

**\*\* E-filed July 16, 2010 \*\***

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NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

KEVIN EMBRY, and individual, on behalf  
of himself, the general public and those  
similarly situated,

Plaintiff,

v.

ACER AMERICA CORPORATION, a  
California corporation, and Does 1 through  
50,

Defendants.

No. C09-01808 JW (HRL)

**ORDER DENYING PLAINTIFF'S  
MOTION TO COMPEL DEPOSITION  
ATTENDANCE**

**[Re: Docket No. 62]**

**BACKGROUND**

This is a putative class action suit against defendant Acer America Corporation (“Acer”), a personal computer manufacturer. Plaintiff Kevin Embry (“Embry”) alleges that Acer advertised its computers as having a fully functional version of the Microsoft Windows operating system (“Windows”), but instead installed Original Equipment Manufacturer (“OEM”) versions that lacked full functionality as compared to the retail version.

In January, this Court denied in part Embry’s previous motion to compel partly because he sought discovery about “the specific differences between the software Acer advertised and that which it installed, as well as customer complaints for the same.” (Docket No. 51 (the “January 28

1 Order”) at 3.) The Court explained that discovery of this sort would have little-to-no impact on  
2 class certification and should therefore be deferred until the merits phase of this case. (*Id.*)

3 Some months later, after settlement talks apparently fell apart, Embry filed a deposition  
4 notice for Acer’s Federal Rule of Civil Procedure (“FRCP”) 30(b)(6) deponent on eight different  
5 topics in preparation for his class certification motion (the deadline for which is August 2). (Docket  
6 No. 62 (“Motion”), Ex. 3.) After Acer initially refused to supply a deponent, Embry moved to  
7 compel the deposition. (Motion.) Acer subsequently agreed to produce a FRCP 30(b)(6) deponent  
8 for five of the topics, and so only three disputed topics remain. (Docket No. 68 (“Opp’n.”) at 3;  
9 Docket No. 69 (“Reply”) at 2.) They are:

- 10 (1) Topic 3: Customer complaints or inquiries about the features, functions, or use of  
11 WINDOWS OPERATING SYSTEM SOFTWARE, and YOUR customer service practices  
12 with respect to such complaints and inquiries;
- 13 (2) Topic 5: YOUR knowledge of the WINDOWS OPERATING SYSTEMS and PCs that  
14 PLAINTIFF purchased; and
- 15 (3) Topic 7: The number of, and possible methods for identifying, members of the proposed  
16 class set forth in paragraph 28 of the Complaint.

17 (Motion, Ex. 3.)

18 Pursuant to Civil Local Rule 7-1(b), the Court finds the matter suitable for determination  
19 without oral argument, and the July 20, 2010 hearing is vacated.

## 20 DISCUSSION

### 21 *Topic 3*

22 Acer argues that the information sought by Topic 3 was already ruled upon by this Court in  
23 its January 28 Order. It is correct. Topic 3 seeks information related to customer complaints about  
24 the OEM version of Windows that was included with or preinstalled on Acer’s computers, but this  
25 Court already determined that such information is not related to class certification when it denied  
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1 Embry’s previous motion to compel responses to two of its requests for production of documents.<sup>1</sup>  
2 Thus, Acer does not have to provide a deponent on this topic.

3 *Topic 5*

4 Topic 5 is somewhat vague. Acer claims that what Embry seeks is testimony about the  
5 differences between the retail version of Windows and the OEM version that was installed on  
6 Embry’s computer. (Opp’n. at 4.) Embry denies this and instead claims that Topic 5 is meant to  
7 cover “information about the product he purchased,” such as “whether [the OEM software] was  
8 loaded on his computer exactly as it was licensed from Microsoft or whether it was modified by  
9 [Acer].” (Reply at 4.)

10 Despite Embry’s attempt to clarify the language of Topic 5, it still sounds like he is trying to  
11 elicit “the specific differences between the software Acer advertised and that which it installed” —  
12 information for which this Court already denied a motion to compel. (January 28 Order at 3.)  
13 Nevertheless, the Court fails to see how the information sought by Topic 5 (as clarified by Embry)  
14 relates to class certification. In his reply, Embry makes a conclusory statement that such  
15 information is related to class certification because it would help him establish typicality and  
16 commonality, but he offers no explanation of how it would do so. (See Reply at 3.) Thus, because  
17 Topic 5 seeks more-or-less the same information that this Court previously ruled was not related to  
18 class certification and Embry has not convinced the Court otherwise, Acer does not have to provide  
19 a deponent on this topic, either.

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22 <sup>1</sup> The Court denied Embry’s motion to compel responses to, among other things, his Requests for  
23 Production Nos. 20 and 21. (January 28 Order at 4.) Embry’s Request for Production No. 20  
24 sought “[a]ll telephone logs, correspondence, memoranda, complaints, complaint reports, claims,  
25 training manuals, news reports, lawsuits, databases, and other DOCUMENTS that RELATE TO any  
26 claims, complaints, inquiries, questions or contentions RELATED TO or concerning OEM  
27 SOFTWARE, including WINDOWS OPERATING SYSTEM SOFTWARE.” (Docket No. 40 at  
28 20.) And his Request for Production No. 21 sought “[a]ll telephone logs, correspondence,  
memoranda, complaints, complaint reports, claims, training manuals, news reports, lawsuits,  
databases, and other DOCUMENTS that RELATE TO any claims, complaints, inquiries, questions  
or contentions RELATED TO or the inability of the CUSTOMER to reboot his or her PC after a  
system failure concerning OEM SOFTWARE, including WINDOWS OPERATING SYSTEM  
SOFTWARE.” (Docket No. 40 at 21.)

1 *Topic 7*

2 Acer argues that the information sought by Topic 7 relates to an allegation that Judge Ware  
3 dismissed at the pleading stage. In his reply, Embry tries to avoid this conclusion by arguing that  
4 Judge Ware’s dismissal only related to his allegation that Acer failed to initially provide recovery  
5 disks and was not related to his allegation that the recovery disks he subsequently purchased  
6 “lack[ed] the full functionality of the Windows operating systems.” (Reply at 4.)

7 Judge Ware’s order, however, appears to capture all of Embry’s allegations regarding the  
8 recovery disks. (*See* Docket No. 19 at 9-10 n9.) Indeed, Judge Ware wrote: “In the absence of any  
9 alleged representations *regarding the inclusion or content* of the recovery disks, the Court finds that  
10 Plaintiff’s claims on this basis are without merit. Accordingly, the Court GRANTS Defendant’s  
11 Motion to Dismiss *as to the sub-issue of misrepresentations and damages associated with the*  
12 *recovery disks.*” (*Id.* (emphasis added)) As such, information about the individuals who purchased  
13 back-up or recovery disks with versions of Windows from Acer is not relevant to Embry’s class  
14 certification motion, and therefore Acer does not have to produce a deponent on this topic.

15 **CONCLUSION**

16 Based on the foregoing, Embry’s motion to compel Acer to produce a FRCP 30(b)(6)  
17 deponent on Topics 3, 5, and 7 of his deposition notice is DENIED. As the parties represent that  
18 Acer will produce a FRCP 30(b)(6) deponent on Topics 1, 2, 4, 6, and 8, the Court DENIES AS  
19 MOOT Embry’s motion regarding those topics. The July 20, 2010 hearing on Embry’s motion is  
20 VACATED.

21 **IT IS SO ORDERED.**

22 Dated: July 16, 2010

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25 HOWARD R. LLOYD  
26 UNITED STATES MAGISTRATE JUDGE  
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