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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

HI.Q, INC. D/B/A HEALTH IQ,  
Petitioner,  
v.  
ZEETOGROUP, LLC,  
Respondent.

Misc. Action No.: 22cv1440-LL-MDD

**ORDER GRANTING  
PETITIONER’S MOTION TO  
COMPEL COMPLIANCE WITH  
OUT-OF-DISTRICT SUBPOENA**

[ECF No. 1]

This is a subpoena-related dispute concerning a putative class action pending in the Northern District of California. *See Toby Hoy, individually and on behalf of all others similarly situated v. Hi.Q, Inc. d/b/a Health IQ*, 4:21cv4875-TLT (N.D. Cal.). In that case, Plaintiff Toby Hoy alleges that Defendant HI.Q, Inc. (“Health IQ”) sent unlawful marketing texts and/or prerecorded telemarketing calls about its insurance products to Hoy and other consumers registered on the National Do Not Call list in violation of the Telephone Consumer Protection Act (“TCPA”). *See* 47 U.S.C. §§ 227, et seq. and 47 C.F.R. § 64.1200(c).

Health IQ maintains it had consent to contact Hoy, which would be a complete defense to Hoy’s claims. Health IQ contends here that Respondent ZeetoGroup, LLC (“Zeeto”) has records and testimony that could establish

1 Hoy's consent to contact from Health IQ. Zeeto is a nonparty lead generation  
2 service with a principal place of business in San Diego, California.  
3 (ECF No. 1).

4 Health IQ served Zeeto with two subpoenas to help establish its  
5 affirmative defense of consent in the underlying case. The subpoenas sought  
6 information, documents, and testimony about consumers who (1) went  
7 through Zeeto's lead-generation path, (2) provided their consent to  
8 telemarketing contact, and (3) arguably saw (or should have seen) Health IQ  
9 listed as an affiliated partner for purposes of consent.

10 Zeeto refused to comply with the subpoenas. On September 23, 2022,  
11 Health IQ filed this action to compel Zeeto's subpoena responses.  
12 (ECF No. 1). This Court issued a briefing schedule (ECF No. 4), and Zeeto  
13 filed its response on October 25, 2022. (ECF No. 6). Plaintiff Hoy also filed a  
14 response. (ECF No. 7). Health IQ filed a reply on November 1, 2022. (ECF  
15 No. 13). Zeeto opposes the motion to compel, arguing the subpoenas were  
16 procedurally defective and raising numerous substantive objections.

### 17 Brief Conclusion

18 The Court agrees the documents and deposition testimony that Health  
19 IQ subpoenaed are relevant, warranted, and proportional to the needs of the  
20 case, and therefore, **GRANTS** Health IQ's motion to compel Zeeto's response  
21 to the subpoenas. Zeeto shall produce the subpoenaed materials within 21  
22 days of this order, and the subpoenaed deposition shall occur within 30 days  
23 of such production.

## 24 **I. Background**

### 25 A. The Difficulty of Tracking Consumers' Consent to Telemarketing 26 Contact By Companies Such As Health IQ

1 Whether Health IQ had Plaintiff Hoy's consent to telemarketing contact  
2 depends upon whether Health IQ was disclosed to Hoy (and other consumers)  
3 as Zeeto's affiliated partner at the time Hoy provided consent through Zeeto  
4 as a lead generator. As a lead generator, Zeeto facilitated a "survey path"  
5 whereby online consumers, like Hoy, would interact with that path while  
6 viewing certain advertisements. When consumers clicked on relevant  
7 advertisements, Zeeto's survey path would take those consumers through a  
8 series of questions, asking consumers to (1) provide their contact information,  
9 (2) give consent to Zeeto's standard disclosures, and (3) answer several other  
10 questions. Consumers' answers matched them with Zeeto's "affiliated  
11 partners," or advertisers, such as a company named Policyscout (also known  
12 as "Cege" and "Enfuego"), who in turn sold leads to companies like Health IQ.  
13 (ECF No. 1 at 67 ¶ 3; ECF No. 6 at 4).

14 Health IQ and Hoy have both been seeking documents and testimony  
15 from Zeeto throughout the past year. Plaintiff Hoy first subpoenaed Zeeto in  
16 connection with the underlying case in January 2022. *See Hoy v. ZeetoGroup,*  
17 *LLC*, Case No. 22cv0151-LL-MDD (S.D. Cal. Feb. 11, 2022) (ECF No. 1-8). At  
18 that time, Zeeto's counsel, Brian Gillick, accepted service of Hoy's subpoenas  
19 via email, but Zeeto asserted several objections. *Id.* (ECF Nos. 26 and 30  
20 [5/25/2022 Hr'g Tr.]). Instead of producing documents or identifying a  
21 representative to provide deposition testimony, Zeeto produced three  
22 declarations over the course of four months from its Chief Revenue Officer,  
23 Shayne Cardwell.

24 On March 10, 2022, Cardwell initially declared that, based on his  
25 review of relevant information and documents, "Health IQ was disclosed at  
26 the time the subject consumers provided consent," and "during the relevant  
27 time period, each and every consumer who went through Zeeto's path would

1 have seen Health IQ listed as an affiliate.” (ECF No. 1, Ex. 6 [3/10/2022  
2 Cardwell Decl. ¶¶ 9-10]). That sworn statement appeared to provide a  
3 defense for Health IQ, namely “that Health IQ was disclosed as a ‘marketing  
4 partner’ to at least some of the consumers that visited the Website during the  
5 Relevant Time Period.” (ECF No. 13 at 5).

6 Along with Cardwell’s March declaration, Zeeto produced “validation  
7 reports” purporting to show that 26 consumers, including Hoy, provided  
8 consent to marketing calls and text messages from Health IQ. (ECF No. 1,  
9 Ex. 7). The validation reports came from a verification company that Zeeto  
10 hired called Jornaya that tracked consumers’ path through Zeeto’s business  
11 operations and provided a certification called “LeadID.” (ECF No. 13 at 6;  
12 ECF No. 6, Ex. 11 [Cardwell Decl. ¶¶ 5-6]). LeadID created a visual playback  
13 designed to validate a consumer’s journey through Zeeto’s survey path. (*Id.*).  
14 This Court previously examined in detail that sampling of 26 LeadID  
15 playbacks from Jornaya. (*See Hoy v. ZeetoGroup*, Case No. 22cv0151-LL-  
16 MDD, ECF No. 30 [Hr’g Tr. from 5/25/2022]). The playbacks included specific  
17 consumer leads purporting to show that Health IQ was individually  
18 identified as a marketing partner to consumers who submitted their  
19 information on Zeeto’s website, “GetItFree.com,” which is Zeeto’s trade name.  
20 (*Id.*).

21 This Court held one hearing on the record concerning Hoy’s motion to  
22 compel Zeeto’s subpoena responses, and several telephone conferences. (*See*  
23 *id.*). Health IQ participated in those court proceedings. During the May 25,  
24 2022 hearing, the Court explained that Jornaya’s 26 links gave “mixed  
25 results . . . some will work, some will not.” (*Id.* [Hr’g Tr. at 12, 15]). The  
26 Court next explained the importance of getting critical information from  
27 Zeeto to the parties in the underlying case. (*Id.* [Hr’g Tr. at 14]). Finally,

1 this Court urged Zeeto’s compliance in getting “unfettered access to this  
2 consent file” into the hands of Hoy and Health IQ through a “gross approach,”  
3 rather than a sampling. (*Id.* [Hr’g Tr. at 14-16]).

4 The Court ordered Zeeto to cooperate with Plaintiff in the underlying  
5 case to get the “data related to the calls made by [Health IQ] – calls/texts –  
6 track them back to Jornaya, [and] get that data” to Hoy and Health IQ. (*Id.*  
7 [Hr’g Tr. at 16]). The parties expressed their perceived ability to exchange  
8 necessary documents and move the underlying case forward, so Hoy informed  
9 the Court that his motion to compel was resolved. The Court denied Hoy’s  
10 motion to compel as moot and closed that matter. *See Hoy v. ZeetoGroup*,  
11 Case No. 22cv0151, ECF No. 26 (S.D. Cal. July 6, 2022).

12 On June 29, 2022, Zeeto provided a new declaration to Plaintiff Hoy,  
13 wherein Cardwell reversed his earlier position, stating instead that “Health  
14 IQ did not appear on the marketing partner list or otherwise on Zeeto’s  
15 websites between June 24, 2017, and December of 2021.” (See ECF No. 1, Ex.  
16 12 [6/29/2022 Cardwell Decl.], Ex. No. 13 at 6). That sworn statement  
17 appeared to void Health IQ’s affirmative defense of consent, at least as far as  
18 Zeeto’s records could confirm. A few days later, Zeeto provided a third  
19 Cardwell declaration, which included the same statement about Health IQ  
20 not appearing as a marketing partner, and Zeeto sought to “withdraw”  
21 Cardwell’s March declaration. (*Id.*, Ex. 13 [7/1/2022 Cardwell Decl.]).

22 Unfortunately, Zeeto never produced the documents the parties needed  
23 and anticipated receiving, so Health IQ served the subpoenas now in dispute.  
24 Based on the similarity between Hoy’s motion to compel and the current  
25 action, this matter was transferred to the undersigned as a related-case  
26 pursuant to the district’s “low-number rule.” (See ECF No. 3, ECF No. 6-1,  
27 Ex. B).

1           B. Health IQ's Current Subpoenas to Zeeto

2           On July 12, 2022, Health IQ issued two subpoenas to Zeeto, one for 24  
3 document-production requests, and the second for deposition testimony  
4 related to the document production. (ECF No. 1, Exs. 1-2). Health IQ's  
5 subpoenas mimic Hoy's requests in part and add requests related to  
6 Cardwell's revised declarations. (*Id.*). Zeeto asserts many of the same  
7 objections it raised with Hoy's subpoenas, as well as new arguments. (ECF  
8 No. 1, Ex. 17 [Objections]).

9           Health IQ contends that Zeeto failed to (a) produce documents,  
10 (b) properly object to the subpoenas, (c) appear for deposition, or (d) file a  
11 motion to quash/modify either subpoena. Health IQ filed this motion to  
12 compel citing Federal Rules of Civil Procedure 37(a)(1) and 45, seeking an  
13 order for Zeeto to produce documents and appear for a deposition. (ECF No.  
14 1, Ex. 1 [subpoena *duces tecum*] and Ex. 2 [subpoena *ad testificandum*]).

15           Health IQ's subpoenas issued from the Northern District of California.  
16 (*Id.*). The subpoenas ordered Zeeto to produce documents to "Undersigned  
17 Counsel Electronically," by August 2, 2022, or to produce them at a specified  
18 address in Wilmington, Delaware. Health IQ explained that it served its  
19 subpoenas in Delaware because Zeeto is a Delaware limited liability company  
20 with a registered agent in Wilmington, Delaware. (ECF No. 1-1 at 3; *see also*  
21 ECF No. 1 at 7). Zeeto's Corporation Trust Company is located at 1209  
22 Orange Street, Wilmington, Delaware 19801. Production responsive to the  
23 subpoena *duces tecum* was to be electronic, or at Fox Rothschild LLP's office  
24 located at Citizens Bank Center, 919 N. Market Street, Suite 300,  
25 Wilmington, Delaware 19899, 0.3 miles from Zeeto's registered agent. (ECF  
26 No. 1-1 at 14). The deposition was set to occur "Via remote means (TSG  
27 reporting)" on August 24, 2022, at 9:00 a.m. Pacific time. (ECF No. 1 at 13).

1 Zeeto objected to Health IQ's subpoenas in part because Cardwell,  
2 Zeeto's intended deponent, resides in San Diego, California, and San Diego is  
3 Zeeto's principal place of business. (See ECF No. 1 at 67-68 [Cardwell Decl.],  
4 ECF No. 6 at 8-9). Zeeto did not seek a protective order, nor did it file a  
5 motion to quash or modify either subpoena.

6 Health IQ maintains that Zeeto waived any subpoena objections  
7 because Zeeto erroneously sent objections to Plaintiff Hoy's counsel, rather  
8 than Defendant Health IQ's counsel. (ECF No. 1, Exs. 15-16; ECF No. 1-1 at  
9 14 n.4). When Health IQ's attorney learned from Plaintiff's counsel that  
10 Zeeto had objections, Health IQ contacted Zeeto's counsel and confirmed that  
11 Health IQ had provided its correct address to Zeeto on several occasions, and  
12 that counsel for Health IQ and Zeeto previously communicated with each  
13 other at that correct email address. (ECF No. 1 at 549). The proper contact  
14 information for Health IQ was also included on the face of the subpoenas.  
15 (ECF No. 1-1 at 10 & n.3, ECF No. 1 at 548-52). Zeeto informed Health IQ  
16 that any procedural errors on its part posed no prejudice to Health IQ, and  
17 Zeeto continued to refuse compliance with both subpoenas. (ECF No. 1 at  
18 548).

19 Zeeto's counsel acknowledged the erroneous service of the objections to  
20 Health IQ, but said his firm made immediate attempts to resolve the service  
21 issue. (ECF No. 1 at 550). Health IQ disputes such attempts and maintains  
22 that Zeeto has never provided its objections to Health IQ, and Zeeto does not  
23 refute that position. (See ECF No. 1 at 548). Zeeto maintains that Health  
24 IQ's subpoenas are procedurally deficient, as well as burdensome, irrelevant,  
25 overbroad, harassing, vague, ambiguous, and non-specific, and Zeeto asserts  
26 attorney-client privilege and confidentiality over a portion of the requested  
27 material. Zeeto never produced a privilege log. (ECF No. 1-1 at 9-13).

1 Health IQ and Hoy maintain they need the subpoenaed documents and  
2 deposition testimony to move the underlying case forward and ask this Court  
3 to compel Zeeto's compliance with the Health IQ's subpoenas. (ECF No. 1-1,  
4 ECF No. 7 at 3).

## 5 II. Legal Standard

### 6 Rule 45: Subpoenas to Nonparties

7 Rule 45 of the Federal Rules of Civil Procedure governs the service of  
8 subpoenas for deposition testimony and documents to nonparties. Fed. R.  
9 Civ. P. 45(c)(1) (deposition), (c)(2) (documents). A valid subpoena must  
10 "command each person to whom it is directed to . . . attend and testify," or  
11 "produce designated documents" at "a specified time and place." Fed. R. Civ.  
12 P. 45(a)(1)(A)(iii). "Proper subpoenas issued by attorneys on behalf of the  
13 court are treated as orders of the Court." *McKeon v. Cent. Valley Cmty.*  
14 *Sports Found.*, No. 1:18-CV-00358-BAM, 2019 WL 1208986, at \*2 (E.D. Cal.  
15 Mar. 14, 2019) (collecting cases).

16 A party issuing a subpoena must take reasonable steps to avoid  
17 imposing "undue burden or expense on a person subject to the subpoena."  
18 Fed. R. Civ. P. 45(d)(1). "The court for the district where compliance is  
19 required" must enforce that duty and impose an appropriate sanction on a  
20 party or attorney who fails to comply with that requirement. Fed. R. Civ. P.  
21 45(d)(1).

22 The rules protect nonparties from inconvenience by limiting issuance of  
23 a subpoena for production of documents "within 100 miles of where the  
24 person resides, is employed, or regularly transacts business in person." Fed.  
25 R. Civ. P. 45(c)(2). Similarly, deposition testimony must be commanded to  
26 occur to "within 100 miles of where the person resides, is employed, or  
27 regularly transacts business in person." Fed. R. Civ. P. 45(c)(1)(A).



1 The purpose of resolving subpoena-related motions in nonparties' home  
2 district "is to protect them from the burden of challenging a subpoena in a  
3 remote location[.]" *Dr. Muhammad Mirza, et al. v. YELP, INC.*, No. 21-MC-  
4 80077-TSH, 2021 WL 2939922, at \*3 (N.D. Cal. July 13, 2021) (considering a  
5 motion to transfer subpoena-related issues) (citation omitted); *Raap v. Brier*  
6 *& Thorn, Inc.*, No. 17-MC-3001, 2017 WL 2462823, at \*3 (C.D. Ill. July 7,  
7 2017) ("The purpose of protecting nonparties is defeated if a party could  
8 demand compliance in a location more than 100 miles from where the  
9 nonparty resides, is employed, or regularly transacts business in person and  
10 still require the nonparty to adjudicate a dispute over that subpoena in a  
11 distant forum").

12 *Subpoena for Documents or Tangible Things*

13 Rule 45 permits a person commanded to produce "*documents or tangible*  
14 *things*" to serve the issuing party written objection within 14 days after the  
15 subpoena is served or before compliance is required (whichever is earlier).  
16 Fed. R. Civ. P. 45(d)(2)(B) (emphasis added). A nonparty that fails to timely  
17 and properly object to a subpoena generally waives any objection it may have  
18 had. *BNSF Ry. Co. v. Alere, Inc.*, No. 18cv291-BEN-WVG, 2018 WL 2267144,  
19 at \*8 (S.D. Cal. May 17, 2018); *Baker v. Ensign*, 11-CV-2060-BAS(WVG),  
20 2014 WL 3058323, \*6 (S.D. Cal. July 3, 2014).

21 If a nonparty served with a subpoena *duces tecum* does not comply or  
22 serve timely objections, it may instead move to quash or modify the subpoena  
23 before the requested date for production of documents under Rule 45(d)(3).  
24 *See Franco v. Alorica Inc.*, 20cv05035-DOC-KESx, 2021 WL 6104816, at \*3  
25 (C.D. Cal. Nov. 5, 2021). The objecting person may also seek a protective  
26 order under Rule 26(c), which requires a showing of "good cause . . . to protect  
27 a party or person from annoyance, embarrassment, oppression, or undue

1 burden or expense.” Fed. R. Civ. P. 26(c); *United States v. King Cnty.*,  
2 *Washington*, No. 2:20-CV-00203-RJB, 2022 WL 16835866, at \*3 (W.D. Wash.  
3 Nov. 9, 2022); *see also Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318,  
4 1322-23 (Fed. Cir. 1990) (outlining a nonparty’s options in responding to a  
5 subpoena).

6 If a nonparty serves timely objections to a subpoena *duces tecum*, the  
7 issuing party must obtain an order from the district court where compliance  
8 is required compelling production or inspection pursuant to Rule  
9 45(d)(2)(B)(i). *See Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492,  
10 494 & n. 5 (9<sup>th</sup> Cir. 1983) (although a subpoena itself is a court order and  
11 noncompliance may warrant contempt sanctions, once a nonparty objects, the  
12 party seeking discovery must obtain a court order directing compliance);  
13 *DeGeer v. Gillis*, 755 F. Supp. 2d 909, 930 (N.D. Ill. 2010) (same).

14 Under Civil Rule 45(g), a court may hold in contempt a person who fails  
15 “without adequate excuse” to obey a subpoena or order related to it. Fed. R.  
16 Civ. P. 45(g). “Adequate excuse” is not a defined standard. *See* Fed. R. Civ.  
17 P. 45 Advisory Committee’s Note to 1991 Amendment. Instead, it is factually  
18 dependent. *Sanchez v. Albertson’s, LLC*, No. 2:19-CV-2017-JAD-DJA, 2022  
19 WL 656369, at \*8 (D. Nev. Mar. 3, 2022) (citing *Residential Constructors,*  
20 *LLC v. Ace Property and Casualty Ins. Co.*, No. 2:05-cv-01318-BES-GWF,  
21 2006 WL 8442461, at \*4 (D. Nev. Aug 8, 2008) (compiling cases)).

