

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

**BP PRODUCTS NORTH AMERICA INC.'S
OPPOSITION TO MOTION TO DISMISS**

BP Products North America Inc. ("BP Products") asks this Court to deny the Plaintiffs' Steering Committee's Motion to Dismiss this mandamus proceeding. Neither the apex issue nor the enforceability of the binding Rule 11 Agreement has been mooted. First, the apex doctrine protects former CEOs. Second, and at any rate, mandamus remains in order because of the unjustified repudiation of the Rule 11 Agreement. Thus, this dispute will remain alive, and in need of resolution by this Court, so long as Plaintiffs continue to pursue Lord Browne's deposition.

I. The Apex Issue Is Not Moot

Apex deposition guidelines apply not only to those who currently hold the CEO title, but also to *former* top executives who held office during events giving rise to the litigation. *In re El Paso Healthcare System*, 969 S.W.2d 68, 74-75 (Tex. App.–El Paso 1998) (orig. proceeding). The official at issue in *El Paso Healthcare* resigned in October 1997, and the court of appeals issued its opinion the next year. *El Paso Healthcare* held that the resignation of an apex official does not moot a mandamus. *Id.* “[S]imply because Rolfe [the apex official] no longer holds the corporate office does not suddenly endow him with discoverable personal knowledge nor does it strip him retroactively of the protection he should have been given in the first place.” *Id.* These words apply with equal force here. If Lord Browne’s deposition is important enough to warrant Plaintiffs’ continued pursuit of him even after he steps down, then it is important enough to warrant continuing application of the apex standards.

Reaching this conclusion does not require the Court to make new law. This Court already has applied apex guidelines to retired apex officials. *In re Alcatel*, 11 S.W.3d 173, 175 (Tex. 2000) (orig. proceeding) (apex rules applied to Kang who was Chairman during the earliest events giving rise to the litigation, and was Chairman Emeritus at the time the deposition was noticed.) Accordingly, the apex issue is not moot.¹

¹ Plaintiffs’ assertion about the affidavit in this case based on an obviously unrelated issue in England is a diversion tactic. Browne’s affidavit here proving lack of unique or superior knowledge is confirmed by numerous deponents. *See* BP Products’ Brief on Merits at 18-28.

II. The Rule 11 Issue Is Not Moot

Enforceability of the parties' Rule 11 Agreement governing Browne's deposition provides an independent basis for mandamus relief. Plaintiffs make no effort to explain how the Rule 11 issue is mooted by Browne's resignation. This silence speaks volumes. As they have done throughout the mandamus briefing, Plaintiffs pretend that the Rule 11 Agreement does not exist.

As the Court will recall, BP Products voluntarily produced John Manzoni for deposition. In exchange, Plaintiffs withdrew their deposition notice for Browne and agreed not to notice or request the deposition of any other executive officer or board member of BP p.l.c. except in one and only one narrow circumstance. 9 R 3124-25. This condition for deposing Browne – that new evidence must be adduced during the Manzoni deposition establishing unique or superior knowledge on Browne's part – was never satisfied. *Id.* at 3124.

Under its unambiguous terms, the Rule 11 Agreement does not make Browne's deposition dependent upon whether he continues to serve as CEO. Browne's continued service as CEO is *not* a condition of the Rule 11 Agreement's continued enforceability. Browne's retirement does not change the fact that Manzoni's deposition failed to establish any unique or superior knowledge on Browne's part. Browne's retirement also does not change the fact that the trial court relied upon entirely ad hoc reasons for disregarding a binding Rule 11 Agreement – reasons Plaintiffs themselves neither advocated below nor supported in their appellate briefing.

Plaintiffs contend they have a right to break their promises. The trial court agreed. This Court should address this important issue.

It is commonplace to decry the expense and incivility of discovery disputes in litigation. It also is commonplace to lament the expenditure of court resources necessary to resolve such disputes. Rule 11 Agreements provide an important tool for combating the pernicious effects of uncontrolled and unceasing discovery quarrelling. This Court should decide the pending mandamus on the merits; enforce the parties' Rule 11 Agreement; and signal to Texas courts and litigants that Rule 11 Agreements cannot casually be disregarded.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' Motion to Dismiss the mandamus as moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to TEX. R. APP. P. 9.5, I certify that on May 7, 2007, a copy of the foregoing was delivered, by the method indicated, to the following:

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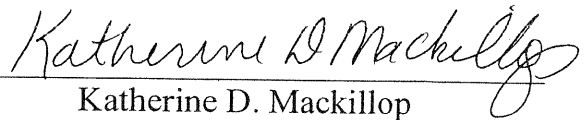
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May 7, 2007

Mr. Blake A. Hawthorne, Clerk
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201 W. 14th Street Room 104
Austin, TX 78701

VIA HAND-DELIVERY

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

Dear Mr. Hawthorne:

Enclosed for filing in connection with the captioned matter are the original and twelve copies of BP Products North America Inc.'s Opposition to Motion to Dismiss.

Please acknowledge receipt and filing of this pleadings by placing your file mark on the extra copy of the pleading and returning same to the undersigned as proof of filing.

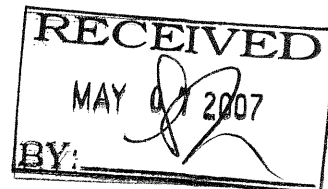
By copy of this letter, all counsel of record have been provided copies of this filing.

Sincerely,

Katherine Mackillop
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KDM/mh

Enclosures



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cc: (w/enclosures)

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Sent: Monday, May 07, 2007 11:54 AM
To: Hernandez, Mary; Package Express
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Sender	Katherine Mackillop Fulbright & Jaworski L.L.P. Fulbright Tower 1301 McKinney Houston, TX 77010-3095 +1 713 651 5568 x15568	Absolute Delivery Deadline	May 7 2007 at 1:30 pm
Recipient	Arthur J. Gonzalez Brent Coon & Associates 300 Fannin, Suite 200 Houston, Texas 77002 713-225-1682	Special Instructions	Deliver copy of BP's Opposition to Motion to Dismiss (No. 07-0119, Tx Supreme Court)
Charge Info	<i>Matter #:</i> 10503964 <i>Client:</i> BP America Inc. <i>Matter:</i> Investigation of March 23, 2005 Explosion <i>Employee:</i> 388	Service Speed Packaging Round Trip Airport Run	ASAP Envelope No No