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10 **UNITED STATES DISTRICT COURT**  
 11 **NORTHERN DISTRICT OF CALIFORNIA**  
 12 **SAN JOSE DIVISION**

14 IN THE MATTER OF A DEPOSITION  
 SUBPOENA SERVED IN:

15 F.B.T. PRODUCTIONS, LLC AND EM2M,  
 16 LLC,

17 Plaintiffs,

18 v.

19 AFTERMATH RECORDS, INTERSCOPE  
 20 RECORDS, UMG RECORDING, INC., and  
 ARY, INC.,

21 Defendants.

Case No. 08-80040 Misc. RMW (PVT)

[Related to Case No. CV 07-3314 PSG  
 (MANx) (C.D. Cal.)]

**NON-PARTY STEVE JOBS'S  
 OBJECTION TO ORDER DENYING  
 MR. JOBS'S MOTION FOR  
 PROTECTIVE ORDER TO QUASH  
 "APEX" DEPOSITION SUBPOENA**

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1 **I. INTRODUCTION**

2 Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure and Civil L.R. 72-2, non-  
3 party Steve Jobs, the CEO of Apple, Inc. (“Apple”), respectfully objects to Magistrate Judge  
4 Patricia V. Trumbull’s May 1, 2008 Order Denying Non-Party’s Steve Jobs’ Motion to Quash  
5 Subpoena (the “Order”).<sup>1</sup>

6 The Order is clearly erroneous and contrary to the well-settled law governing apex  
7 depositions and discovery from non-parties. The underlying litigation, pending in the Central  
8 District of California, focuses solely on the interpretation of certain terms in a contract between  
9 music artist Eminem and his record company, Universal Music Group. Neither Mr. Jobs nor  
10 Apple is a party to the litigation or to the underlying contract, and Mr. Jobs does not have any  
11 knowledge relevant to the dispute. Plaintiffs, moreover, have not shown that any information  
12 pertaining to Apple’s distribution of Eminem’s music on iTunes is not available through other  
13 means or from more knowledgeable witnesses. Therefore, the Order must be set aside.

14 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

15 On May 21, 2007, Plaintiffs F.B.T. Productions, LLC and Em2M, LLC (collectively,  
16 “Plaintiffs”) commenced an action (“Action”) against Defendants Aftermath Records, Interscope  
17 Records, UMG Recordings, Inc., and Ary, Inc. (collectively, “Defendants”). On June 13, 2007,  
18 Plaintiffs filed a First Amended Complaint (“Complaint”) asserting claims for breach of contract  
19 and declaratory judgment. (Vandell Decl. ¶ 3, Ex. A (Complaint).) The Complaint alleges that  
20 Defendants have breached certain agreements (the “UMG Agreements”) relating to the payment  
21 of royalties for recordings of performances by Eminem (the “Eminem Masters”). (Vandell Decl.  
22 ¶ 4.) According to the Complaint, the UMG Agreements require Defendants to pay royalties at a  
23 rate of 50 percent “[o]n masters licensed by us or our licensees to others for their manufacture and  
24 sale of records or for any other use.” (Vandell Decl. ¶ 3, Ex. A (Complaint ¶ 29).) Plaintiffs  
25 allege that this provision of the UMG Agreements governs the payment of royalties for the sale of  
26 digital downloads of Eminem’s recordings. (Vandell Decl. Ex. A (Complaint ¶ 35.) Instead,

27  
28 <sup>1</sup> A copy of the Order is attached to the declaration of Colin Vandell as Exhibit I.

1 Defendants have allegedly calculated the royalties under the “distribution” provisions of the  
2 UMG Agreements at a 12 percent royalty rate. (Vandell Decl. ¶ 5, Ex. A (Complaint ¶ 35);  
3 Plaintiffs’ Opposition to Motion for Protective Order at 1-2.)

4 Mr. Jobs and Apple are not parties to the Action or to the UMG Agreements. Mr. Jobs  
5 and Apple were not involved in negotiating, drafting, or executing the UMG Agreements, and  
6 Apple has no agreements with Plaintiffs specific to the Eminem Masters. (Saul Decl. ¶¶ 3-5; Cue  
7 Decl. ¶¶ 3-4.) Apple’s relationship with Defendants is limited to a series of distribution  
8 agreements entitled “Digital Music Download Sales Agreements” (the “Download Agreements”).  
9 (Saul Decl. ¶ 5; Cue Decl. ¶ 5.) The Download Agreements provide the terms under which Apple  
10 may make electronic digital copies of sound recordings, owned or controlled by the Defendants,  
11 available for preview and purchase through Apple’s iTunes Store. (Saul Decl. ¶ 5; Cue Decl.  
12 ¶ 5.)

13 On January 11, 2008, Plaintiffs served a document subpoena on Apple consisting of  
14 numerous over broad and vague requests (the “Apple Document Subpoena”). (Vandell Decl. ¶ 6,  
15 Ex. B (Apple Document Subpoena).) The subpoena covered matter far beyond the scope of the  
16 Action including, *inter alia*, any and all agreements between Apple and UMG Recordings, Inc.  
17 regarding the distribution of music, and all communications and other documents relating in any  
18 way to such agreements. (Vandell Decl. ¶ 8, Ex. B (Apple Document Subpoena).) Apple  
19 engaged in meet and confer discussions with Plaintiffs in an effort to negotiate, in good faith, a  
20 proper scope of production. (Vandell Decl. ¶ 9.) Apple offered to provide a number of  
21 documents, including any agreements between Apple and any of Defendants (and any  
22 amendments) that pertain to distribution of the Eminem Masters. (Vandell Decl. ¶ 10.)

23 Plaintiffs refused Apple’s offer and instead served a deposition subpoena on Steve Jobs,  
24 Apple’s CEO (the “Jobs Deposition Subpoena”). (Vandell Decl. ¶ 12, Ex. F (Jobs Deposition  
25 Subpoena).) Plaintiffs also filed a motion to compel further responses to the Apple Document  
26 Subpoena in the Central District of California. (Vandell Decl. ¶ 11.)

27 During the meet and confer discussions required under Civil L.R. 37-1 that preceded  
28 Mr. Jobs’s Motion for Protective Order, Plaintiffs’ sole explanation for the relevance of Mr.

1 Jobs's deposition was the fact that he authored an essay entitled *Thoughts on Music*. (Vandell  
2 Decl. ¶ 13.) In this essay, Mr. Jobs discusses his views on why Apple uses a digital rights  
3 management system to protect content offered through the iTunes Store. (See Vandell Decl. ¶ 14,  
4 Ex. H (*Thoughts on Music*.) The music available through iTunes is subject to various  
5 agreements with content owners that require Apple to protect the content from unauthorized  
6 distribution. To emphasize this point, Mr. Jobs observed that because Apple does not own the  
7 music, "it must license the rights to distribute music from others." (See Vandell Decl. ¶ 14, Ex. H  
8 (*Thoughts on Music*.) In the essay, Mr. Jobs does not define or use the term "license" in any  
9 technical or legal sense, and he does not offer any opinion on the scope of the rights of on-line  
10 distributors to sell music content. (See Vandell Decl. ¶ 15, Ex. H (*Thoughts on Music*.) Mr. Jobs  
11 simply uses common terminology to underscore the fact that Apple does not own the music  
12 available through its iTunes store but must acquire the rights to distribute that content from  
13 others. (See Vandell Decl. ¶ 15, Ex. H (*Thoughts on Music*.)

14 During the meet and confer discussions, Plaintiffs did not – and could not – show that  
15 *Thoughts on Music* had any relevance to the Action. Given Mr. Jobs's numerous responsibilities  
16 as the CEO of Apple and the fact that he does not possess any unique knowledge relevant to the  
17 Action, Mr. Jobs moved to quash the deposition subpoena on March 24, 2008.

18 During the hearing, Plaintiffs asserted that the deposition of Mr. Jobs was warranted  
19 because he executed the original Download Agreement. Plaintiffs, however, never made this  
20 argument during the meet and confer discussions that preceded the hearing. (Vandell Decl. ¶ 16.)

21 The Order denied the motion for protective order and granted Plaintiffs a two-hour  
22 deposition of Mr. Jobs. The Order states that the "nature of the [Download Agreements are]  
23 relevant to the present litigation, because the contract at issue in this litigation provides for  
24 different royalty rates depending on whether the recordings covered by the contract are sold or  
25 licensed." (Vandell Decl. Ex. I (Order at 2).) Citing the fact that Mr. Jobs authored the essay and  
26 signed one of the Download Agreements, the Order concludes that "a party's subjective  
27 understanding may be relevant to the interpretation of a contract." (Vandell Decl. Ex. I (Order at  
28 2-3).) Mr. Jobs timely filed an objection to the Order.

1 **III. ARGUMENT**

2 The Order should be set aside because it is a complete departure from well-established  
3 precedent governing apex depositions and the law governing third-party discovery under Rule 26  
4 of the Federal Rules of Civil Procedure.

5 **A. The Order Is Contrary to the Law Limiting Apex Depositions.**

6 Federal courts routinely protect non-parties, particularly high-level, apex corporate  
7 officials, from harassing, inconvenient, and repetitive depositions and discovery. *See, e.g., Dart*  
8 *Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980); *Thomas v. IBM*, 48 F.3d  
9 478, 483 (10th Cir. 1995). The doctrine requires that a party seeking to depose an apex employee  
10 must first establish that the deposition is necessary by showing that: (1) the high-level official  
11 possesses unique personal knowledge of relevant facts at issue; and (2) the party seeking the  
12 deposition has already exhausted less intrusive discovery methods. *See Celerity, Inc. v. Ultra*  
13 *Clean Holding, Inc.*, No. C 05-4374 MMC (JL), 2007 WL 205067, at \*4 (N.D. Cal. Jan. 25,  
14 2007); *Webside Story v. Netratings Inc.*, No. 06cv408 WQH (AJB), 2007 WL 1120567, at \*2  
15 (S.D. Cal. Apr. 6, 2007). The Order is contrary to the law and clearly erroneous because it  
16 permits the deposition of a non-party, apex witness without any showing that the witness has  
17 unique knowledge of relevant facts or that Plaintiffs have exhausted other sources.

18 **1. Steve Jobs Does Not Possess Unique Personal Knowledge of Any**  
19 **Relevant Fact.**

20 The Order is contrary to law because it permits the deposition to proceed even though  
21 Plaintiffs failed to establish that Mr. Jobs has unique personal knowledge of a relevant fact at  
22 issue. Unique personal knowledge “is an essential component of the standard for an apex  
23 deposition - [meaning] unique personal knowledge by the high corporate official, unavailable  
24 from less intrusive discovery, including interrogatories and the depositions of lower-level  
25 employees.” *See Celerity*, 2007 WL 205067, at \*8.

26 The Order states: “[I]t appears that [Steve Jobs] may have first-hand knowledge of a  
27 relevant fact.” Mr. Jobs executed a Download Agreement and, according to the Order, there is  
28 “at least some reason to believe that Jobs understood the nature” of the Download Agreements



1 based on the *Thoughts on Music* essay. (Vandell Decl. Ex. I (Order at 2-3).) The Order’s  
2 findings are clearly erroneous for at least two reasons. First, Mr. Jobs does not have unique  
3 personal knowledge of the Download Agreements or the provisions relating to the grant of  
4 authority to Apple to offer digital downloads of sound recordings. (Saul Decl. ¶¶ 6, 8; Cue Decl.  
5 ¶ 6.) Second, even if Mr. Jobs had some unique understanding of those provisions – which he  
6 does not – his understanding is irrelevant.

7                   **a.     Mr. Jobs’s Execution of One Download Agreement Does Not**  
8                   **Support a Finding That He Has Relevant Personal Knowledge,**  
9                   **Much Less Unique Knowledge.**

