IN THE GEORGIA COURT OF APPEALS

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| ROBERT RANDALL BUCHANAN, Individually and as Administrator of the ESTATE OF GLENDA MARIE BUCHANAN, | ) | CASE NO. A20I0192 |
| Plaintiff-Respondent, | ) | |
| v. | ) | |
| GENERAL MOTORS, LLC, | ) | |
| Defendant-Petitioner. | ) | |

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**BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPLICATION FOR INTERLOCUTORY APPEAL**

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In this product liability case, Plaintiff-Respondent seeks to take the deposition of Mary Barra, the Chief Executive Officer of General Motors, LLC ("GM"). The State Court ordered the deposition of Ms. Barra to go forward without having found that she had "unique or superior personal knowledge" of any discoverable matter. If an executive officer like Ms. Barra could routinely be required to give a deposition in every product liability case, her time would be consumed with giving depositions with no benefit to those lawsuits.

This case presents an ideal vehicle for this Court to consider the apex deposition doctrine, a doctrine other courts have used to evaluate whether to allow the deposition of senior executive officers. Whether a court should allow such a deposition raises significant legal issues, best addressed in an interlocutory appeal. Amicus Curiae, the Chamber of Commerce of the United States of America ("the Chamber"), respectfully asks that the Court grant the Application for Interlocutory Appeal.

## I. THE INTEREST OF AMICUS CURIAE IN THIS CASE

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly

represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

This is such a case. Businesses, particularly ones that operate throughout the United States and all around the globe, can find themselves involved as parties in dozens, hundreds and even thousands of lawsuits. If executives in such companies can routinely be deposed in cases when they have no unique, relevant personal knowledge, the burden of litigation on those businesses increases without any resulting benefit. Businesses will be disrupted because their key executives are required to devote time to depositions that do not aid the litigation. Also, the threat of such executive depositions will become a weapon to extract nuisance settlements. Thus, the Chamber has an interest in promoting deposition ground rules that minimize disruptions of its

members and the broader business community and limit time-wasting depositions.

## II. ARGUMENT AND CITATION OF AUTHORITIES

This case concerns whether Georgia law recognizes what courts and commentators have called the "apex doctrine" or the "apex deposition doctrine." That doctrine defines the legal standard for determining when a president, CEO, or other executive officer can be required to give a deposition when that person denies having unique personal knowledge of relevant facts. This case presents an ideal vehicle for this Court to clearly affirm that Georgia follows the apex deposition doctrine. This Court's review is urgently needed.

### A. Interlocutory Review is Necessary in This Case

Under the Rules of this Court, an interlocutory appeal of the order at issue is appropriate if the order "appears erroneous" and the order "will adversely affect rights of the appealing party until entry of final judgment." Rule 30(b)(2), Ga. Ct. App. An interlocutory appeal also is appropriate when "[t]he establishment of precedent is desirable." *Id.* Rule 30(b)(3). This case satisfies both standards.

Although Georgia appellate courts have considered cases in which the parties were refused the opportunity to depose corporate executives, those cases did not clearly address the legal standard that should apply to the decision to allow or prevent such a deposition. *See Tankersley v. Security Nat. Corp.,* 122 Ga. App. 129, 130 (1970); *Wheeling-Culligan v. Allen*, 243 Ga. App. 776 (2000). Georgia trial courts also have wrestled with applying the apex deposition doctrine. *See* Order on Motions for Protective Orders, *Diamond Financial Services, LLC v. TMX Finance Holding, Inc.*, in the Superior Court of Fulton County, Georgia, Business Case Division, Case No. 2014CV253677 (entered March 4, 2019)[1]; Protective Order, *Robinson v. Wellshire Fin. Servs., LLC*, in the Superior Court of Fulton County, Georgia, Business Case Division, Case No. 2015CV259408 (entered June 1, 2015).[2]

As discussed below, the federal district courts in Georgia and appellate courts in other states have considered the issue and embraced

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[1] Order available at https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=1472&context=businesscourt (last visited March 2, 2020).

[2] Order available at https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=1333&context=businesscourt (last visited March 2, 2020).

the apex deposition doctrine. Georgia, which serves as the headquarters of many businesses, large (16 Fortune 500 companies are headquartered here) and small, would benefit from having a clear precedent for Georgia state trial courts defining the legal standard for allowing an apex deposition. Moreover, Georgia's lawsuit climate remains among the ten worst in the nation, 41st overall, according to a national survey of senior business executives conducted by the U.S. Chamber Institute for Legal Reform (ILR).[3] This is Georgia's lowest ranking since ILR began this survey in 2002.[4] Amicus Curiae urges this Court to take steps to push back against that anti-business reputation.

An interlocutory appeal is needed because the decision to allow an apex deposition, such as the one at issue here, cannot effectively be reviewed after entry of a final judgment. Once an unnecessary and harassing deposition has taken place, the damage is done. An appeal after a final judgment cannot repair that damage. Also, depending on

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[3] Report available at https://www.instituteforlegalreform.com/uploads/pdfs/2019_Harris_Poll_State_Lawsuit_Climate_Ranking_the_States.pdf (last visited March 2, 2020).

[4] *See* https://www.instituteforlegalreform.com/resource/georgias-lawsuit-climate-ranked-among-nations-ten-worst (last visited March 2. 2020).

how the case progresses, no appeal after a final judgment may ever occur. Even the threat of such a deposition can impact the conduct of a case, perhaps inducing a settlement to avoid the deposition, leaving no opportunity for appellate review.

