UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, v. AMERICAN AIRLINES GROUP INC. and JETBLUE AIRWAYS CORPORATION, Defendants.	Case No.: 1:21-cv-11558-LTS

NON-PARTIES GLEN HAUENSTEIN, JOSEPH ESPOSITO, AND DELTA AIR LINES INC.'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL AND MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO QUASH TRIAL SUBPOENAS TO GLEN HAUENSTEIN AND JOSEPH ESPOSITO

INTRODUCTION

Defendants American Airlines Group Inc. ("American") and JetBlue Airways Corporation ("JetBlue") ask this Court to compel two of the most senior executives of non-party Delta Air Lines, Inc. ("Delta")—Glen Hauenstein (Delta's President) and Joseph Esposito (Delta's Senior Vice President of Network Planning)—to testify at trial in this action. But Defendants have not, and cannot, show "cause" that outweighs the burden on Delta's executives, both of whom reside and work in Atlanta, to interrupt their busy schedules to attend trial in Boston.

As to Mr. Hauenstein, Defendants acknowledge this is not the first time that they have subpoenaed him to testify in this case. Defendants' Memorandum in Support of their Motion (ECF 176) ("Defs' Memo.") at 2 n.2. The Northern District of Georgia quashed the subpoena requiring Mr. Hauenstein to appear for deposition.[1] But both Delta and the court offered Defendants the opportunity to again seek to depose Mr. Hauenstein if the already noticed depositions of other Delta witnesses (including Mr. Esposito) proved insufficient to Defendants' needs. *See* Mitchell Decl. Ex. 4, Order at 11 ("The Court cannot find, *at this juncture*, that American could not obtain the information it seeks through the depositions that it has already scheduled." (emphasis added)); Mitchell Decl. Ex. 3, Delta Reply at 2 ("At a bare minimum, the apex doctrine requires American to take these depositions before seeking Mr. Hauenstein's."). Notably, Defendants did not pursue that opportunity, presumably because the depositions of the three witnesses that Defendants took satisfied their need for information.[2] Defendants never expressed any concern to Delta about the sufficiency of the testimony they obtained during these depositions, or that they needed more

[1] *In re Subpoena to Glen Hauenstein*, No. 1:22-cv-01654-MHC (N.D. Ga.), Order dated May 20, 2022 (ECF 12), attached as Exhibit 4 to the Declaration of Michael S. Mitchell ("Mitchell Decl."), filed contemporaneously herewith.

[2] In addition to Mr. Esposito, Defendants also took the depositions of Delta employees Robert Somers (Senior Vice President, Global Sales) and Andrew Guenthner (Director, Alliances).

information. When American Airlines' counsel alerted Delta to the trial subpoenas at issue, she stated that Defendants would be willing to forego a trial subpoena for Mr. Hauenstein if Delta would agree to produce Mr. Esposito at trial—indicating yet again that Mr. Esposito's testimony would be sufficient for Defendants' needs. Mitchell Decl. ¶¶ 2-3.

As to Mr. Esposito, the only showing of "cause" that Defendants could muster to require his appearance at trial is based on *his deposition testimony*, which can be shown at trial, and the documents Delta produced in discovery that are equally available for trial—and as to which Defendants have either already questioned him, or chose not to do so when they had the chance. At bottom, Defendants' justification for requiring Mr. Esposito to appear for trial is *not* that it is necessary for him to be present for the Court to hear the substance of his testimony, but that it would be preferable to have him appear live. That is not sufficient reason to compel Mr. Esposito to undergo the burden of traveling to Boston and interfering with his significant professional commitments and personal plans.

Added to the lack of Defendants' need for the testimony of these non-party witnesses is the heavy and unwarranted burden that compelling their attendance at trial would impose on them. Mr. Hauenstein, as Delta's President and second highest-ranking executive, has a wide variety of responsibilities that require him to maintain a very full schedule. Declaration of Glen Hauenstein ¶¶ 6-7, 10-12 ("Hauenstein Decl."). Similarly, Mr. Esposito, as Senior Vice President of Network Planning, is responsible for Delta's global network strategy and also maintains a very busy schedule. Declaration of Joseph Esposito ¶¶ 6, 10 ("Esposito Decl."). Although Defendants indicate they would intend to call Mr. Esposito and Mr. Hauenstein between October 11 and 14 (Defs' Memo. at 4 n.4), Mr. Hauenstein has significant professional commitments on October 11 and 12 in Atlanta, and will be traveling overseas from October 13-23 for a personal trip that has

been planned for over a year. Hauenstein Decl. ¶ 11. Mr. Esposito is also scheduled to host and attend multiple meetings in Atlanta on October 11 and 12, and will be traveling out of the country for a planned vacation from October 13 to 17. Esposito Decl. ¶ 11. Requiring Mr. Hauenstein and Mr. Esposito to cancel their long-planned personal trips and take time out from their scheduled job responsibilities to instead prepare for, travel to, and sit for trial testimony would impose a significant burden on both Mr. Hauenstein and Mr. Esposito personally, and on Delta.

Finally, the trial subpoenas should be quashed because Defendants failed to provide adequate notice of them. Defendants' delay now only adds to the burden that would be placed on Messrs. Hauenstein and Esposito were they required to appear for trial, in light of their conflicting obligations. Defendants apparently put both Mr. Hauenstein and Mr. Esposito on their final trial witness list on June 13, 2022, but did not bother to inform Delta of that fact, or that they intended to serve trial subpoenas for their testimony until August 25—over two months later, and only a few weeks before trial was scheduled to begin. Delta had no reason to believe Defendants still sought testimony from either witness given the deposition testimony they obtained (including from Mr. Esposito), Defendants' lack of any expressed concern about the sufficiency of that testimony, and their failure to pursue Mr. Hauenstein's deposition after the other Delta depositions were concluded. Defendants' dilatory notice belies their claim of need, and underscores the burden of now requiring Mr. Hauenstein and Mr. Esposito at this late stage to upend their schedules and preexisting commitments.

ARGUMENT

Ordinarily, the 100-mile limit imposed by Rule 45 would preclude Defendants from seeking to compel Mr. Hauenstein and Mr. Esposito, who are located in Atlanta, Georgia, to appear at trial in Boston. However, the trial subpoenas in question were served pursuant to a special

statutory provision permitting nationwide service on witnesses in antitrust lawsuits brought by the United States government,

> Provided, That in civil cases no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application ***and cause shown***.

15 U.S.C. § 23 (emphasis added). While Delta understands this Court's Scheduling Order permits nationwide service of trial subpoenas under 15 U.S.C. § 23 (ECF 76 at 17-18 (¶ 20)), the statute also requires that Defendants must show "cause" to compel non-party Delta's executives, both of whom reside and work in Atlanta, to appear at the trial in Boston. *See United States v. Wyeth*, No. CV 03-12366-DPW, 2015 WL 8024407, at *4 (D. Mass. Dec. 4, 2015) (explaining that under 15 U.S.C. § 23 "cause must be shown for subpoenas issued to distant witnesses").

Moreover, the Court "must quash or modify a subpoena that . . . subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv); *see also United States ex rel. Lutz v. Berkeley Heartlab, Inc.*, No. 9:14-230-RMG, 2017 WL 5624254, at *3 (D.S.C. Nov. 21, 2017) (noting that while 15 U.S.C. § 23 removes the geographic limitation imposed by Rule 45 on trial subpoenas, "Rule 45 provides several bases, other than geographic limitations, for quashing a subpoena—most notably if the subpoena 'subjects a person to undue burden'"). In determining whether a subpoena imposes an "undue burden" on a non-party, courts consider the "relevance, the requesting party's need, the breadth of the request, and the burden imposed." *Satanic Temple, Inc. v. City of Boston*, No. 21-CV-10102-AK, 2022 WL 1028925, at *3 (D. Mass. Apr. 6, 2022); *see also Solamere Cap. v. DiManno*, --- F.Supp.3d ----, No. 22-MC-91197-ADB, 2022 WL 3154551, at *5 (D. Mass. Aug. 8, 2022) (stating "factors to consider" in assessing "undue burden" under Rule 45(d) "include the relevance of the documents sought, the necessity of the documents sought, the breadth of the

request, and the expense and inconvenience.") (internal quotations omitted); *United States ex rel. Lutz v. Berkeley Heartlab, Inc.*, 9:14-230-RMG, 2017 WL 11673310, at *1 (D.S.C. Dec. 1, 2017) ("The key factors are the relevance of the information requested, the need of the party for the testimony, and whether it is available from another source."). Importantly, "[c]oncern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs." *Solamere*, 2022 WL 3154551, at *5 (alteration in original) (quoting *Cascade Yarns, Inc. v. Knitting Fever, Inc.*, 755 F.3d 55, 59 (1st Cir. 2014)).

Mr. Hauenstein, Mr. Esposito, and Delta oppose Defendants' motion to compel and move this Court to quash the subpoenas under Federal Rule of Civil Procedure 45(d) because there is no "cause" under 15 U.S.C. § 23 to compel their appearance at trial in Boston—Defendants have not and cannot show any need for their live trial testimony—and doing so would impose an undue burden.

I. The Trial Subpoena to Mr. Hauenstein Should Be Quashed.

Defendants cannot show "cause" for the trial subpoena to Mr. Hauenstein because they have not demonstrated that Mr. Hauenstein's testimony is necessary and unavailable from another source—namely Mr. Esposito's deposition. Indeed, a sister court has already found that it is not, and American Airlines' counsel has conceded as much.

Defendants have already sought to compel testimony from Mr. Hauenstein once in this case through a deposition subpoena. Delta filed a motion to quash.[3] In opposing Delta's motion, American Airlines argued that it needed Mr. Hauenstein to testify about certain information for which he supposedly had unique, first-hand knowledge, specifically: "Delta's competitive

[3] Pursuant to Federal Rule of Civil Procedure 45, Delta's and Mr. Hauenstein's motion to quash his deposition subpoena was filed in the United States District Court for the Northern District of Georgia because that is where compliance was required.

strategies generally and its strategic and competitive response to the Northeast Alliance specifically"; "the formation and effects of joint ventures and code-sharing agreements in the airline industry"; and "the relevant market definition for New York City airports." Mitchell Decl. Ex. 4, Order at 8. American argued that Mr. Hauenstein "personally oversees Delta's response to the Northeast Alliance," and that given his broad "scope of responsibilities," only he (and Delta's CEO) "can speak definitively for Delta on the full breadth of key disputed issues." Mitchell Decl. Ex. 2, American Airlines Opp'n at 2.

Magistrate Judge Christopher Bly of the United States District Court for the Northern District of Georgia rejected those arguments and quashed the deposition subpoena pursuant to the apex deposition doctrine. *See* Mitchell. Decl. Ex. 4, Order. In its Order, the court explained that American Airlines failed to show the requisite need to depose such a senior executive of Delta. *Id.* at 12-13. The court reviewed the evidence American Airlines presented as demonstrating the need for Mr. Hauenstein's deposition, and found nothing that indicated lower level, but still senior, employees at Delta—including Mr. Esposito—could not competently testify on the subjects sought. *Id.* at 9-11. This Court should quash the trial subpoena to Mr. Hauenstein for the same reasons.

Undeterred, Defendants now put forward the same rejected arguments to require Mr. Hauenstein to appear at trial—a far *greater* burden than a deposition in Atlanta in addition to no demonstrated need, in light of deposition testimony from three Delta executives. In particular, Defendants recycle the same rejected arguments that Mr. Hauenstein "has firsthand knowledge of the issues that are highly relevant to the underlying action" because he "has ultimate responsibility for all aspects of Delta's business," "uses a top-down leadership model and takes an active role in

developing and approving Delta's strategies," and "personally oversees Delta's response to the Northeast Alliance." Defs' Memo. at 2, 8.[4]

Despite Defendants' conclusory assertions, the evidence they cite shows—just as the Georgia court found—that Mr. Hauenstein delegated to others primary responsibility for developing Delta's response to the Northeast Alliance. Mitchell Decl. Ex. 4, Order at 9 ("[F]rom the evidence American cites in support of its assertion that Mr. Hauenstein has knowledge in these areas, it appears that there are others more directly involved in the planning and strategizing relevant to the underlying action who could provide the necessary information that American seeks."); *see also* Hauenstein Decl. ¶¶ 8-9. For example, Mr. Esposito's deposition testimony cited by Defendants shows Delta's decision-making on the Northeast Alliance was not made by Mr. Hauenstein, but "coalesced as a commercial group." Defs' Memo. at 9 (citing Esposito Dep. at 96:15-97:2).[5]

Similarly, DX 247 reflects a meeting between the leaders of Delta's Network Planning department and Mr. Hauenstein on July 30, 2020, during which Mr. Hauenstein's "feedback" and

[4] Defendants' motion to compel identifies several more topics that they claim justify compelling the testimony of Mr. Esposito and Mr. Hauenstein, but do not argue that only Mr. Hauenstein, as opposed to Mr. Esposito, can provide such testimony. To the contrary, they readily admit Mr. Esposito can testify, and in fact already has testified, as to those topics. Defs' Memo. at 2 ("The foregoing examples are only a few of the key points discussed in . . . Mr. Esposito's deposition testimony."); *see also id.* at 6-8 (quoting Mr. Esposito's deposition testimony).

[5] In support of their motion to compel Mr. Hauenstein's appearance at trial, Defendants cite the deposition testimony of Scott Laurence, identified as a "former Delta employee." Defs' Memo. at 2-3 n.3. Defendants fail to mention that Mr. Laurence is also a former employee of Defendant JetBlue, and a current employee of Defendant American. So Mr. Laurence is hardly unbiased. Even more incredibly, Defendants neglect to mention that: Mr. Laurence was a Delta employee for less than a month in early 2022 (long after the NEA was announced in June 2020); reported to Mr. Esposito, not Mr. Hauenstein; and was walled off from discussions, if any, about the "Northeast Alliance." Esposito Decl. ¶ 8. Thus, he is not in a position to speak credibly, much less knowledgeably, about either Mr. Hauenstein's "leadership model" or his role in assessing Delta's response to the Northeast Alliance.

"guidance" was for others to "spool up a team to further the analysis and develop" Delta's response plan. Notably, Joe Esposito is copied on the email, and American Airlines examined him about it in his deposition. Esposito Dep. at 102:19-120:4 (discussing DX 247 (Esposito Dep. Ex. 3, DAL-00015450)). As Mr. Esposito testified, Mr. Hauenstein's only feedback raised "the same questions we all had about what it means for us and understanding the pros and cons." Esposito Dep. at 96:20-22. Defendants also neglect to inform the Court that Mr. Hauenstein did not even attend the follow up meeting, which was instead requested by Mr. Esposito. DX 241 (Aug. 18, 2020 email: "Joe has requested that we get together this week and review the strategy and next steps . . . .").[6]

Even more unhelpful to Defendants is DX 249, which reflects an email exchange in which the leader of Delta's Domestic Network Planning team summarizes for Mr. Hauenstein Defendants' "next set of NYC/BOS route additions," and lays out Delta's planned announcement of its Fall 2021 schedule on certain routes. DX 249. Nothing in the email indicates Mr. Hauenstein's comments were directed in response to the Northeast Alliance; they were rather focused on Delta's own plans. Defendants again neglect to mention that Mr. Esposito is copied on the email, and that they chose not to ask him about it at his deposition. Instead, Defendants ask this Court to issue a subpoena to a non-party competitor's second-highest executive so they can solicit trial testimony about a single document of questionable relevance they decided not to inquire about while deposing the individual with knowledge about the document.

In sum, none of the arguments or evidence proffered by Defendants warrants this Court revisiting the ruling of a sister district court. What was true in discovery is true at trial. There is nothing to suggest that Mr. Hauenstein's testimony is needed, or that any testimony he might

[6] American Airlines also examined Mr. Esposito about DX 241 (DAL-00011908) (and DX 242, 00011909) in his deposition. *See* Esposito Dep. at 121:20-122:7 (discussing Esposito Dep. Ex. 4).

provide is unique, and unavailable from others. Rather, their motion makes clear they already obtained testimony on the subjects they identify from Mr. Esposito's deposition. As Defendants admit, Mr. Esposito's deposition testimony "demonstrates that he has firsthand knowledge of topics central to this proceeding," and he "extensively discussed" those topics, especially Delta's response to the Northeast Alliance, at his deposition. Defs' Memo. at 6-8. Thus, there is no "cause" to justify haling Mr. Hauenstein into court to testify at trial.