10           Mr. Jobs does not have unique personal knowledge of the Download Agreements. While  
11 Mr. Jobs executed one of the several contracts that make up the Download Agreements, he was  
12 not involved in negotiating the provisions relating to the scope of Apple’s authority to offer  
13 Defendants’ content on iTunes. (Saul Decl. ¶ 8; Cue Decl. ¶ 7.) In fact, Mr. Jobs was not a  
14 member of the negotiating team and he did not attend the negotiation sessions. (Saul Decl. ¶ 6.)  
15 Apple’s negotiating team consisted of Kevin Saul, Eddy Cue, Bud Tribble, James Higa, and Jeff  
16 Robbin. (Saul Decl. ¶ 6; Cue Decl. ¶ 6.) The negotiations covered all the details that appeared in  
17 the final Download Agreements, including the terms governing the scope of authority granted to  
18 Apple for the distribution of content owned by UMG. (Saul Decl. ¶ 8.) The structure of the  
19 Download Agreements as well as their definitions, terms, and technical requirements were the  
20 sole responsibility of the negotiating team. (Saul Decl. ¶ 8.) Mr. Jobs’s involvement was limited  
21 to providing direction in determining high-level business points such as price. (Saul Decl. ¶ 8.)  
22 Mr. Jobs was not involved in drafting or negotiating the provisions contained in the Download  
23 Agreements that bear on Apple’s authority to offer for sale digital downloads. Thus, Mr. Jobs  
24 does not have unique personal knowledge of the nature or scope of Apple’s rights regarding  
25 digital downloads.

26           Mr. Cue, Mr. Saul and the other members of the negotiation team are far more familiar  
27 with the “nature” of the Download Agreements and have substantially more information  
28

1 concerning the nature of the relationships between Apple and the Defendants.<sup>2</sup> (Saul Decl.  
2 ¶¶ 6-8; Cue Decl. ¶ 6.) As Mr. Jobs’s counsel suggested at the hearing – and as Plaintiffs have  
3 done in other related litigation – Plaintiffs should be required to exhaust these alternative sources  
4 of relevant evidence before they seek Mr. Jobs’s deposition. (Cue Decl. ¶¶ 10-13.) *See* Fed. R.  
5 Civ. P. 26; *Mulvey v. Chrysler*, 106 F.R.D. 364, 366 (D.R.I. 1985). Apple has offered a 30(b)(6)  
6 deposition on the Download Agreements as well as the depositions of Mr. Cue and Mr. Saul.  
7 Therefore, the law plainly precludes Mr. Jobs’s deposition at this time, and the Order must be set  
8 aside.

9 **b. *Thoughts on Music Does Not Support a Finding That Mr. Jobs***  
10 ***Has Relevant Personal Knowledge, Much Less Unique***  
11 ***Knowledge.***

12 Nothing in *Thoughts on Music* supports the Order’s conclusion that Mr. Jobs may have  
13 relevant personal knowledge based on the contents of the essay. (Vandell Decl. Ex. I (Order at  
14 2-3).) In *Thoughts on Music*, Mr. Jobs offers his personal views on the use of digital rights  
15 management systems to protect content available through the iTunes Store. (Vandell Decl. Ex. H  
16 (*Thoughts on Music*.) Mr. Jobs wrote: “Since Apple does not own or control any music itself, it  
17 must license the rights to distribute music from others, primarily the ‘big four’ music companies.”  
18 (Vandell Decl. ¶ 14, Ex. H (*Thoughts on Music*.) This observation simply underscores that  
19 Apple does not own the music but must acquire the rights to distribute the content from the  
20 owners.

21 This is a far cry from the question at issue in the Action. The dispute in the Action is over  
22 whether Plaintiffs should be paid under the UMG Agreements for music sold and downloaded  
23 from the Internet under a royalty rate based on the distribution of “records” or under a royalty rate  
24 based on the licensing of *master* recordings. (Vandell Decl. Ex. A (Complaint ¶¶ 29 & 35);  
25 Plaintiffs’ Opposition to Motion for Protective Order at 1-2.) The UMG Agreements provide that

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26 <sup>2</sup> In fact, Mr. Cue was deposed by Plaintiffs’ counsel in lieu of deposing Mr. Jobs in a similar  
27 litigation pending in New York. Mr. Cue was questioned on both the substance of the Download  
28 Agreements and on the meaning of the *Thoughts on Music* essay, which he reviewed and  
provided comments on prior to its publication. (*See* Cue Decl. ¶¶ 10-13.) After Mr. Cue’s  
deposition, Plaintiffs’ counsel did not seek to depose Mr. Jobs.

1 Plaintiffs are entitled to a special 50 percent royalty (instead of the 12 percent royalty they receive  
2 for sales of non-LP records) for “*masters* licensed by us or our Licensees to others *for their*  
3 *manufacture and sale of records or for any other use.*” (Vandell Decl. Ex. A (Complaint ¶ 29).)  
4 Any third party selling Eminem’s music must have authority from UMG because UMG controls  
5 the rights to “manufacture, distribute, sell, and license for sale and distribution those master  
6 recordings in various configurations throughout the universe.” (Vandell Decl. Ex. A (Complaint  
7 ¶ 26).) But Mr. Jobs’s essay does not demonstrate that he has any knowledge relevant to the  
8 Action because the essay does not consider the very distinction upon which the parties are  
9 litigating. *Thoughts on Music* does not address, either explicitly or implicitly, whether Apple  
10 licensed a *master* recording for “*manufacture and sale of records or for any other use*” from  
11 Defendants within the meaning of the UMG Agreements.

12 The Order’s finding that the essay provides “at least some reason to believe that Jobs  
13 understood the nature of the iTunes Agreement to be a license rather than a sale” (Vandell Decl.  
14 Ex. I (Order at 2)) fails to appreciate that the issue is not one of sale versus license but whether  
15 Apple has been granted a license to a master recording for the uses specified in the UMG  
16 Agreement. Mr. Jobs’s essay does not begin to address this distinction and thus does not suggest  
17 that Mr. Jobs has unique personal information relevant to the Action.

18 **c. Mr. Jobs’s Subjective Understanding of the Download**  
19 **Agreements Is Irrelevant.**

20 Even if Mr. Jobs had some unique opinion regarding the nature of the authority granted to  
21 Apple in the Download Agreements – which he does not – that opinion would be irrelevant to the  
22 underlying dispute. When a third-party contract arguably bears some relevance to litigation,  
23 courts have uniformly held that a non-party’s *opinion* about the contract is inadmissible and  
24 irrelevant as a matter of law. *See, e.g., Morrow v. L.A. Unified Sch. Dist.*, 149 Cal. App. 4th  
25 1424, 1444-45 (2007); *Medmarc Cas. Ins. Co. v. Arrow Int’l, Inc.*, No. CIV A 01 CV 2394, 2002  
26 WL 1870452, at \*6 (E.D. Pa. July 29, 2002) (denying discovery of agreements between defendant  
27 and third party on ground that they were irrelevant to interpretation of contract between plaintiff  
28 and defendant) (citation omitted). While the Download Agreements may be relevant to determine

1 whether the Defendants granted Apple rights to “masters licensed by [Defendants] for their  
2 manufacture and sale of records or for any other use,” as specified in the UMG Agreements, this  
3 turns on the legal interpretation of the UMG Agreement and the rights granted in the Download  
4 Agreements, not on Mr. Jobs’s subjective opinion.

5 The Order states that “there are situations in which a contracting party’s subjective  
6 understanding may be relevant to the interpretation of a contract,” and suggests that *Thoughts on*  
7 *Music* may evidence Mr. Jobs’s understanding of the nature of the UMG Agreements. (Order at  
8 2-3 (citing Cal. Civ. Code § 1649).) This determination is wrong as a matter of law and  
9 constitutes clear error. *See Houghton v. Kerr Glass Mfg. Corp.*, 261 Cal. App. 2d 530, 536-37  
10 (1968) (holding that trial court’s admission of evidence of party’s subjective understanding of  
11 contract constituted reversible error). A party’s uncommunicated subjective understanding of a  
12 contract is not relevant. *Houghton*, 261 Cal. App. 2d at 537 (“It has long been a settled principle  
13 of contract law that the intention of a party to a bilateral agreement which is undisclosed and  
14 uncommunicated to the other party is, in the absence of mistake or fraud, immaterial under the  
15 objective theory of contract.”) (collecting cases); *see also Orton v. Embassy Realty Assocs.*, 91  
16 Cal. App. 2d 434, 441 (1949) (“When words of a doubtful meaning are used in a writing, parol  
17 testimony is admissible to show the common meaning of the words used, but it is not admissible  
18 to show the private understandings of the parties as to the meaning of such words.”).

19 What may be relevant, if a contract is held to be ambiguous, is evidence of the  
20 communicated, mutual intent of the parties. *See* Cal. Civ. Code §§ 1649; Cal. Civ. Proc. Code  
21 § 1860; *Ribiero v. Dotson*, 187 Cal. App. 3d 819 (1960) (“[W]hen the language of a contract is  
22 fairly susceptible to one of two constructions (i.e., when it is ambiguous) extrinsic evidence may  
23 be considered not to vary or modify the terms of the agreement but to aid the court in ascertaining  
24 the true intent of the parties.”); *see also Alex Robertson Co. v. Imperial Cas. & Idem. Co.*, 8 Cal.  
25 App. 4th 338, 346 (1992) (holding that, because a contract “must be interpreted to give effect to  
26 the *mutual* intention of the parties,” evidence of a party’s subjective intent is irrelevant in the  
27 absence of any evidence that “this intent was ever communicated” to the other party) (emphasis in  
28 original). Neither Mr. Jobs’s undisclosed subjective understanding of the Download Agreements

1 nor the views expressed in *Thoughts on Music* constitute the type of parol evidence that may be  
2 admissible to interpret the mutual intention of the parties to the contract. Because the evidence  
3 Plaintiffs seek from Mr. Jobs is immaterial to the Action, the Order is in clear error and must be  
4 set aside.

5 **2. The Order Is Contrary to Law Because It Permits the Deposition of a**  
6 **Non-Party Apex Witness Without a Showing of Exhaustion of Other**  
7 **Sources.**

8 The Order's holding that, "[a]bsent at least *some* actual showing of undue burden, there is  
9 no legal authority for requiring Defendants [sic] to use purportedly less burdensome means of  
10 obtaining the discovery before allowing 'apex' depositions," is contrary to the law. The Federal  
11 Rules of Civil Procedure require the court to limit discovery "if it determines that the discovery  
12 sought is . . . obtainable from some other sources that is more convenient, less burdensome, or  
13 less expensive." *See* Fed. R. Civ. P. 26(b)(2)(C); *see also* Fed. R. Civ. P. 45(c)(3) (setting forth  
14 court's power to quash or modify unduly burdensome subpoenas); *Nidec Corp. v. Victor Co.*, \_\_\_  
15 F. Supp. 2d \_\_\_, 2007 WL 1994171, at \*1 (N.D. Cal. July 5, 2007) (holding that motion to quash  
16 should be granted when non-party discovery sought is "obtainable from a source more direct,  
17 convenient, and less burdensome").

18 The Order's formulation of the law ignores the inherent burden imposed by non-party  
19 discovery, particularly when the non-party is a busy CEO at the apex of corporate management.  
20 *See Del Campo v. Kennedy*, 236 F.R.D. 454, 458 (N.D. Cal. 2006) ("Underlying the protections  
21 of Rule 45 is the recognition that 'the word non-party serves a constant reminder of the reasons  
22 for the limitations that characterize third party discovery.'") (quoting *Dart Indus.*, 649 F.2d at  
23 649). Courts have uniformly recognized the major burden imposed by third-party discovery and  
24 held that a subpoenaed individual's non-party status is significant in determining whether the  
25 discovery sought is appropriate. *See Dart Indus.*, 649 F.2d at 649 (holding that trial court must  
26 impose restrictions on non-party discovery to "protect third parties from harassment,  
27 inconvenience, or disclosure of confidential documents"); *Jack Frost Lab. Inc. v. Physicians &*  
28 *Nurses Mfg. Corp.*, No. 92 Civ 9264 (MGC), 1994 WL 9690, at \*2 (S.D.N.Y. Jan. 13, 1994)  
("[T]he most obvious burden is borne by the non-party witness, and we are instructed to be

1 particularly sensitive to any prejudice to non-litigants drawn against their will into the legal  
2 disputes of others.”). The Order’s failure to consider the burden imposed by a deposition on an  
3 apex witness of a non-party constitutes clear error.

