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 RESPONSE TO PETITION FOR WRIT OF MANDAMUS

BRENT COON & ASSOCIATES
Brent W. Coon
State Bar No. 04769750
Arturo J. Gonzalez
State Bar No. 08124050
3550 Fannin
Beaumont, Texas 77701
Telephone 409.835.2666
Facsimile 409.833.4483

THE HOLMAN LAW FIRM, P.C.
David W. Holman
State Bar No. 09902500
24 Greenway Plaza, Suite 2000
Houston, Texas 77046
Telephone 713.400.4840
Facsimile 713.400.4841
Lead Counsel

Counsel for Real Parties in Interest BP Plaintiffs' Steering Committee

ORAL ARGUMENT REQUESTED

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 Chriss, 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, 2007, the court of appeals granted a stay of the deposition order. On November 22, 2007, the court of appeals granted the parties' agreed motion to abate mandamus proceedings. On February 9, 2007, the court of appeals lifted the abatement, denied mandamus, and lifted the stay.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

The Real Parties in Interest, the BP Plaintiffs' Steering Committee[1] ("the Committee"), respond to 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 some evidence of that Mr. Browne does possess such knowledge, the trial court could not

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

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). 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 trial 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

The deposition should proceed if the plaintiff can"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 Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex.1995) (orig. proceeding)). While an official does not possess "unique or superior" knowledge merely because of his or her status as an apex official, the deposition should proceed if the official has first-hand knowledge of relevant facts. *See, e.g.*, *In re Burlington Northern and Santa Fe Ry. Co.*, 99 S.W.3d 323, 327 (Tex. App.—Fort Worth 2003, orig. proceeding) (apex deposition can proceed if official

is "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."); *JHC Ventures, L.P. v. Fast Trucking*, *Inc.*, 94 S.W.3d 762, 777-78 (Tex. App.—San Antonio 2002, no pet.) (apex deposition can proceed on evidence that the CEO was the only person with knowledge of the purpose of the design changes); *Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 168 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (apex deposition can proceed if official has "first-hand knowledge of certain facts"); *Simon v. Bridewell*, 950 S.W.2d 439, 442 (Tex. App.—Waco 1997, no writ) (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.").

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 trial court conducted an evidentiary hearing on BP's motion for protection for both the depositions of John Browne and John Manzoni, the second in command of the company. 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 developed during Manzoni's deposition, then Browne could 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 trial 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 trial 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.

On October 18, 2006, BP filed a petition for writ of mandamus in the First Court of Appeals to prevent the deposition of John Browne. *See In re BP Products North America, Inc.*, No. 01-06-00943-CV (Tex. App.—Houston [1st Dist.] , orig. proceeding). The court of appeals granted a stay of the deposition on October 30, 2006. The issues were fully briefed. On February 9, 2007, the First Court of Appeals, by memorandum opinion, denied BP's petition for writ of mandamus.

ARGUMENT

I. John Browne Has Unique or Superior Knowledge of Discoverable Information

BP and its amici characterize this case as "the typical apex controversy," in which the Plaintiffs seek to harass and abuse a CEO of a corporation, sitting up in his corporate tower with no knowledge of relevant facts. BP represents in its petition that all the record shows is that Mr. Browne "reviewed reports," or that he had "knowledge of company policies," or that he had a "big picture view" of budget decisions. *See* Petition, at 7-10. Of course, if that were all the record showed, then neither the trial court nor the court of appeals would have allowed the deposition to proceed. That is not what the record shows.

The record shows that John Browne has direct, personal, first-hand knowledge of relevant, discoverable evidence, and that he has personally injected himself into many aspects of this case. 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. *See In re Alcatel*, 11 S.W.3d at 176.

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.

That same day, Browne met with the Mayor of Texas City before holding a press conference at City Hall (2 R. 426).[2] 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 meeting with the Mayor and the press conference, both of which are relevant and discoverable, Browne has unique or superior knowledge.

