

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

STEVE SIMMS, ET AL.,

Plaintiffs,

Civil Action No. 3:11-CV-0248-M-BK

v.

NATIONAL FOOTBALL LEAGUE,

Defendant.

ORDER

Pursuant to the District Court's *Order of Reference* (Doc. 236), Plaintiffs' *Motion to Compel Deposition of Roger Goodell* (Doc. 229) has been referred to the undersigned for determination. After considering the arguments and applicable law, Plaintiffs' motion is **GRANTED IN PART.**

This case involves claims by Plaintiffs, ticketholders to the Super Bowl XLV game at Cowboys Stadium in Arlington, Texas, against Defendant National Football League ("NFL") for breach of contract and fraudulent inducement resulting from being denied seating at the Super Bowl XLV game. (Doc. 125 at 2).

On February 27, 2013, the undersigned entered an order granting the NFL's *Motion for Protective Order to Quash the Deposition of NFL Commissioner Roger Goodell*, and contemporaneously denying Plaintiffs' *First Motion to Compel the Deposition of Commissioner Roger Goodell*. (Doc. 176). In the order, the undersigned determined that (1) Goodell was an apex executive; (2) Plaintiffs did not establish that Goodell possessed "firsthand and non-repetitive knowledge" regarding the relevant issues thus warranting his deposition; and (3) Plaintiffs had not first attempted to depose lower-ranking employees before seeking the deposition of Goodell. *Id.* at 3-4.

Plaintiffs again move to compel the deposition of Goodell, averring that they have since deposed the executives the NFL designated as employees with knowledge, but they were still unable to obtain the information they seek. (Doc. 229 at 6). Plaintiffs seek specific information regarding Goodell's statements in which he allegedly admitted the NFL's fault in the events giving rise to this lawsuit and to mistakes relating to the temporary seating, as well as his alleged claims that the NFL would conduct a thorough investigation. *Id.* Plaintiffs aver that the witnesses they have deposed claimed that they were unable to answer what Goodell intended by his statements. *Id.*

Plaintiffs further maintain that Goodell was "actively and personally involved in planning Super Bowl XLV." *Id.* at 9. They contend that Goodell (1) declared that he helped develop the video replay board as a feature in enhancing fan viewing experiences; (2) "hyped" the video replay board to Super Bowl fans; (3) attended a January 10, 2011 Super Bowl planning meeting at the NFL's New York offices; and (4) received emails regarding the goal of breaking the NFL's attendance record and was asked to review attendance numbers. *Id.* at 8-10. Plaintiffs also aver that Goodell admitted to "pre-game awareness" that there was a mistake in the fan seating, that he did not know how many fans would be affected, and that he wanted to meet with the affected fans. *Id.* at 10. Plaintiffs allege that Goodell made several relevant post-game admissions as well, including "it was obviously a failure on our behalf, and we have to take responsibility for that;" "we take responsibility for that as putting on this game;" "[w]e put on this event [...] [t]his is a responsibility of the NFL;" and "there is no excuse [...] [w]hen you put on an event like this, you know you are going to have those challenges [. . .] [w]e're used to those kinds of things." *Id.* at 11. Plaintiffs further allege that Goodell claimed to have met with the affected fans, planned to review the issues, offered affected fans either Super Bowl tickets for

the next year or a money payment option, and personally signed the letters addressed to the affected fans. *Id.* at 11-12, 22.

Plaintiffs assert that they have now deposed Frank Supovitz, the NFL's Senior Vice President of Events; Fred Otto, the NFL's Director of Events Management; and Bill McConnell, the NFL's Senior Director of Events, who are the NFL employees that the NFL identified as witnesses with knowledge, and neither of them was able to explain what Commissioner Goodell meant by any of his public statements or in the letter he signed. *Id.* at 15-17. In conclusion, Plaintiffs claim Goodell has first-hand and unique knowledge of relevant facts in this suit, and he is "the only NFL executive known to Plaintiffs who has gone on record and admitted fault and mistakes on behalf of the NFL in relation to the temporary seating." *Id.* at 21.

Defendant NFL, on the other hand, claims that Plaintiffs have only deposed four out of the ten individuals it proffered as persons with knowledge, and their deposition testimonies do not establish that Goodell has firsthand and non-repetitive knowledge of relevant information. (Doc. 244 at 6-7). The NFL claims that Plaintiffs only seek to harass Goodell by asking questions outside the realm of the relevant issues in this lawsuit, such as the cost of his hotel accommodations and transportation to the Super Bowl game. *Id.* at 7-8, 11. Further, the NFL maintains that out of the two claims that remain at issue in this action, the facts relevant to these claims include:

- (i) whether and when the temporary seating areas were made available for use on game day, (ii) whether any of the seats had compromised views and whether the NFL knew about any compromised views at the time the tickets were sold, (iii) whether the NFL made any representations concerning the quality of views at the time the tickets were sold, (iv) the extent to which Plaintiffs relied on such statements, and (v) the amount of Plaintiffs' alleged damages.

Id. at 8.

