CAUSE NO. 2019-33415

ABEL AND NANCY VERA, ET AL.,	§	**IN THE DISTRICT COURT OF**
	§	
***Plaintiffs*,**	§	
	§	
v.	§	**HARRIS COUNTY, TEXAS**
	§	
FIGURE FOUR PARTNERS, LTD., ET AL.,	§	
	§	
Defendants.	§	**234TH JUDICIAL DISTRICT**

DEFENDANT PERRY HOMES' MOTION FOR PROTECTIVE ORDER

Defendant Perry Homes, LLC ("Perry Homes") files this Motion for Protective Order asking the Court to enter an order quashing Plaintiffs' notice to take the oral and videotaped deposition of Ms. Britton, and protecting Perry Homes' Chief Executive Officer Kathy Britton from an unwarranted apex deposition.

INTRODUCTION

On April 13, 2021, Plaintiffs requested dates for the deposition of Perry Homes' Chief Executive Officer, Kathy Britton. *See* Ex A. On April 16, 2021, Perry Homes responded by informing Plaintiffs that Ms. Britton does not have any unique or superior personal knowledge of discoverable information, and that as a result, Perry Homes would not be providing dates for her deposition. *See* Ex B. Nevertheless, on Sunday April 18, 2021, Plaintiffs served a notice to take the oral and videotaped deposition of Ms. Britton on May 7, 2021. Ex. C. As a result, Perry Homes has filed this motion for protective order to quash the deposition based on objections to time and place, as well as substantive grounds.

Ms. Britton is an apex-level official and, under Texas law, cannot be deposed without a showing that she has "***unique or personal knowledge***" of discoverable information. Plaintiffs cannot make this showing—and, as a result, Perry Homes respectfully asks the Court to quash Plaintiffs' notice of deposition, and enter an order protecting Ms. Britton from deposition.

The fact that Plaintiffs' requested Ms. Britton's deposition in the first place is curious. This case is a residential land development case involving contractors and engineers hired by a MUD to perform residential land development work. The case is set for mediation in just over three weeks, and Plaintiffs recently stated they had no more depositions to take prior to mediation. Then, Sunday night, Plaintiffs noticed Ms. Britton's deposition—begging the question, what changed? What new information suddenly made Ms. Britton an essential witness? Nothing. In fact, not one witness has testified that she had any personal, first-hand knowledge or involvement in the facts underlying this case. Rather than focus on issues that are relevant to the litigation, Plaintiffs continue to waste the parties' time and money—including funds that might otherwise be available to the Plaintiffs.

ARGUMENTS AND AUTHORITIES

A. Perry Homes Objects to the Time and Place of Ms. Britton's Deposition

Texas Rule of Civil Procedure 199.4 states that "[a] party or witness may object to the time and place designated for an oral deposition by motion for protective order, or by motion to quash the notice of deposition." TEX. R. CIV. P. 199.4. "If the motion is filed by the third business day after service of the notice of deposition, an objection to the time and place of a deposition stays the oral deposition until the motion can be determined." *Id*.

As stated above, on Sunday, April 18, 2021, Plaintiffs unilaterally noticed Ms. Britton's deposition for May 7, 2021 at 10:00 a.m. Ex. C. Neither Ms. Britton nor Perry Homes' counsel are available that day as a result of previously scheduled obligations. Accordingly, the deposition should be quashed. *See* TEX. R. CIV. P. 199.4.

B. The *Crown Central* Apex Deposition Rules

The Texas Supreme Court set the rules for depositions of corporate presidents and other upper level corporate management—known as "apex depositions"—in *Crown Central Petroleum*

Corp. v. Garcia, 904 S.W.2d 125, 128 (Tex. 1995). These rules are mandatory and must be applied whenever an apex deposition is ordered or prevented. *In re Daisy Mfg. Co.,* 17 S.W.3d 654, 656 (Tex. 2000) (orig. proceeding) ("[i]n ordering or preventing an apex deposition, a trial court must follow *Crown Central*'s framework.); *see also, e.g., In re Sam Houston Elec. Coop., Inc*., 2019 WL 4865199, at *4 (Tex. App.—Beaumont Oct. 3, 2019, orig. proceeding) (holding "trial court abused its discretion by ordering [apex depositions] without following the procedures set forth in *Crown Central* and its progeny.").

