

# 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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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

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**BP PRODUCTS NORTH AMERICA INC.'S REPLY BRIEF ON THE MERITS**

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**ORAL ARGUMENT REQUESTED**

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## SUMMARY OF THE ARGUMENT

Recognizing that they lose under the Texas apex rules, Plaintiffs travel the country in an attempt to find cases from other jurisdictions under other apex standards to support their request for CEO Browne's deposition. But Plaintiffs are in Texas and must follow this Court's apex decisions. Under those decisions, Plaintiffs are barred from deposing this CEO. The litany of Browne's activities upon which Plaintiffs rely establish, at most, that Browne was doing the things a CEO does – not that he has unique or superior knowledge. More fundamentally, the record is replete with evidence that other people had direct knowledge regarding the topics about which Plaintiffs profess to need Browne's testimony. Despite Plaintiffs' arguments otherwise, that others have knowledge of the events or activities is proof positive that this CEO does not have unique or superior knowledge.

With respect to the Rule 11 Agreement, Plaintiffs have almost nothing to say. Tellingly, rather than trying to argue from the evidence, they have to drop back and quote the trial court. And, what they cite as the purported "new evidence" from Manzoni's deposition identified in the response is nothing new. As for the grounds set forth in the trial court's order setting aside the Rule 11 Agreement, Plaintiffs make no effort to support at least three of the reasons given by the trial court for disregarding that binding agreement. Insofar as Plaintiffs do attempt to support the trial court's reasons for setting aside the agreement, their arguments fall short.

Rule 11 agreements on discovery issues are wide-spread. From a simple extension of time to more elaborate agreements like the one here, these agreements are the grease that keeps the wheels of day-to-day litigation running. They are as important to Texas litigation as enforcement of the apex doctrine and are a completely separate basis for setting aside this CEO's deposition.

## **ARGUMENT**

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

#### **A. The Apex Test is Clear and Stringent**

The parties do not disagree about the controlling legal standard. The standard for apex depositions turns on “whether the proponent of the deposition has ‘arguably shown that the apex official has any unique or superior personal knowledge of discoverable information.’” *In re BP Products North America Inc.*, 2006 Tex. App. LEXIS 6898, at \*\*8-9 (Tex. App.–Houston [1st Dist.] Aug. 4, 2006) (orig. proceeding) (quoting *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995) (orig. proceeding)). Plaintiffs emphasize 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. And here, no matter which of the words in the test is emphasized, the result is the same – Plaintiffs have not met their burden to show unique or superior knowledge by BP p.l.c.’s CEO John Browne.

This Court has said that unique or superior personal knowledge “must be some showing *beyond mere relevance*, such as 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 available sources.” *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 179 (Tex. 2000) (orig. proceeding) (emphasis added). Thus, a discussion of the knowledge of others is crucial in judging the knowledge of Browne. 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, BP Products Vice President for Health, Safety and Environment, answered questions on the HSE Policy).

Plaintiffs state that they did not attempt to meet the second part of the Texas apex test. Plaintiffs’ Br. at 4-5. That is true, and it is telling that they did not attempt to do so, considering that discovery was at an end when they noticed Browne’s deposition. But Plaintiffs fail to explain how the CEO has unique or superior knowledge of a topic when they deposed others with knowledge of that topic and either (1) asked about it, showing that Browne was not the only one with knowledge or (2) failed to ask about it, revealing more than they would like about their motivations for seeking Browne’s deposition.

**B. Browne Does Not Have Unique or Superior Knowledge**

**1. Browne’s Visits With Employees After the Accident Do Not Satisfy the Test**

Plaintiffs cite Browne’s visit to Texas City after the accident in the company of other upper-level officials as evidence that Browne has personal knowledge of the accident and that he has unique or superior knowledge of the accident. Plaintiffs’ Br. at 10-13.

Plaintiffs misapprehend the evidence, claiming that it showed that Browne was alone with employees. 2 R 246. The evidence proves the contrary. The email says that the group of executives went to the site of the explosion (the ISOM unit) and then that entire group went to the control room of the adjacent Ultracracker unit. 2 R 246; 8 R 2925, 2974. Plaintiffs would like the evidence to show that Browne pulled aside each employee and interviewed him about the accident, careful to keep well away from anyone else within the confines of the control room of the Ultracracker Unit. But the evidence is that the group went to the unit and Browne spoke to each of the employees, not each of the employees *alone*. 2 R 246. At any rate, Browne's discussions with the employees, even if done privately, would not take Plaintiffs where they need to go. These employees would also have knowledge of their meeting with Browne, negating that he had unique or superior knowledge.

