

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AILENE SABRINA BROYLES, *individually*
and on behalf of all others similarly situated,

Plaintiff,

v.

CONVERGENT OUTSOURCING, INC.,

Defendant.

Case No. C16-775-RAJ

ORDER

I. INTRODUCTION

This matter comes before the Court on Defendant Convergent Outsourcing, Inc.’s (“Convergent”) Motion to Quash Deposition Notices and Request for a Protective Order (Dkt. # 17) and Plaintiff Ailene Sabrina Broyles’ Motion to Compel Discovery (Dkt. # 20). For the following reasons, the Court **GRANTS** Convergent’s motion and **GRANTS in part** and **DENIES in part** Broyles’ motion.

II. BACKGROUND

Broyles alleges that Convergent accessed her credit report, despite knowing that her debts had been discharged in bankruptcy. Dkt. # 1 (Complaint). Broyles alleges that, by doing so, Convergent violated the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681b. On May 26, 2016, she filed this action on behalf of herself and a proposed class of similarly situated consumers whose credit reports she alleges that Convergent also wrongfully accessed. Discovery has since commenced.

ORDER – 1

1 On February 20, 2017, Broyles served upon Convergent a deposition notice
2 communicating her intent to depose Convergent’s in-house counsel and Convergent’s
3 litigation support specialist. Dkt. # 17-4 at 14-17. Convergent moves to quash Broyles’
4 notice of these depositions and requests a protective order precluding the depositions of
5 these individuals. Dkt. # 17. Broyles opposes the motion. Dkt. # 21.

6 As a separate matter, Broyles moves to compel discovery from Convergent.
7 Dkt. # 20. She requests that the Court compel Convergent to provide additional
8 information in response to interrogatories, requests for admission (“RFA”), and requests
9 for production (“RFP”). Convergent opposes the motion. Dkt. # 24.

10 III. LEGAL STANDARD

11 The Court has broad discretion to control discovery. *Avila v. Willits Env’tl.*
12 *Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011). That discretion is guided by
13 several principles. Most importantly, the scope of discovery is broad. “Parties may
14 obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim
15 or defense” Fed. R. Civ. P. 26(b)(1). But “the court must limit the frequency or
16 extent of discovery otherwise allowed by these rules or by local rule if it determines that
17 . . . the discovery sought is unreasonably cumulative or duplicative, or can be obtained
18 from some other source that is more convenient, less burdensome, or less expensive”
19 Fed. R. Civ. P. 26(b)(2)(C). “The court may, for good cause, issue an order to protect a
20 party or person from annoyance, embarrassment, oppression, or undue burden or expense
21” Fed. R. Civ. P. 26(c)(1).

22 IV. DISCUSSION

23 A. Convergent’s Motion to Quash Deposition Notices and Request for 24 Protective Order

25 Under Rule 45, the Court must quash a deposition notice that “requires disclosure
26 of privileged or other protected matter, if no exception or waiver applies” or “subjects a
27 person to undue burden.” Fed. R. Civ. P. 45(d)(3)(A). The “leading case on attorney
28 depositions” is *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986). *FMC*

1 *Techs., Inc. v. Edwards*, No. C05-946-JCC, 2007 WL 836709, at *3 (W.D. Wash. Mar.
2 15, 2007) (quoting *Mass. Mut. Life Ins. Co. v. Cerf.*, 177 F.R.D. 472, 479 (N.D. Cal.
3 1998)); *see also Willer v. Las Vegas Valley Water Dist.*, 176 F.3d 486 (9th Cir. 1999)
4 (unpublished) (applying *Shelton* test as stated in *Mass. Mut. Life Ins.*, 177 F.R.D. at 479).

5 *Shelton* provides that the party seeking to depose opposing counsel must carry the
6 burden of showing that “(1) no other means exist to obtain the information than to depose
7 opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the
8 information is crucial to the preparation of the case.” *Shelton*, 805 F.2d at 1327 (citation
9 omitted). “Though *Shelton*’s holding applies to ‘opposing trial counsel,’ 805 F.2d at
10 1327, district courts in this circuit have applied the standard to depositions of in-house
11 counsel as well.” *Busey v. Richland Sch. Dist.*, No. 13-CV-5022-TOR, 2014 WL
12 1404580, at *2 (E.D. Wash. Apr. 10, 2014); *see also Bybee Farms LLC v. Snake River*
13 *Sugar Co.*, No. CV-06-5007-FVS, 2008 WL 820186, at *7 (E.D. Wash. Mar. 26, 2008)
14 (agreeing with defendants that “*Shelton* applies to depositions of in-house counsel as well
15 as to opposing trial counsel”); *Caterpillar Inc. v. Friedemann*, 164 F.R.D. 76, 78 (D. Or.
16 1995) (applying *Shelton* test to depositions of in-house counsel).

17 **i. In-House Counsel**

18 Broyles contends that deposing Convergent’s in-house counsel, Timothy Collins,
19 is necessary because she anticipates that Convergent will raise an “advice of counsel”
20 defense. On this basis, she seeks to explore the “underpinnings of that defense,”
21 including “advice to his client,” “legal research,” and other topics related to his capacity
22 as counsel to Convergent. Broyles also contends that Collins’ deposition testimony is
23 crucial in light of Convergent’s objections to her 30(b)(6) notice. Lastly, Broyles
24 contends that Collins’ understanding of Convergent’s debt collection policies is relevant
25 to the issue of class certification.

26 These contentions fall short of the showing required under *Shelton*. As
27 Convergent notes in its response, it has neither pleaded advice of counsel as an

1 affirmative defense nor otherwise put the defense at issue. Broyles’ speculation that
2 Convergent may raise the defense is an insufficient basis for permitting Broyles to depose
3 Collins about the advice he has rendered to his client, particularly given the plainly
4 privileged nature of that advice. *See Shelton*, 805 F.2d at 1327. With respect to
5 Convergent’s objections to the 30(b)(6) notice, Broyles fails to explain why these
6 objections mean that no other avenues exist to obtain the information she seeks to elicit
7 from Collins. *See id.* Broyles similarly fails to show why Collins is the only source from
8 which she can obtain information relevant to class certification. *See id.* Moreover,
9 Collins’ knowledge on this topic squarely implicates attorney-client privilege. *See id.*
10 Among other things, Broyles seeks to inquire about “his research and investigation of
11 administrative and case law guidance.” Dkt. # 21 at 11. In addition to the above
12 deficiencies, Broyles fails to show why deposing Collins is “crucial” to her case. *See*
13 *Shelton*, 805 F.2d at 1327.

14 **ii. Litigation Support Specialist**

15 The Court finds that the *Shelton* test also applies to Convergent’s litigation support
16 specialist, Alisia Stephens. Convergent contends, without rebuttal, that Stephens is an
17 agent of its in-house counsel, and thus, that the attorney-client privilege extends to her.
18 That contention is supported by the law. *See United States v. Nobles*, 422 U.S. 225, 238
19 (1975) (holding that work product doctrine extends to an attorney’s agents).

20 Broyles’ primary argument for deposing Convergent’s litigation support specialist
21 is that she has waived attorney client privilege through discussions with Plaintiff’s
22 counsel. Even if this contention had merit (and the Court doubts that it does), waiver
23 alone is not sufficient for Broyles to carry her burden under the *Shelton* test. As noted,
24 Broyles must also show that the information in Stephens’ possession is unattainable
25 elsewhere and that the information is crucial to her case. Broyles’ argument that
26 Stephens possesses crucial information mimics one of her arguments as to Collins—that
27 Convergent objected to various aspects of her 30(b)(6) notice. Once again, the Court is

1 not persuaded that Convergent’s 30(b)(6) objections weigh at all in favor of permitting
2 Broyles to depose a member of Convergent’s legal department.

