NO. 07-0119

In the Supreme Court of Texas

IN RE: BP PRODUCTS NORTH AMERICA, INC.,

Relators.

ORIGINAL PROCEEDING FROM THE 212TH JUDICIAL DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
CAUSE NO. 05CV0337-A

REAL PARTIES IN INTEREST BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of case:	This is a suit for wrongful death and personal injury brought as a result of an explosion at the BP Texas City Refinery on March 23, 2005.
Respondent:	The Honorable Susan Criss, 212th Judicial District Court of Galveston County, Texas
Relief sought:	Relator seeks to vacate an Order entered October 11, 2006, that denied its motion for protection and ordered the deposition of Mr. John Browne to proceed at a time and place within the United States to be determined by agreement of the parties, or, if in London, with costs/expenses to be paid by Relator. (11 R 3690-91); *see* BP's Petition for Writ of Mandamus, Appendix A.
Court of Appeals:	No. 01-06-00943-CV— *In re: BP Products North America, Inc.* (filed October 18, 2006)
Court of Appeals Disposition:	On October 30, 2006, the court of appeals granted a stay of the deposition order. On November 22, 2006, the court of appeals granted the parties' agreed motion to abate mandamus proceedings. On February 9, 2007, after full briefing, the court of appeals lifted the abatement, denied mandamus, and lifted the stay.

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REAL PARTIES IN INTEREST BRIEF ON THE MERITS

TO THE HONORABLE FIRST COURT OF APPEALS:

The Real Parties in Interest, the BP Plaintiffs' Steering Committee[1] ("the Committee"), file this Brief on the Merits in support of their position that this Court should deny the petition for writ of mandamus filed by BP Products North America, Inc. ("BP"), as follows:

INTRODUCTION

This mandamus seeks to prevent the deposition of Mr. John Browne, an apex official. The deposition should go forward if the Committee "**arguably**" showed that the official "has **any** unique or superior knowledge of discoverable information." *In re Alcatel USA, Inc.*,11 S.W.3d 173, 175 (Tex. 2000). No other showing is required. *Id*. at 176. Thus, if there is

[1] The "BP Plaintiff's Steering Committee" represents the Plaintiffs in this case, who have combined for the purposes of discovery.

some evidence of that Mr. Browne does possess such knowledge, the district court could not have abused its discretion. *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002)("The trial court does not abuse its discretion if some evidence reasonably supports the trial court's decision."). Because, on this record, there is such evidence, BP's petition for writ of mandamus should be denied.

STANDARD OF REVIEW—MANDAMUS

Mandamus relief is available only to correct a "clear abuse of discretion" when there is no other adequate remedy at law. *See Walker v. Packer*, 827 S.W.2d 833, 839-44 (Tex.1992). Under the abuse of discretion standard, the court of appeals cannot overrule the trial court's decision unless the trial court acted unreasonably or in an arbitrary manner, without reference to guiding rules or principles. *Beaumont Bank v. Buller*, 806 S.W.2d 223, 226 (Tex.1991). Moreover, the court of appeals cannot substitute its judgment for the trial court's reasonable judgment even if it would have reached a contrary conclusion. *Walker*, 827 S.W.2d at 839-40; *Beaumont Bank*, 806 S.W.2d at 226. The trial court does not abuse its discretion if some evidence reasonably supports the trial court's decision. *Butnaru,* 84 S.W.3d at 211. This Court must uphold the decision of the district court unless the Court concludes that "the trial court could reasonably have reached only one decision." *In re MacGregor (FIN) Oy*, 126 S.W.3d 176, 181-82 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding).

STANDARD OF REVIEW—APEX DEPOSITIONS

BP filed a motion for protection to prevent John Browne's deposition because he is an "apex official." The parties agree on the test for the Court's review of BP's motion. If BP's "apex" affidavit is sufficient,[2] then the burden shifts to the plaintiff to "arguably" show "that the official has any unique or superior personal knowledge of discoverable information." *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 175 (Tex.2000) (orig. proceeding) (quoting *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex.1995) (orig. proceeding)).

If the plaintiff cannot show that the official possesses "unique or superior knowledge," then the deposition should not go forward unless the plaintiff shows "after a good faith effort to obtain the discovery through less intrusive means, (1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate." *Id.* at 176.

Against this backdrop, an official possesses "unique or superior knowledge" if the 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 available sources." *See In re Burlington Northern and Santa Fe Ry. Co.*, 99 S.W.3d 323, 327 (Tex. App.—Fort Worth 2003, orig. proceeding); *see JHC Ventures, L.P. v. Fast Trucking*,

[2] In view of the court of appeals' treatment of the Manzoni affidavit, the Committee does not challenge the sufficiency of Browne's affidavit. However, the Committee challenges the accuracy of the affidavit because, as shown below, Browne does possess unique or superior knowledge about matters highly relevant to this case.

Inc., 94 S.W.3d 762, 777-78 (Tex. App.—San Antonio 2002, no pet.) (court refused to quash apex deposition when there was evidence that the CEO was the only person with knowledge of the purpose of the design changes). An "apex" official who has personal knowledge of relevant facts cannot avoid the deposition merely because of his status as an "apex" official. *See Boales v. Brighton Builders, Inc*., 29 S.W.3d 159, 168 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (alleged "apex" deposition can proceed if official has "first-hand knowledge of certain facts"); *see Simon v. Bridewell*, 950 S.W.2d 439, 442 (Tex. App.—Waco 1997, no writ) ("apex" doctrine applies where corporate officer has been noticed for deposition merely because of officer's corporate position; an officer with first-hand knowledge of relevant facts cannot avoid deposition because of "apex" status). This Court has held that a deposition of the head of a company cannot be taken merely because he is the head of the company with knowledge of the company's general policies or because he has read a report or attended a meeting. *See In re Alcatel USA, Inc*., 11 S.W.3d at 175-79. However, if he is the author of the report, he has unique or superior knowledge. *Id*. at 179 ("A recipient's knowledge of the contents of a report is not unique or generally superior to the author's, of course.").

The Committee strongly disagrees with the way that BP has approached this test. Throughout its brief on the merits, BP complains that the Committee has made no showing that it could not find out that information from other sources, perhaps several rungs lower on the pecking order. But, as this Court clarified in *Alcatel,* that is not the test. There, as here, the court of appeals combined the tests, as BP has done, such that the plaintiff would have been required to show not only that the official had unique or superior knowledge, but

also that the plaintiff could not obtain that information through less intrusive means. *In re Alcatel*, 11 S.W.3d at 176. This Court held in *Alcatel* that such a combined test was wrong. The tests are separate. The **first** test is whether the party has arguably shown that the official has unique or superior knowledge of discoverable information. *Id*. If so, "the trial court should deny the motion for protection and the party seeking discovery should be entitled to take the apex depositions." *Id.*

The **second** test—that is, whether the party seeking the deposition has attempted to discover the information through less intrusive means—does not even kick in unless the official is **not shown** to have any unique or superior knowledge. *Id.*

So that the Court is not confused by BP's briefing, the Committee wishes to emphasize that it **never sought** to prove the second "less intrusive means" test, and does not seek to do so now. Rather, the **only thing** that the Committee sought to present below is evidence that John Browne "arguably" had some "unique or superior knowledge of discoverable information." *Id.* As this Court held in *Alcatel*: "The party seeking the apex deposition is required to pursue less intrusive means of discovering the information **only when** that party cannot make the requisite showing concerning unique or superior knowledge." *Id.* (emphasis added).

Thus, this mandamus rises or falls on whether the Committee has presented some evidence that John Brown has unique or superior knowledge of discoverable information.

STATEMENT OF FACTS

On March 23, 2005, there was an explosion at the BP Texas City refinery, in which 15 people were killed and hundreds injured.

On July 31, 2006, the Committee noticed the deposition of John Browne, who is CEO of BP p.l.c. (2 R 313-14).

On August 2, 2006, BP moved for protection from that deposition (2 R 305). On August 15, 2006, BP filed a motion for protection based on the apex doctrine, and attached Browne's affidavit (2 R 334-37). On August 24, 2006, the Committee filed its response to BP's motion for protection (2 R 416-422).

On August 28, 2006, the district court conducted an evidentiary hearing on BP's motion for protection. The court denied the motion for protection and ordered Browne's deposition to proceed.

On August 31, 2006, the parties entered into a Rule 11 agreement, which allowed the deposition of John Manzoni to proceed, but withdrew the deposition notice of Browne, with the exception that if new evidence of Browne's unique and superior knowledge develops during Manzoni's deposition, then Browne can be re-noticed for a one-hour deposition.

Manzoni's deposition was taken on September 8, 2006.

On September 20, 2006, the Committee re-noticed Browne's deposition (9 R 3120-22). BP filed a new motion for protection, and a supplement to that motion (10 R 3224). Plaintiffs responded (9 R 3193-223; 11 R 3419-596).

The district court conducted hearings on October 9 and 11, 2006. At those hearings, the court learned for the first time that since the Rule 11 agreement, Browne had been

traversing the world, engaged in a major PR campaign, talking about the Texas City explosion in public presentations, private presentations, and public interviews, all shortly before trial. Following those hearings, the district court issued an order that denied BP's motion for protection and ordered the deposition of John Browne to proceed without the limitations of the Rule 11 agreement.

BP sought mandamus in the First Court of Appeals which, after full briefing and a stay to consider the matter, denied mandamus on February 9, 2007.

SUMMARY OF ARGUMENT

The deposition of a high corporate official can be taken if that official arguably possesses unique or superior knowledge of discoverable information. In this case, the Committee presented some evidence that John Browne possessed unique or superior information in many ways: (1) his personal visit to the accident site and interviews with witnesses; (2) his public statements and press conferences about the explosion at the Texas City Refinery; (3) his personal knowledge and involvement in the 25% budget cuts that may have led to the tragedy; (4) his personal appointment of James Baker to head up the Baker Panel to investigate BP safety issues, despite allegations of conflicts of interest; (5) his personal changes to the BP safety policy prior to the accident; and (6) his personal overhauling of the Corporate Code of Conduct just months after the explosion. Because there is some evidence that Browne has unique or superior knowledge of issues relevant to the case, he may be deposed. The district court did not abuse her discretion in ordering the deposition to proceed.

BP also contends that the district court did not have any authority to go beyond the parties' Rule 11 agreement. But, a district court controls discovery in her court. And, the parties' Rule 11 agreement does not trump that control. Because of BP's conduct, the district court was well within her discretion in ordering a longer deposition than that to which the parties agreed.

Because there is no abuse of discretion, and because Browne should be deposed, the Committee requests that BP's petition for writ of mandamus be denied.

ARGUMENT

I. John Browne Has Unique Or Superior Knowledge Of Discoverable Information

Discovery is a process to learn the truth, based on facts that are revealed, not based on facts that are concealed. *See Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984). Our courts liberally construe discovery questions to favor disclosure, to allow litigants to obtain the fullest knowledge of the facts and issues before trial. *See Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 (Tex.1990)(orig. proceeding); *Kessell v. Bridewell*, 872 S.W.2d 837, 842 (Tex. App.—Waco 1994, no writ). The apex deposition doctrine is no exception to that rule. The apex deposition doctrine was never intended to provide immunity from discovery for corporate executives, or to provide a shield behind which to hide relevant facts. *See Six West Retail Acquisition v. Sony Theatre Management Corp*. 203 F.R.D. 98, 102 (S.D.N.Y. 2001).

