

1 member of the Liberty Mutual Board of Directors and member of that board's
2 Compensation Committee. Plaintiffs have noticed the depositions of Long, Sweeney
3 and Hunt and have stated their intention to notice the deposition of Mundt.
4 Defendants claim the depositions are inappropriate because: (1) the executives
5 Plaintiffs want to depose are protected by the "apex doctrine;" and, (2) Plaintiff will
6 exceed the 10 deposition limit of Federal Rule of Civil Procedure 30(a)(2).

7 David Long

8 David Long is the current Chief Executive Officer and President of Liberty
9 Mutual Insurance. In 1997, Mr. Long was a member of the Board of Directors of
10 Golden Eagle. Golden Eagle then-CEO Fred Marziano, who gave deposition
11 testimony in this case, described Mr. Long as his "right-hand man." Citing to other
12 deposition testimony, Plaintiff claims that Mr. Long "had discussions with other
13 executives at Liberty Mutual specifically about whether or not the transitioning
14 Golden Eagle employees would be credited with their prior years of service for the
15 purpose of benefit accrual under the retirement plan." Plaintiff further claims that
16 "Mr. Long also knew that Golden Eagle employees were under (the apparently
17 mistaken) impression that they *would* receive credit for the purposes of accrual, yet
18 for reasons that Mr. Long can perhaps elaborate on, those misconceptions were never
19 clarified."

20 Defendant claims that Mr. Long's participation in the Golden Eagle
21 transaction is not relevant to the instant action, that Mr. Long lacks personal
22 knowledge relevant to the instant action, and that less burdensome means of
23 discovery have not been exhausted.

24 Tim Sweeney

25 Tim Sweeney is the current Executive Vice President of Liberty Mutual
26 Insurance and the President of Liberty Mutual's Personal Insurance division. In
27 1997, Mr. Sweeney worked under Mr. Long and Mr. Marziano.

28 Plaintiffs, again relying upon deposition testimony obtained in this case,

1 contend that, like Mr. Long, Mr. Sweeney had discussions with his colleagues
2 relating to Golden Eagle employee benefits and “knew there was confusion about
3 what credits would be offered, yet failed to address it.” Plaintiff’s claim that Mr.
4 Sweeney helped Mr. Marziano interpret and understand the terms of the 1997
5 Rehabilitation Agreement that Plaintiff’s believe is a key document in the instant
6 action. Plaintiff claims that Mr. Sweeney worked directly on documents analyzing
7 Golden Eagle’s employee staffing and benefits. Plaintiff also claims that Mr.
8 Sweeney was directly involved in an August 1997 meeting explaining how employee
9 benefits would be effected by the Liberty Mutual transaction.

10 Defendant claims that Plaintiff has not demonstrated that Mr. Sweeney had
11 any involvement related to pension benefits in the 1997 transaction, that even if he
12 had involvement such involvement is irrelevant, and that Plaintiff has not
13 demonstrated that Mr. Sweeney participated in any benefit meetings.

14 Geoff Hunt

15 Geoff Hunt is a former Executive Vice President of Liberty Mutual. Mr. Hunt
16 was “the principal coordinator of mergers and acquisitions at Liberty Mutual,
17 including the Golden Eagle merger,” and was one of the chief negotiator’s in the
18 transaction.

19 Plaintiffs claim that Mr. Hunt was directly involved in the creation of
20 documents containing the benefit provisions at issue in this case. Plaintiffs assert
21 that Mr. Hunt has personal knowledge of the issue of retirement benefits that were
22 negotiated in the transaction, the negotiations themselves and the handling of the
23 human resources impacts of the benefits.

24 Defendant claims that Mr. Hunt was not the author of the benefits provisions
25 Plaintiff wishes to discuss, and that other lower level employees are both available
26 for deposition and have more direct knowledge of the events in question.

27 Ray Mundt

28 Ray Mundt is a former member of the Liberty Mutual Board of Directors and

1 a member of that board's Compensation Committee. Plaintiffs point to Liberty
2 Mutual's initial disclosures where Defendant states, regarding Mr. Mundt: "He is
3 expected to have information and knowledge regarding the intended scope and
4 limitations of the credit to be provided to said employees relating to their prior
5 service with [Golden Eagle]."

6 Defendant admits that Mr. Mundt may have relevant information. However,
7 Defendant claims that any information Mr. Mundt might have is already in the
8 possession of Plaintiff. Defendant claims that all relevant information about the
9 Compensation Committee, and its meeting approving the benefits plan for Golden
10 Eagle employees, is contained in the minutes of that meeting and Plaintiff has access
11 to those minutes.

12 Legal Standard

13 The Federal Rules of Civil Procedure generally allow for broad discovery,
14 authorizing parties to obtain discovery regarding "any nonprivileged matter that is
15 relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Also, "[f]or good
16 cause, the court may order discovery of any matter relevant to the subject matter
17 involved in the action." *Id.* Relevant information for discovery purposes includes any
18 information "reasonably calculated to lead to the discovery of admissible evidence,"
19 and need not be admissible at trial to be discoverable. *Id.* There is no requirement
20 that the information sought directly relate to a particular issue in the case. Rather,
21 relevance encompasses any matter that "bears on" or could reasonably lead to matter
22 that could bear on, any issue that is or may be presented in the case. *Oppenheimer*
23 *Fund, Inc. v. Sanders*, 437 U.S. 340, 354 (1978). District courts have broad discretion
24 to determine relevancy for discovery purposes. *See Hallett v. Morgan*, 296 F.3d 732,
25 751 (9th Cir. 2002). Similarly, district courts have broad discretion to limit discovery
26 where the discovery sought is "unreasonably cumulative or duplicative, or can be
27 obtained from some other source that is more convenient, less burdensome, or less
28 expensive." Fed. R. Civ. P. 26(b)(2)(C). Limits also should be imposed where the

1 burden or expense outweighs the likely benefits. *Id.*

2 Discussion

3 The Apex Doctrine

4 Courts consistently define apex employees as “high-level corporate executives.”
5 *See Apple Inc. v. Samsung Electronics Co., Ltd*, 282 F.R.D. 259, 263 (N.D. Cal. 2012)
6 (“the deposition of a high-level executive (a so-called apex deposition,)”); *DR Sys., Inc.*
7 *v. Eastman Kodak Co.*, 2009 WL 2973008 at *2 (S.D. Cal. Sept. 14, 2009) (“an official
8 at the highest level or apex of a corporation”); *Bank of the Ozarks v. Capital Mortg.*
9 *Corp.*, 2012 WL 2930479 at *1 (E.D. Ark. July 18, 2012) (“The apex doctrine protects
10 high-level corporate officials . . .”).

11 When a party seeks to take the deposition of an official at the highest level or
12 “apex” of a corporation a stricter standard applies to the party seeking discovery, and
13 the court may exercise its authority under the federal rules to limit discovery.
14 Fed.R.Civ.P. 26(b)(1). *See, e.g., Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.C.
15 R.I.1985) (Virtually every court that has addressed deposition notices directed at an
16 official at the highest level or “apex” of corporate management has observed that such
17 discovery creates a tremendous potential for abuse or harassment.). Even when
18 seeking the deposition of an apex official, “it is very unusual ‘for a court to prohibit
19 the taking of a deposition altogether absent extraordinary circumstances.’” *Apple*,
20 282 F.R.D. at 263 (quoting *WebSideStory, Inc. v. NetRatings, Inc.*, 2007 WL 1120567
21 at *2 (S.D. Cal. Apr. 6, 2007)). “When a witness has personal knowledge of facts
22 relevant to the lawsuit, even a corporate president or CEO is subject to deposition. A
23 claimed lack of knowledge, by itself it is insufficient to preclude a deposition.” *Id.*

24 When determining whether to allow an apex deposition, courts often consider:
25 (1) whether or not the high-level deponent has unique first-hand, non-repetitive
26 knowledge of the facts at issue in the case and (2) whether the party seeking the
27 deposition has exhausted other less intrusive discovery methods, such as
28 interrogatories and depositions of lower level employees. *See Salter v. Upjohn*, 593

1 F.2d 649, 651 (5th Cir.1979) (granting protective order for executive where plaintiff
2 had sought to depose the president of the company before deposing lower level
3 executives); *Baine v. General Motors Corp.*, 141 F.R.D. 332 (M.D.Ala.1991) (granting
4 protective order for Vice President of General Motors where plaintiff had failed first
5 to depose lower level employees).

