

FILED

17 OCT -4 PM 12: 20

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY: *[Signature]* DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

11 SHA'LENA ELLIS,

12 Plaintiff,

13 v.

14 KAISER PERMANENTE, et al.,

15 Defendants.

Case No.: 16cv195-LAB(KSC)

**ORDER GRANTING IN PART AND  
IN PART DENYING PLAINTIFF'S  
EX PARTE MOTION TO RE-OPEN  
DISCOVERY [Doc. No. 71.]**

17  
18 Plaintiff is pursuing the operative First Amended Complaint *pro se* and *in forma*  
19 *pauperis*.<sup>1</sup> [Doc. Nos. 6, 29.] Before the Court is plaintiff's Ex Parte Motion to Re-  
20 Open Discovery to Take the Declaration of Vicky Cornejo to Preserve Her Testimony to  
21 Use at Trial and to Serve New Subpoena(s). [Doc. No. 71.] Defendants' have filed an  
22 Opposition to Plaintiff's Motion to Re-Open Discovery. [Doc. No. 72.] For the reasons  
23 outlined more fully below, the Court finds that plaintiff's Ex Parte Motion to Re-Open  
24 Discovery must be GRANTED in part and DENIED in part.

25  
26  
27 <sup>1</sup> District Courts are obligated to afford a certain amount of leeway to *pro se* litigants  
28 and to construe their pleadings liberally. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir.  
2010).

1 Background

2 Plaintiff's First Amended Complaint alleges that she was employed by defendant  
3 Kaiser Permanente as a medical assistant from October 11, 2004 through March 12,  
4 2015. [Do. No. 3, at p. 3.] Defendants have indicated that plaintiff erroneously sued  
5 Kaiser Permanente and that she was actually employed by Southern California  
6 Permanente Medical Group (SCPMG). [Doc. No. 21, at p. 2; Doc. No. 72, at p. 2.] The  
7 First Amended Complaint includes causes of action for racial discrimination, wrongful  
8 termination, retaliation, and violations of the ADA. [Doc. No. 3, at p. 2.] In an Order  
9 filed on June 2, 2017, the District Court dismissed plaintiff's claims brought under  
10 Section 1983, because plaintiff worked for a private employer so defendants were not  
11 engaged in state action or acting "under color of state law." [Doc. No. 69, at p. 2.] As a  
12 result of the District Court's Order, plaintiff's remaining claims are those alleged in the  
13 fourth through tenth causes of action under Section 1981, Title VII, and the Americans  
14 with Disabilities Act (ADA) for racial and other discrimination, wrongful termination,  
15 retaliation, and ADA violations. [Doc. No. 69, at p. 2.]

16 On October 31, 2016, this Court entered a Scheduling Order setting February 28,  
17 2016 as the deadline for completing fact discovery. Expert discovery was scheduled to  
18 be completed as of June 23, 2017. Dispositive motions were to be filed no later than  
19 August 7, 2017. [Doc. No. 63, at pp. 1-3.]

20 On February 15, 2017, after the time for completing fact discovery had expired, the  
21 parties filed a Joint Motion to Extend the Fact Discovery Cutoff. [Doc. No. 67.] In the  
22 Joint Motion, defendants sought additional time to complete plaintiff's deposition.  
23 Defendants had been unable to complete the deposition because of plaintiff's work  
24 schedule. [Doc. No. 67, at pp. 1-3.] The Court granted defendants' request and  
25 extended the discovery deadline until April 30, 2017, so that the parties could complete  
26 plaintiff's deposition. [Doc. No. 68.]

27 On August 7, 2017, defendants filed their Motion for Summary Judgment in  
28 accordance with the deadline set forth in the Scheduling Order, and this Motion is

1 currently pending before the District Court. [Doc. No. 72; Doc. No. 63, at p. 3.] On the  
2 same day, plaintiff filed the instant Ex Parte Motion to Re-Open Discovery. [Doc. No.  
3 71.] In her Ex Parte Motion, plaintiff seeks to re-open discovery so she can obtain “new  
4 testimony” and “new evidence” from defendants that she has “now” discovered “through  
5 due diligence” and that she believes will “corroborate” her claims against defendants.  
6 [Doc. No. 71, at p. 1.]

### 7 Discussion

#### 8 **A. Relevance Standard.**

9 Federal Rule of Civil Procedure 26 provides as follows: “Parties may obtain  
10 discovery regarding any non-privileged matter that is relevant to any party's claim or  
11 defense and proportional to the needs of the case, considering the importance of the  
12 issues at stake in the action, the amount in controversy, the parties' relative access to  
13 relevant information, the parties' resources, the importance of the discovery in resolving  
14 the issues, and whether the burden or expense of the proposed discovery outweighs its  
15 likely benefit. Information within this scope of discovery need not be admissible in  
16 evidence to be discoverable.” Fed.R.Civ.P. 26(b)(1).

#### 17 **B. Request for Documents.**

18 In her Ex Parte Motion to Re-Open Discovery, plaintiff explains that she was  
19 “written up for allegedly adminis[tering] a vaccine to a patient using the wrong  
20 technique that ultimately led the patient to be hospitalized.” [Doc. No. 71, at p. 3.] By  
21 contrast, the First Amended Complaint alleges that a patient “had an allergic reaction” to  
22 a vaccination, that defendants “failed to do a proper investigation,” and that defendants  
23 wrongly concluded on or about April 10, 2014 that plaintiff was at fault. [Doc. No. 3, at  
24 p. 12.]

25 The Court notes that Declarations submitted by defendants in support of their  
26 pending Motion for Summary Judgment state that in early April 2014 a patient was  
27 “given a vaccination shot incorrectly in her shoulder” and was then hospitalized for five  
28 days. [Doc. No. 72-3, at p. 2.] These Declarations further indicate that an investigation

1 commenced and it was determined that plaintiff administered the vaccine. [Doc. No. 72-  
2 3, at pp. 2-3.] According to the declarants, this vaccination incident was one of a  
3 number of disciplinary offenses that led to the termination of plaintiff's employment.  
4 [Doc. No. 72-3, at p. 2-6; Doc. No. 72-4, at pp. 2-5; Doc. No. 72-5, at pp. 2-8.]

5 In her Ex Parte Motion, plaintiff claims that "[i]t has now come to light that a  
6 second patient during the same time frame also had an allergic reaction to the same  
7 batch of vaccine who[] was also ultimately hospitalized." [Doc. No. 71, at p. 3.]  
8 However, plaintiff believes that the employee who administered this second vaccine  
9 "was not written up" and the "vaccine overseers" were notified that "they might have a  
10 bad batch" of vaccine. [Doc. No. 71, at p. 3.] Plaintiff indicates that she learned of this  
11 "new evidence" in documents released by defendants and argues that "documents must  
12 now be subpoenaed." [Doc. No. 71, at p. 1.]

13 The Court construes this portion of plaintiff's Ex Parte Motion as a request to re-  
14 open discovery so that she can serve defendants with a request for production of  
15 documents related to this second alleged vaccination incident that defendants have not  
16 yet produced. From plaintiff's moving papers, it is unclear whether plaintiff requested  
17 any such documentary evidence from defendants prior to the February 28, 2017 deadline  
18 for completing fact discovery. [Doc. No. 63, at p. 1.] If any such documentary evidence  
19 does exist, it would be relevant to plaintiff's theory of the case. Plaintiff contends that  
20 she was not at fault in the vaccination incident, but defendants erroneously concluded  
21 she was at fault because they did not complete a "proper investigation." [Doc. No. 3, at  
22 p. 12.]

23 **C. Request for a Declaration or Deposition of Vicky Cornejo.**

24 Plaintiff also claims in her Ex Parte Motion to Re-Open Discovery that "through  
25 due diligence," she has learned that "new testimony has now appeared from one  
26 Ms. Vicky Cornejo. . . [which] corroborates [her] causes of action against defendants."  
27 [Doc. No. 71, at p. 1.] According to plaintiff, Ms. Vicky Cornejo "will provide  
28 testimony" stating that defendant Patricia Dodgen-Bower "has been written up by

1 Ms. Vicky Cornejo as well as other [SCPMG] employees under [Ms. Dodgen-Bower's]  
2 supervision." [Doc. No. 71, at p. 3.] Defendant's Opposition to plaintiff's Ex Parte  
3 Motion clarifies that Ms. Dodgen-Bower "is or was Ms. Cornejo's supervisor." [Doc.  
4 No. 73, at p. 4.] Plaintiff also states in her Ex Parte Motion that she previously  
5 requested access to Ms. Dodgen-Bower's employment file but was told by defense  
6 counsel during a "meet and confer" that there are no "write ups" or complaints filed  
7 against Ms. Dodgen-Bower. [Doc. No. 71, at p. 3.] However, the relief sought by  
8 plaintiff in her Ex Parte Motion is somewhat unclear, as she sometimes indicates she  
9 wants a "declaration" by Ms. Cornejo and at other times she states that she seeks a  
10 "deposition" of Ms. Cornejo. [Doc. No. 71, at pp. 1, 3, 4.]