When a high corporate executive truly has no personal knowledge of facts relevant to the issues in the lawsuit, the courts should protect such an executive from the harassment of a deposition. *See In re Alcatel USA, Inc*., 11 S.W.3d 173, 175 (Tex.2000) (orig. proceeding). On the other hand, when it is "arguably" shown that the high corporate

executive has "unique or superior knowledge of discoverable information," the deposition should be allowed to proceed. *Id.*

BP argues in its mandamus that Mr. Browne "has only second-hand knowledge," and that "no apex deposition is warranted." *See* BP Brief on Merits, at 9. That statement is false. The evidence presented on this record reveals that Mr. Browne has direct, personal, first-hand knowledge of highly relevant and discoverable information. Because the Committee "arguably" presented evidence that Browne has "unique or superior knowledge of discoverable information," the Committee met its burden and the mandamus should be denied. *Id.*

In its Brief on the Merits, BP maintains that a high corporate executive cannot be deposed if the evidence merely shows: (1) that the high corporate official is provided reports of information; (2) that the CEO has ultimate responsibility for decision making; (3) that the high corporate official has knowledge of company policies; or (4) that the high corporate officer has aims and goals for the company. *See* BP Brief on Merits, at 12-14. The Committee **agrees** with each of those propositions. And, if that were all that the evidence showed here, then the deposition of Browne should not go forward. But those are square holes into which BP cannot put this round peg. In this case, the evidence shows that Browne does possess unique or superior knowledge of facts highly relevant to the issues in this lawsuit. Because the district court's decision to allow the Browne deposition to go forward was based on that evidence, the district court did not abuse her discretion, and the mandamus should be denied.

A. Browne has unique or superior knowledge concerning his on-site examination of the accident scene

On the day after the explosion, Browne personally visited the site, met with and interviewed employees and company officials ("For the better part of an hour Browne spoke individually with each employee present, asking about their welfare and their experiences during the incident . . .")(2 R. 426). Only Browne can speak about those experiences. Thus, he has unique and superior knowledge regarding his visit to the Texas City refinery on the day after the incident.

BP describes this as a group task to "offer both sympathy to those affected and their appreciation to those involved in responding to the accident." *See* BP Brief on Merits, at 18 (no citation to the record). BP says that there is no evidence that Browne was ever alone with any of the employees. That statement is belied by the evidence. BP's own evidence reveals that Browne "spoke individually with each employee present, asking about their welfare and their experiences during the incident . . ." (2 R. 426). This evidence reveals more than just group commiseration. Browne actually discussed the accident, personally, on the day after the accident, with those who were involved in the accident, about their experiences in the accident. Browne was present on the accident scene. He can testify about what he learned.

BP misrepresents the plaintiff's burden. BP says that there were others there too, and that there is no evidence Browne was ever alone. But, this Court said that the burden was to show that the official possessed "unique or superior knowledge of discoverable information," and Browne certainly has unique or superior knowledge about what he learned from the

employees and his visit to the accident site on the day after the explosion at the Texas City Refinery. *See In re Alcatel U.S.A., Inc.*, 11 S.W.3d at 175; *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 145 F.R.D. 92, 98 (S.D. la. 1992) ("'[w]hen a witness has personal knowledge of facts relevant to the lawsuit, even a corporate president [or CEO] is subject to deposition.'") (*quoting Digital Equipment Corp. v. Systems Industries, Inc.*, 108 F.R.D. 742, 744 (D. Ma. 1986)); *see also Anderson v. Air West, Inc.*, 542 F.2d 1090, 1092-93 (9th Cir. 1976) (plaintiffs may depose sole stockholder who "probably had some knowledge" regarding substance of plaintiffs' claims); *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975) (district court erred in granting protective order ordering plaintiff not to depose Herald-Examiner's publisher when plaintiff suggested possible information publisher might have that others did not); *Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 102-06 (S.D. N.Y. 2001) (compelling deposition of CEO of Sony Corporation when plaintiff "presented sufficient evidence to infer that [CEO] had some unique knowledge on several issues related to its claims").

The apex official doctrine prevents an official who has no personal knowledge of an event from being dragged into the litigation simply because he is the CEO of the company. But, it does not prevent the deposition of an official who has "any" personal, first hand knowledge of the event. *See Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 168 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Here, there is no question that Browne has personal, first hand knowledge of discoverable information. He was there. He observed the scene of the accident on the day after. He personally interviewed employees present, individually, for over an hour. A BP

press relations official could not speak for Browne, and discuss what Browne saw and heard and discussed and did. Where the apex official has so personally injected himself into the controversy, he is not immune from discovery into his first hand experiences.

Imagine an automobile accident. No one contends that the injured victims of the automobile accident could go to the CEO of Ford and say let me examine you about your policies concerning seat belts. But, if that CEO showed up at the scene of the automobile accident, talked to the victims, talked to the people on the scene for over an hour and gave a press conference about it and talked about what the reaction of Ford was going to be to this automobile accident, then certainly that CEO who had first hand knowledge could be deposed. *See Simon v. Bridewell*, 950 S.W.2d 439, 442 (Tex. App.—Waco 1997, no writ) ("If the president of a Fortune 500 corporation personally witnesses a fatal car accident, he cannot avoid a deposition sought in connection with a resulting wrongful death action because of his 'apex' status.").

BP says in its petition: "This mandamus record establishes that Browne has only second-hand knowledge concerning an accident provided to him whom Plaintiffs already have deposed." *See* BP Brief on Merits, at 9. Clearly, that statement is wrong. Browne has direct, first hand knowledge of discoverable information.

BP contends that the information is discoverable through less intrusive means. Why, they say, there were other BP officials there the next day, why don't you ask them? Or, why don't you talk to all the employees on the scene and ask them what they talked about with Browne? Or, why don't you talk to the Mayor and find out what he talked about with Browne?

The answer to all of those questions, of course, is that it is not required. The burden on the party seeking to take the deposition is to "arguably show that the official has any unique or superior knowledge of discoverable information." *In re Alcatel*, 11 S.W.3d at 176. Once that is shown, as here, the court has the discretion to deny the motion for protection and order the deposition to proceed without any further showing. *Id.* Only when the party **does not show** that the official possesses unique or superior knowledge of discoverable information, must the plaintiff proceed to the second test to attempt to prove that it could not get the information through less intrusive means. *Id.*

Once it is shown that an official possesses "any unique or superior knowledge of discoverable information," the deposition may proceed. Here that is shown. The mandamus should be denied.

B. Brown has unique or superior knowledge concerning his press conference

That same day, Browne met with the Mayor of Texas City before holding a press conference at City Hall (2 R. 426). As pointed out in the district court, a video of Browne's press conference appears on the internet.[3] During that press conference, Browne stated that he had heard "lots of harrowing stories" from the men and women who operate the refinery, that he had toured the area of the explosion, and that BP was "responsible" for the explosion.[4] Only Browne can speak about his experience in meeting with the Mayor on the day after the explosion and the meaning of his statements to the press. With regard to the

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[3] *See* http://www.netroadshow.com/custom/bp/texas032405.asp?t=w&s=l.

[4] Others were asked what John Browne meant when he said at the press conference that BP was "responsible for what happens inside the boundaries our plant" and they did not know. Only Browne can explain that.

meeting with the Mayor and the press conference, both of which are relevant and discoverable, Browne has unique or superior knowledge.

A very similar issue was discussed in 2002 by a federal court in California. *See In re AIR CRASH AT TAIPEI, TAIWAN on October 31, 2000,* 2002 WL 32155478 (C.D.Cal. 2002). In a case involving a fatal airline crash that killed 82 people, the plaintiffs sought to depose Dr. Cheong Choong Kong, Deputy Chairman and CEO of Singapore Airlines. The defendants sought to shield him from discovery with the argument, as here, that Dr. Cheong "does not have unique or superior knowledge of the accident or the ensuing investigation." *Id.* at *2. The plaintiffs sought, as here, to examine Dr. Cheong about public statements that he had made after the crash in which he said, as here, that SIA accepted "responsibility" for the crash. *Id.* at *3. Although Dr. Cheong's public statements were not made under oath, plaintiffs wanted the opportunity to depose him to get those statements under oath. *Id.*

The court agreed that the plaintiffs could depose Dr. Cheong concerning his public statements about the crash. The court said:

> Here, Dr. Cheong made public comments wherein he accepted responsibility on behalf of defendant SIA for the Taiwan crash. Plaintiffs seek to ask questions of Dr. Cheong regarding these public comments to bind defendant SIA at trial, and this is certainly an acceptable use of discovery.

Id.

In addition to the press conference on the day after the accident, the district court judge was confronted with literally dozens of public statements and press conferences that Browne has given with direct reference to the explosion at the Texas City Refinery—including interviews in the *Financial Times*, FORTUNE magazine, town hall

meetings, and "Leadership Briefing Packs" prior to trial to "key contacts," among others. (*See, e.g.*, 9 R. 3222; 11 R. 3423, 3560, 3590-95). Where the CEO has so personally, and publicly, injected himself into the facts of the accident, he is not immune from discovery. There is no sound reason to permit the press—on numerous occasions—to question the CEO about his unique or superior knowledge about the accident, but to prevent the plaintiffs from asking the CEO about his unique or superior knowledge about the accident.

In an effort to avoid the appeal of this logic, BP cites *In re Daisy Manufacturing*[5] for the proposition that "a CEO's appearance on '20/20" to defend against the precise allegation in a case did not meet the Crown Central test." *See* BP Brief on Merits, at 20, n. 3 (citing *In re Daisy Manufacturing Co.*, 17 S.W.3d 654, 657 (Tex. 2000) (orig. proceeding). That citation is incorrect and misleading. As a matter of fact, this Court itself pointed out that the CEO's appearance on "20/20" was "**[u]nrelated to Sanchez's suit** . . ." *In re Daisy Mfg. Co.*, 17 S.W.3d at 657 (emphasis added). That is a far cry from the situation presented here where, it appears, literally every other week Lord Browne is giving another press interview about **this specific case**. In such a situation, Browne is not immune from discovery. He has unique or superior knowledge, at least about his public statements—which is a legitimate area of discovery. *See In re AIR CRASH,* 2002 WL 32155478, at *3.[6]

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[5] BP cites this opinion so frequently in its Brief on the Merits that it is cited *passim* in the Table of Authorities.

[6] The court notes that when there is a fatal crash, like the fatal explosion here, one could "reasonably expect" the CEO to have unique or superior knowledge of that crash—as contrasted with the low-level employee who wants to depose the CEO in an employment discrimination case. *See In re Air Crash*, 2002 WL 32155478, at *3, n.3.

Thus, because there is some evidence that Browne arguably has unique or superior knowledge of relevant facts, he should be deposed.

C. Browne has unique or superior knowledge about his personal oversight of the Texas City Refinery

An interesting document from 2003, entitled "Safety Performance Alert!" reveals that although BP had 18 refineries throughout the world, Browne looked at the monthly data for 17 of those refineries together, but "[h]e looks at TCR [Texas City Refinery] data separately each and every month!" (2 R. 430) (emphasis in original). John Manzoni, BP's "number two man" was asked why, prior to the accident, Browne looked at all the data concerning BP's other refineries together, but looked at data concerning the Texas City Refinery separately. Manzoni testified that did not know and called it "very unusual." (9 R 3194). Only Browne can explain why he looked at Texas City Refinery separately and what significance that had for safety.

BP does not explain why, prior to the accident, Browne looked at data concerning Texas City Refinery separately. Instead, they try to push this in the square hole of he merely "reviewed reports," and, of course, that doesn't give him unique or superior knowledge. But, BP's attempted deflection aside, the real question is why Browne was so focused on the safety reports of the Texas City Refinery, to the exclusion of the other refineries throughout the world, which he considered as a group. Only Browne can answer that question.