Plaintiffs argue that visiting an accident scene after an accident or talking to people who were at an accident creates "firsthand" knowledge of the accident. Indeed, Plaintiffs liken it to witnessing a car accident. Plaintiffs' Br. at 12. But their example proves BP Products' point. Visiting with employees after an accident, assuming these employees were themselves witnesses, does not establish firsthand knowledge of the accident. Plaintiffs do not cite any personal knowledge cases to support their "investigator has first hand knowledge" theory.<sup>1</sup> That is because an investigator does not

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<sup>1</sup> Plaintiffs cite two cases for the proposition that an apex official who has personal knowledge of relevant facts cannot avoid being deposed simply because of his status as an apex official. Plaintiffs' Br. at 11-12. That is correct if, as they note, a CEO witnesses a car accident, but the cited cases add nothing to the analysis here. *See Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 168 (Tex. App.–Houston [14th Dist.] 2000, pet. denied); *Simon v. Bridewell*, 950 S.W.2d 439, 442 (Tex. App.–Waco 1997, no writ.).

have firsthand knowledge of an accident. Instead, he finds people who have firsthand knowledge. Personal knowledge does not mean hearing about events after they occur. *See Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 555 (Tex. 1990) (illustrating that a petroleum engineer who worked at a gas well before and during a blowout had firsthand knowledge of the event); *Vasquez v. Macias*, No. 04-02-00320-CV, 2003 WL 1522944, at \*1 (Tex. App.–San Antonio March 26, 2003, no pet.) (unpublished) (affiant had personal knowledge that mortgagee was “not keeping the property in good repair” because affiant went to the house and saw the property).<sup>2</sup> *See also* BLACK’S LAW DICTIONARY 888 (8th ed. 2004) (defining “personal knowledge” as “[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.”).<sup>3</sup>

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The plaintiffs in *Boales* complained about a motion for protection that prevented the deposition of John Krugh, general counsel for Perry Homes. *Boales*, 29 S.W.3d at 168. Krugh had personally participated in contract negotiations and training sessions for Perry Homes’ sales representatives. *Id.* New homebuyers sued the development company and Perry Homes, alleging fraud and misrepresentations about future taxes on the property. *Id.* at 162. Since the legal advice Krugh provided during training sessions on buyer disclosures was at issue in the case, and he had firsthand knowledge of that information, the apex doctrine did not apply. *Id.*

In *Simon*, Cynthia Bacon sued Melvin Simon, Herbert Simon, and others after her husband was fatally shot at the Irving Mall. 950 S.W.2d at 440. Bacon sought to depose Melvin and Herbert Simon who were general partners of a development company that had an ownership interest in Irving Mall before the shooting. *Id.* *Simon* stands for the proposition that, if an apex official has firsthand knowledge of relevant facts, the apex doctrine will not apply. *Id.* at 442. Since Browne has no firsthand knowledge, these cases do not apply.

<sup>2</sup> *See People v. Morgason*, 726 N.E.2d 749, 753 (Ill. App. Ct. 2000) (defining personal knowledge as “having actually perceived the events that are the subject of the statement. Excluded from this definition are statements made to the witness by a third party, where the witness has no firsthand knowledge of the event that is the subject of the statements made by the third party.”); *Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348, 361-62 (Md. App. Ct. 1985) (citing MCCORMICK ON EVIDENCE § 316 for the concept that investigations “by definition are not the product of firsthand knowledge”).

<sup>3</sup> Personal knowledge does not mean meeting with the press after an incident. Indeed, a CEO’s appearance on “20/20” to defend against the precise allegation in a case did not meet the *Crown Central* test. *In re Daisy Mfg. Co.*, 17 S.W.3d 654, 657 (Tex. 2000) (orig. proceeding) (per curiam). Plaintiffs

If meeting with people who may have been witnesses is firsthand knowledge, then Texas apex rules would never apply any time a CEO either visited an accident scene or talked with his employees after an accident. The CEO would automatically be presumed to have personal knowledge of that accident. This runs counter to Texas apex requirements and would have the practical effect of telling CEOs that doing their job automatically subjects them to a deposition.

Rejecting Texas law, Plaintiffs travel to other jurisdictions in an effort to find support for their theory about firsthand knowledge. Plaintiffs' Br. at 11. None of Plaintiffs' cases applies the Texas apex test. Nor do these cases change the plain meaning of the word "firsthand."

## **2. A Press Conference Does Not Establish the Requisite Knowledge**

Plaintiffs claim that the meeting with the Mayor and a press conference prove unique or superior knowledge. Plaintiffs' Br. at 13-15; 2 R 419. There is no evidence that Browne and the mayor were alone. Certainly, Plaintiffs' claim that Browne held a press conference cannot give rise to a suggestion that he is the only person with knowledge of that press conference.<sup>4</sup>

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attempt to discount *In re Daisy* by misquoting this Court's remark that the CEO's appearance on "20/20" was "[u]related to Sanchez's [the Daisy plaintiff's] suit." Plaintiffs' Br. at 15. This Court specifically recognized that, while the CEO did not specifically address Sanchez's suit on "20/20," he did discuss the safety issue at the heart of that case and even commented that Sanchez's expert was not credible. *Id.* at 657; see also *In re Daisy Mfg. Co.*, 976 S.W.2d 327, 329 (Tex. App.—Corpus Christi 1998)(orig. proceeding) (quoting "20/20" interview and concluding that CEO's generalized opinion about safety do not imbue that official with unique or superior knowledge).