22 Timely served objections may constitute an “adequate excuse” for not  
23 responding to a subpoena *duces tecum*. *In re Plise*, 506 B.R. 870, 878 (B.A.P.  
24 9<sup>th</sup> Cir. 2014); *DeGeer*, 755 F. Supp. 2d at 930; *see also In re Exxon Valdez*,  
25 142 F.R.D. 380, 385 (D.D.C. 1992). If the serving party seeks an order for  
26 contempt, magistrate judges are required to refer contempt charges to the  
27 district court, *see Grimes v. City & County of San Francisco*, 951 F.2d 236,

1 240 (9th Cir. 1991), with specific certification of all facts supporting any  
2 recommendation that a particular individual be held in contempt. 28 U.S.C.  
3 § 636(e)(6)(iii). Generally, an order for contempt is not issued until a person  
4 or company has failed to comply with an order compelling document  
5 production. *See Poturich v. Allstate Insur. Co.*, EDCV 15-0081-GW(KKx),  
6 2015 WL 12766048, at \*3 (C.D. Cal. Aug. 11, 2015) (declining to award  
7 sanctions under Rule 45’s contempt authority where there was no court order  
8 in place compelling discovery).

9 *Subpoena for Deposition Testimony*

10 While a nonparty may challenge a subpoena *duces tecum* via written  
11 objection, a deposition subpoena may only be challenged by moving to quash  
12 or modify the subpoena pursuant to Federal Rule of Civil Procedure  
13 45(c)(3)(A), or by moving for a protective order pursuant to Rule 26(c). *See* 9  
14 James Wm. Moore, *Moore’s Federal Practice* § 45.30 (2007) (“The written  
15 objection procedure is available only for a subpoena commanding production  
16 or inspection . . .”); *BNSF Ry. Co.*, 2018 WL 2267144, at \*7 (explaining that  
17 the proper method for a nonparty to seek the court’s assistance after being  
18 served with a subpoena to testify at a deposition is to file a motion to quash  
19 or modify the subpoena).

20 If a nonparty were “simply able to serve objections to any subpoena and  
21 avoid compliance, there would be no need for a nonparty to quash or modify a  
22 subpoena. A nonparty could simply lodge an objection to any subpoena and  
23 wait for the subpoenaing party to file a motion to compel compliance.” *See id.*  
24 (citing *Biliski v. Kappos*, 561 U.S. 593, 607-08 (2010) (noting canon against  
25 interpreting a provision in a manner that would render another provision  
26 superfluous)); *see generally Aetna Casualty and Surety Co. v. Rodco*  
27 *Autobody*, 130 F.R.D. 2 (D. Mass. 1990) (“the fact that objections were served

1 [by the nonparty] is *no excuse whatsoever* not to attend the deposition.”). A  
2 motion to quash or modify “must be made promptly,” allowing it to “be heard  
3 *and granted before* the scheduled deposition.” *See Unigene Lab’ys, Inc. v.*  
4 *Apotex, Inc.*, No. C 07-80218SI, 2007 WL 2972931, at \*2 (N.D. Cal. Oct. 10,  
5 2007) (citation omitted); *see also Odyssey Reinsurance Co. v. Nagby*, No. 16-  
6 CV-3038-BTM(WVG), 2018 WL 1963665, at \*2 (S.D. Cal. Apr. 26, 2018)  
7 (“Motions to quash under Rule 45(d)(3)(A)(iii) are required to be filed in a  
8 “timely” fashion, which courts have read to mean before the compliance date  
9 designated in the subpoena.”).

### 10 *Enforcing Subpoenas In the “Place of Compliance”*

11 Parties and nonparties seeking to quash or modify a subpoena must file  
12 in the district where compliance is required. Fed. R. Civ. P. 45(d)(3)(A). The  
13 court for the district where compliance is required must quash or modify a  
14 subpoena upon a timely motion if the subpoena:

- 15 (i) fails to allow a reasonable time to comply;
- 16 (ii) requires a person to comply beyond the geographical limits  
specified in Rule 45(c);
- 17 (iii) requires disclosure of privileged or other protected matter, if  
18 no exception or waiver applies; or
- 19 (iv) subjects a person to undue burden.

20 Fed. R. Civ. P. 45(d)(3)(A)(i)-(iv).

### 21 **III. Discussion**

22 Health IQ cites Rules 37 and 45 of the Federal Rules of Civil Procedure  
23 in support of its motion to compel, but it limits its reliance on Rule 37 to  
24 affirming its good faith attempts to confer with Zeeto and provide notice to all  
25 parties prior to filing. (ECF No. 1-1 at 12-13). Under Rule 45, Health IQ  
26 asks the Court to modify, transfer and/or enforce the subpoena, but it does  
27 not specifically reference Rule 45(d)(2)(B)(i)), which governs orders to compel

1 a commanded person’s compliance with a subpoena *duces tecum*, or Rule  
2 45(g), which addresses a person’s failure to obey a subpoena or order related  
3 to it without adequate excuse, as well as contempt orders for such failure.  
4 *See* Fed. R. Civ. P. 45(d), (g). The Court will construe Health IQ’s motion as  
5 one filed under Rule 45(d)(2)(B)(i) and (g) but will first address why Health  
6 IQ’s motion is properly filed in this district.

7 A. The Motion to Compel is Properly Filed in the Southern District of  
8 California Because San Diego is the Nonparty’s Principal Place of  
9 Business, and Zeeto’s Deponent Resides Here

10 The parties do not challenge this Court’s power to resolve Health IQ’s  
11 motion to compel, but that question warrants consideration because the  
12 subpoenas were issued from the Northern District of California to a  
13 registered agent in the District of Delaware. The parties here had discussed  
14 electronic production of documents and a remote video deposition, but if those  
15 efforts failed, Health IQ identified Wilmington, Delaware as the place of  
16 compliance on the face of the subpoenas. (*See* ECF No. 1, Exs. 1-2).

17 This Court’s power to consider the current dispute arises under Rule 45,  
18 which focuses on the burden placed on nonparties. Rule 45 requires that  
19 disputes related to nonparty subpoenas be resolved locally, “where  
20 compliance is required,” to avoid imposing undue travel or expense burdens  
21 on nonparties challenging a subpoena. *See, e.g.*, Fed. R. Civ. P. 45(d)(2)(B)(i)  
22 (directing the serving party to file motions to compel in “the district where  
23 compliance is required”). But the question often arises as to what is meant  
24 by the “place of compliance.”

25 Many courts reject labeling the “place of compliance” analysis as a  
26 jurisdictional question because that issue focuses on a forum state’s power  
27 and notice to a potential witness, whereas Rule 45 focuses on the burden to

1 nonparties. *Regents of Univ. of California v. Kohne*, 166 F.R.D. 463, 465 (S.D.  
2 Cal. 1996) (“Jurisdictional analysis is inappropriate for analyzing Rule 45  
3 because it responds to an entirely different set of concerns.”); *see also Sol v.*  
4 *Whiting*, No. CV-10-01061-PHX-SRB, 2014 WL 12526314, at \*2 (D. Ariz. July  
5 22, 2014) (“If the 100-mile rule was jurisdictional, there would be limits on  
6 whether parties could stipulate to procedures that departed from Rule 45(c)  
7 and would raise questions whether a court could quash or modify a subpoena  
8 that transgressed the geographical limits found under that rule.”).

9         The *Sol* court explained that parties often conflate jurisdictional  
10 analysis with non-jurisdictional objections raised under Rule 45, noting that  
11 Rule 82 excludes framing this as a jurisdictional matter because the federal  
12 rules “do not extend or limit the jurisdiction of the district courts or the venue  
13 of actions in those courts.” *Sol*, 2014 WL 12526314, at \*2 (citing Fed. R. Civ.  
14 P. 82). The parties do not raise a jurisdictional concern, and this Court  
15 agrees without deciding that Rule 45 focuses on burdens placed on  
16 nonparties, rather than the Court’s jurisdictional power.

17         In consideration of the burden on nonparties, courts are often called  
18 upon to decide whether the “place of compliance” refers to that named on the  
19 face of a subpoena, or whether those terms are tethered to the location of the  
20 documents sought or the person subpoenaed. The meaning of Rule 45’s  
21 repeated use of “place of compliance” is not immediately apparent, and courts  
22 construing those terms are “decidedly split.” *See Ello v. Brinton*, No. 2:14–  
23 CV–299–TLS–JEM, 2017 WL 56316, at \*5 (N.D. Ind. Jan. 5, 2017) (“The  
24 authority defining the place of compliance is mixed.”).

25         Case law suggests that making the “place of compliance” determination  
26 may vary based upon the type of motion filed and the facts available to the  
27 reviewing court. *See Merch. Consulting Grp., Inc. v. Beckpat, LLC*, No. 17-

1 11405-PBS, 2018 WL 4510269, at \*3 (D. Mass. July 11, 2018), *report and*  
2 *recommendation adopted* (Aug. 1, 2018) (“In this instance, the issue arises  
3 under Rule 45(g). The court has little information apart from the fact that  
4 the place of compliance designated in the subpoena *duces tecum* is Boston,  
5 Massachusetts, and Blue Square, although located in Arizona, has interposed  
6 no objections to the subpoena.”). For example, a court that only knows the  
7 place of compliance listed on the face of a subpoena cannot very well defer to  
8 the place of compliance where documents are stored, or a deponent resides.

9         Some courts have chosen to analyze the appropriate place for a  
10 subpoena dispute based on the location identified on the face of the subpoena,  
11 even if it is not where compliance is actually required. *See Uniloc USA, Inc.*  
12 *v. Apple Inc.*, No. 19-cv-01692-EJD (VKD), 2020 WL 6262349, at \*2 (N.D. Cal.  
13 Oct. 23, 2020) (“the Court concludes that under the plain language of Rule  
14 45(d), Apple’s motion to compel is properly filed in this district, as it is the  
15 place where compliance is required on the face of the subpoena, even if that  
16 place of compliance is not proper under Rule 45(c)”); *CSS, Inc. v. Herrington*,  
17 354 F. Supp. 3d 702, 709 (N.D. Tex. 2017) (“for purposes of a Rule 45(d)(2) or  
18 45(d)(3) motion, the court or district ‘where compliance is required’ is  
19 determined by the location or ‘place’ for compliance identified on the  
20 subpoena”); *see also Adams v. Symetra Life Ins. Co.*, No. 19-MC-401-EFM-  
21 ADM, 2020 WL 489523, at \*3 (D. Kan. Jan. 28, 2020) (“[T]he undersigned  
22 shares the view of courts that have determined that the place of compliance  
23 is the location for production identified on the subpoena.”).

24         Many other courts, however, have held that the “place of compliance”  
25 depends on where the documents sought are located or where the nonparty  
26 subpoena recipient resides or works. *Raap*, 2017 WL 2462823, at \*2-3 (“In  
27 light of the purposes behind Rule 45, the Court finds that the better approach

1 is to tie the place of compliance to the location of the subpoenaed person or  
2 entity.”); *Dennis v. Good Deal Charlie, Inc.*, No. 21-cv-01760-BEN-JLB, 2022  
3 WL 62919, at \*6 (S.D. Cal. Jan. 6, 2022) (recognizing that “the district where  
4 compliance is required” has been defined as the location of the subpoenaed  
5 person or entity, in keeping with Rule 45’s purpose of protecting local  
6 nonparties and resolving disputes locally); *Koenig v. Johnson*, 2:18-cv-3599,  
7 2020 WL 635772, at \*2 (D.S.C. Feb. 11, 2020) (“Rule 37 and Rule 45 require  
8 that when a party seeks to compel a non-party’s action pursuant to a  
9 subpoena *duces tecum*, the party must file its motion to compel in the district  
10 where the sought documents are located, not in the district where the  
11 subpoena was issued.”); *Agincourt Gaming, LLC v. Zynga, Inc.*, No. 2:14-cv-  
12 0708-RFB-NJK, 2014 WL 4079555, at \*4 (D. Nev. Aug. 15, 2014) (“Rule 45  
13 makes clear that the place of compliance is tethered to the location of the  
14 subpoenaed person, where the individuals lived and were employed in the  
15 same district where the subpoena commanded production); *XTO Energy, Inc.*  
16 *v. ATD, LLC*, No. 14–1021 JB/SCY, 2016 WL 1730171, at \*20 (D.N.M. Apr. 1,  
17 2016) (noting that “revised rule 45(d)(3) provides that motions to quash or  
18 enforce a subpoena can be brought in the district where compliance is  
19 required—*i.e.*, the district in which the subpoena’s recipient resides or  
20 works”); *Gilbert v. Rare Moon Media, LLC*, No. 15-MC-217-CM, 2016 WL  
21 141635, at \*2 (D. Kan. Jan. 12, 2016) (“The place of compliance for a  
22 deposition subpoena or subpoena for production of documents, however, must  
23 be within 100 miles of where the person resides, is employed, or regularly  
24 transacts business or within the state where the person resides, is employed,  
25 or regularly transacts business in person.”).

