

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

**GOOD TECHNOLOGY
CORPORATION,
Plaintiff,**

Case No. 3:11-CV-2373-M-BK

**v.
LITTLE RED WAGON
TECHNOLOGIES, INC. and
FIXMO US, INC.,
Defendants.**

ORDER

Pursuant to the District Court's *Orders of Reference* (Docs. 169, 175), this cause is before the Court for a ruling on Plaintiff's *Motion for Protective Order Quashing Defendants' Notices of Deposition of King R. Lee* (Doc. 164) and Defendants' *Cross-Motion to Compel Deposition of King R. Lee* (Doc. 170). Upon review, Plaintiff's *Motion for Protective Order* (Doc. 164) is **GRANTED** and Defendants' *Motion to Compel* (Doc. 170) is **DENIED WITHOUT PREJUDICE**.

Fixmo U.S., Inc., ("Fixmo") and Little Red Wagon Technologies, Inc., ("LRW") make, use, sell, export, supply, and/or distribute products and/or services that allow for over-the-air synchronization of data with smartphones and other devices. (Doc. 109 at 5-6). In a lawsuit commenced in September 2011, Good Technology accused Fixmo and LRW of infringing five patents that all relate to specific methods of data synchronization. (Doc. 1; Doc. 109 at 3-17).

Plaintiff has filed a *Motion for Protective Order*, seeking to quash the notice of deposition of its former CEO King R. Lee. (Doc. 164). Plaintiff represents that it listed Lee as a Federal Rule of Civil Procedure 30(b)(6) witness who had knowledge of Plaintiff's patents, technology, products, strategy, and marketing. However, when Lee was replaced at the company

by Ms. Christy Wyatt in January 2013, she was substituted as a Rule 30(b)(6) witness.

Defendants want to take the depositions of both Wyatt and Lee, who currently serves as Plaintiff's Executive Chairman of the Board.

Plaintiff contends that Defendants do not need to depose these two "apex" witnesses, and they cannot show that Lee possesses "unique or superior knowledge" compared to that of several other scheduled corporate deponents. *Id.* at 8. At a minimum, Plaintiff seeks to postpone Lee's deposition until after the depositions of Wyatt and the other six corporate deponents, and then only allow Lee's deposition if Defendants can demonstrate its necessity. Plaintiff urges that Defendants must first "exhaust other less intrusive discovery methods." *Id.*

Defendants responded and cross-moved to compel, arguing that the evidence shows that Lee had significant interactions with Defendants and was directly involved in the events leading up to this litigation, including the decision to file this action. (Doc. 170 at 6-7, 12). Defendants have submitted with their response various email chains that include Lee. (Doc. 170-1). Defendants point to this evidence as proof that Lee was intimately involved with Plaintiff's overall intellectual property and competitive strategy and has personal knowledge about the events that led to this litigation. On the other hand, Defendants point out that Wyatt did not participate in any of these communications or interactions because she was not working for Plaintiff at the time and did not commence her employment there until after this suit had been filed. *Id.* at 7, 13. Defendants maintain that Plaintiff listed Lee in their initial disclosures as a knowledgeable witness, and its removal of him as a Rule 30(b)(6) witness cannot erase his knowledge. *Id.* at 9-11. Defendants oppose any delay in Lee's deposition, arguing that they will require his unique testimony regardless of the outcome of the other corporate witnesses' testimony. *Id.* at 14.

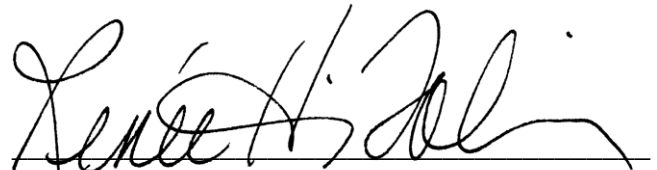
Federal courts permit the depositions of high-level (or “apex”) executives when conduct and knowledge at the highest levels of the corporation are relevant to the case. *See, e.g., Kimberly-Clark Corp. v. Cont’l Cas. Co.*, 2006 WL 3436064, at *2 (N.D. Tex. 2006). However, “the Fifth Circuit has recognized the need for first utilizing less-intrusive means before taking an apex deposition, by way of deposing lesser-ranking employees.” *Schmidt v. Goodyear Tire & Rubber Co.*, 2003 U.S. Dist. LEXIS 28130, at *3 (E.D. Tex. 2003) (citing *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979)). Unless the executive possesses “unique personal knowledge” about the controversy, the court should regulate the discovery process to avoid “oppression, inconvenience, and burden” to the executive and the corporation. *Computer Acceleration Corp. v. Microsoft Corp.*, 2007 WL 7684605, at *1 (E.D. Tex. 2007). Should alternative discovery methods prove inadequate, the court may revisit the issue if the deposition of a high-ranking executive remains necessary. *Turner v. Novartis Pharmaceuticals*, 2010 WL 5055828, at *4 (E.D. La. 2010); *Gauthier v. Union Pac. R. Co.*, 2008 WL 2467016, at *4 (E.D. Tex. 2008).

Without question, as Executive Chairman of the Board of the Plaintiff company, Lee is an apex executive. Moreover, there is insufficient evidence that Lee possesses “firsthand and *non-repetitive* knowledge” regarding the relevant issues. *See Computer Acceleration Corp.*, 2007 WL 7684605, at *1 (emphasis added). Specifically, while the emails attached to Defendants’ response demonstrate that Lee was involved in various meetings and strategy sessions, they do not show that Lee is the only person with knowledge of those events. Particularly germane to the Court’s determination that the requested relief is warranted is the fact that Defendants have not first deposed lower-ranking employees and Wyatt before seeking Lee’s deposition, as is the approach sanctioned by Rule 26(b)(1) and this Circuit’s precedent. *See Salter*, 593 F.2d at 651; *Schmidt*, 2003 U.S. Dist. LEXIS 28130, at *3.

Accordingly, Plaintiff's *Motion for Protective Order* (Doc. 164) is **GRANTED** and Defendants' *Motion to Compel* (Doc. 170) is **DENIED WITHOUT PREJUDICE**.

Notwithstanding the foregoing, Defendants may petition the Court for leave to depose Lee in the future, if, after taking the depositions of the other individuals proposed by Plaintiff, Defendants are unable to obtain the relevant and material information sought.

SO ORDERED on July 1, 2013.



RENEE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE