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

IN RE: SUBPOENAS TO NON-PARTY MARK CUBAN **CUNG LEE, ET AL.,** **Plaintiffs,** **v.** **ZUFFA, LLC,** **Defendants.**	**No. 3:17-MC-27** **Related to Case: C.A. No.: 2:15-CV-01045-RFB-PAL (D. Nev.)**

MOTION TO QUASH DEPOSITION SUBPOENAS OF MARK CUBAN AND BRIEF IN SUPPORT

Third parties AXS TV LLC ("AXS") and Mark Cuban ("Mr. Cuban") move as follows for an order quashing Plaintiffs Cung Le's, Nate Quarry's, Jon Fitch's, Brandon Vera's, Javier Vazquez's, and Kyle Kingsbury's (collectively, "Underlying Plaintiffs") and Defendant Zuffa, LLC d/b/a Ultimate Fighting Championship and UFC's ("UFC") (the Underlying Plaintiffs and UFC, collectively, the "Parties" or singularly, a "Party") subpoenas of Mr. Cuban, attached hereto as Exhibits "A" and "B" (collectively the "Subpoenas" or singularly, a "Subpoena"). For the reasons set forth below, third parties AXS and Mr. Cuban respectfully request that the Subpoenas be quashed; or, in the alternative, that the Parties first conduct other, related depositions and then (i) confer with counsel for Mr. Cuban and AXS about the need and/or scope of the requested deposition, and then, if the parties cannot agree, (ii) show the Court why Mr. Cuban's deposition is necessary.

I. INTRODUCTION

The Parties cannot establish that they have met the standard for taking an apex deposition of Mr. Cuban, the President, CEO, and Chairman of AXS. The underlying litigation is an antitrust suit in which the Underlying Plaintiffs claim that UFC, the nation's leading mixed martial arts ("MMA") promoter, is violating federal antitrust laws. *See generally* CONSOLIDATED AMENDED ANTITRUST CLASS ACTION COMPLAINT, Case No. 2:15-CV-01045-RFB-(PAL) (D. NEV. FILED NOV. 20, 2015), attached hereto as Exhibit "C". Neither Mr. Cuban nor AXS are parties to the underlying litigation. *Id.* Testimony and documents from AXS are purportedly relevant to the underlying litigation because AXS (and its predecessor, HDNet) is a high-definition television network that either currently or previously broadcasted, promoted, and/or advertised MMA events. Additionally, counsel for the Underlying Plaintiffs have informed the undersigned that they are interested in examining Mr. Cuban about communications he had with UFC's President and CEO, Dana White – who, despite being the employee of a Party, has still not been deposed in the underlying litigation.

The Parties cannot show that they have attempted less intrusive means of obtaining testimony other than deposing Mr. Cuban. Indeed, AXS and Mr. Cuban offered to abate any motions to quash or other motion practice related to the Subpoenas and revisit the need for Mr. Cuban's deposition after (1) the deposition of the AXS executive responsible for AXS's MMA business, Andrew Simon, took place later this April and (2) Mr. White's deposition. The Underlying Plaintiffs, however, refused to abate the briefing and confer regarding the need for and/or scope of Mr. Cuban's deposition after Mr. Simon's and Mr. White's depositions. UFC did not respond to the request for an abatement, but previously informed the undersigned that UFC would not be opposed to a motion to quash the Subpoenas, but reserved its rights to

examine Mr. Cuban should his deposition be ordered. Accordingly, Mr. Cuban and AXS now come to this Court to respectfully request that it quash the Subpoenas seeking an apex deposition of Mr. Cuban.

II. PROCEDURAL BACKGROUND

The Underlying Plaintiffs initially served their Subpoena on March 6, 2017 (and completed formal service on April 10, 2017 by delivering the required witness fee on that date) and have set the deposition for April 21, 2017. After the Underlying Plaintiffs initial attempt at service, UFC issued its Subpoena for a deposition on the same date, April 21, 2017.

III. ARGUMENT AND AUTHORITY

Federal Rule of Civil Procedure 45(d)(3)(A) states that "the court for the district where compliance is required must quash or modify a subpoena that . . . subjects a person to undue burden." The moving party has the burden of proof. *See Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004). When the non-party opposing discovery shows that the requested discovery was overly broad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden, the Court may grant the motion to quash. *See S.E.C. v. Brady*, 238 F.R.D. 429, 437-38 (N.D. Tex. 2006); *Merrill v. Waffle House, Inc*., 227 F.R.D. 475, 477 (N.D. Tex. 2005).

