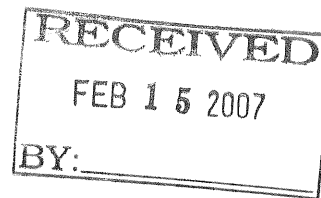


February 14, 2007

**VIA FEDERAL EXPRESS**

Mr. Blake Hawthorne, Clerk  
TEXAS SUPREME COURT  
201 West 14th Street, Room 104  
Austin, Texas 78701



Re: No. 07-0119; *In re: BP Products North America Inc.*; In the Texas Supreme Court

Dear Mr. Hawthorne:

Enclosed is the original and twelve (12) copies of *Brief of Amici Curiae Texas Chemical Council, Texas Oil and Gas Association, Texas Association of Manufacturers, Texas Association of Business, and Exxon Mobil Corporation in Support of Petition for Writ of Mandamus filed by BP Products North America, Inc.*

Please file in your usual manner and return the file-stamped copy in the self-addressed stamped envelope, provided.

As always, thank you for your courtesy and assistance.

Sincerely,

A handwritten signature in cursive script that reads "Michelle Meuhlen".

Michelle Meuhlen  
Legal Secretary

Enclosures

H-659387.1

Mr. Blake Hawthorne

February 14, 2007

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**In the Supreme Court of Texas**

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*In re:*

**BP PRODUCTS NORTH AMERICA INC.,**

*Relator.*

---

**BRIEF OF AMICI CURIAE  
TEXAS CHEMICAL COUNCIL, TEXAS OIL AND GAS ASSOCIATION, TEXAS  
ASSOCIATION OF MANUFACTURERS, TEXAS ASSOCIATION OF BUSINESS  
AND EXXON MOBIL CORPORATION IN SUPPORT OF PETITION FOR WRIT  
OF MANDAMUS FILED BY BP PRODUCTS NORTH AMERICA, INC.**

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**NO. 07-0119**

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**In the Supreme Court of Texas**

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*In re:*

**BP PRODUCTS NORTH AMERICA INC.,**

*Relator.*

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**BRIEF OF AMICI CURIAE**

**TEXAS CHEMICAL COUNCIL, TEXAS OIL AND GAS ASSOCIATION, TEXAS  
ASSOCIATION OF MANUFACTURERS, TEXAS ASSOCIATION OF BUSINESS  
AND EXXON MOBIL CORPORATION IN SUPPORT OF PETITION FOR WRIT  
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TO THE HONORABLE THE TEXAS SUPREME COURT:

Amici Curiae the Texas Chemical Council, the Texas Oil and Gas Association, the Texas Association of Manufacturers, the Texas Association of Business, and Exxon Mobil Corporation submit this Amici Brief in support of Relator BP Products North America, Inc.'s ("BP Products") Petition for Writ of Mandamus. Amici join BP Products in asking that BP Products' petition be granted and that this Court vacate the trial court's order compelling the apex deposition of Lord John Browne, the London-based chief executive of a non-party corporate parent whose deposition has not been shown to be necessary to the prosecution of this locally-based suit.

#### **INTEREST OF AMICUS CURIAE**

Amici curiae are business associations and a major oil and gas company that have substantial common interests in ensuring that the apex deposition doctrine – articulated by this Court in *Crown Central* and reinforced in *In re Alcatel* – be applied to fulfill the stated goal of protecting high-level corporate executives from unnecessary, costly, and disruptive depositions.

The Texas Chemical Council is a statewide trade association of businesses operating chemical manufacturing facilities in Texas. The 85 member companies of the council provide employment and career opportunities for some 70,000 Texans at more than 200 separate facilities across the state. Their combined economic activity sustains approximately 500,000 jobs for Texans. Chemical products made by Texans are valued at almost \$72 billion annually.

The Texas Oil & Gas Association is a general, multipurpose petroleum trade association with 2,000 members, some 500 of whom are executives of 50 of the state's largest energy companies. The Association is the oldest and largest organization in the state representing petroleum interests and is the only organization in the state that embraces all segments of this industry. Its membership produces and markets more than ninety percent of all Texas' crude oil and natural gas.

The Texas Association of Manufacturers is a statewide trade organization composed of 40 leading manufacturing companies, which represent a cross-section of manufacturing industry sectors. Manufacturing contributes \$96 billion to the Texas economy each year and more than 892,000 Texans work in the manufacturing industry.

The Texas Association of Business is a statewide, broad-based business association representing small and large employers and local chambers of commerce from every corner of the state. Its 3,000 member companies and chambers provide jobs for millions of Texans.

Exxon Mobil Corporation is the world's largest publicly traded international oil and gas company, with over 84,000 employees worldwide. The company has interests in exploration and production acreage in 36 countries and production in 26 countries located in Africa, Asia Pacific, the Middle East, Europe, North and South America, and the Russia/Caspian region. Exxon Mobil Corporation's downstream operations are equally extensive and diverse. It has interests in 45 refineries located in 25 countries and more than 35,000 retail outlets in nearly 100 countries. It has 41,675 Texas-based employees

and 152 facilities located in the state. Its worldwide headquarters is located in Texas and a number of its most senior executives, including its CEO, are located here.

The fees for this brief are being paid by the Amici. *See* TEX. R. APP. P. 11(c).

### STATEMENT OF FACTS

BP Products' Texas City facility suffered an explosion on March 23, 2005. Hundreds of lawsuits arising from the explosion have been consolidated for discovery before the 212th District Court in Galveston County. Claiming that other discovery was insufficient, Plaintiffs noticed the deposition of Lord John Browne ("Browne"), Executive Director and Group Chief Executive of BP p.l.c., the non-party ultimate corporate parent of BP Products, for September 29, 2006, in Galveston, Texas. BP Products moved to quash the deposition and for protection. The trial court denied the motion for protection and ordered the deposition to proceed. The First Court of Appeals denied BP Products' mandamus petition. *See In re BP Products North America, Inc.*, No. 01-06-00943-CV (Tex. App.—Houston [1st Dist.] Feb. 9, 2007, orig. proceeding) (mem. opinion). BP Products' mandamus petition to this Court followed.

### INTRODUCTION

The apex deposition doctrine is based upon the recognized need to balance interests between (1) permitting discovery as necessary to the prosecution of a case and (2) preventing abusive, harassing, and disruptive discovery of high-ranking corporate executives who typically know little of the matters in dispute. In this era of scorched-earth litigation, the balance sought by the doctrine has been frustrated as plaintiffs increasingly have requested the depositions of senior corporate management, often

motivated by nothing more than the hope that dissemination of the request will “have an in terrorem effect within the organization and can effect settlement leverage with a minimum of effort.” Jay E. Grenig & Jeffrey S. Kinsler, HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE § 7.17 (2d. ed. 2006) (observing that attempts to take apex depositions “are on the increase” and are now “a frequent practice”); *see also* Scott A. Mager, *Curtailing Deposition Abuses of Senior Corporate Executives*, 45 JUDGE’S JOURNAL 30 (Winter 2006) (noting that attempted depositions of apex executives “has become commonplace”). If settlement leverage is not the goal, then cost, disruption, and harassment serve as alternative goals. The problems created by such uncurtailed discovery are exponentially greater when plaintiffs are allowed to reach beyond the corporation sued in the lawsuit to notice depositions of officers of affiliated or parent corporations that are not parties in the case, especially when the targeted executive is a high-level executive located in a distant country. The trial court has ordered such a deposition here. The trial court’s ruling, if given this Court’s imprimatur, would impose a significant burden upon the many energy, petrochemical, financial services, insurance, and other types of companies that do business in Texas (including those represented by the Amici), and, by extension, upon the Texas economy in which these companies play a pivotal role.

## ARGUMENT

### I. The apex deposition doctrine is intended to minimize discovery abuse and harassment with respect to the depositions of senior-level corporate executives.

This Court has played a leading role in the development of the apex deposition doctrine, which seeks to minimize the potential for discovery abuse and harassment by limiting the circumstances under which senior corporate executives can be deposed. *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 175-76 (Tex. 2000); *In re Daisy Mfg. Co.*, 17 S.W.3d 654 (Tex. 2000); *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995). The doctrine provides that a party seeking to depose a corporate president or senior corporate executive must show, in response to a proper motion for protection, that:

- the executive has unique or superior personal knowledge of discoverable information, or
- after a good faith effort to obtain the discovery through less intrusive means, (1) there is a reasonable indication that the executive's deposition is calculated to lead to the discovery of admissible evidence, and (2) the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate.

*In re Alcatel*, 11 S.W.3d at 175-76.

Under this doctrine, both state and federal courts, in Texas and elsewhere, have refused to permit "a plaintiff's deposition power to automatically reach the pinnacle of a corporate structure," *Liberty Mut. Ins. Co., v. Superior Court*, 13 Cal. Rptr. 2d 363, 366 (Cal. App. 1992), and have blocked the depositions of senior executives, including those at companies like American Airlines, IBM, General Motors, Samsung and Chrysler. *See, e.g., In re Alcatel*, 11 S.W.3d at 175-76 (chairman and CEO of Samsung); *AMR Corp. v. Enlow*, 926 S.W.2d 640 (Tex. App.—Fort Worth 1996, no writ) (chairman and CEO of

American Airlines); *Thomas v. Int'l Bus. Mach.*, 48 F.3d 478, 483-84 (10th Cir. 1995) (chairman of IBM); *Liberty Mutual*, 13 Cal. Rptr. 2d at 366 (CEO of Liberty Mutual); *Baine v. General Motors Corp.*, 141 F.R.D. 332, 335-36 (M.D. Ala. 1991) (top executive of GM's Buick division); *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.R.I. 1985) (Lee Iacocca, chairman of Chrysler Corporation); *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979) (president of Upjohn).

The foregoing courts properly recognize that high-ranking corporate executives are charged with managing and controlling the direction of large corporate organizations, many of which span the globe, with hundreds of thousands of employees and shareholders. If the apex deposition doctrine were not rigorously applied, these executives would be required to appear at countless depositions, given the thousands of lawsuits their companies have pending at any given time and the scores of new lawsuits they receive each month. Such a result would cause the companies to incur enormous costs and severely disrupt the executives' schedules and the management of their companies, to the detriment of employees, shareholders, customers, and the public at large.

**II. Plaintiffs did not satisfy their burden of showing that Lord Browne had "unique or superior personal knowledge of discoverable information" or that they made "a good faith effort to obtain the discovery through less intrusive means."**

Many of the arguments that Plaintiffs have made below would have severe repercussions on corporate management and practices of the Amici's members if endorsed by this Court.

For example, Plaintiffs argue that Browne's post-accident visit to Texas City, his hour-long visit with employees at the refinery, and his statements to the media, gave Browne "unique or superior personal knowledge" relating to the accident. 11 MR 3428. They claim that only Browne can speak to the meaning of his statements to the press. In today's corporate culture, a senior executive of a parent company will appear at the scene of a significant incident to express corporate concern and to demonstrate the company's determination to take appropriate action. If a corporate officer were subjected to a deposition each time he or she made a public statement regarding an incident or comforted an employee or family member or reassured a community, the apex deposition doctrine would be eviscerated.

When an accident occurs, high-ranking corporate officers serve as the face of the corporation to their employees, the media, and the larger community, extending sympathy and reassurance to those affected. Public policy is not served if these executives are exposed to unnecessary, unproductive depositions for assuming this beneficial role. Such a result would chill corporate speech without advancing any legitimate countervailing interest. An extension of corporate sensitivity after a tragic accident should be encouraged, rather than discouraged by exposing the executive who delivers the message to a deposition.

Plaintiffs also claim that they are entitled to depose Browne regarding budgetary decisions and regulatory policies affecting the refinery. 11 MR 3428-29. For example, they assert that Browne has unique or superior knowledge because "London, through Lord Browne, approved budgets and capital expenditures," and that Browne directed the

revision of a Health Safety and Environmental Performance policy. *Id.* BP Products demonstrated below that these factual assertions are groundless. 3 MR 623-25. Even if true, Plaintiffs' allegations would not overcome the rigorous standard established by this Court – that a showing of unique or superior knowledge requires “evidence that a high-level executive is the *only* person with personal knowledge of the information sought or that the executive arguably possesses relevant knowledge greater in quality or quantity than other sources.” *In re Alcatel*, 11 S.W.3d at 179 (emphasis added). This standard would be meaningless if it permitted a party to depose a CEO on his or her personal thoughts about a company's goals, policies, statements, or budgetary decisions.

Finally, Plaintiffs assert that Browne's testimony is needed to discover information regarding several remedial measures taken by BP following the accident, including a change in the Corporate Code of Conduct, the appointment of James Baker to lead an independent panel examining BP's North American refining operations, and planned changes in BP's safety culture. Even if Browne provided the impetus for these remedial measures, it does not follow that Browne has unique or superior knowledge about their development or implementation or that information about them cannot be obtained from other sources. Exposing a CEO to a deposition for announcing a corporate commitment to take remedial measures would create a significant disincentive for corporate executives to announce such measures after an accident. When balancing the potential benefit of deposing a senior corporate officer with little personal knowledge of the events leading up to the accident against the potential detriment of discouraging

remedial measures, public policy favors protection of the executive and a rigorous application of the apex deposition guidelines proffered by this Court.

**III. A retreat from this Court's apex deposition guidelines would set back Texas' efforts to attract business to the state.**

Over the last decade, Texas has made great strides in reforming its civil litigation system to eliminate abusive practices. Permitting the trial court's order to stand would be a step backwards. Companies would be reluctant to shift business operations to Texas if doing so meant that those activities could subject their senior officers – many of whom are located in other states or countries – to depositions in Texas, regardless of whether the relevant evidence is available through less disruptive means. Companies with their headquarters in Texas have an interest in avoiding a legal precedent that foreign courts could invoke in ordering Texas-based senior managers to be deposed in distant places about incidents that occur in affiliate operations. This Court should not initiate or countenance a retreat from the progress Texas has made in creating an environment hospitable to economic growth.

**CONCLUSION**

For the foregoing reasons, Amici Curiae the Texas Chemical Council, the Texas Oil and Gas Association, the Texas Association of Manufacturers, the Texas Association of Business, and Exxon Mobil Corporation urge this Court to grant Relator BP Products North America, Inc.'s Petition for Writ of Mandamus and the relief requested therein.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of the *Brief of Amici Curiae* was served on the respondent and the following counsel of record on this 14th day of February, 2007:

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