

1 In support of its Motion, Defendant filed the Declaration of Saina S.
2 Shamilov (“Shamilov Declaration”) (Shamilov Decl., ECF No. 152-3), and its
3 accompanying Exhibits A through AA¹ (Def.’s Ex. A (ECF No. 152-4); Ex. B (ECF
4 No. 152-5); Ex. C (ECF No. 152-6) ; Ex. D (ECF No. 152-7) ; Ex. E (ECF No. 152-
5 8) ; Ex. F (ECF No. 152-9); Ex. G (ECF No. 152-10); Ex. H (ECF No. 152-11) ;
6 Ex. I (ECF No. 152-12); Ex. J (ECF No. 155-13); Ex. K (ECF No. 152-14); Ex. L
7 (ECF No. 152-15); Ex. M (ECF No. 152-16); Ex. N (ECF No. 152-17); Ex. O (ECF
8 No. 152-18); Ex. P (ECF No. 152-19); Ex. Q (ECF No. 152-20); Ex. R (ECF No.
9 152-21); Ex. S (ECF No. 152-22); Ex. T (ECF No. 152-23); Ex. U (ECF No. 152-
10 24); Ex. V (ECF No. 152-25); Ex. W (ECF No. 152-26); Ex. X (ECF No. 152-27);
11 Ex. Y (ECF No. 155-13); Ex. Z (ECF No. 155-15); Ex. AA (ECF No. 152-30)).

12 Plaintiff opposes the Motion. (Jt. Stip. 12–14, 38–61.)² In support of its
13 opposition, Plaintiff filed the Declaration of Jordan C. Strauss (“Strauss
14 Declaration”) (Strauss Decl., ECF No. 152-31), and its accompanying Exhibits 1
15 through 31 (Pl.’s Ex. 1 (ECF No. 155-2);; Ex. 2 (ECF No. 152-33); Ex. 3 (ECF No.
16 152-34); Ex. 4 (ECF No. 152-35); Ex. 5 (ECF No. 152-36); Ex. 6 (ECF No. 152-
17 37); Ex. 7 (ECF No. 152-38); Ex. 8 (ECF No. 152-39); Ex. 9 (ECF No. 155-3); Ex.
18 10 (ECF No. 155-4); Ex. 11 (ECF No. 155-5); Ex. 12 (ECF No. 155-6); Ex. 13
19 (ECF No. 155-7); Ex. 14 (ECF No. 155-8); Ex. 15 (ECF No. 155-9); Ex. 16 (ECF
20 No. 152-47); Ex. 17 (ECF No. 155-48); Ex. 18 (ECF No. 152-49); Ex. 19 (ECF No.
21 155-10); Ex. 20 (ECF No. 152-51); Ex. 21 (ECF No. 152-52); Ex. 22 (ECF No.
22 155-11); Ex. 23 (ECF No. 155-12); Ex. 24 (ECF No. 152-55); Ex. 25 (ECF No.
23 152-56); Ex. 26 (ECF No. 152.57); Ex. 27 (ECF No. 152-58); Ex. 28 (ECF No.
24

25 ¹ Some exhibits are filed under seal. The sealed exhibits appear in their redacted
26 form in ECF No. 152, and in their unredacted form in ECF No. 155.

27 ² Pinpoint citations in this Order refer to the page numbers appearing in the ECF-
28 generated headers of cited documents.

1 152-59); Ex. 29 (ECF No. 152-60); Ex. 30 (ECF No. 152-61); Ex. 31 (ECF No.
2 152-62). In addition, Plaintiff filed the Declaration of Professor Stephen A.
3 Edwards (“Edwards Declaration”) (Edwards Decl., ECF No. 152-2), and its
4 accompanying Exhibits 1 through 3 (Edwards Ex. 1 (*id.* at 8–36); Ex. 2 (*id.* at 37–
5 70); Ex. 3 (*id.* at 71–91)).

6 Having read and considered the papers submitted by the parties, the Court
7 finds the Motion suitable for disposition without a hearing. *See* Fed. R. Civ. P. 78;
8 C.D. Cal. L.R. 7-15. Accordingly, the hearing set for November 5, 2021 is hereby
9 **VACATED** and taken off calendar. For the reasons set forth below, Plaintiff’s
10 Motion is **GRANTED**.

11 12 **II. FACTUAL AND PROCEDURAL BACKGROUND**

13 **A. Factual Background³**

14 This patent infringement action, which proceeds on the basis of Plaintiff’s
15 First Amended Complaint (“FAC”), involves digital picture frame technology.
16 (FAC, ECF No. 31, at ¶¶ 8, 19.) Plaintiff is the owner of U.S. Patent Nos.
17 6,442,573 (“ ’573 Patent”), 9,203,930 (“ ’930 Patent”), and 9,654,562 (“ ’562
18 Patent”) (collectively, “Asserted Patents”). (*Id.* at ¶¶ 10, 28; *see also id.* at Exs. 1,
19 2, 3.) Plaintiff contends that Defendant infringes on the Asserted Patents through
20 three accused product families—the Kindle e-Reader, the Echo Show, and the Fire
21 Tablet families. (*Id.* at ¶¶ 95–116.)

22 ///

23 ///

24
25 ³ The Court summarizes the allegations and claims in the FAC and the exhibits in
26 support of the Joint Stipulation. In doing so, the Court neither opines on the
27 veracity or merit of the parties’ allegations and claims nor makes any findings of
28 fact.

1 1. The Creation of the Ceiva Frame

2 Plaintiff alleges that, although digital picture frames existed as of 1999, the
3 technology required formatting of digital photos and proprietary equipment. (FAC
4 ¶ 18.) Convinced that there was a better way to share and view digital photos,
5 Ceiva’s founders set out to invent a digital picture frame that overcame the
6 challenges of the then-existing digital picture frame technology. (*Id.* at ¶ 19.) Thus
7 was born the “Ceiva Display.” (*Id.*) Generally, the Ceiva Display is “a self-
8 configuring digital picture frame that automatically obtain[s] digital images from
9 display on the frame from a repository that [can] be accessed via a communications
10 network.” (*Id.* at ¶ 20.) Specifically, the Asserted Patents disclose a digital picture
11 frame that does not require user input to download new content or to update its
12 software. (*Id.* at ¶¶ 56–59.) The claims in the Asserted Patents describe the
13 technologies that enable the digital picture frame “to automatically access[] a
14 remote data repository without any further user input.” (*Id.* at ¶ 56.) In addition,
15 the patent specifications describe the technological improvements that “enable the
16 claimed digital picture frame to automatically issue a request to the remote server
17 system, and thereby receive images and software updates without any user input.”
18 (*Id.*) At the time, the technologies claimed in the Asserted Patents were
19 “unconventional.” (*Id.* at ¶¶ 61–70.) The unique features of the Ceiva Display are
20 described in its packaging: “(1) ‘No computer needed to receive photos’; (2)
21 ‘Automatically receives and displays a digital photo slide show – up to twenty new
22 photos a day’; (3) ‘Simple to set up and use’; and (4) ‘Perfect for parents and
23 grandparents.’” (*Id.* at ¶ 75.) Plaintiff released its commercial embodiment of the
24 Asserted Patents—the Ceiva Frame—in December 1999. (*Id.* at ¶ 73.)

25 On December 10, 1999, Plaintiff filed its first United States patent
26 application to protect the inventions implemented in the Ceiva Display, Serial No.
27 09/458,849 (“ ’849 Application”). (FAC ¶ 22.) Four United states patents covering
28 the inventions disclosed in the ’849 Application have issued to date, three of which

1 are the Asserted Patents. (*Id.* at ¶ 23.) The '573 Patent issued on August 27, 2002,
2 the '930 Patent issued on December 1, 2015, and the '562 Patent issued on May 16,
3 2017. (*Id.* at ¶¶ 24, 26, 27.)

4
5 2. The Amazon-Ceiva Resale Agreement and Defendant's
6 Promotion of the Ceiva Frame

7 While the '849 Application was pending, and before any patents issued, the
8 parties developed a relationship related to the Ceiva Frame. In March 2000, the
9 parties entered into an agreement whereby Defendant would have the exclusive
10 sales rights over the Ceiva Frame, which it would sell through its Amazon.com
11 website ("Resale Agreement"). (Pl.'s Ex. 1.) The Resale Agreement required
12 Defendant to, among other things, "support the launch of the Ceiva [Frame] on its
13 web site with marketing to its customer base," including, among other things,
14 sending "e-mail messages to targeted Amazon.com customers." (*Id.* at 2.)

15 On March 27, 2000, in "its first-ever national print advertisement,"
16 Defendant issued a press release about the Ceiva Frame. (*See* FAC ¶ 81.) It was
17 entitled "Amazon.com Named Exclusive Retailer for New Internet-Enabled Picture
18 Frame Ceiva, Making Amazon.com the Best Place to Find and Discover the Hottest
19 Electronics." (Pl.'s Ex. 5 at 2.) The press release touted the Ceiva Frame as "the
20 first-ever Internet-connected digital picture frame, which enables people to receive
21 photos to a picture frame directly over a phone line." (*Id.*) It characterized the
22 Ceiva Frame's functions as "anything but traditional." (*Id.*) It explained that,
23 "[o]nce activated, it automatically calls the Ceiva service every night and
24 downloads new images sent by friends and family," and displays "up to 10 new
25 photos every morning." (*Id.*) It quoted Defendant's general manager as saying:
26 "As the exclusive retailer of Ceiva, we give our customers just what they are
27 looking for — access to the latest and greatest products first." (*Id.*)
28

1 On March 30, 2000, Defendant placed an advertisement in the *Wall Street*
2 *Journal* in which it pictured the Ceiva Frame, publicizing it as “[t]he world’s first
3 internet-connected picture frame meets Uncle Frank’s toupé” and highlighting that
4 the reader could “[r]eceive photos of family and friends over the internet without
5 computer. Available at Amazon.com. To learn more visit
6 www.amazon.com/ceiva.” (Pl.’s Ex. 6.)

7 On April 4, 2000, Sara Morris, the then-employee of Defendant who oversaw
8 the relationship between Defendant and Plaintiff, sent an email to Plaintiff’s
9 representatives regarding an email that Mr. Bezos was to send to Defendant’s
10 customers (“Morris Email”). (Def.’s Ex. R.) The Morris Email attached a draft of
11 what Ms. Morris referred to as “the Jeff email”—an email that would be sent from
12 Mr. Bezos to Defendant’s first one hundred thousand customers, offering them a
13 special deal—“we’ll give you \$25 off”—on the Ceiva Frame (“Jeff Email”).
14 (Def.’s Ex. Q.) The subject line of the Jeff Email was: “A special offer for long-
15 time Amazonians.” (*Id.* at 2.) The Jeff Email described the Ceiva Frame as “a
16 pretty remarkable device” and noted that Defendant was “the only retailer—online
17 or off—who carries it.” (*Id.*) Distinguishing it from a “wooden picture frame,” the
18 Jeff Email explained that the Ceiva Frame “lets you download digital photos and
19 display them in full color.” (*Id.*) The Jeff Email noted the simplicity of the Ceiva
20 Frame: “Just store your images in your account . . . encourage your friends and
21 family to do the same . . . plug your Ceiva frame into the phone line and it’ll fill
22 with smiles and snapshots of your favorite people” with “[n]o Internet connection
23 or computer needed.” (*Id.*) The Jeff Email was signed: “Sincerely, Jeff Bezos,
24 Founder and CEO, Amazon.com.” (*Id.*) In the Morris Email, Ms. Morris explained
25 that the Jeff Email she was forwarding was a draft that would be personalized by
26 Mr. Bezos that day, that his edits might be “substantial,” that his “his edits are
27 final,” and that there would be no “opportunity to make changes” thereafter.
28 (Def.’s Ex. R at 2.)