6 Defendant contends that each potential deponent named in the joint motion is
7 an apex executive. (ECF No. 180). Plaintiff does not dispute that Mr. Long is an
8 apex executive, is silent on the issue regarding Mr. Sweeney, and claims that the
9 doctrine does not apply to former executives Messrs. Hunt and Mundt. *Id.* Former
10 executives, however, are within the scope of the apex doctrine. *See Mulvey v.*
11 *Chrysler Corp.*, 106 F.R.D. 364, 365 (D.R.I. 1985) (holding that the magistrate erred
12 in allowing the deposition of Lee Iacocca, the former Chairman of Chrysler Corp.);
13 *Gauthier v. Union Pac. R. Co.*, 2008 WL 2467016 (E.D. Tex. June 18, 2008)
14 (unpublished) (quashing the deposition of a former executive).

15 Each potential deponent participated to some extent in the 1997 transaction
16 between Golden Eagle and Liberty Mutual. The questions presented are (1) whether
17 the personal knowledge of each executive, attained during that period, is unique and
18 relevant to issues in this case; and (2) whether means less intrusive than deposition
19 remain available to Plaintiff's for acquiring such unique information. *See Salter*, 593
20 F.2d at 651.

21 The 1997 transaction is at the heart of this case. At the time of the transaction
22 Mr. Long was a member of the Board of Golden Eagle and is described by Mr.
23 Marziano as being his "right hand man" during the transaction. (ECF No. 180 at 16;
24 ECF No. 180-16 at 8). Mr. Sweeney worked for both Mr. Long and Mr. Marziano, and
25 it appears assisted with the interpretation of allegedly key documents. (ECF No.
26 180-16 at 5). Plaintiff's claim, and Defendant does not deny, that Mr. Hunt was a
27 chief negotiator of the transaction. (ECF No. 180 at 7). Mr. Mundt was a member of
28 Liberty's Mutual's Compensation Committee that approved the benefits plan at issue.

1 Each were in a position to have obtained unique personal relevant knowledge.

2 There is no evidence that Plaintiff's is seeking this discovery for the purpose of
3 harassment. Plaintiff has demonstrated sufficiently that these individuals may have
4 personal, non-repetitive knowledge of relevant facts. The Court does not believe that
5 there are less intrusive means of discovery available for these witnesses.
6 Accordingly, the apex doctrine does not bar their depositions.

7 The Ten Deposition Limit

8 Federal Rule of Civil Procedure 30(a)(2) requires leave of court when "parties
9 have not stipulated to [a] deposition," and "the deposition would result in more than
10 10 depositions" taken by a party. The advisory committee notes accompanying Rule
11 30(a)(2) state: "A deposition under Rule 30(b)(6) should, for purposes of this limit, be
12 treated as a single deposition even though more than one person may be designated
13 to testify." Fed. R. Civ. Proc. 30(a)(2)(A) Advisory Committee Notes (1993).

14 Defendant claims that Plaintiffs have already taken ten depositions and have
15 noticed seven others. (ECF No. 180-13 at 2). Defendant admits, in a footnote, that a
16 number of the depositions were taken pursuant to Rule 30(b)(6). Properly counting
17 the 30(b)(6) depositions, Plaintiffs admit to having taken seven depositions.

18 Plaintiffs may depose three more people before requiring leave of court. *See*
19 Fed. R. Civ. Proc. 30(a)(2)(A). Plaintiffs have noticed the depositions of Messrs. Long,
20 Sweeney and Hunt. Those depositions may proceed as noticed or Plaintiff may
21 choose to substitute Mr. Mundt for one of these other witnesses upon proper notice.
22 The Court is not authorizing any depositions beyond the allotted ten at this time.

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Conclusion

The motion to quash the deposition notices of Messrs. Long, Sweeney and Hunt is **DENIED**. The motion for leave to take more than ten depositions is **DENIED without prejudice.**

IT IS SO ORDERED

DATED: October 30, 2012


Hon. Mitchell D. Dembin
U.S. Magistrate Judge