IN THE SUPREME COURT OF ALABAMA

FLEXIBLE PRODUCTS COMPANY, et al.,	)	
Petitioners.	)	
(RE: RANDY WADE BICE,	)	CASE NO. 1050931
et al.,	)	CIRCUIT COURT OF JEFFERSON
Plaintiffs,	)	COUNTY, ALABAMA BESSEMER DIVISION
v.	)	CIVIL ACTION NOS.
MICON, INC., *et al.*,	)	CV-01-1194 CV-01-1341
Defendants.)	)	CV-02-1518

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OF THE DOW CHEMICAL COMPANY

ORAL ARGUMENT REQUESTED

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I. INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of businesses, representing an underlying membership of more than 3,000,000 businesses and professional associations of every size, in every sector, and from every region of the country, including the State of Alabama. The Chamber serves as the principal voice of the American business community, and represents the interests of its members by serving as *amicus curiae* in cases addressing issues of national concern to American business.

The Chamber of Commerce has an interest in this Petition because Rule 30(b)(6) is the discovery rule that specifically addresses the corporation. American businesses are required to respond everyday to Rule 30(b)(6) notices, to designate Rule 30(b)(6) witnesses, and to produce such witnesses for deposition. As explained below, the decision of the trial court in this case, if allowed to stand, will have a significant and negative impact upon how corporations respond to Rule 30(b)(6) notices. Thus, this petition raises an issue of utmost importance to the Chamber of Commerce and its membership.

II. SUMMARY OF THE ARGUMENT

Though the trial court erred in many respects, the Chamber of Commerce will focus in this brief upon the detrimental impact the trial court's decision will have upon discovery in Alabama cases, and the use of Alabama Rules of Civil Procedure Rule 30(b)(6) in particular.

The clear import of the trial court's decision is that a corporation that designates the "wrong" witness or witnesses to testify as to designated areas risks incurring draconian "death penalty" sanctions. Unless the trial court's decision is reversed, corporations responding to Rule 30(b)(6) notices will be forced -- because of the risks involved -- to designate virtually every employee having any personal knowledge of the issue in question, rather than the one or two corporate representatives that they would designate today. Though "over-designating" witnesses would make the process far more difficult for the corporation, and far less useful for the discovering party, the risk to the corporation of doing anything less -- the risk of a default sanction striking each and every defense -- would simply be too great. In addition, the corporation would be well-advised to file a motion for a protective

order in response to every Rule 30(b)(6) notice in order to obtain explicit and advance rulings from the trial court on the adequacy of its designation, even if there were no objection by the opposing party or hint of a discovery dispute.

The end result will be detrimental to all concerned. The original purpose of Rule 30(b)(6) -- to make corporate depositions easier and more useful for both parties -- will be lost, and courts will be enmeshed in time-consuming micromanagement of discovery issues.

As explained below, this draconian distortion of the discovery process arises from two fundamental mistakes in the trial court's application of the Alabama Rules of Civil Procedure. First, the rules require the parties, prior to seeking court intervention, to endeavor to resolve amongst themselves any discovery disagreement that might arise -- including any disagreement as to the breadth and the scope of the testimony of witnesses designated to speak for the corporation on "the matters on which examination is requested" having been described "with reasonable certainty." This "meet and confer" process is highly efficient, as it not only reduces discovery disputes, but

allows all parties to make *reasonable* efforts to comply with discovery requests and an opportunity to cure deficiencies in good faith without judicial intervention. If the meet and confer process does not resolve the dispute, the discovering party bears the burden of filing a motion to compel. The plain language of the rules, which the trial court did not apply, strikes the proper balance between ensuring compliance and promoting an efficient and fair discovery process.

Second, the outrageously harsh sanction imposed by the trial court in this case -- apart from clearly violating due process -- reflects a fundamental misunderstanding of the purpose of the Rule 30(b)(6) deposition. The purpose of Rule 30(b)(6) is not to replace depositions of fact witnesses or interrogatories, but to supplement these other means of discovery in appropriate instances. *See* Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 ALA. L. REV. 651, 657-660 (1999) (hereafter "Alabama Law Review"). The test for sanctions or other remedial action should not be whether the discovering party has been able to discover its entire case

through a single Rule 30(b)(6)notice, but whether "the deposition in conjunction with other information available to the discovering party is sufficient to permit fair preparation for trial." Alabama Law Review at 680.