Defendants' conduct following Judge Bly's Order quashing the deposition subpoena further belies their supposed need for Mr. Hauenstein's trial testimony. Both Delta and the court invited Defendants to again seek to depose Mr. Hauenstein if the already noticed depositions of the witnesses Delta had offered (including Mr. Esposito) proved insufficient to Defendants' needs.[7] But Defendants never followed up. Following the three Delta depositions they took, Defendants did not inform Delta that they believed Mr. Hauenstein's testimony was still needed, or that the various Delta employees deposed had provided insufficient testimony—until a trial subpoena was raised for the first time on August 25. Mitchell Decl. ¶ 2. If Defendants believed they needed Mr. Hauenstein's testimony in this case, they should have sought his deposition, or at the very least, informed Delta long ago that Defendants had put him on their final trial witness list on June 13, 2022, and of their intent to serve him with a trial subpoena. Yet Defendants did none of that. What's more, counsel for American Airlines told Delta's counsel that they would forego the trial subpoena to Mr. Hauenstein if Delta would agree to make Mr. Esposito available. *Id.*

[7] *See* Mitchell Decl. Ex. 1, Delta Memo. at 11-12 ("The Court should require American Airlines take Mr. Esposito's deposition (and others if necessary), before requiring Mr. Hauenstein to sit for deposition. Only after such other depositions occur can there be any meaningful assessment of whether Mr. Hauenstein's deposition is necessary . . . ."); *see also* Mitchell Decl. Ex. 4, Order at 11 ("The Court cannot find, at this juncture, that American could not obtain the information it seeks through the depositions that it has already scheduled.").

at ¶ 3. That concession alone vitiates any cause Defendants might have under 15 U.S.C. § 23. And it should eliminate any concern the Court might have about depriving Defendants of testimony from Mr. Hauenstein that Defendants claim they need.

Finally, the burden on Mr. Hauenstein to fly to Boston to testify at trial is undue. As the Northern District of Georgia court recognized in quashing his deposition subpoena, Mr. Hauenstein is the President of Delta and second highest-ranking executive in the company. Mitchell Decl. Ex. 4, Order at 2. Mr. Hauenstein's varied responsibilities require him to maintain a very full schedule, and compelling him to take time out from those job responsibilities to prepare for, travel to, and sit for trial testimony would impose a significant burden on both him and Delta. Hauenstein Decl. ¶¶ 6-7, 10-13. And with respect to the period during which American says it would likely seek Mr. Hauenstein's appearance (*i.e.*, the week of October 10) (Defs' Memo. at 4 n.4), Mr. Hauenstein is scheduled to travel overseas from October 13 through October 23 for a personal trip that has been planned for over a year. *Id.* at ¶ 11. On October 11 and 12, Mr. Hauenstein has several meetings in preparation for Delta's quarterly earnings release on October 13, 2022, as well as a number of other executive level meetings. *Id.*[8] As discussed in more detail below *(see infra* at Section III, p. 14), Defendants' failure to provide adequate notice of the trial subpoena to Mr. Hauenstein further underscores the undue burden of forcing him to modify or cancel his plans to attend the trial in Boston.

II. The Trial Subpoena to Mr. Esposito Should Also Be Quashed.

Defendants also cannot show "cause" for Mr. Esposito's trial testimony, let alone to overcome the undue burden that would be imposed by forcing him to Boston for trial.

[8] With respect to earlier periods in the trial schedule, Mr. Hauenstein has other significant pre-existing professional and personal commitments. Hauenstein Decl. ¶ 12.

Mr. Esposito already sat for a deposition in this matter on June 21, 2022. At that video recorded deposition, American Airlines and the United States each extensively questioned Mr. Esposito. Defendants gave no indication at the time, or any time before August 25, that Mr. Esposito's testimony was insufficient for their needs. Nor did Defendants ever suggest that they felt they needed more deposition time with Mr. Esposito. Defendants should not now be permitted to impose the burden on Mr. Esposito of preparing for and attending a trial in Boston just so they can get a second bite at the apple.

Defendants' motion makes clear that Mr. Esposito's trial testimony is unnecessary. Defendants argue they need Mr. Esposito's trial testimony on the following topics: "Delta's perception of the competitive landscape in the Northeast": "Delta's dominant presence in Boston and New York before the NEA was announced"; "the significance of having a broad network"; "the airline features valued by corporate customers"; and "the benefits of airline partnerships for enhancing an airlines network." Defs' Memo. at 1-2. But in arguing the need for his trial testimony on those topics, Defendants devote three pages of their brief to quoting from Mr. Esposito's deposition *on those very topics*. *See, e.g.*, *id.* at 6-7 (explaining that Mr. Esposito could testify about the purported competitive justification of the Northeast Alliance and Delta's attention to it, by quoting extensively from Mr. Esposito's deposition transcript); *id.* at 7-8 (same for Delta's "perception of the competitive landscape in the Northeast"). Defendants do not have "a tremendous need for the testimony" from Mr. Esposito that they cannot obtain "from any other source" (Defs' Memo. at 9), because they already have it *from Mr. Esposito,* whose video

deposition can be shown at trial. The same is true of the documents produced by Delta, which are equally available for use at trial.[9]

The burden here on Mr. Esposito is also undue. Mr. Esposito is Delta's Senior Vice President of Network Planning. Esposito Decl. ¶ 6. He oversees Delta's entire Network Planning department and is responsible for Delta's global network strategy—responsibilities that involve a busy and full schedule. *Id.* at ¶¶ 6, 10. From October 10 to October 13, Mr. Esposito has multiple business meetings in Atlanta, before leaving the country on the afternoon of October 13 for a long-planned personal trip through October 17. *Id.* at ¶ 11.[10] Compelling Mr. Esposito to cancel or modify his trip, and take time out of his job responsibilities to prepare for, travel to, and sit for trial testimony, would impose a significant burden, especially when he has already provided a day of deposition testimony in this matter. *Id.* at ¶ 13. Defendants' delay in notifying Delta of their intention to subpoena Mr. Esposito for trial, and seeming satisfaction with the testimony he has already given, have only added to the current disruption to his schedule that Mr. Esposito would face if he were required to appear for trial.

Defendants create a strawman that Mr. Esposito seeks to quash exclusively on the basis that he has already been deposed. Defs' Memo. at 11. As described above, Mr. Esposito establishes the burden that compliance would place on him. And even the cases cited by Defendants show why Mr. Esposito should not be compelled to appear at trial. In *Deines v.*

[9] Defendants cite two Delta-produced documents as the basis for their need for Mr. Esposito's trial testimony. *Id.* at 5-6 (citing DX 241 & DX 243). Defendants have already questioned Mr. Esposito extensively at his deposition about DX 241 (Esposito Dep. Ex. 4) (*see* Esposito Dep. 120:12-137:14), as well as others on their trial exhibit list: DX 232 (Esposito Dep. Ex. 8), DX 237 (Esposito Dep. Ex. 6), DX 239 (Esposito Dep. Ex. 5), DX 242 (part of Esposito Dep. Ex. 4), DX 247 (Esposito Dep. Ex. 3), DX 248 (Esposito Dep. Ex. 7). Defendants did not bother to ask Mr. Esposito about DX 243 at his deposition, which belies their claim about it being necessary.

[10] Mr. Esposito also has significant personal and professional obligations, including pre-existing trips, during the rest of the scheduled trial period. Esposito Decl. ¶ 12.

Vermeer Manufacturing Co., 133 F.R.D. 46 (D. Kan. 1990), the plaintiff in a product liability action sought a *second deposition* of the defendant company's founder, who remained on its board of directors and who was involved in the design and manufacture of the product alleged to have caused the plaintiff's injury. *Id.* at 48-49. The plaintiff had expected the witness to be available at trial until the witness's doctor sent a letter claiming he would not be able to testify due to a medical condition, and on that basis the court permitted a second deposition. *Id.* at 47. Even then, the court imposed restrictions on the conduct of the deposition. *Id*. at 49. Critically, the court did not discuss factors relevant to non-party testimony or whether good cause exists to compel trial testimony from a competitor's executive when he has already been deposed.

United States v. IBM addresses the admissibility of party depositions, but it too undercuts Defendants' request to compel Mr. Esposito to appear at trial to the extent it is based on some perceived deficiency in the deposition record. *United States v. Int'l Bus. Machs. Corp.*, 90 F.R.D. 377, 381 (S.D.N.Y. 1981). In that case, the government objected to the defendant's proposed admission of deposition testimony because the government had taken only "incomplete," "discovery" depositions rather than "evidentiary" depositions intended for trial. *Id.* The court rejected that argument, and held that the "admission of unfavorable deposition records was a risk the government assumed when it chose to limit its questioning." *Id.* Thus, even if "Defendants had no expectation at the time [Mr. Esposito's] deposition was taken that his deposition would be a substitute for trial testimony" (Defs' Memo at 12 n.5), they assumed that risk.[11]

[11] Defendants argue the Scheduling Order permitting nationwide service of trial subpoenas somehow meant Defendants had no reason to expect Mr. Esposito's "deposition testimony would be a substitute for trial testimony." Defs' Memo. at 12 n.5. This suggests Defendants knew they were going to subpoena Mr. Esposito for trial before they took his deposition, but then did not alert him of that fact for over two more months until trial was a month away.

At bottom, Defendants' justification for requiring Mr. Esposito to appear for trial is not that it is necessary for him to be present for the Court to hear the substance of his testimony, but that it would be preferable to have him appear live. That is not sufficient reason to compel Mr. Esposito to undergo the burden of traveling to Boston and disrupting his significant pre-existing commitments.

III. Defendants' Inadequate Notice to the Witnesses and Delta Further Warrants Quashing the Subpoenas.

Defendants' failure to provide Mr. Hauenstein, Mr. Esposito and Delta with adequate notice in seeking to compel their trial testimony further supports quashing the trial subpoenas. The deadline for the parties to exchange final trial witness lists was June 13, 2022. ECF No. 76 at 2. Defendants apparently included both Mr. Hauenstein and Mr. Esposito on their final trial witness list but never bothered to tell Delta. Instead, Defendants inexplicably waited until August 25—almost two and half months later—to inform Delta's counsel for the first time that they planned to seek to compel them to attend a trial to begin (by that point) in a month. Mitchell Decl. ¶ 2. Until then, as far as Delta, Mr. Hauenstein and Mr. Esposito knew, Defendants were satisfied they had obtained everything that they needed from Mr. Esposito's deposition and Defendants' Motion to compel does not claim otherwise. Thus, as far as Mr. Hauenstein and Mr. Esposito knew, they were free to make plans that conflicted with the trial in this case, and they did so. Even after Delta confirmed on August 30 that Delta would move to quash the subpoenas if served, Defendants then waited another two weeks (September 13) to actually serve the subpoenas. ECF 177, Declaration of Marguerite M. Sullivan, at ¶¶ 6, 8 ("Sullivan Decl."). Defendants offer no explanation for these

delays, all of which suggest Defendants were not especially concerned about the need for Mr. Hauenstein's and Mr. Esposito's attendance at trial.[12]

Without apparent irony, Defendants argue that "because Mr. Hauenstein and Mr. Esposito have always appeared on Defendants' witness list, and *all parties* have known about both individuals' crucial involvement with the subject matter before this Court, they should be compelled to comply with the subpoena." Defs' Memo. at 11 (emphasis added). But Delta is not a party.[13]

CONCLUSION

Mr. Hauenstein, Mr. Esposito, and Delta respectfully request that the Court quash Defendants' trial subpoenas to Mr. Hauenstein and Mr. Esposito.

[12] Defendants' assertion that they "will afford Mr. Esposito and Mr. Hauenstein flexibility in scheduling their appearance and testimony [the week of October 10] to accommodate any conflicts" (Defs' Memo. at 4. n.4) rings hollow given their failure to provide sufficient notice of the trial subpoenas.

[13] Nor is this the only time that Defendants lose sight of Delta's third party status. For instance, Defendants repeatedly cite *Hardisty v. Moore*, where the witnesses sought to be compelled to appear at trial *were the Defendants*. *Hardisty v. Moore*, No. 11-cv-01591-BAS(BLM), 2014 WL 4472718, at *1 (S.D. Cal. Sept. 10, 2014). A more appropriate analogy would be to the defendant (but third-party witness as to the plaintiff seeking the subpoena) in *Johnson v. Bay Area Rapid Transit District*, No. 09-CV-0901-EMC, 2014 WL 2514542, at *2 (N.D. Cal. June 4, 2014), who was deposed but then deployed overseas prior to trial. Weighing the interests of justice, the court declined to issue a subpoena because "it is not 'impractical' for Plaintiffs to obtain the information they reasonably need from [the witness] without his presence because (1) an extensive video deposition of [the witness] has been taken on the facts underlying this action and (2) the Federal Rules expressly provide a vehicle for admission of this deposition testimony." *Id*. Nor does this case present unique factors requiring in-person testimony for the benefit of the fact-finder. *Cf. Pac. Gas & Elec. Co. v. Howard P. Foley Co.*, No. 85-cv-2992, 1993 WL 299219, at *10 (N.D. Cal. July 27, 1993) (ordering third-party witness to appear at trial to permit counsel to "raise adverse inferences against witnesses who refuse to testify in response to probative evidence").

Dated: September 21, 2022

Respectfully submitted,

/s/ Michael S. Mitchell

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CERTIFICATE OF SERVICE

I certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Dated: September 21, 2022

/s/ Michael S. Mitchell

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, v. AMERICAN AIRLINES GROUP INC. and JETBLUE AIRWAYS CORPORATION, Defendants.	Civil Action No.: 1:21-cv-11558-LTS

DECLARATION OF MICHAEL S. MITCHELL

I, Michael S. Mitchell, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am an attorney licensed to practice law in Washington, D.C., and have been admitted *pro hac vice* to this Court in the above-captioned case. I am a partner at the law firm of Boies Schiller Flexner LLP, counsel to Delta Air Lines, Inc. ("Delta"), which moves the Court, along with Glen Hauenstein and Joseph Esposito, to quash the trial subpoenas served on Mr. Hauenstein and Mr. Esposito for their appearance at the upcoming trial in this action. I submit this declaration in support of Delta's motion to quash the subpoenas and opposition to Defendants' motion to compel. I have personal knowledge of the facts contained herein, and, if called as a witness, I could and would testify competently thereto.

2. On August 25, 2022, I spoke by telephone with Marguerite Sullivan of Latham & Watkins, LLP, counsel for American Airlines in this case. Ms. Sullivan informed me that Defendants American Airlines and JetBlue Airways had identified Mr. Hauenstein and Mr. Esposito on their final trial witness list, and that Defendants intended to serve subpoenas on Mr.

Hauenstein and Mr. Esposito for them to appear and testify at trial. This was the first time Defendants informed me or anyone representing Delta that Defendants intended to seek the trial testimony of Mr. Hauenstein and Mr. Esposito and had put them on their final trial witness list.

3. I told Ms. Sullivan that I expected Delta would be inclined to move to quash the subpoenas, but that I would confer with Delta. In response, Ms. Sullivan told me that Defendants would be willing to forego the subpoena to Mr. Hauenstein if Delta agreed to make Mr. Esposito available to testify at trial. I told her I would inform Delta of her proposal and get back to her.

4. On August 30, 2022, I spoke with Ms. Sullivan again. I informed her that I had conferred with Delta, and that if Defendants served trial subpoenas on Mr. Esposito and/or Mr. Hauenstein, Delta would move to quash the subpoenas.

5. Attached hereto as **Exhibit 1** is a true and correct copy of Delta's Memorandum of Law In Support of Motion for Protective Order and to Quash Deposition Subpoena to Glen Hauenstein, filed on April 12, 2022 in *In re Subpoena to Glen Hauenstein*, Case No. 1:22-mi-00029-MHC-CCB (N.D. Ga.) (ECF 1-1) (case number later changed to Case No. 1:22-cv-1654-MHC-CCB (N.D. Ga.)).

6. Attached hereto as **Exhibit 2** is a true and correct copy of American Airlines' Opposition to Motion for Protective Order and to Quash Deposition Subpoena to Glen Hauenstein, filed on April 26, 2022 in *In re Subpoena to Glen Hauenstein*, Case No. 1:22-cv-1654-MHC-CCB (N.D. Ga.) (ECF 4).

7. Attached hereto as **Exhibit 3** is a true and correct copy of Delta's Reply In Support of Motion for Protective Order and to Quash Deposition Subpoena to Glen Hauenstein, filed on May 10, 2022 in *In re Subpoena to Glen Hauenstein*, Case No. 1:22-cv-1654-MHC-CCB (N.D. Ga.) (ECF 11).

8. Attached hereto as **Exhibit 4** is a true and correct copy of United States Magistrate Judge Christopher C. Bly's Order dated May 20, 2022 granting Delta's Motion for Protective Order and to Quash Deposition Subpoena to Glen Hauenstein in *In re Subpoena to Glen Hauenstein*, Case No. 1:22-cv-1654-MHC-CCB (N.D. Ga.) (ECF 12).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21st day of September, 2022 in Washington, DC.

Michael S. Mitchell

EXHIBIT 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

In re Subpoena to *Glen Hauenstein*.	Case No. 1:22-mc- **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND TO QUASH DEPOSITION SUBPOENA TO GLEN HAUENSTEIN** Underlying Litigation: *United States v. Am. Airlines Grp. Inc.*, No. 1:21-cv-11558-LTS (D. Mass.)