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).

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[2] A video of Browne's press conference appears on the internet. *See* http://www.netroadshow.com/custom/bp/texas032405.asp?t=w&s=l.

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. His knowledge is unique because there was no one else on the scene who had his perspective or his participation in those events. For example, 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.").

Because the Committee "arguably" showed "that the official has any unique or superior personal knowledge of discoverable information," then the trial court had the

discretion to allow the deposition to proceed. *See In re Alcatel USA, Inc*., 11 S.W.3d at 175. The mandamus should be denied.

B. 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 he 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.

Once again, because this evidence demonstrates that Browne "arguably" has some unique or superior knowledge of discoverable information, the deposition should proceed.

C. 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).

The evidence revealed that 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 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, had testified that he had no knowledge about who ordered the budget cuts (9 R 2195, 3206).

BP characterizes comments by Kathleen Lucas, the Operations Manager of the Texas City Refinery, about the budget cuts as "that Browne probably recognized there should be cost savings due to a consolidation of resources after the merger of Amoco and BP p.l.c.". *See* Petition, at 9. However, that watered-down version is not what Ms. Lucas said. She 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).

Thus, Browne has unique or superior knowledge about the 25% budget cuts that are alleged to have been a direct cause of the 2005 explosion. For that reason also, the deposition should proceed and the petition should be denied.

D. 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 about the independence of this "independent" panel because of Baker's direct "financial ties to BP." (10 R. 3408).[3]

Manzoni testified that Browne alone made the decision to appoint James Baker to head the investigative panel. (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. Thus, for that reason also, his deposition may proceed and the petition should be denied.

E. Browne has unique or superior knowledge about the changes to BP's Health Safety and Environmental Performance Policy and Code of Conduct.

In 2001, BP revised the Health Safety and Environmental (HSE) Performance policy, the company's safety 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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[3] For example, since 1993, BP has given Baker's Institute for Public Policy some $245,000 (10 R. 3408).

> "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.*).

Further, the evidence reveals that just two months after the accident, Browne also directed a wholesale revision to the Corporate Code of Conduct (2 R. 451). 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.").

If the apex official is the one who ordered the policy changes that are directly relevant to the accident, then that official has first-hand knowledge of discoverable information, and the deposition should go forward. *See JHC Ventures, L.P. v. Fast Trucking*, Inc., 94 S.W.3d 762, 778 (Tex. App.—San Antonio 2002, no pet.). The changes to the safety policy, the Code of Conduct and the 25 percent budget cuts were not merely enactments of general corporate policy, but specific revisions personally overseen by Browne with direct relevance to the accident, either because they contributed to the accident (the budget cuts), or because they were done in direct response to the accident. Because Browne has unique or superior knowledge about the purpose of those changes, he can be required to testify about them.

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

On August 28, 2006, after the trial 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 had unique and superior knowledge of relevant facts.

The Committee presented evidence that Manzoni testified that only Browne could testify about why, prior to the accident, Browne looked at Texas City refinery data separately from the data from all other BP refineries (9 R. 3124)(Manzoni even called this "very unusual."). The Committee presented evidence that Manzoni had no knowledge about the 25% budget cuts (9 R. 3195, 3206). 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). And, the Committee presented evidence that Manzoni testified that Browne personally appointed James Baker to head up the panel to investigate the

accident (9 R 3195, 3207). Thus, with regard to questions concerning the Baker appointment, Browne has unique and superior knowledge

The Committee also presented evidence that Manzoni contended he did not know the answers to many questions put to him. As the trial court noted, if BP's number two man does not know the answer to many of those questions, there is only one other person who would know the answer—and that is John Browne (11 R. 3644, 3720). The trial court found 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 the trial court's decision is supported by evidence, her decision cannot be an abuse of discretion, and mandamus should be denied. *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.").