III. DISCUSSION

A. Practical Impact of the Trial Court's Decision

The key to understanding the practical impact of the trial court's decision is that, in making decisions as to how to respond to a Rule 30(b)(6) notice, a corporation cannot afford to take the risk that its designation, or the testimony of the designated witness, will be deemed inadequate in a subsequent hearing on a motion for sanctions. Under the trial court's decision, the discovering party need not confront the corporation with any perceived inadequacy in the designation or the testimony, or file a motion to compel, but may move directly for, and be awarded, "death penalty" sanctions. The corporation, therefore, has no margin for error. With no margin for error, the corporation will inevitably (and reasonably) take precautions -- precautions that will increase the cost and delays associated with discovery for all concerned.

Under the best of circumstances, it is extremely difficult to prepare witnesses for Rule 30(b)(6) depositions. Rule 30(b)(6) witnesses are required to testify not only as to their personal knowledge but also as to facts reasonably available to the corporation on a particular topic. Indeed, as every trial lawyer knows, there is no such thing as the perfectly prepared Rule 30(b)(6) witness. No matter how well-prepared the witness, the examining lawyer will inevitably be able to ask questions that exceed the limits of the witness's knowledge, either because of the breadth of the topic or the granularity of the question. *E.g.*, *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 541 (7th Cir. 1998) ("It is no surprise that the company's chief lawyer [and federal counterpart Rule 30(b)(6) witness] was unable to answer financial questions of a kind so picayune in relation to the full range of SunAmerica's business and therefore her responsibilities.").

In other contexts, an honest response of "I don't know" in such instances will not doom the corporation's case but simply means that the witness probably will be unable to answer that question at trial. Under the trial court's

decision in this case, however, the response of "I don't know" in a Rule 30(b)(6) deposition is evidence of discovery abuse warranting the ultimate sanctions.[1]

This problem is aggravated further if, as in this case, the discovering party, in a single Rule 30(b)(6) notice, identifies virtually every issue in the case, implicating tens of thousands of documents and literally dozens of fact witnesses with personal knowledge. The appropriate response -- like Dow's response in this case -- is to designate a key witness or two to testify for the corporation on each topic. Yet no matter how well prepared the witness is, the examining lawyer will easily be able to ask questions that fall in the gaps between the witness' knowledge or beyond the scope of a witness' knowledge.

To reduce the risk of losing the case because of the inability of even the best-prepared Rule 30(b)(6) witness to answer every question, corporations will not even

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[1] "'No, no!' said the Queen. 'Sentence first--verdict afterwards.' 'Stuff and nonsense!' said Alice loudly. 'The idea of having the sentence first!' 'Hold your tongue!' said the Queen, turning purple. 'I won't!' said Alice. 'Off with her head!' the Queen shouted at the top of her voice. Nobody moved." Alice's Adventures in Wonderland, by Lewis Carroll, CHAPTER XII: Alice's Evidence.

attempt to educate a single key witness or even several key witnesses as to facts within the corporation's knowledge, particularly if the Rule 30(b)(6) notice covers a broad topic or a long period of time. The corporation will instead designate for each topic a large number of witnesses, each with personal knowledge of a particular narrow slice of the noticed topic. The scope of each witness' testimony would be relatively more narrow, but the corporation would rest assured that the collective testimony covers the noticed topics with sufficient detail. The corporation would thereby inoculate itself against the charge that it has failed to produce witnesses responsive to the notice.