4 The Order is also inconsistent with the long line of cases holding that, when the deposition  
5 of an apex witness is sought, the court must consider the relatively high likelihood of harassment  
6 and burden, which will often outweigh the potential benefits of the discovery. *See, e.g., Salter v.*  
7 *Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Celerity, Inc.*, 2007 WL 205067 at \*2-3; *Baine v.*  
8 *Gen. Motors Corp.*, 141 F.R.D. 332, 334 (M.D. Ala. 1991); *Mulvey*, 106 F.R.D. at 366 (corporate  
9 officers are “easily subjected to unwarranted harassment and abuse”). The purpose of the apex  
10 doctrine – to prevent unnecessary harassment of prominent corporate individuals – is undermined  
11 by the Order’s failure to require Plaintiffs to exhaust less burdensome means of obtaining  
12 discovery.<sup>3</sup> *See Celerity, Inc.*, 2007 WL 205067 at \*2-3; *Mulvey*, 106 F.R.D. at 366. Such a  
13 result would permit parties to use the discovery process to harass companies and their highest  
14 level corporate managers, even when less burdensome sources of discovery are readily available.  
15 The law does not support such a result.

16 **B. Because Plaintiffs Failed to Raise Mr. Jobs’s Participation in Executing the**  
17 **Download Agreements During the Meet and Confer Discussions, This Court**  
18 **Should Consider the Additional Factual Declarations.**

19 The Court should consider the declarations of Eddy Cue and Kevin Saul submitted in  
20 support of Mr. Jobs’s Objections to the Order. The declarations are offered to refute new  
21 arguments presented by Plaintiffs at the hearing on the Motion for Protective Order. During the  
22 meet and confer discussions preceding the Motion, Plaintiffs insisted that Mr. Jobs’s essay,  
23 *Thoughts on Music*, was the sole basis for proceeding with a deposition of Mr. Jobs. (Vandell  
24 Decl. ¶ 13.) Plaintiffs never sought Mr. Jobs’s deposition on the basis of his execution of one of

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25 <sup>3</sup> Even if the Court could justify its refusal to apply the apex doctrine to Mr. Jobs’s Motion, its  
26 refusal to require Plaintiffs to exhaust alternative sources of discovery would still be in error  
27 because it ignores the strong evidence of harassment manifested by the deposition subpoena. As  
28 Mr. Jobs argued in his Motion and Reply brief, Plaintiffs’ conduct in serving the deposition  
subpoena during the course of contentious negotiations over Plaintiffs’ document demands  
strongly suggests that their primary motivation in seeking Mr. Jobs’s deposition is to harass  
Apple. (Reply Brief (Docket #10) at 6.) It is clear error to let Mr. Jobs’s deposition proceed in  
the face of such clear potential for harassment.

1 the Download Agreements, or his role in the negotiation and drafting of those agreements. (*Id.*  
2 ¶ 16.) Accordingly, the moving papers focused on showing that the *Thoughts on Music* essay  
3 alone was irrelevant to the parties' contract dispute and did not afford proper grounds for an apex  
4 deposition.

5 At the hearing, Plaintiffs insisted that Mr. Jobs's execution of a Download Agreement was  
6 a sufficient basis to justify his deposition. The Order, moreover, relies on both his execution of  
7 the agreement and the essay. Because the issue of Mr. Jobs's actual involvement with the  
8 negotiation, drafting and execution of the Download Agreements – as opposed to his views in the  
9 *Thoughts on Music* – was not properly raised before the motion was filed, the Court should  
10 exercise its discretion to consider the additional facts submitted in the declarations of Eddy Cue  
11 and Kevin Saul. *See United States v. Howell*, 231 F.3d 615, 621-22 (2000) (holding that district  
12 court “has discretion” to “consider evidence presented for the first time” in party's objection to  
13 magistrate judge's order); *Brown v. Roe*, 279 F.3d 742, 745 (9th Cir. 2002) (“[I]n making a  
14 decision on whether to consider newly offered evidence, the district court must actually exercise  
15 its discretion, rather than summarily accepting or denying the motion.”); *see also Conetta v. Nat'l*  
16 *Hair Care Ctrs., Inc.*, 236 F.3d 67, 74 (2001) (district court should also be permitted to consider  
17 new evidence when it reviews magistrate orders pursuant to 28 U.S.C. § 636(b)(1)(A)).

18 **IV. CONCLUSION**

19 For the foregoing reasons, Non-Party Steve Jobs's Objection should be sustained.  
20 Accordingly, the Court should set aside the Order and grant Non-Party's Motion for Protective  
21 Order to Quash “Apex” Deposition Subpoena.

22  
23 DATED: May 15, 2008

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