26 The *Raap* court explained that:  
27



1 [t]o protect local nonparties, local resolution of disputes about  
2 subpoenas is assured by the limitations of Rule 45(c) and the  
3 requirements in Rules 45(d) and (e) that the motions be made in the  
4 court in which compliance is required under Rule 45(c).

4 *Raap*, 2017 WL 2462823, at \*3; *see also Sandifer v. Hoyt Archery, Inc.*, No.  
5 12cv322, 2014 WL 3540812, at \*4 (M.D. La. July 17, 2014) (“Any motion . . .  
6 to compel . . . compliance with a Rule 45 subpoena should have first been filed  
7 in the district where the discovery is or will be taken”); *see also Klein v.*  
8 *Gordon*, No. SACV 17-0123-AB (JPRx), 2018 WL 5099504, at \*2 (C.D. Cal.  
9 Aug. 21, 2018) (denying motion to compel and explaining that party was  
10 “obligated to move to compel compliance with [the] subpoenas” in the district  
11 where the documents were located); *Europly Cap. Advisors, LLC v. Does*,  
12 323 F.R.D. 628, 629 (C.D. Cal. 2018) (“Rule 45 further requires that the place  
13 of compliance for the ‘production of documents, electronically stored  
14 information, or tangible things [is] at a place within 100 miles of where the  
15 person resides, is employed, or regularly transacts business in person.”);  
16 *Youngevity Int’l, Corp. v. Smith*, No. 16cv704-BTM-JLB, 2017 WL 6418961,  
17 (S.D. Cal. Dec. 15, 2017) (Rule 45(c) “makes clear that the place of compliance  
18 is tethered to the location of the subpoenaed person.”) (citation omitted).

19 The latter approach concluding that the place of compliance is where  
20 the documents are located, and where the deponent resides, makes more  
21 sense in this action for several reasons. First, Rule 45 expressly requires  
22 minimizing the burden placed on a nonparty. Fed. R. Civ. P. 45(d)(1). That  
23 is best accomplished by resolving this dispute and requiring production of  
24 documents and deposition testimony to occur where the nonparty’s principal  
25 place of business, responsive documents, and the deponent are located: in  
26 San Diego. Even if the parties can manage the electronic production of  
27 documents and a remote deposition, the burden on Zeeto is reduced by

1 litigating here instead of in a Delaware court. *See Black v. Wrigley*, No.  
2 18cv2367-GPC-BGS, 2019 WL 1877070, at \*5 (S.D. Cal. Apr. 26, 2019)  
3 (finding undue burden where a subpoena required production more than 100  
4 miles from where the nonparty resided, was employed, or regularly conducted  
5 business in person).

6 Second, it makes little sense to require Health IQ to re-file a motion to  
7 compel in the district listed on the face of the subpoenas knowing the  
8 nonparty asserts that San Diego is the place of compliance. This Court also  
9 rejects Health IQ's invitation to transfer this dispute to the Northern District  
10 of California, where the underlying action is pending. (ECF No. 1-1 at 6, 27-  
11 28). Zeeto opposes such a transfer. (ECF No. 6 at 15-16). Absent the parties'  
12 consent, a court may transfer a subpoena dispute in exceptional  
13 circumstances, and the proponent of transfer bears the burden of showing  
14 that such circumstances are present. *Natural-Immunogenics Corp. v.*  
15 *Newport Trial Grp.*, No. 15CV-02034-JVS (JCGx), 2017 WL 10562985, at \*5  
16 (C.D. Cal. Mar. 6, 2017). Such exceptional circumstances are not presented  
17 here because this Court has already considered similar issues from Hoy's  
18 motion to compel, and the dispute is already well known to this Court.

19 The third reason this Court's resolution of the subpoena dispute makes  
20 sense is that Health IQ made several pre-filing attempts to address any  
21 procedural concerns that Zeeto raised about the subpoenas to no avail.  
22 Health IQ explained that it served Zeeto's registered agent in person at its  
23 place of incorporation in Delaware after Zeeto exercised its lawful right to  
24 insist upon personal service. The parties discussed the convenience of Zeeto  
25 electronically producing responsive documents and remotely appearing for  
26 deposition, and those options for production and testimony are expressly  
27 stated on the face of the subpoenas. (ECF No. 1 at 551, 555).

1           When Health IQ belatedly learned that Zeeto had a procedural  
2 objection, Health IQ relentlessly sought to understand Zeeto's position on  
3 several occasions, including the following three written communications from  
4 Health IQ to Zeeto, all of which preceded Health IQ's motion to compel:

5           Service on ZeetoGroup was formally and properly completed on  
6 July 12, 2022. ZeetoGroup is a Delaware company and, because  
7 your office refused to accept service of the subpoenas, Health IQ  
8 formally served a Subpoena for Documents and Subpoena for  
9 Deposition on ZeetoGroup's Delaware-based agent for service.  
10 ZeetoGroup's response and any objections were required to be  
11 returned to counsel for Health IQ's Wilmington, DE office or (for  
12 convenience of the subpoena recipient), we offered to accept  
13 responses electronically by email at prosenthal@foxrothschild.com.  
14 ZeetoGroup failed to send any objections to either of these locations  
15 and, therefore has not timely served any objections to the Subpoena  
16 for Documents.

17 (ECF No. 1 at 551, 8/2/2022 email).

18 [W]e would like to better understand your service objection. As  
19 detailed in the email below, ZeetoGroup LLC was identified to be a  
20 Delaware corporation and, because you would not agree to accept  
21 service, the subpoenas were served on its Delaware agent with a  
22 response requested to be served at our firm's Wilmington, DE office.  
23 Are you saying that your client is not a Delaware corporation? Or  
24 that the service was not on your client's proper agent for service?

25 (ECF No. 1 at 550, 8/10/2022 email).

26 On August 10-11, we engaged in email discussion regarding  
27 ZeetoGroup's challenge to service and the response location;  
however, ZeetoGroup still has not answered the foundational  
questions posed by Health IQ: Are you saying that ZeetoGroup is  
not a Delaware corporation? Or that the service was not on your  
client's proper agent for service?

(ECF No. 1 at 555, 8/12/2022 letter).

1 To the extent Zeeto had a valid objection to service of the subpoenas in  
2 Delaware, its remedies included properly served objections to the subpoena  
3 *duces tecum*, a motion for a protective order, a motion to quash, or a motion to  
4 modify either subpoena. Zeeto failed to properly execute any of those options.