The end result, however, is that the utility of Rule 30(b)(6) would be eliminated in most instances. As the number of witnesses designated in response to a Rule 30(b)(6) notice increases, the more the process resembles discovery without Rule 30(b)(6), where the discovering party uncovers facts known to the corporation through a number of fact witnesses rather than through relatively

fewer corporate representatives.[2]

Unless the trial court's decision is reversed, any prudent corporation will also take the additional precaution, even in the absence of a discovery dispute, of filing a motion for a protective order to limit or clarify the scope of the Rule 30(b)(6) notice and to obtain advance approval from the trial court of the corporation's designation. Since the corporation may lose the case entirely if its response is deemed inadequate after the fact, there is no margin for error and no compelling reason, from the corporation's perspective, not to have the trial court set detailed rules for discovery in advance of any possible dispute. Though extremely burdensome to the court and to the parties, the process of adjudicating these issues in advance will substantially reduce the risk to the corporation. Yet this micromanagement by the trial court of discovery would be severely detrimental to the pretrial

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[2] Obviously, the relevant consideration in determining a useful number of corporate representatives is not the number of witnesses designated per notice, but the number of witnesses designated per discrete topic in the notice. If the notice covers a wide range of topics, like the notice to Dow in this case, it is entirely appropriate for the corporation to designate different witnesses for different topics to speak on the corporation's behalf.

process. *See Banks v. Office of the Senate Sergeant-at-Arms*, 222 F.R.D. 7, 18 (D.D.C. 2004) (Requiring parties to seek protective order ahead of 30(b)(6) deposition, where defendant feared discovery on irrelevant topics, "is completely unprecedented and would require the court to micromanage the discovery process.").

The practical impact of the trial court's decision, therefore, will be detrimental for all concerned: parties seeking discovery from corporations will be unable to obtain focused testimony from relatively fewer key corporate representatives; corporations will incur far more costs than reasonably necessary; and courts will be forced into time-consuming micromanagement of discovery.

B. Proper Application of the Rules of Procedure

In reversing the trial court, this Court has the opportunity to restore the balance struck in the Alabama Rules of Civil Procedure and to maintain the utility of Rule 30(b)(6). First, the trial court clearly erred by awarding sanctions under Rule 37(d) without requiring the plaintiffs to adhere to the pre-sanction processes specified in the Alabama Rules of Civil Procedure, including a good faith conference and the filing of a

motion to compel. Second, the severity of the sanctions imposed in this case betrays a fundamental misunderstanding of the role of Rule 30(b)(6) in the overall scheme of discovery.

1. Resolving Disputes Over Compliance with Rule 30(b)(6)

The rules recognize that parties acting in good faith will have disputes over whether the organization's response to a Rule 30(b)(6) notice complies with the rules. The rules address four separate situations, three of which require a motion to compel, the fourth of which is the proper subject of a direct motion for sanctions. If

(a) the corporation fails to designate a Rule 30(b)(6) witness,

(b) the designated witness appears at the deposition but does not answer a question, or

(c) the designated witness appears at the deposition but makes an evasive or incomplete answer,

then the discovering party *must* first "endeavor[] to resolve the subject of the discovery motion through correspondence or discussions with opposing counsel." Ala. R. Civ. P. 37(a)(2). If that good faith conference (also

called a "meet and confer") does not resolve the dispute, then the discovering party may apply for an order compelling discovery.

The only instance in which sanctions are appropriate without a good faith conference and a motion to compel is if a "person designated under Rule 30(b)(6)" to testify on behalf of an organization "fails to appear" for a properly noticed deposition. Ala. R. Civ. P. 37(d).

The trial court reasoned that the inability of Dow's Rule 30(b)(6) witnesses to answer all of the plaintiffs' questions was tantamount to a failure of the corporation to appear for its deposition, thereby authorizing the trial court to award sanctions without a showing that the plaintiffs had endeavored to resolve the dispute under Rule 37(a)(2) and without a prior order compelling the discovery. The trial court's decision on this issue should be reversed for the following reasons.

Foremost, considering the plain language of the rule, the notion that a witness' inability to answer certain question is "tantamount" to the failure of the corporation to appear for the deposition ignores those provisions of Rule 37 specifically addressing the situation in which a

witness appears at the deposition but for whatever reason does not answer the questions. Rule 37(a)(2) explicitly provides that the remedy for the failure of a witness to "answer a question" is a motion to compel, which motion must be preceded by a good faith discovery conference. Rule 37(a)(2) goes further to provide that if the answers are "evasive or incomplete" then such a failure must also be addressed by a motion to compel. The only instance in which direct Rule 37(d) sanctions are appropriate is if the designated witness "does not appear." But if the witness does appear and his or her answers are deemed inadequate, a motion to compel plainly is required.[3] In light of the other provisions of Rule 37, there is no room to expand the definition of "to appear" beyond what it means in plain English. *See generally* 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE Civil 2D § 2103 ("Sanctions are available against the corporation if the person it designates fails to appear for the taking of his or her

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[3] *See Salahuddin v. Harris*, 782 F.2d 1127, 1130 (2d Cir. 1986) (construing federal counterpart; "'Failure to appear' is strictly construed in this Circuit and only occurs where a deponent 'literally fails to show up for a deposition session.'").

deposition or refuses to obey an order to provide or permit discovery."); Alabama Law Review at 677-683 (concluding that cases holding that Rule 37(d) sanctions are appropriate "are neither warranted under the Rule nor sustainable in logic and common sense").

While the plain language of the rules is clear, there is a split of authority as to whether Rule 37(d) sanctions are appropriate when a designated witness appears for the deposition but has no knowledge of the topics identified in a 30(b)(6) Notice of Deposition. *Compare Gutierrez v. AT&T Broadband, LLC*, 382 F.3d 725, 733 (7th Cir. 2004) (under federal counterpart, party disappointed with unresponsive Rule 30(b)(6) witness should move to compel designation of better witnesses), *and United States v. Rachel*, 289 F.Supp.2d 688, 692 n. 2 (D. Md. 2003) (under federal counterpart, party had a duty to confer with opposing party before filing motion for sanctions),[4] *with Resolution Trust*

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[4] *See also Alexander v. Fed. Bureau of Investigation*, 186 F.R.D. 137, 143 (D. D.C. 1998) (motion for sanctions denied; under federal counterpart, witness' deposition "can hardly be said to be tantamount to a failure to appear" where witness answered many questions and "provided the name of the person that could answer" other questions); *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995) (under federal counterpart, even

Corp. v. S. Union Co., 985 F.2d 196, 197-98 (5th Cir. 1993) (under federal counterpart, appearance of RTC witness who had no knowledge relevant to the subject matters identified in the Rule 30(b)(6) notice authorized imposition of modest monetary sanctions under Rule 37(d)).[5]

But the cases holding that Rule 37(d) sanctions are appropriate are inapposite here because even plaintiffs do

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though Rule 30(b)(6) witness was improperly unprepared, motion for sanctions denied because moving party failed to certify "that they presented Citibank with their objections to the Rule 30(b)(6) deposition before filing this Motion"); *United States v. Mass. Ind. Fin. Agency*, 162 F.R.D. 410, 412 (D. Mass. 1995) (under federal counterpart, disagreeing that witness' "inability to fully testify on all the topics set forth in the notice was tantamount to a complete failure of the agency to appear"); *cf. Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75-76 (D. Neb. 1995) (after deposition of corporate representative, granting motion to compel corporation to designate more knowledgeable witness); *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D. N.C. 1989) (corporation's failure to designate knowledgeable witness in response to specific notice warranted relief under Rule 37(a)(4)).

[5] *See also Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275 (3d Cir. 2000) (under federal counterpart, where Rule 30(b)(6) witness was wholly unprepared and uncooperative, monetary sanctions under Rule 37(d) for costs and attorney's fees associated with taking of deposition were appropriate); *Arctic Cat, Inc. v. Injection Research Specialists, Inc.*, 210 F.R.D. 680, 683 (D. Minn. 2002) (under federal counterpart, Rule 30(b)(6) witness' "abject inability to provide substantive answers to the questions" warranted imposition of "modest" monetary sanctions).

not contend that the Dow witnesses had no knowledge of the noticed or designated topics.[6] Further, even if these cases did apply, they should be rejected by this Court because they are contrary to the plain language of the rules and, as discussed below, are also contrary to common sense.

