

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

DEC - 7 2015
CLERK, U.S. DISTRICT COURT
By  Deputy

**ZENIMAX MEDIA, INC. and
ID SOFTWARE, LLC,
Plaintiffs,**

v.

**OCULUS VR, LLC, et al.,
Defendants.**

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No. 3:14-CV-1849-P (BF)

ORDER

Before the Court is Facebook, Inc.'s ("Facebook") Motion for Protective Order Prohibiting Plaintiffs From Deposing Mark Zuckerberg, Facebook's Chief Executive Officer [D.E. 251] ("Motion for Protective Order") referred to United States Magistrate Judge Paul D. Stickney. *See* Electronic Order Referring Mot. [D.E. 254]. Upon consideration, the Motion for Protective Order [D.E. 251] is GRANTED in part. The deposition of Mr. Zuckerberg is ordered to proceed after the depositions of the other Facebook and Oculus VR, LLC ("Oculus") personnel have concluded.

In the Motion for Protective Order [D.E. 251], Facebook contends that ZeniMax Media, Inc. and id Software, LLC (collectively, "ZeniMax") demanded to depose Mr. Zuckerberg prior to taking a single deposition in this case. *See* Mot. [D.E. 251 at 1]. Facebook argues that ZeniMax's conduct is clearly improper under the *apex* doctrine which requires a party seeking to depose a high-ranking corporate executive to demonstrate that the executive has unique, relevant, and personal knowledge prior to seeking his deposition. *See id.* [D.E. 251 at 1]. Facebook contends that because ZeniMax has not exhausted less intrusive discovery options prior to seeking Mr. Zuckerberg's deposition, which is a required prerequisite in showing that he has unique, relevant, and personal knowledge, Facebook asked ZeniMax to withdraw the deposition notice for Mr. Zuckerberg. *See id.* [D.E. 251 at 1]. Facebook further contends that it asked ZeniMax to hold off on Mr. Zuckerberg's deposition and

revisit the issue after they completed the other scheduled depositions, but that ZeniMax insisted on going forward with Mr. Zuckerberg's deposition as noticed. *See id.* [D.E. 251 at 3].

ZeniMax argues in its opposition that it is beyond dispute that Mr. Zuckerberg personally tested prototypes of the Rift virtual reality headset prior to deciding whether to proceed with Facebook's multi-billion-dollar acquisition of Oculus, and that he personally communicated with Oculus's CEO Brendan Iribe to discuss Facebook's acquisition of Oculus. *See Opp'n* [D.E. 257 at 1-2]. ZeniMax further argues that it is beyond dispute that Mr. Zuckerberg has considerable personal authority to make independent decisions regarding significant acquisitions such as that of Oculus. *See id.* [D.E. 257 at 2]. Therefore, ZeniMax contends that it noticed Mr. Zuckerberg's deposition to explore how his personal decision to acquire Oculus, as well as his personal valuation of Oculus, depended on his personal testing of the Oculus Rift headset, including features of the headset that it contends were based on misappropriated ZeniMax technology. *See id.* [D.E. 257 at 2]. ZeniMax contends that such testimony will support its proof of liability and damages for its claims. *See id.* [D.E. 257 at 2].

ZeniMax further argues that while there are undoubtedly other individuals who spent more hours on the details of the Oculus acquisition than Mr. Zuckerberg, no one else is in a better position to testify about Mr. Zuckerberg's personal decision-making regarding that acquisition, and that he is uniquely knowledgeable about his own experiences in testing the Oculus Rift and the decisions he made based on those experiences. *See id.* [D.E. 257 at 4-5]. ZeniMax further argues that while Facebook alternatively proposes that the deposition of Mr. Zuckerberg proceed after the depositions of the other Facebook personnel who were involved in the Oculus acquisition, ZeniMax would then presumably have to file a motion to compel, and several rounds of discovery motions should not

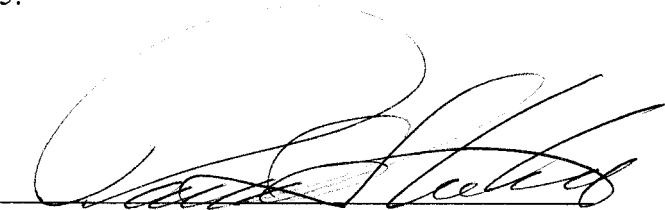
have to take place before ZeniMax is permitted to depose an individual whose personal knowledge is clearly relevant to the claims in this case. *See id.* [D.E. 257 at 7].

In the reply, Facebook continues to argue that ZeniMax failed to show that less intrusive means have been exhausted and that Mr. Zuckerberg has unique knowledge regarding the topics he will be questioned about. *See Reply* [D.E. 267 at 1]. Further, Facebook points out that the Northern District of Texas cases ZeniMax cites in its opposition: (1) *Kimberly-Clark Corp. v. Cont'l Cas. Co.*, No. 3:05-CV-475-D, 2006 WL 3436064, at *1 (N.D. Tex. Nov. 29, 2006); (2) *Gaedeke Holdings VII, Ltd. v. Mills*, No. 3:15-MC-36-D (BN), 2015 WL 3539658, at *1 (N.D. Tex. June 5, 2015); and (3) *Simms v. Nat'l Football League*, No. 3:11-CV-248-M (BK), 2013 WL 9792709, at *2-3 (N.D. Tex. July 10, 2013), all involved parties relying on Rule 30(b)(6) testimony or other discovery in seeking to take an *apex* deposition, whereas ZeniMax has not done so here. *See id.* [D.E. 267 at 3].

Given Mr. Zuckerberg's active participation in Facebook's acquisition of Oculus, he has unique knowledge, as Facebook's Founder, Chairman, and CEO, regarding his own decision to acquire Oculus and his valuation of Oculus based on his testing of the Rift headset which ZeniMax alleges includes misappropriated ZeniMax technology. "Federal courts have permitted the depositions of high level executives when conduct and knowledge at the highest corporate levels of the defendant are relevant in the case." *Kimberly-Clark Corp.*, 2006 WL 3436064, at *2 (quotations and citations omitted). However, "the United States Court of Appeals for the Fifth Circuit has recognized the need for first utilizing less-intrusive means before taking such as deposition, by way of deposing lesser-ranking employees." *Mills*, 2015 WL 3539658, at *3 (citing *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979)). "[T]he Court is guided to regulate the discovery process to avoid 'oppression, inconvenience, and burden' to the executive and the corporation." *Simms*, 2013 WL

9792709, at *3 (quoting *Computer Acceleration Corp. v. Microsoft Corp.*, No. 9:06-CV-140, 2007 WL 7684605, at *1 (E.D. Tex. June 15, 2007)). Therefore, Mr. Zuckerberg's deposition shall proceed after the other noticed depositions have been conducted so that less intrusive discovery can be exhausted and information that could adequately be obtained from lesser ranking employees will be acquired before his deposition.

SO ORDERED, December 7, 2015.

A handwritten signature in black ink, appearing to read "Paul D. Stickney", is written over a horizontal line.

PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE