

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

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

SAMUEL BRANDON KRESS, et al.,

Plaintiffs,

No. CIV S-08-0965 LKK GGH

vs.

PRICE WATERHOUSE COOPERS,

ORDER

Defendant.

Previously pending on this court’s law and motion calendar for October 27, 2011,  
was defendant’s motion to compel further deposition testimony, filed September 29, 2011.  
Edward Wynne appeared for plaintiffs. Norman Hile represented defendant. After hearing oral  
argument and reviewing the joint statement, the court now issues the following order.

BACKGROUND

This case involves a proposed class action concerning overtime compensation and  
other wages. The proposed class which is the subject of this motion is PwC Senior Associates in  
the Assurance Line of service in California. The deadline for plaintiffs’ class certification  
motion is November 1, 2011. Pertinent to the instant motion is defendant’s request for an order  
compelling further depositions of named plaintiffs and potential class representatives Kenny and  
Kress. Although these individuals were deposed earlier, defendant claims to need five additional

1 hours per deponent to question them about their positions as Senior Associates, and has noticed  
2 further depositions for November 8 and 10, 2011, respectively.

3 Kress and Kenny both worked as Associate and Senior Associate during their  
4 tenure in PwC's Assurance line of service in California, beginning in 2002. Kress resigned in  
5 December, 2006, and Kenny resigned in March, 2007.

6 DISCUSSION

7 Defendant argues that the central issue in this case is the activities these  
8 accountants performed on a weekly basis while employed at PwC, and whether their activities  
9 qualify them for exemption from relevant overtime laws as defendant asserts.<sup>1</sup> At the time of the  
10 first depositions of Kress and Kenny, on June 23 and 29, 2009, defendant believed these  
11 individuals would serve as representatives of a proposed class of Associates in PwC's Assurance  
12 line of service. At that time, plaintiffs' motion to certify the Associate class was one month  
13 away, so that defendant focused almost all of the seven hours on Kress and Kenny's activities  
14 while working in the position of Associate, not Senior Associate. At the end of the deposition,  
15 defendant reserved the right to further depose these individuals. In fact, according to defendant,  
16 plaintiffs relied extensively on this deposition testimony in their motion to certify the nationwide  
17 Associate class. Defendant states that ultimately, however, these individuals did not seek to  
18 represent the class of Associates, which defendant discovered after the depositions, but that they  
19 instead have been named in the complaint as Senior Associates. Therefore, defendant argues it  
20 needs to depose these individuals about their work in this capacity in order to oppose the  
21 upcoming motion for class certification of Senior Associates, and therefore it has shown good  
22 cause.

23 \\\

---

25 <sup>1</sup> Defendant refers to state and federal exemptions for professional and/or administrative  
26 positions which it asserts requires a very fact specific inquiry into the nature of the work, under  
Campbell v. Pricewaterhouse Coopers LLP, 642 F.3d 820, 833 (9th Cir. 2011).

1           In order to take a deposition of a deponent who has already been deposed, leave of  
2 court is required, and “the court must grant leave to the extent consistent with Rule 26(b)(2).”  
3 Fed. R. Civ. P. 30(a)(2)(A)(ii). Repeat depositions are not favored, except in certain  
4 circumstances, some of which include a long passage of time with new evidence, or where an  
5 amended complaint has added new theories. Graebner v. James River Corporation, 130 F.R.D.  
6 440, 441 (N.D. Cal. 1990). “Good cause” for an order exists where new claims or defenses have  
7 been added, Collins v. Int’l Dairy Queen, 189 F.R.D. 496, 498 (M.D. Ga. 1999); new parties  
8 have been added, Christy v. Pennsylvania Turnpike Comm’n, 160 F.R.D. 51, 52-53 (E.D. Pa.  
9 1995); and new documents have been produced, Miller v. Federal Express Corp., 186 F.R.D.  
10 376, 389 (W.D. TN 1999), Harris v. New Jersey, 259 F.R.D. 89, 94-95 (D. N.J. 2007). W.W.  
11 Schwarzer, A.W. Tashima & J. Wagstaffe, Federal Civil Procedure Before Trial § 11:1374.  
12 “Courts may limit the scope of the second deposition to matters not covered in the first  
13 deposition.” Id.

14           Although these cases outline reasons for granting additional deposition time  
15 which do not apply here, defendant’s cited case of Fleming v. Coverstone, 2009 WL 4040066  
16 (S.D. Cal. 2009), is most similar. There, the court permitted extra hours to complete a deposition  
17 where several important issues related to the allegations remained to be addressed. Defendant  
18 has shown good cause for further depositions for the same reasons.