5 Finally, resolving the dispute here promotes judicial economy. This  
6 Court considers Health IQ’s motion and the subpoenas at issue within the  
7 policy enshrined in Rule 1 that “[t]hese rules . . . should be construed,  
8 administered, and employed by the court to secure the just, speedy, and  
9 inexpensive determination of every action.” Fed. R. Civ. P. 1. Rule 45 does  
10 not unambiguously require courts to deem the “place of compliance” as that  
11 which the serving party names on the face of the subpoena, so there is “no  
12 reason to inflate the costs of litigation by ruling out . . . sensible option[s] for”  
13 resolving such disputes in this district, where compliance is actually  
14 required. *See generally BBK Tobacco & Foods LLP v. Skunk Inc.*, No. CV-18-  
15 02332-PHX-JAT, 2020 WL 619675, at \*2 (D. Ariz. Feb. 10, 2020) (applying  
16 Rule 1 concerning personal service of a subpoena) (citation omitted).

17 As the *BBK Tobacco & Foods* court noted, concerns about judicial  
18 economy are particularly acute in cases like this, where the serving party  
19 made several unsuccessful attempts to resolve the nonparty’s complaints.  
20 *Id.*; *see generally Westmore Equities, LLC v. Vill. of Coulterville*, No. 3:15-cv-  
21 241-MJR-DGW, 2016 WL 695896, at \*2 (S.D. Ill. Feb. 22, 2016)  
22 (“Importantly, the 2013 Advisory Committee Notes make clear that, while  
23 the rule now specifies default geographic limits on place of production, it is  
24 expected that lawyers will continue to cooperate and use common sense to  
25 facilitate the sensible production of documents and ESI and avoid putting  
26 nonparties to any unnecessary expense. . . the practical reality is that  
27 documents can be readily copied and shipped across the country via mail,

1 courier, or others means.”).

2 To the extent that Health IQ also cites Rule 37 of the Federal Rules of  
3 Civil Procedure in its motion to compel, that rule similarly provides that “[a]  
4 motion for an order to a nonparty must be made in the court where the  
5 discovery is or will be taken.” Fed. R. Civ. P. 37(a)(2). For all those reasons,  
6 the Court finds the motion to compel is properly filed here, where compliance  
7 with the subpoenas will actually occur.

8 B. The Court Will Construe Health IQ’s Motion to Compel Under  
9 Rule 45 Rather Than Rule 37 of the Federal Rules of Civil  
10 Procedure

11 Rule 37 does not apply to a nonparty who fails to comply with a  
12 subpoena *duces tecum* in the Ninth Circuit. See *In re Plise*, 506 B.R. at 870  
13 (reversing bankruptcy court’s sanction against nonparty for failure to respond  
14 to subpoena *duces tecum* because that court relied upon rule 37 instead of  
15 rule 45); *Pennwalt Corp.*, 708 F.2d at 494 & n.4 (stating as dictum that Rule  
16 37 motions to compel could apply to nonparties subpoenaed to attend  
17 depositions, but not motions to compel nonparties to produce documents); see  
18 also *Warkentin v. Federated Life Ins. Co.*, No. 1:10cv0221 DLB, 2012 WL  
19 113745, \*2 (E.D. Cal. Jan. 13, 2012) (“Rule 37 does not authorize an award of  
20 expenses for a motion to compel nonparties to produce documents.”) (citation  
21 omitted).

22 Instead, courts consider challenges to a nonparty’s objections to a  
23 subpoena *duces tecum* under Rule 45, which the Court will do here as well.  
24 See *McAllister v. St. Louis Rams, LLC*, Case No. 2:17-mc-157-AB (KSx), 2018  
25 WL 6164281, at \*2 n.4 (C.D. Cal. July 2, 2018) (applying sanctions against  
26 nonparty under Rule 45(d)(1), stating Rule 37 sanctions are inapplicable  
27 against nonparty) (citations omitted).

1 While it is less clear whether Rule 37 *may* be used to compel a  
2 nonparty’s presence at a deposition, the Court concludes the better course  
3 here is to proceed with the motion to compel deposition testimony under Rule  
4 45 as well. *See Martinez v. City of Pittsburg*, No. C 11-01017 SBA LB, 2012  
5 WL 699462, at \*4 (N.D. Cal. Mar. 1, 2012) (“when a non-party does not  
6 comply with a subpoena and does not appear for deposition, the most  
7 appropriate procedural step is to file an application for an order to show  
8 cause, not a motion to compel”) (citing, *e.g.*, *Prescott v. County of Stanislaus*,  
9 *et al.*, No. 1:10-cv-00592 JLT, 2012 WL 10617, at \*4 (E.D. Cal. Jan. 3, 2012)  
10 (construing defendants’ motion to compel a non-party to appear for deposition  
11 as a Rule 45 application for an order to show cause why the non-party should  
12 not be held in contempt); *Rodriguez v. County of Stanislaus, et al.*, No. 1:08-  
13 cv-00856 OWW GSA, 2010 WL 3733843, at \*6 (E.D. Cal. Sept. 16, 2010)  
14 (“Because Ms. Torres is a non-party to this action, Defendants should have  
15 filed an application for an order to show cause why sanctions should not be  
16 imposed for Ms. Torres’ failure to appear at the deposition.”) (additional  
17 quotation omitted)); *Ceremello v. City of Dixon*, No. CIV S–04–1423 DFL  
18 EFB, 2006 WL 2989002, at \*2 (E.D. Cal. Oct.18, 2006) (“As explained at the  
19 hearing, the ‘motion to compel,’ which is the remedy under the Federal Rules  
20 to compel a party’s compliance with a discovery request, is not the applicable  
21 procedure to address [a non-party’s] alleged refusal to obey a duly-issued  
22 subpoena.”)); *see also Foshee v. Mastec Network Sols., Inc*, No. 1:20-cv-00890-  
23 AWI-SAB, 2021 WL 5529891, at \*12 (E.D. Cal. Nov. 24, 2021) (discussing  
24 differences between enforcement of subpoena for deposition versus  
25 documents under Rules 37 and 45 and granting motion to compel nonparty to  
26 attend deposition) (citation omitted); *see also Morgutia-Johnson v. City of*  
27 *Fresno*, No. 1:14-cv-00127-LJO, 2015 WL 1021123, at \*2 (E.D. Cal. Mar. 9,

1 2015) (construing motion to compel nonparty to attend deposition as an order  
2 to show cause regarding contempt); *GREE, Inc. v. Supercell Oy*, No. 21-MC-  
3 80069-TSH, 2021 WL 1222487, at \*\*2-3 (N.D. Cal. Apr. 1, 2021) (setting a  
4 Rule 45 show cause hearing where nonparty refuses to comply with subpoena  
5 for documents and testimony).