A party opposing an apex deposition "invokes the protection of the apex deposition doctrine by filing a motion for protection accompanied by the affidavit of the official 'denying any knowledge of relevant facts.'" *In re Baylor Univ.*, 2020 WL 6878411, at *5 (Tex. App.—Houston [1st Dist.] Nov. 24, 2020, orig. proceeding); *see also In re Alcatel USA, Inc.,* 11 S.W.3d 173, 175 (Tex. 2000) (orig. proceeding); *see, e.g.*, *In re TMX Fin. of Tex., Inc*., 472 S.W.3d 864, 875 (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding) (affidavit denying "first-hand personal knowledge of relevant facts concerning the subject matter" invoked *Crown Cent.* protections); *In re El Paso Healthcare Sys.*, 969 S.W.2d 68, 73 (Tex. App.—El Paso 1998, orig. proceeding) (EPH "established by its motion and affidavit that Rolfe is a corporate president who does not participate in the day-to-day administration of units within this particular hospital and who possesses no discoverable personal knowledge. This is sufficient to satisfy [EPH's] burden under *Crown Cent. Petroleum Corp.*").

"Once the corporate official moves for protection and files a sufficient affidavit, the burden shifts to the party seeking the apex deposition to demonstrate that the official has ***unique or superior personal knowledge of discoverable information***." *In re Baylor Univ.*, 2020 WL 6878411, at *5 (emphasis added); *see also In re Alcatel*, 11 S.W.3d at 179. However, a plaintiff cannot meet the "unique or superior personal knowledge" requirement merely by showing that an

apex official has "some knowledge" of discoverable information. *In re Alcatel*, 11 S.W.3d at 179; *In re TMX*, 472 S.W.3d at 875 ("[m]erely having some knowledge of the subject matter of a dispute is not enough to compel an apex deposition."). Instead, "[t]he Texas Supreme Court has explained that, for character of knowledge to be unique or superior, 'there 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 Baylor Univ.*, 2020 WL 6878411, at *5 (quoting *In re Alcatel*, 11 S.W.3d at 179) (emphasis added).

"If the party seeking the deposition cannot show that the corporate official has any unique or superior personal knowledge of discoverable information, the trial court should grant the motion for protection and require the party seeking the deposition to 'attempt first to obtain the desired discovery through less intrusive means.'" *In re Baylor Univ.*, 2020 WL 6878411, at *6 (quoting *Crown Central*, 904 S.W.2d at 128); *see also In re Alcatel* 11 S.W.3d at 180 ("[a]bsent a showing that an executive arguably has unique or superior personal knowledge, a court has **no discretion** to allow an apex deposition unless the party seeking the deposition establishes that it has attempted to obtain the information through less intrusive methods.") (emphasis added). "'Less intrusive methods' depend on the circumstances of the case, but can include depositions of lower-level employees, the deposition of the corporation itself, and interrogatories and requests for production of documents directed to the corporation." *In re Baylor Univ.*, 2020 WL 6878411, at *6 (citing *Crown Central*, 904 S.W.2d at 128); *see also AMR Corp. v. Enlow*, 926 S.W.2d at 644 (noting that although many lower-level depositions had been taken, the showing of less intrusive means was not satisfied because no corporate deposition was taken).

The apex deposition may then only go forward upon a demonstration by the party seeking the deposition that, after making a good faith effort to obtain the desired discovery through less

intrusive methods: (1) there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence; and (2) the less intrusive methods of discovery are unsatisfactory, insufficient, or inadequate. *Crown Central*, 904 S.W.2d at 128. Importantly, merely completing *some* less-intrusive discovery does not trigger an automatic right to depose the apex official. *In re Daisy,* 17 S.W.3d at 658. Instead, the less intrusive methods must prove "unsatisfactory, insufficient, or inadequate." *Crown Central*, 904 S.W.2d at 128.

