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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

	)	Civil No. 05-CV-1018-AJB(WVG)
In Re: NATIONAL WESTERN LIFE	)	
INSURANCE DEFERRED ANNUITIES	)	ORDER ON DISCOVERY DISPUTE
LITIGATION	)	REGARDING TAKING OF APEX
	)	DEPOSITIONS
	)	
	)	
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Plaintiffs seek to depose Robert L. Moody and Ross R. Moody, two top executives at National Western Life Insurance Company. However, because these gentlemen are at the "apex" of National Western, Defendant objects to their depositions. After the parties asked the Court to resolve this dispute, the Court ordered letter briefs and held an informal telephonic hearing on the record. Mssrs. Moody also submitted follow-up declarations and Plaintiffs submitted a response letter-brief. Needless to say, both sides have had ample opportunity to make their case. The Court fully understands the respective arguments, the issues, and finds that no further briefing or arguments are necessary. Having considered the parties' letter briefs, declarations, and oral arguments, the Court

1 ORDERS that Robert Moody and Ross Moody submit to deposition on or  
2 before April 25, 2011.

3 **I. LEGAL STANDARD**

4 "The party who resists discovery has the burden to show  
5 discovery should not be allowed, and has the burden of clarifying,  
6 explaining, and supporting its objections." Keith H. v. Long Beach  
7 Unified Sch. Dist., 228 F.R.D. 652, 655-56 (C.D. Cal. 2005)  
8 (citation omitted); see also Blankenship v. Hearst Corp., 519 F.2d  
9 418, 429 (9th Cir. 1975) ("Under the liberal discovery principles of  
10 the Federal Rules defendants were required to carry a heavy burden  
11 of showing why discovery was denied.").

12 However, the Court also has discretion to limit discovery and  
13 impose restrictions where the discovery sought "is obtainable from  
14 some other source that is more convenient, less burdensome, or less  
15 expensive." Fed. R. Civ. P. 26(b)(1). "It is very unusual,  
16 however, for a court to prohibit the taking of a deposition  
17 altogether absent extraordinary circumstances, as such an order  
18 would likely be in error." Salter v. Upjohn, 593 F.2d 649, 651, 651  
19 (5th Cir. 1979).

20 When a party seeks to take the deposition of an official at  
21 the highest level or "apex" of a corporation, the Court may exercise  
22 its authority under the federal rules to limit discovery. Fed. R.  
23 Civ. P. 26(b)(1); see also WebSideStory, Inc. v. NetRatings, Inc.,  
24 2007 U.S. Dist. LEXIS 20481, \*6 (S.D. Cal. Mar. 22, 2007) ("Virtu-  
25 ally every court that has addressed deposition notices directed at  
26 an official at the highest level or "apex" of corporate management  
27 has observed, that such discovery creates a tremendous potential for  
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1 abuse or harassment.") (citing Mulvey v. Chrysler Corp., 106 F.R.D.  
2 364 (D. R.I. 1985)).

3 When determining whether to allow an apex deposition, courts  
4 often consider: (1) whether the high-level deponent has unique  
5 first-hand, non-repetitive knowledge of the facts at issue in the  
6 case, First United Methodist Church of San Jose v. Atl. Mut. Ins.  
7 Co., 1995 U.S. Dist. LEXIS 22469, \*6 (N.D. Cal. 1995), and (2)  
8 whether the party seeking the deposition has exhausted other less  
9 intrusive discovery methods, such as interrogatories and depositions  
10 of lower level employees, see Salter, 593 F.2d at 651 (granting  
11 protective order for executive where plaintiff had sought to depose  
12 the president of the company before deposing lower level executives;  
13 Baine v. Gen. Motors Corp., 141 F.R.D. 332, 334-36 (M.D. Ala. 1991)  
14 (granting protective order for Vice President of General Motors  
15 where plaintiff had failed first to depose lower level employees).  
16 When a high-level corporate executive lacks unique or superior  
17 knowledge of the facts in dispute, courts have found that good cause  
18 exists to prohibit the deposition. See, e.g., Thomas v. Int'l Bus.  
19 Machs., 48 F.3d 478, 482 (10th Cir. 1995); Lewelling v. Farmers Ins.  
20 of Columbus, Inc., 879 F.2d 212, 218 (6th Cir. 1989); Salter, 593  
21 F.2d at 651. However, when a witness has personal knowledge of  
22 facts relevant to the lawsuit, even a corporate president or CEO is  
23 subject to deposition. Rolscreen Co. v. Pella Prods. of St. Louis,  
24 Inc., 145 F.R.D. 92, 98 (S.D. La. 1992) (quoting Digital Equip.  
25 Corp. v. Sys. Indus., Inc., 108 F.R.D. 742, 744 (D. Ma. 1986)); see  
26 also Anderson v. Air W., Inc., 542 F.2d 1090, 1092-93 (9th Cir.  
27 1976) (plaintiffs may depose sole stockholder who "probably had some  
28 knowledge" regarding substance of plaintiffs' claims); Blankenship,

