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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

ZANE HARDIN,

Plaintiff,

vs.

WAL-MART STORES, INC.

Defendant.

CASE NO. 08-CV-0617 AWI BAM

**ORDER ON DEFENDANT’S MOTION FOR
RECONSIDERATION AND PLAINTIFF’S
MOTION FOR COMPLIANCE AND
SANCTIONS**

(Doc. 153, 155, 156)

In the motion to be reconsidered, Defendant Wal-Mart Stores Inc., (“Defendant”) sought a Motion for Protective Order to prevent the deposition of its Executive Vice-President Susan Chambers. (Doc. 140). Plaintiff Zane Hardin (“Plaintiff”) filed a Cross-Motion to Compel the deposition asking the Court to order Wal-Mart to produce Ms. Chambers for deposition. (Doc. 146). On December 2, 2011, this Court, finding good cause, denied Wal-Mart’s Motion for Protective Order and granted Plaintiff’s request to depose Ms. Chambers. (Doc. 152). Thereafter, Wal-Mart filed the current Motion to Reconsider. (Doc.153). In response, Hardin filed a Cross-Motion to Compel compliance with this Court’s order on the Chambers’ deposition and a Motion for Sanctions. (Doc. 155). The Court heard oral argument from counsel on December 20, 2011. Counsel John Shepardson appeared by telephone on behalf of Plaintiff. Counsel Gregory Spallas and Anna Gehrigger appeared by telephone on behalf of Defendant. Having reviewed Wal-Mart’s Motion for Reconsideration, Hardin’s responsive motions for compliance and sanctions, the arguments of counsel, and the declarations of Susan Chambers and Plaintiff’s counsel John Shepardson, this Court issues the following order.

Reconsideration is appropriate when the district court is presented with newly discovered

1 evidence, committed clear error, or there is an intervening change in controlling law. *School District*
2 *No. 1J, Multnomah County, Oregon v. A C and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), *cert. denied*,
3 512 U.S. 1236 (1994). “Motions for reconsideration serve a limited function: to correct manifest errors
4 of law or fact or to present newly discovered evidence.” *Publisher’s Resource, Inc. v. Walker Davis*
5 *Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) (quoting *Keene Corp. v. Int’l Fid. Ins. Co.*, 561
6 F.Supp. 656, 665-66 (N.D. Ill. 1982), *aff’d*, 736 F.2d 388 (7th Cir. 1984); *see also*, *Novato Fire*
7 *Protection Dist. v. United States*, 181 F.3d 1135, 1142, n.6 (9th Cir. 1999), *cert. denied*, 529 U.S. 1129
8 (2000). Reconsideration should not be used to “argue new facts or issues that inexcusably were not
9 presented to the court in the matter previously decided.” *Brambles USA, Inc. v. Blocker*, 735 F.Supp.
10 1239, 1240 (D. Del. 1990). Under this Court’s Local Rule 230(j), a party seeking reconsideration must
11 demonstrate “what new facts or circumstances are claimed to exist which did not exist or were not
12 shown upon such prior motion, or what other grounds exist for the motion and why the facts or
13 circumstances were not shown at the time of the prior motion.”

14 Wal-Mart moves for reconsideration of this Court’s December 2, 2011 order based on the new
15 30(b)(6) notice of deposition filed by Hardin. (Doc.153). According to Wal-Mart, the “apex deposition”
16 doctrine serves to shield Ms. Chambers from being deposed by Plaintiff. The “apex doctrine” protects
17 high-level corporate officials from deposition unless: (1) the executive has unique or special knowledge
18 of the facts at issue and (2) other less burdensome avenues for obtaining the information sought have
19 been exhausted. *See Van Den Eng v. Coleman Co., Inc.*, 2005 U.S. Dist. LEXIS 40720, 2005 WL
20 3776352, at *2 (D. Kan. 2005). Additionally, “when a witness has personal knowledge of facts relevant
21 to the lawsuit, even a corporate president or CEO is subject to deposition.” *See e.g. WebSideStory, Inc.*
22 *v. NetRatings*, 2007 U.S. Dist. LEXIS 20481 at *6 (S.D. Cal. 2007). A claimed lack of knowledge, by
23 itself, is insufficient to preclude a deposition. *Id.*

24 Ms. Chambers is a high level executive who oversees recruiting, training, and retention initiatives
25 for more than two million Wal-Mart associates worldwide. Chambers Decl. at 1 (Doc. 154). Wal-Mart
26 argues that Hardin seeks information from an apex deponent and as such the information sought through
27 direct testimony from Ms. Chambers is available to Hardin through less obtrusive means such as written
28 depositions or corporate discovery. Wal-Mart further argues that Hardin’s new 30(b)(6) notice includes

1 multiple topics that are not specific to Ms. Chambers and are of the nature that Wal-Mart can produce
2 a corporate deponent rather than produce Ms. Chambers for deposition. (Doc. 153). Wal-Mart claims
3 it can provide Hardin with a corporate witness to testify on behalf of the company that can speak to
4 issues noticed in the deposition. This witness would be located at Wal-Mart's headquarters in Arkansas
5 but would be less senior than Ms. Chambers. Wal-Mart alleges that allowing a different corporate
6 deponent to testify would (1) address the information Plaintiff seeks and (2) cause significantly less
7 burden thus satisfying the apex doctrine and the Court's inherent discretion to limit discovery where it
8 is unreasonably cumulative or duplicative or obtainable from some other source that is more convenient,
9 less burdensome, or less expensive. If the Court is unwilling to reconsider its prior ruling, Wal-Mart
10 asks for leave to produce Ms. Chambers for deposition after the busy holiday shopping season.¹

