No. 07-0119

In the Supreme Court of Texas

IN RE BP PRODUCTS NORTH AMERICA INC.

Relator

CASE NO. 01-06-943-CV
FROM THE FIRST COURT OF APPEALS, HOUSTON, TEXAS

ORIGINAL PROCEEDING FROM THE 212TH JUDICIAL DISTRICT COURT,
GALVESTON COUNTY, TEXAS
CAUSE NO. 05-CV-0337-A
THE HONORABLE SUSAN CRISS, PRESIDING

REPLY TO RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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SUMMARY OF THE ARGUMENT

With respect to the apex doctrine, the proffered litany of Browne's activities establishes, at most, that Browne was doing the things a CEO does – not that he has unique or superior knowledge. The record is replete with evidence that other people had direct knowledge regarding the topics about which Plaintiffs profess to need Browne's testimony.

With respect to the Rule 11 Agreement, the purported "new evidence" from Manzoni's deposition is nothing new, and Plaintiffs make no effort to support at least two of the trial court's reasons for disregarding that binding agreement. Plaintiffs ought to be required to keep their end of the deal.

Space constraints imposed by an 8-page reply make it difficult to unpack each of Plaintiffs' generalizations. They use this circumstance to full advantage by throwing arguments against the wall in hopes something will stick. Full briefing on the merits is warranted to give the Court a complete picture of the circumstances, which will confirm that mandamus relief is warranted.

ARGUMENT

I. The Trial Court Abused Its Discretion by Violating Apex Law

A. The Apex Test is Clear and Stringent

The parties agree that the controlling standard is "whether the proponent of the deposition has 'arguably shown that the apex official has any unique or superior personal knowledge of discoverable information.'" *Crown Central Petroleum Corp. v. Garcia*,

904 S.W.2d 125, 128 (Tex. 1995) (orig. proceeding). Plaintiffs seize upon the word "arguably" but do not contest the standard as recognized by this Court. No matter how Plaintiffs try to spin it, every Texas apex case confirms that the test is intentionally difficult to meet.

Plaintiffs ignore all the other discovery in the case. And well they should: an inquiry about unique or superior knowledge invites a comparison to the knowledge of others. The fact that others have knowledge about a subject proves that Browne does not have unique or superior knowledge on that topic. *See, e.g.*, 4 R 1296-97, 1312-13, 1318-19 (Keith, Health, Safety and Environment V.P., discussing the HSE Policy). Additionally, the failure to question those with knowledge of the issues on which Plaintiffs seek to depose Browne reveals the real reason behind the Browne deposition notice – precisely the tactics this Court sought to stop by setting apex deposition requirements. *See, e.g.*, 6 R 1973-2049 (member of the Group Compliance and Ethics Department deposed but not asked about the Code of Conduct).

B. Browne Does Not Have Unique or Superior Knowledge

1. Visits With Employees Do Not Prove Knowledge

Browne's visit to Texas City after the accident in the company of other upper-level officials is not evidence that Browne has personal knowledge of the accident, or that Browne has unique or superior knowledge of the accident. Visiting with employees ***after*** an accident does not establish firsthand knowledge of the accident. Even if comforting employees and thanking responders could be termed an "investigation," an investigator

does not have firsthand knowledge of an accident. He simply finds people who have firsthand knowledge. Personal knowledge cannot mean hearing about events after they occur, going to an accident scene to comfort survivors, or being a good corporate citizen by meeting with the press or local government. *In re Daisy Manufacturing Co.*, 17 S.W.3d 654, 657 (Tex. 2000) (orig. proceeding) (per curiam) (CEO appearance on "20/20" not sufficient). This is typical CEO-type conduct.

The fact that others were present at the employee meetings, the meeting with the mayor, and the press conference disproves the *Alcatel* requirement for unique or superior knowledge. *In re Alcatel USA, Inc.*, 11 S.W.3d 173 (Tex. 2000). *Alcatel* requires that the CEO be either (1) the only person with the knowledge or (2) possess knowledge greater in quality or quantity to others. *Id.* at 179. A group meeting necessarily means that the definition of unique or superior cannot be met. Indeed, *Alcatel* teaches that even "some knowledge of discoverable information" is not sufficient to meet the test. *Id.*

A recurring theme in the Response is that only Browne can speak to his own impressions, experiences or thoughts. But that is true of every CEO. If a CEO's experiences or impressions on topics on which others have knowledge constitutes unique or superior knowledge, then the apex test is eviscerated. Plaintiffs cite no case law for this proposition because none exists.