1 In or around April 2000, Mr. Bezos took part in an interview conducted and
2 broadcast by the Cable News Network (“CNN”). (Def.’s Ex. T; *see also* ECF No.
3 156.) The interview focused on the profitability of Defendant’s family of
4 businesses. (Def.’s Ex. T.) Mr. Bezos explained to the CNN interviewer that
5 Defendant was driving toward profitability in each of its businesses; that some of
6 the businesses—such as the United States books business—already were profitable,
7 while other businesses, which were at different stages of their life cycles—such as
8 books, music, and video as a group—were not; that Defendant’s goal was to make
9 that group profitable by the end of 2000; and that, in the meantime, Defendant was
10 continuing to invest in its new business units, such as electronics, toys, and tools.
11 (*See id.*) At this point, Mr. Bezos light-heartedly said: “By the way, I would like to
12 encourage all of your viewers to buy the Ceiva picture frame ... that will help us
13 with profitability.” (*Id.*) To which the CNN host responded in laughter: “All right
14 . . . we’ve all decided to go out and buy some . . . so that Jeff doesn’t go bankrupt.”
15 (*Id.*)

16 On April 19, 2001, Dean Schiller, Plaintiff’s founder and inventor of the
17 Asserted Patents, sent an email to Mr. Bezos referencing a meeting between the two
18 at a TED conference⁴ (“Schiller Email”). (Jt. Stip. 26 n.14; Def.’s Ex. S.) In the
19 Schiller Email, Mr. Schiller recounted their conversation at TED; offered to send

21 ⁴ TED is a nonprofit organization “devoted to spreading ideas, usually in the form
22 of short, powerful talks (18 minutes or less).” *Our Organization*, TED
23 <https://www.ted.com/about/our-organization> (last visited Oct. 25, 2021). Its
24 “agenda is to make great ideas accessible and spark conversation.” *Id.* “TED”
25 stands for “Technology, Entertainment, Design.” *Conferences*, TED,
26 <https://www.ted.com/about/conferences> (last visited Oct. 25, 2021). TED describes
27 its conferences, which occur two or more times per year, as “a unique multi-day
28 TED experience” attended by “industry leaders and impactful people” that
showcase “important research and ideas from all disciplines,” including the
“signature TEDTalks,” which are short lectures on a particular topic, as well as
“interviews, debates, workshops, activities, interactive exhibits, evening events and
parties.” (*Id.*)

1 Mr. Bezos a current version of the Ceiva Frame; acknowledged Mr. Bezos’s
2 support and enthusiasm; noted that Amazon.com had been a “very good distribution
3 point for [Ceiva]”; acknowledged Mr. Bezos’s “offer to send [an] email,” which
4 Ceiva was “unable to make happen for whatever reason;” stated that he would love
5 to have Mr. Bezos send such an email if Mr. Bezos was “still interested”; and noted
6 that Mr. Bezos’s “own experience is an honest and compelling story that reveals the
7 wonderful side of” the Ceiva Frame. (Def.’s Ex. S.)
8

9 3. The Alleged Infringement Notice to Defendant

10 Plaintiff marked the Ceiva Frame with its ’573 Patent number. (FAC ¶ 89.)
11 Defendant began offering Plaintiff’s smart displays marked with the ’573 Patent
12 number for sale on its Amazon.com website at least as early as February 10, 2003.
13 (*Id.* at ¶ 93.) In addition, but without Plaintiff’s authorization, Defendant makes
14 and sells Amazon-branded products—the Echo Show family of products, the Fire
15 Tablet family of products, and the Kindle E-Book family of products—covered by
16 at least one claim of the Asserted Patents. (*Id.* at ¶¶ 95–116.) Also without
17 Plaintiff’s authorization, Defendant offers for sale and sells third-party products
18 covered by the ’562 and the ’930 Patents. (*Id.* at ¶¶ 98, 107.)

19 In November 2018, Plaintiff sent a letter to Defendant giving notice of
20 Defendant’s infringement of the ’562 Patent and demanding that Defendant stop its
21 infringement (“Notice Letter”). (FAC ¶ 89.) Despite having received and
22 acknowledged the Notice Letter, Defendant has continued its infringement
23 activities. (*Id.* at ¶¶ 91–92.)

24 This lawsuit followed.

25 ///

26 ///

27 ///

28 ///

1 **B. Procedural Background**

2 1. The Lawsuit

3 On October 23, 2019, Plaintiff filed its lawsuit against Defendant. (Compl.,
4 ECF No. 1.) The operative FAC, filed on February 13, 2020, asserts claims of
5 direct infringement of the Asserted Patents. (*See* FAC.) Relevant here, Defendant
6 asserts defenses, among others, that the Asserted Patents are invalid because they
7 are obvious in light of prior art under 35 U.S.C. § 103 (Jt. Stip. 27), and that the
8 Asserted Patents are not patent-eligible under 35 U.S.C. § 101 (*id.* at 30).

9
10 2. The Discovery Dispute

11 Plaintiff currently seeks to depose Mr. Bezos on two general topics: (1) his
12 role in the relationship between Defendant and Plaintiff, and his personal
13 endorsement or promotion of the Ceiva Frame, and (2) his involvement in the
14 design and development of the accused products. (Def.’s Ex. F at 8–10.) Plaintiff
15 served Defendant with a notice of deposition of Mr. Bezos pursuant to Federal of
16 Civil Procedure (“Rule”) 30(b)(3). In addition, Plaintiff served Defendant with a
17 Rule 30(b)(6) notice of deposition covering the following topics, among others:

18
19 Topic 18: The involvement of Jeff Bezos in the design and
20 development of each accused product (*see, e.g.*,
21 document no. AMZ-CEIVA00000754).

22 Topic 114: Amazon’s business relationship with Ceiva as a
23 seller of Ceiva’s digital picture frame.

24 Topic 115: Amazon’s business relationship with Ceiva as the
25 exclusive retailer of Ceiva’s digital picture frame.

26 Topic 116: Amazon’s advertising, marketing and promotion of
27 the Ceiva digital picture frame.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- Topic 117: Ownership and/or use of Ceiva’s digital picture frames by amazon’s founders, board members, employees or agents.
- Topic 118: Any technical and/or physical evaluating, testing, analysis, or reverse engineering of the [sic] Ceiva’s digital picture frame by Amazon.
- Topic 119: Communications between Amazon and Ceiva, including in connection with Amazon’s business relationship with Ceiva as the exclusive retailer of the [sic] Ceiva’s digital picture frame.
- Topic 120: Communications between any employees of Ceiva and employees of Amazon in connection with their business relationship, including as the exclusive retailer of the [sic] Ceiva’s digital picture frame.
- Topic 121: Use by Amazon’s founders, board members, or employees of the Ceiva subscription service.
- Topic 122: Jeff Bezos’ involvement in the business relationship between Ceiva and Amazon, including in connection with Amazon being the exclusive retailer of the Ceiva digital picture frame.

(Jt. Stip. 16–17.) All Topics, except Topics 18 and 118, relate to Plaintiff’s first area of inquiry: Mr. Bezos’s role in the relationship between Defendant and Plaintiff and his personal endorsement or promotion of the Ceiva Frame. Topics 18 and 118 relate to Plaintiff’s second area of inquiry: Mr. Bezos’s involvement in the design and development of the accused products and the alleged reverse engineering of the Ceiva Frame by Defendant.

Before issuing these deposition notices, Plaintiff sought to obtain the information encompassed by Topics 18 and 114 through 122 through other discovery means. (Jt. Stip. 49.) Specifically, Plaintiff served requests for

1 admissions asking Defendant to admit that Mr. Bezos: (1) owned at least one Ceiva
2 Frame, and (2) marketed, promoted, boasted, or referred to the Ceiva Frame as
3 “revolutionary,” all of which Defendant denied. (*Id.* (citing Pl.’s Ex. 28 at 3–4).)
4 In addition, Plaintiff served an interrogatory asking Defendant to “[i]dentify any
5 pre-suit communication(s) made by or on behalf of Amazon concerning Ceiva or its
6 digital picture frame products,” in response to which Defendant identified the pre-
7 suit infringement notice letters, which did not involve Mr. Bezos. (*Id.* (citing Pl.’s
8 Ex. 29 at 4).)

9 Because Defendant objected to the deposition of Mr. Bezos, Plaintiff
10 requested the Court’s intervention through its informal discovery dispute resolution
11 process, seeking an order compelling Mr. Bezos’s deposition. The Court held an
12 informal discovery conference on June 4, 2021 (“June 4 IDC”). (June 4, 2021 IDC
13 Order, ECF No. 123.) At the June 4 IDC, Plaintiff did not dispute that Mr. Bezos is
14 “a high-ranking official” of Defendant, despite the fact that he would be stepping
15 down on July 5, 2021 from his then-CEO position to one of Executive Chair. (June
16 4, 2021 IDC Tr., ECF No. 132, at 5–6.) Defendant objected to the deposition on
17 the basis of the apex doctrine, arguing that (1) Plaintiff had not established that Mr.
18 Bezos had unique knowledge about the deposition topics because it had not taken a
19 single deposition before seeking that of Mr. Bezos, (2) Defendant had designated
20 witnesses on the topics at issue and that those depositions had not yet been taken
21 place, (3) Defendant had not exhausted other less-intrusive means of obtaining this
22 information, including through third-party discovery, and (4) the discovery sought
23 was not relevant. (*Id.* at 12–15.) Upon conferring with the parties, the Court noted
24 that it was not convinced that Plaintiff had exhausted all other less-intrusive
25 discovery methods before seeking to depose Mr. Bezos. (*Id.* at 15.) The Court
26 suggested that, instead, Plaintiff first take the Rule 30(b)(6) depositions and
27 depositions of other percipient witnesses and thereafter return to the Court with
28 evidence that the depositions did not yield the information Plaintiff needs and that it

1 believes can only be obtained from Mr. Bezos. (*Id.* at 16–17, 27.) The Court noted
2 that it was not foreclosing the possibility of compelling Mr. Bezos to give a
3 deposition, but that it wanted the parties to “do this in a way that makes sense and
4 that respects the apex doctrine for somebody who . . . Plaintiffs admit is very high-
5 ranking.” (*Id.* at 30.)

6 Having deposed four corporate designees regarding the topics at issue,
7 Plaintiff again requested the Court’s intervention through its informal discovery
8 dispute resolution process, seeking an order compelling Mr. Bezos’s deposition.
9 The Court held a further informal discovery conference on September 20, 2021
10 (“September 20 IDC”). (Sept. 20, 2021 IDC Order, ECF No. 144.) At the
11 September 20 IDC, Plaintiff argued that the four corporate designees did not
12 provide answers to the questions posed and, at times, provided testimony on the
13 basis of speculation. (Sept. 20, 2021 Tr., ECF No. 145, at 5–10.) Defendant again
14 objected to the deposition on the basis of the apex doctrine, arguing that (1) twelve
15 depositions had been taken and that those deponents addressed the topics on which
16 Plaintiff seeks to depose Mr. Bezos, and (2) in any event, Mr. Bezos’s personal
17 knowledge on those topics is not relevant to the case. (*Id.* at 12–19, 29–38.) The
18 parties were unable to reach a resolution during the September 20 IDC, and this
19 Motion followed.

20 Defendant seeks a protective order preventing Mr. Bezos’s deposition on
21 three grounds. *First*, it argues that Mr. Bezos has no unique, first-hand relevant
22 knowledge regarding the relationship between Defendant and Plaintiff. (*Id.* at 18–
23 33.) *Second*, it argues that Mr. Bezos has no unique, first-hand relevant knowledge
24 regarding the development of the accused products. (*Id.* at 33–35.) *Third*, it argues
25 that, as a high-level executive who lacks unique, first-hand relevant knowledge
26 about the case, Mr. Bezos is protected from deposition under the apex doctrine. (*Id.*
27 at 35–36.)

28 ///

1 **III. ANALYSIS**

2 **A. Legal Standard**

3 Rule 26(b)(1) governs the scope of discovery in federal cases and provides
4 that parties may obtain discovery regarding any nonprivileged matter that is
5 relevant to any party's claim or defense. Fed. R. Civ. P. 26(b)(1). Rule 401 of the
6 Federal Rules of Evidence provides that evidence is relevant if: "(a) it has any
7 tendency to make a fact more or less probable than it would be without the
8 evidence; and (b) the fact is of consequence in determining the action." Fed. R.
9 Evid. 401. But relevance alone does not justify discovery. As a general matter,
10 Rule 26(b) is to be "liberally interpreted to permit wide-ranging discovery of
11 information," even if that information is not ultimately admitted at trial. *Comcast*
12 *of L.A., Inc. v. Top End Int'l, Inc.*, No. CV 03-2213-JFW(RCx), 2003 U.S. Dist.
13 LEXIS 18640, at *6 (C.D. Cal. July 2, 2003).

14 In addition to relevance, Rule 26(b)(1) requires that the discovery be
15 proportional to the needs of the case. Fed. R. Civ. 26(b)(1). Proportionality is
16 determined by a consideration of the following factors: "the importance of the
17 issues at stake in the action, the amount in controversy, the parties' relative access
18 to relevant information, the parties' resources, the importance of the discovery in
19 resolving the issues, and whether the burden or expense of the proposed discovery
20 outweighs its likely benefit." *Id.* "Information within this scope of discovery need
21 not be admissible in evidence to be discoverable." *Id.*

22 Further, the court "must limit the frequency or extent of discovery" pursuant
23 to Rule 26(b)(2) if:

- 24 (i) the discovery sought is unreasonably cumulative or
25 duplicative, or can be obtained from some other source
26 that is more convenient, less burdensome, or less
27 expensive; (ii) the party seeking discovery has had ample
28 opportunity to obtain the information by discovery in the
action; or (iii) the proposed discovery is outside the scope
permitted by Rule 26(b)(1).

1 Fed. R. Civ. P. 26(b)(2)(C).

2 Upon a motion by a party, and for good cause shown, a court “may issue an
3 order to protect a party or person from annoyance, embarrassment, oppression, or
4 undue burden or expense, including . . . forbidding the disclosure or discovery.”
5 Fed. R. Civ. P. 26(c)(A). To obtain such a protective order, “the party resisting
6 discovery or seeking limitations thereon must show ‘good cause’ for its issuance.
7 *Id.* “[A] strong showing is required before a party will be denied entirely the right
8 to take a deposition.” *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.
9 1975) (citing 4 J. Moore, *Federal Practice* ¶ 26.69 (2d ed. 1974)). Such is a “heavy
10 burden.” *Id.*

11 Courts recognize that depositions of high-level executives “create[] a
12 tremendous potential for abuse or harassment.” *Celebrity, Inc. v. Ultra Clean*
13 *Holding, Inc.*, No. C 05-4374 MMC (JL), 2007 U.S. Dist. LEXIS 8295, at *8 (N.D.
14 Cal. Jan. 25, 2007). Thus, protective orders under Rule 26(c) have been used to
15 protect an entity when it faces, such as Defendant faces here, the deposition of an
16 executive officer, also known as an apex deposition. *See, e.g., Doble v. Mega Life*
17 *& Health Ins. Co.*, No. C 09-1611 CRB (JL), 2010 U.S. Dist. LEXIS 56190, at *3–
18 4 (N.D. Cal. May 18, 2010) (collecting cases where courts have prohibited the
19 deposition of high-ranking corporate executives). In exercising discretion under
20 Rules 26(b)(1) and (b)(2) to determine whether to prohibit an apex deposition,
21 courts consider “(1) whether or not the high-level deponent has unique first-hand,
22 non-repetitive knowledge of the facts at issue in the case and (2) whether the party
23 seeking the deposition has exhausted other less intrusive discovery methods, such
24 as interrogatories and depositions of lower level employees.” *WebSideStory, Inc. v.*
25 *NetRatings, Inc.*, No. 06-cv-408 WQH(AJB), 2007 U.S. Dist. LEXIS 20481, at *7
26 (S.D. Cal. Mar. 22, 2007).

27 As an initial matter, the party seeking the apex deposition must show that the
28 executive has “direct personal factual information pertaining to material issues in an

1 action[.]” *Littlefield v. Nutribullet*, No. CV 16-6894 MWF (SSx), 2017 U.S. Dist.
2 LEXIS 229420, at *17 (C.D. Cal. Nov. 7, 2017) (quoting *Church of Scientology of*
3 *Boston v. I.R.S.*, 138 F.R.D. 9, 12 (D. Mass. 1990)); *see also* *Hunt v. Cont’l Cas.*
4 *Co.*, No. 13-cv-05966-HSG, 2015 U.S. Dist. LEXIS 44304, at *6–7 (N.D. Cal. Apr.
5 3, 2015) (finding that plaintiff “proffered a substantial basis for concluding that
6 [deponent] may have unique first-hand knowledge regarding the facts at issue in
7 this case” because plaintiff’s “gender and age discrimination claims include direct
8 allegations regarding actions taken by and statements made by [deponent]” based
9 on plaintiff’s “direct interactions with [deponent]”).

10 Even where an apex deponent has such direct personal knowledge, good
11 cause has been found to prohibit an apex deposition where the “high-level corporate
12 executive lack[ed] unique or superior knowledge of the facts in dispute.”

13 *WebSideStory, Inc.*, 2007 U.S. Dist. LEXIS 20481, at *7. (citations omitted).

14 Good cause also has been found where “the information sought in the deposition
15 can be obtained through less intrusive discovery methods (such as interrogatories)
16 or from depositions of lower-level employees with more direct knowledge of the
17 facts at issue.” *Affinity Labs of Tex. v. Apple, Inc.*, No. C 09-4436 CW (JL), 2011
18 U.S. Dist. LEXIS 53649, at * 42 (N.D. Cal. May 9, 2011) (quoting *Baine v. Gen.*
19 *Motors Corp.*, 141 F.R.D. 332, 334 (M.D. Ala. 1991)).

20 On the other hand, even a high-ranking executive is subject to deposition
21 where it is found that he or she “has personal knowledge of facts relevant to the
22 lawsuit[.]” *Id.* (citations omitted). Generally, a claimed lack of knowledge on
23 behalf of the deponent does not alone provide sufficient ground for a protective
24 order. *Id.* (citations omitted). Nor is “the fact that the apex witness has a busy
25 schedule” sufficient to foreclose otherwise proper discovery. *Id.* (citation omitted).

26 ///

27 ///

28 ///

1 **B. A Protective Order Preventing the Deposition of Mr. Bezos**
2 **Regarding Topic 18⁵ is Warranted.**

3 Defendant contends that, because its Rule 30(b)(6) designees regarding
4 Plaintiff’s Topic 18— Matt Wong, Senior Manager of the Fire Tablet family of
5 products, and Kevin Burkhart, Director of Marketing for the Echo Show family of
6 products—have fully answered Plaintiff’s questions on this topic, any knowledge or
7 information Mr. Bezos may have is not “unique” as required for an apex deposition
8 (Jt. Stip. 33–35.) Plaintiff, on the other hand, disputes that Messrs. Wong and
9 Burkhart fully answered its questions on this topic, and contends instead that, given
10 Mr. Bezos’s involvement in the subject matter of this topic, any knowledge and
11 information he may have is “unique” and justifies an apex deposition. (*Id.* at 49–
12 55.)

13 Defendant notes that Mr. Wong testified that, pursuant to his experience, “we
14 have never had a review with [Mr. Bezos] regarding Fire Tablets,” including
15 product development milestones, and that the appearance of Mr. Bezos’s name on
16 certain product management documents does not necessarily mean that he
17 specifically reviewed or approved them. (Def’s Ex. Z at 199:1–200:13.) In
18 addition, Defendant notes that Mr. Burkhart testified that Mr. Bezos was not
19 involved in the drafting of technical documents, including concept review or go-to-
20 market documents, but instead he provided only high-level guidance on the overall
21 physical design of Echo Show devices, including the industrial design and form
22 factor. (Def.’s Ex. Y at 138:22–139:14, 142:3–18.)

23 Plaintiff takes issue with the sufficiency of the testimony of Messrs. Wong
24 and Burkhart. (Jt. Stip. 49–55.) With respect to Mr. Wong’s testimony regarding
25 the design and development of the Fire Tablet family of products, Plaintiffs notes
26

27 ⁵ For purposes of this Motion, Plaintiff does not pursue information regarding Mr.
28 Bezos’s involvement in the design and development of the Kindle e-Reader family
of products. (ECF No. 144 at 2; Jt. Stip. 16 n.6.)

1 that, as a threshold matter, Mr. Wong did not discuss with Mr. Bezos “his input or
2 approval in the development of any version of the Fire Tablet product” (Pl.’s Ex. 22
3 at 199:5–12); that his only conversation with Mr. Bezos, which occurred in Spring
4 2020, was “on a confidential project” that was “not related Fire Tablets in any
5 way,” that also was not related to the Kindle or Echo Show families of products,
6 and was instead “related to COVID-19” (*id.* at 202:9–15; 207:12–24; 210:19–24);
7 and that he did not “try to search or locate any documents . . . indicating Mr.
8 Bezos’s involvement in the design or development of any Fire Tablet product” (*id.*
9 at 212:2–5, 221:2–7).

10 In addition, Plaintiff notes Mr. Wong’s further testimony as follows: that he
11 could not recall seeing or reviewing “any communications indicating Mr. Bezos’s
12 involvement in the development of approval of a Fire Tablet product” (*id.* at
13 199:13–17, 201:14–21, 203:23–204:1, 204:16–20, 218:24–219:3, 220:19–25); that
14 he could not confirm whether a 2010 Business Requirement Document (“BRD”)
15 for [REDACTED]
16 [REDACTED]; that
17 he did not know whether the reference in the BRD for two other Fire Tablets to
18 [REDACTED]; that he could not
19 confirm whether Mr. Bezos was personally involved in approving two other Fire
20 Tablets, [REDACTED]
21 [REDACTED]; that he “would be speculating” as to Mr.
22 Bezos’s involvement (*id.* at 218:20–23, 219:4–11); that he did not know the earliest
23 date that Mr. Bezos became involved in providing input into the development or
24 launch of the Fire Tablet family of products (*id.* at 200:20–23); that he did not
25 know “which products Mr. Bezos view[ed] as the biggest competitive threats to the
26 Fire Tablet family of products” (*id.* at 205:16–20); that he did not recall or know
27 how many of Defendant’s products Mr. Bezos has “ever been personally involved
28 with at the development stage” (*id.* at 207:6–10). In addition, Plaintiff notes that

1 Mr. Wong limited his testimony to the period June 2019 to the present and 2015 to
2 2017 for only certain Fire Tablets (*id.* at 20:23–21:6, 21:25–22:6, 199:2–4, 200:5–
3 19, 201:8–13, 211:14–212:1, 215:7–12, 215:20–216:11); and that he conceded that
4 his testimony for any other time frame would be based on “[s]peculation based on
5 [his] work on Fire Tablets since 2019” (*id.* at 219:16–19, 220:2–7).