11 Although in her declaration Ms. Chambers states she has no knowledge of the employment
12 decisions affecting Hardin at store 2985, Hardin alleges that the Chambers Memo authored in 2005
13 contains company-wide discriminatory policies and changes in benefits. Hardin alleges that as a direct
14 result of the Chambers Memo Wal-Mart implemented policies which adversely affected his employment.
15 (Doc. 100 ¶¶59-60.).

16 Rule 26(c) provides that a court "may, for good cause, issue an order to protect a party or person
17 from annoyance, embarrassment, oppression, or undue burden or expense." FED.R.CIV.P. 26(c)(1). To
18 establish "good cause," a party seeking a protective order for discovery materials must "present a factual
19 showing of a particular and specific need for the protective order." *Welsh v. City and County of San*
20 *Francisco*, 887 F.Supp. 1293, 1297 (N.D.Cal.1995). The test under Rule 26 is not whether a putative
21 deponent had personal involvement in an event, or even whether they have "direct" knowledge of the
22 event, but whether the witness may have information from whatever source that is relevant to a claim
23 or defense. FED. R. CIV. P. 26; *Miles v. Wal-Mart Stores*, 2007 U.S. Dist. LEXIS 57895 at ** 6-7 (W.D.
24 Ark. Aug. 7, 2007).

25
26 ¹ Wal-Mart alleges that producing Ms. Chambers at this time, the holiday season, is extremely
27 difficult. According to Wal-Mart, Ms. Chambers is among the highest executives of the nation's largest
28 retailer. As such, the scheduling difficulties of the holidays and the holiday shopping season during
which retailers are under the most pressure of the year, makes a deposition before the non-expert
discovery cut-off prohibitively difficult.

1 In her declaration, Ms. Chambers admits to having personal knowledge about the Chambers
2 Memo and its effects. She oversaw a group responsible for researching and analyzing the data in the
3 memo and as a result, she also has relevant information concerning the ideas and policies found in the
4 memo. Ms. Chambers also has personal knowledge concerning Wal-Mart's decision whether to
5 implement the policies and whether directives were issued which affected Hardin's employment status
6 and resulted in reduced health care costs, among other results. As this deponent may have relevant
7 information concerning the policies triggering the challenged employment decisions impacting Hardin,
8 and the policies implemented relevant to Hardin's case, the Court finds that this deposition falls outside
9 of the realm of the "apex deposition" doctrine and Ms. Chambers must be produced for deposition.
10 There is no question Ms. Chambers is a busy, high-ranking executive. However, that status, by itself,
11 is insufficient to preclude her deposition. The Court is satisfied that Ms. Chambers has personal
12 knowledge of facts relevant to this lawsuit and her deposition may go forward.

13 On the other hand, while Ms. Chambers has relevant information related to Hardin's claim, to
14 prevent cumulative deposition testimony, her deposition must be taken last. The Supreme Court has
15 opined that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate
16 the sequence of discovery." *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998); *see also, Bell Atlantic*
17 *Corp. v. Twombly*, 550 U.S. 544, 595 n.13 (2007) ("Rule 26 confers broad discretion to control the
18 combination of interrogatories, requests for admissions, production requests, and depositions permitted
19 in a given case; the sequence in which such discovery devices may be deployed; and the limitations
20 imposed upon them"). Hardin has not presented any compelling argument for ordering the deposition
21 of Ms. Chambers before the remaining depositions and during the busy holiday season. There is no
22 dispute that Ms. Chambers had a hand in creating the "Chambers Memo." The pertinent issue is
23 whether the ideas and policies found in the memo were adopted and implemented throughout Wal-Mart
24 stores. Hardin's belief that because the memo exists and Hardin's hours were reduced that one event
25 caused the other is misplaced. Taking the remaining depositions first will allow Hardin to establish a link
26 between the Chambers' Memo and any derivative policies that may have affected Hardin's employment.
27 It is that link—to the extent that it exists—that should guide the questions at Ms. Chambers deposition.

28 Having considered Defendant's motion, which presents no new facts or law, this Court finds that

1 no conditions exist to justify reconsideration of this Court's order. Further, based on the Court's
2 discretion to dictate the sequence of discovery, and after careful consideration of the facts and the
3 parties' conduct, this Court:

- 4 (1) DENIES Defendant's Motion for Reconsideration regarding this Court's order on
5 Defendants' objection to the deposition of Susan Chambers (Doc. 153); and
- 6 (2) GRANTS Defendant's request to produce Ms. Chambers for deposition after the
7 holiday season. Wal-Mart shall produce Ms. Chambers for deposition on or after
8 January 23, 2012; The deposition shall be limited to no more than four (4) hours.
- 9 (3) DENIES Plaintiffs's Request for Sanctions. (Doc. 155).

IT IS SO ORDERED.

10 **Dated: December 21, 2011**

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE

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