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SOUTHERN DISTRICT OF CALIFORNIA  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

NYKEYA KILBY,  <p style="text-align: right;">Plaintiff,</p> v.  CVS PHARMACY, INC.,  <p style="text-align: right;">Defendant.</p>		Case No.: 09cv2051-MMA(KSC)  <b>ORDER RE JOINT MOTION FOR DETERMINATION OF DISCOVERY DISPUTE (RULE 30(b)(6) TOPICS)</b>  <b>[Doc. No. 173]</b>
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Before the Court is the parties' Joint Motion for Determination of Discovery Dispute. [Doc. No. 173.] In the Joint Motion, plaintiff seeks an order compelling defendant to make witnesses available for deposition pursuant to Federal Rule of Civil Procedure 30(b)(6) to testify about six different topics. [Doc. No. 173, at p. 4.] For the reasons outlined below, the Court finds that plaintiff's request for an order compelling defendant to make Rule 30(b)(6) witnesses available for deposition must be DENIED.

**Discussion**

**A. Timeliness of Plaintiff's Fourth 30(b)(6) Notice of Deposition.**

"A party may, by oral questions, depose any person, including a party, without leave of court. . . ." Fed.R.Civ.P. 30(a)(1). "In its notice or subpoena, a party may name as the deponent a . . . corporation, . . . or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate

1 one or more officers, directors, or managing agents, or designate other persons who  
2 consent to testify on its behalf; and it may set out the matters on which each person  
3 designated will testify.” Fed.R.Civ.P. 30(b)(6). “A party who wants to depose a person  
4 by oral questions *must give reasonable written notice* to every other party. . . .”  
5 Fed.R.Civ.P. 30(b)(1) (emphasis added).

6 The parties’ papers indicate plaintiff served defendant with her “Fourth 30(b)(6)  
7 Notice of Deposition” on February 17, 2017, just ten calendar days before the  
8 February 27, 2017 deadline for completing class-related discovery. [Doc. No. 159; Doc.  
9 No. 173, at p. 10; Doc. No. 173-2 (Exh. 1), at pp. 1-6; Doc. No. 173-7, at p. 3.] Based  
10 on the number and scope of topics included in the February 17, 2017 Notice and the  
11 February 27, 2017 deadline for completing class-related discovery, the Court finds that  
12 plaintiff failed to provide defendant with “reasonable written notice” as required by  
13 Federal Rule 30(b)(1).

14 For the same reasons, the Court also finds that plaintiff’s Notice was untimely  
15 under the Court’s Scheduling Order of September 13, 2016. [Doc. No. 159.] The  
16 Scheduling Order provides that discovery under Rule 30 “must be initiated a sufficient  
17 period of time in advance of the cut-off date, taking into account the times for service,  
18 notice and response as set forth in the Federal Rules of Civil Procedure.” [Doc. No. 159,  
19 at p. 1.] As defendant explains in the Joint Motion, it was unreasonable for plaintiff to  
20 expect defendant to compile all of the necessary data, locate and prepare competent  
21 witnesses, and then appear for depositions of the scope requested in just ten calendar  
22 days before the expiration of the deadline for completing class discovery. [Doc. No.  
23 173, at pp. 10, 15-17, *et seq.*]

24 **B. Scope of Discovery Requested in Plaintiff’s Fourth 30(b)(6) Notice of**  
25 **Deposition.**

26 **1. Topic Nos. 37, 38, 39, and 41.**

27 Topic Nos. 37, 38, 39 and 41 in plaintiff’s Deposition Notice seek information  
28 about employees who work or have worked in six different CVS stores located in San

1 Diego County during the class period (June 9, 2008 to the present). [Doc. No. 173, at  
2 p. 4.] At plaintiff's request and by agreement of the parties, plaintiff conducted a  
3 physical inspection of these CVS stores on February 24, 2017. [Doc. No. 173, at p. 14;  
4 Doc. No. 173-1, at pp. 4-5; Doc. No. 173-7, at p. 2.]

5 Specifically, Topic Nos. 37, 38, 39, and 41 seek an order compelling defendant to  
6 make a witness or witnesses available to testify about the following: (1) the identities of  
7 each clerk/cashier, store manager, store manager in training, operations manager, or shift  
8 supervisor [Topic Nos. 37, 38]; (2) the identities of each clerk/cashier who used a seat  
9 while working at the check stands; (3) the nature of any criticism of clerk/cashiers about  
10 their performance while using a seat [Topic No. 39]; and (4) the identity of any  
11 clerk/cashier who requested to use a seat [Topic No. 41]. [Doc. No. 173, at p. 5.]

12 Defendant argues, and the Court agrees, that the discovery plaintiff seeks is overly  
13 burdensome. Defendant represents that identifying employees and former employees  
14 who worked at the six stores would first require database searches. Then, to obtain the  
15 remaining information that plaintiff seeks, defendant would need to: (1) interview about  
16 331 current and former clerk/cashiers; (2) interview about 56 store managers; (3) review  
17 each individual's personnel file; and (4) possibly search and review numerous e-mails.  
18 Many of the employees no longer work for defendant and may be difficult to contact.  
19 Records do not exist to separate clerk/cashiers who operated cash registers from those  
20 who did not. [Doc. No. 173, at pp. 16-23.]

21 Most of the information plaintiff seeks by way of the Deposition Notice is also  
22 duplicative of other discovery that has already been produced or is in the process of  
23 being produced. At this late date in the class discovery process, the Deposition Notice  
24 further reveals an attempt by plaintiff to implement a whole new discovery strategy. In a  
25 prior Joint Motion, plaintiff sought an order compelling defendant to provide further  
26 responses to a number of very broadly worded discovery requests seeking the same or  
27 similar documents and information as to all 9,600 CVS stores in the United States and/or  
28 all 940 CVS stores in California. [Doc. No. 160, at pp. 1-48.] For example, plaintiff's

1 Interrogatory No. 23 sought the identity of “each Clerk/Cashier who was employed in  
2 California at any time between June 9, 2008 and the present who operated a front-end  
3 cash register for at least one pay period during that time.” [Doc. No. 182, at p. 8.] For  
4 the reasons outlined in the Court’s Order of April 19, 2017, defendant was ordered to  
5 update a list of putative class members that was previously produced to plaintiff in 2011  
6 by providing plaintiff with a representative list of clerk/cashiers employed by defendant  
7 in its California stores any time after the prior production in 2011. [Doc. No. 182, at pp.  
8 9-10.]

9 Plaintiff’s Interrogatory No. 25 additionally sought the identity of “each  
10 Clerk/Cashier *anywhere in the United States* who, at any time between June 9, 2008 and  
11 the present, used a seat or stool while operating the cash register.” [Doc. No. 182, at p.  
12 11 (emphasis added).] Subject to the confidentiality provisions of the Protective Order  
13 [Doc. No. 62], the Court ordered defendant to identify all clerk/cashiers in its California  
14 stores that have used or are using a seat or stool while operating a cash register from  
15 June 9, 2008 to the present. [Doc. No. 182, at p. 12.] In addition, as outlined in the  
16 parties’ prior Joint Motion [Doc. No. 160] and in the Court’s Order of April 19, 2017  
17 [Doc. No. 182], defendant has already provided plaintiff with other discovery on this  
18 topic. Defendant produced records from a Human Resources database showing requests  
19 for seat accommodations and describing instances where California retail employees  
20 requested the use of a seat. Defendant also made a Rule 30(b)(6) witness available to  
21 testify at a deposition about responses received when an e-mail was sent out asking  
22 whether requests had been received for a seat. [Doc. No. 160, at pp. 39, 42; Doc. No.  
23 182, at p. 14.]

24 Based on the moving and opposing arguments presented in this prior Joint Motion,  
25 it is apparent that plaintiff was unwilling to narrow the scope of Interrogatory Nos. 23  
26 and 25 and other broadly worded discovery requests that were disputed at the time.  
27 [Doc. No. 160, at pp. 1-48.] Now, after the large amount of discovery on the same or  
28 similar topics that defendant has already produced or is in the process of producing in

1 response to the Court's Order of April 19, 2017 [Doc. No. 182], which narrowed the  
2 scope of plaintiff's overly broad discovery requests, plaintiff ~~now~~ wants to narrow and  
3 re-focus class-related discovery in a different manner on employees at six specific stores  
4 in San Diego County.