C. Perry Homes Has Invoked the Apex Deposition Doctrine

Perry Homes has invoked the protections of the apex deposition doctrine and the *Crown Central* standards by filing this motion for protection accompanied by the affidavit of Ms. Britton attached hereto as Exhibit D. *In re Baylor Univ.*, 2020 WL 6878411, at *5; *In re Alcatel,* 11 S.W.3d at 175. The litmus test for a sufficient affidavit is whether an apex official has "denied unique or superior personal knowledge of discoverable information." *In re TMX*, 472 S.W.3d at 875; *In re Taylor,* 401 S.W.3d 69, 74 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding) ("*Crown Central* does not require apex officials to assert total ignorance of all possible facets of a controversy."); *In re BP Prods. N. Am. Inc.*, 2006 WL 2192546, at *6 (Tex. App.—Houston [1st Dist.] Aug. 4, 2006, orig. proceeding) ("[h]aving 'some knowledge of discoverable information' does not render an affidavit insufficient."). Ms. Britton has clearly met this threshold showing—expressly stating, among other things, that "I do not have any unique first-hand, personal knowledge related to the underlying facts of the lawsuit or Plaintiffs' allegations, nor do I have any first-hand, personal knowledge related to the lawsuit or Plaintiffs' allegations that would be superior to that available from other sources." Ex. D, ¶ 5, *see also* ¶ 5 (specifically denying any "first-hand, personal knowledge of any relevant facts referenced in Plaintiffs' Eighth Amended Petition and made the basis of Plaintiffs' allegations").

D. Plaintiffs Cannot Meet Their Apex Deposition Burden

Because Perry Homes has invoked the protections of the apex deposition doctrine and the *Crown Central* standards, Plaintiffs have the burden to show that Ms. Britton has "'unique or superior personal knowledge of discoverable information,'" or—alternatively—that Ms. Britton has knowledge of relevant information that Plaintiffs have been unable to obtain after a good faith attempt to use less intrusive methods. *In re Baylor Univ.*, 2020 WL 6878411, at *6 (citing *Crown Central*, 904 S.W.2d at 128). Plaintiffs cannot meet this burden.

1. Plaintiffs cannot show unique or superior knowledge.

A plaintiff cannot meet the "unique or superior personal knowledge" requirement merely by showing that an apex official has "some knowledge" of discoverable information. *In re Alcatel*, 11 S.W.3d at 179; *In re TMX*, 472 S.W.3d at 875 ("[m]erely having some knowledge of the subject matter of a dispute is not enough to compel an apex deposition."); *see also In re Miscavige*, 436 S.W.3d at 441 ("the mere fact that an apex executive had direct knowledge of the alleged corporate wrongdoing does not support an inference that the executive has unique or superior knowledge of relevant facts."). Instead, "[t]he Texas Supreme Court has explained that, for character of knowledge to be unique or superior, 'there 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 Baylor Univ.*, 2020 WL 6878411, at *5 (quoting *In re Alcatel*, 11 S.W.3d at 179) (emphasis added).

Instead, courts applying the "unique or superior personal knowledge" standard allow depositions only in exceptional circumstances—such as where the official is integral to the operative facts at the center of the litigation, s*ee In re TMX*, 472 S.W.3d at 875 (allowing deposition where COO was actively involved in the marketing efforts, operations, conference calls, and site visits made the basis of the plaintiffs' trade secret and tortious interference claims); or

where the official is the ***only*** person with knowledge necessary to establish a party's claims. *See In re Taylor*, 401 S.W.3d 69 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding) (allowing deposition where president alone knew how stock value had been calculated for privately held company, and no backup data existed).