Likewise, under Federal Rule of Civil Procedure 26(c), the Court may, for good cause, issue an order to protect a person from annoyance, embarrassment, oppression, or undue burden or expense. *See* FED. R. CIV. P. 26(c)(1). The Court has broad discretion in determining whether to grant a motion for a protective order. *See Harris v. Amoco Prod. Co.*, 768 F.2d 669, 684 (5th Cir. 1985).

"Whether a burdensome subpoena is reasonable must be determined according to the facts of the case, such as the party's need for the documents and the nature and importance of the litigation." *Wiwa*, 392 F.3d at 818 (internal quotation marks and footnote omitted). Further, "if the person to whom the [ ] request is made is a non-party, the court may also consider the expense and inconvenience to the non-party." *In re Subpoenas to Plains All Am. Pipeline, L.P.*, No. 1:11-CV-03543-WHP, 2014 WL 204447, at *3 (S.D. Tex. Jan. 17, 2014) (citation omitted).

When the subpoena at issue is *ad testificandum*, courts consider factors applicable to testimony, such as the following: "(1) the relevancy of the proposed testimony; (2) the need for the testimony; (3) the breadth of the subpoena; (4) availability of the testimony by other means; (5) burden on the subpoenaed party in obeying the subpoena." *E.A. Renfroe & Co. v. Moran*, No. 2:06-CV-1752-WMA, 2007 WL 4276906, at *2 (N.D. Miss. Dec. 3, 2007). "Whether a subpoena imposes an undue burden is a question of reasonableness determined by balancing the benefits and burdens of the deposition and whether the information is obtainable from an alternative source." *Davila v. Webb Cty.*, No. CV L-12-42, 2013 WL 12142346, at *1 (S.D. Tex. Mar. 14, 2013) (citing *Advanced Tech. Incubator, Inc. v. Sharp Corp.*, 263 F.R.D. 395, 399 (W.D. Tex. 2009).

Attached as Exhibit "D" is the affidavit of Mr. Cuban (the "Cuban Affidavit"), declaring that (1) Mr. Cuban is the President, CEO, and Chairman of AXS (Cuban Affidavit at ¶ 2); (2) Mr. Cuban does not possess any unique knowledge of the relevant facts in this case beyond that which might be provided by AXS management personnel, or by an AXS 30(b)(6) representative (Cuban Affidavit at ¶ 4); (3) the Underlying Plaintiffs have not deposed any AXS employees or an AXS 30(b)(6) representative (Cuban Affidavit at ¶ 5); and (4) due to Mr. Cuban's busy schedule and obligations as a high-level executive, requiring his deposition, as opposed to a

lower-level AXS employee's or an AXS 30(b)(6) representative's deposition, constitutes an undue burden (Cuban Affidavit at ¶ 6).

Examining the factors and facts set forth above, while testimony from someone associated with AXS may be relevant to the underlying litigation, the testimony is available by other means, namely lower-level executives like Mr. Simon or a 30(b)(6) representative. Furthermore, the Subpoenas are overly broad in that they contain absolutely no limitations or specification of topics. *See generally* Exs. A & B. Likewise, Mr. Cuban's schedule that is a result of his role as a high-level executive within AXS and dozens of other companies makes it a burden for him to comply with the Subpoenas. Cuban Affidavit at ¶ 6.

The protections of Rule 45 discussed above apply to high-level executives, referred to as "apex" executives. This is especially true when the apex executive is a non-party. For example, when the court in *Intelligent Verification System, LLC v. Microsoft Corporation* examined whether a subpoena *ad testificandum* to a non-party apex executive was an undue burden, the court specifically noted that the executive argued that his status as a non-party weighed strongly in favor of quashing the subpoena. No. 2:12CV525, 2014 WL 12544827, at *2 (E.D. Va. Jan. 9, 2014). Then, the court stated that "all of the above-listed factors weigh in favor of [the non-party]" and quashing the deposition. *Id.* Therefore, Mr. Cuban's status as a non-party, in addition to his status as an apex executive, leans in favor of this Court determining that the Subpoenas inflict an undue burden on Mr. Cuban.

The Texas Supreme Court has explained, "apex" deposition guidelines apply "[w]hen a party seeks to depose a corporate president or other high level corporate official." *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995). "Although this Court is not subject to Texas state court decisions applying the so-called Apex Doctrine, federal courts

permit the depositions of high-level executives, sometimes referred to as apex executives, when conduct and knowledge at the highest levels of the corporation are relevant to the case." *Gaedeke Holdings VII, Ltd. V. Mills*, 2015 WL 3539658, at *3 (N.D. Tex. June 5, 2015) (Horan, J.). *See e.g., Simms v. Nat'l Football League*, No. 3:11–cv–248–M–BK, 2013 WL 9792709, at *3 (N.D. Tex. July 10, 2013) (Toliver, Mag.); *Kimberly-Clark Corp. v. Cont'l Cas. Co.*, No. 3:05–cv–475–D, 2006 WL 3436064, at *2 (N.D. Tex. Nov. 29, 2006) (Fitzwater, J.). "But the United States Court of Appeals for the Fifth Circuit has recognized the need for first utilizing less-intrusive means before taking such a deposition, by way of deposing lesser-ranking employees." *Gaedeke Holdings*, 2015 WL 3539658, at *3 (citing *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979)).