<sup>4</sup> Plaintiffs venture outside of the record to reference a web site containing the press conference. Plaintiffs' Br. at 13. But, this very evidence supports the conclusion that the press conference, being public, cannot prove that only Browne can speak to that press conference.

Plaintiffs do not explain how either of these activities helps them meet their burden, other than to imply that this post-accident visit must have resulted in Browne possessing unique or superior knowledge of his own experiences or thoughts. Plaintiffs' Br. at 13. As BP Products explained in its opening brief, if that were the standard, then the apex test would be eviscerated. It is always the case that only the apex official can speak to his state of mind or describe his own experiences from his perspective. BP Products' Br. at 20. Plaintiffs cite no case law for the proposition that this sort of knowledge meets the *Crown Central* test because none exists.

Plaintiffs appear to ask this Court to create a new exception to the apex test, requiring a CEO to be deposed if he makes a public statement about an accident or any other matter concerning his company. Plaintiffs' Br. at 14. That the CEO, who is normally the public face of the corporation, makes a statement about an incident involving his company tells nothing about that CEO's knowledge. Under Texas law, this does not show unique or superior knowledge. In this instance, contrary to Plaintiffs' assertions, senior management was asked about Browne's statement on behalf of the company and stated precisely what it meant, again on behalf of the company.<sup>5</sup> Indeed,

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<sup>5</sup> See, e.g., John Manzoni's testimony at 10 R 3265-66 ("Q. Mr. Manzoni, early on in this matter Lord Browne said, "We accept responsibility for what happened out here." Do you recall that? A. Yes, I do. Q. Do you accept responsibility for what happened out there on behalf of BP? A. I can't imagine any other position for a responsible company to take. Q. And when you say "responsibility," sir, are you saying you take legal responsibility for what occurred out at Texas City on March 23rd, 2005? A. I think that the -- you know, I am not a lawyer. And here's our position: We had a tragic accident at Texas City. Fifteen people lost their lives, and many more were injured. The company that runs that plant has to take the leadership responsibility in response to that sort of an accident. I can't imagine personally or in a company sense any other position that this company could have taken. Now, with regard to legal accountability, legal responsibility and, in particular, the U.S. legal system, I am certainly not an expert and I don't know where that goes; but in a leadership sense, we have to take responsibility for the safety and health of our employees. And that means that we have to set about doing all of the things that we can

Plaintiffs are forced to rely on an inapposite case from California to support their claim that making a public statement equates to unique or superior knowledge.<sup>6</sup>

Plaintiffs then confess that the real reason that the trial court here allowed the CEO's deposition was because the mere happening of such an accident means the CEO has unique or superior knowledge. Plaintiffs' Br. at 15 n.6. However, this Court has specifically rejected this argument, concluding that the fact the subject matter of the lawsuit was very important to the corporation is insufficient to justify an apex deposition. *In re Alcatel*, 11 S.W.3d at 177. In *Alcatel*, a theft of trade secrets case, the plaintiff sought to depose the defendant's former chairman and also its current chairman and CEO. *Id.* at 174-75. The plaintiff claimed that because the trade secret information at issue "involved huge investments and expected revenue" the information "smacks of

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possibly do to minimize the chance of it happening a second time. And that's what we have done. Q. I understand and appreciate that, Mr. -- Mr. Manzoni; but what I need to find out from you, sir, is whether or not it's your understanding that BP, as a company, is prepared to step up to the plate and say, "Not only do we take responsibility as a corporate citizen but that we take full legal accountability for what happened on March 23rd, 2005." A. Well, what I know is we have taken the position that says we will compensate as best we can and one can never compensate for the loss of life or severe injury. We have fully taken that position and attempted to do so, which is part of this process. We have taken responsibility for what happened and how we can set about improving that. I have to say that in terms of the legalities, I am simply beyond my area of expertise, frankly. My concern is the morale, the motivation, how we can learn from that situation so that it never happens again. Q. (BY MR. COON) Are you saying it's BP's desire to take responsibility from a legal standpoint, at least to the standard of fully compensating those persons harmed as a result of that explosion? A. That's the statement that we have said.").

<sup>6</sup> Plaintiff's citation to an unreported California district court opinion does not support their argument because that court's analysis runs counter to several of this Court's holdings on Texas apex standards. *In re Air Crash Disaster at Taipei, Taiwan*, 2002 WL 32155478 (C.D. Cal. 2002). First, that court, directly contradicting *In re Alcatel*, found that the importance of the accident equated to knowledge by the CEO. *Id.* at \*3 n.3; *In re Alactel*, 11 S.W.3d at 177. Next, the court found that the CEO's statement that he had no knowledge was not sufficient to grant a protective order because "the plaintiff[s] are entitled to 'test' the claim of lack of knowledge . . . by deposing the witness." *In re Air Crash Disaster*, at \*3. Texas apex requirements cannot be set aside merely because the plaintiffs want to test the CEO's knowledge. Such a rule would eviscerate Texas apex law. The case is factually off the mark also. There, the court noted that the CEO had personally decided to fire the employee responsible for the accident. *Id.* at \*3.

chairman-level importance.” *Id.* at 177. This Court concluded that, although admittedly important to the corporation, the mere importance of the information did not show that the CEO’s knowledge of the issues was unique or superior to others in the organization. *Id.*

Plaintiffs then claim that meetings with employees and only two interviews prove that Browne “injected” himself into the facts of the accident proving that he should be deposed. Plaintiffs’ Br. at 14-15. This argument suffers from a variety of problems. First, it is not part of the Texas apex test that unique or superior knowledge equates to meeting with employees and talking to financial publications about a number of problems facing the corporation. *See* BP Products’ Br. at 38-41. Second, the argument appears to be that if the head of a corporation is concerned about an accident which took the lives of some of the company’s employees, then that concern must turn itself into a reason for an apex deposition. The practical effect of that new rule would be to tell CEOs that if they comment to the financial press about an accident or discuss an accident with their employees, then they must be deposed. Again, this would mean that the CEO has the choice of not doing his job or being deposed when he has no unique or superior knowledge. That cannot be the rule.

### **3. Browne’s Review of Reports Prepared by Others Does Not Prove Unique or Superior Personal Knowledge**

Plaintiffs ignore binding precedent from this Court (cited by BP Products) that 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; BP Products’ Br. at 20-21.

Whether Browne reviewed reports about Texas City separately or whether he looked at reports on Texas City in combination with other refineries is beside the point. His knowledge of the information contained in any report is not unique or superior to the knowledge of the person who prepared the report. *Id.* at 179 (“A recipient’s knowledge of the contents of a report is not unique or generally superior to the authors, of course.”).

Plaintiffs also ignore Manzoni’s testimony that Browne did not look at Texas City separately. John Manzoni is the person who sends reports on refining to Browne, and he said that Browne was not looking at Texas City separately. 9 R 3143.<sup>7</sup>

Plaintiffs’ argument appears to be that a CEO of an international oil company may be deposed if he reviews reports on that company’s refining business. If that is the test, then every oil company CEO can be deposed in any case involving any issue about their company’s refining business, because it is to be hoped that they all review reports on that portion of their business.

#### **4. No Evidence That Browne Has Unique or Superior Knowledge of Refining Budget Cuts**

Plaintiffs’ own evidence proves that Browne did not have unique or superior knowledge on this topic. First, they cite a series of emails which do not mention Browne, and Browne is not a recipient or sender of any of those emails. 2 R 433-44; Plaintiffs’ Br. at 17.<sup>8</sup> Next, they quote Alvin Keith, the former Director of Health, Safety and

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<sup>7</sup> Manzoni said that Browne received refining reports only from him and Manzoni did not give Browne reports on Texas City separately, so it would be unusual for Browne to *have* looked at Texas City separately, not that it was unusual that he *did* look at Texas City separately. 9 R 3143.

<sup>8</sup> BP Products discussed each of these pieces of evidence in its opening brief. BP Products’ Br. at 24-28. Plaintiffs ignore this discussion and do not attempt to refute it.

Environment on capital expenditures, claiming that his testimony proved that Browne was responsible for the budget cuts. However, in a footnote, Plaintiffs confess that Keith had no knowledge of the delegation of capital expenditure authorities. 1 R 80;<sup>9</sup> Plaintiffs' Br. at 17 n.8. In fact, in the quote Plaintiffs cite, Keith testified 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. 1 R 80.

Next, Plaintiffs point to Manzoni's lack of knowledge. Plaintiffs' Br. at 18. The fact that Manzoni, who was not in his current position when any such cost challenge was issued, did not know about it does not prove unique or superior knowledge on the part of John Browne. Simply put, lack of knowledge by Manzoni does not imply knowledge by Browne. Plaintiffs admit that the evidence in this record is that Doug Ford, not Browne, ordered a cost reduction in the refining business. Plaintiffs' Br. at 21 n.11; BP Products' Br. at 25-26. Their only response is that, because Ford is no longer employed by BP, Browne became the person with the most knowledge about any budget cuts. But, a person's leaving a company's employment neither strips him of his knowledge of events while at the company nor automatically imbues his superior with all of this knowledge. And, Plaintiffs never sought either Ford's deposition or a corporate representative

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<sup>9</sup> Keith testified: "Q. And do you know how that process [Expenditure Request] works now or at least at the time of your retirement in 2004? A. I do not. Q. Do you know if there are any capital budgeting requirements that still go through Chicago? A. No, I do not. Q. Did any of them go over to London? A. My understanding at the time that I left was that capital investment decisions were the responsibility of the line organization and depending on the size of the request, would be approved by Manzoni, Hoffman, the refinery manager or managers that reported to the refinery manager." 1 R 80.

deposition on any refining budget cuts to obtain the company's knowledge about that topic.

Finally, Plaintiffs cite a memo that the senior management team, including Browne, "communicated the strategy and goals for the new BP Amoco group to all employees and the financial investment community." 9 R 3212; *see* Plaintiffs' Br. at 18. This establishes that Browne was not the only person with knowledge of the financial strategies and goals for the newly formed company. Plaintiffs then paste two separate sentences together, appearing to imply that Browne and senior management issued a public communication specifically about Texas City. Plaintiffs' Br. at 18. The documents Plaintiffs quote is a Texas City Business Unit financial plan. 9 R 3212; *see e.g.*, 9 R 3214-15 (discussing issues particular to the Gulf of Mexico); 9 R 3217-20 (business goals as applied to Texas City). In that document, the Texas City leadership group states that Browne and senior management communicated to employees and the financial investment community the strategy and goals of the newly merged company. 9 R 3212. Then, the memo states that the Texas City leadership took those strategies and applied them to Texas City. *Id.* Certainly all of the evidence proves that a budget reduction in refining was widely known throughout the organization.<sup>10</sup>

Plaintiffs' discussion of the law shows only that they disagree with it. Plaintiffs' Br. at 19-21. The CEO's responsibility for all decisions made by the corporation does

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<sup>10</sup> Again, BP Products has already stated that Kathleen Lucas' testimony was that Browne recognized after the merger of Amoco and BP p.l.c. that there should be a cost savings due to the consolidation of their resources. 4 R 1478. Her quote reflects that. BP Products' Br. at 26.

not equate to unique or superior knowledge. *See AMR Corp. v. Enlow*, 926 S.W.2d 640, 644 (Tex. App.–Fort Worth 1996) (orig. proceeding) (the “testimony amounts to nothing more than the simple, obvious recognition that the highest-ranking corporate officer of any corporation 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).

Even if the policy is *directly related* to the issue in the case, the CEO’s involvement in and responsibility for it does not change this rule. In *AMR*, the accident was allegedly caused by a passenger who was served too much alcohol on an airplane flight. 926 S.W.2d at 641. The policy that the plaintiff wanted to question the CEO about was the policy concerning serving alcohol to airline passengers. *Id.* at 643. In *Daisy*, the accident was caused by a misfired BB gun. 17 S.W.3d at 657. The policy that the plaintiff wanted to question the CEO about was the policy concerning the safety and design of the BB gun. *Id.* at 659. *Burlington Northern* reached the same conclusion holding that the CEO’s aims for the company, even when directly related to the issues of the case, do not meet the apex requirements. *In re Burlington N. & Santa Fe Rwy. Co.*, 99 S.W.3d 323, 326-27 (Tex App.–Fort Worth 2003) (orig. proceeding) (CEO’s goals for safe railroad crossings did not meet apex test in crossings case); *BP Products’ Br.* at 14-15.

Unable to make their case under Texas law, Plaintiffs rely extensively on federal authorities.<sup>11</sup> Plaintiffs' Br. at 19-21. This reliance is misplaced because the federal courts use a different test for apex depositions. *See Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 145 F.R.D. 92, 96 (S.D. Iowa 1992) ("The courts have imposed a balancing test in determining whether good cause has been shown.") ("Protective orders which totally prohibit the deposition of an individual are rarely granted absent extraordinary circumstances."). Under federal law there is no burden shifting. *See Gen. Star Indem. Co. v. Platinum Indem. Ltd.*, 210 F.R.D. 80, 82 (S.D.N.Y. 2002) ("the party seeking to bar the deposition bears the burden of demonstrating that the proposed deposition would not lead to relevant information"). Accordingly, federal courts often order the deposition of an apex official to test his knowledge even if the party seeking the deposition has failed to provide any evidence that the official has unique knowledge. *See Six West Retail Acquisition v. Sony Theatre Management Corp.*, 203 F.R.D. 98, 102 (S.D.N.Y. 2001) ("Even where, as in this case, a high-ranking corporate officer denies personal knowledge of the issues at hand, this 'claim . . . is subject to testing by the examining party.'"); *Digital Equip. Corp. v. Sys. Indus., Inc.*, 108 F.R.D. 742, 744 (D. Mass. 1986) ("When a witness has personal knowledge of facts relevant to the lawsuit, even a corporate president is subject to deposition"). The federal courts also apply their test less rigorously, allowing depositions under circumstances that do not justify an apex

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<sup>11</sup> Plaintiffs' citation of *JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 777-78 (Tex. App.—San Antonio 2002, no pet.) does not support their argument. In that case, another employee testified that the CEO was the **only** person in the small corporation with knowledge about certain design changes relevant to the allegedly defective product. *Id.* at 778. *See* BP Products' Br. at 15.

deposition under this Court's pronouncements. *Compare In re Air Crash*, 2002 WL 32155478, \*2 (C.D. Cal. 2002) (any "personal knowledge of facts relevant to the lawsuit" is sufficient to subject apex official to deposition) *with Alcatel*, 11 S.W.3d at 177 (mere showing of personal knowledge is insufficient, knowledge must be unique or superior); *compare Gen. Star Indem.*, 210 F.R.D. at 84 ("Courts have allowed depositions of high ranking corporate executives where questions have been raised regarding corporate policies") *with Alcatel*, 11 S.W.3d at 177 ("knowledge of company policies does not, by itself, satisfy" the test); *compare Six West*, 203 F.R.D. at 103 (apex official "fielded several reports from senior members of Sony's management team") *with In re Alcatel*, 11 S.W.3d at 178-79 (reviewing reports from others is insufficient); *compare In re Bridgestone/Firestone, Inc.*, 205 F.R.D 535, 536 (S.D. Ind. 2002) (apex rule applies only in single personal injury cases) *with In re Alcatel*, 11 S.W.3d at 179-80 (the *Crown Central* apex requirements must be met in all cases, whether business or tort or "whether high-level executives would be expected to participate in a decision relevant to the dispute.").

Plaintiffs' request that this Court abandon the Texas apex rule in favor of rules requiring less than unique or superior knowledge fails for all of the policy reasons this Court has articulated over the years. *See, e.g., Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127-28 (Tex. 1995) (orig. proceeding); *see In re Daisy Mfg. Co.*, 17 S.W.3d 654, 660 (Tex. 2000) (individuals being deposed are entitled to protection from undue burden and harassment under Tex. R. Civ. P. 192.6(b)).

## 5. Appointment of James Baker Does not Prove Unique or Superior Knowledge by Browne

Plaintiffs observe that in 2005 Browne asked James Baker to chair the investigation of BP's American facilities. Plaintiffs conclude that this fact shows knowledge sufficient for an apex deposition. That conclusion does not follow.

The issue in this case is the cause of the March 2005 accident and whether BP Products was responsible for that accident. The Baker Panel was specifically directed *not* to determine the cause of the March accident. *In re BP Products North America Inc.*, 2006 WL 2522217 at \*2 (Tex. App.–Houston [1st Dist.] Sept. 1, 2006). The Court of Appeals decided that most of the Baker Panel information is so unrelated to this case that discovery of that information would not be allowed. *Id.* According to one media report, Baker owned a small amount of BP stock that he sold before he did any work on the Panel and his law firm did a small amount of work for BP. 10 R 3408. But that same report quoted Baker as stating that it would be a “transparent operation” and the investigation would be aggressive. *Id.* Thus, the Chemical Safety Board chairwoman apparently had no problem with the appointment, praising the review. 10 R 3409.<sup>12</sup> Simply put, the appointment is too far afield from this case to raise any issue of unique or superior knowledge by Browne, justifying a deposition in this case.

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<sup>12</sup> Plaintiffs provide no cite to the record to support their claim that the Baker Panel report was criticized in the media. Plaintiffs' Br. at 24. In fact, Plaintiffs refer to the Baker Panel report, but fail to tell this Court that Report is not in this record and was thus did not play any role in the trial court's decision to allow Browne's deposition.

## 6. Browne's Knowledge of Company Policies Does Not Satisfy the Apex Requirement

Browne's knowledge of company policies and his responsibility for corporate decisions does not establish unique or superior personal knowledge under Texas law. The fact that a CEO has ultimate responsibility for all company policies does not implicate unique or superior knowledge. *AMR Corp.*, 926 S.W.2d at 644 (knowledge of policies is insufficient); *In re Daisy Mfg.*, 17 S.W.3d at 658.

Again, Plaintiffs' evidence proves nothing more than Browne had ultimate authority over company policies. On the HSE policies, the evidence shows that personnel in BP's HSE, Legal and other departments wrote the policy for Browne to approve. 2 R 447. Thus, it is clear that Browne was not the only person with knowledge of the HSE policies or the changes to those policies. It also proves that he certainly could not have greater quantity or quality of knowledge of those changes than the people who were actually writing the changes. Indeed, Plaintiffs stretch the evidence to the breaking point by insisting that Browne personally wrote the policies, when their evidence states precisely the opposite, that others wrote the policy for Browne's approval. Plaintiffs' Br. at 24-25; 2 R 447.

In their search to find case support for their arguments, Plaintiffs again must shed Texas law, this time in favor of a district court opinion from Massachusetts. Plaintiffs' Br. at 25-26; *Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140, 143 (D. Mass. 1987). There are several problems with this case. The first is that the case does not evaluate the requests for depositions under the Texas "unique or superior" apex test. 116

F.R.D. at 142; BP Products’ Br. at 22-24. In addition, it was important to the court that the executives’ affidavits did not *deny* knowledge of the event, instead they stated that they did not *remember* certain events. 116 F.R.D. at 143. The court found these statements to be insufficient to support the request for protection from deposition. *Id.* Finally, unlike in *Travelers*, here there is no evidence that Browne originated this policy. The only evidence is that others were writing a company policy that was to be approved (or not) by the CEO. This is typical CEO-type conduct, not evidence of unique or superior knowledge.

Likewise, the corporate code of conduct is another 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; Plaintiffs’ Br. at 26. A CEO directing others to create policies does not show unique or superior knowledge by that CEO. *In re Burlington N. & Santa Fe Rwy. Co.*, 99 S.W.3d at 326-27.

Plaintiffs refuse to acknowledge that the review and changes to this policy began well before the March 2005 accident, with a close-to-final draft circulated before the accident.<sup>13</sup> Plaintiffs know that they are incorrect in asserting that BP Products – under the direction of Browne or otherwise – undertook an overhaul of this policy after the March accident. In fact, the record reference they point to is merely a transmittal on May

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<sup>13</sup> There is evidence, produced to Plaintiffs but not in this mandamus record, that the close-to-final draft was circulated before the accident.

25 to some employees of the close-to-final draft, indicating that it was prepared before that date. 2 R 451.

Thus, there is no evidence that Browne has unique or superior knowledge of company policies written by others. Mandamus should issue.

## **II. The Trial Court Abused Any Applicable Discretion by Disregarding the Rule 11 Agreement**

### **A. Nothing in Manzoni's Deposition Justifies Deposing Browne**

As a threshold matter, Plaintiffs miss the point when they assert that “[t]he interpretation of a Rule 11 agreement is a job for the trial court.” Plaintiffs’ Br. at 27 (citing *Browning v. Holloway*, 620 S.W.2d 611, 615-20 (Tex. Civ. App.–Dallas 1981, writ ref’d n.r.e.)). There is no disagreement about the standard that must be satisfied under the Rule 11 Agreement before Browne can be deposed. There is no dispute about what the words in the Rule 11 Agreement mean. There is no interpreting to be done. The question for mandamus purposes is whether the trial court abused its discretion by compelling Browne’s deposition when the unambiguous requirement for deposing him has not been met.

Plaintiffs erroneously assert that “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.” Plaintiffs’ Br. at 27. As stated above, that is not a correct reading of Manzoni’s testimony. Again, Manzoni said that Browne received refining reports only from him and he did not give Browne reports on Texas

City separately, so it would be unusual for Browne to *have* looked at Texas City separately – not that it was unusual that he *did* look at Texas City separately. 9 R 3194.

Throughout their brief, Plaintiffs repeatedly rely upon a non-sequitur. They assume that an asserted lack of knowledge by Manzoni automatically equates to superior and unique knowledge on the part of Browne. The flawed logic goes like this: If the number two man did not know a particular fact, then the only person in the world who possibly could know it is the CEO. *See* Plaintiffs’ Br. at 27. In the abstract, this argument fails because Manzoni’s lack of knowledge does not establish Browne’s unique and superior knowledge. Any number of people below Manzoni could know something that Manzoni does not.

And, the record here confirms that Plaintiffs’ argument rests on a logical fallacy. Plaintiffs contend that “Manzoni also testified that he did not have knowledge about the 25% budget cuts.” Plaintiffs’ Br. at 27. Manzoni did not have knowledge about this circumstance because the evidence is that it occurred on the watch of Manzoni’s predecessor – an individual whom Plaintiffs have not deposed. *See* above at 10; BP Products’ Br. at 25-26. Thus, the person most appropriately deposed on the question of budget cuts is Manzoni’s predecessor – not Browne.

The record cites proffered to support Plaintiffs’ arguments likewise fall short upon closer examination. For example, Plaintiffs cite 11 R 3644 for the proposition that Browne must know the answer “[i]f BP’s number two man does not know the answer to those questions . . . .” Plaintiffs’ Br. at 28. This is a cite to argument of Plaintiffs’

counsel during the apex deposition hearing in the trial court. This argument establishes nothing about what Browne knows. It is not evidence.

Plaintiffs go even further afield when they cite 11 R 3634 for the proposition that “circumstantial evidence developed during Manzoni’s deposition revealed that Browne had such knowledge.” Plaintiffs’ Br. at 28. This is a cite to argument by *BP Products’* lawyer asking Plaintiffs during the hearing to identify exactly what circumstantial evidence was developed during Manzoni’s deposition that showed any unique or superior knowledge by Browne. Plaintiffs never provided the information at the hearing and do not do so in the Response.

Plaintiffs also reference questioning of Manzoni about the appointment of James Baker to the Baker Panel. As pointed out in BP Products’ Brief, this was public information 10 months before the Rule 11 Agreement was executed and therefore is not new information gained during Manzoni’s deposition. BP Products’ Br. at 34-35.

**B. Plaintiffs Abandon any Effort to Justify the Trial Court’s Stated Grounds for Disregarding the Rule 11 Agreement**

Given all the grounds the trial court gave for shredding the Rule 11 Agreement, it is puzzling that Plaintiffs leave some of those grounds undefended. Plaintiffs make no attempt to defend the trial court’s *sua sponte* findings of misrepresentation and estoppel. This silence speaks volumes. These unpleaded and unsupported grounds should be disregarded.

