reviewed same with the backup tapes, if any, to the best of my ability.

In witness whereof, I have hereto subscribed my name, this the 29th day of May, 2013.



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Official Court Reporter