6 With respect to Mr. Burkhart’s testimony regarding the design and
7 development of the Echo Show family of products, Plaintiff notes that, like Mr.
8 Wong, Mr. Burkhart did not “try to locate any documents regarding Mr. Bezos’s
9 level of involvement in the design or development of the Echo Show products”
10 (Pl.’s Ex. 23 at 144:21–24), and that, while Mr. Burkhart recalled having some
11 discussions with Mr. Bezos, he could not recall how many, when, or the specific
12 details of the discussions, including details regarding the industrial design or Mr.
13 Bezos’s feedback about the product (*id.* at 137:4–138:16, 139:7–11, 139:19–24,
14 140:10–13).

15 In addition, Plaintiff notes Mr. Burkhart’s further testimony as follows: that
16 he could not confirm whether the Echo Show Gen 1 BRD stating “it reflects the
17 direction received from Jeff” incorporated input from Jeff Bezos (*id.* at 136:19–
18 137:2); that he “never asked Mr. Bezos whether or not he did edit or draft” the
19 document (*id.* at 142:3–8, 142:20–23); that he did not know “the earliest date Mr.
20 Bezos became involved in the development for the Echo Show products” (*id.* at
21 141:8–11); that he did not know the competitors that Mr. Bezos viewed as “the
22 biggest threats” at the time of the concept review of an Echo Show product (*id.* at
23 143:15–19); that he did not know whether “Mr. Bezos’ [sic] level of involvement in
24 the Echo Show product family differed from his involvement in the development of
25 any other [of Defendant’s] products” (*id.* at 143:21–144:2); that he did not know
26 whether there was a “particular Echo [S]how product version that Mr. Bezos was
27 more heavily involved in with respect to the development or approval compared to
28 the other Echo Show products” (*id.* at 144:4–8); that he did not know how many

1 Echo Show product meetings Mr. Bezos attended (*id.* at 142:24–143:2); that he did
2 not know if “Mr. Bezos’ [sic] vision for the Echo Show product family evolved or
3 changed over the course of time” (*id.* at 141:12–16); that he did not know what
4 other products Mr. Bezos was considering launching at the time of the concept
5 review of an Echo Show product (*id.* at 141:18–22); and that he did not know what
6 top five features and risk factors Mr. Bezos recommended for the Echo Show
7 family of products (*id.* at 143:3–13).

8 Based upon this testimony, the Court concludes that Defendant failed to
9 produce Rule 30(b)(6) witnesses who could answer Plaintiff’s questions about Mr.
10 Bezos’s involvement in the design and development of the Fire Tablet and Echo
11 Show families of products. Indeed, neither witness was able to testify to any details
12 of Mr. Bezos’s involvement. Nor were they able to testify with certainty that Mr.
13 Bezos was *not* involved in the design and development of such products. Mr.
14 Burkhardt testified that Mr. Bezos’s involvement with the Echo Show family of
15 products was limited to high-level input on the overall physical design of the
16 products and he would not have drafted or reviewed technical documents, while
17 Mr. Wong testified that he was not aware of Mr. Bezos having any involvement in
18 the design or development of the Fire Tablet family of products. Mr. Wong also
19 acknowledged that documents for certain products named Jeff as an approver or
20 made references to his review, although Mr. Wong added that this did not
21 necessarily mean that Mr. Bezos personally reviewed or approved the design of the
22 products at issue. Overall, however, this testimony is not sufficient to establish that
23 Mr. Bezos actually has *any* first-hand knowledge on this issue, let alone *unique*
24 first-hand knowledge, as required for an apex deposition. *See, e.g., Nucap. Indus.*
25 *Inc. v. Robert Bosch LLC*, No. 15 CV 2207, 2017 U.S. Dist. LEXIS 201458, at *8–
26 11 (N.D. Ill. Dec. 7, 2017) (holding that the appearance of an executive’s name on
27 certain emails and business documents was insufficient to establish that executive’s
28 involvement in the events at issue, so as to justify taking his deposition).

1 Moreover, even assuming Mr. Bezos actually participated in the design and
2 development of the Fire Tablet and Echo Show families of products, and even if his
3 knowledge is unique, Plaintiff has not established that his knowledge on this topic
4 would be relevant to any issue in this case. Rather than explain the relevancy of
5 Mr. Bezos’s involvement in the design and development of the accused products to
6 the claims and defenses here, Plaintiff simply notes that “the jury should hear from
7 Mr. Bezos himself regarding the role he went onto [sic] play in developing the
8 accused products, after initially lauding the Ceiva Frame in 2000.” (*Id.* at 60–61.)
9 This is not enough. As Defendant argues, “[w]hether Mr. Bezos was involved in
10 any design and development of the accused products is irrelevant. What is relevant
11 is the actual design, development, and functionality of the accused products.” (*Id.*
12 at 34.) The Court agrees with Defendant. The infringement inquiry requires
13 comparing the claims of the asserted patents to the accused products. *See Kahn v.*
14 *Gen. Motors Corp.*, 135 F.3d 1472, 1477 (Fed. Cir. 1998) (“Literal infringement of
15 a claim exists when every limitation recited in the claim is found in the accused
16 device.”). Defendant notes that it designated several witnesses as corporate
17 representatives to testify about that technical aspects of the accused products—Mr.
18 Bekele (regarding the Echo Show, Show Mode and Fire Tablet technical topics),
19 Mr. Pradhan (regarding Alexa technical topics), Mr. Fresko (regarding the Fire
20 Tablet technical topics), Mr. Nilakantan (regarding the Kindle technical topics), and
21 Mr. Schulze (regarding the software update technical topics). (*Id.* at 33–34 n.19.)
22 Noting that Plaintiff has identified no deficiency with this testimony or otherwise
23 pointed to technical information it has not been able to obtain, Defendant questions
24 the need for Mr. Bezos to answer technical questions. (*Id.* at 34.) Moreover,
25 Plaintiff has offered no authority for its argument that the composition of the design
26 and development team, and specifically the role each member played, in any way
27 informs the ultimate infringement analysis. (*See generally* Jt. Stip.)

28 ///

1 Plaintiff’s reliance on a Northern District of California case permitting the
2 deposition of a Samsung executive who “oversaw the development of features that
3 [the plaintiff] contend[ed] infringe[d] its utility patents” is misplaced. (Jt. Stip. 61
4 (citing *Apple Inc. v. Samsung Elecs. Co.*, 282 F.R.D. 259, 267–68 (N.D. Cal.
5 2012).) There, the plaintiff pointed to evidence showing comments and questions
6 by the executive that specifically related to the allegedly infringing features of the
7 accused products. *See Apple Inc.*, 282 F.R.D. at 267–68. Here, there is no similar
8 evidence. At most, the name “Jeff” or “Jeff B.” appears on some BRDs, but there
9 is no evidence that these references are to Mr. Bezos. Moreover, Plaintiff has not
10 established that Mr. Bezos “oversaw” the development of any features, let alone the
11 specific features that allegedly infringe the Asserted Patents.

12 On this basis, the Court concludes that a protective order preventing Mr.
13 Bezos’s deposition regarding Topic 18 is warranted.

14
15 **C. A Protective Order Preventing Mr. Bezos’s Deposition Regarding**
16 **Topics 114, 115, 119, 120, and 122 Is Warranted.**

17 Defendant contends that, because its Rule 30(b)(6) designees regarding
18 Plaintiff’s Topics 114, 115, 119, 120, and 122—Scott Hayden, Vice President of IP
19 and Associate General Counsel, on Topics 114 and 115, and Sara Morris, a former
20 junior-level marketing manager, originally on Topics 116 through 122, and later
21 added for Topics 114 and 115—have fully answered Plaintiff’s questions on these
22 topics, any knowledge or information Mr. Bezos may have is not “unique” as
23 required for an apex deposition (Jt. Stip. 18–26.) Plaintiff, on the other hand,
24 disputes that Mr. Hayden and Ms. Morris fully answered its questions on these
25 topics, and contends instead that, given Mr. Bezos’s involvement in the subject
26 matter of the topics, any knowledge and information he may have is “unique” and
27 justifies an apex deposition. (*Id.* at 39–49.)

28 ///

1 Defendant first notes that Mr. Hayden testified that, despite Defendant’s
2 search for individuals with information about its relationship with Plaintiff, it was
3 unable to find any current employees with such information. (Def.’s Ex. I at 43:2–
4 44:6, 47:4–15.) Because of this, Defendant designated Ms. Morris—a former
5 employee with such knowledge—on these topics. (Jt. Stip. 18 n.7.)

6 Defendant details Ms. Morris’s testimony as follows: that the relationship
7 between Defendant and Plaintiff began in early 2000 when Plaintiff approached
8 Defendant (Def.’s Ex. K at 71:9–21, 197:7–14); that the relationship was “one tool
9 in a large toolkit of activities that [Defendant was] undertaking to build a new
10 product category” of consumer electronics (*id.* at 43:10–44:5); that Defendant
11 wanted to be an exclusive retailer of the Ceiva Frame as part of Defendant’s
12 strategy to “drive traffic into the [consumer electronics] store” through “a number
13 of different partnerships with different merchants or vendors who had new,
14 somewhat gadgety products that would be enticing to customers” (*id.* at 73:24–
15 74:8, 75:8–13); that an exclusive retailer arrangement “is a standard tactic in
16 retailing and merchandising to give both parties a unique window of opportunity to
17 achieve their objectives” (*id.* at 92:7–14); that Defendant believed the Ceiva Frame
18 would “draw attention and drive traffic” to Defendant’s website because “it was a
19 new product that showed digital photographs in a rotating fashion, and that was
20 somewhat new at the time” (*id.* at 75:24–76:6); that Defendant’s emails to Plaintiff
21 used terms such as “gateway page” and “camera and digital imaging category
22 pages” to describe the placement of Plaintiff’s product on Defendant’s website (*id.*
23 at 177:24–178:19); that Defendant worked with “many different vendors and
24 merchants” and engaged in “many different activities . . . to build awareness of this
25 new [consumer electronics] product category” which Defendant was working to
26 build “as quickly as possible . . . to achieve lots of goals very quickly,” including
27 through “relationships with Sony and Canon and Hewlett-Packard” and their
28 “Canon digital cameras,” “Sony music products,” and “DVD players.” (*id.* at 44:6–

1 11, 45:19–25, 87:24–88:5, 88:19–89:5, 89:21–90:6); and that Defendant engaged in
2 other exclusive deals with partners over the years, including “an exclusive deal with
3 Segway” (*id.* at 77:24–78:2, 198:2–11).

4 With respect to Mr. Bezos’s involvement in Defendant’s relationship with
5 Plaintiff, Ms. Morris testified that he “played no role in that relationship” and that
6 as the main person overseeing the relationship, she was “unaware of any personal
7 involvement on behalf of Jeff Bezos” in that relationship” or “with the parties’ 2000
8 Resale Agreement” and that the “likelihood that [Mr. Bezos] would be reviewing
9 individual reseller agreements is very, very low.” (*Id.* at 84:6–14, 96:20–21, 97:4–
10 5.)

11 Plaintiff takes issue with the sufficiency of Defendant’s Rule 30(b)(6)
12 witnesses regarding Defendant’s business relationship with Plaintiff, the Resale
13 Agreement, communications regarding the same, and Mr. Bezos’s involvement
14 therewith. *First*, Plaintiff notes that the testimony of Mr. Hayden makes clear that
15 Defendant found no one with relevant information regarding the relationship
16 between Defendant and Plaintiff. (Jt. Stip. 40–42.) When asked, Mr. Hayden
17 admitted that Defendant’s investigation yielded “no one that had any relevant
18 information related to” the relationship between Defendant and Plaintiff or the
19 exclusive seller transaction. (Pl.’s Ex. 19 at 52:10–15; *see also id.* at 47:4–7, 47:9.)
20 Mr. Hayden also testified that he did not know whether Mr. Bezos had participated
21 in any meetings with representatives of Plaintiff (*id.* at 51:19–52:6), and did not ask
22 Mr. Bezos about any such meetings (*id.* at 44:11–14); that he knew no details
23 regarding any meeting between Mr. Bezos and Mr. Schiller (*id.* at 112:24–114:2);
24 that the only document Defendant was able to locate about the relationship was the
25 Resale Agreement (*id.* at 44:5–6, 47:4–15, 52:19–23, 55:17–18); that he could not
26 confirm (1) the participants involved in putting the Resale Agreement in place,
27 (2) why Defendant wanted to be the exclusive reseller of the Ceiva Frame, or
28

1 (3) why Defendant did not want other retailers selling the Ceiva Frame (*id.* 57:17–
2 59:1).

3 *Second*, Plaintiff contends that, like Mr. Hayden, Ms. Morris also was unable
4 to answer Plaintiff’s questions on these topics. (Jt. Stip. 42–49.) Plaintiff notes
5 that, as a threshold matter, like Mr. Hayden, Ms. Morris did not speak with Mr.
6 Bezos and found no documents responsive to these topics. (*See Id.* at 42.) Indeed,
7 Ms. Morris testified that she did not report to or work with Mr. Bezos (Pl.’s Ex. 21
8 at 83:17–20); that she worked as a “junior level marketing manager” at Amazon
9 from 1999 to 2002 with at least four reports between her and Mr. Bezos (*id.* at
10 37:3–16, 45:14–15, 65:15–16, 84:2–5); that she only personally interacted with Mr.
11 Bezos on two occasions, neither of which had any significance to the designated
12 topics” (*id.* at 112:21–113:24); that neither she nor anyone acting for her
13 communicated with Mr. Bezos in preparation for her testimony (*id.* 188:14–17);
14 that she did not search for or locate any documents from her time at Defendant’s
15 employ regarding the deposition topics for which she was designated (*id.* at 17:18–
16 23, 18:3–5, 18:12–18); and that she was “reaching really far back” in her memory
17 given the amount of time that had passed since her employment with Defendant and
18 the events at issue (*id.* at 80:4–10).

19 Moreover, Plaintiff notes that Ms. Morris testified that she had not seen the
20 Resale Agreement prior to her preparation for her deposition (*id.* at 26:11–20); that
21 other than noting that Carl Gish had signed the Resale Agreement, she did not
22 know (1) who at Defendant was involved in the decision to enter into the
23 relationship with Plaintiff (*id.* at 76:7–11:1, 77:7–8); (2) what Defendant’s top five
24 objectives were in entering the Resale Agreement (*id.* at 93:18–22); (3) whether
25 Mr. Bezos reviewed the Resale Agreement (*id.* at 82:7–14, 87:4–10) or who wrote
26 it” (*id.* at 81:25–82:3); that she could not “speak to the specifics of the business
27 dealings” between Defendant and Plaintiff (*id.* at 44:12–19, 45:10–18); that she
28 “could not speak from direct knowledge” regarding Defendant’s interest in Plaintiff

1 because she was not involved in those conversations (*id.* at 71:22–72:16); that she
2 was unable to identify “any other products for which [Defendant] entered into an
3 exclusive reseller arrangement in the consumer electronics category in 2000” (*id.* at
4 80:4–10, 92:15–23); and that she could not identify any other products Defendant
5 may have pursued in 2000 (*id.* at 90:10–14).

6 Based upon this testimony, the Court concludes that Defendant failed to
7 produce a Rule 30(b)(6) witness who could answer Plaintiff’s questions about
8 Defendant’s relationship with Plaintiff and the Resale Agreement. *First*, Mr.
9 Hayden simply had no information on these topics. *Second*, although Ms. Morris
10 was able to provide some generalities regarding the relationship between Defendant
11 and Plaintiff, she was unable to answer the more pointed questions about the
12 relationship and the Resale Agreement at all or without resorting to speculation.
13 Finally, Defendant concedes that Ms. Morris could not answer questions regarding
14 who made the decision to enter into the Resale Agreement and who prepared it. (Jt.
15 Stip. 25 (citing Def.’s Ex. K at 76:7–77:8, 81:25–82:3).)

16 Nevertheless, while these deponents may not have been able to answer all of
17 Plaintiff’s questions, Plaintiff has failed to establish that Mr. Bezos possesses any
18 knowledge about these topics, let alone the “first-hand knowledge” required for an
19 apex deposition. The only evidence before the Court is that there existed a business
20 relationship between Defendant and Plaintiff, as evidenced by the Resale
21 Agreement. (*See* Pl.’s Ex. 1.) But that alone is not sufficient to compel an apex
22 deposition of Mr. Bezos. Instead, to avoid the protective order requested here,
23 Plaintiff must establish that Mr. Bezos actually has first-hand knowledge about that
24 relationship and the Resale Agreement (Topics 114, 115, 119, and 120), and that he
25 actually was involved in that business relationship and in negotiating the Resale
26 Agreement (Topic 122). This, Plaintiff has not done. To the contrary, the
27 testimony of Defendant’s Rule 30(b)(6) deponent is that Mr. Bezos was not
28 involved in either the business relationship between Defendant and Plaintiff or the

1 Resale Agreement. In addition, with respect to an alleged meeting between Mr.
2 Bezos and Mr. Schiller, while there is evidence of an email from Mr. Schiller to Mr.
3 Bezos regarding a purported meeting at a TED conference, there is no evidence
4 before the Court that the meeting actually took place or that Mr. Bezos actually
5 received the email or responded to it. Moreover, that Mr. Hayden and Ms. Morris
6 did not speak with Mr. Bezos in preparation for the deposition does not necessarily
7 mean, or otherwise reasonably imply, that Mr. Bezos has any knowledge of these
8 topics. Without evidence of Mr. Bezos’s actual first-hand knowledge about these
9 topics, Plaintiff fails to meet its burden to justify an apex deposition.

10 On this basis, the Court concludes that a protective order preventing Mr.
11 Bezos’s deposition regarding Topics 114, 115, 119, 120, and 122 is warranted.

12
13 **D. A Protective Order Preventing the Deposition of Mr. Bezos**
14 **Regarding Topic 116 Is Warranted.**

15 Defendant contends that because its Rule 30(b)(6) designee regarding Topic
16 116—Ms. Morris—sufficiently answered Plaintiff’s questions on this topic, any
17 knowledge or information Mr. Bezos may have is not “unique” as required for an
18 apex deposition. Although Topic 116 broadly seeks information regarding
19 Defendant’s advertising, marketing, and promotion of the Ceiva Frame, relevant
20 here are Plaintiff’s specific inquiries about (1) Defendant’s marketing campaign for
21 the Ceiva Frame, including the *Wall Street Journal* advertisement and Defendant’s
22 March 2000 press release, (2) the Jeff Email, and (3) the CNN endorsement. (Jt.
23 Stip. 43–48.) The Court addresses each sub-topic in turn.

24
25 1. Defendant’s Marketing Campaign of the Ceiva Frame

26 Defendant details Ms. Morris’s testimony regarding its marketing campaign
27 for the Ceiva Frame as follows: that the “joint marketing campaign” between
28 Defendant and Plaintiff was to promote the Ceiva Frame through Amazon.com,

1 which followed the “co-op marketing” format Defendant used with a lot of vendors
2 and merchants (Def.’s Ex. K at 99:15–100:12); that Defendant featured the Ceiva
3 Frame in direct mail and print advertisements, including in the *Wall Street Journal*
4 and a Sunday circular, as well as on its website and inserts included in its packaging
5 (*id.* at 100:13–22, 101:15–23); that Defendant sent targeted promotional emails to
6 its customers and also promoted the Ceiva Frame along with other consumer
7 electronics products on a “media tour” undertaken by its Chris Payne, Defendant’s
8 General Manager of Consumer Electronics (*id.* at 53:6–9, 55:2–12, 95:11–96:3);
9 that Plaintiff provided one million dollars for the joint marketing campaign (*id.* at
10 100:18–101:9); that Defendant issued a press release that, as part of its push to
11 launch the new category of consumer electronics, announced its sale of the Ceiva
12 Frame (*id.* at 114:1–115:5, 120:24–121:6); and that calling the Ceiva Frame
13 “revolutionary” in the March 2000 press release was part of Defendant’s marketing
14 and publicity strategy and was done to “gain[] attention in a crowded marketplace
15 and [to] find[] creative ways to call attention to what [Defendant] [was] doing” and
16 to “generate attention and enthusiasm” for its new consumer electronics store (*id.* at
17 124:16–23, 173:12–19).

18 Plaintiff takes issue with the sufficiency of Ms. Morris’s testimony regarding
19 Defendant’s marketing campaign for the Ceiva Frame. It notes that Ms. Morris
20 testified as follows: that she had no direct knowledge of whether Mr. Bezos was
21 personally involved in approving the Wall Street Journal advertisement for the
22 Ceiva Frame (Pl.’s Ex. 21 at 143:8–18, 144:15–22, 144:23–145:2, 145:8–14); that
23 she did not know who drafted, edited, or approved the March 2000 press release for
24 the Ceiva Frame (*id.* at 106:5–15, 107:2–7; 107:13–108:2, 108:25–109:7, 117:9–
25 20, 117:21–118:8); that she could not recall whether Defendant issued any other
26 similar press releases during the 2000 timeframe” (*id.* at 115:24–116:9, 121:8–11);
27 and that she recalled that Mr. Bezos “may have encouraged people to buy” the
28 Ceiva Frame (*id.* at 128:18–24). Plaintiff also notes that, in its responses to

1 Plaintiff's interrogatories, Defendant denied that Mr. Bezos marketed, promoted,
2 boasted, or referred to the Ceiva Frame as "revolutionary." (Jt. Stip. 49.)

3 Plaintiff's concerns regarding Ms. Morris's testimony and Defendant's
4 answer to its interrogatory are without merit. As a threshold matter, the subject
5 matter of Topic 116, as written, does not contemplate answers regarding the nature
6 and extent of Mr. Bezos's involvement in the marketing campaign. Unlike Topic
7 122, which expressly seeks a designee regarding Mr. Bezos's involvement, the
8 language of Topic 116 reasonably could be interpreted to seek information about
9 the marketing campaign, but not necessarily about Mr. Bezos's involvement. Still,
10 even if Topic 116 were interpreted as broadly seeking information regarding Mr.
11 Bezos's involvement in the marketing campaign, Plaintiff fails to establish the
12 factual underpinnings of Mr. Bezos's first-hand knowledge on this topic—that he,
13 in fact, was involved in the marketing campaign of the Ceiva Frame in the first
14 instance, or that it was he who wrote the March 2000 press release that called the
15 Ceiva Frame "revolutionary." Although Plaintiff must meet this burden before
16 being allowed to take an apex deposition on this topic, it has offered no evidence of
17 such involvement.

18 On this basis, the Court concludes that a protective order preventing Mr.
19 Bezos's deposition regarding Topic 116 as it relates to Defendant's marketing
20 campaign of the Ceiva Frame is warranted.

