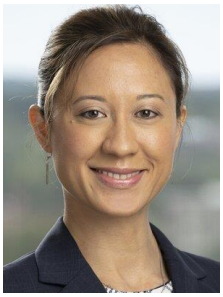
How Executives' Deposition Standards Can Differ

By **Genevieve Halpenny and John Cook** (October 23, 2023)



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The apex doctrine is the principle that courts should limit depositions of high-level executives to prevent abuse or harassment, particularly when information can be obtained from another source that is more convenient, less burdensome or less expensive.[1]

Courts differ as to what degree they apply the apex doctrine and in their analysis of whether to grant a protective order under Rule 26 of the Federal Rule of Civil Procedure.[2]

In the July 17 Trustees of Purdue University v. Wolfspeed Inc. decision, U.S. Magistrate Judge L. Patrick Auld in the U.S. District Court of the Middle District of North Carolina granted Wolfspeed Inc.'s motion for a protective order that invoked the apex doctrine, striking the deposition notice of Wolfspeed's CEO, Gregg Lowe, and ordering the trustees of Purdue University to pay Wolfspeed's fees and expenses.[3]

Purdue initially sought to depose Lowe regarding his purported efforts to politically interfere with inter partes review of the patent asserted by Purdue in this case during President Joe Biden's visit to Wolfspeed's facilities.[4]

Specifically, Purdue contended that it was no coincidence that the director of the U.S. Patent and Trademark Office reversed the Patent Trial and Appeal Board's denial of institution of the inter partes review three days after Biden's visit.[5]

After Wolfspeed opposed Lowe's deposition on this basis, Purdue added that the deposition would also cover Lowe's communications with stock analysts and participation in investor calls, topics ostensibly relevant to damages.[6]

Rule 26 provides that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

The party opposing the discovery bears the burden of showing good cause to block the apex deposition.[7] In deciding whether the party seeking the protective order has met its burden, courts consider (1) whether the deponent has unique firsthand, nonrepetitive knowledge of facts at issue in the case, and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods.[8]

Judge Auld synthesized the modifications that Fourth Circuit courts have made to this analysis.[9] At one end of the spectrum, some courts recognize a rebuttable presumption that the deposition of a high-ranking corporate executive constitutes good cause for a protective order as an annoyance or undue burden under Rule 26(c)(1).[10]

At the other end of the spectrum, the apex doctrine "is bottomed on the apex executive lacking any knowledge of the relevant facts."[11] Ultimately, Judge Auld "[put] aside the interplay of the apex Doctrine and the general standard for protective orders under Federal Rule of Civil Procedure 26(c)" and decided Wolfspeed's motion under the proportionality

principles of Rule 26(b)(2)(C).[12]

Judge Auld found that Lowe's general statements made during earnings calls were insufficient evidence that he possesses personal knowledge relevant to Purdue's claim for induced infringement or reasonable royalty damages.[13]

Additionally, Purdue's depositions of other witnesses on those topics would be unreasonably cumulative or duplicative under Rule 26(b)(2)(C)(i).[14] Lastly, Purdue's "interest in deposing Lowe regarding an unsupported corrupt bargain with President Biden with no identified impact on the litigation of this case does not satisfy basic relevance and proportionality standards."[15]

As such, Judge Auld prohibited Lowe's deposition under Federal Rule of Civil Procedure 26(b)(2)(C) and found that Wolfspeed established good cause for a protective order under Federal Rule of Civil Procedure 26(c). These holdings are consistent with failed attempts to depose other executives on the basis of general public statements.

Mini-Review of Apex Witness Deposition Decisions

In the 2021 Ceiva Logic Inc. v. Amazon.com Inc. decision, U.S. Magistrate Judge Maria A. Audero in the U.S. District Court for the Central District of California granted Amazon's motion for a protective order preventing the deposition of Jeffrey Bezos, Amazon's executive chair and former chief executive officer, regarding the design and development of the Amazon Fire tablets that Ceiva Logic Inc. accused of infringing its patents directed to digital picture frame technology and other topics.[16]

Before Amazon developed the Fire tablets, Amazon had an exclusive agreement with Ceiva to sell Ceiva's display, and Bezos encouraged viewers to buy them during a CNN interview.[17]

Although there were some documents and testimony that suggested Bezos might have had high-level oversight of the development of the accused Fire tablets, Judge Audero concluded that any involvement was irrelevant to infringement.[18]

The protective order was also granted as to the remaining topics, because Ceiva failed to present enough evidence that Bezos had any unique firsthand knowledge, that the information sought was relevant or that it had sought the information by other means without success.

In contrast, in the November 2022 Masimo Corp. v. Apple Inc. decision, U.S. District Judge James V. Selna of the Central District of California overruled Apple's objections to special master Andrew Guilford's order that Apple make Tim Cook, Apple's chief executive officer, available for a three-hour deposition on three topics relevant to the plaintiffs' trade secret misappropriation claims.[19]

Although Apple argued that Cook lacked any unique knowledge relevant to disputed facts, the special master found these arguments unpersuasive in view of emails that suggested Cook may have had unique firsthand knowledge regarding the relationship between the parties.[20]

Additionally, the special master found Cook's deposition "justified to explore possible inconsistencies on significant points by significant witnesses."[21] This case illustrates that it is possible to depose even a high-profile executive on targeted topics.

However, in the 2018 Lynx System Developers Inc. v. Zebra Enterprise Solutions Corp. decision, where the CEO "was more than just a figurehead who was otherwise uninvolved in the subject of the [trade secrets misappropriation] litigation," U.S. District Judge George A. O'Toole of the U.S. District Court for the District of Massachusetts denied the defendants' request for a protective order precluding a deposition of its CEO, Anders Gustafsson.[22]

Specifically, Judge O'Toole found that emails demonstrated that Gustafsson was active not only in the parties' business dealings but also in other relevant negotiations.[23]

Similarly, in the Nov. 8, 2022, Evolve BioSystems Inc. v. Abbott Laboratories decision, U.S. Magistrate Judge Heather K. McShain in the U.S. District Court for the Northern District of Illinois denied Abbott Laboratories' motion for a protective order barring plaintiffs Evolve BioSystems Inc. and the Regents of the University of California from deposing Christopher Calamari, its North American president of nutrition and senior vice president for U.S. nutrition.[24]

Like Gustafsson, "Calamari had significant involvement in the events underlying the claims and counterclaims in this case, including the potential co-marketing opportunity between Evolve and Abbott," even though other employees could testify on the same matters.[25]

Judge McShain was also unpersuaded by Abbott's unsubstantiated argument that Calamari was "working around the clock on Abbott's efforts to solve a nationwide infant formula shortage," and that a deposition would "significantly impede Mr. Calamari's leadership efforts to help solve the nationwide formula shortage."[26]

Additionally, Evolve offered to make the deposition less burdensome on Calamari by taking the deposition remotely and limiting it to five hours.[27] Under these circumstances, Abbott failed to meet its burden of demonstrating that the burdens of the Calamari deposition merited the issuance of a protective order.[28]

As these cases illustrate, courts have broad discretion to decide whether to allow an executive to be deposed and whether such deposition should be limited.

In exercising their discretion, courts distinguish between executives who are intimately involved in relevant decisions and actions, and those executives whose oversight is high-level and fairly removed from relevant facts. In developing a strategy to compel or resist an apex deposition, parties should consider the following takeaways.

Takeaways for the Party Seeking an Apex Deposition:

- Identify evidence that the witness has been intimately involved in the subject matter of the litigation.

- Use depositions of other witnesses and other discovery methods to identify the unique knowledge held by the witness.

- Argue that the witness failed to show that the burden of appearing for a deposition would be undue, and present any offers that were made to limit the deposition topics or otherwise make the deposition more convenient for the witness.

Takeaways For the Party Seeking a Protective Order:

- Provide evidence that the witness lacks firsthand knowledge of relevant information.

- Offer alternate witness testimony and other discovery on the proposed deposition topics.

- Provide an affidavit explaining how the witness's schedule would be affected or evidence of the deposition proponent's intent to harass or embarrass the witness.

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[1] See Trs. of Purdue Univ. v. Wolfspeed, Inc., No. 1:21cv840, 2023 U.S. Dist. LEXIS 122058, at *4, *8-*10 (M.D.N.C. July 17, 2023).

[2] See City of Rockford v. Mallinckrodt ARD, Inc., Nos. 17 CV 50107, 20 CV 50056, 2020 U.S. Dist. LEXIS 59810, at *6 (N.D. Ill. Apr. 6, 2020) ("Courts may protect high-level executives from being deposed when any of four circumstances exist: (1) the official has 'no unique personal knowledge of the matter in dispute'; (2) the information can be garnered from other witnesses or (3) other discovery methods; and (4) sitting for the deposition would impose a hardship in light of the officer's duties."); Apple Inc. v. Samsung Elecs. Co., 282 F.R.D. 259, 263 (N.D. Cal. 2012) ("In determining whether to allow an apex deposition, courts consider (1) whether the deponent has unique firsthand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods.").

[3] See Purdue, 2023 U.S. Dist. LEXIS 122058, at *22.

[4] See id. at *3.

[5] See id.

[6] See id. at *3-*4.

[7] See Desrosiers v. MAG Indus. Automation Sys., LLC, 675 F. Supp. 2d 598, 601 (D. Md. 2009).

[8] Apple v. Samsung, 282 F.R.D. at 263; Smithfield Bus. Park, LLC v. SLR Int'l Corp., No. 5:12-CV-282, 2014 U.S. Dist. LEXIS 16338, at *6 (E.D.N.C. Feb. 10, 2014).

[9] See Purdue, 2023 U.S. Dist. LEXIS 122058, at *9-*10.

[10] See id. at *9 (quoting Performance Sales & Mktg. LLC v. Lowe's Companies, Inc., No. 5:07-CV-140, 2012 U.S. Dist. LEXIS 131394, at *20 (W.D.N.C. Sept. 14, 2012)).

[11] See id. at *10 (quoting Paice, LLC v. Hyundai Motor Co., No. 12-CV-499, 2014 U.S. Dist. LEXIS 95045, at *3-4 (D. Md. June 27, 2014) (emphasis in original)).

[12] Id.

[13] See id. at *18.

[14] Id.

[15] Id. at *18-*19.

[16] See Ceiva Logic, Inc. v. Amazon.com, Inc., No. 2:19-CV-09129-AB-MAAx, 2021 U.S. Dist. LEXIS 252721, at *67 (C.D. Cal. Oct. 26, 2021).

[17] See id. at *6-*10.

[18] Id. at *22-*30.

[19] See Masimo Corp. v. Apple Inc., No. SA CV 20-00048 JVS (JDEx), 2022 U.S. Dist. LEXIS 236177, at *9 (C.D. Cal. Nov. 16, 2022).

[20] See id. at *5.

[21] Id. at *6.

[22] See Lynx Sys. Developers v. Zebra Enter. Sols. Corp., No. 15-12297-GAO, 2018 U.S. Dist. LEXIS 126552, at *6-7 (D. Mass. July 25, 2018).

[23] See id. at *6.

[24] See Evolve BioSystems, Inc. v. Abbott Labs., No. 19 C 5859, slip op. at 5 (N.D. Ill. Nov. 8, 2022).

[25] Id. at 3-4.

[26] Id.

[27] See id. at 4-5.

[28] See id. at 5.