In *Simms*, the court stated that it had previously held that the party seeking the executive's deposition could not depose an apex executive because it found that

> (1) [the individual whose deposition was sought] was an apex executive; (2) [the party seeking to depose the apex executive] did not establish that [the apex executive] possessed 'firsthand and non-repetitive knowledge' regarding the relevant issues thus warranting his deposition; and (3) [the party seeking the deposition] had not first attempted to depose lower-ranking employees before seeking the deposition of [the apex executive]

2013 WL 9792709, at *1. The *Simms* court then went on to explain that, due to subsequent alternative discovery leading to evidence that suggested that the apex executive was actively and personally involved in the dispute, it would now allow the party seeking the apex executive's deposition to do so. 2013 WL 9792709, at *1-3.

It is undeniable that Mr. Cuban is an apex executive within AXS because, as President, CEO, and Chairman, he is a high-level executive. Cuban Affidavit at ¶ 2. Indeed, Mr. Cuban is at the apex of more than fifty (50) companies, including the Dallas Mavericks, Landmark Theaters, Magnolia Pictures, among others. Cuban Affidavit at ¶ 6. Thus, he is extremely busy

and would be burdened by a deposition in a case in which he and his companies have no interest. *Id*. Furthermore, the Underlying Plaintiffs have not executed less-intrusive means of collecting relevant information thus rendering the burden on Mr. Cuban to certainly be undue. To the extent the Parties contend that AXS's efforts in the MMA industry are relevant, Mr. Simon—the AXS executive in charge of the company's MMA efforts for the past 10 years, or a 30(b)(6) representative deposed on AXS's behalf can provide that testimony. Cuban Affidavit at ¶ 4. To the extent the Parties assert that Mr. Cuban's communications with Mr. White are relevant, they can obtain that discovery from Mr. White—UFC's president and a representative of a Party to the underlying litigation. Thus, the Parties have not shown that they have exhausted less-intrusive means of obtaining the discovery they purportedly seek through Mr. Cuban's deposition.

In fact, AXS and Mr. Cuban offered to abate the motion practice until after Mr. Simon and Mr. White were deposed, and then revisit the need and claimed scope of Mr. Cuban's deposition. The Underlying Plaintiffs refused to enter into that agreement.

The Parties have not shown that Mr. Cuban has any unique personal knowledge of discoverable information that is unavailable from other sources. The Underlying Plaintiffs cannot show that the other depositions of AXS management personnel or an AXS 30(b)(6) representative (namely Mr. Simon) or the deposition of Mr. White (a Party-representative) are unsatisfactory, insufficient or inadequate. Rather, the Subpoenas are merely an attempt to harass AXS and Mr. Cuban and constitute an undue burden.

Therefore, AXS and Mr. Cuban respectfully request the Court (1) grant their motion to quash the deposition of Mr. Cuban and issue a protective order that protects Mr. Cuban from a deposition in this matter; and (2) grant a stay of the April 21, 2017 deposition return date in the

Subpoenas while the Court considers this motion. In the alternative, AXS and Mr. Cuban would respectfully request a protective or other order, requiring the Parties to conduct the depositions of Mr. Simon and Mr. White and then show the Court the need for Mr. Cuban's deposition, after first conferring with Mr. Cuban's and AXS's counsel.

Dated: April 17, 2017

Respectfully submitted,

By: */s/ Scott C. Thomas*

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document and the related appendix thereto have been served upon the following person(s) using the method(s) mentioned next to their name(s) on April 17, 2017:

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/s/Scott C. Thomas
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CERTIFICATE OF CONFERENCE

This is to certify that the undersigned conferred with the parties to the underlying litigation and the plaintiffs in the underlying litigation are opposed to the relief requested herein, and the plaintiffs in the underlying litigation were also opposed to abating the motion practice with respect to the subpoenas seeking Mr. Cuban's deposition until after other depositions took place. The defendant in the underlying litigation previously informed the undersigned that it did not oppose a motion to quash, but wished to reserve rights to question Mr. Cuban should the deposition be ordered to occur. The defendant informed the undersigned that it was not opposed to attempting to order the depositions in the manner proposed in Mr. Cuban and AXS's request regarding the abatement of the motion practice referenced above.

/s/Scott C. Thomas
Scott Thomas