5 In this Court's view, the time to narrow and re-focus class discovery in this new  
6 and different manner was during meet and confer sessions the parties completed before  
7 the prior Joint Motion [Doc. No. 160] was filed.<sup>1</sup> To allow plaintiff to narrow and re-  
8 focus discovery now in this new and different manner would require the Court to re-  
9 open class-related discovery for several more months so that the parties could prepare  
10 for and complete the broad scope of depositions plaintiff now seeks as to the six stores in  
11 San Diego County. There is simply no good cause for doing so, particularly when  
12 plaintiff's Deposition Notice is untimely and seeks discovery that is essentially  
13 duplicative. In this regard, the Court notes that the parties already had a seven-month  
14 period of time in 2011 to complete class-related discovery. [Doc. Nos. 33, 42.] The  
15 current Scheduling Order, which was issued on September 13, 2016, allowed the parties  
16 an additional five months until February 27, 2017 to update prior class-related discovery  
17 completed in 2011, mostly to learn of any "changes" that occurred while the case was on  
18 appeal. [Joint Discovery Plan, submitted on Sept. 7, 2016, at pp. 2-3.]

19 As far as the Court is aware, the only topic in this group that may not be  
20 duplicative is Topic No. 38, which seeks testimony on the identification of store  
21 managers, store managers in training, operations managers, or shift supervisors during  
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24 <sup>1</sup> Once again, the Court expects a party seeking discovery to attempt to narrow the  
25 scope of broadly worded requests during meet and confer sessions and to discuss any  
26 such efforts in any moving papers seeking an order compelling further responses. For the  
27 most part, plaintiff did not do so in connection with the prior Joint Motion [Doc. No. 160,  
28 at pp. 1-48]. It is unlikely the prior Joint Motion of 48 pages [Doc. No. 160] would have  
even been necessary if plaintiff previously offered to narrow the scope of its overly broad  
discovery requests to six specific stores in San Diego.

1 the class period at the six CVS stores in San Diego County. Plaintiff argues that the  
2 Court should compel defendant to make a witness available to identify these employees,  
3 because managers who are not class members “are likely to have discoverable  
4 information about defendant’s employment practices” and “whether the nature of the  
5 work reasonably permits the use of seats.” [Doc. No. 173, at p. 7-8.]

6 Citing the privacy rights of third parties, defendant argues that the Court should not  
7 order testimony on this topic, particularly when there is no reason to believe these  
8 managers would have more or specialized knowledge about the use of seats in CVS  
9 stores than putative class members who have already been identified or will be identified  
10 in response to the Court’s Order of April 19, 2017 [Doc. No. 182]. [Doc. No. 173, at p.  
11 19.] The Court agrees with defendant’s argument, which is essentially that the burden of  
12 producing a witness on this topic exceeds its likely benefit. As outlined in the prior Joint  
13 Motion [Doc. No. 160, at pp. 1-48]; the Court’s Order of April 19, 2017 [Doc. No. 182];  
14 and in the current Joint Motion [Doc. No. 173], plaintiff already has plenty of access to  
15 information about defendant’s employment practices and the use of seats by  
16 clerk/cashiers from other sources of discovery that have been produced or will soon be  
17 produced in response to the Court’s Order of April 19, 2017 [Doc. No. 182].

18 In sum, under the circumstances presented, the Court will not re-open class-related  
19 discovery to compel defendant to make Rule 30(b)(6) witnesses available to testify on  
20 Topics 37, 38, 39, and 41 in response to plaintiff’s untimely Fourth 30(b)(6) Notice of  
21 Deposition. Without enforcement of the Fourth 30(b)(6) Notice of Deposition, plaintiff  
22 already has access to more than enough discovery to prepare and submit her second  
23 motion for class certification. Accordingly, the Court finds that plaintiff’s request for an  
24 order compelling defendant to make Rule 30(b)(6) witnesses available for deposition to  
25 testify about Topic Nos. 37, 38, 39 and 41 in the Fourth 30(b)(6) Notice of Deposition  
26 must be DENIED.

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1           2.     Topic 40.

2           Topic 40 in plaintiff's Deposition Notice seeks testimony about the identities of  
3 customers who have complained about any clerk/cashier using a seat while working at  
4 the cash registers in six different CVS stores located in San Diego County during the  
5 class period. [Doc. No. 173, at p. 5.] Plaintiff seeks testimony on this topic "to the  
6 extent" that defendant claims that clerk/cashiers should not be given seats because  
7 customers expect them to stand. [Doc. No. 173, at p. 8.]

8           For the reasons outlined by defendant in the current Joint Motion, this topic is  
9 overly burdensome. It would require defendant to "hunt through" more than 300  
10 personnel files to locate clerk/cashiers who used a seat and then determine whether there  
11 were any customer complaints that relate to the use of the seat. [Doc. No. 173, at p. 21.]  
12 In other words, defendant argues convincingly that the burden of producing a witness on  
13 this topic exceeds its likely benefit. In addition, defendant argues convincingly that the  
14 circumstances do not warrant an invasion of the privacy rights of third party customers  
15 who may have made complaints and could perceive the release of their identities in this  
16 litigation as retaliation. [Doc. No. 173, at p. 21.] Given these concerns and the  
17 untimeliness of plaintiff's Deposition Notice, the Court finds that plaintiff is not entitled  
18 to an order compelling defendant to make a Rule 30(b)(6) witness available to testify on  
19 Topic 40.

20           Defendant did offer during the meet and confer process to check its databases to  
21 see if a customer ever lodged any sort of "complaint" about the use of a seat by a cashier  
22 and "explain the situation" to plaintiff "without revealing names." [Doc. No. 173, at p.  
23 21.] Plaintiff was not satisfied with defendant's offer. [Doc. No. 173, at p. 21.]  
24 Without more, the relevance of any such customer complaints to class certification  
25 issues is unclear. Although the Court will not now re-open class discovery for this  
26 purpose, the Court's Order on the current Joint Motion does not preclude plaintiff from  
27 seeking information about customer complaints involving the use of a seats by cashiers  
28 in a narrowly tailored request made during any time allowed for fact discovery following

1 a ruling on any motion related to class certification. In sum, the Court finds that  
2 plaintiff's request for an order compelling defendant to make Rule 30(b)(6) witnesses  
3 available for deposition to testify about Topic No. 40 in the Fourth 30(b)(6) Notice of  
4 Deposition must be DENIED without prejudice.

5 **3. Topic 42.**

6 Topic 42 seeks testimony about the total number of pay periods worked by all  
7 clerk/cashiers at six CVS stores in San Diego County. [Doc. No. 173, at p. 5.]  
8 According to plaintiff, "the number of pay periods worked by Clerk/Cashiers is relevant  
9 to penalties under PAGA. Cal. Lab. Code § 2699(e)(2) (penalties accrue at \$100/\$200  
10 per pay period per violation)." [Doc. No. 173, at p. 8.] As defendant contends, this  
11 topic is overly broad as worded, because there are clerk/cashiers "who have never  
12 operated a register during their employment with CVS." [Doc. No. 173, at p. 23.]

13 Without more, the information sought in Topic 42 appears to be relevant to the  
14 issue of class damages rather than to class certification. It is true that class and fact  
15 discovery are not bifurcated [Doc. No. 159, at p. 1], so nothing precluded plaintiff from  
16 seeking this type of discovery during the time period permitted to complete class  
17 discovery. However, given the untimeliness of plaintiff's Deposition Notice, the Court  
18 will not re-open class discovery to permit plaintiff to pursue this type of discovery.  
19 However, the Court's Order on the current Joint Motion is not intended to preclude  
20 plaintiff from seeking information about pay periods worked by clerk/cashiers in  
21 defendant's California stores in a narrowly tailored request made during any time  
22 allowed for fact discovery following a ruling on any motion related to class certification.  
23 In sum, the Court finds that plaintiff's request for an order compelling defendant to  
24 make Rule 30(b)(6) witnesses available for deposition to testify about Topic No. 42 in  
25 the Fourth 30(b)(6) Notice of Deposition must be DENIED without prejudice.

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1 Conclusion

2 Based on the foregoing, IT IS HEREBY ORDERED that plaintiff's request in the  
3 Joint Motion [Doc. No. 173] for an order compelling defendant to make Federal Rule  
4 30(b)(6) witnesses available for deposition to testify about Topics 38, 39, 40, 41, and 42  
5 is DENIED. This Order is without prejudice to plaintiff seeking discovery on Topics 40  
6 and 42 in narrowly tailored discovery requests served during time allowed for fact  
7 discovery following a ruling on any motions related to class certification.

8 IT IS SO ORDERED.

9 Dated: April 26, 2017

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11 Hon. Karen S. Crawford  
12 United States Magistrate Judge  
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