NO. CV-22-635

BEFORE THE ARKANSAS SUPREME COURT

MONSANTO COMPANY PETITIONER

v.

CORNELIUS KILGORE, et al. RESPONDENTS

On Petition from the Circuit Court of Drew County

Honorable Robert B. Gibson III, Presiding Judge

BRIEF OF THE UNITED STATES CHAMBER OF COMMERCE THE AMERICAN TORT REFORM ASSOCIATION, and THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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This Court has never permitted discovery to devolve into an "outright and unadulterated fishing expedition." *Parker v. S. Farm Bureau Cas. Ins. Co.*, 326 Ark. 1073, 1081, 935 S.W.2d 556, 560 (1996). Arkansas Rule of Civil Procedure 26(c) implements that principle by protecting both parties and non-parties from "annoyance, embarrassment, oppression, or undue burden or expense" in the discovery process. But the circuit court here disregarded that principle by ordering the deposition of a non-party's German chief executive officer in violation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Convention"). The

* As required by R. Ark. Sup. Ct. 4-6(c), the amici disclose (i) that no counsel for a party authored this brief in whole or in part and (ii) that no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief or otherwise collaborated in the preparation or submission of the brief. No person or entity, other than the amici curiae, their members, or their counsel made such monetary contribution to the brief or collaborated in its preparation.

German CEO, Werner Baumann, works for Bayer AG, the foreign indirect parent company of Monsanto. Baumann has no independent knowledge of anything at issue. Yet the circuit court has ordered Monsanto to produce him as a witness without even a subpoena, much less compliance with the Hague Convention,[1] and regardless of whether he has personal knowledge relevant to this case.

If allowed to stand, the circuit court's order threatens a flood of similar depositions for CEOs and other high-ranking executives in cases across Arkansas. The Court should alleviate that threat by granting Monsanto's petition and following courts across the country in adopting the "apex doctrine." The apex doctrine implements Rule 26's protections in the particular context of deposing high-ranking corporate officers by requiring parties seeking such depositions to show that the

[1] Though amici believe that the issue of forcing a foreign national's deposition without compliance with the Hague Convention (or other applicable law) is an issue of great importance, this brief focuses on the apex doctrine because abusive apex depositions threaten all companies in litigation, including those based in the United States.

officer has unique and relevant personal knowledge and that the information cannot be obtained through other less intrusive discovery. The apex doctrine thus strikes the appropriate balance between the need for discovery on the one hand, and the burden placed on opposing parties when discovery becomes abusive.

I. The Arkansas Rules of Civil Procedure implement policies consistent with the apex doctrine.

When the Court adopted the Arkansas Rules of Civil Procedure, it stated the primary policy animating the rules, requiring that the rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action." Ark. R. Civ. P. 1. Ark. R. Civ. P. 26(c) implements that policy in the discovery context by authorizing circuit courts "to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The rules therefore empower courts to control the discovery process to promote efficiency and eliminate abusive, burdensome discovery tactics.

Neither Rule 26 nor any other discovery rules, however, provide guidance to circuit courts in applying those general principles in the particular context of depositions of corporate officers. In similar

contexts, the Court has adopted factors to guide the circuit courts in the exercise of their discretion. For example, the Court has adopted a test to guide circuit courts in considering whether a party should be allowed to call an opposing attorney as a witness. *See Weigel v. Farmers Ins. Co.*, 356 Ark. 617, 625, 158 S.W.3d 147, 153 (2004) (requiring party seeking testimony from opposing attorney to show "(1) that the attorney's testimony is material to the determination of the issues being litigated; (2) that the evidence is unobtainable elsewhere; and (3) that the testimony is or may be prejudicial to the testifying attorney's client"). Adopting the apex doctrine would serve the same function in the context of corporate-officer depositions by establishing guidelines for circuit courts considering whether to allow such depositions.

II. The apex doctrine balances the benefits and burdens of discovery, an issue critical to all doing business in Arkansas.

The "goal of discovery is to permit a litigant to obtain whatever information he may need to prepare adequately for issues that may develop without imposing an onerous burden on his adversary." *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 444, 47 S.W.3d 866, 874 (2001). Discovery thus requires balance between need and burden. But the burden of discovery sometimes becomes a weapon to harass and burden

another party, perhaps to pressure them into settling a meritless case. One such weapon of harassment and burden is seeking to depose a high-level executive of a corporate party—not because that executive possesses any relevant personal knowledge—but in the hope that the deposition will impose significant logistical hurdles and lead the corporation to settle rather than expend time and resources fighting the deposition, particularly when the lack of rules in a jurisdiction leaves the matter uncertain.

Many courts thus recognize that deposing senior executives "raise[s] 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). That potential derives largely from the position that such executives fill. A CEO, for instance, "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). Thus, "virtually every court which has addressed the subject" has recognized the need for discovery rules that "reasonably accommodate" the unique problems presented by deposing high-level executives. *Crown Cent. Petroleum Corp. v. Garcia*, 904

S.W.2d 125, 128 (Tex. 1995) (recognizing and defining the apex deposition doctrine).

The apex deposition doctrine is a tool for achieving the balance between need and burden that *Dodson* identified as the goal of discovery. The doctrine achieves that balance by limiting apex depositions to situations in which the senior corporate officer has "unique or superior knowledge of discoverable information" and the party seeking the deposition has no less intrusive form of discovery available to obtain that information. *Id*.

United States District Judge Kristine Baker essentially applied that rule in *Bank of the Ozarks v. Cap. Mortg. Corp*., 2012 WL 2930479 (E.D. Ark. July 18, 2012). It was undisputed that the CEO, George Gleason, had personal knowledge, so Judge Baker turned to whether that knowledge was unique and unavailable through less intrusive means. *Id*. at *2. Judge Baker found that the defendants seeking the deposition had "not demonstrated that Mr. Gleason's knowledge is truly unique or that they have exhausted less burdensome avenues for obtaining the information they intend to seek from" him. *Id*. Judge Baker thus did not allow the deposition but allowed the defendants to

move for leave to take the deposition if discovery showed that "Mr. Gleason has unique personal knowledge unavailable through other less burdensome avenues of discovery." *Id.* at *3.

That approach protects companies not just in a single case, but from the cumulative effect that demands for apex depositions in many lawsuits might have. That possibility particularly threatens larger enterprises that operate throughout the United States and worldwide. Such businesses can find themselves party to dozens, hundreds, or even thousands of lawsuits.[2] For instance, Walmart—of course, an Arkansas corporation—faces dozens of lawsuits in several jurisdictions arising

[2] Here, the circuit court's handling of the so-called "managing agent" rule multiplies that threat considerably by forcing the CEO of a corporate parent company like Bayer to appear for depositions of its subsidiaries that are parties to litigation. Like Bayer, large Arkansas companies have subsidiaries that might find themselves in litigation. The circuit court's ruling here would subject the CEOs of those companies to depositions any time one of those corporate subsidiaries is a party to a case.

from its sale of the pain reliever acetaminophen. *See* Jef Feeley, *Walmart, CVS Face Suits Blaming Common Painkiller for Autism* at tinyurl.com/WMlawsuits (Sept. 29, 2022). Of course, those lawsuits arise from the sale of a single class of products and thus do not account for other litigation that such a company might face. Even a short deposition of a corporate executive would become burdensome if repeated over and over across scores of cases. Requiring high-ranking executives to devote time to prepare and sit for depositions when they have no unique, relevant personal knowledge relevant to the case or when any relevant personal knowledge they do possess can be obtained through less intrusive means burdens and disrupts companies trying to do business in Arkansas, without any resulting benefit and to the detriment of the local economy.

The lack of any standards for such depositions increases the threat to businesses. Senior officials often must act as spokespersons for their businesses in matters in which they have no personal, first-hand knowledge. But these high-profile, indirect roles should not turn them into deposition targets. The circuit court's ruling requiring Monsanto to produce the CEO of its indirect corporate parent for

deposition could, if replicated, result in the CEO of any company with even a tenuous link to a case being required to sit for a deposition in an Arkansas case merely for having high-level knowledge of the situation at issue in the case. Such a burden would weigh heavily on every business operating in Arkansas or having a corporate connection to a business operating here.

Adopting the apex doctrine would alleviate these risks and implement the policy of ensuring "the just, speedy and inexpensive determination of every action" by preventing abusive, burdensome discovery.

III. Other jurisdictions recognize and apply the apex deposition doctrine to balance need and burden in the discovery process.

This Court sometimes considers authority from other jurisdictions when deciding an issue of first impression, particularly when the issue requires application of civil procedure rules much like the rules in other jurisdictions. *See Mutaqim v. Hobbs*, 2017 Ark. 97, 3, 514 S.W.3d 464, 467 (stating that the Court will consider federal interpretations of corresponding rules when they are substantially identical to the Arkansas version of the rule). In the context of apex depositions, other courts apply the same considerations of need and burden that underlie

this Court's discovery rules. Their decisions are particularly relevant and persuasive here.

Other jurisdictions have nearly universally recognized the inherent abuse in apex depositions and the need to protect against unfair, needless burden. "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). Those courts have thus adopted the rule that "high-ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is necessary and relevant and unavailable from a lesser ranking officer." *Halderman v. Pennhurst State Sch. & Hosp.*, 96 F.R.D. 60, 64 (E.D. Pa. 1982). Under that rule, such depositions should be allowed only when the official possesses unique personal knowledge of matters relevant to the litigation that can only be obtained through his deposition. *See Baine v. General Motors Corp.*, 141 F.R.D. 332, 334–35 (M.D. Ala. 1991) (surveying the case law and setting forth rule generally applied).

Federal courts have recognized this principle for more than seventy years when a corporate executive could contribute "nothing beyond that which would be gleaned from an examination" of a lower-level employee. *M.A. Porazzi Co v. The Mormaclark*, 16 F.R.D. 383, 383–84 (S.D.N.Y. 1951). Judge Baker applied a similar rule decades later in *Bank of the Ozarks*. And other federal courts have taken the same approach, holding that officers with no direct knowledge of a case should not be deposed. *See, e.g.*, *Bush v. Dictaphone Corp.*, 161 F.3d 363, 367 (6th Cir. 1998) (upholding denial of plaintiff's request to depose high-ranking officer where there was no showing that the individual participated in the termination at issue); *Thomas v. IBM*, 48 F.3d 478, 482–84 (10th Cir. 1995) (affirming an order quashing the deposition of IBM's chair when the plaintiff made no attempt to show that the information sought could not be gathered from other IBM personnel); *Ohio-Sealy Mattress Mfg. Co. v. Duncan*, 749 F.2d 1560, 1561–62 (11th Cir. 1985) (upholding trial court's granting of a motion to quash the deposition of the president of Simmons Company); *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) (upholding district court decision to vacate notice of deposition of Upjohn's president when

plaintiff failed to first depose other more knowledgeable Upjohn employees).

As the Texas Supreme Court decision in *Crown Central Petroleum* shows, state courts have almost universally taken the same approach to apex depositions, requiring "unique or superior knowledge of discoverable information" unavailable by less intrusive means. 904 S.W.2d at 128. Florida has even gone so far as to codify the apex doctrine in its rules of civil procedure. That new rule requires trial courts to grant a protective order prohibiting an apex deposition "unless the party seeking the deposition demonstrates that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information." *In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d 459 (Fla. 2021).

Other states have similarly refused to allow such depositions when the proponents failed to make the required showing of unique personal knowledge that cannot be obtained elsewhere. *See, e.g.*, *State ex rel. Massachusetts Mut. Life Ins. Co. v. Sanders*, 724 S.E.2d 353 (W. Va. 2012) (adopting apex deposition rule and prohibiting enforcement of orders for deposition of CEO); *Alberto v. Toyota Motor Corp.*, 289 Mich.

App. 328, 796 N.W.2d 490 (2010) (adopting apex deposition rule in corporate setting and remanding for further consideration); *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602 (Mo. 2002) (precluding depositions of an executive director and vice president because the same information had not been sought by less intrusive means, the need for the information was slight, and the depositions would impose significant burden, expense, annoyance, and oppression); *Liberty Mutual Ins. Co.*, 13 Cal. Rptr. 2d at 366 (holding that it is an abuse of discretion to refuse a protective order absent a showing that the high-ranking officer has unique, personal knowledge of the case).

Underlying each of those decisions is the same goal that *Dodson* recognized as underlying the discovery process: the balance between need for information to develop a case and the burden imposed when discovery lapses into abuse. The apex doctrine helpfully provides trial courts specific considerations to guide their balancing of need and burden in this context. And the situation facing Bayer and its CEO here perfectly illustrates the need for the rule. Bayer is not a party to this litigation—its indirect subsidiary Monsanto is a party. If CEO Baumann were subject to deposition in every case in which some Bayer

subsidiary is a party, his job would quickly shift from running Bayer to testifying in depositions. And the same threat would loom over all other parties facing litigation in Arkansas, including members of the Amici, with their executives forced to spend their time as witnesses instead of corporate executives.

Other jurisdictions have adopted the apex doctrine to prevent that outcome. Businesses in Arkansas deserve the same protections from abusive discovery, and the apex doctrine provides those protections while preserving the ability of parties to take such depositions where they are truly needed.

CONCLUSION

This Court should join mainstream jurisprudence, adopt the apex doctrine in Arkansas, and instruct courts on the proper evaluation needed before permitting depositions of high-ranking officers. Otherwise, such depositions will become part of a regular pretrial discovery arsenal in a way that would undermine justice, not advance it. Requiring a corporate executive to sit for a deposition in these cases will make it impossible to run a company.

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CERTIFICATE OF SERVICE

I certify that on January 6, 2023, I filed this amicus brief using the Court's eFlex filing system, which will serve a copy on all counsel of record.

/s/ Gary D. Marts, Jr.
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CERTIFICATE OF COMPLIANCE

I certify that this amicus brief complies with Administrative Order No. 19, that it complies with Administrative Order 21, Section 9, and that it conforms to the word-count limitations in Rule 4-6 of this Court's rules. The statement of the case and the facts and the argument sections altogether contain 2,678 words.

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