21 22 2. The Jeff Email

23 Defendant details Ms. Morris's testimony regarding the Jeff Email as
24 follows: she agreed that the Resale Agreement required Defendant to "send e-mail
25 messages to targeted Amazon.com customers" to promote the Ceiva Frame and she
26 believed that Defendant did so (Def.'s Ex. K at 95:17–96:3); she confirmed that on
27 April 4, 2000, she sent to Plaintiff's representatives the draft Jeff Email, which was
28 intended to be sent to the first one hundred thousand Amazon customers, calling the

1 Ceiva Frame “a pretty remarkable device,” explaining that Defendant would be the
2 “only retailer—online or off—who carries it,” and offering \$25.00 off its purchase
3 price (*id.* at 150:20–151:11; *see also* Def.’s Ex. Q)); that the draft Jeff Email was
4 not drafted by Mr. Bezos but rather was drafted by the marketing team “in his
5 voice” and that “Jeff [was] personalizing it [that day]” (*id.* at 151:20–152:7); that
6 sending marketing emails to customers as if they were personalized messages from
7 Mr. Bezos was a “fairly standard tool” that was employed “with some regularity”
8 (*id.* at 158:17–25, 159:21–25); that the Jeff Email referred to the Ceiva Frame as
9 “remarkable” because Mr. Bezos was “an enthusiast” and the email was “intended
10 to carry his tone and his voice,” because the Ceiva Frame was “a new kind of
11 product,” “it was a digital frame as opposed to a static wooden frame,” and it could
12 rotate ten photos, and because such language was intended to “generate attention
13 and enthusiasm” for the Ceiva Frame and Defendant’s new consumer electronics
14 store (*id.* at 162:4–19, 173:12–19, 201:7–19); and that the Jeff Email targeted
15 Defendant’s first one hundred thousand customers because they were “a customer
16 segment that” Defendant’s employees “talked about fairly frequently,” they were
17 “early adopters” and “understood the internet a lot earlier than a lot of other people”
18 and therefore “they might be naturally inclined to enjoy other products that were on
19 the leading edge” (*id.* at 162:20–163:7).

20 Plaintiff takes issue with the sufficiency of Ms. Morris’s testimony regarding
21 the Jeff Email. Plaintiff notes that Ms. Morris testified as follows: that despite
22 having authored the April 4, 2000 email to Plaintiff’s representatives, which she
23 “did not remember [] at all,” she could not confirm whether or why Mr. Bezos
24 personalized the email, even though her own email stated that Mr. Bezos would be
25 revising the email (Pl.’s Ex. 21 at 150:2–5, 150:20–24, 151:7–152:17, 155:18–
26 156:19, 160:16–18); that she could only assume that the Jeff Email refers to the
27 Ceiva Frame as “remarkable” “because it was new and it was a digital frame as
28 opposed to a static wooden frame” (*id.* at 161:25–162:6, 162:14–19); that although

1 Ms. Morris characterized such personal emails from Mr. Bezos as a marketing tool
2 Defendant used “with some regularity,” she could not recall any other specific
3 product endorsed by Mr. Bezos through a personal email (*id.* at 158:13–25, 159:21–
4 25); and that it would not be common for Mr. Bezos to be involved in marketing
5 the product, and that if, in fact, he did so, it would be “an unusual event” (*id.* at
6 156:20–24, 159:1–6, 200:3–9).

7 Based upon this testimony, the Court concludes that Defendant failed to
8 produce a Rule 30(b)(6) witness who could answer Plaintiff’s specific questions
9 about the Jeff Email with any degree of certainty, and instead produced a witness
10 who inserted generalities about Defendant’s practices into the discussion. Indeed,
11 Ms. Morris was unable to provide answers to the most basic—let alone direct—
12 questions about the Jeff Email and its meaning. Moreover, Ms. Morris’s testimony
13 brings into question the meaning of her own words in the April 4, 2020 email she
14 sent to Plaintiff’s representatives and who exactly wrote and “personalized” the Jeff
15 Email, if at all. Specifically, although Ms. Morris wrote that Mr. Bezos would be
16 “personalizing [the Jeff Email]” on that day, she testified that this actually meant
17 that “[Mr. Bezos’s] team was crafting a message in his voice that would go out
18 under his name.” (Pl.’s Ex. 21 at 151:20–152:17.)

19 Nevertheless, while Ms. Morris may not have been able to answer all of
20 Plaintiff’s questions about the Jeff Email, Plaintiff has failed to meet its burden of
21 showing that Mr. Bezos has the “first-hand knowledge” about this topic required
22 for an apex deposition. The only evidence before the Court is that someone
23 prepared a draft email promoting the Ceiva Frame which, subject to personalization
24 by Mr. Bezos, would be sent to the first one hundred thousand of Defendant’s
25 customers with a discount offer, and that this email was forwarded by Ms. Morris to
26 Plaintiff, noting that Mr. Bezos’s edits would be final. But that alone is not enough.
27 Instead, to avoid the protective order requested here, Plaintiff must establish the
28 factual underpinnings of Mr. Bezos’s first-hand knowledge on this topic—that he,

1 in fact, was aware of the Jeff Email, or wrote, personalized, or sent it. This,
2 Plaintiff has not done. Moreover, the evidence is to the contrary. Indeed, Ms.
3 Morris testified that Defendant’s marketing team wrote the email and that sending
4 out emails as if written by Mr. Bezos was a standard marketing tool. Moreover,
5 Plaintiff’s own document—the Schiller Email—implies that the Jeff Email was not
6 sent (at least as of the alleged meeting at the TED conference), bringing further into
7 question whether Mr. Bezos ever was involved with the Jeff Email.

8 On this basis, the Court concludes that a protective order preventing Mr.
9 Bezos’s deposition regarding Topic 116 as it relates to the Jeff Email is warranted.

11 3. The CNN Endorsement

12 As a threshold matter, the Court must conclude, for obvious reasons, that Mr.
13 Bezos has first-hand knowledge regarding the CNN endorsement. Unlike the other
14 topics discussed above, the CNN endorsement inherently bears indicia of first-hand
15 knowledge. Indeed, the inquiry on this topic regards words that Mr. Bezos
16 personally spoke during a CNN interview that was broadcast to the public in April
17 2000. (*See* Jt. Stip. 24; Def.’s Ex. T.) Moreover, Defendant does not dispute that
18 Mr. Bezos made the statement. (*See generally* Jt. Stip.)

19 Having found that Mr. Bezos has the requisite first-hand knowledge on this
20 topic, the Court turns to the inquiry of whether such knowledge is unique to him.
21 Defendant details Ms. Morris’s testimony regarding Mr. Bezos’s CNN endorsement
22 of the Ceiva Frame as follows: that Mr. Bezos “encouraged [Defendant’s]
23 customers to considering purchasing” the Ceiva Frame, among other consumer
24 electronics products including the Segway, (Def.’s Ex. K at 129:14–130:3, 130:15–
25 23); that Mr. Bezos likely called the Ceiva Frame “really great” in the April 2000
26 CNN interview because he typically received “talking points” from his “media PR
27 team,” and that she “would think that he was handed talking points that morning
28 and told what he needed to get into the media spot, and that was the talking point of

1 the day” (*id.* at 135:16–25); that “typically when a CEO does a media appearance
2 like that, he or she is prepped by his or her media team to convey a certain set of –
3 of talking points” (*id.* at 137:12–15); and that the interview had been focused
4 “around profitability” and Mr. Bezos likely “knew that the needed to get in one
5 other talking point” (*id.* at 136:8–22).

6 Plaintiff again takes issue with the sufficiency of Ms. Morris’s testimony
7 regarding the CNN endorsement. Plaintiff notes that Ms. Morris testified as
8 follows: that her testimony as to why Mr. Bezos “encourage[d] all of [CNN’s]
9 viewers to buy the Ceiva [F]rame” was based on only her general knowledge of
10 how executives prepared for media interviews using talking points prepared by their
11 media teams (Pl.’s Ex. 21 at 133:25–134:9, 136:12–22); that she had not seen the
12 CNN segment until preparing for her deposition (*id.* at 138:13–17); that she
13 admitted to “speculating” regarding Mr. Bezos’s decision to encourage customers
14 to buy the Ceiva Frame or to describe the Ceiva Frame as “really great” because she
15 does “not live in his head” and didn’t know what he was thinking (*id.* at 136:1–17,
16 137:4–11, 137:24–138:6, 138:18–23, 182:9–23); that she did not know whether Mr.
17 Bezos or others conducted research in order to reach the opinion “that the frame
18 was pretty remarkable” (*id.* at 183:12–15, 183:17); that she did not know “what Mr.
19 Bezos may or may not have thought about how other image display devices
20 compare[d] to the Ceiva [F]rame” (*id.* at 183:18–24); that she did not know what
21 “Mr. Bezos believe[d] was unique about the Ceiva [F]rame” (*id.* at 182:14–17); that
22 she did not know what “features of the Ceiva [F]rame [Mr.] Bezos may have
23 viewed as novel” (*id.* at 183:25–184:3, 184:5); that she could not identify any
24 “products . . . [Defendant] perceived as a competitor of the Ceiva [F]rame in 2000”
25 (*id.* at 80:1–3); that she did not know what consumer electronic products Mr. Bezos
26 was personally involved with or personally endorsed in 2000 (*id.* at 91:17–21,
27 130:4–12); that “[a]s a viewer, [she] would think that he was handed his talking
28

1 points” (*id.* at 135:16–25); and that “typically” CEOs are given talking points in
2 preparation for media appearances (*id.* at 137:12–15).

3 Based on this testimony, the Court concludes Defendant failed to produce a
4 Rule 30(b)(6) witness who could answer Plaintiff’s specific questions about Mr.
5 Bezos’s CNN endorsement other than what is known publicly and/or could be
6 gleaned by watching the interview video, and that any insights offered by
7 Defendant’s witness about Mr. Bezos’s statement during the CNN interview were
8 speculative. Indeed, the testimony reveals that Ms. Morris testified solely from her
9 limited personal knowledge about this topic. Moreover, Defendant concedes that
10 Ms. Morris could not answer questions about Mr. Bezos’s state of mind and
11 personal beliefs, and specifically about his thoughts and decision-making process
12 regarding the endorsement during the television interview, whether he actually
13 believed the Ceiva Frame was “remarkable,” what he believed was “unique” about
14 it, and his thoughts regarding the comparison between the Ceiva Frame and other
15 image display devices. (Jt. Stip 17 (citing Def.’s Ex. K at 136:8–14, 182:9–11,
16 182:14–16, 183:18–24).) On this basis, the Court concludes that Mr. Bezos’s first-
17 hand knowledge regarding the CNN endorsement is unique.

18 But the inquiry does not end there. A protective order preventing Mr.
19 Bezos’s deposition regarding the CNN endorsement may be warranted if his
20 knowledge of the topic, despite being first-hand and unique, is not relevant to the
21 claims or defenses of the case. Plaintiff argues that Mr. Bezos’s knowledge
22 regarding the CNN endorsement is relevant to (1) Defendant’s obviousness defense,
23 premised on Defendant’s assertion that the Asserted Patents “are not new or novel”
24 and instead are “obvious in light of prior art disclosing, among other things,
25 Internet-enabled picture frames” under 35 U.S.C. § 103 (Jt. Stip. 56–59);
26 (2) Defendant’s ineligibility defense, premised on Defendant’s assertion that the
27 Asserted Patents are directed to subject matter that is not eligible for patenting
28

1 under 35 U.S.C. § 101 (*id.* at 59); and (3) damages (*id.* at 59–60). For the reasons
2 stated below, the Court disagrees.

