



1 (9<sup>th</sup> Cir. 1975) (district court erred in granting protective order ordering plaintiff not to depose  
2 Herald-Examiner’s publisher when plaintiff suggested possible information publisher might have  
3 that others did not). Here, although one of Apple’s in-house counsel has submitted a declaration<sup>2</sup>  
4 containing conclusory assertions about Jobs having a “busy” schedule, there is no declaration that  
5 states *specific facts* from which the court could conclude that it would be unduly burdensome for  
6 Jobs to appear for a short deposition.<sup>3</sup> Absent at least *some* actual showing of undue burden, there is  
7 no legal authority for requiring Defendants to use purportedly less burdensome means of obtaining  
8 the discovery before allowing “apex” depositions. *See* FED.R.CIV.PRO. 26(c) (authorizing protection  
9 from *undue* burden “for good cause shown”).

10 Protection from “apex” depositions is particularly inappropriate where, as here, it appears  
11 that the deponent may have first-hand knowledge of a relevant fact.<sup>4</sup> Plaintiffs assert, and Jobs does  
12 not deny, that Jobs himself executed the original agreement between Apple and Defendant UMG  
13 Recordings, Inc. (the “iTunes Agreement”). The nature of the iTunes Agreement is relevant to the  
14 present litigation, because the contract at issue in this litigation provides for different royalty rates  
15 depending on whether the recordings covered by the contract are sold or licensed. Contrary to Jobs’  
16 argument, there *are* situations in which a contracting party’s subjective understanding may be

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18 <sup>2</sup> Plaintiffs objected to Paragraph 17 of Saul’s declaration on the grounds that it is not  
19 based on Saul’s personal knowledge, and that, to the extent it is based on statements by others, it is  
20 hearsay. Jobs responded that the passage is based on Saul’s own observation of the essay itself and its  
21 placement on the public iTunes website. The court sustains Plaintiffs’ objections, and strikes Paragraph  
22 17 from the declaration. This court’s Local Rule 7-5(b) prohibits inclusion of conclusions or argument  
23 in declarations, and provides that such declarations may be stricken in whole or in part. Saul’s assertions  
24 are not factual evidence, they are merely conclusions and argument based on speculation about Jobs’  
25 “intent” in writing the article (only Jobs has personal knowledge of his intent).

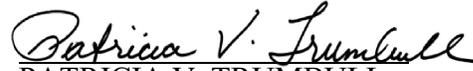
26 <sup>3</sup> Jobs himself did not submit any declaration setting forth any facts that demonstrate that  
27 appearing for a short deposition would unduly interfere with his ability to fulfill his work obligations.

28 <sup>4</sup> Because of the potential for abuse, courts do sometimes protect high-level corporate  
officers from depositions when the officer has no first-hand knowledge of relevant facts or where the  
testimony would be repetitive. *See Salter v. Upjohn Co.*, 593 F.2d 649 (5<sup>th</sup> Cir. 1979). However, where  
a corporate officer may have *any* first hand knowledge of relevant facts, the deposition should be  
allowed. *See Blankenship*, 519 F.2d at 429; *see also, Anderson v. Air West, Inc.*, 542 F.2d 1090,  
1092-93 (9<sup>th</sup> Cir. 1976) (approving denial of Howard Hughes’ motion for protective order because he  
“probably had some knowledge” regarding the substance of the plaintiffs’ claims). Further, a claimed  
lack of knowledge or recollection does not provide sufficient grounds for a protective order, because the  
opposing party is entitled to test that lack of knowledge or recollection. *See Amherst Leasing Corp. v.*  
*Emhart Corp.*, 65 F.R.D. 121, 122 (D. Conn. 1974); and *Travelers Rental Co., Inc.*, 116 F.R.D. 140, 143  
(D. Mass. 1987).

1 relevant to the interpretation of a contract. *See, e.g.*, CAL.CIV.CODE, § 1649 (“If the terms of a  
2 promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the  
3 promisor believed, at the time of making it, that the promisee understood it.”)

4         Jobs’ *Thoughts on Music* essay provides at least some reason to believe that Jobs understood  
5 the nature of iTunes Agreement to be a license rather than a sale. Under all the circumstances, the  
6 court finds it appropriate to allow the deposition, but to limit it to two hours. *See* FED.R.CIV.PRO.  
7 26(b)(2)(c)(iii).

8 Dated: 5/1/08

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10 PATRICIA V. TRUMBULL  
11 United States Magistrate Judge  
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