3 Accordingly, the Court **GRANTS** Convergent’s Motion to Quash Deposition
4 Notices and Request for a Protective Order. Dkt. # 17. Convergent requests that the
5 Court order Broyles to pay the attorney’s fees incurred in connection with this motion.
6 For reasons discussed in a greater detail below, the Court denies Convergent’s request for
7 fees. *See infra* § IV.B.v.

8 **B. Broyles’ Motion to Compel¹**

9 As a threshold matter, Broyles contends that Convergent has objected on the basis
10 of privilege, yet failed to produce a privilege log. Under Rule 26, a party who withholds
11 information as privileged must produce a privilege log:

12 When a party withholds information otherwise discoverable by claiming
13 that the information is privileged or subject to protection as trial-
14 preparation material, the party must: (i) expressly make the claim; and (ii)
15 describe the nature of the documents, communications, or tangible things
16 not produced or disclosed—and do so in a manner that, without revealing
17 information itself privileged or protected, will enable other parties to assess
18 the claim.

19 Fed. R. Civ. P. 26(b)(5)(A). *Aecon Bldgs., Inc. v. Zurich N. Am.*, 253 F.R.D. 655, 661
20 (W.D. Wash. 2008), *clarified on denial of reconsideration* (Aug. 28, 2008) (“[I]f it
21 withholds requested materials on the basis of privilege, a party is obligated to document
22 those materials in a privilege log to give the requesting party an opportunity to assess the
23 privilege asserted.”).

24 Having reviewed Convergent’s responses to Broyles’ discovery requests, the
25 Court finds that Convergent has withheld information on the basis of privilege.

26 Accordingly, the Court **ORDERS** Convergent to either produce a privilege log that

27 ¹ The Courts limits it rulings on Broyles’ motion to the substantive arguments that
28 Broyles articulates in the body of her briefs. The Court disregards conclusory arguments or
arguments advanced in footnotes. *Bach v. Forever Living Prod. U.S., Inc.*, 473 F. Supp. 2d
1127, 1132 (W.D. Wash. 2007) (“If an argument is worth making, a party should put the
argument in the body of its brief.”).

1 complies with Rule 26 or withdraw its objections.

2 Apart from a privilege log, Broyles moves to compel information from
3 Convergent through broader responses to interrogatories, RFA's, and RFP's.² Rule 37
4 permits a party to move to compel responses to discovery requests. Fed. R. Civ. P.
5 37(a)(1), (a)(3)(B).

6 **i. Pre-Class Certification Discovery**

7 "The availability and scope of pre-certification discovery lie within the discretion
8 of the Court." *Heredia v. Eddie Bauer LLC*, No. 16-CV-6236-BLF-SVK, 2017 WL
9 1316906, at *1 (N.D. Cal. Apr. 10, 2017). "[O]ften the pleadings alone will not resolve
10 the question of class certification and that some discovery will be warranted." *Vinole v.*
11 *Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009). Before obtaining pre-
12 certification discovery, "Plaintiff must 'either make a prima facie showing that the Rule
13 23 class action requirements are satisfied, or . . . show that discovery is likely to produce
14 substantiation of the class allegations.'" *Lieberg v. Red Robin Gourmet Burgers, Inc.*,
15 No. C15-1242-TSZ, 2016 WL 1588381, at *1 (W.D. Wash. Apr. 20, 2016) (quoting
16 *Ogden v. Bumble Bee Foods, LLC*, 292 F.R.D. 620, 622 (N.D. Cal. 2013)).

17 Convergent contends that Plaintiff has not made a prima facie showing under Rule
18 23: "[I]n her motion, Plaintiff has not made any showing of a prima facie entitlement to
19 the class certification information she requests." Dkt. # 24 at 8. This, however, is the
20 extent of Convergent's argument. Convergent does not attempt to explain why the
21 specific class action allegations in Plaintiff's complaint are insufficient to satisfy the
22 numerosity, commonality, typicality, and adequacy prerequisites of Rule 23. Fed. R. Civ.
23 P. 23(a); *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1324 (W.D. Wash. 2015) ("These
24 Rule 23(a) prerequisites are often referred to in shorthand as numerosity, commonality,
25 typicality, and adequacy."). "Courts often rely on the plaintiff's reasonable allegations

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27 ² In her reply, Broyles withdraws her motion with respect to requests for production 6-10,
28 21-23, and 27-28. Dkt. # 25 at 2 n.1 (Reply Brief).

1 for concluding that the plaintiff has made a prima facie showing.” *Heredia*, No. 16-CV-
2 6236-BLF-SVK, 2017 WL 1316906, at *2; *Lieberg*, No. C15-1242-TSZ, 2016 WL
3 1588381, at *1 (“The Court determines whether plaintiffs can establish a prime facie
4 showing of the Rule 23 requirements by reference to the claims underlying the lawsuit.”).

5 As alleged in her complaint, Broyles’ class comprises:

6 All natural persons: (a) whose consumer report was obtained by Defendant
7 after the date beginning five years prior to the filing of this Complaint; (b)
8 for account review purpose; and, (c) where Defendant’s records note that
9 the account relationship had terminated because (i) the debt on the account
had been discharged in bankruptcy; (ii) the account was closed with a zero
balance; or, (iii) the account had been sold or transferred to a third party.

10 Compl. ¶ 28. She alleges that this class consists of “at least thousands of members,” that
11 the class is united by the common issue of Convergent obtaining a class member’s
12 consumer report despite knowing that the class member’s debt had been extinguished,
13 that the claims she alleges are typical across the class, and that the class action procedure
14 is adequate because her interests are aligned with those of the class members. These
15 allegations are sufficient to state a prima facie showing under Rule 23. Accordingly, the
16 Court finds that limited pre-certification discovery is warranted.

17 The Court **DENIES** Broyles’ motion with respect to Interrogatory 3, which
18 requests that Convergent “[s]tate the size of the class as defined in the Complaint.”
19 Dkt. # 24-2 at 5. This Court agrees with Convergent that this request is overbroad.

20 The Court **DENIES** Broyles’ motion with respect to Interrogatory 4 and RFP 20,
21 which seek the names, addresses, and telephone numbers of all putative class members.
22 The case law generally recognizes that in evaluating requests for the identifying
23 information of putative class members, the Court must balance the privacy rights of those
24 non-party putative class members and the requesting party’s need for that information.
25 *See Artis v. Deere & Co.*, 276 F.R.D. 348, 352-53 (N.D. Cal. 2011). In conducting this
26 balancing, however, courts note that disclosure of customer “names, addresses, and
27 telephone numbers is a common practice in the class action context.” *Id.* at 352 (citing

1 *Currie-White v. Blockbuster, Inc.*, No. C09-2593-MMC-MEJ, 2010 WL 1526314, at *2
2 (N.D. Cal. Apr.15, 2010)). Here, Broyles seeks identifying information about consumers
3 who have undergone debt collection or bankruptcy proceedings. This information is
4 inherently sensitive and squarely implicates privacy concerns.³ Moreover, Broyles has
5 not convincingly demonstrated why she needs contact information of putative class
6 members at this stage. She contends that “there may be a need to contact such members
7 in the event Defendant raises issues concerning Plaintiff’s typicality and adequacy.”
8 Dkt. # 25 at 3. On balance, the privacy rights of putative class members outweigh
9 Broyles’ purported need for their contact information.