3
4 *a. Mr. Bezos’s Knowledge Regarding the CNN Endorsement*
5 *Is Not Relevant to Defendant’s Obviousness Defense.*

6 Under 35 U.S.C. § 103 (“Section 103”), a patent is obvious “if the
7 differences between the claimed invention and the prior art are such that the
8 claimed invention as a whole would have been obvious before the effective filing
9 date of the claimed invention to a person having ordinary skill in the art to which
10 the claimed invention pertains.” 35 U.S.C. § 103. To determine obviousness, a
11 court must review “(1) the scope and content of the prior art; (2) the level of
12 ordinary skill in the art; (3) the differences between the claimed invention and the
13 prior art; and (4) objective evidence of nonobviousness.” *Mintz v. Dietz & Watson,*
14 *Inc.*, 679 F.3d 1372, 1375–76 (Fed. Cir. 2012) (citing *Eli Lilly & Co. v. Teva*
15 *Pharms. USA, Inc.*, 619 F.3d 1329, 1336 (Fed. Cir. .2010)). These factors must be
16 reviewed from the perspective of a “person having ordinary skill in the art” (also
17 known as a “POSA”). *See* 35 U.S.C. § 103; *see also* *Vulcan Eng’g Co. v. Fata*
18 *Aluminum, Inc.*, 278 F.3d 1366, 1373 (Fed. Cir. 2002) (“Appreciation by
19 contemporaries skilled in the field of the invention is a useful indicator of whether
20 the invention would have been obvious to such persons at the time it was made.”).

21 The fourth factor, also known as the “secondary considerations,” often may
22 be “the most probative and cogent evidence of nonobviousness in the record.”
23 *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538 (Fed. Cir. 1983); *see also*
24 *Ortho-McNeil Pharm., Inc. v. Mylan Labs., Inc.*, 520 F.3d 1358, 1365 (Fed. Cir.
25 2008) (“[T]his evidence is not just a cumulative or confirmatory part of the
26 obviousness calculus but constitutes independent evidence of nonobviousness.”).
27 An analysis of secondary considerations requires attention to “unexpected results,
28 expert skepticism, copying, commercial success, praise by others (even from the

1 accused infringer . . .), failure by others, and long-felt need.” *Mintz*, 679 F.3d at
2 1379; *see also Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1053 (Fed. Cir.
3 2016) (en banc) (“Evidence that the industry praised a claimed invention or a
4 product that embodies the patent claims weighs against an assertion that the same
5 claimed invention would have been obvious.”).

6 Plaintiff argues that Mr. Bezos’s praise of the Ceiva Frame is relevant to the
7 secondary consideration of “industry praise.” (Jt. Stip. 56.) Defendant responds
8 that Mr. Bezos’s testimony about the CNN endorsement is not relevant to the
9 inquiry of “industry praise” for four reasons: (1) Mr. Bezos’s personal beliefs
10 behind the CNN endorsement are rendered irrelevant because the endorsement
11 already is public and Plaintiff may rely on it without Mr. Bezos’s testimony;
12 (2) Mr. Bezos does not qualify as a POSA of the Ceiva Frame; (3) the endorsement
13 was self-serving; and (4) the endorsement was not tied to the claimed invention.
14 Without analyzing the first three reasons, the Court agrees with Defendant with
15 respect to the fourth reason.

16 To be tied to the claimed invention, there must be a nexus between the
17 purported industry praise and the specific feature claimed in the patent. *See*
18 *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 306 n.42 (Fed.
19 Cir. 1985). Indeed, high-level remarks about a purportedly practicing product—
20 such as being characterized as “unique” or designated as a “Top Ten FinTech
21 Compan[y] to Watch”—do not have a nexus to specific patent claims. *Centripedal*
22 *Networks, Inc. v. Cisco Sys.*, 847 F. App’x 881, 888–89 (Fed. Cir. 2021).

23 Here, nothing that Mr. Bezos said during the CNN interview about the Ceiva
24 Frame was related to the features claimed in the Asserted Patents. As the FAC
25 explains, the claims in the Asserted Patents describe the technologies that enable
26 the digital picture frame “to automatically access[] a remote data repository without
27 any further user input.” (FAC ¶ 56.) In addition, the patent specifications describe
28 the technological improvements that “enable the claimed digital picture frame to

1 automatically issue a request to the remote server system, and thereby receive
2 images and software updates without any user input.” (*Id.*) Mr. Bezos’s
3 endorsement of the Ceiva Frame did not even approximate a discussion—let alone
4 praise—about these features. As Ms. Morris explained, and as the video confirms
5 (*see* Def.’s Ex. T), the interview focused on the profitability of Defendant’s
6 businesses. As detailed above, Mr. Bezos discussed the profitability of Defendant’s
7 businesses, Defendant’s goals to make the newer business more profitable by the
8 end of 2000, and its continued investments in the new business units. It was at the
9 end of the interview that Mr. Bezos light-heartedly, and in passing, said: “By the
10 way, I would like to encourage all of your viewers to buy the Ceiva picture frame . .
11 . that will help us with profitability.” (*Id.*) To which the CNN host responded in
12 laughter: “All right . . . we’ve all decided to go out and buy some . . . so that Jeff
13 doesn’t go bankrupt.” (*Id.*)

14 Notably, contrary to Plaintiff’s questioning of Ms. Morris about the CNN
15 endorsement, which suggests Mr. Bezos said the Ceiva Frame was “really great,”
16 Mr. Bezos did not say those words. (*See id.*) In any event, without describing it or
17 explaining what it was, Mr. Bezos simply encouraged the CNN viewers to buy the
18 Ceiva Frame. (*Id.*)

19 Thus, the Court is not convinced that any knowledge Mr. Bezos may have
20 regarding the CNN endorsement would inform the obviousness inquiry, as Plaintiff
21 contends.

22 *b. Mr. Bezos’s Knowledge Regarding the CNN Endorsement*
23 *Is Not Relevant to Defendant’s Ineligibility Defense.*

24 35 U.S.C. § 101 (“Section 101”) defines patent-eligible subject matter as
25 follows: “Whoever invents or discovers any new and useful process, machine,
26 manufacture, or composition of matter, or any new and useful improvement thereof,
27 may obtain a patent therefor, subject to the conditions and requirements of this
28 title.” 35 U.S.C. § 101. The Supreme Court has found an implicit exception to this

1 broad rule of patentability for (1) laws of nature, (2) natural phenomena, and
2 (3) abstract ideas. *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208, 217
3 (2014). Here, Defendant claims that the Asserted Patents fall within the third
4 category of unpatentability—abstract ideas. (Jt. Stip. 30–31.)

5 The first two exceptions—laws of nature and natural phenomena—are not
6 particularly difficult to identify. *Versata Dev. Group, Inc. v. SAP Am., Inc.*, 793
7 F.3d 1306, 1331 (Fed. Cir. 2015) (“Generally, the courts have found that the task of
8 applying the first two of these judicially-crafted exceptions . . . [is] not particularly
9 difficult.”). However, the third exception—abstract ideas—is not as easily
10 understood or applied. *Id.* The patent eligibility inquiry involves two steps. *Alice*
11 *Corp. Pty. Ltd.*, 573 U.S. at 217. The court first must determine whether the claims
12 are directed to an abstract idea. *Id.* If so, the court must decide whether the claims
13 add an “inventive concept”—“an element or combination of elements that is
14 ‘sufficient to ensure that the patent in practice amounts to significantly more than a
15 patent upon the [abstract idea] itself.’” *Id.* at 217–18 (quoting *Mayo Collaborative*
16 *Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 72–73 (2012)). The “ultimate
17 question of patent eligibility is one of law,” that in some cases may involve a
18 narrow underlying fact issue as to whether individual claim limitations are well
19 understood, routine, and conventional. *Berkheimer v. HP Inc.*, 890 F.3d 1369,
20 1370–72 (Fed. Cir. 2018) (en banc) (Moore, J. concurring), *cert. denied*, 140 S. Ct.
21 911 (2020).

22 Based upon this framework, Defendant argues that Mr. Bezos’s testimony
23 about the CNN endorsement is not relevant to either step of the *Alice* test. (Jt. Stip.
24 31–32.) Defendant notes that step one of the *Alice* test “presents a legal question
25 that can be answered based on the intrinsic evidence.” *CardioNet, LLC v.*
26 *InfoBionic, Inc.*, 955 F.3d 1358, 1372 (Fed. Cir. 2020). It then argues that “no
27 extrinsic evidence, *i.e.* evidence outside of the patent and its prosecution history—
28 and certainly not the testimony of Mr. Bezos—is relevant to that inquiry.” (Jt. Stip.

1 31.) But Defendant overstates the *Alice* limitation to intrinsic matter in the step one
2 inquiry. Indeed, the court in *CardioNet* expressly stated the contrary. The court
3 rejected the dissent’s suggestion that the *CardioNet* holding made it “impermissible
4 for courts to ‘look[] outside the intrinsic evidence’ as part of their *Alice* step one
5 inquiry,” or that all such evidence “would be irrelevant to the inquiry.” *Id.* at 1373
6 (quoting Dissent Op. 9). It explained that the holding “simply clarify[ies] that step
7 one of the *Alice* framework does not *require* an evaluation of the prior art or facts
8 outside of the intrinsic record regarding the state of the art at the time of the
9 invention.” *Id.* at 1374 (emphasis added).

10 Nevertheless, Defendant also argues that Mr. Bezos’s testimony would be
11 irrelevant to step two of the *Alice* test because “[p]ublic praise of practicing
12 products ha[s] nothing to do with patent eligibility.” (Jt. Stip. 31.) The Court
13 agrees. Even if the CNN endorsement were considered public praise, any
14 testimony by Mr. Bezos about the CNN endorsement would not be relevant to
15 Defendant’s ineligibility argument. *See Diamond v. Diehr*, 450 U.S. 175, 188–90
16 (1981) (distinguishing patent novelty from eligibility); *see also Ameranth, Inc. v.*
17 *Domino’s Pizza, LLC*, 792 F. App’x 780, 788 (Fed. Cir. 2019 (finding inventor
18 declaration discussing generic praise of plaintiff’s practicing system irrelevant to
19 patent eligibility)).

20 Thus, the Court is not convinced that any knowledge Mr. Bezos may have
21 regarding the CNN endorsement would inform the eligibility inquiry, as Plaintiff
22 contends.

23
24 *c. Mr. Bezos’s Knowledge Regarding the CNN Endorsement*
25 *Is Not Relevant to the Georgia-Pacific Damages Analysis.*

26 Plaintiff also argues that Mr. Bezos’s testimony is relevant to the damages
27 analysis under *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116,
28 1120 (S.D.N.Y. 1970). (See Jt. Stip. 59–60.) The court disagrees.