BP also says that the Committee should have asked the authors of the email—Woody Anderson or Rick Hale—about it. First, the authors of the email could not explain why Browne did what he did. But, second, as a practical matter, the sort of orderly discovery

process by which the plaintiffs could depose every witness on every relevant subject did not occur in this case. This email (BPISOME00995445) was produced by BP in its 67th production on or about March 31, 2006. The production consisted of about 360,000 pages of material and was not printed and completely reviewed until mid-June, 2006. Woody Anderson's deposition was taken on March 30, 2006, before the document was produced. Rick Hale's deposition was taken on June 1, 2006, before the significance of the document was known, and after another million documents had been produced.[7]

Finally, there is no requirement that the party seeking discovery go to others when the evidence shows that the corporate official has unique or superior knowledge of facts relevant to an issue in the lawsuit. For that reason also, the district court had sufficient information to justify the deposition of Browne. The mandamus should be denied.

D. Brown has unique or superior knowledge of budget cuts

Although BP's motion tries to portray the United States' operations as distant step children to the London parent, the evidence reveals that London, through Lord Browne, approved budgets and capital expenditures (2 R 432-443). The "major authority" with regard to budget cuts "was obviously Lord Browne." (1 R. 80).[8]

After the merger with Amoco, BP London ordered a 25% cash cost cut from 1998 levels (9 R 3195, 3212). This 25% budget cut has direct relevance to the accident because

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[7] The material responsive to Rick Hale's subpoena duces tecum had a bates range of BPISOME01959600-1966444. A total of 6 million documents have been produced, volumes of which were irrelevant to any issue in the case.

[8] BP cites Alvin Keith for testimony with regard to BP's chain of command. However, Keith did not know at what level Browne was personally involved in decisions regarding capital expenditures (1 R 80).

it is alleged that the cost cutting led to the lack of essential manpower "which was one of the reasons this explosion happened in the first place."(11 R 3648; 9 R. 3081); *see also* (11 R 3713) ("And that's [the 25% budget cut's] instrumental in this case because it directly impacts the operation of that unit and it specifically reduced the manpower on that unit.").

Manzoni, BP's number two man, was asked about the budget cuts. He did not know.

> Q. After the merger, there was apparently a decision made to advise the various business unit leaders at the various refineries to cut their fixed operational budgets by another 25%. Do you know anything about that?
>
> A. No, not specifically. I don't know when that was. Certainly not since I was in this job.
>
> Q. When was it you were first made aware of the issues emanating from London to various refineries to cut the budget 25 percent post merger?
>
> A. I don't think I was.

(9 R 2195, 3206).

Those budget cuts were announced in a memo entitled *Texas City Business Unit Strategy* (9 R 3195, 3212). In that document, it is stated that Browne "and his senior management team" issued a public communication to the financial investment community about the "long-term strategic direction and performance of the Texas City Business Unit." (9 R. 3212). As part of that long-term strategy, BP ordered 25% reduction in business unit cash costs from 1998 levels. (*Id.*). Kathleen Lucas, whom BP acknowledges is the Operations Manager for the Texas City refinery, testified that Browne personally ordered the budget cuts.

Q. Okay, do you know where the request came from?

A. The 25 percent?

Q. Yes.

A. My understanding was that that was a target that John Browne had just as, you know, benefits from merger.

(11 R 3422, 3557).

BP tries to distance itself from this evidence by stating that it only shows general "ultimate responsibility" and that Browne has "precisely the same knowledge as any other CEO of a large multi-national corporation." *See* BP Brief on Merits, at 28. However, this is not a case about some general policy for which the CEO has "ultimate responsibility." Instead, this is a case in which the corporate policy itself caused the fatal accident that killed 15 people and injured hundreds of others.[9]

Numerous courts have dealt with situations, as here, where the corporate policy itself is at issue. *See, e.g.*, *see JHC Ventures, L.P. v. Fast Trucking*, *Inc.*, 94 S.W.3d 762, 777-78 (Tex. App.—San Antonio 2002, no pet.) (court permitted deposition where CEO had unique or superior knowledge of design changes); *see also Kimberly-Clark Corp. v. Continental Cas. Co.*, 2006 WL 3436064, at *2 (N.D.Tex. 2006)("Federal courts have permitted the depositions of high level executives when conduct and knowledge at the highest corporate levels of the defendant are relevant in the case."); *General Star Indem. Co. v. Platinum*

[9] This is not just some pie-in-the-sky theory created by the Plaintiffs out of thin air. On October 30, 2006, the United States Chemical Safety and Hazard Investigation Board issued its preliminary findings in which it found that cost cutting compromised safety which led to the explosion at Texas City. *See* http://www.csb.gov/index.cfm?folder=news_releases&page=news&NEWS_ID=315 (United States Chemical Safety and Hazard Investigation Board's website announcing the report).

Indem. Ltd., 210 F.R.D. 80, 84 (S.D.N.Y. 2002)("Courts have allowed depositions of high ranking corporate executives where questions have been raised regarding corporate policies."); *Six West Retail Acquisition v. Sony Theatre Management Corp*., 203 F.R.D. 98, 105-106 (S.D.N.Y. 2001) (compelling the deposition of the CEO of the Sony Corporation and the President of Sony America).; *Travelers Rental Co., Inc. v. Ford Motor Co.,* 116 F.R.D. 140, 146 (D. Mass. 1987) ("those with greater authority may have the last word on why Ford formulated and/or administered the plan in the manner which the lower level executives described it").

The most applicable case on this issue involved the deposition of William Clay Ford, Chairman of the Board of Ford Motor Company. *See In re Bridgestone/Firestone, Inc*., 205 F.R.D. 535 (S.D. Ind. 2002). Mr. Ford's deposition was noticed in the multi-district litigation involving hundreds of injuries allegedly caused by rollovers. The defendants contended, as here, that Mr. Ford, as an apex official, could not be deposed. The court disagreed. The court allowed Mr. Ford to be deposed for the following reasons:

- Mr. Ford had personal knowledge and involvement in certain relevant matters, including the Firestone tire recall, Explorer safety issues, and Ford's response to the tire and Explorer issues;[10]
- The rationale for barring apex depositions is missing when the official has personal involvement in relevant issues;

[10] The court stated, "Federal courts have permitted the depositions of high level executives when conduct and knowledge at the highest corporate levels of the defendant are relevant to the case." *In re Bridgestone*, 205 F.R.D. at 536 (citing *Six West Retail Acquisition v. Sony Theatre Mgmt*, 203 F.R.D. 98 (S.D.N.Y. 2001); *Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140 (D. Mass. 1987)).

- Here, "conduct and knowledge at Ford's highest corporate levels may well be relevant to the issues presented in this litigation";
- This is not a deposition related to a single personal injury case, "but to depose him **once** for all of the hundreds of pending personal injury cases pending in the MDL, the MDL class action, and many state court cases." *Id.* at 536 (emphasis in original);
- The trial judge provided deference by ordering the deposition to be taken at the corporate headquarters; and
- Nearly all the other depositions have been conducted.

Id.

The policies articulated by the federal court in the *Bridgestone/Firestone* case are directly applicable here. In our case, the evidence reveals that Browne has personal knowledge and involvement in the budget cuts that are alleged to have been a contributing cause of the deaths and injuries caused by the explosion at the Texas City Refinery. The question of why that policy was implemented at the expense of safety can only be answered by Browne.[11] In this case, the "conduct and knowledge at [BP's] highest corporate levels may well be relevant to the issues presented in this litigation." *Id.*[12] Further, despite the fact that there remain hundreds of injury cases pending, as there did in *Bridgestone/Firestone*,

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[11] BP says that Doug Ford has the most knowledge about the budget cuts. *See* BP's Brief on Merits, at 25. Doug Ford, Manzoni's predecessor, reported directly to Browne.(5 R. 1536). And, as BP knows, Doug Ford is no longer with the company. Thus, the only person remaining at BP with the most knowledge of the budget cuts is Browne.

[12] Even Paul Maslin, BP's technology vice president for BP Refining, conceded that the 25% budget cuts were "nonsensical" and "clearly ridiculous." (5 R. 1515, 1537).

John Browne's deposition will only be taken **once.** And, that deposition can be taken in Browne's hometown, London. And, almost all other depositions in the case have already been taken.

BP says, well, the goals and aims of a corporation do not rise to unique or superior knowledge. This was not merely a "goal or aim." As Maslin said, it was a "directive." (5 R. 1537). This was a specific policy that may have caused the deaths of 15 people and the horrendous injuries of many others. If BP is to "take responsibility," let it answer for this policy.

All of the policy interests and balancing that were addressed in *Bridgestone/Firestone* are applicable here. There is no sound reason to provide Browne immunity from relevant questions about relevant corporate policies. Browne has unique or superior knowledge about the 25% budget cuts that are alleged to have been a direct cause of the 2005 explosion. The deposition should proceed and the petition should be denied.

E. Browne has unique or superior knowledge of the appointment of James Baker to the Baker Panel

After the accident, the United States Chemical Safety and Hazard Investigation Board (CSB) recommended that BP set up an independent panel to investigate the cultural issues and deficits in BP's refining operations in North America that resulted in the explosion at the BP Texas City refinery (9 R 3195). BP appointed James Baker to lead the panel, which became known as the "Baker Panel."

Questions have been raised concerning the independence of this "independent" panel that was to investigate "safety and management oversight" following the tragedy (10 R.

3408). Both Baker's law firm and his public policy institute were reported to have "financial ties to BP." (*Id*.). For example, Baker's Institute for Public Policy received $245,000 from BP since 1993. (*Id*.).

Manzoni was asked about BP's decision to appoint James Baker to head the panel.

> Q. The CSB also recommended that you appoint an independent panel to look over the cultural issues and deficits associated with BP's operation here in the States, correct?
>
> A. Correct.
>
> Q. And at some point, a decision was made to select Mr. Baker to head this panel?
>
> A. Correct.
>
> Q. And who made the decision to pick Secretary Baker to lead this panel?
>
> A. I think John Browne made that decision.

(9 R 3195, 3207).

Thus, with regard to the decision to appoint James Baker to lead the "independent" panel to investigate BP's safety and management as a result of the 2005 Texas City refinery explosion, Browne has unique or superior knowledge.

BP addresses this entire argument in a footnote, criticizing the Committee for the "lengths to which Plaintiffs are forced to go . . ." *See* BP Brief on Merits, at 27, n. 8. Then, BP dodges the issue. BP never addresses whether Browne appointed Baker (he did) or whether there were conflict of interest questions raised (there were). Instead, BP contends that the Baker Panel report is not relevant to the Texas City explosion. That is untrue. The

impetus for the issuance of the Baker Panel report was the Texas City disaster, and the Baker Panel report investigated the "safety culture" at all five BP U.S. refineries, which included Texas City. Not only was this investigation directly relevant to safety at Texas City, but the Baker Panel announced many specific conclusions and recommendations regarding the BP operations at Texas City.[13] Although there are many laudatory features about the Baker Panel report, the report has been criticized in the news media for sanitizing BP's gross negligence and intentional disregard for safety, and for downplaying the cost cutting issues found to be a critical cause of the Texas City disaster by the United States Chemical Safety and Hazard Investigation Board.[14]

The Baker Panel report is directly relevant to the safety issues, and Browne has unique or superior knowledge about it. For that reason also, his deposition should go forward.

F. Browne has unique or superior knowledge about the changes to BP's Health Safety and Environmental Performance Policy, because he directed those changes

In 2001, BP revised the Health Safety and Environmental (HSE) Performance policy, which is, of course, directly relevant to the liability allegations in this lawsuit. A document reveals that Browne personally directed the revisions to that document and would not sign it until the wording was changed. (2 R 447). The memo reads:

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[13] The 374-page Baker Panel Report was issued in January, 2007, and can be found on the internet at http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/SP/STAGING/local_assets/assets/pdfs/Baker_panel_report.pdf.

[14] The Baker Panel report does find that from 1992 to 2000, total capital spending at the Texas City Refinery fell by 84 percent. *See supra*, note 12, at 82. Notwithstanding that reduction, after the merger and prior to the explosion, BP called for an additional 25 percent cost reduction at the Texas City Refinery. *Id.*

> "For your information, attached is a revision to the current corporate HSE policy that contains additional wording to conform with ISO 14001 requirements. The current policy that John Browne signed in January 1999 does not meet ISO 14001 standards. For the past seven months, personnel within BP's HSE Law and other departments have been tweeking the policy to get Sir John to approve the final revision. As you can imagine, with each review, more language was added to the point where Sir John has not agreed to sign it."

(*Id.*).

Not only did Browne review and approve this policy, but also Browne personally revised it, directing that revisions be added and refusing to sign until the revisions were done. Thus, this is much more than inquiring about the company's general policies. Rather, it is asking Browne to explain the meaning of a document whose changes he personally directed. Browne has unique or superior knowledge about the changes in that particular policy. *See JHC Ventures, L.P. v. Fast Trucking*, *Inc.*, 94 S.W.3d 762, 777-78 (Tex. App.—San Antonio 2002, no pet.) (court refused to quash apex deposition when there was evidence that the CEO was the only person with knowledge of the purpose of the design changes).

While a CEO who merely reviews a policy authored by others may not have unique or superior knowledge, the CEO who personally revised and authored the policy certainly does. *See In re Alcatel USA, Inc*., 11 S.W.3d at 179. ("A recipient's knowledge of the contents of a report is not unique or generally superior to the author's, of course.").

This is not like an inquiry of the CEO of Ford about Ford's general policy regarding seat belts. Instead, this is an inquiry directed at the person who originated the policy to examine that policy and inquire why the policy failed to prevent the tragic accident in question. Browne's personal first-hand knowledge about the changes in the HSE policy are

highly relevant and can be obtained only from him. *See Travelers Rental Co., Inc. v. Ford Motor Co.*, 116 F.R.D. 140, 143 (D.Mass. 1987)("In short, Mr. Poling was the representative of Ford who made the decision to proceed with the 1982 program; he may be deposed respecting his evaluation of the 1981 program and Ford's motivation for continuing the program in 1982").

Because there is some evidence of Browne's unique or superior knowledge about the changes in the BP HSE policy, the deposition should proceed.

G. Browne has unique or superior knowledge about changes in the Corporate Code of Conduct

The evidence presented to the district judge also revealed that, not coincidentally, just two months after the explosion at the Texas City refinery, BP announced a "newly developed" Corporate Code of Conduct (2 R. 451). The evidence further revealed that the document was developed "under the wishes of Lord Browne and now presents our corporate stand on the matter of compliance and ethical behavior for all employees." (*Id.*). Only Browne can testify as to why he directed the company, two months after the tragic explosion, to overhaul its Corporate Code of Conduct. He has both unique and superior knowledge on that issue.

II. New Evidence From Manzoni's Deposition Permits The Deposition Of John Browne To Go Forward

On August 28, 2006, after the district court ordered the depositions of both John Manzoni, BP's number two man, and John Browne to proceed, the parties entered into a Rule 11 agreement (9 R 3124-25). That Rule 11 agreement permitted the deposition of Manzoni to proceed provided that the Plaintiffs would withdraw the deposition notice of

John Browne and not re-notice that deposition unless "new evidence is developed that John Browne has unique and superior personal knowledge of facts relevant to the trial of this matter . . ." (9 R 3124).

The interpretation of a Rule 11 agreement is a job for the trial court. *See Browning v. Holloway*, 620 S.W.2d 611, 615-20 (Tex. Civ. App.—Dallas 1981, writ ref'd n. r. e.). The Committee presented new evidence developed during Manzoni's deposition that indicated that John Browne has unique and superior knowledge of relevant facts.

For example, Manzoni testified that he did not have knowledge about why Browne personally and separately looked at the Texas City refinery data every month before the accident. (9 R. 3124)(Manzoni even called this "very unusual."). Clearly, this information was unique and superior to Manzoni's knowledge about the subject.

Manzoni also testified that he did not have knowledge about the 25% budget cuts. Because Manzoni was the number two man in the company, that would indicate, at least circumstantially, that the person with the unique and superior knowledge about the company's 25% budget cuts was the number one guy, John Browne (9 R. 3195, 3206).

Manzoni was also asked about the appointment of James Baker to the Baker Panel. Manzoni admitted that Browne appointed Baker (9 R 3195, 3207). Thus, with regard to questions concerning the Baker appointment, Browne has unique and superior knowledge

As with the above, Manzoni's answers, at least circumstantially, indicated that Browne had unique and superior knowledge. Manzoni said that he did not know the answer to many of the questions put to him. If BP's number two man does not know the answer to

those questions, there is only one other person that would know the answer—and that is John Browne (11 R. 3644). As Judge Criss said at the October 11th hearing:

> I think the things that Manzoni said about the things he didn't know, not just that he didn't know, but there were things that the guy at the top had to know. And if the guy number two didn't know, that only leaves the guy at the top.

(11 R. 3720). Although Manzoni did not use the words "unique or superior knowledge," the circumstantial evidence developed during Manzoni's deposition revealed that Browne had such knowledge. (11 R 3634). Thus, the Court found that new evidence had developed during the Manzoni deposition to allow the deposition of John Browne to proceed: "The Court finds that new circumstantial evidence developed during John Manzoni's deposition shows that Mr. Browne has unique or superior knowledge of relevant facts." (11 R 3690).

Because new evidence developed during the deposition of John Manzoni that John Browne had unique and superior knowledge of relevant facts, the Committee is entitled to re-notice John Browne's deposition. Because the district court based its decision on the evidence presented, the district court did not abuse its discretion in allowing the deposition to proceed. *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002)("The trial court does not abuse its discretion if some evidence reasonably supports the trial court's decision."). For that reason also, the petition for writ of mandamus is without merit and should be denied.

