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Protections For "Apex Deponents": Eastern District of California Reaffirms Limits on Depositions of Senior Corporate Executives

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Complex litigation imposes burdens on corporate defendants that extend well beyond legal fees, settlement payments, and other "hard" costs. While difficult to quantify, the disruption caused by the need to divert internal resources to litigation support and away from productive business activities can have a real, and significant, impact on a company's bottom line.

Never is this more so than when senior management testimony is required. While trial testimony from senior corporate executives is relatively rare, attempts to depose senior executives are common, and the liberal discovery rules that prevail in federal courts (as well as most state courts) offer only limited protection against those demands, even when the executive served with a deposition notice has little, if any, knowledge of the underlying issues in a case. The inconvenience, expense, and disruption that preparing a senior executive for deposition testimony and scheduling his or her deposition can entail are both significant burdens on a corporate litigant and a source of settlement leverage for the opposing party.

Fortunately, federal courts have increasingly recognized the "tremendous potential for abuse or harassment" that arises where a party seeks to depose a senior corporate executive with only limited knowledge of the underlying issues in a case and have shown an increased willingness to exercise their authority under federal procedural rules to impose limits on such abusive discovery practices. *See, e.g., WebSide Story, Inc. v. NetRatings, Inc.*, No. 06cv408, 2007 WL 1120567, at *2 (S.D. Cal. Apr. 6, 2007); *Celerity, Inc. v. Ultra Clean Holdings, Inc.*, No. C 05-4374, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007). In deciding whether to allow such depositions to proceed, the particular circumstances of the case and the potential witness's knowledge of the facts will weigh heavily in the court's decision. Factors that courts commonly consider include (1) whether the proposed deponent—the so-called "apex witness" at the top of a corporation's chain of command—"has unique first-hand, non-repetitive knowledge of the facts at issue in the case" and (2) whether other less burdensome methods of discovery are available to obtain the sought-after information. *WebSide Story*, 2007 WL 1120567, at *2. With respect to the second of these factors, the ability to obtain the sought-after testimony from other witnesses, and in particular a corporation's designated representative under Rule 30(b)(6), is given particular weight in the analysis. *See, e.g., id.* at *5.

While this case law is most clearly established in litigation involving public-sector entities, federal courts have increasingly applied this "apex witness" doctrine in considering whether to permit depositions of senior executives at private companies. This trend is apparent in the Eastern District of California's recent ruling in *Affholter v. Franklin County Water District, et al.*, No. 07-CV-03888, 2009 WL 2390583 (E.D. Cal. Aug. 3, 2009). The underlying claims in *Affholter* arise from groundwater contamination allegedly caused by the operations of a former subsidiary of a Fortune 500 pharmaceutical company in Merced County, California. Over the course of almost two years of litigation, the company gave the plaintiffs the opportunity to inspect documents related to the adequacy and effectiveness of groundwater remediation efforts at the site—a key issue in the case—and identified witnesses with first-hand knowledge of the remediation. Nevertheless, without reviewing the relevant documents, and after making only limited efforts to obtain discovery from other witnesses or sources, the plaintiffs sought to depose the individual serving as the company's president, chairman and CEO. Moreover, the plaintiffs made only cursory, *post hoc* attempts to explain their reasons for seeking to depose that individual. Although these reasons were never clearly articulated, they appeared to be based on an attempt to link the company's broader corporate social and environmental responsibility policies to remedial activities at the Merced County site.

The company moved for a protective order, arguing the deposition was noticed for the sole purpose of harassment and pointing out the

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plaintiffs' failure to identify a relevant topic of testimony on which the president had "unique, non-cumulative, personal knowledge" and the plaintiffs' failure to obtain the sought-after discovery through less burdensome means. The court granted the company's motion, holding that a protective order was warranted in light of the plaintiffs' failure to take the depositions of other company witnesses, inspect documents that had been available to them for almost one year, or offer any evidence that linked the company's president directly to remedial activities at the site.

The reasoning underlying Magistrate Judge Beck's ruling underscores the fact-intensive nature of the court's analysis. Of particular importance to the court was the independent document review that the company conducted after receiving the deposition notice and the paucity of evidence linking the president to the site that the review yielded. And even with respect to the three documents that the company's review identified—for example, a memorandum bearing the president's signature—the court observed that the plaintiffs had made no effort to depose the author or other recipients of the documents. On that basis, the court concluded that the deposition notice served on the president was "untimely" and, at a minimum, premature.

Also noteworthy is the court's discussion of whether a party seeking to depose a senior corporate executive bears the burden of coming forward with a justification for taking the deposition. The depositions of a corporate party's officers and employees are presumptively proper under federal discovery rules, and the party moving for a protective order ordinarily bears the burden of showing that good cause exists to grant the motion. Nonetheless, when a deposition notice seeks the testimony of an "apex witness," a number of district courts, including several within the Ninth Circuit, have recognized that the potential for abuse of the discovery process warrants shifting the burden to show a need to obtain the deponent's testimony to the noticing party. *See WebSide Story*, 2007 WL 1120567, at *3-4. Judge Beck's opinion recognized the absence of controlling Ninth Circuit authority on the subject and did not expressly shift the burden of justifying the need to take the company president's deposition to the plaintiffs. But the court recognized that the burden-shifting approach provided "guidance" in light of the company's allegations that the president's deposition had been noticed for an improper purpose, allegations which the court found it unnecessary to address or decide.

The court's favorable view of the burden-shifting analysis should offer at least some protection to corporate litigants faced with deposition notices directed at senior corporate officers for improper purposes. That being said, the thrust of the court's decision affirmed the importance of establishing a strong evidentiary record when seeking to prevent the deposition of a senior corporate executive. At a minimum, a well-developed record establishing that the executive lacks first-hand knowledge of the subject matter at issue can force opposing parties to depose other witnesses or propound other methods of discovery to obtain the sought-after information, thereby deferring and perhaps obviating the expense and disruption that a deposition notice served on a senior executive often entails and reducing the burden of responding to this all-too-common litigation tactic.

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