19           The consolidated class action complaint filed on September 18, 2008 includes  
20 Kress and Kenny as named plaintiffs. (Dkt. no. 29.) This complaint refers to all plaintiffs as a  
21 class of “Uncertified Associates” throughout, (Compl. ¶¶ 2, 3, dkt. no. 29), but does refer to  
22 groupings of Associates and Senior Associates, although not designating any particular plaintiff  
23 to a particular group. (Id. at ¶ 1.) The complaint specifies that it is brought on behalf of two  
24 groups of former PwC employees: “Uncertified Associates” and “Uncertified Associates of  
25 Defendant, excluding non-senior associates...” (Id. at ¶¶ 4-5.) In regard to Kress and Kenny  
26 specifically, the complaint sets forth that they were employed as Associates *and* Senior

1 Associates “during the statutory period covered by this Complaint.” (Id. at ¶¶ 37, 41.) (emphasis  
2 added).

3           Plaintiffs argued (perhaps belatedly) that Kress and Kenny have always been  
4 outside the statute of limitations period in regard to their positions as Associates and therefore  
5 could not be representatives in the Associate group, as defendant purportedly well knew.  
6 However, at the time of the initial depositions, they were not yet disqualified as representatives  
7 for the Associate class for this reason. Defendant adds that at the time these depositions were  
8 taken, on June 23 and 29, 2009, plaintiff had filed a motion for class certification of Associates,  
9 and Kress and Kenny were listed as class representatives. See Motion for Conditional  
10 Certification, filed April 20, 2009, (dkt. no. 52) (listing Kress and Kenny as plaintiffs and  
11 Associates), withdrawal of same motion, filed April 23, 2009 (dkt. no. 54), and re-filing of  
12 conditional certification motion, filed July 20, 2009, (dkt. no. 57), which again names Kress and  
13 Kenny as plaintiffs of the Associate class. As of March 23, 2011, it was still not clear whether  
14 Kress and Kenny would be plaintiffs in the Associate Class or the Senior Associate Class. See  
15 Second Amended Consolidated Class/Collection Action Complaint. (Dkt. no. 214) (listing Kress  
16 and Kenny as “individuals employed as Associates and/or Senior Associates”). Therefore, it was  
17 not clear at the time of the first depositions of Kress and Kenny that they would not represent the  
18 class as Associates. Plaintiffs argued at hearing that defendant knew for a full year that it was  
19 not possible these plaintiffs would be class representatives for the Associate Class based on the  
20 statute of limitations problem, but defendant apparently was not sure of this information at the  
21 time the depositions were taken over two years ago and before the tolling arrangement was  
22 worked out.

23           In addition to the previously mentioned focus of the depositions on Kress and  
24 Kenny’s work as Associates, defendant adds that during their initial depositions, these former  
25 employees attempted to disavow the plain language of documents presented to them, some of  
26 which they created, requiring prolonged inquiry, which is one of the reasons defendant needs

1 further depositions. See Wynne Decl., Exs. 1, 2. This stance undermines plaintiffs' argument  
2 that defendant, as plaintiffs' past employer, had access to all the information it needed regarding  
3 plaintiffs' jobs as Senior Associates prior to the depositions, and that defendant was just not  
4 prepared for these initial depositions.

5           The deponents' apparent disavowal of some documents is also a reason why  
6 plaintiffs' suggestion to obtain the needed information in a more convenient, less burdensome  
7 and less expensive way, such as by written discovery, will not work. Such discovery will be  
8 responded to by attorneys who aid the plaintiffs in framing answers which does not promote the  
9 truth seeking endeavor as well as depositions.

10           Contrary to plaintiffs' argument that defendant in fact did examine these  
11 deponents on the subjects it now claims were not covered, the transcript citations indicate that the  
12 deponents were questioned only briefly regarding their positions as Senior Associates. Plaintiff  
13 refers to excerpts of the transcripts of both depositions which cover about twelve to thirteen  
14 pages of questions about both Kress and Kenny's positions as Senior Associates, out of more  
15 than 291 and 332 pages of transcripts for both depositions. (Wynne Decl., Exs. 1, 2.)

16           Plaintiffs additionally argue that defense counsel has not examined a single  
17 plaintiff on a "week by week" basis as they seek to do now, and in any event such examination is  
18 unnecessary because the job at issue is "uniform, routine and repetitive." Plaintiffs assert that the  
19 main issue in the case, whether these jobs were subject to exemption where discretion and  
20 independent judgment were used, has already been inquired into at length by defendant at the  
21 first depositions. Furthermore, plaintiff Kress was a Senior Associate for only 15 months, and  
22 Kenny was a Senior Associate for only 18 months, and not the long periods of time defendant  
23 suggests. Plaintiffs contend that the number of assignments they had was far fewer than  
24 suggested by defendant.

25           At hearing, defendant indicated that it had not taken any depositions of any other  
26 Senior Associates, further warranting these depositions. Additionally, when questioned whether

1 Kress and Kenny would be listed as class representatives in their upcoming motion for class  
2 certification, to be filed five days after this hearing, plaintiffs' counsel could not answer, but  
3 responded only that a few firms were working on the motion and this particular aspect of it was  
4 not his bailiwick. Therefore, defendant cannot be faulted for requesting further depositions after  
5 the date that the class certification motion is due to be filed. Plaintiffs' counsel was also asked to  
6 identify the significant hardship suffered if Kress and Kenny are subjected to five more hours of  
7 depositions, but he could only state that they would have to take time off work again and would  
8 or might lose compensation.

9 CONCLUSION

10 Accordingly, IT IS ORDERED that:

11 1. Defendant's motion to compel further deposition testimony, filed September  
12 29, 2011, (dkt. #237), is granted.

13 2. Plaintiffs Kenny and Kress shall appear for further deposition on November 8  
14 and 10, 2011 respectively, for five more hours of deposition per deponent. Deposition questions  
15 shall be limited to the position of Senior Associate.

16 DATED: November 1, 2011

17 /s/ Gregory G. Hollows  
18 UNITED STATES MAGISTRATE JUDGE

19 GGH:076/Kress0965.dsy4.wpd  
20  
21  
22  
23  
24  
25  
26