In practice, this standard is extremely difficult to meet. Upper level management and corporate officials routinely acquire knowledge from other sources—but reported knowledge is not unique or superior personal knowledge. *In re Alcatel*, 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."). Neither can unique or superior knowledge be established by showing that an apex official possesses knowledge of company policies or other, similar knowledge characteristic of any apex-level position. *Id*. at 177. Even showing that an apex official personally assisted in developing a company policy that the plaintiff identifies as the cause of her damages is insufficient. *In re Semgroup Corp*., 2016 WL 3085875, at *2 (Tex. App.—San Antonio June 1, 2016, orig. proceeding). As the Texas Supreme Court stated in *Alcatel*, "[a]llowing apex depositions merely because a high level corporate official possesses apex-level knowledge would eviscerate the very guidelines established in *Crown Central*." *In re Alcatel*, 11 S.W.3d at 177.

The outcome is not altered by the litigation's subject matter or importance to the official or the parties. *In re Alcatel*, 11 S.W.3d at 177 ("[P]roof of the importance… at most tends to show that the [apex] official whose deposition is sought may possess discoverable information[;] [i]t does not, however, arguably show that the official's knowledge is unique or superior."). Nor is it significant that the official whose deposition is sought has the authority to set the company vision—or the ultimate responsibility for all corporate decisions. *Id*. (citing *AMR Corp. v. Enlow*, 926 S.W.2d 640, 644 (Tex. App.–Fort Worth 1996, orig. proceeding) ("[t]his 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 far short of the [*Crown Central*] standard.")). As a result, the "unique or superior personal knowledge" requirement will generally bar the deposition of an apex official whose primary relationship to a lawsuit arises from characteristic apex-level activities. *See, e.g. In re Cont'l Airlines, Inc*., 305 S.W.3d 849, 853-58 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding).

Plaintiffs have not shown that Ms. Britton has "unique or superior personal knowledge" of discoverable facts relevant to the case. Indeed, Plaintiffs have not even *attempted* to articulate a reason why they believe Ms. Britton has unique or personal knowledge. In response to Perry Homes' email stating that Ms. Britton cannot be deposed because she does not have any unique or superior personal knowledge of discoverable information, Plaintiffs' counsel simply responded by saying, "I disagree. We will notice it and you can quash it." Ex. E.

The simple fact is that Plaintiffs ***cannot*** show that Ms. Britton has "unique or superior personal knowledge." In the affidavit attached to this motion as Exhibit D, Ms. Britton specifically states:

- I have no first-hand, personal knowledge of any relevant facts referenced in Plaintiffs' Eighth Amended Petition and made the basis of Plaintiffs' allegations. Additionally, while I may have knowledge of some facts related to the lawsuit and Plaintiffs' allegations by virtue of my role as Perry Homes' Chief Executive Officer, I do not have any unique first-hand, personal knowledge related to the underlying facts of the lawsuit or Plaintiffs' allegations, nor do I have any first-hand, personal knowledge related to the lawsuit or Plaintiffs' allegations that would be superior to that available from other sources.

- I have no first-hand, personal knowledge of the flooding events made the basis of this lawsuit. While I have general knowledge of the flooding events, my knowledge of these events is second-hand, and is neither unique nor superior to the knowledge possessed by those to whom I have delegated such responsibilities and on whom I rely to keep me informed on these matters.

- I have no first-hand, personal knowledge of the construction or engineering practices followed by Perry Homes, Figure Four Partners, Ltd., PSWA, Inc., or any of the subcontractors hired to work on the Woodridge Village Development. While I have general knowledge of Perry Homes' practices and policies relating to construction and engineering practices, my knowledge of these matters is second-hand, and is neither

unique nor superior to the knowledge possessed by those to whom I have delegated such responsibilities and on whom I rely to keep me informed on these matters.

- I have no first-hand, personal knowledge of the selection, hiring, retention, training, or supervision of any of the subcontractors on the Woodridge Village Development. While I have general knowledge of Perry Homes' practices and policies regarding the selection, hiring, retention, training, and supervision of subcontractors, my knowledge of these matters is second-hand, and is neither unique nor superior to the knowledge possessed by those to whom I have delegated such responsibilities and on whom I rely to keep me informed on these matters.

- I have no first-hand, personal knowledge of any engineering or design requirements for the Woodridge Village Development. While I have general knowledge of Perry Homes' practices and policies regarding engineering and design requirements, my knowledge of these matters is second-hand, and is neither unique nor superior to the knowledge possessed by those to whom I have delegated such responsibilities and on whom I rely to keep me informed on these matters.

- I have no first-hand, personal knowledge of the engineering design or plans implemented or created for the Woodridge Village Development, including whether and how such plans were approved or followed. While I have general knowledge of Perry Homes' practices and policies regarding engineering and design creation and implementation, my knowledge of these matters is second-hand, and is neither unique nor superior to the knowledge possessed by those to whom I have delegated such responsibilities and on whom I rely to keep me informed on these matters.

- I have no first-hand, personal knowledge as to whether the work performed at the Woodridge Village Development was properly supervised. While I have general knowledge of Perry Homes' practices and policies regarding supervision of work at construction sites, my knowledge of these matters is second-hand, and is neither unique nor superior to the knowledge possessed by those to whom I have delegated such responsibilities and on whom I rely to keep me informed on these matters.

- I have no first-hand, personal knowledge as to what work was performed (or not performed) at the Woodridge Village Development, how or when such work was performed, or whether such work was performed properly. While I have general knowledge of Perry Homes' practices and policies regarding performance and scheduling of work at construction sites, my knowledge of these matters is second-hand, and is neither unique nor superior to the knowledge possessed by those to whom I have delegated such responsibilities and on whom I rely to keep me informed on these matters.

- I have no first-hand, personal knowledge of any other aspect of the events or allegations described in Plaintiffs' Petition that would be superior to that available from other sources.

Ex. D at ¶ 5. Based on this testimony, not only have Plaintiffs failed to meet their *Crown Central* burden, Perry Homes has negated it—and, as a result, Plaintiffs cannot claim entitlement to Ms. Britton's deposition on the basis of "unique or superior personal knowledge."

2. Plaintiffs cannot show exhaustion of less intrusive means.

Similarly, Plaintiffs cannot demonstrate an entitlement to Ms. Britton's deposition through an exhaustion of less intrusive methods. Merely completing *some* less-intrusive discovery does not trigger an automatic right to depose the apex official. *In re Daisy,* 17 S.W.3d at 658. Instead, as stated above, Plaintiffs must show that, after making a good faith effort to obtain the discovery through less intrusive methods: (1) there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence; and (2) the less intrusive methods of discovery are unsatisfactory, insufficient, or inadequate. *Crown Central*, 904 S.W.2d at 128. "'Less intrusive methods' … include depositions of lower-level employees, the deposition of the corporation itself, and interrogatories and requests for production of documents directed to the corporation." *In re Baylor Univ.*, 2020 WL 6878411, at *6 (citing *Crown Central*, 904 S.W.2d at 128); *see also AMR Corp. v. Enlow*, 926 S.W.2d at 644 (noting that although many lower-level depositions had been taken, the showing of less intrusive means was not satisfied because no corporate deposition was taken).

Plaintiffs already deposed Richard Hale, Perry Homes' Executive Vice President for Development, for 6 hours on the Woodridge Village project. Plaintiffs also deposed Taylor Gunn, Perry Homes' Director of Development, for four hours and eighteen minutes, on many of the same topics covered in Mr. Hale's deposition. Plaintiffs are also taking a corporate representative deposition of Perry Homes on June 2. At a minimum, the standards set forth in *Crown Central* and *In re Baylor Univ*. require Plaintiffs to identify relevant information they seek from Ms. Britton that they have attempted, but failed, to obtain from other sources. *In re Baylor Univ.*, 2020 WL

6878411, at *8 (citing *In re Alcatel*, 11 S.W.3d at 180); *Crown Central*, 904 S.W.2d at 128. But Plaintiffs have not done this—nor can they in this litigation.

PRAYER

For the foregoing reasons, Perry Homes respectfully requests that the Court quash Plaintiffs' notice to take the oral and videotaped deposition of Ms. Britton, enter an order protecting Ms. Britton from deposition in this case, and award Perry Homes any such other and further relief, at law and in equity, to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was duly furnished to all counsel of record (1) electronically through the electronic filing manager (www.efiletexas.gov), and (2) via e-mail on this 21st day of April 2021 as follows:

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