10 The Court **GRANTS** Broyles’ motion with respect to Interrogatories 5, 6, and 7.
11 These interrogatories request information about the number of consumers since May 26,
12 2011, as to whom Convergent has obtained a consumer report under the circumstances
13 alleged to comprise Broyles’ proposed class. This information is relevant to the issue of
14 class certification and it is unattainable elsewhere. *Doninger v. Pac. Nw. Bell, Inc.*, 564
15 F.2d 1304, 1313 (9th Cir. 1977) (discussing class certification discovery and noting that
16 such discovery may be proper “especially when the information is within the sole
17 possession of the defendant”).

18 **ii. Interrogatories 2, 9, 11, and 15**

19 The **GRANTS** Broyles’ motion with respect to Interrogatory 2. Interrogatory 2
20 requests that Convergent identify individuals whom it knows to have information
21 pertinent to Broyles’ allegations or any defense to those allegations. In response,
22 Convergent identified Broyles. Now, in its motion, Convergent identifies its Rule
23 30(b)(6) designee. These responses are incomplete. Convergent must provide a
24 complete answer to Interrogatory 2.

25 The Court **DENIES** Broyles’ motion with respect to Interrogatories 9, 11, and 15.

26 ³ Although the information produced in this case is subject to a stipulated protective
27 order, that order does not negate the privacy interests of the putative class members in avoiding
28 the disclosure of their information to counsel for Broyles.

1 Those interrogatories request information about each time Convergent obtained a
2 consumer report concerning Boyles, the facts that support why obtaining these report was
3 necessary, and the factual bases for Convergent’s defenses. To each interrogatory,
4 Convergent responded that:

5 Defendant obtained Plaintiffs credit report on August 6, 2015, in
6 connection with a T-Mobile account placed with Defendant for collection.
7 Defendant obtained Plaintiff’s credit report on February 2, 2016, in
8 connection with an account placed with Defendant for collection other than
9 the T-Mobile account. Defendant obtained Plaintiffs credit report on
10 February 14, 2016, in connection with an account placed with Defendant
11 for collection other than the T-Mobile account.

12 Dkt. # 24-2 (Responses to Interrogatories). This answer is a sufficient response to
13 Interrogatories 9, 11, and 15.

14 **iii. Requests for Admission 9-12**

15 The Court **DENIES** Broyles’ motion with respect to RFA’s 9-11. These RFA’s
16 request that Convergent admit to having received certain bankruptcy notices on certain
17 dates. Convergent contends that, despite a reasonable inquiry, it lacks sufficient
18 information to fully admit or deny these RFA’s. Under Rule 36, “If a matter is not
19 admitted, the answer must specifically deny it or state in detail why the answering party
20 cannot truthfully admit or deny it.” Fed. R. Civ. P. 36(a)(4). By explaining why it
21 cannot admit or deny the RFA, Convergent has complied with Rule 36.

22 The Court also **DENIES** Broyles’ motion with respect to RFA 12. This RFA
23 requests that Convergent admit that Broyles’ obligation to repay any debt to Convergent
24 was discharged on a particular date. Convergent denied RFA 12. This response is
25 sufficient.

26 **iv. Requests for Production 1, 2, 4-6, and 10**

27 “In general, a court analyzing a motion to compel production of documents should
28 conduct a two-step inquiry, first examining whether the requested documents are relevant
and within the scope of permissible discovery, and second inquiring whether the burden
or expense of the document request outweighs its likely benefit.” *Snyder v. Fred Meyer*

1 *Stores, Inc.*, No. C12-1397-JLR, 2013 WL 3089405, at *2 (W.D. Wash. June 18, 2013)
2 (citations omitted). “[D]iscovery requests and related responses should be reasonably
3 targeted, clear, and as specific as possible.” LCR 26(f).

4 The Court **DENIES** Broyles’ motion with respect to RFP 1. This RFP seeks “[a]ll
5 documents relating to or referring to Plaintiff including, but not limited to, her consumer
6 reports, her bankruptcy and her bankruptcy discharge.” Dkt. # 24-3. Convergent refuses
7 to comply with the request on the grounds that it is overbroad. The Court agrees. RFP 1
8 requests every document that so much as mentions Broyles by name, regardless of its
9 relevance to the instant dispute. This request is not “reasonably targeted” within the
10 requirement of LCR 26(f) and it fails to pass the threshold inquiry of relevance.

11 The Court **GRANTS** Broyles’ motion with respect to RFP 2, 4-6, and 10. Broyles
12 contends that Convergent’s production in response to these RFPs is incomplete because it
13 asserted confidentiality objections. The parties have jointly stipulated to a protective
14 order that shields confidential or proprietary information from public disclosure. Dkt. #
15 14. As such, the Court fails to see how Convergent would have a basis to object on the
16 grounds of confidentiality.

17 **v. Sufficiency of Convergent’s Supplemental Responses**

18 Broyles challenges the sufficiency of Convergent’s supplemental discovery
19 responses as to Interrogatories 8 and 10, as well as RFA’s 16-17.

20 The Court **DENIES** Broyles’ motion with respect to Interrogatories 8 and 10. In
21 its supplemental responses, Convergent cross-references records it has produced to
22 Broyles as containing the information that Broyles seeks. Under certain circumstances, a
23 Rule 33 permits a party to respond in this manner. Fed. R. Civ. P. 33(d). “A party
24 claiming that the opposing party inappropriately used Rule 33(d) must make a prima
25 facie showing that use of this rule is somehow inadequate, because either the information
26 is not fully contained in the documents or because it is too difficult to abstract.” *Bite*
27 *Tech, Inc. v. X2 Biosystems, Inc.*, No. C12-1267-RSM, 2013 WL 12191342, at *2 (W.D.

1 Wash. May 13, 2013). Broyles has not sought to make this showing.

2 The Court also **DENIES** Broyles' motion with respect to RFA's 16-17. These
3 RFA's seek Convergent's admission to knowledge of certain Federal Trade Commission
4 guidelines. In its supplemental responses, Convergent states that, despite a diligent
5 search, it currently lacks sufficient information to admit or deny to the RFA's. As noted,
6 under Rule 36, a party that cannot admit or deny an RFA may respond by stating in detail
7 the reasons why. Fed. R. Civ. P. 36(a)(4). Convergent's responses are permissible.

8 **vi. Fees**

9 Under Rule 37, if a motion to compel is "granted—or if the disclosure or
10 requested discovery is provided after the motion was filed—the court must, after giving
11 an opportunity to be heard, require the party or deponent whose conduct necessitated the
12 motion, the party or attorney advising that conduct, or both to pay the movant's
13 reasonable expenses incurred in making the motion, including attorney's fees." Fed. R.
14 Civ. P. 37(a)(5)(A). But the Court is precluded from awarding expenses if: "(i) the
15 movant filed the motion before attempting in good faith to obtain the disclosure or
16 discovery without court action; (ii) the opposing party's nondisclosure, response, or
17 objection was substantially justified; or (iii) other circumstances make an award of
18 expenses unjust." *Id.*

19 The Court finds that an award of expenses would be unjust. As noted in the
20 previous section, Broyles sought an unwarranted deposition of Convergent's in-house
21 counsel, which the Court quashed. In doing so, the Court denied Convergent's request
22 for fees. Awarding fees to Broyles in the context of a separate discovery dispute would
23 be unfair. Accordingly, the Court declines to award fees under Rule 37(a)(5)(A)(iii).

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2 **V. CONCLUSION**

3 For the reasons stated above, the Court **GRANTS** Convergent's Motion to Quash
4 Deposition Notices and Request for a Protective Order (Dkt. # 17) **GRANTS in part** and
5 **DENIES in part** Broyles' Motion to Compel Discovery (Dkt. # 20).

6 DATED this 23rd day of May, 2017.

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11 The Honorable Richard A. Jones
12 United States District Judge
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