1 There are two alternative categories of infringement compensation: (1) the
2 patentee’s lost profits, and (2) the reasonable royalty the patentee would have
3 received through arms-length bargaining. *See Lucent Techs., Inc. v. Gateway, Inc.*,
4 580 F.3d 1301, 1324 (Fed. Cir. 2009). “Determining a fair and reasonable royalty
5 is often . . . a difficult judicial chore, seeming often to involve more the talents of a
6 conjurer than those of a judge.” *ResQNet.com Inc. v. Lansa, Inc.*, 594 F.3d 860,
7 869 (Fed. Cir. 2010) (quotation marks and citation omitted). To ascertain the
8 reasonable royalty, patentees commonly consider a hypothetical negotiation, in
9 which the asserted patent claims are assumed valid, enforceable, and infringed, and
10 attempt to ascertain the royalty upon which the parties would have agreed had they
11 successfully negotiated an agreement just before infringement began. *Lucent*, 580
12 F.3d at 1324–25; *see also Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1554 n.13
13 (Fed. Cir. 1995) (en banc); *see also Georgia-Pacific*, 318 F. Supp. at 1120–21.
14 Thus, the hypothetical negotiation upon which the reasonable royalty is determined
15 is one that occurs “at the time infringement began.” *DataTreasury Corp. v. Wells*
16 *Fargo & Co.*, No. 2:06-CV-72DF, 2011 U.S. Dist. LEXIS 118443, at *26–27 (E.D.
17 Tex. Aug. 2, 2011); *see also Transocean Offshore Deepwater Drilling, Inc. v.*
18 *Maersk Drilling USA, Inc.*, 699 F.3d 1340, 1357 (Fed. Cir. 2012) (“The
19 hypothetical negotiation seeks to determine the terms of the license agreement the
20 parties would have reached had they negotiated at arm’s length when infringement
21 began.”) In *Georgia-Pacific*, the court enunciated fifteen factors that should be
22 considered in the determination of a reasonable royalty. *Georgia-Pacific*, 318 F.
23 Supp. at 1120–21. The Federal Circuit “has sanctioned the use of the *Georgia*
24 *Pacific* factors to frame the reasonable royalty inquiry.” *Uniloc USA, Inc. v.*
25 *Microsoft Corp.*, 632 F.3d 1292, 1317 (Fed. Cir. 2011).

26 Plaintiff contends that Mr. Bezos’s knowledge regarding “the prior history
27 between [Plaintiff] and [Defendant] (including Mr. Bezos’s statements)” is relevant
28

1 to the fifth *Georgia-Pacific* factor.⁶ (Jt. Stip. 59–60.) Factor Five considers “[t]he
2 commercial relationship between the licensor and licensee, such as, whether they
3 are competitors in the same territory in the same line of business; or whether they
4 are inventor and promotor.” *Georgia-Pacific*, 318 F. Supp. at 1120. Plaintiff urges
5 the Court to not erase from the hypothetical negotiation Mr. Bezos’s knowledge
6 about “the prior history between [Plaintiff] and [Defendant] (including Mr. Bezos’s
7 statements).” (Jt. Stip. 59.) The Court disagrees with Plaintiff.

8 Here, there is no evidence that the CNN endorsement in any way informs the
9 fifth factor’s inquiry regarding the commercial relationship between Plaintiff, as the
10 hypothetical licensor, and Defendant, as the hypothetical licensee. As stated above,
11 the CNN endorsement does nothing more than encourage the CNN viewers to buy
12 the Ceiva Frame. Moreover, the CNN endorsement was made in April 2000, while
13 the relationship explored by the fifth factor is one that would have occurred in Fall
14 2011, the date of the first accused product launch. (Def.’s Ex. X at 18:15–19:3.)
15 *See DataTreasury Corp.*, 2011 U.S. Dist. LEXIS 118443, at *26–27. Despite this
16 eleven-year gap, Plaintiff provides no authority, and the Court is aware of none, for
17 the proposition that the fifth *Georgia-Pacific* factor is not burdened by the temporal
18

19
20 ⁶ Defendant notes that during the June 4 IDC, Plaintiff advised that Mr. Bezos’s
21 testimony is relevant to the ninth *Georgia-Pacific* factor. (Jt. Stip. 32 (citing Def.’s
22 Ex. U at 8:25–9:3).) In that Plaintiff appears to have abandoned this argument, the
23 Court does not address it. “[O]ur adversary system is designed around the premise
24 that the parties know what is best for them, and are responsible for advancing the
25 facts and arguments entitling them to relief.” *Greenlaw v. United States*, 554 U.S.
26 237, 244 (2008) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia,
27 J., concurring). Courts “review only issues which are argued specifically and
28 distinctly” *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir.
2003) (quoting *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir.
1994)). Courts have “refused to address claims that were only argue[d] in passing,
or that were bare assertion[s] . . . with no supporting argument.” *Christian Legal
Soc’y Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 487 (9th Cir. 2010) (alterations
in original) (quotation marks and citations omitted).

1 requirement that the hypothetical negotiation must be time-placed at just before the
2 first infringement. (*See generally* Jt. Stip.) Nor does Plaintiff provide authority,
3 and again the Court is aware of none, for the proposition that the fifth *Georgia-*
4 *Pacific* factor includes a review of the parties’ “prior history.” (*See generally id.*)

5 Moreover, as to any of the other *Georgia-Pacific* factors and the hypothetical
6 royalty negotiation, the Court notes that there is no indication that Mr. Bezos is the
7 person in the best position to give a deposition on this topic. Rather, it appears that
8 a financial officer would be in a better position to do so.

9 Thus, the Court is not convinced that any knowledge Mr. Bezos may have
10 regarding the CNN endorsement would inform the damages inquiry, as Plaintiff
11 contends.

12 On the basis of the foregoing, the Court concludes that a protective order
13 preventing Mr. Bezos’s deposition regarding Topic 116 is warranted.

14
15 **E. A Protective Order Preventing the Deposition of Mr. Bezos**
16 **Regarding Topic 117 Is Warranted.**

17 Defendant concedes that Ms. Morris could not answer questions about Mr.
18 Bezos’s ownership or use of the Ceiva Frame in response to Topic 117, specifically
19 whether he personally owned, used, purchased, acquired or gave to others a Ceiva
20 Frame, whether his family members owned any. (Jt. Stip. 25 (citing Def.’s Ex. K at
21 148:24–149:16).)

22 Plaintiff takes issue with Ms. Morris’s testimony regarding Mr. Bezos’s
23 ownership and use of the Ceiva Frame, adding to Defendant’s concession that Ms.
24 Morris had no knowledge regarding whether Mr. Bezos’s family owned one or if he
25 gave the Ceiva Frame as gifts. (*See* Pl.’s Ex. 21 at 148:24–149:16, 182:18–23.)
26 Plaintiff also takes issue with Defendant’s response to Plaintiff’s request for
27 admissions, denying that Mr. Bezos owned at least one Ceiva Frame. (Pl.’s Ex. 28
28 at 3–4.)

1 As a threshold matter, the Court notes that, in seeking information regarding
2 the ownership and use of the Ceiva Frame by Mr. Bezos’s family members, or
3 whether Mr. Bezos gifted the Ceiva Frame to anyone, Plaintiff improperly expands
4 the scope of Topic 117. Topic 117 is limited to the ownership and/or use of the
5 Ceiva Frame by Defendant’s founders, board members, employees, or agents. (*See*
6 *Jt. Stip. 16.*) Accordingly, the Court concludes that a protective order preventing
7 Mr. Bezos’s deposition regarding Topic 117 as it relates to his family and friends is
8 warranted.

9 With respect to whether Mr. Bezos himself owned and/or used the Ceiva
10 Frame, the Court concludes, based on the above testimony, that Defendant failed to
11 produce a Rule 30(b)(6) witness who could answer Plaintiff’s questions on this
12 topic. Nevertheless, while Defendant’s witness may not have been able to answer
13 Plaintiff’s questions on this topic, Plaintiff has failed to establish the factual
14 underpinning for Mr. Bezos’s first-hand knowledge on Topic 117—that he, in fact,
15 ever owned and/or used the Ceiva Frame. Plaintiff must do so before being allowed
16 to take an apex deposition on this topic.

17 On this basis, the Court concludes that a protective order preventing Mr.
18 Bezos’s deposition regarding Topic 117 as it relates to himself is warranted.

19
20 **F. A Protective Order Preventing the Deposition of Mr. Bezos**
21 **Regarding Topic 118 Is Warranted.**

22 Defendant contends that, because Ms. Morris, its Rule 30(b)(6) designee
23 regarding Topic 118—Defendant’s alleged reverse engineering of the Ceiva
24 Frame—fully answered Plaintiff’s questions regarding this topic, any knowledge or
25 information Mr. Bezos may have is not “unique,” as required for an apex
26 deposition. (*Jt. Stip. 22.*)

27 Defendant notes that Ms. Morris testified as follows: that an “editorial team”
28 would have performed “basic testing” of the Ceiva Frame prior to selling it on the

1 Amazon website, and that such testing would not involve Defendant’s engineers
2 (Def.’s Ex. K at 213:2–214: 3); that such testing would have included plugging in
3 the device and figur[ing] out how it rotated . . . how it flipped the pictures, or how it
4 displayed the pictures” (*id.* at 213:20–23); that Defendant did not have a team that
5 was responsible for “reverse engineering” of products, that Defendant never reverse
6 engineered the Ceiva Frame or any of Plaintiff’s products, and that “[t]here was
7 never one single discussion or conversation” on the topic of reverse engineering (*id.*
8 at 149:17–20, 179:11–24).

9 Plaintiff takes issue with Ms. Morris’s testimony, noting that it was limited to
10 the narrow time frame of 1999–2002 and that, in any event, she testified that she
11 had “no information on . . . this subject.” (Pl.’s Ex. 21 at 180:14–19, 181:20–
12 182:4.)

13 Based on this testimony, the Court concludes that Defendant failed to
14 produce a Rule 30(b)6) witness who could answer Plaintiff’s questions on this
15 topic. Nevertheless, while Defendant’s witness may not have been able to answer
16 any of Plaintiff’s questions regarding Defendant’s alleged reverse engineering of
17 the Ceiva Frame, Plaintiff has failed to establish the factual underpinning for Mr.
18 Bezos’s first-hand knowledge on Topic 118—that Defendant, in fact, engaged in
19 the alleged reverse engineering. There is no evidence that Defendant did so. (*See*
20 *generally* Jt. Stip.) Indeed, the evidence is to the contrary. According to Ms.
21 Morris, Defendant never reverse-engineered the Ceiva Frame or any other product
22 and there were never any discussions about reverse-engineering. Moreover, even if
23 Defendant had engaged in reverse engineering of the Ceiva Frame, Plaintiff has not
24 established that Mr. Bezos was involved or would have any unique, first-knowledge
25 about this.

26 On this basis, the Court concludes that a protective order preventing Mr.
27 Bezos’s deposition regarding Topic 118 is warranted.
28

1 **G. A Protective Order Preventing the Deposition of Mr. Bezos**
2 **Regarding Topic 121 Is Warranted.**

3 Defendant notes that Plaintiff “did not ask a *single* question” of Defendant’s
4 witness regarding Topic 121—the alleged use by Defendant’s founders, board
5 members, or employees of Plaintiff’s subscription service. (Jt. Stip. 14–15.)
6 Plaintiff does not dispute this. (*See generally* Jt. Stip.)

7 Because Plaintiff provides no evidence that it attempted to obtain discovery
8 about Topic 121 through a less-intrusive means, it has not demonstrated the
9 exhaustion that is required for an apex deposition on this topic.

10 On this basis, the Court concludes that a protective order preventing Mr.
11 Bezos’s deposition regarding Topic 121 is warranted.

12
13 **IV. CONCLUSION**

14 For the reasons stated above, the Court **ORDERS** as follows:

15 1. Defendant’s Motion is **GRANTED**, and Mr. Bezos need not sit for
16 deposition regarding Plaintiff’s Rule 30(b)(6) Topics 18 and 114 through 122.

17 2. The November 5, 2021 hearing is hereby **VACATED**.

18 3. The Court provisionally seals this Order. Within seven days after the
19 issuance of this Order, the parties shall file a joint statement as to whether any
20 matter stated in this Order is information that should remain under seal, consisted
21 with this Court’s order granting Defendant’s request for leave to file under seal.
22 (ECF No. 154.) Thereafter, the Court will determine whether any portions of this
23 Order should be redacted in the version filed on the public docket.

24
25 DATED: October 26, 2021

26
27 
28 _____
MARIA A. AUDERO
UNITED STATES MAGISTRATE JUDGE