Apart from the plain language of the rules and the

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[6] The authors of the Alabama Law Review article on Rule 30(b)(6) offer the following pertinent analysis of the leading case relied upon by the trial court, *Resolution Trust Corp. v. S. Union Co.*, 985 F.2d 196 (5th Cir. 1993):

> It is significant that the Fifth Circuit holding in *Resolution Trust Corp. v. S. Union Co.*, upholding sanctions, was conditioned upon the fact that there *was* a knowledgeable witness readily available. In this case, the producing entity possessed documents that clearly identified a third individual as having personal knowledge of the subject of the deposition, and the entity did not produce those documents or designate the third witness until *after* it had designated two utterly unknowledgeable witnesses, had imposed upon counsel for the discovering party the expense of traveling across the country for two pointless deposition exercises, and then had been served with a motion for sanctions. In this egregious situation, the Fifth Circuit found that the trial court's conclusion that the producing party did not make a "meaningful effort to acquit its duty to designate an appropriate witness" was manifestly correct and surely not an abuse of discretion. Hence, it upheld the award of costs and fees under Rule 37(d).

Alabama Law Review at 677.

substantial case law and commentary supporting Dow's position, it also simply makes good sense to require litigants to address discovery disputes with the other party prior to demanding the intervention of the court and the imposition of sanctions. The good faith conference required by Rule 37(a)(2) will in many instances resolve the dispute entirely. In addition, as the framers of the rules were aware, the discovery conference also gives the responding party the opportunity to cure any perceived deficiencies in discovery promptly.

This "meet and confer" process is highly efficient, as it not only reduces discovery disputes but allows all parties to make *reasonable* efforts to comply with discovery requests and an opportunity to cure deficiencies in good faith without judicial intervention. Requiring the good faith discovery conference will also give the corporation the leeway to give the discovering party what it really needs from a Rule 30(b)(6) deposition -- focused evidence from key corporate representatives -- without incurring the risk of "death penalty" sanctions in the event the witness cannot answer every question.

In sum, by reversing the trial court, this Court can

restore the balance struck by the rules between ensuring compliance and providing an efficient process for obtaining discovery from corporations under Rule 30(b)(6).

2. The Severity of the Sanctions Ignores Purpose and Limits of Rule 30(b)(6)

The trial court's order in many respects, including the severity of the sanction, reveals a fundamental misunderstanding of the role of Rule 30(b)(6) depositions. As this Court is well aware, the original purpose of the federal counterpart to Rule 30(b)(6) was to reduce the difficulties associated with discovering corporate "knowledge" encountered by the party taking the discovery *as well as* the corporation itself. *Advisory Committee's Explanatory Statement Concerning Amendments to the Discovery Rules*, 48 F.R.D. 487, 515 (1970). "This new procedure was meant to prevent the necessity of naming several company representatives in order to find the one with knowledge of the relevant facts whose testimony could bind the company." *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000). The advantage to the organization is that the Rule 30(b)(6) deposition eliminated the need for the discovering party, "uncertain of who in the organization has knowledge," to issue "shotgun" notices of deposition

identifying numerous corporate officials who end up having little relevant knowledge.

As beneficial as it is, however, Rule 30(b)(6) was designed to *supplement*, not replace, other traditional means of obtaining discovery from an organization. *Advisory Committee Notes*, *supra*, 48 F.R.D. at 515 (stating Rule 30(b)(6) "should be viewed as an added facility for discovery"). The discovering party may still, of course, name corporate officials to be deposed under Rule 30(a). *Id.* In addition, "contention" interrogatories under Rules 33(a) and (b) in particular remain valuable tools in obtaining a response from the organization on any topic relevant to the case, including the identity of knowledgeable witnesses and pertinent records and the organization's collective knowledge of facts germane to particular claims and defenses. Rule 30(b)(6) cannot replace these other necessary tools of discovery because witnesses, no matter how well-prepared, cannot be expected, and are not required by Rule 30(b)(6), to provide a "binding synthesis" of every fact known to the corporation. As Judge Posner explained in an instructive case, it can be a mistake for a litigant to proceed exclusively under Rule

30(b)(6) and not serve interrogatories, when it is unlikely that "any one person could have answered all the questions." *IDS Life*, 136 F.3d at 541 ("They dropped the discovery ball. The district judge wasn't required to pick it up for them; nor we."). *See also* Alabama Law Review at 660 (discussing abuses relating to over-reliance on Rule 30(b)(6)).

Clearly, an organization may not disregard its obligations under Rule 30(b)(6) just because the discovering party has not taken advantage of other means of discovering the same information. As a matter of common sense, however, if the corporation has made the same information available to the discovering party in some other form -- either in the person of a fact witness or in response to written discovery -- certainly the discovering party is not entitled to sanctions that would be appropriate only for willful discovery abuse. *See Ultracashmere House, Ltd. v. Meyer*, 407 So.2d 125, 129 (Ala. 1981) (stating that the use of the "most severe" sanction "must be tempered by the careful exercise of judicial discretion to assure that its imposition is

merited").[7] The purpose of all of the various tools of discovery is to allow the parties to obtain information from one another in an efficient and fair manner. The test for sanctions, therefore, "should be whether the deposition in conjunction with other information available to the discovery party is sufficient to permit fair preparation for the coming trial." Alabama Law Review at 680. *See United States v. Rachel*, 289 F.Supp.2d 688, 92 (D. Md. 2003) (concluding sanctions not warranted where discovering party "had more than an adequate opportunity to depose a wide variety of people related to the underlying transaction").[8]

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[7] *See also Ex parte Coale*, 757 So.2d 393, 395 (Ala. 1999) ("A default judgment, like a dismissal, would be a 'severe sanction.'"); *Iverson v. Xpert tune, Inc.*, 553 So.2d 82, 87 (Ala. 1989) (summarizing standard in Alabama for "most severe" sanction of dismissal in that "conduct must mandate dismissal" and "willfulness" is a "key factor"); *Johnson v. Citizens Bank, Inc.*, 778 So.2d 828, 831 (Ala. Ct. App. 2000) (concluding it would be "fundamentally unjust to dismiss case" when conduct not willful).

[8] Indeed, a persuasive argument can be made that in such circumstances no remedies are necessary at all:

> Where the witness has *some* knowledge and has not totally failed to address the topics specified, no relief may be necessary. One court expressly concluded that the entity had satisfied its duty under Rule 30(b)(6) by providing "the most qualified person

Unless the trial court's decision is reversed, this case will give litigants in Alabama powerful incentive to rely exclusively on Rule 30(b)(6) notices and to eschew, as the plaintiffs have in this case, other forms of discovery. Such a result is manifestly inconsistent with the purpose of the rule to supplement other means of discovery. By reversing the trial court, this Court can restore Rule 30(b)(6) to its proper role in the discovery process.

> available" as its deponent. Such a witness combined with other discovery made available under regular means such as interrogatory responses and document production, will in many cases provide the deposing party with all that it needs to be ready to present its case at trial and to challenge the entity's case. Particularly when substantial time has passed between the events being litigated and the date of the deposition, limits on the knowledge of the witness are not surprising, and where both Rule 30(b)(6) and regular depositions have taken place, re-deposition under Rule 30(b)(6) can be avoided.

Alabama Law Review at 679.

This 25th day of May, 2006.

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I hereby certify that a copy of the above and foregoing Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of the Petition of The Dow Chemical Company for Writ of Mandamus, Oral Argument Requested has been served on this the 15th day of May, 2006, by depositing a copy of same in the United States mail, postage prepaid and properly addressed upon the following:

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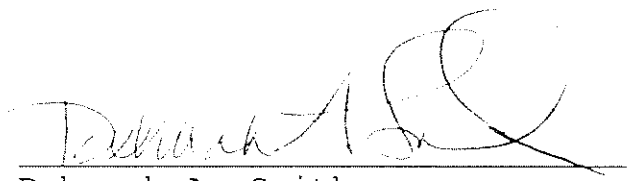

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