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND TO QUASH DEPOSITION SUBPOENA TO GLEN HAUENSTEIN

PRELIMINARY STATEMENT

On March 30, 2022, Glen Hauenstein accepted service of a non-party deposition subpoena issued by Defendant American Airlines Group Inc. ("American Airlines") in the underlying action *United States of America, et al. v. American Airlines Group Inc. and JetBlue Airways Corporation*, No. 1:21-cv-11558-LTS (D. Mass.) (the "Northeast Alliance Lawsuit"). *See* Decl. of Michael Mitchell ("Mitchell Decl."), Ex. 1 (the "Subpoena"). Mr. Hauenstein is President of Delta Air Lines, Inc. ("Delta") a position he has held since May 2016. Neither Mr. Hauenstein nor Delta are a party to the Northeast Alliance Lawsuit.

Delta and Mr. Hauenstein move the Court for a protective order under Federal Rule of Civil Procedure 26(c)(1), and to quash the Subpoena under Federal Rule of Civil Procedure 45(d). The Court should protect Mr. Hauenstein from the deposition Subpoena under the "apex doctrine," which prohibits American Airlines from obtaining Mr. Hauenstein's deposition because: (1) requiring Mr. Hauenstein, Delta's second highest-ranking executive, to sit for a deposition would impose an undue burden on both himself and Delta; (2) Mr. Hauenstein does not possess unique information relevant to the Northeast Alliance Lawsuit; and (3) American Airlines has made no attempt to first obtain the information sought from Mr. Hauenstein through other means, including from depositions of other, lower-ranking Delta

executive witnesses (whom Delta has previously offered, and remains willing, to make available to American Airlines for deposition).

BACKGROUND

In September 2021, the United States filed a lawsuit in the United States District Court for the District of Massachusetts against Defendants American Airlines and JetBlue Airways Corporation ("JetBlue") alleging that their "Northeast Alliance"—a joint venture pursuant to which the two airlines share revenues and coordinate their scheduling and other commercial activities on certain routes in the Northeast part of the United States—violates the U.S. antitrust laws. Neither Mr. Hauenstein nor Delta is a party to the Northeast Alliance Lawsuit, and Mr. Hauenstein has never been an employee or representative of either American Airlines or JetBlue. Declaration of Glen Hauenstein ("Hauenstein Decl.") ¶¶ 3-4.

Delta, headquartered in Atlanta, Georgia, is one of the world's largest airlines, operating nearly 5,000 flights daily across the globe, and is a publicly-traded, Fortune 500 company. Hauenstein Decl. ¶ 5. As Delta's President, Mr. Hauenstein is the airline's second highest-ranking executive officer. Hauenstein Decl. ¶ 6. Mr. Hauenstein has a wide range of responsibilities at Delta, including responsibility for the overall performance and strategy of the business, managing and overseeing senior level executives responsible for Delta's network, revenue management,

reservation sales, customer care, customer engagement and loyalty strategies, and representing Delta at industry events. *Id.* While Mr. Hauenstein oversees the departments at Delta responsible for Delta's network, revenue management, reservation sales, customer care, customer engagement and loyalty strategies, he is not involved in the day-to-day activities of each of those groups. Hauenstein Decl. ¶ 7. Rather, the senior executives who lead those groups have more direct, day-to-day responsibility for their respective areas. *Id.*

Defendant American Airlines served a deposition subpoena on Mr. Hauenstein on March 30, 2022. The Subpoena commanded Mr. Hauenstein to appear for a deposition on April 8, 2022, at the Atlanta, Georgia offices of Delta. Mitchell Decl. ¶ 3. American Airlines has agreed to postpone the deposition pending the outcome of Delta's instant motion for Protective Order and to Quash the Subpoena.

ARGUMENT

Under Rule 45, "the court for the district where compliance is required" must or may quash or modify a subpoena in certain circumstances. Fed. R. Civ. P. 45(d)(3). The Court "must quash or modify a subpoena that: . . . subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv). Courts commonly recognize "that depositions of high-level officers" place an undue burden upon "those officers

and the entities they represent." *United States ex rel. Galmines v. Novartis Pharms. Corp.*, No. 06-3213, 2015 WL 4973626, at *1 (E.D. Pa. Aug. 20, 2015); *Tierra Blanca Ranch High Country Youth Program v. Gonzales*, 329 F.R.D. 694, 697 (D.N.M. 2019) (describing a "rebuttable presumption that a high-level official's deposition represents a significant burden upon the deponent and that this burden is undue") (quoting *Galmines*, 2015 WL 4973626, at *2), *objections overruled*, 2019 WL 1487241 (D.N.M. Apr. 4, 2019).[1] That Mr. Hauenstein is a non-party to the underlying litigation also "weigh[s] against disclosure in the undue burden inquiry." *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1337 (11th Cir. 2020).[2]

[1] Courts have long recognized the burden of depositions on high-ranking corporate officials and their corporate entities. *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) (affirming the trial court's protective order as to the deposition of Upjohn's president where the plaintiff had noticed depositions of other employees who "had more knowledge of the facts," "in light of defendant's reasonable assertions that [Upjohn's president] was extremely busy and did not have any direct knowledge of the facts," until and unless it occurred that "the testimony of the other employees was unsatisfactory"); *cf. In re United States*, 985 F.2d 510, 512 (11th Cir. 1995) (per curiam) (granting a writ of mandamus to quash the deposition of the FDA Commissioner in part to avoid the Commissioner being forced "to take valuable time away from other tasks in deciding whether to incur the sanction of the court").

[2] *See also In re Photochromic Lens Antitrust Litig.*, No. 8:10-MD-2173-T-27EAJ, 2012 WL 12904391, at *2 (M.D. Fla. Dec. 20, 2012) ("[I]n a discovery dispute involving a nonparty, the nonparty's status is considered by the court in assessing the burden of complying with the discovery request."); *Viscito v. Nat'l Plan. Corp.*, No. 3:18-30132-MGM, 2020 WL 4274721, at *5 (D. Mass. July 24, 2020) ("'[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to

To prevent such undue burden, courts apply the "apex doctrine," "an analytical framework used by courts in assessing whether to permit the depositions of individuals at the 'apex' of corporations and other entities." *Galmines*, 2015 WL 4973626, at *1. "The doctrine recognizes that depositions of high-level officers severely burdens those officers and the entities they represent, and that adversaries might use this severe burden to their unfair advantage." *Id.* "The rationale for barring such depositions is that 'high level executives are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the courts.'" *Robinson v. Wells Fargo Bank, N.A.*, No. 1:10-CV-3819-TCB-GGB, 2012 WL 13130022, at *6 (N.D. Ga. June 7, 2012) (quoting *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 205 F.R.D. 535, 536 (S.D. Ind. 2002)); *see also Tierra Blanca*, 329 F.R.D. at 696-97 ("At its most general, the 'apex doctrine' provides some protection from depositions to high-level executives and government officials.").

Under the apex doctrine, the party seeking the deposition has the burden to show that the "executive has 'unique or superior knowledge of discoverable information' that cannot be obtained by other means." *Cuyler v. Kroger Co.*, No.

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special weight in evaluating the balance of competing needs.'") (alteration in original) (quoting *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998)).

1:14-CV-1287-WBH-AJB, 2014 WL 12547267, at *6 (N.D. Ga. Oct. 3, 2014) (quoting *Chick-Fil-A, Inc. v. CFT Dev., LLC*, No. 5:07-cv-501-Oc-10GRJ, 2009 WL 928226, at *1 (M.D. Fla Apr. 3, 2009)); *Robinson*, 2012 WL 13130022, at *6 (N.D. Ga. June 7, 2012) ("Under the apex rule, the party seeking the deposition must show that the executive has unique or superior knowledge of discoverable information that cannot be obtained by other means."); *Degenhart v. Arthur State Bank*, No. CV411-041, 2011 WL 3651312, at *1 (S.D. Ga. Aug. 8, 2011) ("Where, as here, an apex deposition is challenged, the burden is placed upon the deposing party . . . . Thus, [plaintiff] must show that [the executive in question] has 'unique or superior knowledge of discoverable information that cannot be obtained by other means.'") (quoting *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, No. 4:08-MD-2004(CDL), 2009 WL 4730321, at *1 (M.D. Ga. Dec. 1, 2009)); *Porter v. Eli Lilly & Co.*, No. 1:06-CV-1297-JOF, 2007 WL 1630697, at *3 (N.D. Ga. June 1, 2007) ("[A] plaintiff must show that the executive would have personal knowledge of the events in question and a plaintiff has no other means of obtaining the information."); *Maier v. Belfor USA Grp., Inc.*, No. 1:14-CV-3906-ODE, 2016 WL 11745953, at *1 (N.D. Ga. May 24, 2016) (granting a motion to quash where "there is nothing in the record demonstrating that [the executive in question] has unique or specialized knowledge of the facts underlying" the action); *Dashtpeyma*

v. Liberty Ins. Corp., No. 1:11-CV-3809-JEC-AJB, 2012 WL 13013007, at *3 (N.D. Ga. Apr. 9, 2012) (denying a motion to compel an apex deposition where "Plaintiff has not yet shown (or even attempted to show) that [the executive in question] has unique or superior knowledge of discovery information"); *Tierra Blanca*, 329 F.R.D at 697 ("Under . . . the 'apex doctrine,' the Court may protect a high level corporate executive from the burdens of a deposition when any of the following circumstances exist: (1) the executive has no unique personal knowledge of the matter in dispute; (2) the information sought from the executive can be obtained from another witness; (3) the information sought from the executive can be obtained through an alternative discovery method; or (4) sitting for the deposition is a severe hardship for the executive in light of his obligations to his company.") (quoting *Naylor Farms, Inc. v. Anadarko OGC Co.*, No. 11-cv-01528-REB-KLM, 2011 WL 2535067, at *1 (D. Colo. June 27, 2011)).")[3]

[3] Courts in other jurisdictions, including within the First Circuit, where the underlying Northeast Alliance Lawsuit is pending, routinely apply this standard. *See, e.g.*, *Viscito*, 2020 WL 4274721, at *2-6 (granting motions to quash three subpoenas where the plaintiff failed to show executives had unique relevant information); *Brown v. Saint-Gobain Performance Plastics Corp.*, No. 16-cv-242-JL, 2022 WL 122609, at *2 (D.N.H. Jan. 7, 2022) (finding the "apex deposition doctrine" applied to bar the deposition of the chairman of the board of the defendant's parent company).

Generally, this standard is met only where there is a record developed or evidence demonstrating that the executive in question has some unique personal and direct knowledge of the subject matter in question not available from other employees or, alternatively, from documentary production or written discovery. *See Cuyler*, 2014 WL 12547267, at *7 ("In short, '[a]n officer at the apex of the corporation can only be deposed if he or she has unique knowledge or the subject matter requested in deposition was pursued unsatisfactorily through less intrusive means.") (quoting *McMahon v. Presidential Airways, Inc.*, No. 6:05-cv-1002-Orl-28JGG, 2006 WL 5359797, at *2 (M.D. Fla. Jan. 18, 2006)); *Porter*, 2007 WL 1630697, at *3 ("[A] plaintiff must show that the executive would have personal knowledge of the events in question and a plaintiff has no other means of obtaining the information.").

American Airlines cannot meet this standard to require Mr. Hauenstein to sit for a deposition.

First, there can be no dispute that Mr. Hauenstein is an "apex" executive. Mr. Hauenstein is the second-highest ranking executive of Delta, one of the world's largest airlines and a publicly-traded company. Hauenstein Decl. ¶¶ 5-6. This creates a "rebuttable presumption" that requiring Mr. Hauenstein to sit for a deposition would be "a severe hardship for the executive in light of his obligations

to his company." *Tierra Blanca*, 329 F.R.D at 697 (first quoting *Galmines*, 2015 WL 4973626, at *2; and then quoting *Naylor Farms*, 2011 WL 2535067, at *1). Indeed, it would. As Delta's President, Mr. Hauenstein's responsibilities to Delta require him to maintain a very full schedule. Hauenstein Decl. ¶ 13. The demands on his time have only increased during the pandemic and as more robust demand for air travel (hopefully) returns. *Id.* Having to prepare and sit for a deposition would be a significant burden on both Mr. Hauenstein and Delta. *Id.* *See also Rembrandt Diagnostics, LP v. Innovacon, Inc.*, No. 16-cv-0698 CAB (NLS), 2018 WL 692259, at *6-7 (S.D. Cal. Feb. 2, 2018) (granting motion for protective order for deposition of former high-level executive of international, publicly traded defendant company).

Second, Mr. Hauenstein does not have "unique personal knowledge" as to any topic for which American Airlines seeks his deposition. While Mr. Hauenstein oversees the departments at Delta responsible for Delta's network, revenue management, reservation sales, customer care, customer engagement and loyalty strategies, he is not involved in the day-to-day activities of each of those departments. Hauenstein Decl. ¶¶ 6-7.[4] Rather, the senior executives who lead those

[4] American Airlines asserted it needs Mr. Hauenstein's deposition because his areas of responsibility as listed on Delta's website "are central to the defense of DOJ's lawsuit." *See* Mitchell Decl. Ex. 2. But that does not support that Mr. Hauenstein has "unique or superior knowledge of discoverable information that cannot be

groups have more direct, day-to-day responsibility for their respective areas. Hauenstein Decl. ¶ 7. These responsibilities included Delta's assessment of the Northeast Alliance, as well as the development and implementation of any competitive response to it. Hauenstein Decl. ¶¶ 7-12. Thus, Mr. Hauenstein's knowledge is shared and developed by others at Delta and "the information sought . . . can be obtained from []other witness[es]." *Tierra Blanca*, 329 F.R.D at 697 (quoting *Naylor Farms*, 2011 WL 2535067, at *1); *see also Cuyler*, 2014 WL 12547267, at *6 (denying a motion to take apex depositions where plaintiff "has not shown that these three witnesses have unique knowledge or that the subject matter he seeks via these proposed depositions has been pursued unsatisfactorily through less intrusive means").

Third, American Airlines has not even attempted to obtain the information they seek from Mr. Hauenstein by other less burdensome and less intrusive means, such as through the depositions of other Delta senior executives, whom Delta has offered to make available for deposition. *Cuyler*, 2014 WL 12547267, at *7 (requiring plaintiff show "unique knowledge" or "unsatisfactorily" seeking the information through other means); *Robinson*, 2012 WL 13130022, at *7 (granting

obtained by other means." *Cuyler*, 2014 WL 12547267, at *6 (quotation marks omitted).

protective order upon conclusion "that the discovery sought could have been obtained from another source or via written discovery"); *Tierra Blanca*, 329 F.R.D at 697-98.

For example, Joe Esposito is Delta's Senior Vice President of Network Planning and is in charge of leading and developing Delta's global network strategy. Hauenstein Decl. ¶ 8. In his role, Mr. Esposito oversees Delta's Domestic Network Planning group, which has primary responsibility for evaluating the American/JetBlue Northeast Alliance from a network perspective. Hauenstein Decl. ¶¶ 8-10. Mr. Hauenstein has consistently relied on Mr. Esposito and the Domestic Network Planning team to lead that effort. Hauenstein Decl. ¶ 10. Despite Delta's offer to make Mr. Esposito (and other knowledgeable executives) available for deposition, American Airlines has pressed its demand for Mr. Hauenstein.

The Court should require American Airlines take Mr. Esposito's deposition (and others if necessary), before requiring Mr. Hauenstein to sit for deposition. Only after such other depositions occur can there be any meaningful assessment of whether Mr. Hauenstein's deposition is necessary to obtain facts relevant to American Airlines' defense of the government lawsuit. To date, of course, American Airlines has not even attempted to seek this discovery through means other than an immediate apex deposition. This is a textbook example of the purpose

for which the apex doctrine exists—to protect executives from being subjected to deposition demands that could be resolved through other less intrusive means.

CONCLUSION

Delta respectfully requests that the Court enter a protective order barring Mr. Hauenstein's deposition in this matter and quashing American Airlines' Subpoena.

Dated: April 12, 2022

Respectfully submitted,[5]

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[5] Pursuant to Local Rule 7.1D, counsel for Movants certifies that this brief was prepared with a font and point selection approved in Local Rule 5.1.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2022, the foregoing was filed via the Court's ECF system, and served on the following counsel for the parties in the underlying litigation, *United States v. Am. Airlines Grp. Inc.*, No. 1:21-cv-11558-LTS (D. Mass.), via e-mail:

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EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

In re Subpoena to Glen Hauenstein	Case No. 1:22-mi-00029-MHC-CCB Underlying Litigation: *United States v. Am. Airlines Grp. Inc.*, No. 1:21-cv-11558-LTS (D. Mass.)

OPPOSITION TO MOTION FOR PROTECTIVE ORDER AND TO QUASH DEPOSITION SUBPOENA TO GLEN HAUENSTEIN

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I. INTRODUCTION

Movant Delta Air Lines, Inc. ("Delta") and Glen Hauenstein seek to avoid the deposition of a key witness in *United States v. Am. Airlines Grp. Inc.*, No. 1:21-cv-11558 (D. Mass. Sept. 21, 2021) (the "underlying action"), a complex antitrust lawsuit through which the Department of Justice ("DOJ") and several states seek to enjoin the Northeast Alliance between American Airlines Group Inc. ("American") and JetBlue Airways Corp. ("JetBlue"). Their motion to quash should be denied.

At the heart of the underlying action is the question of how the Northeast Alliance will affect competition in the U.S. airline industry—an industry plaintiffs allege is dominated by four airlines, including Delta. Key questions of fact include how airlines compete on pricing, service quality, route and network selection, scheduling, and capacity. Thus, in this high-profile antitrust litigation, Delta's competitive strategies and its reactions to the Northeast Alliance are important and highly-contested factual questions.

Glen Hauenstein is undoubtedly the right Delta employee to question on these issues. He oversees Delta's network, revenue management, reservation sales, customer care, customer engagement and loyalty strategies, "masterminded the transformation of the airline's network," *see* Ex. 5, and routinely speaks for Delta publicly on competitive strategies, including its network strategies specifically. For

example, at Delta "Investor Days," during which Delta employees update the public on the company's general strategies, Mr. Hauenstein is the person who addresses Delta's network strategies, its "unmatched competitive advantages," and its strategies for particular airports, including Boston Logan International Airport and John F. Kennedy International Airport ("JFK"). *See* Ex. 6 at 17, 19, Delta Air Lines, Inc., *Investor Day Transcript* (Dec. 12, 2019). Mr. Hauenstein regularly addresses Delta's strategies for competing with low-cost carriers ("LCCs") like JetBlue, and he personally oversees Delta's response to the Northeast Alliance. Mr. Hauenstein is also unique in the way the scope of his responsibilities matches the competitive strategy issues relevant to his case. Only two people can speak definitively for Delta on the full breadth of key disputed issues: Edward H. Bastian (Delta's Chief Executive Officer ("CEO")) and Mr. Hauenstein. Delta's demand that American depose more junior employees who cannot speak to the full ambit of the contested issues ignores Defendants' need for a definitive voice on Delta's strategies. Indeed, Plaintiffs and Defendants have noticed the deposition of Mr. Hauenstein's counterparts at United Airlines, Inc. ("United") and Alaska Airlines ("Alaska"), and both have agreed to be deposed. Nothing distinguishes Mr. Hauenstein from these executives.

The Court should deny Delta's motion, which is premised exclusively on the "apex doctrine." That doctrine is *not* a general license for executives to avoid depositions and provides no basis to quash here where there is no potential for "numerous, repetitive, harassing, and abusive depositions" of Delta or Mr. Hauenstein and Defendants have a crystal clear need for his deposition. In the alternative, the Court should transfer Delta's motion to the District of Massachusetts so that the judge presiding over this action may decide whether Mr. Hauenstein's deposition is appropriate.

II. BACKGROUND

The underlying action was commenced on September 21, 2021. The fundamental dispute is whether the Northeast Alliance between American and JetBlue restrains competition, as Plaintiffs allege, or promotes competition by making American and JetBlue more competitive against Delta and United in the Northeast. That makes Delta a central actor in plaintiffs' theory of the case. Delta is mentioned several times in the complaint, more than any other non-party airline. Ex. 3, Compl. ¶¶ 1, 23, 26, 29, 33, 34, 60, *United States v. Am. Airlines Grp. Inc.*, No. 1:21-cv-11558-LTS (D. Mass. Sept. 21, 2021), ECF No. 1. Plaintiffs contend that "legacy" airlines like Delta *benefit* from the Northeast Alliance, because the Alliance *weakens* competition by JetBlue against legacy airlines. *See id.* ¶¶ 25–29,

75. Defendants, on the other hand, contend that the Northeast Alliance was specifically designed to *compete more effectively with Delta*, and that Delta has responded accordingly. Ex. 4, Mem. in Supp. of Mot. to Dismiss at 8, No. 1:21-cv-11558-LTS (D. Mass. Nov. 22, 2021), ECF No. 68.

Looming over all of this is the nature of airline competition, and in particular how legacy airlines—American, United and Delta—compete with one another and with LCCs such as Southwest and JetBlue. Plaintiffs contend that legacy airlines do not compete hard against one another, but are forced to compete on price because of pressure from LCCs. Decl. of Daniel M. Wall in Supp. of Resp. to Mot. to Quash ("Wall Decl.") ¶ 3. Defendants, on the other hand, maintain that there is vigorous "network competition" among airlines, including specifically among legacy airlines. *Id.* Thus, while Plaintiffs suggest that the Northeast Alliance is anticompetitive because it softens competition from JetBlue, Defendants argue that the Alliance is an example of, and promotes, network competition by making both American and JetBlue more competitive in the Northeast against Delta and United.

This puts Delta and its strategies at the heart of this case.

There is no dispute between the parties to this case regarding the need for discovery from Delta about its competitive strategies. Pursuant to Rule 26 of the Federal Rules of Civil Procedure, the parties exchanged their initial disclosures on

December 14, 2021; Plaintiffs and Defendants all identified Delta as an entity that is likely to have discoverable information that the disclosing party might use to support its claims or defenses. On January 17, 2022, American served a subpoena *duces tecum* on Delta. To date, Delta has made five document productions totaling several thousand documents in response to American's subpoena. Wall Decl. ¶ 2.

The trial of this action is set to begin on September 26, 2022, and to that end, fact discovery must be completed by June 8, 2022—just six weeks from now. Anticipating the need to call one or more Delta witnesses at trial, American's lead counsel called Delta's outside counsel on March 4, 2022, to arrange for Mr. Hauenstein's deposition. *Id.* ¶ 5. While the Motion to Quash suggests that American just dropped a subpoena on Mr. Hauenstein without considering its options, that is not true. In the first place, American's management, which is well versed in Delta's strategies and public statements, identified Mr. Hauenstein as the key person in Delta with respect to overall competitive strategy, network strategy, pricing strategy and sales strategy. *Id.* ¶ 4. As Delta admits, Mr. Hauenstein oversees many critical aspects of Delta's business, strategy, and operations, including "responsibility for the overall performance and strategy of the business, managing and overseeing senior level executives responsible for Delta's network, revenue management, reservation sales, customer care, customer engagement and loyalty strategies, and

representing Delta at industry events." *See* Mem. in Supp. Mot. for Protective Order and to Quash Dep. Subpoena to Glen Hauenstein ("Motion to Quash"), ECF No. 1-1 at 2–3. He is, in short, Delta's senior executive spokesperson on these issues, fitting perfectly Defendants' need for an authoritative Delta voice on these issues. The same process and thinking went into the identification of Andrew Nocella (Mr. Hauenstein's counterpart at United) as United's senior executive spokesperson on these issues—and he agreed to testify.

Delta makes much of the fact that Defendants "started" with Mr. Hauenstein before exhausting other options, but that is misleading at best. American began this process by calling Delta's counsel concerning Mr. Hauenstein *as a courtesy*, stating expressly that while Defendants would need to depose lower-level Delta employees too, they needed to depose Mr. Hauenstein (or Delta's CEO) and wanted to be sensitive to his scheduling needs. Wall Decl. ¶¶ 5–7. When Delta resisted, American's counsel discussed options with Delta's counsel. *Id*. ¶¶ 5–10. But the alternatives Delta proposed—Eric Beck, Delta's Managing Director for Domestic Network Planning, and Amy Martin, Delta's Managing Director for International Network Planning—are too junior to speak definitively and cannot speak to the full breadth of Delta's competitive strategies. *Id*. ¶¶ 8-9. Ignoring this fact, Delta demanded that American depose those employees first. *Id*. ¶¶ 8–10. On April 12,

2022, Delta moved this Court to quash the subpoena on the grounds that the "apex doctrine" bars American from taking Mr. Hauenstein's testimony.

III. ARGUMENT

Delta's arguments in support of its motion to quash fail for three reasons: (1) Mr. Hauenstein possesses unique, firsthand knowledge of issues that go to the heart of the underlying action; (2) other avenues of discovery, including the deposition of lower-level Delta employees, are not an adequate substitute for Mr. Hauenstein's testimony; and (3) Delta has not demonstrated that Mr. Hauenstein's deposition would be unduly burdensome. Accordingly, this Court should deny Delta's motion to quash. In the alternative, this Court should transfer Delta's motion to the District of Massachusetts.

A. Legal Standard

Rule 45 of the Federal Rules of Civil Procedure "provides a means for parties to subpoena testimony and documents from nonparties." *Clarity Sports Int'l LLC v. Silver*, No. 1:21-CV-676-MHC-WEJ, 2021 WL 2480110, at *2 (N.D. Ga. Mar. 2, 2021). Because "Rule 45 is decided under the same standards set forth in Rule 26(b)," a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." *Id.* at *3 (internal quotations omitted)

(quoting Fed. R. Civ. P. 26(b)(1)). A court must "quash or modify a subpoena" that "subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv).

There is a "heavy burden" on the party moving to quash the subpoena to show "that compliance with the subpoena would be unreasonable and oppressive." *Fitzhugh v. Topetzes*, No. 1:04-CV-3258-RWS, 2005 WL 8154753, at *4 (N.D. Ga. Sept. 1, 2005) (internal quotations omitted). Thus, "it is highly unusual for a court to prohibit the taking of a deposition altogether absent extraordinary circumstances." *SEC v. Merkin*, 283 F.R.D. 689, 694 (S.D. Fla. 2012); *accord Gamache v. Hogue*, No. 1:19-CV-21 (LAG), 2022 WL 989483, at *3 (M.D. Ga. Mar. 30, 2022) (noting that "a protective order which prohibits a deposition is rarely given").

Courts in this District sometimes apply the so-called "apex doctrine" when assessing the propriety of depositions of high-ranking corporate executives. *See, e.g.*, *Cochran v. Brinkmann Corp.*, No. 1:08-CV-1790-WSD, 2009 WL 10668460, at *2–3 (N.D. Ga. Feb. 11, 2009). That doctrine exists for a specific and limited purpose, which Delta describes correctly:

> "The rationale for barring such depositions is that 'high level executives are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the courts.'" *Robinson v. Wells Fargo Bank, N.A.*, No. 1:10-CV-3819-TCB-GGB, 2012 WL 13130022, at *6 (N.D. Ga. June 7, 2012) (quoting *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 205 F.R.D. 535, 536 (S.D. Ind. 2002)).

Mem. of Law in Supp. Mot. for Protective Order and to Quash Dep. Subpoena to Glen Hauenstein ("Mot. to Quash") at 5. In other words, "highly-placed executives are not immune from discovery." *Balfour Beatty Rail, Inc. v. Vaccarello*, No. 3:06-CV-551-J-20MCR, 2007 WL 842765, at *4 (M.D. Fla. Mar. 20, 2007). Instead, they (and the corporation) are protected against *harassment* in the form of unnecessary and abusive depositions, *e.g.*, when in "a lawsuit by someone who slipped on a banana peel in the produce aisle at Safeway [plaintiff] seeks to depose Safeway's CEO." *Cameron v. Apple Inc. (In re Apple iPhone Antitrust Litig.).*, No. 11CV06714YGRTSH, 2021 WL 485709, at *4 (N.D. Cal. Jan. 26, 2021). Depositions of high-level executives are permissible when those executives have "specific and unique knowledge related to the suit" and "other avenues of discovery have not or could not provide an adequate substitute." *Koninklijke Philips Elecs. N.V. v. ZOLL Med. Corp.*, No. CIV. 10-11041-NMG, 2013 WL 1833010, at *1 (D. Mass. Apr. 30, 2013). And even where courts have found that a deposition of an apex executive would be unduly burdensome, the doctrine ordinarily "limits the length of a deposition, rather than barring it altogether," unless there are "extraordinary circumstances." *Cameron*, 2021 WL 485709, at *3, 5 (N.D. Cal. Jan. 26, 2021); *see also Cochran*, 2009 WL 10668460, at *3 (permitting apex deposition

due to witness's "unique personal knowledge" of "fundamental issues in this case," but limiting the deposition in time and to particular topics).

It is well established that "the party seeking to take the deposition need not prove conclusively that the deponent certainly has unique non-repetitive information; rather, where a corporate officer may have ***any*** first-hand knowledge of relevant facts, the deposition should be allowed." *Cameron*, 2021 WL 485709, at *5 (internal quotations omitted) (emphasis added); *see also Powertech Techs., Inc. v. Tessera*, No. C 11–6121 CW, 2013 WL 3884254, at *2 (N.D. Cal. July 26, 2013) (holding that the party seeking the deposition "was not required to prove that [the apex deponent] certainly has [relevant] information"). Accordingly, "where conduct and knowledge of the highest corporate levels are relevant in the [underlying] case, a deposition of the executive is generally permitted." *In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig.*, No. 4:08-MD-2004 (CDL), 2009 WL 4730321, at *1–2 (M.D. Ga. Dec. 1, 2009).[1]

[1] While witness declarations are necessary for a party to successfully seek a protective order, self-serving affidavits rarely suffice to establish that an apex witness has no relevant information. *See, e.g.*, *In re Mentor Corp.*, 2009 WL 4730321, at *2 (allowing apex depositions and finding that witnesses had direct knowledge of relevant issues despite declarations to the contrary); *Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140, 143 (D. Mass. 1987) (characterizing affidavits that high-ranking executives knew nothing about certain topics were

In antitrust litigation, where high-level competitive strategy is at issue, it is commonplace and entirely proper to depose senior executives. As the court in *Cameron* put it, "[w]hen a lawsuit concerns important aspects of a company's business model that are plainly the result of high-level executive decisions, we should expect that high-level executives will be deposed, and their testimony will be relevant and proportional, and the depositions will not be abusive or harassing." 2021 WL 485709, at *4. Similarly, in an antitrust case in the District of Massachusetts, the court rejected Ford Motor Company's argument that plaintiff sought depositions of high-level executives "solely for the purpose of harassment" because the plaintiff "outlin[ed] the connections between the four executives and the evidence and issues in this lawsuit." *Travelers Rental Co.*, 116 F.R.D. at 146–47 ("When the motives behind corporate action are at issue, an opposing party usually has to depose those officers and employees who in fact approved and administered the particular action."); *see also, e.g.*, *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C-07-05634 CRB (DMR), 2014 WL 939287, at *4 (N.D. Cal. Mar. 6, 2014) (denying motion for protective order because apex witness's "position

"plainly insufficient to support a motion to quash," given that the executives "were personally involved in matters relevant to this case").

as the supervisor in charge of this department could provide unique, firsthand information relevant to Plaintiffs' claims").

B. Mr. Hauenstein Has Unique, Firsthand Knowledge Of Facts That Are At Issue In The Underlying Action And Are Central To American's Defenses

Mr. Hauenstein has firsthand knowledge of issues that are highly relevant to the underlying action. Delta has consolidated in its President (the title Mr. Hauenstein has maintained from 2016 to the present) supervision of "a team responsible for Delta's network, revenue management, reservation sales, customer care, customer engagement and loyalty strategies"—functions that are central to understanding the effects of the Northeast Alliance on the airline industry and Delta's competitive response. *See* Ex. 5, *Glen Hauenstein, President*, Delta (June 15, 2020). Mr. Hauenstein's public statements and documents produced in the underlying action show that Mr. Hauenstein has firsthand knowledge of Delta's competitive strategies generally and its strategic and competitive response to the Northeast Alliance specifically. He routinely speaks to these issues, publicly, in investor presentations, earnings calls, and other settings. *See, e.g.*, Ex. 6 at 14–19, Delta Air Lines, Inc., *Investor Day Transcript* (Dec. 12, 2019). In another antitrust case, Mr. Hauenstein testified that he provides input to, and signs-off on, decisions relating to Delta's capacity levels and operating plans. Ex. 7, G. Hauenstein Dep.

Tr., *In re: Domestic Airlines Travel Antitrust Litig.*, No. 1:15-MC-01404-CKK (D.D.C. June 11, 2019), ECF No. 500-25 at 23–41.

Mr. Hauenstein personally oversees Delta's response to the Northeast Alliance, as demonstrated by numerous documents Delta has produced in the underlying action. For example, after a "debrief" on the Northeast Alliance, Mr. Hauenstein instructed Delta employees to "[redacted]." *See* Ex. 8, DAL-00015453. Similarly, Mr. Hauenstein helped establish Delta's plans to "[redacted]. *See* Ex. 9, DAL-00022126, at -22129. And Mr. Hauenstein presented [redacted]. *See* Ex. 10, DAL-00001543, at -1547–50, -1553–54, -1565; *see also* Ex. 11, DAL-00006117, at -6117 (email from Mr. Hauenstein [redacted]). Mr. Hauenstein's first-hand expertise in Delta's response to the Northeast Alliance—and

his involvement in establishing network plans, setting capacity strategy, and competing for passengers generally—are critical to gauging the effects of the Northeast Alliance on competition and output in the airline industry. This soars over the bar needed to justify his deposition.

In addition, Mr. Hauenstein possesses firsthand information regarding at least two other central issues in this case: (1) the formation and effects of joint ventures and code-sharing agreements in the airline industry, and (2) the relevant market definition for New York City airports. Mr. Hauenstein sets and oversees Delta's alliance strategy; his official biography credits him with Delta's "trans-Atlantic joint venture with Air France-KLM and Alitalia and a newly formed joint venture with Virgin Atlantic Airways." Ex. 5, *Glen Hauenstein, President*, Delta (June 15, 2020). [redacted]. *See* Ex. 10, DAL-00001543. Mr. Hauenstein's deep knowledge of Delta's efforts to leverage partnerships to compete more effectively will help Defendants rebut Plaintiffs' assumption that alliances are inherently bad for competition.

Similarly, Mr. Hauenstein has overseen efforts to "establish[ ] a leading presence [for Delta] in New York at both LaGuardia Airport and John F. Kennedy

International Airport" and led "Delta's historic expansion at LaGuardia." Ex. 5, *Glen Hauenstein, President*, Delta (June 15, 2020). Documents produced in the underlying action show Mr. Hauenstein discussing [redacted]. *See* Ex. 12, DAL-00020016, at -20016–17. And a slide deck [redacted]. *See* Ex. 13, DAL-00011344, at -11344, -11348. Central to Plaintiffs' case in the underlying action is the argument that Newark Liberty International Airport is not part of the same geographic market as New York's LaGuardia Airport or JFK. Mr. Hauenstein clearly has uniquely high-level insight into how Delta perceives competition among these airports.

In short, there is more than sufficient evidence that Mr. Hauenstein possesses a firsthand perspective on issues that go to the heart of the underlying action and to Defendants' main arguments in defense of the Northeast Alliance. As the second-in-command at one of three "legacy" carriers in the United States, Mr. Hauenstein has a singular perspective on the relevant markets in this case and how initiatives like the Northeast Alliance impact competition in the airline industry. Defendants should be permitted to develop that record.

C. Other Avenues Of Discovery Would Not Provide An Adequate Substitute For Mr. Hauenstein's Deposition

Delta's argument that American can obtain information from other "less burdensome and less intrusive means," Mot. to Quash at 10, is meritless. To begin with, American is not required to take other executives' depositions "before requiring Mr. Hauenstein to sit for deposition." *Id*. at 11. The apex doctrine is not a sequencing requirement. If it appears that a senior executive's deposition might be ***needless***, then "exhaustion of other discovery methods" can be "an important, but not dispositive, consideration." *Cameron*, 2021 WL 485709, at *5. The issue, however, remains whether the deponent has "specific and unique knowledge related to the suit." *Koninklijke*, 2013 WL 1833010, at *1. In other words, courts consider whether "other avenues of discovery have not ***or could not*** provide an adequate substitute." *Id.* (emphasis added).[2] When it is clear, as it is here, that a senior

[2] To the extent it matters, Defendants have exhausted other, non-testimonial means of discovery by serving Delta with a subpoena for the production of documents responsive to twenty-six requests. *Palmisano v. Paragon 28, Inc.*, No. 21-60447-CIV, 2021 WL 1686928, at *3 (S.D. Fla. Apr. 23, 2021) (affirming on reconsideration the denial of a motion to quash an "apex" subpoena where "[prior] document requests were not fruitful"); *Robinson v. Bay Club L.A., Inc.*, No. CV2103578DMGRAOX, 2021 WL 6618819, at *5 (C.D. Cal. Dec. 22, 2021) (granting a motion to compel an apex deposition subpoena where the parties seeking the deposition had initially "propounded a significant amount of written discovery, including requests for production"). In order to avoid overburdening Delta in its response to the subpoena, American did not seek the production of Mr. Hauenstein's

executive has a specific expertise and knowledge base about a relevant subject matter, sequencing arguments never prevail.

Delta's offer of lower-ranking employees like Mr. Esposito is not a sufficient replacement for the breadth of Mr. Hauenstein's knowledge about matters central to the underlying action. Indeed, many of Mr. Hauenstein's relevant documents and emails do not involve Mr. Esposito at all, demonstrating that their knowledge does not overlap in many respects. *See* Exs. 8-11, 13. Documents produced by Delta show that the company's competitive response to the Northeast Alliance is wide-ranging and relates to many aspects of Delta's business—not only network planning, but also marketing, revenue management, and customer care. In all events, a collection of lower-level employees cannot possibly replicate the firm-wide perspective on strategy and competition in the airline industry that Mr. Hauenstein possesses. *See In re Mentor Corp.*, 2009 WL 4730321, at *1–2 ("[W]here conduct and knowledge of the highest corporate levels are relevant in the [underlying] case, a deposition of the executive is generally permitted."). Again, only Delta's CEO

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custodial documents. Thus, Delta's document productions cannot adequately provide insight into Mr. Hauenstein's knowledge of relevant facts. But even Mr. Hauenstein's emails that are contained in the productions cannot replace his testimony and the opportunity to question Mr. Hauenstein about those emails.

and Mr. Hauenstein can provide what Defendants need in the way of authoritative Delta perspectives on these issues. We are limiting ourselves to the least-apex of the two.

Moreover, the condensed schedule in the underlying action means that American cannot take the deposition of numerous other Delta employees first and hope that those depositions will be an adequate replacement for Mr. Hauenstein's testimony. Fact discovery in this matter closes in six weeks. Scheduling depositions of busy executives and coordinating travel during the pandemic present particular difficulties, and Delta's suggestion that American should take a wait-and-see approach to how discovery develops in the underlying action is simply not practicable. *See Jernigan v. Scholastic, Inc*., 2018 WL 11323497, at *1–2 (M.D. Fl. Sept. 17, 2018) (granting motion to compel and rejecting argument that apex deposition should be "delayed until all other depositions are completed" because of the approaching deadline for fact discovery).

In sum, no other means of discovery provides an adequate replacement for Mr. Hauenstein's testimony.

D. A Deposition Would Not Unduly Burden Mr. Hauenstein

To the extent Delta argues that a deposition of Mr. Hauenstein would be "harassing" or "abusive," *see* Mot. to Quash at 5, that argument is belied by the

record in the underlying action. His deposition would be conducted in Atlanta, where he is currently located. American remains committed to finding a mutually agreeable date and time for Mr. Hauenstein's deposition. And American has made clear that it will endeavor to limit Mr. Hauenstein's deposition as much as possible in time and scope. Delta has not attempted to identify any supposed harassment or abuse here—because none exists.[3]

If there were any doubt about this, the fact that Plaintiffs and Defendants are deposing similarly situated executives at other airlines removes it. Defendants noticed the deposition of Mr. Hauenstein's counterpart at United, and Plaintiffs have counter-noticed that deposition. Wall Decl. ¶ 11. Plaintiffs noticed the deposition of Mr. Hauenstein's counterpart at Alaska, and Defendants intend to counter-notice that deposition. *Id.* ¶ 12. Neither United nor Alaska claimed harassment or sought protection under the apex doctrine. And this is standard fare in antitrust cases, where corporate strategies "that are plainly the result of high-level executive decisions" are at issue, such that "we should expect that high-level executives will be deposed, and

[3] Even if there were some undue burden or expense associated with Mr. Hauenstein sitting for a deposition, courts frequently limit the time or scope of the deposition rather than denying a deposition altogether. *See, e.g.*, *Hickey v. N. Broward Hosp. Dist.*, No. 14-CV-60542-BLOOM, 2014 WL 7495780, at *3–4 (S.D. Fl. Dec. 17, 2014) (allowing apex deposition to proceed on limited topics).

their testimony will be relevant and proportional, and the depositions will not be abusive or harassing." *Cameron*, 2021 WL 485709, at *4.

E. Alternatively, This Court Should Transfer This Action To The District Of Massachusetts

If the Court has any doubt about the propriety of this deposition, Defendants respectfully request the Court transfer Delta's motion to quash to the District of Massachusetts, where the underlying action is being litigated.

When the court where compliance of a subpoena is required did not issue the subpoena, the court may transfer a motion to quash the subpoena to the issuing court if the court finds "exceptional circumstances." Fed. R. Civ. P. 45(f). "Courts faced with a transfer motion must account for the complexity, procedural posture, duration of pendency, and the nature of the issues pending before, or already resolved by, the issuing court in the underlying litigation," and they must further "balance the interest of local resolution against factors such as judicial economy and risk of inconsistent rulings." *In re Early*, No. 221CV00029SCJJCF, 2021 WL 2636020, at *2 (N.D. Ga. Apr. 20, 2021). "Exceptional circumstances" justify a Rule 45(f) transfer where, as here, "the underlying litigation is highly complex and therefore transfer would be the most efficient use of limited court resources." *Virnetx, Inc. v. Apple Inc.*, No. 13-80769-MC, 2013 WL 12108440, at *3 (S.D. Fla. Sept. 26, 2013).

Delta's motion to quash stems from a complex antitrust case that involves numerous alleged relevant product and geographic markets, and which the plaintiffs have brought under a novel legal theory arguing for merger analysis under Section 7 of the Sherman Act to apply to a Section 1 claim. Those complex issues, in turn, inform American's need to depose Mr. Hauenstein. Given the presiding judge's familiarity with the underlying action, transfer under Rule 45(f) is proper. *Cf. In re Early*, 2021 WL 2636020, at *2 (granting a Rule 45(f) motion to transfer due to the transferee court's "intimate knowledge of the underlying litigation," and noting that the transferee court was "better positioned to understand the full scope and implications of the issues in this subpoena dispute"); *The Dispatch Printing Co. v. Zuckerman*, No. 16CV80037BLOOMVALLE, 2016 WL 335753, at *3 (S.D. Fla. Jan. 27, 2016) (noting that "familiarity with the underlying action . . . is a compelling factor in highly complex cases where the issuing court is aware of the full scope of issues involved as well as any implications the resolution of the motion will have on the underlying litigation" (internal quotations omitted)).

Moreover, the underlying action is on an expedited schedule, with a fact discovery cutoff in early June and trial scheduled for September. "Considering these impending deadlines as well as the trial schedule, transfer is warranted to 'avoid disrupting the issuing court's management of the underlying litigation.'" *In re*

K.M.A. Sunbelt Trading Co., No. 8:17-MC-55-30AAS, 2017 WL 2559790, at *2 (M.D. Fla. June 13, 2017) (quoting Fed. R. Civ. P. 45(f) advisory committee's note to 2013 amendments) (granting transfer under Rule 45(f)).

Lastly, requiring Delta to litigate the instant motion in the District of Massachusetts would not impose an undue burden or cost. *See In re Early*, 2021 WL 2636020, at *3. The parties will have briefed Delta's motion to quash before this Court, and there is no indication that the court in Massachusetts would hold a hearing, so any potential litigation or travel expenses are highly speculative at this point. *Cf. id.* (finding no undue burden in granting a Rule 45(f) transfer where the subpoenaed party had "already filed a brief opposing the [subpoena-related] motion," "he would not have to make significant alterations to that brief if he were required to file it in the [transferee court]," and "the parties ha[d] not sought a hearing on this motion, and there [was] no reason to believe that one would be necessary in [the transferee court]").[4]

[4] In any event, the court in the District of Massachusetts has, to date, conducted remote hearings in the underlying action, so to the extent a hearing would be required, Mr. Hauenstein and his counsel may be able to participate remotely without incurring any travel-related expenses. *Cf. In re Early*, 2021 WL 2636020, at *3 (noting that, if the transferee court were to hold a hearing on the subpoena-related motion, "current procedures may allow [the subpoenaed party] to participate in a manner that will reduce the burden upon him, such as in a hearing utilizing teleconference technology"); *In re K.M.A.*, 2017 WL 2559790, at *2 (finding no

IV. CONCLUSION

For the reasons set forth above, this Court should deny Delta's Motion to Quash, or in the alternative, transfer this action to the District of Massachusetts.

Dated: April 26, 2022

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undue burden in granting a transfer where, "although Non–Movants are physically located in Florida, the Eastern District of Texas has conducted telephonic hearings in this matter").

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1D

I hereby certify that the foregoing document was prepared in Times New Roman, 14-point font, as provided by Local Rule 7.1D.

/s/ Richard J. Valladares
Richard J. Valladares

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2022, the foregoing Opposition To Motion For Protective Order And To Quash Deposition Subpoena To Glen Hauenstein was filed electronically with the Clerk of Court using CM/ECF. I also certify that a copy of the foregoing is being served upon the following by email:

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This 26th day of April, 2022.

Respectfully submitted,

/s/ Richard J. Valladares
Richard J. Valladares

EXHIBIT 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

In re Subpoena to *Glen Hauenstein*.	Case No. 1:22-cv-1654-MHC-CCB **REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND TO QUASH DEPOSITION SUBPOENA TO GLEN HAUENSTEIN** Underlying Litigation: *United States v. Am. Airlines Grp. Inc.*, No. 1:21-cv-11558-LTS (D. Mass.)

REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND TO QUASH DEPOSITION SUBPOENA TO GLEN HAUENSTEIN

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Cases

PRELIMINARY STATEMENT

Delta Air Lines, Inc. ("Delta") and Glen Hauenstein respectfully submit this reply in support of their motion for a protective order and to quash the non-party deposition subpoena issued by American Airlines Group Inc. ("American") in the underlying action *United States of America, et al. v. American Airlines Group Inc. and JetBlue Airways Corporation*, No. 1:21-cv-11558-LTS (D. Mass) (ECF 1), and in response to American's Opposition (ECF 4).

ARGUMENT

American does not cite a single case applicable to the deposition it seeks to take—that of an apex executive of a *non-party* to the underlying lawsuit. This despite established law that the burdens on witnesses of third parties are entitled to deference that party witnesses are not accorded. Moreover, the cases American does cite undercut its arguments. These cases make clear that to justify the deposition of an apex witness like Mr. Hauenstein, much less as a non-party witness, the party seeking the deposition must demonstrate the executive has unique information unobtainable from lower ranking employees. American fails this standard.

Prior to filing its motion, Delta offered several witnesses in lieu of Mr. Hauenstein. Yet, American rejected those offers. On May 5, 2022, however, American reversed course, and subpoenaed three additional Delta witnesses for

deposition, which are now scheduled: (1) Joe Esposito (Senior Vice President, Network Planning); (2) Andrew Guenthner (Director, Alliances); and (3) Robert Somers (Senior Vice President, Sales). As explained more fully below, these witnesses have more direct, firsthand knowledge about each of the topics for which American seeks Mr. Hauenstein's deposition. At a bare minimum, the apex doctrine requires American to take these depositions before seeking Mr. Hauenstein's.

After offering no factual or legal support to justify its request to depose the President of Delta, American asks to transfer this matter to the District of Massachusetts. But American fails to show any "exceptional circumstances" warranting transfer under Rule 45(f), certainly none that "avoid burdens on local nonparties subject to subpoenas . . . ." Adv. Comm. Note to 2013 Amendment, Fed. R. Civ. P. 45(f). This Court should reject American's transfer request, and American's subpoena for Mr. Hauenstein's deposition should be quashed.

I. American Ignores the Heightened Standard to Compel an Apex Deposition of a Non-Party Witness Such as Mr. Hauenstein.

As Mr. Hauenstein and Delta previously explained, Mr. Hauenstein's status as a non-party to the litigation underlying the subpoena "weigh[s] against disclosure in the undue burden inquiry." *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1337 (11th Cir. 2020); *see* ECF No. 1-1 at 4 & n.2. American does not dispute

that higher standard applicable to non-parties, and does not cite a single case applicable to an apex executive of a *non-party* to the underlying lawsuit.

Rather, all of the cases American cites involved apex depositions of a party to the lawsuit. *E.g.*, *Cameron v. Apple Inc. (In re Apple iPhone Antitrust Litig.)*, No. 11-cv-06714-YGR (TSH), 2021 WL 485709, at *3-4 (N.D. Cal. Jan. 26, 2021) (depositions of defendant Apple's CEO and two Vice Presidents); *Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140 (D. Mass. 1987) ("depositions of several high-level executives at the [defendant] Ford Motor Company"); *Cochran v. Brinkmann Corp.*, 1:08-cv-1790-WSD, 2009 WL 10668460, at *2 (N.D. Ga. Feb. 11, 2009) (considering "request to depose the President and Chief Executive Officer of the Defendant"); *Balfour Beatty Rail, Inc. v. Vaccarello*, No. 3:06-cv-551-J-20MCR, 2007 WL 842765, at *3 (M.D. Fla. Mar. 20, 2007) (motion to compel "top executives with Balfour Beatty LLP," a corporate parent of the plaintiff); *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, No. 4:08-MD-2004(CDL), 2009 WL 4730321, at *1 (M.D. Ga. Dec. 1, 2009) (depositions of defendant's President, and also its founder and former CEO); *In re Transpacific*

Passenger Air Transp. Antitrust Litig., No. C-07-05634 CRB (DMR), 2014 WL 93928, at *5 (N.D. Cal. Mar. 6, 2014) (deposition of Defendant's CEO).[1]

American tries to blur the distinction between party and non-party discovery. However, Mr. Hauenstein's and Delta's non-party status justifies considerable weight in the Court's assessment of the burden on him and Delta. *Gumwood HP Shopping Partners L.P. v. Simon Prop. Grp., Inc.*, No. 3:11-cv-268-JD-CAN, 2015 WL 13664418, at *4-5 (N.D. Ind. July 7, 2015) (granting motion to quash deposition subpoena for non-party's CEO as unduly burdensome under the apex doctrine); *see also Aeritas, LLC v. Delta Airlines, Inc.*, No. 1:13-CV-00346-RWS-WEJ, 2013 WL 454452, at *2 (N.D. Ga. Feb. 7, 2013) ("[N]on-party status is a significant factor to be considered in determining whether the burden imposed by a subpoena is undue.") (citation omitted); *Pinehaven Plantation Props., LLC v. Mountcastle Family LLC*, No. 1:12-cv-62 (WLS), 2013 WL 6734117, at *2 (M.D. Ga. Dec. 19, 2013) ("Non-party status is a factor courts may consider when analyzing whether a subpoena is unduly burdensome.").

[1] In *Powertech Techs., Inc. v. Tessera*, No. C 11–6121 CW, 2013 WL 3884254, at *2 (N.D. Cal. July 26, 2013), the subpoena target argued that as an officer of both a party and a non-party he should be afforded protection, but the court rejected the premise on the basis that "Tessera seeks to take his deposition for information regarding his participation in, and business activities of, [Powertech Technology Inc.], not for information regarding" the non-party corporation. *Id.* at *2.

II. American Has Now Issued Subpoenas For The Depositions Of Persons With First-Hand Knowledge Of The Subjects For Which It Claims To Need Mr. Hauenstein.

American argues that it is not required to pursue other depositions before seeking Mr. Hauenstein's, and that the "apex doctrine is not a sequencing requirement." ECF 4 at 20. But the cases cited by American say the opposite: less intrusive discovery and testimony must be pursued before an apex deposition.[2]

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[2] *E.g.*, *Balfour*, 2007 WL 842765, at *3 (denying apex depositions because the Court was "not satisfied Defendants have questioned all other employees with information," but permitting apex depositions where "[n]o other employees were present during the conversations and therefore, no other employees could be questioned"); *Cochran*, 2009 WL 10668460, at *2-3 (limiting apex deposition to "unique personal knowledge [the apex witness] may have"); *Palmisano v. Paragon 28, Inc.*, No. 21-60447-CIV, 2021 WL 1686928, at *1 (S.D. Fla. Apr. 23, 2021) (compelling apex deposition of former president of a party to the underlying litigation, only after "document requests were futile, and [defendant] already had deposed more than 25 [plaintiff] witnesses"); *Hickey v. N. Broward Hosp. Dist.*, No. 14-CV-60542, 2014 WL 7495780, at *3 (S.D. Fla. Dec. 17, 2014) (finding apex deposition justified where plaintiff had "deposed his previous supervisor . . . and Defendant's HR Director . . ., neither of whom know the details or reasoning behind" the CEO's decision to uphold plaintiff's termination); *Mentor*, 2009 WL 4730321, at *2 ("the depositions of nearly all current and former Mentor employees who were to be deposed in this action should have been completed by now, so the parties should be able to narrow the scope of questioning" for the apex depositions).*See also In re Transpacific*, 2014 WL 93928, at *5 (finding "Plaintiffs did make an attempt to learn more about the [topic of the apex deposition] before seeking" the apex deposition "through depositions of lower level employees" and written discovery); *Powertech*, 2013 WL 3884254, at *2 (granting motion to compel apex deposition after the party "has already tried to obtain the information from other deponents"); *Koninklijke Philips Elecs. N.V. v. ZOLL Med. Corp.*, No. 10-cv-11041-NMG, 2013 WL 1833010, *2 (D. Mass. Apr. 30, 2013) (permitting apex deposition because interrogatories and "depositions of a corporate designee and the individuals Philips

Just last week, American requested the depositions of three other Delta witnesses and those depositions are now scheduled.[3] These witnesses have more direct, firsthand knowledge on the topics for which American claims to need Mr. Hauenstein's testimony: (1) Joe Esposito (Senior Vice President, Network Planning), who oversees Delta's global network strategy, can testify, based on personal knowledge, as to both Delta's network planning response to the American-JetBlue Northeast Alliance and Delta's assessment of the factors relevant to whether New York area airports are a single antitrust market; (2) Andrew Guenthner (Director, Alliances) can testify on first-hand knowledge about "the formation and effects of joint ventures and code-sharing agreements in the airline industry"; and (3) Robert Somers (Senior Vice President, Sales), who is in charge of the Sales Department, can testify, also based on first-hand knowledge, about Delta's Sales Department's response to the Northeast Alliance. *See* ECF 4 at 16-19. The depositions of these witnesses with firsthand knowledge render Mr. Hauenstein's deposition unnecessary and inappropriate under the apex doctrine.

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designated as having knowledge" on the topic "has not yielded specific information regarding the relevant time period"); *Travelers*, 116 F.R.D. at 141-42 (evaluating plaintiff's motion to compel apex depositions only after it had deposed "five official of [defendant] who were not as high on the corporate ladder").

[3] *See* Declaration of Michael S. Mitchell, ¶¶ 4-6, attached hereto.

III. American's Cited Evidence Confirms Mr. Hauenstein Does Not Have Unique, Firsthand Knowledge On The Topics For Which It Seeks Testimony.

American argues Mr. Hauenstein's deposition is justified under the apex doctrine because he has "unique, firsthand knowledge" on issues "highly relevant to the underlying action." ECF 4 at 16. The evidence on which American relies, however, undercuts that claim. Instead, it confirms that Mr. Hauenstein's knowledge would be second-hand based on information developed and provided to him by other Delta employees more immersed in the topics and on whom Mr. Hauenstein relied—including the other Delta witnesses now scheduled for deposition at American's request.

For example, as evidence that Mr. Hauenstein has "first-hand experience in Delta's response to the Northeast Alliance," American cites a single email, which describes a "debrief" on the American-JetBlue Northeast Alliance with Mr. Hauenstein and another executive. ECF 4 at 17; ECF 7-2 (Ex. 8). The email makes clear, however, that Mr. Hauenstein was not involved in preparing the presentation or "initial action items" for the meeting, and that he instead relied on a team led by those who reported to him. The email was authored by Andrew Guenthner, Delta's Director for Alliances, *who will be deposed by American on June 1*. The email also shows Mr. Hauenstein provided only "one takeaway" from the "debrief," which was

to direct the team to "identify which cities will be impacted the most from a presence perspective by the combination of AA+B6 and *then determine what our strategy is to compete effectively against that challenge*." *Id.* (emphasis added).[4] Thus, the Delta employees who were asked to analyze the information and "determine what our strategy is" (including Andrew Guenthner) have firsthand, knowledge on the topic—not Mr. Hauenstein.[5]

The emails cited by American in support of Mr. Hauenstein's "involvement in establishing network plans, setting capacity strategy, and competing for passengers generally" (ECF 4 at 18) show the same thing: that Mr. Hauenstein delegated and relied on others to develop the plans and make decisions. ECF 7-3 (Ex. 9, at DAL-00022129: email from Eric Beck setting forth the Network plan for new routes in Boston and New York), 7-5 (Ex. 11, at DAL-00006117: email update sent to Mr. Hauenstein about revenue in various cities from July 2019, a year before

[4] Although Delta has not redacted the language quoted from the exhibits relied on by American, Delta does not waive its confidential designation of the underlying documents, and maintains those documents should remain under seal, as set forth in its response to American's motion to seal (ECF 8) filed at the same time as this reply.

[5] The email also states that the work requested by Mr. Hauenstein was performed by Amy Martin and Eric Beck, two Delta Network Planning employees whom Delta has offered for deposition, and who reported directly to Joe Esposito, whose deposition is set for June 8. *See* ECF 4-2 (reflecting offer of depositions of Ms. Martin and Mr. Beck) & ECF 4-9 (thanking "Eric, Amy and the network team" for identifying the "top outstations most impacted by the AA+B6 partnership").

the Northeast Alliance was announced), 7-6 (Ex. 12, at DAL-00020016-17: email update to Mr. Hauenstein about New York and Boston demand recovery, to which Mr. Hauenstein responded merely "This is great" and asked his assistant to print); 7-7 (Ex. 12, at DAL-00011344: presentation on "NYC/BOS" demand recovery prepared "for Glen"). While Mr. Hauenstein may have received updates, none of these emails evidence his unique, firsthand knowledge of the subject matter.

The documents cited by American also do not support its contention that Mr. Hauenstein possesses unique, firsthand information about (1) "the formation and effects of joint ventures and code-sharing agreements in the airline industry," and (2) "the relevant market definition for New York City airports." ECF 4 at 18.

American points to Mr. Hauenstein's biography on Delta's website to support its argument that Mr. Hauenstein has unique knowledge about Delta's "joint ventures and code-sharing," The website describes Mr. Hauenstein as having "*led a team* in building a network that includes Delta flights to six continents and extended reach through a leading trans-Atlantic joint venture with Air France-KLM and Alitalia and a newly formed joint venture with Virgin Atlantic Airways." ECF 4-6 at 2 (emphasis added). American omits from its quotation Mr. Hauenstein's having led "a team." *Compare* ECF 4 at 18 *with* ECF 4-6 at 3.

Similarly, American provides nothing to indicate that Mr. Hauenstein has unique knowledge to testify whether Delta considers the three New York area airports to be a single market. As the head of Delta's global network planning Mr. Esposito is well-equipped to testify on that subject. American cites two emails (one of which copies Mr. Esposito and the other of which was sent to Amy Martin, who reported to Mr. Esposito) indicating Mr. Hauenstein was kept informed on the recovery of demand in certain airports in September 2020. *See* ECF 4 at 19 (citing ECF 7-6 (Ex. 12) & 7-7 (Ex. 13)). Neither email supports a claim that Mr. Hauenstein is uniquely positioned to testify on market definition, and again Mr. Esposito, whose deposition is scheduled, is well-positioned to testify on that subject.

IV. American's Delay In Seeking Depositions Does Not Excuse Its Failure To Satisfy The Apex Doctrine.

The Court should also reject American's argument that "the condensed schedule in the underlying action" excuses it from the requirement to take the depositions of more junior executives before demanding an apex deposition. ECF 4 at 22. Any such timing concerns are entirely of American's own making. The underlying action has been pending for over six months. American could have taken depositions of other witnesses offered by Delta, and then evaluated whether there was a need for Mr. Hauenstein's deposition and, if so, on what topics. But as detailed above, there is no such need; Mr. Esposito, Mr. Somers, and Mr. Guenthner all have

firsthand knowledge of the topics for which American claims to need Mr. Hauenstein's testimony.

V. That Other Airlines Have Agreed to Make Their Executives Available Is Irrelevant to Assessing the Burden on Mr. Hauenstein and Delta.

American argues Mr. Hauenstein's deposition will not burden him or Delta because Mr. Hauenstein's "counterparts" at United Airlines (Andrew Nocella) and Alaska Airlines (Andrew Harrison) have agreed to be deposed. ECF 4 at 19. How other airlines and their executives respond to subpoenas is irrelevant to the question of whether an apex deposition is appropriate here. Moreover, American has the facts wrong. Mr. Nocella and Mr. Harrison are the Executive Vice Presidents and Chief Commercial Officers of their respective airlines. *Id.* Mr. Hauenstein is Delta's President. The "Presidents" of United and Alaska are Brett Hart and Ben Minicucci, respectively—neither of whom American represents will be deposed.

American also provides no basis on which to conclude that United's Mr. Nocella and Alaska Airlines' Mr. Harrison have a similar range of responsibilities as Mr. Hauenstein. ECF 4-1, ¶¶ 11-12. American describes Mr. Hauenstein as "Delta's senior executive spokesperson" on "many critical aspects of Delta's business, strategy, and operations," and Mr. Nocella as the equivalent. ECF 4 at 5-6. It is true that Mr. Hauenstein's wide-ranging responsibilities as Delta's President include representing Delta at industry events, and public-facing engagements with

investors and the press. ECF 1-3, Hauenstein Decl. ¶ 6; ECF 4-7 & 4-11. But American does not, and cannot, argue that Mr. Hauenstein's public-facing duties are relevant to the issues in the underlying case. Thus, instead of justifying his deposition under the apex doctrine, Mr. Hauenstein's obligations and responsibilities as Delta's "senior executive spokesperson" in communicating with shareholders and the public warrant quashing it. Indeed, the apex deposition doctrine exists precisely to protect senior executives with such wide-ranging corporate responsibilities from the burden of a deposition when other employees, without the same range of important corporate duties, could provide the needed information.

VI. This Court Should Not Transfer This Motion.

The Court may transfer the motion to quash to the District of Massachusetts only upon a showing of "exceptional circumstances" as required by Rule 45(f). "Exceptional circumstances" means "transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when the court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts." Fed. R. Civ. P. 45(f) advisory committee's note to 2013 amendment. American has made no such showing.

This dispute is a narrow one—whether American can force an apex deposition of a non-party to the underlying litigation immediately, despite the burden it places

on the corporation and the deponent. American tries to confuse the issue by arguing that Delta's motion "stems from a complex antitrust case" in which Plaintiffs advance a purported "novel legal theory." ECF 4 at 25. This has nothing to do with Delta's motion. While this Court is perfectly capable of understanding and evaluating any antitrust complexities, the simple fact is that doing so is unnecessary.

In addition, all the cases to which American points are readily distinguishable, and show there are no "exceptional circumstances" here warranting transfer. In each of those cases, the court granted transfer because of risks of disrupting the underlying litigation or multiple rulings on the same issue. *In re Early*, No. 2:21-CV-00029-SCJ-JCF, 2021 WL 2636020, at *2-3 (N.D. Ga. Apr. 20, 2021) (transferring motion because the case had "been pending for almost three years," similar discovery disputes "already resolved by the [transferee court] touched on issues that may overlap with those in subpoena dispute," and "the nature of Early's attorney-client privilege objections to the subpoena here could potentially force the decisionmaker in this motion to compel to delve into the merits of Plaintiffs' underlying fraud claims."); *Virnetx, Inc. v. Apple Inc.*, No. 12-80769-MC, 2013 WL 12108440, at *1 (S.D. Fla. Sept. 26, 2013) (transferring motion where "substantially similar" subpoenas were issued to seven different parties in three districts, resulting in five

"nearly identical Motions to Quash," and "the same issues are likely to arise in many districts, and the potential for disparate rulings is great.").[6]

Here, there are no such risks, no indication of the Massachusetts court having already ruled on a similar issue, and no issue that could affect the merits of the underlying dispute. *Fed. Deposit Ins. Corp. v. Galan-Alvarez*, No. 1:15-mc-00752 (CRC), 2015 WL 5602342, at *3 (D.D.C. Sept. 4, 2015) (rejecting transfer motion where motion to quash did not "concern[] the subpoenaed documents *relevance* to the underlying dispute," and was instead involved solely consideration of the apex doctrine); *Platinum Props. Inv. Network, Inc. v. AMCO Ins. Co.*, No. 15-mc-213-JAR-TJJ, 2015 WL 5883819, at *5 (D. Kan. Oct. 8, 2015) (denying transfer where an earlier motion to compel in the underlying litigation did not address the issue in dispute for the subpoenas). The only question before the Court is whether American

[6] *See also Dispatch Printing Co. v. Zuckerman*, No. 16-cv-80037, 2016 WL 335753, at *3 (S.D. Fla. Jan. 27, 2016) (pointing to a docket "totaling 1,015 entries" and lasting "for almost ten years" as proof of the complexity of the underlying litigation, along with attorney-client privilege issues in common with "a number of other subpoenas" for "this same type of information from various judicial districts" leading to "a demonstrable risk of inconsistent discovery rulings"); *In re K.M.A. Sunbelt Trading Co.*, No. 8:18-mc-55-30AAS, 2017 WL 2559790, at *1-2 (M.D. Fla. June 13, 2017) (transferring where there were eight days until "the current deadline for filing motions in limine and the Joint Pretrial Statement and less than a month before jury instructions were due, and where the transferee court "has intimate knowledge of the underlying litigation, parties, facts, and prior rulings" because "the record contains 248 filings to date").

is entitled to an apex deposition without any showing that Mr. Hauenstein possesses unique, firsthand information and without first exhausting alternative sources of that same information. The answer to that question is no, and it does not require intimate familiarity with the underlying litigation.

CONCLUSION

Delta respectfully asks the Court to enter a protective order barring Mr. Hauenstein's deposition in this matter and quashing American's Subpoena.

Dated: May 10, 2022

Respectfully submitted,[7]

/s/ Andrew J. Tuck

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Attorneys for Movants Glen Hauenstein and Delta Air Lines, Inc.

[7] Pursuant to Local Rule 7.1D, counsel for Movants certifies that this brief was prepared with a font and point selection approved in Local Rule 5.1.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2022, the foregoing was filed via the Court's ECF system, and served on counsel for the parties in the underlying litigation, *United States v. Am. Airlines Grp. Inc.*, No. 1:21-cv-11558-LTS (D. Mass.), via e-mail.

Dated: May 10, 2022

/s/ Andrew J. Tuck

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Attorney for Movants Glen Hauenstein and Delta Air Lines, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

In re Subpoena to *Glen Hauenstein.*	Case No. 1:22-cv-1654-MHC-CCB **DECLARATION OF MICHAEL S. MITCHELL** Underlying Litigation: *United States v. Am. Airlines Grp. Inc.*, No. 1:21-cv-11558-LTS (D. Mass.)

DECLARATION OF MICHAEL S. MITCHELL IN SUPPORT OF REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND TO QUASH DEPOSITION SUBPOENA TO GLEN HAUENSTEIN

I, Michael S. Mitchell, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am an attorney licensed to practice law in Washington, D.C., and am admitted *pro hac vice* to this Court for this action. I am a partner at the law firm of Boies Schiller Flexner LLP, counsel to Delta Air Lines, Inc. ("Delta"), which, along with Mr. Hauenstein (together "Movants"), files a reply in support of their motion for a protective order and quash the deposition subpoena to Mr. Hauenstein.

2. I have personal knowledge of the facts contained herein, and, if called as witness, I could and would testify competently thereto.

3. I make this declaration in support of Movants' Reply in Support of Motion for Protective Order and to Quash Deposition Subpoena.

4. American Airlines Group Inc. ("American"), after it filed its Opposition, subpoenaed three additional Delta witnesses for deposition: Joe Esposito (Senior Vice President, Network Planning); Andrew Guenthner (Director, Alliances); and Robert Somers (Senior Vice President, Sales).

5. Delta and American have agreed to the scheduling of all three depositions: Robert Somers will be deposed on May 31; Andrew Guenthner will be deposed on June 1; and Joseph Esposito will be deposed on June 8.

6. Attached hereto as Exhibit 1 is a true and correct copy of my email exchange with Marguerite Sullivan, outside counsel for American, scheduling the three depositions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 10th day of May, 2022.

Michael S. Mitchell

Exhibit 1

From: Michael Mitchell
To: Marguerite.Sullivan@lw.com
Cc: James P. Denvir
Subject: Re: U.S. v. American Airlines, et al, No. 1:21-cv-11558-LTS // Deposition Subpoenas
Date: Friday, May 6, 2022 3:56:13 PM

Maggy,

We are confirmed for the following:

May 31 - Bob Somers
June 1 - Andrew Guenthner
June 8 - Joe Esposito

I will get back to you to confirm the location in Atlanta.

Thanks.

Mike

Michael S. Mitchell
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From: Marguerite.Sullivan@lw.com <Marguerite.Sullivan@lw.com>
Sent: Friday, May 6, 2022 1:44:14 PM
To: Michael Mitchell <mmitchell@bsfllp.com>
Cc: James P. Denvir <JDenvir@bsfllp.com>
Subject: RE: U.S. v. American Airlines, et al, No. 1:21-cv-11558-LTS // Deposition Subpoenas

Mike,

Based on our discussion, I'm confirming that Mr. Somers' deposition will be on May 31, and we are available for Mr. Guenthner's deposition on either June 1 or 2. Just let us know which works best for him/Delta/you.

Regarding Mr. Esposito, I was able to check our calendar immediately after our call. Could he be available on any of the following dates instead of May 25th: May 19, May 20, May 24, June 8.

Thanks,

Maggy

From: Michael Mitchell <mmitchell@bsfllp.com>
Sent: Friday, May 06, 2022 1:16 PM
To: Sullivan, Marguerite (DC) <Marguerite.Sullivan@lw.com>
Cc: James P. Denvir <JDenvir@bsfllp.com>
Subject: RE: U.S. v. American Airlines, et al, No. 1:21-cv-11558-LTS // Deposition Subpoenas

I will call at 1:30pm ET.

Thanks.

Michael S. Mitchell
Partner

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From: Marguerite.Sullivan@lw.com <Marguerite.Sullivan@lw.com>
Sent: Friday, May 6, 2022 1:11 PM
To: Michael Mitchell <mmitchell@bsfllp.com>
Cc: James P. Denvir <JDenvir@bsfllp.com>
Subject: RE: U.S. v. American Airlines, et al, No. 1:21-cv-11558-LTS // Deposition Subpoenas

Thanks Mike. Yes, I'm available this afternoon. I'm free until 2, and then again at 4. Easiest number to use today is 202-679-7738. Just let me know when would be best for you.

Maggy

From: Michael Mitchell <mmitchell@bsfllp.com>
Sent: Friday, May 06, 2022 1:05 PM
To: Sullivan, Marguerite (DC) <Marguerite.Sullivan@lw.com>
Cc: James P. Denvir <JDenvir@bsfllp.com>
Subject: RE: U.S. v. American Airlines, et al, No. 1:21-cv-11558-LTS // Deposition Subpoenas

Maggy,

After conferring with Delta about availability, here are some proposed dates for the depositions of these three witnesses. May I call you this afternoon to discuss further, including logistics? If so, please let me know a time and number to call.

Joe Esposito
- May 25

Bob Somers
- May 31
- June 7

Andrew Guenthner
- June 1
- June 2

Thanks.

Michael S. Mitchell
Partner

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From: Michael Mitchell
Sent: Friday, May 6, 2022 9:52 AM
To: Marguerite.Sullivan@lw.com
Cc: James P. Denvir <JDenvir@BSFLLP.com>
Subject: RE: U.S. v. American Airlines, et al, No. 1:21-cv-11558-LTS // Deposition Subpoenas

Maggy,

We will accept service for Delta by email.

Mike

Michael S. Mitchell
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From: Marguerite.Sullivan@lw.com <Marguerite.Sullivan@lw.com>
Sent: Thursday, May 5, 2022 6:39 PM
To: Michael Mitchell <mmitchell@bsfllp.com>
Subject: U.S. v. American Airlines, et al, No. 1:21-cv-11558-LTS // Deposition Subpoenas

Mike,

Following up on my voice mail earlier today, I'm attaching subpoenas for the depositions of Andrew Guenthner, Joseph Esposito, and Robert Somers at Delta. Please let us know whether you will accept service of these subpoenas on their behalf.

Thanks,
Maggy

Marguerite M. Sullivan

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EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: SUBPOENA TO GLEN HAUENSTEIN	**CIVIL ACTION NO. 1:22-CV-1654-MHC-CCB**

ORDER

This matter is before the Court for consideration of two motions: (1) Delta Air Lines, Inc. (Delta) and Glen Hauenstein's (Movants) motion for a protective order and to quash a deposition subpoena issued to Mr. Hauenstein by American Airlines Group Inc. (American), (Doc. 1), and (2) American's motion for leave to file matters under seal, (Doc. 8). American filed a response in opposition to the motion for a protective order and to quash, (Doc. 4), and Movants filed a reply, (Doc. 11). Movants also filed a response to American's motion to seal. (Doc. 10).

I. BACKGROUND

The underlying case, *United States v. Am. Airlines Grp. Inc. and JetBlue Airways Corp.*, is an antitrust action filed in the United States District Court for the District of Massachusetts. No. 1:21-cv-11558-LTS (D. Mass.); (Doc. 1-1 at 1–2). The United States has alleged, in the underlying action, that American and JetBlue's

(Defendants) "Northeast Alliance" violates antitrust laws. (Doc. 1-1 at 3). The Northeast Alliance is "a joint venture pursuant to which [Defendants] share revenues and coordinate their scheduling and other commercial activities on certain routes in the Northeast part of the United States." *Id.* Defendants maintain that a key issue in this lawsuit is whether the Northeast Alliance is anticompetitive, or, rather, whether it promotes network competition "by making both American and JetBlue more competitive in the northeast against Delta and United." (Doc. 4 at 8). American seeks to depose Mr. Hauenstein to ask about "Delta's competitive strategies and its reactions to the Northeast Alliance," as Delta is "one of three 'legacy carriers' in the United States." *Id.* at 5, 19. Defendants have also noticed the depositions of executives at United Airlines and Alaska Airlines. *Id.* at 6.

Mr. Hauenstein has been the President of Delta Airlines since May of 2016 and, as such, he is the second highest-ranking executive officer in the company. (Doc. 1-1 at 2–3). He is responsible for "the overall performance and strategy of the business, managing and overseeing senior level executives responsible for Delta's network, revenue management, reservation sales, customer care, customer engagement and loyalty strategies, and representing Delta at industry events." *Id.*

at 3–4 (citing Doc. 1-3 at ¶ 6 (Hauenstein's Declaration)). On January 17, 2022, American served a subpoena *duces tecum* on Delta, and Delta has made "five document productions totaling several thousand documents" in response. (Doc. 4 at 9). On March 30, 2022, American served a non-party deposition subpoena on Mr. Hauenstein. (Doc. 1-1 at 2, 4).

II. MOTION FOR A PROTECTIVE ORDER AND TO QUASH

Movants seek a protective order and to quash the subpoena, arguing that American cannot meet its burden of proving that, in light of the heightened standard for deposing high-ranking executives (the "apex doctrine"), Mr. Hauenstein should nonetheless be required to sit for a deposition. (Doc. 1-1 at 4–13). Movants further assert that American should be required to take the deposition of other Delta senior executives before being authorized to depose Mr. Hauenstein. *Id.* at 11–12.

American opposes the motion for a protective order and to quash, arguing that the deposition of Mr. Hauenstein is permissible, despite his high-ranking position, because he possesses unique, firsthand knowledge on issues that go to the heart of the underlying action and because other avenues of discovery would

not provide an adequate substitute for his testimony. (Doc. 4 at 11–22). American also argues that a deposition would not be unduly burdensome. *Id.* at 11, 22–24. In the alternative, American suggests that the Court should transfer this action to the District of Massachusetts, where the underlying case is pending. *Id.* at 24–26.

Movants filed a reply, noting first that, since the filing of the instant motion, American subpoenaed and scheduled depositions of three additional witnesses from Delta, rendering Mr. Hauenstein's deposition "unnecessary and inappropriate." (Doc. 11 at 5–6, 10). Movants reassert that American has not met its burden for deposing a high-level executive, particularly given that Delta is not a party to the underlying litigation. *Id.* at 8. Movants argue that Mr. Hauenstein does not possess the type of knowledge that would require his deposition, that the time restraints in the underlying action do not permit American to evade the heightened standard for apex employees, and that the fact that other airlines have allowed depositions of their high-level executives is simply not relevant to whether the Court should require Mr. Hauenstein to provide testimony. *Id.* at 11–16. Finally, Movants argue that there are no exceptional circumstances warranting transfer of the instant motion to the District of Massachusetts. *Id.* at 16–19.

Movants argue that American has not met its burden of showing that requiring Mr. Hauenstein's deposition is appropriate under the heightened standard for high-level executive officers. (Doc. 1-1 at 4–13). This heightened standard, commonly referred to as the apex doctrine, requires that the party seeking to depose the high-level executive officer show that he or she has "unique or superior knowledge of discoverable information that cannot be obtained by other means." *Cuyler v. Kroger Co.*, No. 1:14-CV-1287-WBH-AJB, 2014 WL 12547267, at *6 (N.D. Ga. Oct. 3, 2014) (internal quotation marks omitted). The rationale behind this standard "is that high level executives are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the courts." *Id.* at *7 (internal quotation marks omitted). Thus, where the party seeking to depose an officer "at the apex" of a company fails to satisfy its burden, a court may bar such deposition from taking place. *Id.* (quoting *McMahon v. Presidential Airways, Inc.*, No. 6:05-cv-1002-Orl-28JGG, 2006 WL 5359797, at *2 (M.D. Fla. Jan. 18, 2006)).

Here, the parties do not dispute the fact that Mr. Hauenstein is a high-level executive subject to this heightened standard. They do, however, disagree as to

whether the standard is met. Movants assert that Mr. Hauenstein does not have "unique personal knowledge" regarding the information American seeks to obtain from his deposition. (Doc. 1-1 at 10). They argue that although he oversees the departments at Delta that deal with the relevant topics, he is not involved in the day-to-day activities of those departments. *Id.* Rather, it is the senior executives who lead those departments who are directly responsible for their activities, meaning that Mr. Hauenstein's knowledge is neither unique nor specialized. *Id.* at 10–11. American asserts that the party seeking the deposition "need not prove conclusively that the deponent certainly has unique non-repetitive information; rather, where a corporate officer may have *any* first-hand knowledge of relevant facts, the deposition should be allowed." (Doc. 4 at 14 (quoting *In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714-YGR (TSH), 2021 WL 485709, at *5 (N.D. Cal. Jan. 26, 2021) (internal quotation marks omitted))).

Courts in this circuit, however, have routinely considered the "uniqueness" and firsthand nature of the executive's knowledge, with the idea being that if the information can be obtained from a lower-level employee, the party seeking the testimony should first do so. *See Aileron Inv. Mgmt., LLC v. Am. Lending Ctr., LLC,*

No. 8:21-cv-146-MSS-AAS, 2021 WL 7448237, at *3 (M.D. Fla. Aug. 13, 2021) (requiring the party seeking the testimony to establish that the executive has unique, non-repetitive, firsthand knowledge and that other less intrusive means of discovery, such as depositions of other employees, have been exhausted without success); *Hickey v. N. Broward Hosp. Dist.*, No. 14-CV-60542, 2014 WL 7495780, at *2 (S.D. Fla. Dec. 17, 2014) ("[A] party seeking to depose a high ranking corporate officer must first establish that the executive . . . has unique, non-repetitive, firsthand knowledge of the facts at issue . . . ."); *Cuyler*, 2014 WL 12547267, at *7 ("In short, an officer at the apex of the corporation can only be deposed if he or she has unique knowledge or the subject matter requested in deposition was pursued unsatisfactorily through less intrusive means." (alteration and internal quotation marks omitted)); *Robinson v. Wells Fargo Bank, N.A.*, No. 1:10-CV-3819-TCB-GGB, 2012 WL 13130022, at *6 (N.D. Ga. June 7, 2012) ("Under the apex rule, the party seeking the deposition must show that the executive has unique or superior knowledge of discoverable information that cannot be obtained by other means."); *Porter v. Eli Lilly and Co.*, No. 1:06-CV-1297-JOF, 2007 WL 1630697, at *3 (N.D. Ga. June 1, 2007) (noting that "a plaintiff must show that the

executive would have personal knowledge of the events in question and a plaintiff has no other means of obtaining the information").

American suggests that Mr. Hauenstein has personal knowledge of the information it seeks to obtain through his deposition, including: "Delta's competitive strategies generally and its strategic and competitive response to the Northeast Alliance specifically"; "the formation and effects of joint ventures and code-sharing agreements in the airline industry"; and "the relevant market definition for New York City airports." (Doc. 4 at 16–19). American cites to evidence of Mr. Hauenstein's knowledge on these topics, including that he supervises the "team responsible for Delta's network, revenue management, reservation sales, customer care, customer engagement and loyalty strategies"; that he has spoken to these issues "publicly, in investor presentations, earnings calls, and other settings"; that he is involved in "decisions relating to Delta's capacity levels and operating plans"; that he "personally oversees Delta's response to the Northeast Alliance"; and that he "has overseen efforts to establish a leading presence for Delta in New York at both LaGuardia Airport and John F. Kennedy International Airport and led Delta's historic expansion at LaGuardia." *Id.*

(internal quotation marks and brackets omitted); (*see generally* Docs. 7-2, 7-3, 7-6, 7-7 (email exchanges indicating that Mr. Hauenstein received reports and provided input as to these topics).

However, even if American can establish that Mr. Hauenstein satisfies the knowledge component of the analysis, it has not shown that it could not obtain the relevant information from other individuals at Delta. And from the evidence American cites in support of its assertion that Mr. Hauenstein has knowledge in these areas, it appears that there are others more directly involved in the planning and strategizing relevant to the underlying action who could provide the necessary information that American seeks. And, indeed, American has scheduled depositions with three other Delta executives: Joe Esposito—Senior Vice President, Network Planning; Andrew Guenthner—Director, Alliances; and Robert Somers—Senior Vice President, Sales. (Doc. 11 at 10). Movants maintain that Mr. Esposito oversees the Domestic Network Planning group, "which has primary responsibility for evaluating the American/JetBlue Northeast Alliance from a network perspective." (Doc. 1-1 at 12). Mr. Esposito is copied in an email providing Mr. Hauenstein with an overview of demand recovery in New York. (Doc. 7-6).

And Movants note that Amy Martin reported to Mr. Esposito, and that Ms. Martin received an email providing an overview of "recovery of demand in certain airports" ultimately intended for Mr. Hauenstein. (*See* Doc. 7-7, Doc. 11 at 12). Mr. Guenthner drafted an email regarding a meeting with Mr. Hauenstein, explaining that Mr. Hauenstein provided feedback about the team's competitive strategy. (Doc. 7-2). Mr. Guenthner then set forth an action plan for him and his team. *Id.*

In an email and phone exchange between American's counsel and Delta's outside counsel, Delta's counsel recommended Eric Beck, a Managing Director for Domestic Network Strategy, for a deposition instead of Mr. Hauenstein. (Doc. 4-1 at ¶¶ 6–9). American has not indicated that it ever deposed Mr. Beck. However, American cites to an email exchange between Mr. Hauenstein and Mr. Beck in which Mr. Beck lays out a proposed strategy to Mr. Hauenstein for approval. (Doc. 7-3 at 4–5). And while this email exchange certainly demonstrates that Mr. Hauenstein provided input as to Delta's plans, it also shows that there are others directly involved in these plans, including Mr. Esposito (with whom Defendants have scheduled a deposition). *Id.* at 4. The fact that Mr. Hauenstein provided feedback and instruction to these individuals and their teams does not suggest that

they cannot competently provide the information American seeks, and all the evidence that American cites suggests that they potentially can, despite American's conclusory statement that they are "too junior to speak definitively." (Doc. 4 at 10). The Court cannot find, at this juncture, that American could not obtain the information it seeks through the depositions that it has already scheduled.

American asserts that the "condensed schedule" in the underlying action—specifically the fact that discovery closes on June 8, 2022—means that American would not be able to depose Mr. Hauenstein if the scheduled depositions do not provide it with the information it seeks. (Doc. 4 at 9, 22; *see also United States v. Am. Airlines Grp. Inc.*, 1:21-cv-11558-LTS, Doc. 76 at 2). American's deposition with Mr. Esposito is scheduled for June 8, 2022, the date that fact discovery is set to close. (Doc. 11-2 at 2). American cites to one case from the Middle District of Florida where the court permitted the deposition of a high-level employee based in part on the fact that all scheduled depositions had not yet been taken and the court could not determine whether the information sought could be obtained from other witnesses. *Jernigan v. Scholastic, Inc.*, No. 6:17-cv-2039-Orl-37KRS, 2018 WL

11323497, at *1–2 (M.D. Fla. Sept. 17, 2018). Here, the Court agrees with Movant that American's delay in seeking the deposition of Mr. Hauenstein and other Delta employees does not excuse its failure to satisfy the requirements for an apex deposition, and the Court declines to allow the deposition on that ground alone. American could have started deposing lower-level Delta executives earlier than it did, particularly given that it knew that Delta was opposing Mr. Hauenstein's deposition.

That American should have to demonstrate that Mr. Hauenstein has unique knowledge that it cannot obtain elsewhere is especially critical here, where Delta is not even a party to the underlying litigation. "[I]n the context of evaluating subpoenas issued to third parties, a court will give extra consideration to the objections of a non-party, non-fact witness in weighing burdensomeness versus relevance." *Aeritas, LLC v. Delta Airlines, Inc.*, No. 1:13-CV-00346-RWS-WEJ, 2013 WL 454452, at * 2 (N.D. Ga. Feb. 7, 2013) (internal quotation marks omitted); *see also Gumwood HP Shopping Partners L.P. v. Simon Prop. Grp.*, No. 3:11-cv-268-JD-CAN, 2015 WL 13664418, at *4 (N.D. Ind. July 7, 2015) (noting the relevance of a high-level executive's non-party status on the burden of allowing her deposition).

It is one thing to require a high-level executive to sit for a deposition in a matter involving that executive's company. It is another altogether to do so when the executive's company is a third party to the litigation. For all the reasons stated above, American has not carried its burden to require Mr. Hauenstein to sit for a deposition.[1]

American argues that, in the alternative to denying the instant motion, the Court should transfer the motion to the District of Massachusetts. (Doc. 4 at 24–26). Federal Rule of Civil Procedure 45(f) provides that "[w]hen the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances." Movants have not consented to transfer, and the Court must therefore determine whether exceptional circumstances exist to support transfer. The Advisory Committee Notes for the 2013 amendment of Rule 45(f) offer guidance with respect to exceptional circumstances:

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[1] The Court does not find it relevant that American has deposed executives from United and Alaska Airlines without objection. Movants here have objected, and American fails to satisfy the prerequisites for an apex deposition.

> In the absence of consent, the court may transfer in exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are present. The prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions. In some circumstances, however, transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts. Transfer is appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion.

Fed. R. Civ. P. 45 advisory committee's notes to 2013 amendments.

While the undersigned has not found any controlling Eleventh Circuit caselaw addressing exceptional circumstances and transfer under Rule 45(f), several district courts within the Eleventh Circuit have considered whether transfer is appropriate under Rule 45(f) due to exceptional circumstances. These district courts have considered how long the underlying action has been pending in the court where it was filed, the complexity of the issues, the potential for disruption in the underlying litigation should the motion to transfer be granted, the extent of litigation in the underlying court, pending motions in the underlying court, and the risk of inconsistent rulings. *See In re Early*, 2:21-CV-00029-SCJ-JCF,

2021 WL 2636020, at *2–3 (N.D. Ga. Apr. 20, 2021) (transferring where the underlying case had been pending in the Northern District of California for almost three years and where that court had already resolved a motion to dismiss, a motion to compel arbitration or transfer venue, and multiple discovery disputes); *Miller Constr. Equip. Sales, Inc. v. Clark Equip. Co.*, No. 1:15-CV-00007-HRH, 2016 WL 447717, at *5 (S.D. Ga. Feb. 4, 2016) (finding that the court "must account for the complexity, procedural posture, duration of pendency, and the nature of the issues pending before, or already resolved by, the issuing court in the underlying litigation," in addition to "balanc[ing] the interest of local resolution against factors such as judicial economy and risk of inconsistent rulings" (internal quotation marks omitted)); *The Dispatch Printing Co. v. Zuckerman*, No. 16-cv-80037-BLOOM/Valle, 2016 WL 335753, at *2–4 (S.D. Fla. Jan. 27, 2016) (finding that transfer was warranted where the docket for the underlying case showed 1,015 entries, demonstrating its complexity; where the underlying case had been pending for almost ten years; where a number of other subpoenas had been issued and where more subpoenas would be issued in various judicial districts; and where the motion to compel and motion to quash had already been fully briefed

in the underlying court); *Exist, Inc., v. Shoreline Wear, Inc.*, No. 15-61917-MC-DIMITROULEAS/Snow, 2015 WL 13694080, at *2–3 (S.D. Fla. Oct. 16, 2015) (transferring after finding that there was a "real potential for disruption in the underlying litigation caused by potentially conflicting rulings" where the issuing court had pending before it a related motion to quash, as well as the defendant's motion to compel the plaintiff to produce the same documents that it sought by way of the non-party subpoena).

Apart from asserting that the motion to quash "stems from a complex antitrust case . . . brought under a novel legal theory," American has not established any of the other factors warranting transfer. (Doc. 4 at 25). The underlying case was filed in September of 2021—less than a year ago. (Doc. 1-1 at 3; Doc. 4 at 5). Neither party cites to any other motion to quash stemming from the underlying action, nor do they identify pending motions in the underlying court such that resolution of the motion by this Court would risk inconsistent rulings. And despite American's assertion that the underlying litigation is complex, the Court does not find that it is so complex that it could not resolve the instant motion for a protective order and to quash.

Based on the foregoing, the Court finds that transfer of the motion for a protective order and to quash, (Doc. 1), is not warranted, and the Court **GRANTS** the motion.

III. MOTION FOR LEAVE TO FILE MATTERS UNDER SEAL

American has filed a motion for leave to file matters under seal, (Doc. 8), and Movants have filed a response indicating that they do not oppose the motion to seal, (Doc. 10). American requests that certain exhibits filed in support of its response in opposition to Movant's motion for a protective order and to quash a subpoena, along with the portion of the response in opposition that quotes from those exhibits, be sealed. (Doc. 8 at 1).

American seeks to seal Exhibits 8 through 13 to the Declaration of Daniel M. Wall. (Docs. 7-2, 7-3, 7-4, 7-5, 7-6, 7-7). American has also filed an unredacted copy of its response in opposition to the motion for a protective order and to quash a deposition subpoena that it wishes to seal. (Doc. 7-1). For good cause shown, the motion to seal, (Doc. 8), is **GRANTED**. The Clerk is **DIRECTED** to file the entries at Doc. 7 **UNDER SEAL**.

IV. CONCLUSION

Based on the foregoing, Movants' motion for a protective order and to quash a deposition subpoena, (Doc. 1), is **GRANTED**, and American's motion for leave to file matters under seal, (Doc. 8), is **GRANTED**.

IT IS SO ORDERED, this 20th day of May, 2022.

CHRISTOPHER C. BLY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, v. AMERICAN AIRLINES GROUP INC. and JETBLUE AIRWAYS CORPORATION, Defendants.	Civil Action No.: 1:21-cv-11558-LTS

DECLARATION OF GLEN W. HAUENSTEIN

I, Glen W. Hauenstein, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I understand American Airlines Group Inc. ("American Airlines"), Defendant in the above-captioned action (the "Northeast Alliance Lawsuit"), has issued a non-party trial subpoena (the "Subpoena") and filed a motion to compel my presence as a witness at trial. I submit this declaration in support of my and Delta Air Lines, Inc.'s ("Delta") opposition to the motion to compel and in support of our motion to quash the Subpoena. I have personal knowledge of the facts contained herein, and, if called as witness, I could and would testify competently thereto.

2. I understand that American Airlines and JetBlue Airways ("JetBlue") announced a business partnership in 2020, dubbed the "Northeast Alliance," which is the subject of the above-referenced lawsuit brought by the United States Department of Justice (the "Northeast Alliance Lawsuit").

3. Neither I nor my employer Delta is a party to the Northeast Alliance Lawsuit.

4. I have never been an employee or representative of American Airlines or JetBlue.

5. Delta, headquartered in Atlanta, Georgia, is a publicly-traded, Fortune 500 company, and is ranked second among the world's largest airlines by number of scheduled passengers carried, revenue passenger-miles flown, and fleet size. Delta, along with its subsidiaries and regional affiliates, operates nearly 5,000 flights daily and serves over 250 destinations in over 50 countries on six continents.

6. I am the President of Delta, a position I have held since 2016. As President, I am the second highest-ranking executive officer at the company. In that role, I have a wide range of responsibilities, including responsibility for the overall performance and strategy of the business, managing and overseeing senior level executives responsible for Delta's network, revenue management, global sales, cargo, corporate real estate, and customer engagement and loyalty strategies, and representing Delta at industry events.

7. While I oversee the departments at Delta responsible for Delta's network, revenue management, global sales, cargo, corporate real estate, and customer engagement and loyalty strategies, I am not involved in the day-to-day activities of each of those departments. Rather, the senior executives who lead those groups have more direct, day-to-day responsibility for their respective areas. These responsibilities would have included Delta's assessment of the American/JetBlue "Northeast Alliance," as well as the development and implementation of any competitive response to it, which I delegated to them.

8. I understand that while the deposition subpoena issued to me was quashed, American Airlines deposed several Delta employees in this action, specifically: Joseph Esposito (Senior Vice President, Network Planning); Robert Somers (Senior Vice President, Global Sales), and Andrew Guenthner (Director, Alliances). These individuals are senior Delta executives or employees with substantial experience, and are involved in the day-to-day activities of the

departments and teams responsible for Delta's global network and sales strategy, including those routes serviced by the Northeast Alliance.

9. I do not believe I have any first-hand, personal knowledge on any subject on which Defendants have indicated they seek testimony, either earlier this year via the deposition subpoena served by American Airlines or as indicated by the motion to compel Defendants have filed regarding the trial subpoena, that the Delta employees already deposed do not possess.

10. As Delta's President, my responsibilities to Delta require me to maintain a very full schedule. The demands on my time have only increased during the pandemic and after this summer when demand for air travel rebounded in a way that presented many challenges for airlines.

11. I understand that American Airlines is seeking to compel me to appear at the trial during the week of October 10, 2022.[1] On October 11 and 12, I have several meetings in preparation for Delta's quarterly earnings release on October 13, 2022, as well as a number of other executive level meetings. I am scheduled to travel overseas from October 13 through October 23 for a personal trip that has been planned for over a year.

12. For other dates I understand to be in the timeframe of the trial, I will be in Europe on business from September 27 through October 2. During the week of October 3-7, I have significant professional and personal commitments in Atlanta, including business meetings with visitors to Atlanta, and numerous meetings with other Delta executives and/or senior leaders.

[1] The cover letter to the served subpoena offers conflicting information by indicating any date between October 4 and October 17. I assume the document filed with the court is more accurate.

13. Having to modify my schedule and to cancel or reschedule my trip(s), and instead prepare for, travel to, and attend trial in Boston, would impose a significant burden on both me personally, and on Delta.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on this 21st day of September, 2022.

Glen W. Hauenstein

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, v. AMERICAN AIRLINES GROUP INC. and JETBLUE AIRWAYS CORPORATION, Defendants.	Civil Action No.: 1:21-cv-11558-LTS

DECLARATION OF JOSEPH ESPOSITO

I, Joseph Esposito, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I understand American Airlines Group Inc. ("American Airlines"), Defendant in the above-captioned action (the "Northeast Alliance Lawsuit"), has issued a non-party trial subpoena (the "Subpoena") and filed a motion to compel my presence as a witness at trial. I submit this declaration in support of my and Delta Air Lines, Inc.'s ("Delta") opposition to the motion to compel and in support of our motion to quash the Subpoena. I have personal knowledge of the facts contained herein, and, if called as witness, I could and would testify competently thereto.

2. I understand that American Airlines and JetBlue Airways ("JetBlue") announced a business partnership in 2020, dubbed the "Northeast Alliance," which is the subject of the above-referenced lawsuit brought by the United States Department of Justice (the "Northeast Alliance Lawsuit").

3. Neither I nor my employer Delta is a party to the Northeast Alliance Lawsuit.

4. I have never been an employee or representative of American Airlines or JetBlue.

5. Delta, headquartered in Atlanta, Georgia, is a publicly-traded, Fortune 500 company, and is ranked second among the world's largest airlines by number of scheduled passengers carried, revenue passenger-miles flown, and fleet size. Delta, along with its subsidiaries and regional affiliates, operates nearly 5,000 flights daily and serves over 250 destinations in over 50 countries on six continents.

6. I am Delta's Senior Vice President for Network Planning, a role I have held since 2018. In that role, my responsibilities place me in charge of leading and developing Delta's global network strategy, including those routes serviced by the Northeast Alliance.

7. Before becoming Senior Vice President for Network Planning, I was Vice-President for Network Planning - The Americas, and was responsible for the day-to-day economic, financial, and capacity planning of Delta's domestic system as well as schedule planning.

8. Scott Laurence was an employee of Delta from January 18, 2022 until he resigned on February 15, 2022. He was hired to serve as Vice President of Network Planning, and reported to me. Before joining Delta, Mr. Laurence was employed by JetBlue. I understand he is now an employee of American Airlines. During his short time at Delta, Mr. Laurence was walled off from discussions, if any, regarding Defendants' "Northeast Alliance."

9. I was deposed in this case on June 21, 2022. During my June 21, 2022 video-taped deposition, I was questioned extensively by both American Airlines and attorneys for the United States government on topics I understand to be related to the Northeast Alliance Lawsuit. I answered all those questions to the best of my ability, and have no additional information to add on any of the questions posed.

10. As a Senior Vice President for Network Planning at Delta, my responsibilities require me to maintain a very full schedule. My role leading the team developing Delta's global

network strategy places substantial demands on my time, especially as Delta returns to its normal schedule post-COVID.

11. I understand that American Airlines is seeking to compel me to appear at the trial during the week of October 10, 2022.[1] From October 10 to October 13, I am scheduled to lead and/or attend multiple business meetings each day in Atlanta. I am scheduled to leave the country on the afternoon of October 13 and will be overseas through October 17 on a personal trip that was planned long before August 25, 2022.

12. For other dates I understand to be in the timeframe of the trial, I have multiple work meetings scheduled on September 27, 2022, before I depart that afternoon for a business trip to Europe, where I will be through September 29. I will then be in Salt Lake City, Utah on September 30. For the week of October 3-7, I am scheduled to lead and/or attend between five and seven business meetings scheduled for each of Monday, October 3 through Thursday, October 6, and one meeting scheduled for Friday, October 7, all of which are scheduled to occur in Atlanta. On October 18 and October 19, 2022, I will be in Los Angeles, California for a Delta airline operations event.

13. Having to reschedule or cancel those trips, and instead to prepare for, travel to, and attend trial in Boston, would impose a significant burden on both me personally, and on Delta. Similarly, being forced to reschedule or cancel my scheduled meetings would impose a significant burden on me and my team at Delta.

[1] The cover letter to the served subpoena offers conflicting information by indicating any date between October 4 and October 17. I assume the document filed with the court is more accurate.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on this 21 day of September, 2022.

Joseph Esposito