

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

NYKEYA KILBY, individually and on  
behalf of all others similarly situated,  
  
Plaintiff,  
  
v.  
  
CVS PHARMACY, INC.,  
  
Defendant.

Case No.: 09cv2051-MMA(KSC)

**ORDER RE JOINT MOTION FOR  
DETERMINATION OF DISCOVERY  
DISPUTES (PLAINTIFF'S FOURTH  
SET OF INTERROGATORIES AND  
DOCUMENT REQUESTS)**

**[Doc. No. 160-163.]**

Before the Court is the parties' Joint Motion for Determination of Discovery Dispute. [Doc. Nos. 160-163.] In the Joint Motion, plaintiff seeks an order compelling defendant to provide further responses to her Fourth Set of Interrogatories and Requests for Production of Documents. For the reasons outlined more fully below, the Court finds that plaintiff's request for an order compelling further responses to these discovery requests must be GRANTED in part and DENIED in part.

**Background**

The original Class Action Complaint in this case was filed on September 18, 2009. [Doc. No. 1.] A First Amended Class Action Complaint was later filed on January 15, 2010 (the "First Amended Complaint"). [Doc. No. 6.] The First Amended Complaint

1 includes a single cause of action under California Labor Code Section 2698 *et seq.*, also  
2 known as the Private Attorney General Act of 2004 (“PAGA”). [Doc. No. 6, at p. 2.]  
3 According to the First Amended Complaint, PAGA allows employees to recover  
4 penalties when an employer violates certain provisions of the California Labor Code.  
5 [Doc. No. 6, at p. 5.] California Labor Code Section 1198 requires employers to comply  
6 with wage orders. Section 14(a) of Wage Order 7-201 states that: “All working  
7 employees shall be provided with suitable seats when the nature of the work reasonably  
8 permits the use of seats.” [Doc. No. 6, at p. 5.] In this regard, plaintiff alleges that  
9 Section 14(a) applies to the “mercantile industry” and that defendant is a member of the  
10 “mercantile industry.” [Doc. No. 6, at p. 4.] Plaintiff claims she was employed in one  
11 of defendant’s retail drug stores in California as a cashier but was not provided with a  
12 seat while performing her work in violation of California Labor Code Section 1198 and  
13 Section 14(a) of Wage order 7-2001. [Doc. No. 6, at p. 2.]

14 On October 3, 2001, plaintiff filed a Motion for Class Certification. [Doc. No. 63.]  
15 On April 4, 2012, the District Court denied plaintiff’s Motion for Class Certification,  
16 concluding that plaintiff failed to satisfy the commonality requirement of Rule 23(a) and  
17 the predominance and superiority requirements of Rule 23(b)(3). [Doc. No. 131, at p.  
18 10.]<sup>1</sup>

19 Next, defendant filed Motion for Summary Judgment [Doc. No. 113], which was  
20 granted by the District Court on May 31, 2012. [Doc. No. 136.] It was the District  
21 Court’s view that Section 14(a) did not apply to plaintiff’s position of cashier, because  
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24 <sup>1</sup> Defendant also filed a Motion to Strike the Pre-Certification Report of plaintiff’s  
25 expert based on lack of foundation, inadequate data, irrelevant facts, suspect  
26 observations, and erroneous assumptions. [Doc. No. 83.] In its Order of April 4, 2012,  
27 the District Court granted in part and denied in part defendant’s Motion to Strike. [Doc.  
28 No. 131, at p. 1.] Although the District Court acknowledged that the challenged report  
included generally “shaky” evidence, it found that, for the most part, it withstood scrutiny  
under Federal Rule of Evidence 702. [Doc. No. 131, at p. 5.]

1 the “nature of the work” required standing. [Doc. No. 136, at p. 10.] Judgment was  
2 entered in favor of defendant, and the case was terminated. [Doc. No. 136, at p. 10.]  
3 Plaintiff appealed. [Doc. No. 139.]

4 To prevent different interpretations of Section 14, the Ninth Circuit requested that  
5 the California Supreme Court exercise its discretion to decide the following questions  
6 about the meaning of Section 14(a). [Doc. No. 147, at pp. 1-14.]

7 1. Does the phrase ‘nature of the work’ refer to an individual task  
8 or duty that an employee performs during the course of his or her workday,  
9 or should courts construe ‘nature of the work’ holistically and evaluate the  
10 entire range of an employee’s duties?

11 a. If the courts should construe ‘nature of the work’  
12 holistically, should the courts consider the entire range of an employee’s  
13 duties if more than half of an employee’s time is spent performing tasks that  
14 reasonably allow the use of a seat?

15 2. When determining whether the nature of the work ‘reasonably  
16 permits’ the use of a seat, should courts consider any or all of the following:  
17 the employer’s business judgment as to whether the employee should stand,  
18 the physical layout of the workplace, or the physical characteristics of the  
19 employee?

20 3. If an employer has not provided any seat, does a plaintiff need  
21 to prove what could constitute ‘suitable seats’ to show the employer has  
22 violated Section 14(a)?

23 [Doc. No. 147, at pp. 2-3.]

24 On April 14, 2016, the California Supreme Court issued a decision entitled *Kilby v.*  
25 *CVS Pharmacy, Inc.*, 63 Cal.4<sup>th</sup> 11 (2016). Considering the phrase “nature of the work,”  
26 the California Supreme Court rejected the defendant’s argument that Section 14(a)  
27 requires “weighing all of an employees’ ‘standing’ tasks against all of the ‘sitting’ tasks”  
28 while ignoring the duration of those tasks and how often they are performed. *Id.* at 16-  
17. Rather, the California Supreme Court said the inquiry must focus on “consideration  
of the overall job duties performed at the particular location by *any* employee while

1 working there, and whether those tasks reasonably permit seated work.” *Id.* at 17. In  
2 other words, the California Supreme Court rejected an “all-or-nothing approach [that]  
3 could deprive an employee of a seat because most of his job duties are classified as  
4 ‘standing’ tasks, even though the duration, frequency, and location of the employee’s  
5 most common tasks would make seated work feasible while performing them.” *Id.*  
6 According to the California Supreme Court, “[t]here is no principled reason for denying  
7 an employee a seat when he spends a substantial part of his workday at a single location  
8 performing tasks that could reasonably be done while seated, merely because his job  
9 duties include other tasks that must be done standing.” *Id.*

10 The California Supreme Court also held that a “totality of the circumstances”  
11 approach should be applied to determine whether the nature of the work “reasonably  
12 permits” the use of a seat. *Id.* at 19. “Analysis begins with an examination of the  
13 relevant tasks, grouped by location, and whether the tasks can be performed while seated  
14 or require standing. This task-based assessment is also balanced against considerations  
15 of feasibility. Feasibility may include, for example, an assessment of whether providing  
16 a seat would unduly interfere with other standing tasks, whether the frequency of  
17 transition from sitting to standing may interfere with the work, or whether seated work  
18 would impact the quality and effectiveness of overall job performance. This inquiry is  
19 not a rigid quantitative analysis based merely upon the counting of tasks or amount of  
20 time spent performing them. Instead, it involves a qualitative assessment of all relevant  
21 factors.” *Id.* at 20. Other relevant factors may include the employer’s business  
22 judgment based on an objective standard (*e.g.*, “an employer’s reasonable expectations  
23 regarding customer service” and “any evidence submitted by the parties bearing on an  
24 employer’s view that an objective job duty is best accomplished standing”); and “the  
25 physical layout of a workspace.” *Id.* at 21-22.

26 On June 8, 2016, the Ninth Circuit issued a Memorandum decision reversing and  
27 remanding the case to the District Court “to reconsider in light of the California Supreme  
28 Court’s opinion.” [Doc. No. 155, at p. 2.] Thereafter, this Court directed the parties to

1 submit a Joint Discovery Plan and appear for a Case Management Conference. [Doc.  
2 No. 153.] Following a telephonic Case Management Conference, a Scheduling Order  
3 was issued to allow the parties additional time to complete or update class-related  
4 discovery and to file any motions related to class certification. [Doc. No. 159.] The  
5 instant Joint Motion is one of three discovery disputes currently before the Court. [Doc.  
6 Nos. 160, 167, and 178.]

7 **Discussion**

8 **Plaintiff's Interrogatory Nos. 17, 18, 19, 20, and 21** all seek information related to  
9 the cashier stands at defendant's stores. In these requests, plaintiff seeks to elicit  
10 information to support her theory that defendant's stores in California "share similar  
11 cash register layouts." [Doc. No. 160, at p. 9.] As to all of defendant's stores in  
12 California that have been open since June 9, 2008<sup>2</sup> to the present and as to all cash  
13 registers in those stores, plaintiff seeks a detailed description of the following: the  
14 cashier stands and configurations [No. 17]; the physical dimensions of the workspaces  
15 behind and around the cash registers and why those physical dimensions preclude the  
16 use of a seat or stool [No. 18]; the unique attributes of the register stands that impact or  
17 preclude the use of a seat or stool [No. 19]; the distances between the check-out stands  
18 and the product wall [No. 20]; and the identity of any store where defendant contends it  
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22 <sup>2</sup> Defendant objects to providing discovery beginning on June 9, 2008, arguing that  
23 "the relevant time period begins on September 18, 2008, one year preceding the date that  
24 plaintiff filed her original complaint." [Doc. No. 160, at p. 8.] However, plaintiff argues  
25 that under California Labor Code 2699.3 the statute of limitations extends back to one  
26 year before she served her "original pre-litigation PAGA notice." [Doc. No. 160, at p. 2.]  
27 In the context of resolving a discovery dispute, the applicable statute of limitations is not  
28 properly before the Court. However, the Court finds that plaintiff reasonably seeks  
discovery beginning on June 9, 2008, one year before she "filed her pre-filing PAGA  
notice pursuant to [California] Labor Code § 2699.3." [Doc. No. 160-1, at p. 2.]  
Accordingly, for purposes of discovery in this action, the Court finds that the relevant  
time period is June 9, 2008 through the present.

1 would be physically possible or impossible to use a seat or stool while operating the cash  
2 registers. [Doc. No. 160, at pp. 7-19.]

3 As defendant contends, Interrogatory No. 17, 18, 19, 20, and 21 are all unduly  
4 burdensome and overly broad. In California, defendant currently has about 870 stores.  
5 If closed stores are added to this calculation, defendant has had approximately 940 stores  
6 in California during the relevant time period. Assuming a minimum of four cash stands  
7 in each store, plaintiff's interrogatories seek detailed information about some 3,480 cash  
8 stands. [Doc. No. 160, at pp. 12-17.] In addition, the stores vary in size, layout, and  
9 configuration, due in part to the acquisition of a significant number of stores from other  
10 retail companies, and defendant does not maintain the records necessary to respond to  
11 the level of detail plaintiff seeks. [Doc. No. 160, at p. 13.]

12 Plaintiff proposed an e-mail procedure to collect the information requested in these  
13 interrogatories. The proposed procedure would require store managers in all of  
14 defendant's 870 stores in California to describe, photograph, and measure some 3,480  
15 register stations. [Doc. No. 160, at pp. 11-12.] However, the Court agrees with  
16 defendant that this store-by-store procedure is too burdensome, too expensive, and  
17 unworkable. The managers are not trained about cash station design and are not familiar  
18 with any standards or terminology that could be used to make the results accurate or  
19 reliable. As defendant contends, there is no guarantee that the managers would all  
20 consistently measure, photograph, and describe the same things so that the parties could  
21 rely on the information they provide. [Doc. No. 160, at p. 15.] To obtain accurate,  
22 consistent information, defendant would have to send someone to all of the stores and  
23 this would not only be very expensive, it "would take months of effort." [Doc. No. 160,  
24 at p. 14.]

25 It also appears that these interrogatories seek information that is disproportional to  
26 the needs of the case. At this point in the litigation, plaintiff seeks this vast amount of  
27 information in connection with two issues related to class certification (commonality and  
28 predominance). Without more, there is nothing to indicate plaintiff actually needs all of

1 the requested information about each of defendant's stores and cash registers in order to  
2 adequately support its theory that "CVS stores share similar cash register layouts."  
3 [Doc. No. 160, at p. 9.] Under the circumstances presented, it appears that an adequate  
4 sampling would be sufficient. Accordingly, the Court will not require defendant to  
5 provide the information requested in these interrogatories for all of defendant's stores in  
6 California. Without more, information about a representative sample of stores is  
7 sufficient under the circumstances.

8 Additionally, it is apparent that some of the information sought in these  
9 interrogatories is duplicative of discovery already made available to plaintiff. For  
10 example, defendant previously provided plaintiff with photographs and measurements of  
11 the "cash wraps" in 20 stores in different locations throughout the state. [Doc. No. 160,  
12 at p. 14.] Plaintiff rejected defendant's offer to provide similar information for  
13 additional stores. [Doc. No. 160, at p. 14.] As of the date the parties' Joint Motion was  
14 filed, defendant also represented it had produced "132 store layouts" that offer "a bird's  
15 eye view" of each of these stores. [Doc. No. 160, at p. 14.]

16 As to Interrogatory Nos. 18 and 19, seeking the unique attributes and physical  
17 dimensions of the workspaces behind and around the cash registers that allegedly  
18 preclude the use of a seat or stool, defendant previously identified some examples based  
19 on sampling and witness testimony. [Doc. No. 160, at p. 19.] Although defendant  
20 offered to provide more examples based on additional sampling, plaintiff declined and  
21 insisted on a store-by-store analysis of all California stores. [Doc. No. 160, at p. 19.]

22 Plaintiff objects to the information already produced for two main reasons. First,  
23 plaintiff contends that the diagrams previously produced showing cash register  
24 configurations at 20 stores are out of date, because they were produced in response to  
25 discovery requests served in 2011 "as of that date." [Doc. No. 160, at p. 11.] Second,  
26 plaintiff alleges that defendant "cherry picked" the stores to support its version of the  
27 facts (*i.e.*, that there are many types of cashier stands and configurations at its stores).  
28 [Doc. No. 160, at p. 12.]

1 While defendant has offered to provide additional sampling and to update the  
2 information previously produced [*see, e.g.*, Doc. No. 160, at p. 8], plaintiff has not  
3 offered to narrow the scope of Interrogatory Nos. 17, 18, 19, 20, and 21. The Court  
4 expects a party seeking discovery to attempt to narrow the scope of broadly worded  
5 requests during meet and confer sessions and to discuss any such efforts in any moving  
6 papers seeking an order compelling further responses. Since it appears that plaintiff did  
7 not attempt to narrow the scope of these requests, it is difficult for the Court to  
8 determine the size of an adequate sampling.<sup>3</sup>

9 Based on the foregoing, the Court finds that defendant's request for an order  
10 compelling defendant to provide full and complete responses to Interrogatory Nos. 17,  
11 18, 19, 20, and 21, as worded, must be DENIED. However, if plaintiff provides  
12 defendant with a list of twenty (20) additional, randomly selected stores in California,  
13 the Court will require defendant to provide plaintiff with full and complete responses to  
14 these interrogatories as to the 20 (twenty) stores selected by plaintiff and as to the  
15 previous sample of 20 (twenty) stores selected by defendant. To the extent defendant  
16 has already disclosed this information about the previous sample of 20 (twenty) stores,  
17 defendant need only provide updated information to show any change since the prior  
18 production.

19 **Plaintiff's Interrogatory No. 23** seeks the identity of "each Clerk/Cashier who was  
20 employed in California at any time between June 9, 2008 and the present who operated a  
21 front-end cash register for at least one pay period during that time." [Doc. No. 160, at p.  
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24 <sup>3</sup> "Particularly when a party stands on an overly broad request and does not make a  
25 reasonable attempt to narrow it or to explain the need for such a broad range of  
26 documents and/or information, the Court will not 'rewrite a party's discovery request to  
27 obtain the optimum result for that party. That is counsel's job.' [Citation omitted.]"  
28 *Sanchez Ritchie v. Energy*, No. 10cv1513-CAB(KSC), 2015 WL 12914435, at p. 3 (S.D.  
Cal., March 30, 2015), quoting *Bartolome v. City and County of Honolulu*, No. CIV. 06-  
00176SOMLEK, 2008 WL 2736016, at \*14 (D. Hawaii, July 14, 2008).

24.] As worded, this interrogatory is overly broad and unduly burdensome. Defendant represents that it has employed approximately 35,374 clerk/cashiers in its California stores since September 2008 and does not retain records to readily identify individuals who actually operated a cash register. Some employees classified as “clerk/cashiers” do not operate a cash register during their employment. As a result, an individualized inquiry would be necessary to provide this level of detail. [Doc. No. 160, at p. 26.] Under these circumstances, the Court will not require defendant to conduct an individualized inquiry to specifically identify individuals “who operated a front-end cash register.” [Doc. No. 160, at p. 24.]

Interrogatory No. 23 is also duplicative and cumulative in that defendant previously provided plaintiff with names/contact information for about 3,500 putative class members. At the time this information was disclosed, the putative class had about 17,000 members and the 3,500 individuals identified at that time represented about 20 percent of all putative class members. [Doc. No. 160, at p. 26.] Now, “[p]laintiff is willing to limit her request to Clerk/Cashiers who *first* became employed by [defendant] in California at any time after April 20, 2011 (the date of [defendant’s] prior disclosure).” [Doc. No. 160, at p. 26 (emphasis added).] Plaintiff has not explained why the information already disclosed is insufficient. For example, plaintiff has not indicated that defendant’s policies with regard to the use of seating/stools has changed since 3,500 individuals were identified in 2011. Nor has plaintiff explained why she seeks the identity of all clerk/cashiers employed any time after April 20, 2011 rather than offering to narrow the scope of this request to a representative sample. As noted above, the Court expects a party seeking discovery to attempt to narrow the scope of broadly worded requests during meet and confer sessions and to discuss any such efforts in any moving papers seeking an order compelling further responses. Accordingly, the Court declines to rewrite this request for plaintiff’s benefit.

Based on the foregoing, the Court finds that plaintiff’s request for an order compelling defendant to provide a further response to this request as worded must be

1 DENIED. However, the Court will require defendant to update the prior production  
2 with a representative sample of the identities of clerk/cashiers who first became  
3 employed in California stores after April 20, 2011. Defendant shall update its prior  
4 production by identifying 20 percent of all clerk/cashiers in California stores who first  
5 became employed after April 20, 2011 (the date of defendant's prior disclosure).

6 **Interrogatory No. 24** seeks the identification of "each store management employee  
7 (including without limitation Store Manager, Store Manager in Training, Operations  
8 Manager, of Shift Supervisor) who was employed in California at any time between  
9 June 9, 2008 and the present and *who is no longer employed by CVS.*" [Doc. No. 160,  
10 at p. 28 (emphasis added).] Plaintiff has requested this information because she believes  
11 defendant's former management employees have discoverable information as to whether  
12 cashiers have ever used seats and/or could operate a cash register while seated. [Doc.  
13 No. 160, at p. 29.] However, citing a number of declarations previously filed in this  
14 litigation, plaintiff states that she already "knows from her investigation that some  
15 Clerk/Cashiers were allowed to sit while checking out customers." [Doc. No. 160, at p.  
16 29.]

17 Defendant is concerned that this is an overly broad "fishing expedition" and that  
18 plaintiff's "true intent" is to discover "dirt" to use against defendant. [Doc. No. 160, at  
19 pp. 30-31.] As it must, defendant also legitimately raises concerns about the privacy of  
20 third parties. [Doc. No. 160, at pp. 30-31.] Plaintiff has not explained why she needs  
21 additional discovery of this type or why she specifically seeks this type of discovery  
22 from defendant's *former* management employees. As defendant contends, "[p]laintiff  
23 does not offer any reason why former managers would have more or specialized relevant  
24 information regarding the use/potential use of seats in their stores than [defendant's]  
25 current managers or putative class members." [Doc. No. 160, at p. 30.] Nor does this  
26 avenue of discovery appear to be proportional to the needs of the case, particularly when  
27 far less burdensome and intrusive means are available to test plaintiff's theory of the  
28 case, such as a Rule 30(b)(6) deposition of a *current* manager deemed by the

1 corporation to be knowledgeable on this topic. In this regard, the Court notes that  
2 plaintiff has already taken a Rule 30(b)(6) deposition of a corporate representative about  
3 the “[f]acts and circumstances surrounding any situation in which a Clerk/Cashier  
4 operated a cash register from a seated position.” [Doc No. 160, at p. 5.] For all of these  
5 reasons, the Court finds that plaintiff’s request for an order compelling defendant to  
6 provide a further response to Interrogatory No. 24 must be DENIED.

7 **Interrogatory No. 25** states as follows: “Identify each Clerk/Cashier *anywhere in*  
8 *the United States* who, at any time between June 9, 2008 and the present, used a seat or  
9 stool while operating the cash register.” [Doc. No. 160, at p. 31 (emphasis added).] As  
10 plaintiff contends, the requested discovery is relevant to plaintiff’s theory of the case.  
11 However, defendant contends that this interrogatory is unduly burdensome and “[overly  
12 broad] in geographical scope,” because “[p]laintiff’s class action is only about  
13 California’s stores” and defendant has some 9,600 stores in the United States. [Doc. No.  
14 160, at p. 33.] Accordingly, for these reasons, the Court will not require defendant to  
15 disclose information about store employees outside California.

16 Plaintiff’s understanding “from interviews with Clerk/Cashiers in 2011 [is] that  
17 they were allowed to use seats if they provided medical evidence such as a doctor’s  
18 note.” [Doc. No. 160, at p. 32.] Defendant did provide a supplemental response to this  
19 interrogatory “which includes a general description of instances where a California retail  
20 employee requested the use of a seat for a disability accommodation.” [Doc. No. 160, at  
21 p. 33.] However, this response does not address the broader question implied in this  
22 interrogatory. Plaintiff is entitled to pursue her theory of the case and to discover the  
23 full extent of circumstances when clerk/cashiers in California stores used a seat or stool  
24 while operating the cash register, regardless of whether a medical condition was the  
25 reason for the use of a chair or stool while cashiering.

26 According to plaintiff, defendant could compile a complete response to this  
27 interrogatory by “simply send[ing] out an e-mail to its store managers and ask[ing] them  
28 to identify Clerk/Cashiers who used seats” while operating a cash register during the

1 relevant time period. [Doc. No. 160, at pp. 32-33.] Defendant does not argue that it  
2 would be unreasonably difficult and burdensome to obtain this information from its  
3 California stores by e-mail.

4 Although defendant also raised the privacy interests of putative class members who  
5 might be identified in response to this request, the Court has no reason to believe these  
6 interests would not adequately be addressed by the stipulated Protective Order that is  
7 already in place to govern the exchange of confidential information. [Doc. No. 62.]  
8 Based on the foregoing, the Court finds that plaintiff's request for an order compelling  
9 defendant to provide plaintiff with a further response to Interrogatory No. 25, as worded,  
10 must be DENIED. However, subject to the confidentiality provisions of the Protective  
11 Order [Doc. No. 62] and for the reasons outlined above, the Court will require defendant  
12 to identify all clerk/cashiers in its California stores that have used or are using a seat or  
13 stool while operating a cash register from June 9, 2008 to the present.

14 **Document Request No. 41** seeks production of "documents sufficient to show the  
15 amount of workspace behind or around the registers at each CVS store in California  
16 between June 9, 2008 and the present, including without limitation all floor plans,  
17 schematics, design documents, and drawings containing that information." [Doc. No.  
18 160, at p. 34.] This document request is related to plaintiff's Interrogatory Nos. 17, 18,  
19 19, 20, and 21, discussed above, which seek information related to the cashier stands at  
20 defendant's stores in California. For example, Interrogatory No. 18 specifically seeks to  
21 discover the physical dimensions of the workspaces behind and around the cash registers  
22 at all of defendant's stores in California and why those physical dimensions preclude the  
23 use of a seat or stool. For the reasons outlined above in the discussion of Interrogatory  
24 Nos. 17, 18, 19, 20, and 21, this document request is overly broad and unduly  
25 burdensome. Therefore, the Court finds that defendant's request for an order compelling  
26 defendant to provide a further response to this request as worded is DENIED. However,  
27 to the extent available and to the extent it has not already done so, the Court will require  
28 defendant to provide plaintiff with floor plans, schematics, design documents, and

1 drawings showing the workspace behind or around the registers for the representative  
2 sample of stores identified in the discussion above concerning Interrogatory Nos. 17, 18,  
3 19, 20, and 21.

4 **Request for Production No. 43** seeks “[a]ll documents reflecting any request by a  
5 Clerk/Cashier *anywhere in the United States* to use a seat or stool in connection with  
6 operation of a cash register or the performance of his or her job at any time between  
7 June 9, 2008 and the present. [Doc. No. 160, at p. 37 (emphasis added).] **Request for**  
8 **Production No. 44** seeks “[a]ll documents reflecting any consideration of a request by a  
9 Clerk/Cashier *anywhere in the United States* to use a seat or stool in connection with  
10 the operation of a cash register or the performance of his or her job at any time between  
11 June 9, 2008 and the present. [Doc. No. 160, at p. 39 (emphasis added).] **Request for**  
12 **Production No. 45** seeks “[a]ll documents reflecting any oral or written  
13 communications, including e-mail communications, *by or between anyone at CVS*  
14 concerning the use or potential use of seats or stools by Clerk/Cashiers in connection  
15 with the operation of a cash register or the performance of the Clerk/Cashier job at any  
16 time between June 9, 2008 and the present.” [Doc. No. 160, at p. 40 (emphasis added).]

17 These interrogatories are unduly burdensome and overly broad in geographical  
18 scope, because “[p]laintiff’s class action is only about California’s stores” and defendant  
19 has some 9,600 stores in the United States. [Doc. No. 160, at p. 33.] Therefore, the  
20 Court will not compel defendant to produce any documents responsive to these requests  
21 as to stores outside California.

22 According to plaintiff, clerk/cashiers with temporary medical conditions, such as  
23 an injury or pregnancy, were provided with a seat to use while working at the cash  
24 register in response to a doctor’s note. [Doc. No. 160, at pp. 37-38.] Plaintiff argues  
25 that defendant should be ordered to conduct a diligent search and produce all responsive  
26 documents with any sensitive medical information redacted. However, plaintiff argues  
27 that the employee names and store locations in any such documents should not be  
28 redacted. [Doc. No. 160, at p. 38.]

1 Even if these requests are limited to defendant's 870 stores in California, they are  
2 still unduly burdensome, overly broad, and duplicative of other discovery. First, in  
3 response to Interrogatory No. 25, discussed above, defendant previously provided "a  
4 general description of instances where a California retail employee requested the use of  
5 a seat for a disability accommodation." [Doc. No. 160, at p. 33.] Second, as outlined  
6 above in the discussion of Interrogatory No. 25, the Court is already requiring defendant  
7 to identify all clerk/cashiers in its California stores from June 9, 2008 to the present who  
8 have used or are currently using a seat or stool while operating a cash register. Third,  
9 defendant produced records from a Human Resources database showing requests for seat  
10 accommodations and describing instances where a California retail employee requested  
11 the use of a seat. [Doc. No. 160, at p. 39.] Fourth, defendant made a corporate witness  
12 (an Employee Relations Manager) available for deposition to testify about responses she  
13 received after she sent an e-mail to colleagues asking whether they ever received a  
14 request for a seat. [Doc. No. 160, at p. 42.] Fifth, to locate any further responsive  
15 documents would require defendant to search "through thousands upon thousands of  
16 emails and documents." [Doc. No. 160, at p. 39.] Given the extent of documents and  
17 information already produced on this topic and the information that will be produced in  
18 response to Interrogatory No. 25, the Court finds that the burden and expense of any  
19 further discovery in response to these requests "outweighs its likely benefit."  
20 Fed.R.Civ.P. 26(b)(1). Finally, plaintiff has not explained why the discovery that has  
21 already been produced on this subject matter is insufficient.

22 Without more, and under the circumstances presented, the Court finds that  
23 defendant provided satisfactory responses to Document Request Nos. 43, 44, and 45.  
24 The Court will not order a more extensive and costly search for additional documents,  
25 particularly when defendant has already produced relevant documents that appear to be  
26 sufficient under the circumstances and will be identifying all clerk/cashiers who have

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1 used a seat or stool in California stores in response to Interrogatory No. 25. In sum, the  
2 Court finds that plaintiff's request for an order compelling defendant to provide further  
3 responses to Document Request Nos. 43, 44, and 45 must be DENIED.

4 **Request for Production No. 46** seeks "[a]ll documents reflecting any attempt by  
5 [defendant] to comply with Section 14(A) of the wage order, including without  
6 limitation any analysis by [defendant] whether the nature of cashiering work reasonably  
7 permits the use of a seat, whether the existing workstations could be modified to  
8 accommodate seats, and/or what type of seat may be suitable." [Doc. No. 160, at p. 42.]  
9 The Court agrees with plaintiff that Document Request No. 46 is a "fair question."  
10 [Doc. No. 160, at p. 43.]

11 Plaintiff claims that defendant has not produced any documents in response to this  
12 request. [Doc. No. 160, at p. 44.] Defendant represented in the Joint Motion that to the  
13 best of its knowledge "at this time, no documents exist specific to this request that have  
14 not already been produced. . . . Plaintiff's motion is moot as to this request." [Doc. No.  
15 160, at p. 44.] Accordingly, the Court finds that plaintiff's request for an order  
16 compelling defendant to provide a further response to this request must be DENIED.

17 **Request for Production No. 49** seeks "[d]ocuments sufficient to show the identity  
18 or identities of the manufacturer(s) of the front end cash register stations at CVS stores  
19 in California." [Doc. No. 160, at p. 44.] Plaintiff claims that defendant has not  
20 produced any responsive documents. [Doc. No. 160, at p. 45.] Defendant states that it  
21 has "agreed" to produce all responsive, non-privileged documents and argues that the  
22 issue is moot. Defendant's response is ambiguous, because it has only stated that it has  
23 "agreed" to produce all responsive, non-privileged documents. It is therefore unclear  
24 whether defendant has actually produced all responsive, non-privileged documents or  
25 whether defendant is withholding any documents as privileged. To eliminate this  
26 ambiguity, the Court will require plaintiff to provide defendant with a declaration by  
27 counsel or a knowledgeable corporate representative of defendant clarifying that all  
28 responsive, non-privileged documents have been produced or that no responsive

1 documents were located during a diligent search. To the extent defendant is withholding  
2 any documents based on a claim of privilege, defendant must “expressly make the  
3 claim” by providing plaintiff with a suitable privilege log pursuant to Federal Rule of  
4 Civil Procedure 26(b)(5)(A).

5 **Request for Production No. 51** seeks “[a]ll documents supporting any contention  
6 by [defendant] that the nature of the work of operating a cash register at CVS does not  
7 permit the use of a seat.” [Doc. No. 160, at p. 45.] Defendant states that it has “agreed”  
8 to produce all responsive, non-privileged documents and argues that the issue is moot.  
9 However, defendant’s response is ambiguous. Based on the information provided, it is  
10 unclear whether defendant has actually produced all responsive, non-privileged  
11 documents. Nor is it clear whether defendant is withholding any documents as  
12 privileged. To eliminate this ambiguity, the Court will require plaintiff to provide  
13 defendant with a declaration by counsel or a knowledgeable corporate representative of  
14 defendant clarifying that all responsive, non-privileged documents have been produced  
15 or that no responsive documents were located despite a diligent search. To the extent  
16 defendant is withholding any documents based on a claim of privilege, defendant must  
17 also “expressly make the claim” by providing plaintiff with a suitable privilege log  
18 pursuant to Federal Rule of Civil Procedure 26(b)(5)(A).

19 **Request for Production No. 52** seeks “[a]ll documents supporting any contention  
20 by CVS that there is no ‘suitable seat’ that a person operating the cash register at CVS  
21 could use.” [Doc. No. 160, at p. 47.] As worded, Document Request No. 52 is overly  
22 broad on its face and appears to require a very expensive, time-consuming search. As  
23 defendant contends, the request is written so broadly that it could be interpreted to  
24 require defendant “to analyze each of its 3,480+ cash register stands to determine if it  
25 has documents about whether a ‘suitable seat’ is feasible at that location.” [Doc. No.  
26 160, at p. 48.]

27 Plaintiff has not offered to narrow the scope of this request. Nor has plaintiff  
28 explained the need for requesting such a broad range of documents. Once again, the

1 Court expects a party seeking discovery to attempt to narrow the scope of broadly  
2 worded requests during meet and confer sessions and to discuss any such efforts in any  
3 moving papers seeking an order compelling further responses. The Court declines to  
4 rewrite the request for plaintiff's benefit. In other words, the Court finds that plaintiff's  
5 request for an order compelling defendant to provide a further response to Document  
6 Request No. 52 as worded must be DENIED.

7 Defendant has agreed to search for responsive documents from the store where  
8 plaintiff was employed rather than for all stores or all 3,480+ cash register stands and  
9 says it "will produce" any responsive documents. [Doc. No. 160, at p. 48.] Defendant's  
10 response to this request is reasonable under the circumstances, but it is unclear from the  
11 Joint Motion whether defendant has completed a search as agreed or whether any  
12 responsive documents were found and produced. To eliminate this uncertainty, the  
13 Court will require defendant to provide plaintiff with a declaration by counsel or a  
14 knowledgeable corporate representative of defendant clarifying that as to the store where  
15 plaintiff was employed all responsive, non-privileged documents have been produced or  
16 that no responsive documents were located despite a diligent search. To the extent  
17 defendant is withholding any documents based on a claim of privilege, defendant must  
18 also "expressly make the claim" by providing plaintiff with a suitable privilege log  
19 pursuant to Federal Rule of Civil Procedure 26(b)(5)(A).