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

BP also contends that the trial court was bound by the parties' Rule 11 agreement concerning discovery and that it is "unfair" for the court not to enforce it. That is not the rule. The trial court controls 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."). The rules allow a trial court to modify discovery procedures, and Rule 11 agreements are enforced "[u]nless otherwise provided in these rules . . ." TEX. R. CIV. P. 11, 191.1.

Throughout the proceedings, the trial court had 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," and the court warned BP about further use of this tactic (11 R 3460). Trial was scheduled for November, 2006.[4]

After the parties entered into the Rule 11 agreement that freed Browne from having to be deposed, Browne personally embarked on a major PR campaign. The evidence revealed that on September 13, 2006, Browne held a town hall meeting concerning the incident at Texas City (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, 2006, 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, 2006, Browne was interviewed in an article in *Fortune* in which he discussed the deadly explosion at TCR (11 R 3590, 3594-95).

[4] That trial settled on the first day. A trial of other plaintiffs is scheduled for March 5, 2007.

The trial court was understandably aghast at this activity by Browne so close to the trial of the 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 what he thinks and feels and knows." (11 R 3702). The court explained in great detail her decision to allow Browne's deposition to proceed, but the court essentially concluded that because Browne told everybody else that he had superior knowledge of these things, and has told the whole world about it, there is no good reason why he should not be questioned about it by the Committee (11 R 3721-23).

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 trial 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).

CONCLUSION

Because the record reveals 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,

BP PLAINTIFFS' STEERING COMMITTEE

BRENT COON & ASSOCIATES
Brent W. Coon
State Bar No. 04769750
Arturo J. Gonzalez
State Bar No. 08124050
3550 Fannin
Beaumont, Texas 77701
Telephone 409.835.2666
Facsimile 409.833.4483

THE HOLMAN LAW FIRM, P.C.

David W. Holman
State Bar No. 09902500
24 Greenway Plaza, Suite 2000
Houston, Texas 77046
Telephone 713.400.4840
Facsimile 713.6400.4841
Lead Counsel

Counsel for Real Parties in Interest
BP Plaintiffs' Steering Committee

CERTIFICATE OF SERVICE

The undersigned certifies that on February 15, 2007, the foregoing has been served on the following via electronic mail, facsimile and/or Certified Mail-RRR:

Respondent
Honorable Susan Criss
212th Judicial District Court of Galveston
Galveston County Courthouse
600 59th Street, Room 4204
Galveston, Texas 77551
Telephone 409.766.2266 Facsimile 409.765.2610

Counsel for Relator, BP Products North America, Inc.

Ms. Katherine McKillop
Mr. Otway B. Denny, Jr.
Mr. William J. Boyce
Mr. Stephen M. Fernelius
Ms. Julie A. Hardin
FULBRIGHT & JAWORSKI
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone 713.651.5151
Facsimile 713.651.5246

Mr. James B. Galbraith
MCLEOD, ALEXANDER, POWEL & APFFEL
802 Rosenberg
Galveston, Texas 77553
Telephone 409.763.2481
Facsimile 409.762.1155

Mr. David Gunn
BECK, REDDEN & SECREST
One Houston Center
1221 McKinney Street
Suite 4500
Houston, Texas 77010
Telephone 713.655.7727
Facsimile 713.655.7727

Counsel for JE Merit Contractors
Mr. James D. Ebanks
EBANKS, SMITH & CARLSON
2500 Five Houston Center
1401 McKinney
Houston, Texas 77010
Telephone 713.333.4500 Facsimile 713.333.4600

Counsel for Fluor Enterprises, Inc.

Mr. Graham Hill
LOCKE, LIDDEL & SAPP
3400 JP Morgan Chase Tower
600 Travis Street
Houston, Texas 77002
Telephone 713.226.1200
Facsimile 713.223.3717

Mr. S.R. Lewis
LEWIS & WILLIAMS
2200 Market Street, Suite 750
Galveston, Texas 77550
Telephone 409.762.1900
Facsimile 409.762.4606

David W. Holman