Plaintiffs suggest that the trial court did not really “set aside” the Rule 11 Agreement. Plaintiffs’ Br. at 29. In their next breath, however, Plaintiffs acknowledge

that procedural limitations created by the Rule 11 Agreement were not followed. *Id.* It is impossible to read paragraph 4 of the October 11, 2006 order as doing anything other than crumpling up the parties' Rule 11 Agreement and throwing it into the wastebasket.

The only support for setting aside the Rule 11 is a purported "PR campaign" by Browne. No explanation is provided, however, as to how a PR campaign – real or imagined – misrepresents Browne's knowledge or provides proof that he had unique or superior knowledge. As outlined in BP Products' Brief, the information in the news articles and employee town hall meetings was old and/or widely known to others. BP Products' Br. at 38-40.

To support the trial court's remaining assertions regarding supposed public comments and a purported effort "to taint the jury pool," Plaintiffs point to Browne's presence at town hall meetings. Plaintiffs' Br. at 30. Once again, there is a disconnect between the trial court's justifications and the Plaintiffs' arguments. The town hall meetings were held at ***BP's facilities*** and for ***BP's employees alone*** – not for the public. A CEO's presentations to employees regarding major events affecting the company they all work for is entirely appropriate. More to the point, presentations to employees are not "public comments" and cannot credibly be portrayed as efforts to "taint the jury pool." BP Products employees from other cities or in other countries will not serve on the jury. Likewise, the Leadership Pack, which was sent only to BP Products managers, contained no information that was not already widely disseminated. BP Products' Br. at 40-41.

And, none of these materials were on BP's external website or made publicly available by BP Products. 11 R 3602-03, 3719.

Finally, as discussed in BP Products' Brief, the *Financial Times* article contained no new information. BP Products' Br. at 38-39. A review of any national or international financial publications will reveal the frequency with which CEOs communicate with the press and the financial community. Thus, the public comment and tainting-the-jury-pool excuses, even if relevant to the issue of Browne's unique or superior knowledge, do not withstand scrutiny on this record.

In essence, Plaintiffs argue that the trial court was free to simply cast aside the parties' Rule 11 Agreement.<sup>14</sup> Any such assertion is insupportable on this record and harmful to Texas law. It is particularly unfair in this case because Plaintiffs got the benefit of the Rule 11 Agreement and now do not want to keep their part of the bargain. They got to take the apex deposition of John Manzoni without having to face mandamus review of that issue. They ought to keep their end of the deal.

## CONCLUSION

BP Products North America Inc. requests that the Court grant this Petition for Writ of Mandamus and issue a writ of mandamus ordering the trial court to set aside the order denying BP Products' apex objections to the deposition of John Browne, setting aside the

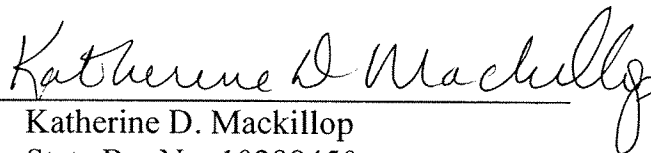
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<sup>14</sup> Plaintiffs' citation to a case in which there was no Rule 11 agreement does not counter the legions of cases, some from this Court, upholding Rule 11 agreements. *Forscan v. Touchy*, 743 S.W.2d 722, 725 (Tex. App.—Houston [14th Dist.] 1987) (orig. proceeding); BP Products' Br. at 29-30.

the Rule 11 Agreement and finding that Browne could be deposed under that Rule 11 Agreement. Relator also seeks any other relief to which it is entitled.

Respectfully submitted,

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**AFFIDAVIT AUTHENTICATING REPLY**

THE STATE OF TEXAS

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§  
§

COUNTY OF HARRIS

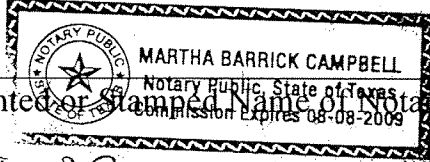
On the 14th day of March, 2007, the affiant, Katherine D. Mackillop, appeared in person before me, a notary public, who knows the affiant to be the person whose signature appears on this document. According to the affiant's statements under oath, the affiant is mandamus counsel for the Relator, BP Products North America Inc. The affiant states under oath that the affiant has read the foregoing Reply to Plaintiffs' Brief on Merits 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 14th day of March, 2007.

*Martha Barrick Campbell*

Notary Public, State of Texas



(Printed or Stamped Name of Notary)

08-08-09

(Commission Expiration Date)

**CERTIFICATE OF SERVICE**

Pursuant to TEX. R. APP. P. 9.5, I certify that on March 15, 2007, a copy of the Reply was delivered, by the method indicated, to the following:

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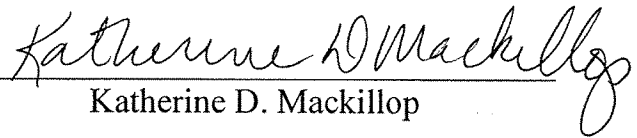
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