### 20 Conclusion

21 Based on the foregoing, IT IS HEREBY ORDERED that plaintiff's request in the  
22 parties' Joint Motion [Doc. No. 160] for an order compelling defendant to provide  
23 further responses to certain interrogatories and requests for production of document is  
24 GRANTED in part and DENIED in part. IT IS FURTHER ORDERED that:

25 1. Plaintiff's request for an order compelling defendant to provide further  
26 responses to Interrogatory Nos. 17, 18, 19, 20, and 21, as worded, is DENIED.  
27 However, if plaintiff provides defendant with a list of twenty (20) additional, randomly  
28 selected stores in California within ten (10) days of the date this Order is issued,

1 defendant is ordered to provide plaintiff with full and complete responses to these  
2 interrogatories as to the 20 (twenty) stores selected by plaintiff and as to the previous  
3 sample of 20 (twenty) stores selected by defendant. To the extent defendant has already  
4 disclosed this information about the previous sample of 20 (twenty) stores, defendant  
5 need only provide updated information to show any change since the prior production.

6 2. Plaintiff's request for an order compelling defendant to provide a further  
7 response to Interrogatory No. 23, as worded, is DENIED. However, defendant is  
8 ordered to update its prior production with a representative sample of clerk/cashiers who  
9 first became employed in California stores after April 20, 2011. Defendant shall update  
10 its prior production by identifying 20 percent of all clerk/cashiers in California stores  
11 who first became employed after April 20, 2011 (the date of defendant's prior  
12 disclosure). The method for identifying any such clerk/cashiers shall be the same as for  
13 the prior production on April 20, 2011.

14 3. Plaintiff's request for an order compelling defendant to provide a further  
15 response to Interrogatory No. 24 is DENIED.

16 4. Plaintiff's request for an order compelling defendant to provide a further  
17 response to Interrogatory No. 25, as worded, is DENIED. However, subject to the  
18 Protective Order governing the exchange of confidential information [Doc. No. 62],  
19 defendant is ordered to identify all clerk/cashiers in its California stores that have used  
20 or are using a seat or stool from June 9, 2008 to the present while operating a cash  
21 register.

22 5. Plaintiff's request for an order compelling defendant to provide a further  
23 response to Document Request No. 41, as worded, is DENIED. However, to the extent  
24 it has not already done so, defendant is ordered to provide plaintiff with floor plans,  
25 schematics, design documents, and drawings showing the workspace behind or around  
26 the registers for the representative sample of stores identified in the discussion above  
27 concerning Interrogatory Nos. 17, 18, 19, 20, and 21.  
28

1           6.     Plaintiffs' request for an order compelling defendant to provide further  
2 responses to Document Request Nos. 43, 44, 45, and 46 is DENIED.

3           7.     Plaintiff's request for an order compelling defendant to provide a further  
4 response to Document Request Nos. 49 and 51 is GRANTED. To eliminate any  
5 ambiguity in defendant's statement that it has "agreed" to provide responsive documents  
6 to these requests, defendant is ordered to provide plaintiff with a declaration by counsel  
7 or a knowledgeable corporate representative of defendant clarifying that all responsive,  
8 non-privileged documents have been produced or that no responsive documents were  
9 located despite a diligent search. To the extent defendant is withholding any documents  
10 based on a claim of privilege, defendant must also "expressly make the claim" by  
11 providing plaintiff with a suitable privilege log pursuant to Federal Rule of Civil  
12 Procedure 26(b)(5)(A).

13           8.     Plaintiff's request for an order compelling defendant to provide a further  
14 response to Document Request No. 52, as worded, is DENIED. However, defendant  
15 agreed in the Joint Motion to search for responsive documents from the store where  
16 plaintiff was employed and said it "will produce" responsive documents if any are  
17 located. Thus, it is unclear whether defendant has produced any responsive documents.  
18 To eliminate this uncertainty, defendant is ordered to provide plaintiff with a declaration  
19 by counsel or a knowledgeable corporate representative of defendant clarifying that all  
20 responsive, non-privileged documents have been produced or that no responsive  
21 documents were located despite a diligent search. To the extent defendant is  
22 withholding any documents based on a claim of privilege, defendant must also  
23 "expressly make the claim" by providing plaintiff with a suitable privilege log pursuant  
24 to Federal Rule of Civil Procedure 26(b)(5)(A).

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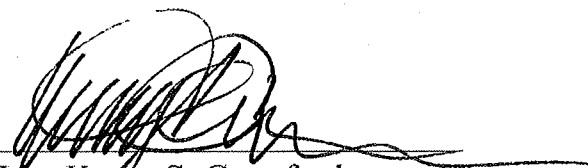
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1           9. Defendant shall comply with this Order by providing plaintiff with the  
2 documents and information as set forth above as soon as possible and on a rolling basis.  
3 **Defendant must fully comply with this Order no later than June 23, 2017.**

4           IT IS SO ORDERED.

5 Dated: April 18, 2017

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7 Hon. Karen S. Crawford  
8 United States Magistrate Judge  
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