The NFL further contends that, due to his high-ranking role, Goodell does not have personal knowledge of the relevant facts or knowledge superior to that of the lower ranking employees who were involved in the operational aspects of the temporary seating areas or the event attendants who managed the sale of tickets, installation of the temporary seats and evaluation of the seats' sightlines. *Id.* at 8-9. The NFL claims that Goodell's knowledge is limited to what he "learn[ed] indirectly through those who have actual responsibility for those functions." *Id.* at 8. Further, the NFL argues that courts usually protect high ranking or "apex" executives due to the potential abuse or harassment discovery can cause. *Id.* at 14-15.

In reply, Plaintiffs argue that "what is at issue are Mr. Goodell's own words and actions." (Doc. 246 at 2). Moreover, Plaintiffs assert that although they have not deposed all the witnesses the NFL identified, they have deposed the witnesses employed by the NFL, and those witnesses all disclaimed any insight as to what Goodell meant by his statements. *Id.* at 3-4. Plaintiffs suggest that the third-party witnesses they have yet to depose would be even more ill-equipped to answer questions about what Goodell meant by his public statements. *Id.* at 3. Plaintiffs maintain that Goodell "voluntarily injected himself into the dispute at hand" through his admissions, acceptance of responsibility, promises to investigate, participation in the decision to break the Super Bowl attendance record, and other public statements and conduct. *Id.* at 5. Plaintiffs further argue that Goodell's actions relate to the NFL's liability to Plaintiffs in this suit. *Id.*

As the undersigned has previously noted, Commissioner Goodell is without doubt a high-level executive of the NFL. Federal courts permit the depositions of such executives, also known as apex executives, when conduct and knowledge at the highest levels of the corporation are relevant to the case. *See, e.g., Kimberly-Clark Corp. v. Cont'l Cas. Co.*, No. 3:05-CV-0475-D, 2006 WL 3436064, at *2 (N.D. Tex. Nov. 29, 2006). However, "the Fifth Circuit has recognized the need for

first utilizing less-intrusive means before taking an apex deposition, by way of deposing lesser-ranking employees.” *Schmidt v. Goodyear Tire & Rubber Co.*, 2003 U.S. Dist. LEXIS 28130, at *3 (E.D. Tex. Jan. 7, 2003) (citing *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979)).

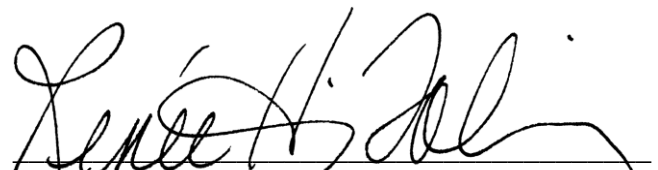
Upon review of the pleadings, the Court concludes Commissioner Goodell possesses first-hand knowledge of relevant information regarding the events giving rise to Plaintiffs’ causes of action for breach of contract and fraudulent inducement. Said first-hand knowledge includes Goodell’s own statements and actions involving the temporary seating and the video replay board, before, during and after the Super Bowl, as well as his intentions in communicating about the same with fans, including those persons directly affected by the temporary seating issues. Plaintiffs are not required to establish that the matters about which Goodell possesses firsthand knowledge are directly relevant to their claims, only that those matters “bear[] on, or [] reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). The Court finds that Plaintiffs have met that burden with respect to the limited issues just referenced.

In addition, it logically follows that if the other NFL executives were unable to answer questions regarding Goodell’s statements, the remaining proffered witnesses, who are not employed by the NFL, would be unlikely to answer those questions as well. Under these circumstances, Plaintiffs are not required to expend additional resources to also depose the third-party witnesses proffered by the NFL. The Court finds Plaintiffs have established that they “first attempt[ed] to obtain the sought after information through less burdensome means of discovery.” *Gauthier v. Union Pac. R. Co.*, 2008 WL 2467016, at *4 n. 2 (E.D. Tex. June 18, 2008).

Finally, in a case such as this, the Court is guided to regulate the discovery process to avoid “oppression, inconvenience, and burden” to the executive and the corporation. *Computer Acceleration Corp. v. Microsoft Corp.*, 9:06-CV-140, 2007 WL 7684605, at *1 (E.D. Tex. June 15, 2007). It is with that consideration that Plaintiffs’ motion to compel the deposition of Goodell is

GRANTED IN PART. Plaintiffs are permitted to depose NFL Commissioner Roger Goodell on the limited topics of (1) his non-privileged statements about the temporary stadium seating, the video replay board, and the affected fans at the Super Bowl XLV; (2) his involvement (a) in developing the video replay board, (b) with the temporary seating, and/or (c) any attempt or goal to break the NFL's Super Bowl attendance record; and (3) any communications he had with the affected fans -- directly or indirectly -- before, during and/or after the Super Bowl game, including the intentions behind any such communications. The deposition must be conducted at the NFL's offices in New York City, unless the parties otherwise agree. The deposition shall be conducted **no later than August 5, 2013.**

SO ORDERED, July 10, 2013.



RENEE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE