

No. 07-0119

In the Supreme Court of Texas

IN RE BP PRODUCTS NORTH AMERICA INC.

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

**BP PRODUCTS' REPLY TO REAL PARTIES IN INTEREST'S RESPONSE TO
BP'S EMERGENCY MOTION
TO STAY THE APEX DEPOSITION OF JOHN BROWNE**

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Not one of the three arguments urged by the Real Parties in Interests (the “Committee”) to the Emergency Motion to Stay the Apex Deposition of John Browne filed by BP Products North America Inc. (“BP Products”) has merit. BP is entitled to a stay.

YES, THERE IS AN EMERGENCY

The Committee argues that BP Products’ claim that there is an emergency is fiction because, according to the Committee, BP Products’ motion to quash prevents the deposition from proceeding. The Committee is dead wrong. Conspicuously absent from the Committee’s response is any stipulation that the Committee will agree to postpone John Browne’s deposition pending this Court’s consideration of BP Products’ petition for writ of mandamus. In addition, the Committee does not deny that it opposes the relief requested by BP Products in its motion; it does not state that BP Products’ certificate of conference in its emergency motion (in which BP Products states that the Committee opposes the relief sought in the motion) was inaccurate. Unless and until the Committee stipulates to postponement of Browne’s deposition while the mandamus is pending, this Court should disregard the Committee’s contentions regarding the need for a stay.

The truth is that BP Products’ motion to quash is set for hearing on Monday, February 19, at which point it can be denied. John Browne’s deposition would then be back on for Friday, February 23. And if not back on for 23rd, very soon after that. *See* TEX. R. CIV. P. 199.2(a) (a “notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken”). And, the

motion to quash, required to be filed within three business days of the notice (TEX. R. CIV. P. 199.4) concerns the time and place of the deposition, not whether the deposition can go forward for failure to meet the apex requirements. That is made clear in BP Products' Motion to Quash. Motion to Quash, attached to Response, at 2, n. 1.

If the Committee plans to ask the trial court on Monday to move the Browne deposition to a time in the future making BP Products' request for mandamus relief *not* an emergency, then it should inform the Court and BP Products. BP Products has no desire to interrupt this Court's work without cause. The Committee made it quite clear in its response, though, that it wanted Browne's deposition testimony for the trial starting with jury selection February 26, one week from this Monday. This statement contradicts its claim that there is no emergency.

YES, THERE IS A LEGITIMATE BASIS FOR BP PRODUCTS' PETITION

The Committee's second response is a merits-related argument. According to the Committee, because the First Court of Appeals conducted an "extensive review of the record" (Response at 3), this Court need not bother with BP Products' petition. The First Court of Appeals did not issue an opinion setting forth its reasons; after stating the case's procedural history, it summarily denied BP Products' petition. Besides, whether the First Court of Appeals conducted an extensive review of the record or not does not make its conclusion any less wrong. *See* BP Products' Petition for Writ of Mandamus. Similarly, the Committee's argument that there is "ample" evidence of John Browne's "unique or superior knowledge" is refuted by BP Products' petition and BP Products' reply brief filed simultaneously with this filing.

THE STAY SHOULD BE GRANTED TO MAINTAIN THE STATUS QUO¹

The Committee's last argument is that the stay should be denied so that it can introduce John Browne's testimony at the trial. Response at 4. In other words, if the stay is not granted, the Committee intends to depose Browne and then use his deposition at the trial. The Committee has thus proved BP Products' point. Without a stay, Browne will be deposed and the Court will be without ability to grant BP Products meaningful relief.

The Committee ends by asserting that a stay will grant BP Products "all the relief that it seeks in its petition for writ of mandamus." *Id.* Not true. This Court can grant the stay and ultimately decide that BP Products is not entitled to mandamus relief, although BP Products believes that the Court would be wrong in doing so. John Browne's deposition can then be taken. Conversely, if the Court denies BP Products' emergency motion to stay the deposition, this Court will have effectively denied BP Products' petition for writ of mandamus. Once Browne is deposed, the issues presented by BP Products' petition for writ of mandamus – whether the trial court abused its discretion by allowing an apex deposition to go forward when the Committee failed to satisfy the stringent requirements for such a deposition and whether the district court abused its

¹ The Committee criticizes BP Products for the number of mandamus petitions it has filed to date. Response at 4, n.2. BP Products has prevailed in many of those proceedings. *E.g.*, *In re BP Prods. N. Am. Inc.*, No. 01-06-00679-CV, 2006 Tex. App. LEXIS 9008 (Tex. App.–Houston [1st. Dist.] 2006, orig. proceeding); *In re BP Prods. N. Am., Inc.*, No. 01-06-00140-CV, 2006 Tex. App. LEXIS 7861 (Tex. App.–Houston [1st. Dist.] 2006, orig. proceeding); *In re BP Prods. N. Am., Inc.*, No. 01-06-00613-CV, 2006 Tex. App. LEXIS 6898 (Tex. App.–Houston 2006, orig. proceeding); *In re BP Products Inc.*, No. 01-06-00980-CV, 2006 WL 3230760 (Tex. App.–Houston [1st Dist.] 2006, orig. proceeding). If any conclusion is to be drawn from the number of mandamus petitions, it is that an unusual degree of appellate-level supervision of the trial court's decisions has been required in this case. The pending mandamus is yet another instance in which the district court has abused its discretion.

discretion by disregarding the parties' binding Rule 11 agreement – will be moot. *In re El Paso Healthcare Sys.*, 969 S.W.2d 68, 75 (Tex. App.–El Paso 1998, orig. proceeding).

CONCLUSION

Relator BP Products North America Inc. renews its request in its Emergency Motion to Stay the Deposition of John Browne. Relator seeks all other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to TEX. R. APP. P. 9.5, I certify that on February 16, 2007, a copy of the

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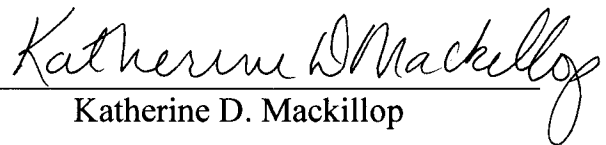
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