11 The Court notes that defendants submitted the Declaration of Ms. Dodgen-Bower  
12 in connection with their pending Motion for Summary Judgment, or in the Alternative,  
13 Partial Summary Judgment [Doc. No. 72]. Ms. Dodgen-Bower's Declaration states that  
14 she supervised plaintiff from March 2012 to January 2015. [Doc. No. 72-3, at p. 2.] As  
15 part of her supervisory duties, Ms. Dodgen-Bower explains in her Declaration that she  
16 investigated the vaccination incident by interviewing plaintiff and calling the patient  
17 who received the vaccination. [Doc. No. 72-3, at pp. 2-3.] Based on her investigation,  
18 Ms. Dodgen-Bower concluded plaintiff improperly administered the vaccine to the  
19 patient and therefore placed plaintiff on "a Level 3 Corrective Action for Performance."  
20 [Doc. No. 72-3, at p. 2.] Mr. Dodgen-Bower's Declaration also includes details about  
21 other "incidents" involving plaintiff that occurred after the vaccination incident that led  
22 to further disciplinary actions against plaintiff. [Doc. No. 72-3, at pp. 2-4.]

23 Although it is true, as defendants contend, that plaintiff does not specifically  
24 explain why she believes "new testimony" from Ms. Cornejo will "corroborate" her  
25 claims against defendants [Doc. No. 71, at pp. 1, 3; Doc. No. 73, at p. 4], the Court must  
26 liberally construe plaintiff's Ex Parte Motion because she is proceeding *pro se*.  
27 Construed liberally, it is apparent that plaintiff seeks access to documents and/or  
28 information that does satisfy the relevance standard in Federal Rule 26(b)(1), because

1 there is a factual dispute about the vaccination incident, and, as a result, Ms. Dodgen-  
2 Bower's credibility is at issue. In addition, plaintiff's request is specific enough that the  
3 Court has no reason to believe it would be too burdensome for defendants to provide  
4 plaintiff with documents or information indicating whether Ms. Cornejo made any  
5 relevant claims or complaints against Ms. Dodgen-Bower.

6 Under the circumstances presented, the Court rejects defendant's contention that  
7 plaintiff's request is "too late." [Doc. No. 73, at p. 5.] Defendant's Opposition to  
8 plaintiff's Ex Parte Motion confirms that plaintiff did request access to Ms. Dodgen-  
9 Bower's personnel records in a subpoena directed to defendant on April 27, 2017, two  
10 months after the deadline for completing discovery and three days before the expiration  
11 of the extension of the discovery cutoff, which was granted to complete plaintiff's  
12 deposition. [Doc. No. 73, at p. 3.] Defendants objected to the subpoena on a number of  
13 grounds, including timeliness, and did not provide plaintiff with a substantive response.  
14 However, defense counsel did tell plaintiff during the meet and confer process that "he  
15 was unaware of any complaints lodged against Ms. Dodgen-Bower." [Doc. No. 73, at  
16 p. 3, citing Doc. No. 73-1, at p. 2 (emphasis added).] Thus, it appears that plaintiff may  
17 have been dissuaded from pursuing this discovery earlier based on counsel's equivocal  
18 representation. It appears likely, however, that plaintiff would have been granted  
19 additional time to pursue this discovery if she requested it after she met and conferred  
20 with defense counsel. Under the circumstances, the Court is reluctant to conclude that  
21 this *pro se* plaintiff's pursuit of information about any claims Ms. Cornejo may have  
22 made against Ms. Dodgen-Bower is "too late," particularly when plaintiff claims she  
23 discovered this "new testimony" by Ms. Cornejo "through due diligence" [Doc. No. 73,  
24 at p. 5], and defendants do not dispute these assertions in their Opposition [Doc. No. 73,  
25 at pp. 2-10].

26 ***D. Good Cause.***

27 Federal Rule 16(b)(4) states that: "A schedule may be modified only for good  
28 cause and with the judge's consent." Fed.R.Civ.P. 16(b)(4). Good cause for an

1 extension exists when the moving party requests additional time and demonstrates he  
2 cannot meet the deadline despite exercising due diligence. Fed.R.Civ.P. 6(b); *Johnson v.*  
3 *Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992). “If that party was not  
4 diligent, the inquiry should end.” *Id.*

5 Defendants argue that plaintiff’s request for additional discovery is untimely, and  
6 she has not shown good cause to re-open discovery. They also challenge plaintiff’s Ex  
7 Parte Motion to Re-Open Discovery on other grounds, including relevance, privacy, and  
8 speculation. However, defendants do not challenge plaintiff’s assertions that she is  
9 seeking additional time for discovery, because she learned of “new evidence” and/or  
10 “new testimony” through “due diligence” and in documents “supplied by the defendants  
11 themselves.” [Doc. No. 71, at p. 2.] Construing plaintiff’s Ex Parte Motion liberally, as  
12 the Court is obligated to do when the plaintiff is proceeding in *pro se*, it appears there is  
13 good cause to briefly re-open discovery to allow plaintiff to discover the following:  
14 (1) any documents concerning a claim made by Ms. Cornejo against Ms. Dodgen-Bower  
15 during the relevant time period; and (2) any documents concerning a second vaccination  
16 incident during the relevant time period. However, to the extent plaintiff seeks to re-  
17 open discovery to take a Rule 30 or Rule 45 deposition of Ms. Cornejo, the Court finds  
18 that plaintiff has not provided enough information to establish there is good cause to re-  
19 open discovery long enough to take Ms. Cornejo’s deposition at this late date in the  
20 proceedings.

### 21 Conclusion

22 Based on the foregoing, IT IS HEREBY ORDERED that plaintiff’s Motion to Re-  
23 Open Discovery is GRANTED in part and DENIED in part. In this regard, IT IS  
24 FURTHER ORDERED that:

25 1. No later than October 18, 2017, SCPMG shall complete a reasonably  
26 diligent search and produce to plaintiff all documents kept in the regular course of  
27 business concerning any incidents from 2014 through the present involving vaccinations  
28 administered by any employee of SCPMG at the facility where plaintiff was employed

1 that resulted in an adverse reaction to the patient but no disciplinary action against the  
2 employee that administered the vaccination. To the extent any such documents include  
3 the names of individuals other than an employee or former employee of SCPMG, the  
4 names may be redacted from the documents to protect the privacy interests of third  
5 parties. If no such documents are located, defendants shall provide plaintiff with a  
6 declaration by a competent witness under penalty of perjury no later than October 18,  
7 2017 stating that a reasonably diligent search was completed but no such documents  
8 were found.

9 2. No later than October 18, 2017, SCPMG and/or Patricia Dodgen-Bower  
10 shall complete a reasonably diligent search and produce to plaintiff all documents kept  
11 in the regular course of business concerning any claims or complaints made against  
12 Ms. Dodgen-Bower by another employee, including but not limited to, Ms. Vicky  
13 Cornejo, from 2014 through the present. To the extent any such documents include the  
14 names of individuals other than Ms. Dodgen-Bower and Ms. Cornejo, the names may be  
15 redacted from the documents to protect the privacy interests of third parties. If no such  
16 claims or complaints are located, defendants shall provide plaintiff with a declaration by  
17 a competent witness under penalty of perjury no later than October 18, 2017 stating that  
18 a reasonably diligent search was completed but no such documents were found.

19 3. Plaintiff's Ex Parte Motion is DENIED to the extent it seeks to re-open  
20 discovery to conduct a deposition of Vicky Cornejo pursuant to Federal Rules of Civil  
21 Procedure 30 or 45 or to obtain a declaration from Ms. Cornejo.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1           4.     The time for completing fact discovery is re-opened until October 18, 2017  
2 for the sole purpose of allowing defendants time to provide plaintiff with the documents  
3 and information set forth above. Discovery remains closed for all other purposes.

4           IT SO ORDERED.

5 Dated: October 4, 2017



Hon. Karen S. Crawford  
United States Magistrate Judge

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28