

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 POWERTECH TECHNOLOGY, INC.,

No. C 11-6121 CW

5 Plaintiff,

ORDER DENYING
DAVID SUN'S MOTION
FOR RELIEF FROM A
NONDISPOSITIVE
PRETRIAL ORDER OF
THE SPECIAL MASTER
(Docket No. 286)

6 v.

7 TESSERA, INC.,

8 Defendant.

9 _____/

10 Mr. David Sun, a director of Plaintiff Powertech Technology,
11 Inc. (PTI) and Chief Financial Officer and Vice President of
12 Operations of non-party Kingston,¹ moves for relief from the
13 Special Master's order denying Mr. Sun's motion to quash his
14 deposition subpoena and granting Defendant Tessera, Inc.'s motion
15 to compel his deposition. Having reviewed the papers filed by Mr.
16 Sun, the Court denies his motion for relief.

17 Under Federal Rule of Civil Procedure 26(c)(1), "[t]he court
18 may, for good cause, issue an order to protect a party or person
19 from annoyance, embarrassment, oppression, or undue burden or
20 expense, including" by forbidding a deposition. "For good cause
21 to exist, the party seeking protection bears the burden of showing
22 specific prejudice or harm will result if no protective order is
23 granted." Phillips v. GMC, 307 F.3d 1206, 1210-1211 (9th Cir.
24 2002). "Rule 26's 'good cause' requirement is a heavy burden."

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26 ¹ Mr. Sun's argument that the Special Master erred by failing
27 to "mention[] that Mr. Sun is a non-party," Mot. at 3 (emphasis
28 omitted), is unavailing. It is undisputed that, as the Special
Master noted, Mr. Sun is an officer of PTI, the plaintiff in this
action.

1 LifeScan Scotland, Ltd. v. Shasta Techs., LLC, 2012 U.S. Dist.
2 LEXIS 100547, at *4 (N.D. Cal.) (citing Blankenship v. Hearst
3 Corp., 519 F.2d 418, 429 (9th Cir. 1975)). "Thus, it is very
4 unusual 'for a court to prohibit the taking of a deposition
5 altogether absent extraordinary circumstances.'" Apple Inc. v.
6 Samsung Elecs. Co., 282 F.R.D. 259, 263 (N.D. Cal. 2012) (quoting
7 WebSideStory, Inc. v. NetRatings, Inc., 2007 U.S. Dist. LEXIS
8 20481, at *7 (S.D. Cal.)).

9 "When the party seeks the deposition of a high-level
10 executive (a so-called 'apex' deposition), the court may exercise
11 its discretion under the federal rules to limit discovery." In re
12 Google Litig., 2011 U.S. Dist. LEXIS 120905 (N.D. Cal.). "In
13 determining whether to allow an apex deposition, courts consider
14 (1) whether the deponent has unique first-hand, non-repetitive
15 knowledge of the facts at issue in the case and (2) whether the
16 party seeking the deposition has exhausted other less intrusive
17 discovery methods." Apple, 282 F.R.D. at at 263 (quoting In re
18 Google Litig., 2011 U.S. Dist. LEXIS 120905, at *10). "'When a
19 witness has personal knowledge of facts relevant to the lawsuit,
20 even a corporate president or CEO is subject to deposition.'" Id.
21 (quoting WebSideStory, Inc., 2007 U.S. Dist. LEXIS 20481, at *7).
22 "'A claimed lack of knowledge, by itself it is insufficient to
23 preclude a deposition.'" Id. (quoting In re Google Litig., 2011
24 U.S. Dist. LEXIS 120905, at *10).

25 To the extent that Mr. Sun argues that Tessera properly bears
26 the burden to show that the deposition should proceed, this is
27 incorrect. As noted above, under Rule 26, Mr. Sun, as the person
28 seeking to avoid discovery, bears the burden of showing that good

1 cause exists to prevent the deposition. "The burden under the
2 apex principle is supplied by the general rule applicable to a
3 party that seeks to avoid discovery in general." In Re Nat'l W.
4 Life Ins. Deferred Annuities Litig., 2011 WL 1304587, at *4 n.2
5 (S.D. Cal.); see also Serrano v. Cintas Corp., 699 F.3d 884,
6 901-02 (6th Cir. 2012) (rejecting argument that, under the apex
7 doctrine, "'harassment and abuse' are 'inherent' in depositions of
8 high-level corporate officers," and reiterating that, under Rule
9 26(c), the party seeking to avoid a deposition must show the harm
10 it would suffer by submitting to the deposition). "The apex
11 deposition principle is not an automatic bar that [the party
12 propounding the discovery] must overcome by a showing of good
13 cause." In Re Nat'l W. Life Ins. Deferred Annuities Litig., 2011
14 WL 1304587, at *4 n.2. "Rather, it is a protective tool that is
15 selectively employed on a case by case basis when deemed
16 appropriate." Id.

17 Although Mr. Sun relies on his position at Kingston to shield
18 him from a deposition here, Tessera seeks to take his deposition
19 for information regarding his participation in, and business
20 activities of, PTI, not for information regarding Kingston. Even
21 if Mr. Sun is a so-called apex executive, the Court agrees with
22 the Special Master that Tessera has identified relevant
23 information that he may have personally and that it has already
24 tried to obtain the information from other deponents, after the
25 Special Master denied its first motion to compel. As the Special
26 Master stated, Tessera was not required to prove that he certainly
27 has such information; Tessera cannot be certain that he does or
28 does not until it has taken his deposition. Further, although Mr.

1 Sun claims that he does not have relevant information, he has
2 indisputably considered and voted on matters relevant to this case
3 in his capacity as a member of PTI's board, even if he was in
4 general not an active member and rarely spoke at Board meetings.

5 Accordingly, the Court DENIES Mr. Sun's motion for relief
6 from a nondispositive order of the Special Master (Docket No.
7 286).

8 IT IS SO ORDERED.

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10 Dated: 7/26/2013

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13 CLAUDIA WILKEN
14 United States District Judge
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