Appellate courts in other states have used different means to allow interlocutory appeals challenging apex depositions. *See In re Continental Airlines, Inc.*, 305 S.W.3d 849 (Tex. App. 2010) (petition for writ of mandamus); *State ex rel. Mass. Mut. Life Ins. Co. v. Sanders*, 724 S.E.2d 353 (W. Va. 2012) (petition for writ of prohibition). An interlocutory appeal is necessary to provide this Court with a chance to define the legal standard for allowing an apex deposition.

### B. The Court Should Confirm that Georgia Law Follows the Apex Deposition Doctrine

The Georgia Civil Practice Act explicitly empowers trial courts to protect litigants and third parties from "annoyance, embarrassment, oppression, or undue burden or expense" in discovery. O.C.G.A. §9-11-26(c). Relying on such language, courts have adopted the apex deposition doctrine.

Depositions of executives present opportunities for abuse. The apex deposition doctrine addresses that potential by requiring a weighing of the costs and benefits before allowing such a deposition.

> As virtually every court which has addressed the subject has observed, depositions of persons in the upper level management of corporations often involved in lawsuits present problems which should reasonably be accommodated in the discovery process.

*Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995) (adopting and defining the apex deposition doctrine). Courts have noted that apex depositions "raise a tremendous potential for abuse and harassment." *Liberty Mut. Ins. Co. v. Superior Court*, 10 Cal. App. 4th 1282, 1287, 13 Cal. Rptr. 2d 363, 366 (1992). A CEO "is a singularly unique and important individual who can be easily subjected to unwanted harassment and abuse." *Mulrey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985). The apex deposition doctrine reflects a balancing of the potential for abuse inherent in apex depositions and legitimate discovery needs. To strike that balance, apex depositions are limited to situations in which the apex witness has "unique or superior knowledge of discoverable information." *Crown Central*, 904 S.W.2d at 128.

Because of the similarity between the Civil Practice Act and the Federal Rules of Civil Procedure, Georgia courts look to federal decisions for guidance in interpreting and applying the Civil Practice Act. *See Bicknell v. CBT Factors Corp.*, 171 Ga. App. 897, 898-99 (1984). In *Bicknell*, this Court noted that the Civil Practice Act, like the Federal Rules of Civil Procedure, allows a court to control the taking of depositions to avoid inconvenience and undue expense and prevent overly burdensome discovery. *Id.* at 899. *See Board of Regents v. Ambati*, 299 Ga. App. 804, 811 (2009) (citing O.C.G.A. §9-11-26(c); "The issuance of a protective order is recognition of the fact that in some circumstances the interest in gathering information must yield to the interest in protecting a party.").

Multiple Georgia federal courts have adopted and applied the apex deposition doctrine. *See Cuyler v. The Kroger Co.*, Case No. 1:14-CV-1287-WBH-AJB, 2014 WL 12547267, at *6-7 (N.D. Ga. Oct. 3, 2014), *magistrate judge's report and recommendation approved,* Case No. 1:14-CV-1287-RWS, 2015 WL 12621041 (N.D. Ga. Jan. 8, 2015) ("[T]he apex doctrine requires that [the deposing party] show that each executive has 'unique or superior knowledge of discoverable information' that

cannot be obtained by other means."); *Dishtpeyma v. Liberty Ins. Corp.*, Case No. 1:11-CV-3809, 2012 WL 13013007, at *3 (N.D. Ga. April 9, 2012); *Degenhart v. Arthur State Bank*, Case No. CV411-041, 2011 WL 3651312, at *1 (S.D. Ga. Aug. 8, 2011). Other federal district courts in the same circuit as Georgia also have adopted and applied the apex deposition doctrine. *See Gavins v. Rezaie*, Case No. 16-24845-CIV-Cooke/Torres, 2017 WL 3034621, at *4-5 (S.D. Fla. July 18, 2017); *Goines v. Lee Memorial Health Sys.*, Case No. 2:17-CV-656-FtM-29CM, 2018 WL 3831169, at *3-4 (M.D. Fla. Aug. 13, 2018); *Baine v. General Motors Corp.*, 141 F.R.D. 332, 334-36 (M.D. Ala. 1991).

Appellate courts in other states have also adopted the apex deposition doctrine. *See*, *e.g., Alberto v. Toyota Motor Corp.*, 796 N.W.2d 490, 494 (Mich. App. 2010); *Liberty Mut. Ins. Co. v. Superior Court*, 10 Cal. App. 4th 1282, 13 Cal. Rptr. 2d 363, 367 (1992); *Arendt v. General Elec. Co.*, 270 A.D.2d 622, 622-23, 704 N.Y.S.2d 346 (N.Y. App. 2000); *State ex rel. Mass. Mut. Life Ins. Co. v. Sanders*, 737 S.E.2d 353, 359-61 (W. Va. 2012). These courts have recognized that the apex deposition doctrine creates a proper balance between the need for discovery and the equally important goal of avoiding discovery abuse. "Virtually every

court that has addressed this subject has noted that deposing officials at the highest level of corporate management creates a tremendous potential for abuse and harassment." S. Mager, *Curtailing Deposition Abuses of Senior Corporate Executives*, 45 Judges J. 30, 33 (2006).

An interlocutory appeal given the circumstances presented would be the right vehicle for this Court to consider the apex deposition doctrine. The doctrine is perfectly consistent with the principles of discovery set out in the Civil Practice Act. Other courts applying similar rules have adopted the doctrine. Ms. Barra is the type of executive that should be protected by the doctrine. The damage inherent in taking her deposition cannot be undone in an appeal after final judgment. Amicus Curiae respectfully urges this Court to consider on the merits the issue this case raises.

## III. CONCLUSION

Amicus Curiae, the Chamber of Commerce of the United States of America, respectfully asks that the Court grant the Application for Interlocutory Appeal.

Respectfully submitted,

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