2. Browne Has No Unique Knowledge of Reports Prepared by Others

Reviewing reports does not demonstrate unique knowledge or knowledge superior to the authors of the report. *In re Alcatel*, 11 S.W.3d at 178-79. Whether Browne

reviewed Texas City reports separately or in combination with other refineries is beside the point. His knowledge of the information contained in reports cannot be unique or superior to the knowledge of the person who prepared the reports. *Id.* at 179. John Manzoni, who is the person who sends reports on refining to Browne, said that Browne was ***not*** looking at Texas City separately. 9 R 3143. Plaintiffs' fallback position is that only Browne can explain why he was looking at reports on refining. Again, if the personal experience of the CEO is the test, then the apex test is eviscerated.

3. Browne Has No Unique or Superior Knowledge of Budget Cuts

Plaintiffs ignore the evidence addressing whether Browne had knowledge greater in quality or quantity than others concerning the 25% cost reduction. Two deponents stated that the cost reduction was ordered by Manzoni's predecessor, Doug Ford. 5 R 1515, 1536-37, 1830. The Group V.P. for Refining confirmed that Browne did ***not*** make that decision. 4 R 1179. Thus, any knowledge Browne had of this cost reduction could not have been greater in quality or quantity than the knowledge of the person who ordered it. Plaintiffs never requested a deposition of Doug Ford or of a corporate representative.

Plaintiffs' other evidence relating to budget cuts also fails. Resp. at 8. The first is a series of emails; they do not mention Browne and he is neither a recipient nor a sender. 2 R 433-44. Plaintiffs next quote Alvin Keith, the former Director of Health, Safety and Environment on capital expenditures. In that quote, Keith said that he was not certain of the delegation of capital expenditure authorities. 1 R 80. He then stated that he surmised

that the ultimate authority for all expenditures was Browne who then delegated that authority to his executive CEOs who in turn delegated that authority to group vice presidents and so on down the line. *Id.* This is typical CEO-type conduct. Plaintiffs then cite a memo that the senior management team, including Browne, "communicated the strategy and goals for the new BP Amoco group to all employees in the financial investment community." 9 R 3212. None of this shows that Browne was the only person with knowledge of the financial strategies and goals for the newly formed company.

At most, this evidence establishes what the courts have long recognized: the buck stops with the CEO. Even if the CEO does not approve budget cuts or have the authority to do so, he is ultimately responsible for all decisions made by the corporation. *AMR Corp. v. Enlow*, 926 S.W.2d 640, 644 (Tex. App.–Fort Worth 1996) (orig. proceeding) (that the highest-ranking corporate officer "has the ultimate responsibility for all corporate decisions and falls short of the *Garcia* [*Crown Central*] standard.") (quoted with approval, *In re Daisy Manufacturing Co.*, 17 S.W.3d at 658.[1] But that responsibility is not an invitation to depose the CEO in the absence of unique or superior knowledge – a high standard Plaintiffs have not satisfied on this record.

4. Browne's Knowledge of Company Policies Is Not Sufficient

Browne's knowledge of company policies and responsibility for corporate decisions does not establish unique or superior personal knowledge That a CEO has

[1] Plaintiffs do not explain how the appointment of Baker to the Panel is possibly relevant to any question the jury will answer, particularly after the Court of Appeals' decision that much of the Baker Panel information is unrelated to this case. *See In re BP Products North America Inc.*, 2006 WL 2522217 at *2 (Tex. App.–Houston [1st Dist.] Sept. 1, 2006) (Baker Panel not investigating the cause of the accident).

ultimate responsibility for all company policies does not implicate unique or superior knowledge. *AMR Corp. v. Enlow*, 926 S.W.2d at 644 (knowledge of policies is insufficient); *In re Daisy Manufacturing*, 17 S.W.3d at 658. Plaintiffs' evidence proves no more than Browne's ultimate authority over company policies. That evidence shows that personnel with BP's HSE, Legal and other departments wrote the policy for Browne to approve. 2 R 447. Likewise, the corporate code of conduct it is an example of Browne as a CEO directing lower level employees to develop a corporate policy. Plaintiffs' evidence establishes that the policy was developed by the "Group Compliance and Ethics Departments" at Browne's request. 2 R 524. A CEO directing others to create policies does not show unique or superior knowledge by that CEO. *In re Burlington Northern & Santa Fe Railway Co.*, 99 S.W.3d, 323, 326-27 (Tex App.–Fort Worth 2003) (orig. proceeding).[2]

II. The Trial Court Abused Its Discretion by Disregarding the Rule 11 Agreement

A. Nothing in Manzoni's Deposition Justifies Deposing Browne

Plaintiffs assert that "[t]he interpretation of a Rule 11 agreement is a job for the trial court." Resp. at 12 (citing *Browning v. Holloway*, 620 S.W.2d 611, 615-20 (Tex. Civ. App.–Dallas 1981, writ ref'd n.r.e.)). Plaintiffs miss the point because there is no disagreement about what the words in the Rule 11 Agreement mean. The question here is whether the Rule 11 agreements' unambiguous threshold for deposing him has been met.

[2] Plaintiffs know that BP Products revised this policy before the March accident because that evidence was produced to them in discovery. Their reference, a May 25 transmittal of the final draft, proves it was prepared before that date. 2 R 451.

Plaintiffs erroneously assert that Manzoni testified that only Browne could testify about why Browne looked at Texas City refinery data separately from the data on other BP refineries. Resp. at 12. Manzoni said Browne received refining reports only from him, and he did not give Browne reports on Texas City separately; therefore, it would be unusual if Browne had looked at Texas City separately. 9 R 3143. He did not say that Browne ***actually looked*** at Texas City separately. *Id.*

Plaintiffs erroneously assert that a lack of knowledge by Manzoni automatically equates to superior and unique knowledge on the part of Browne. Resp. at 12-13. This assumption fails because any number of people ***below*** Manzoni could know something that Manzoni does not. Plaintiffs' claim that Manzoni lacked knowledge about the 25% budget cuts gets them nowhere because it was done by Manzoni's predecessor, not deposed by Plaintiffs. 5 R 1515, 1536-36, 1830. Plaintiffs also reference questioning of Manzoni about the appointment of James Baker. This was public information 10 months before the Rule 11 Agreement was executed.

B. Plaintiffs Cannot Justify the Trial Court's Stated Grounds for Disregarding the Rule 11 Agreement

Plaintiffs do not attempt to defend the trial court's *sua sponte* findings of misrepresentation and estoppel. Resp. at 14-15. Therefore, this Court should disregard these unpleaded and unsupported grounds for ignoring the Rule 11 Agreement.

Plaintiffs rely primarily on a purported "PR campaign." Resp. at 14-15. No explanation is provided as to how a PR campaign, real or imagined, presents a misrepresentation of Browne's knowledge or provides proof that he had unique or

superior knowledge. As proof of public comments and a purported effort "to taint the jury pool," Plaintiffs point to Browne's presence at town hall meetings. Resp. at 14. The town hall meetings were held at ***BP's facilities*** for ***BP's employees alone***. CEO presentations to employees are entirely appropriate and do not "taint the jury pool" because BP Products employees from other cities will not be jurors. Likewise, the Leadership Pack, sent only to BP Products managers, contained no information not already widely disseminated. None of these materials were on the BP Products' website or made publicly available. 11 R 3602-03, 3719. Finally, the *Financial Times* and *Fortune* articles contained no new information. A handful of interviews do not a PR campaign make. Again, this is what CEOs do – communicate with the press and the financial community.

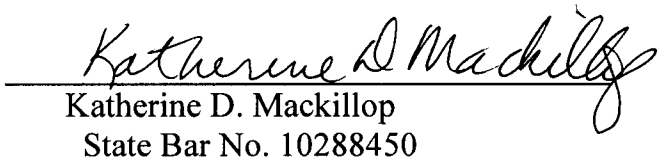
In essence, Plaintiffs' claim that the trial court was free to simply cast aside the parties' Rule 11 Agreement is insupportable on this record and harmful to Texas law. It is particularly unfair here because Plaintiffs got the benefit of the Rule 11 Agreement by taking Manzoni's deposition without facing mandamus review. They ought to keep their end of the deal.

CONCLUSION AND PRAYER FOR RELIEF

Relator BP Products North America Inc. asks this Court to issue a writ of mandamus directing the district court to withdraw its order allowing Browne's deposition. Relator seeks all other relief to which it may be entitled.

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.



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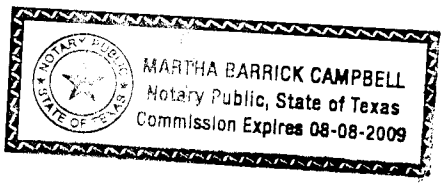
THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

On the 16th day of February, 2007, the affiant, Katherine D. Mackillop, appeared in person before me, a notary public, who knows the affiant to be the person whose signature appears on this document. According to the affiant's statements under oath, the affiant is mandamus counsel for the Relator, BP Products North America Inc. The affiant states under oath that the affiant has read the foregoing reply to response to petition for writ of mandamus and all factual statements in the reply are within the affiant's personal knowledge and true and correct.

Katherine D Mackillop
KATHERINE D. MACKILLOP

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this 16th day of February, 2007.

Martha B. Campbell
Notary Public, State of Texas



CERTIFICATE OF SERVICE

Pursuant to TEX. R. APP. P. 9.5, I certify that on February 16, 2007, a copy of the Reply to Response to Petition for Writ of Mandamus was delivered, by the method indicated, to the following:

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