1 519 F.2d at 429 (district court erred in granting protective order  
2 ordering plaintiff not to depose Herald-Examiner's publisher when  
3 plaintiff suggested possible information publisher might have that  
4 others did not); Six W. Retail Acquisition, Inc. v. Sony Theatre  
5 Mgmt. Corp., 203 F.R.D. 98, 102-06 (S.D.N.Y. 2001) (compelling  
6 deposition of CEO of Sony Corporation when plaintiff "presented  
7 sufficient evidence to infer that [CEO] had some unique knowledge on  
8 several issues related to its claims").

9 Generally, a claimed lack of knowledge on behalf of the  
10 deponent does not alone provide sufficient grounds for a protective  
11 order. Digital Equip. Corp., 108 F.R.D. at 744; Amherst Leasing  
12 Corp. v. Emhart Corp., 65 F.R.D. 121, 122 (D. Conn. 1974); Travelers  
13 Rental Co., Inc., 116 F.R.D. 140, 143 (D. Mass. 1987). Moreover,  
14 the fact that the apex witness has a busy schedule is simply not a  
15 basis for foreclosing otherwise proper discovery." CBS, Inc. v.  
16 Ahern, 102 F.R.D. 820, 822 (S.D.N.Y. 1984).

## 17 **II. DISCUSSION**

18 Chief Executive Officers and other apex-type executives are  
19 certainly not beyond the reach of the litigation process. As an apt  
20 illustrative example, the Northern District of California recently  
21 ordered Steve Jobs, the CEO of Apple Inc. and arguably the apex of  
22 all apexes, to sit for deposition. If Steve Jobs must sit for  
23 deposition, no CEO is *ipso facto* immune from deposition in the  
24 Court's mind. The Court turns to whether Ross and Robert Moody must  
25 submit to deposition under the facts of this case.

26 Plaintiffs argue that Robert Moody, as Chairman of the Board  
27 and CEO, and Ross Moody, as President and COO, were intimately  
28 involved in the minute details of the financial instrument at the

1 core of their case against National Western. As a result, both men  
2 potentially orchestrated and set the interest rate structure and  
3 commission system that are Plaintiffs' main focus. And although  
4 others may have been involved in structuring the annuities, the  
5 Moody gentlemen, as possible prime architects, have unique informa-  
6 tion about the annuities and commission plan. When the Court  
7 inquired why Plaintiffs needed to depose Ross and Robert Moody,  
8 counsel explained:

9 Counsel admitted, he said, the operations that they  
10 [Ross and Robert Moody] run. They are the guys. They  
11 are the heads. They are the ring leaders, so to speak.  
12 And we've shown that even though we have taken other  
13 depositions, what we can't do, without taking these  
14 depositions, is we can't get there in that room when the  
15 Moody's [sic] were together and they made these deci-  
16 sions, and we need to ask them, what was the bases for  
17 that decision? Why did you make that decision? What was  
18 it you were trying to accomplish when you set these  
19 crediting rates? Were you trying to take money back from  
20 the very annuitants that you said you were giving a bonus  
21 to? Were you taking money out of the back pocket after  
22 you led them to think they were getting money up front?  
23 What was the point of how you worked the commissions?  
24 Why did you do it that way? What knowledge did you have?  
25 And at the end of the day, they say they are not going to  
26 call these witnesses at trial. Well, maybe they won't.  
27 That's their prerogative. But it's also our prerogative,  
28 since it is such a small company by relative standards,  
since we are talking about the very conduct that they  
themselves engaged in, the very rates that they them-  
selves manipulated, the very decisions that they them-  
selves made, we may want to call them as on cross. And  
it's prejudicial to us to put us in that position without  
first, at least, knowing what they are going to say.