III. The Court Did Not Abuse Its Discretion In Refusing To Enforce The Rule 11 Agreement With Regard To Time Limits

BP argues that the district court "set aside" the Rule 11 agreement. However, that is not what the district court ordered. Instead, the court ordered that the parties' Rule 11 Agreement "does not prevent the deposition of Mr. Browne going forward . . ." (11 R. 3691).[15]

BP's real complaint is that the district court allowed the Committee to take the deposition without the limitations of the Rule 11 agreement—which limited the re-noticed deposition to one hour (*Id.*). The district court's reason for allowing a full deposition are revealed in the judge's comments at the hearings.

Throughout the proceedings, the district court has expressed grave concern about BP using the public forum to institute a "major PR campaign" to limit its punitive damages and "taint the jury pool." (11 R 3460). While the court conceded that it might be a "brilliant tactic," the court warned that "if I continue to see that there may be other consequences that we have to deal with." (*Id.*).

After the August 28, 2006 hearing at which the court ordered the depositions of both Manzoni and Browne to proceed, the parties entered into a Rule 11 agreement (9 R 3124-25). As previously stated, that Rule 11 agreement set the deposition of Manzoni and withdrew the deposition notice for John Browne. The Committee took the deposition of Manzoni on September 8, 2006 (9 R 3127-189).

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[15] This was the proper result because the Committee showed that new evidence developed during Manzoni's deposition revealed that John Browne had unique and superior knowledge of relevant facts.

Unbeknownst to the parties or to the district court, Lord Browne used his new freedom from deposition to reinvigorate BP's PR campaign. The evidence revealed that on September 13, 2006, Browne held a town hall meeting (11 R 3619); on September 17 and 18, Browne gave interviews with the *Financial Times* discussing how the Texas City refinery explosion "fundamentally changed the way we did business" and was the "faultline" for BP's new push for safety (9 R 3222; 11 R 3423, 3560); on September 22, Browne held another town hall meeting discussing last year's explosion at the Texas City refinery (11 R 3619); on September 25, Browne personally provided a Leadership Briefing Pack to "UK and overseas key contacts" providing "factual information on what is happening in the United States . . ." (11 R 3423, 3562); on September 27, Browne held yet another town hall meeting discussing "last year's explosion at TCR [Texas City Refinery]" and announcing a new six-point plan," which was available on the internet (11 R 3423-24, 3589-90); and on October 2, Browne was interviewed in an article in *Fortune* in which he discussed the deadly explosion at TCR (11 R 3590, 3594-95).[16] All of this was just within weeks of the then scheduled trial.

The district court was understandably aghast at this activity by Browne so close to the trial of this case. The court noted that, when the Rule 11 agreement was entered into, "nobody assumed that John Browne was going to go all over the world telling everybody

[16] As part of its order, the district court ordered BP to produce, "within seven (7) days of the date of this Order written transcripts and any audio, video or DVD recordings of all speeches made by Browne prior to, or during, the trial of this case." (11 R 3690). Pursuant to that Order, BP produced transcripts from two new speeches—a presentation in Chicago, Illinois on October 4, 2006 entitled "Lessons Learned," with direct reference to what he learned from the "Texas City site just after the fire and explosion," and a presentation in Anaheim, California on October 9, 2006.

what he thinks and feels and knows." (11 R 3702). The court said, "Nobody had any idea, I'm assuming you were not happy either, to see your client all over the board on this, making these public statements." (11 R 3721). The court noted that Browne personally injected himself "all over the place." (11 R 3722). Not only did Browne feel "safe" to "go around and tell everybody in the world literally things to support his public relations campaign, but also [he] indicated that he had a personal superior knowledge of these matters." (11 R 3722-23).

The court's final statement is repeated here verbatim because it gives this Court a full understanding of why Judge Criss ordered that the Committee could take the deposition of John Browne without the one-hour limitation of the Rule 11 agreement:

> Now, I have also told y'all over and over again that I was not going to tolerate certain things being represented in court and a different set of facts being represented to the outside world as part of the PR campaign, for the media and for the potential jury pool out there. If you say it out to the real world, I'm going to hold you to it. Lord Browne has said out there in the real world to the public things, indicating he has unique superior knowledge of certain elements. And he's been very clear about that. I'm not convinced he doesn't want to come here and tell the whole world in court about it.
>
> So, I'm going to allow you to depose him, and I'm going to allow you to do it outside the confines of Rule 11.

(11 R 3723).

BP says that Judge Criss could not change the terms of the Rule 11 agreement and that she has no power to order John Browne to submit to a deposition longer than one hour, even considering all the new circumstances that have come to light since the Rule 11 agreement. However, BP misapprehends the nature of the district court's power.

The trial court has broad powers over discovery. *See McClure v. Attebury*, 20 S.W.3d 722, 729-30 (Tex. App.—Amarillo 1999, no pet.) ("the trial court has broad powers in discovery matters"); *see also Lindley v. Flores*, 672 S.W.2d 612, 614 (Tex. App.—Corpus Christi 1984, no writ) ("A court has the power and duty to control the discovery process."). Rule 11 agreements are enforced "[u]nless otherwise provided in these rules . . ." TEX. R. CIV. P. 11. The rules allow a trial court to modify any discovery procedures "with good cause." TEX. R. CIV. P. 191.1. Clearly, in view of Browne's unanticipated and vigorous PR campaign so shortly before trial, after BP had been chastened in the past for its efforts to taint the jury pool, the district court was well within its authority to modify the one-hour limitation on the Rule 11 agreement and to allow Browne to be questioned about his recent public statements. *See Forscan Corp. v. Touchy*, 743 S.W.2d 722, 725 (Tex. App.—Houston [14th Dist.] 1987, orig. proceeding) (holding that relators cited no authority for the proposition that a court was required to enforce a Rule 11 agreement when that agreement concerned the court's powers and prior rulings).

There was no abuse of discretion. The petition for writ of mandamus is without merit.

CONCLUSION

Because of the evidence that John Brown has unique or superior knowledge of discoverable information, the deposition of John Browne should proceed. The petition for writ of mandamus should be denied.

Respectfully submitted,

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