

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

SOCIAL RANGER, LLC, a Delaware limited liability company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation,

Defendant.

C.A. NO. 14-1525-LPS


Redacted Version

**SOCIAL RANGER, LLC'S INITIAL DISPUTE LETTER TO
THE HONORABLE LEONARD P. STARK**

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Dated: November 1, 2016

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VIA EFILING AND HAND DELIVERY

November 1, 2016

The Honorable Leonard P. Stark
U.S. District Court for the District of Delaware
844 North King Street, Unit 26, Room 6124
Wilmington, DE 19801



RE: Social Ranger, LLC v. Facebook, Inc., C.A. No. 14-1525 (LPS); Oral Order (D.I. 194) –

Dear Chief Judge Stark:

Mark Zuckerberg's deposition should proceed. Mr. Zuckerberg personally (1) made public statements that induced others to create the relevant antitrust market, which has generated billions of dollars for Facebook; (2) personally negotiated contracts that restricted competition in the relevant market; and (3) single-handedly made the decision to forever foreclose competition in the relevant market. Mr. Zuckerberg may be a household name, but he is also *the* key witness for each of the central issues in this case. Facebook's recently produced documents and 30(b)(6) testimony confirm that there is no adequate substitute for his testimony. Facebook has not claimed any burden or potential harm related to his deposition, other than Mr. Zuckerberg being an important person. On the other hand, Social Ranger's ability to gather essential evidence and to try its case, in which it is claiming more than \$300 million in damages, would be materially prejudiced if it were prevented from taking the deposition of such an important witness. Social Ranger respectfully requests that Facebook produce Mr. Zuckerberg for deposition on a mutually-convenient date before December 1, 2016.

1. Facebook has not met its heavy burden of showing that Mr. Zuckerberg's deposition should not go forward.

The so-called "apex doctrine" does not relieve Mr. Zuckerberg from appearing at a properly-noticed deposition for at least three reasons. First, neither the apex doctrine—which has not been adopted by the Third Circuit¹—nor any other principle automatically bars the depositions of high-ranking corporate executives.² Indeed, the apex doctrine "is not a separate rule, but merely an application of the general rules regarding limitations on discovery" and, as such, a "heavy burden"³ remains "on the party that seeks to avoid discovery" to establish good cause for a protective order under Fed. R. Civ. P. 26(c).⁴

Second, even in jurisdictions applying the doctrine, "good cause" exists only when the party seeking to avoid deposition shows "specific prejudice or harm will result if no protective order is granted."⁵

¹ *In re Tylenol (Acetaminophen) Mktg., Sales Practices & Prod. Liab. Litig.*, No. 2:13-MD-02436, 2014 WL 3035791, at n.8 (E.D. Pa. July 1, 2014).

² *Otsuka Pharm. Co. v. Apotex Corp.*, No. CIV.A.07-1000, 2008 WL 4424812, at *5 (D.N.J. Sept. 25, 2008).

³ *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012); *see also In re Tylenol*, 2014 WL 3035791, at *2 ("It is rare for a court to issue a protective order that prohibits a deposition...The party moving to quash the subpoena has a heavy burden of persuasion.") (internal quotations and citation omitted).

⁴ *In re Nat'l W. Life Ins. Deferred Annuities Litig.*, No. 05-CV-1018-AJB WVG, 2011 WL 1304587, at *4 n.2 (S.D. Cal. Apr. 6, 2011); *Finisar Corp. v. Nistica, Inc.*, No. 13-CV-03345-BLF(JSC), 2015 WL 3988132, at *2 (N.D. Cal. June 30, 2015) ("the burden remains on the party' seeking to avoid the deposition.").

⁵ *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C-07-05634 CRB (DMR), 2014 WL 939287, at *1 (N.D. Cal. 2014) (citing *Phillips v. GMC*, 307 F.3d 1206, 1210–11 (9th Cir. 2002)); *see*

Third, a CEO's busy schedule or general importance to his or her company does not establish "good cause" if the CEO has—or even *may* have—knowledge of relevant information that is important to the case.⁶ Similarly, a mere assertion that the CEO lacks detailed knowledge or that his or her testimony would be cumulative is not enough to avoid deposition.⁷ And while the deposing party should attempt to obtain the information through less obtrusive means, a deposition can be blocked only if it "unreasonably cumulative or duplicative."⁸

Finally, applying these principles, courts grant the "extraordinary relief" of quashing the deposition of a high-ranking corporate executive only where "the proposed deponent has nothing to contribute,"⁹ lacks "any knowledge of the relevant facts,"¹⁰ or where the executive's "only connection with the matter is the fact that he was Defendant's CEO."¹¹

2. Mr. Zuckerberg has relevant, personal knowledge of the key facts.

The Court recently ordered Facebook to produce long-withheld documents from Mr. Zuckerberg's custodial file that demonstrate the depth and extent of Mr. Zuckerberg's personal involvement in Facebook's monopolization of the virtual-currency services market.

Direct involvement in helping create the relevant market. [REDACTED]

[REDACTED], Mr. Zuckerberg personally promised developers that they could "keep all the revenue" from applications built on the Platform. [REDACTED]

Direct involvement in foreclosing competition in the relevant market. A year later, Mr. Zuckerberg came up with a plan to monopolize the virtual-currency services market. [REDACTED]

Fourth, when the mandate went into effect, Mr. Zuckerberg also personally issued a company-wide "lockdown," or period of intense focus at the company, to ensure the quick death of Google's recently-announced Google+ social game network. [REDACTED] Policy changes made during Mr. Zuckerberg's lockdown, such as a prohibiting developers from "link[ing] to" or "promot[ing]" applications on "competing social platforms" and prohibiting cross-application virtual

also *In re Google Litig.*, No. C 08-03172 RMW PSG, 2011 WL 4985279, at *2 (N.D. Cal. Oct. 19, 2011) (same).

⁶ *Hunt v. Cont'l Cas. Co.*, No. 13-CV-05966-HSG, 2015 WL 1518067, at *1-2 (N.D. Cal. Apr. 3, 2015).

⁷ *Chevron Corp. v. Donziger*, No. 11 CIV. 0691 LAK JCF, 2013 WL 1896932, at *1 (S.D.N.Y. May 7, 2013)

⁸ Fed. R. Civ. P. 26(b) (emphasis added); see also *Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140, 145-46 (D. Mass. 1987) (although discovery may be "somewhat duplicative and cumulative" court does "not believe that the discovery is *unreasonably* so") (emphasis in original).

⁹ *Spadmark, Inc. v. Federated Dep't Stores, Inc.*, 176 F.R.D. 116, 118 (S.D.N.Y. 1997).

¹⁰ *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 126 (D. Md. 2009).

¹¹ *E.E.O.C. v. JBS USA, LLC*, No. 8:10CV318, 2012 WL 5328735, at *2 (D. Neb. Oct. 29, 2012).

currency, guaranteed that Google+ could not emerge as a viable competitor to Facebook’s Platform.

All of this is central to Social Ranger’s case. Testimony from Mr. Zuckerberg is critical for Social Ranger to prove—among other things—the facts underlying its core antitrust claims, Facebook’s intent in monopolizing the relevant market, and that Facebook’s justifications for its conduct are pretextual.

Mr. Zuckerberg is “sufficiently likely to have knowledge of matters that appropriately are the subject of discovery”¹² and has “first hand-knowledge of important, relevant, and material facts.”¹³ Because he has “personal information concerning” the key issues in the case, “the deposition[] clearly fall[s] outside the realm of the ‘apex deposition’ doctrine.”¹⁴

Facebook cannot meet its burden to block the deposition. It has never stated what “specific prejudice or harm” it might suffer if Mr. Zuckerberg appears for a single day of deposition in this matter.

3. Mr. Zuckerberg has unique knowledge, and his testimony would not be unduly cumulative.

[REDACTED]

[REDACTED] Those are key issues in the case, and Mr. Zuckerberg possesses unique, personal knowledge about them.

Mr. Zuckerberg possesses personal knowledge of important facts. Facebook’s corporate representative testified that much of this knowledge is unique to, and can only be obtained from, Mr. Zuckerberg himself. And Facebook has not identified any specific prejudice or harm that would befall Facebook absent a protective order. Social Ranger does not doubt that Mr. Zuckerberg is a very important, very busy individual. But Social Ranger has as much of a right as Facebook to obtain relevant evidence and to try its case. Facebook took repeated depositions of Social Ranger’s highest executives, including two depositions of Scott Lynn (Chairman, Board Member, and majority shareholder of Social Ranger’s owner, Adknowledge), Benn Legg (CEO of Adknowledge), and two depositions of Adam Caplan (CEO of Social Ranger). Facebook should be subject to the same scope of discovery, especially given Mr. Zuckerberg’s personal involvement in the key issues.

[REDACTED]. Social Ranger’s expert report on damages recently detailed how Facebook’s anticompetitive conduct caused [REDACTED] of damage to Social Ranger alone. Given the stakes of the litigation and the level of Mr. Zuckerberg’s involvement, a one-day deposition falls within Rule 26’s proportionality parameters.¹⁶ But even more fundamentally, “the public ... has a right to every man’s evidence.”¹⁷ As at least one other court has been forced to remind Facebook recently,¹⁸ “every man” includes Mark Zuckerberg. The deposition should proceed.

¹² *Spedmark*, 176 F.R.D. at 118 (allowing CEO deposition).

¹³ *First United Methodist Church of San Jose v. Atl. Mut. Ins. Co.*, No. C-95-2243 DLJ, 1995 WL 566026, at *2 (N.D. Cal. Sept. 19, 1995) (allowing corporate officer deposition).

¹⁴ *Mills v. Wal-Mart Stores, Inc.*, No. 06-5162, 2007 WL 2298249, at *2 (W.D. Ark. Aug. 7, 2007).

¹⁵ [REDACTED]

See Fed. R. Civ. P. 26(b)(1).

¹⁷ *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting Wigmore, Evidence (3d ed.) § 2192).

¹⁸ *ZeniMax Media, Inc., v. Oculus VR, LLC*, No. 3:14-cv-1849-P (N.D. Tex. Dec. 7, 2015), ECF 268.

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Respectfully submitted,

/s/ Kenneth L. Dorsney

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KLD/kjh

cc: All counsel of record (via electronic mail)

Exhibit A

**EXHIBIT REDACTED
IN ITS ENTIRETY**

Exhibit B

**EXHIBIT REDACTED
IN ITS ENTIRETY**

Exhibit C

**EXHIBIT REDACTED
IN ITS ENTIRETY**

Exhibit D

**EXHIBIT REDACTED
IN ITS ENTIRETY**

Exhibit E

**EXHIBIT REDACTED
IN ITS ENTIRETY**

Exhibit F

**EXHIBIT REDACTED
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Exhibit G

**EXHIBIT REDACTED
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Exhibit H

**EXHIBIT REDACTED
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