So, we wouldn't do this lightly. This is not an effort  
to just go ahead and willy-nilly take the CEO's deposi-  
tion or the depositions of people at the very top of the  
chain. We are at this juncture because the other wit-  
nesses basically led us up that chain. . . . These  
are hands-on management actions, and we needed to get  
into their heads. We needed to depose the schemers  
behind the scheme, if I can say it in that vein, and to  
not be allowed to do that, I think, is prejudicing us.

(Hearing Transcript, Doc. No. 252 at 13-15.)

1 Plaintiffs represented to the Court that they have deposed  
2 other National Western employees, but that all roads lead to Ross  
3 and Robert Moody. They believe that these gentlemen actually set  
4 the interest rates for some products, or at least have the ultimate  
5 authority to approve those rates. Moreover, both men attend Board  
6 of Directors meetings, which other deponents have not been privy to.  
7 Ross Moody was or is the head of marketing and has a prominent role  
8 in the company's sales conferences and strategy. Both gentlemen  
9 develop new products and set the corporate culture. Plaintiffs aver  
10 they need to depose these gentlemen in part to obtain information on  
11 their Racketeer Influenced and Corrupt Organizations Act claim.

12 Defendant counters that, even if Robert and Ross Moody have  
13 the information Plaintiffs seek, other individuals have identical  
14 knowledge and are more appropriate. In response to Plaintiffs'  
15 counsel's explanation above, Defendant's counsel stated:  
16 "[O]verwhelmingly the statements made by Mr. Bassler about the  
17 knowledge of the Moody's [sic] just aren't true. And I know I can't  
18 prove that today, but however this develops that will be provable."  
19 (Hearing Transcript, Doc. No. 252 at 15.)

20 As far as proffer of undue hardship goes, Ross and Robert  
21 Moody submitted declarations that set forth the days they are  
22 unavailable in April and essentially declare not to have unique or  
23 non-repetitive knowledge or that they simply lack knowledge about  
24 the information Plaintiffs seek. However, the Court finds Defen-  
25 dant's argument that Ross and Robert Moody lack knowledge about  
26 Plaintiffs' proposed topics unpersuasive. If these gentlemen in  
27 fact do not have the requisite knowledge, that is something  
28 Plaintiffs are entitled to explore and discover on their own. The

1 entire purpose of a deposition is to determine what the deponent  
2 does and does not have knowledge about. Moreover, the two declara-  
3 tions reflect many days in April when both men are available for  
4 deposition.

5 The Court finds Plaintiffs' arguments persuasive. It appears  
6 that Plaintiffs have exhausted other avenues before coming to this  
7 point, and it further appears that Plaintiffs' other efforts have  
8 led them here. See Kennedy v. Jackson Nat'l Life Ins. Co., 2010  
9 U.S. Dist. LEXIS 47866, \*2 (N.D. Cal. Apr. 22, 2010) ("[W]here the  
10 testimony of lower level employees indicates that the apex deponent  
11 may have some relevant personal knowledge, the party seeking  
12 protection will not likely meet the high burden necessary to warrant  
13 a protective order.").

14 The Court is also informed by National Western's structure  
15 and the Moody family's intimate involvement in the company's  
16 operations. As National Western itself explains:

17 Ross R. Moody . . . , the President and Chief Operating  
18 Officer and a director of the Company, is the son of  
19 Robert L. Moody and the brother of Russell S. Moody and  
20 Frances A. Moody-Dahlberg. Frances A. Moody-Dahlberg . .  
21 . . , an employee and director of the Company, is the  
22 daughter of Robert L. Moody and the sister of Ross R.  
23 Moody and Russell S. Moody. E. Douglas McLeod . . . , a  
24 director of the Company, is the brother-in-law of Robert  
25 L. Moody. Russell S. Moody . . . , a director of the  
26 Company, is the son of Robert L. Moody and the brother of  
27 Ross R. Moody and Frances A. Moody-Dahlberg.

23 National Western Life Insurance Co. Notice of Annual Meeting of  
24 Stockholders and Proxy Statement For 2010 Annual Meeting of  
25 Stockholders at 12, available at [https://www.nationalwesternlife](https://www.nationalwesternlife.com/pdf/SH-1005.pdf)  
26 .com/pdf/SH-1005.pdf. In other words, with so many Moody family  
27 members at the company's helm, Plaintiffs' argument that Ross and

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1 Robert Moody are more than mere overseers appears to have some  
2 merit.<sup>1/</sup>

3 On balance, the Court finds that Plaintiffs have made a  
4 sufficient showing to establish their need to depose Ross and Robert  
5 Moody. The Court takes counsel at his word that he does not seek to  
6 depose Ross and Robert Moody for an improper purpose and finds that  
7 these gentlemen are more likely than not to possess unique,  
8 discoverable information. This conclusion is based on Plaintiffs'  
9 counsel's explanation of the role the gentlemen potentially played  
10 with respect to the subject matter of this case, as well as the  
11 apparently centralized nature of the decision-making processes at  
12 National Western. On balance, the Court finds that Messrs. Moody  
13 likely take a more active role in the company's operations and the  
14 subject areas which Plaintiffs which to explore. The Courts finds  
15 that the likelihood that Messrs. Moody will have more specific  
16 knowledge is high. See Kennedy, 2010 U.S. Dist. LEXIS 47866 at \*1  
17 ("[J]ust because another witness has testified regarding the same  
18 facts does not mean such testimony would be repetitive.").<sup>2/</sup>

19 Regardless of whether Plaintiffs' counsel is ultimately  
20 proven wrong at deposition, the above representation is his current

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22 <sup>1</sup> On balance, though, these facts play a minor role in the Court's ruling.

23 <sup>2</sup> In a letter that sought leave to respond to Plaintiffs' most recent 5-page  
24 response, Defendants seem to suggest that Plaintiffs bear the burden to show "good  
25 cause" to take the depositions. (Doc. No. 261 at 1 ("National Western believes  
26 that Plaintiffs have not shown good cause to take the depositions of both apex  
27 deponents, let alone one of them.") "Good cause," used by attorneys in courts,  
28 is a term of art that has been loosely thrown around in this case by both sides  
when it does not apply. That term has a certain meaning and is invoked when  
statutory or case law specifically provides for it. It certainly does not apply  
here, and even if it did, the burden is on Defendants to show why the depositions  
should not be taken, not the other way around. The burden under the apex  
principle is supplied by the general rule applicable to a party that seeks to  
avoid discovery in general. The apex deposition principle is not an automatic bar  
that Plaintiffs must overcome by a showing of good cause. Rather, it is a  
protective tool that is selectively employed on a case by case basis when deemed  
appropriate.



1 understanding and his clients are entitled the opportunity to test  
2 that theory at deposition; that is the entire purpose of discovery.  
3 Fed. R. Civ. P. 26 advisory committee notes on 1946 amendments<sup>3/</sup>  
4 ("The purpose of discovery is to allow a broad search for facts, the  
5 names of witnesses, or any other matters which may aid a party in  
6 the preparation or presentation of his case."); see United States v.  
7 Procter & Gamble, 356 U.S. 677, 683 (1958) (explaining that the  
8 purpose of discovery is to make trial "less a game of blind man's  
9 bluff and more a fair contest with the basic issues and facts  
10 disclosed to the fullest practicable extent possible."); Moon v. SCP  
11 Pool Corp., 232 F.R.D. 633, 636 (C.D. Cal. 2005) ("Generally, the  
12 purpose of discovery is to remove surprise from trial preparation so  
13 the parties can obtain evidence necessary to evaluate and resolve  
14 their dispute."). There simply is little basis for the Court to  
15 take the extraordinary step of denying Plaintiffs the opportunity to  
16 take these depositions. Even if National Western never calls Ross  
17 and Robert Moody at trial, they likely possess discoverable  
18 information to which Plaintiffs are entitled now.

### 19 **III. CONCLUSION**

20 The Court denies Defendant's request to insulate Ross Moody  
21 and Robert Moody from the deposition process. In accordance with  
22 Federal Rule of Civil Procedure 30(d), Ross Moody and Robert Moody  
23 are each ordered to submit to one, 7-hour maximum deposition no  
24 later than April 25, 2011. To accommodate the gentlemen's schedule,  
25 the Court further orders that their depositions may take place on  
26 any weekend day, if necessary. Counsel for both sides shall

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28 <sup>3</sup> The Court notes that while Rule 26 was subsequently amended to grant broader authority to courts to narrow the scope of discovery, this 1946 advisory committee note on the general spirit of discovery continues to hold true today.

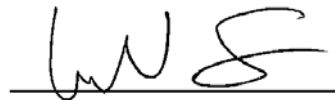
1 cooperatively meet and confer to schedule the depositions, which  
2 shall take place in the city in which National Western's corporate  
3 headquarters is located.

4 IT IS SO ORDERED.

5 DATED: April 6, 2011

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Hon. William V. Gallo  
U.S. Magistrate Judge

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