6 The Court first addresses and resolves Health IQ’s motion to compel  
7 compliance with Health IQ’s subpoena *duces tecum*, and then its subpoena for  
8 deposition testimony.

9 (i) Zeeto Shall Comply with Health IQ’s Subpoena for the Production  
10 of Documents

11 When a nonparty raises timely objections to a subpoena *duces tecum*,  
12 the nonparty is not required to produce documents, or even search for them,  
13 until the propounding party obtains an order directing compliance.  
14 *Pennwalt*, 708 F.2d at 494 & n.5; *DeGeer*, 755 F. Supp. 2d at 930. Rule  
15 45(d)(2)(B)(i) permits the serving party to seek an order compelling  
16 production or inspection of documents. Fed. R. Civ. P. 45(d)(2)(B)(i)  
17 (commanding production of materials or permitting inspection). And, if a  
18 serving party seeks sanctions, it must do so under Rule 45(g), which requires  
19 a finding of contempt if the served party fails to present an adequate excuse  
20 for refusing to comply with the subpoena. *See generally Boards of Trustees of*  
21 *Cement Masons & Plasterers Health & Welfare Tr. v. Sound Floors Gypsum*  
22 *Concrete LLC*, No. 2:20-cv-01307-RAJ, 2021 WL 4307069, at \*2 (W.D. Wash.  
23 Sept. 22, 2021) (rejecting a “sparsely supported” motion to compel a nonparty  
24 to produce documents because the appropriate relief is contempt under Rule  
25 45(g)).

26 Here, it is unclear whether Zeeto served timely objections to health IQ’s  
27 subpoena *duces tecum*.

1           *Zeeto's Objections to the Subpoena Duces Tecum*

2           Zeeto raised objections to every document production request that  
3 Health IQ made. Zeeto did so, however, very poorly. First, it served the  
4 objections on Plaintiff Hoy, instead of Defendant Health IQ. But for Hoy's  
5 communication to Health IQ, it is unclear when or if Health IQ would have  
6 received those objections. Second, Zeeto sent its objections to Health IQ at an  
7 incorrect email address, despite having communicated with Health IQ at the  
8 proper email address several times, and despite the proper address appearing  
9 clearly on the face of the subpoenas. (ECF No. 1-1, Exs. 1-2). Finally, despite  
10 Zeeto's representation to Health IQ that it would remedy its faulty service of  
11 the objections, it never did so.

12           The failure to serve written objections to a subpoena within the time  
13 specified by Rule 45(c)(2)(B) typically constitutes a waiver of such objections.  
14 *See Leader Technologies, Inc. v. Facebook, Inc.*, No. 10–mc–80028, 2010 WL  
15 761296, at \*2 (N.D. Cal. Mar. 2, 2010) (internal citation and quotation marks  
16 omitted). Zeeto does not address whether it waived its right to object to the  
17 subpoena.

18           Nonetheless, “[i]n unusual circumstances and for good cause, . . . the  
19 failure to act timely will not bar consideration of objections [to a Rule 45  
20 subpoena].” *McCoy v. Sw. Airlines Co.*, 211 F.R.D. 381, 385 (C.D. Cal. 2002);  
21 *see also Twin Falls NSC, LLC v. S. Idaho Ambulatory Surgery Ctr., LLC*, No.  
22 1:19-cv-00009-DCN, 2020 WL 5523384, at \*15–16 (D. Idaho Sept. 14, 2020)  
23 (“in unusual circumstances and for good cause, the failure to act timely will  
24 not bar consideration of objections to a Rule 45 subpoena”) (citing *Yousuf v.*  
25 *Samantar*, 451 F.3d 248, 252 (D.C. Cir. 2006); *Moon v. SCP Pool Corp.*, 232  
26 F.R.D. 633, 636 (C.D. Cal. 2005)).



1 Courts have found unusual circumstances where: (1) the subpoena is  
2 overbroad on its face and exceeds the bounds of fair discovery; (2) the  
3 subpoenaed witness is a nonparty acting in good faith; or (3) counsel for the  
4 witness and counsel for the subpoenaing party were in contact concerning the  
5 witness' compliance prior to the time the witness challenged the legal basis  
6 for the subpoena. *Baker v. Ensign*, No. 11–CV–2060, 2014 WL 3058323, at \*6  
7 (S.D. Cal. July 3, 2014) (internal citation omitted); *In re Subpoena to Produce*  
8 *Documents of Clapp, Moroney, Bellagamba, Vucinich, Beeman & Scheley*, No.  
9 14-MC-80191-RS (JSC), 2014 WL 3784112, at \*3 (N.D. Cal. July 31, 2014)  
10 (failure to serve objections could be excused under second or third grounds).  
11 A court need only find one of these circumstances exists in order to consider  
12 untimely objections. *BNSF Ry. Co.*, 2018 WL 2267144, at \*8 (citing *In re*  
13 *Denture Cream Products Liability Litigation*, 292 F.R.D. 120, 124 (D.D.C.  
14 2013) (finding that contact between the parties regarding the subpoena by  
15 itself to be sufficient to consider untimely objections).

16 The Court will excuse Zeeto's failure to timely serve objections to the  
17 subpoena *duces tecum* because counsel for Health IQ and Zeeto were in  
18 contact before and after Zeeto served those objections. It remains unclear  
19 why Zeeto sent objections to the wrong counsel and the wrong address.  
20 Nonetheless, Health IQ did receive the objections, and the parties  
21 communicated about them, albeit quite poorly on Zeeto's part. The Court  
22 next considers, but overrules, Zeeto's objections.

23 “[C]ourts often conclude that a nonparty's objections under Rule  
24 45(d)(2)(B) ‘should be subject to the same requirements facing a party  
25 objecting to discovery under Rule 34,’ including ‘the same prohibition on  
26 general or boiler-plate objections and requirements that the objections must  
27 be made with specificity.’” *A&F Bahamas, LLC v. World Venture Grp., Inc.*,

1 No. CV 17-8523 VAP (SS), 2018 WL 5961297, at \*4 (C.D. Cal. Oct. 19, 2018)  
2 (citing *Am. Fed'n of Musicians of the United States & Can. v. Skodam Films,*  
3 *LLC*, 313 F.R.D. 39, at 36 (N.D. Tex. 2015)).

4 The Court admonishes Zeeto for providing generalized boilerplate  
5 objections. (ECF No. 1, Ex. 17); see *Walker v. Lakewood Condo. Owners*  
6 *Ass'n*, 186 F.R.D. 584, 587 (C.D. Cal. 1999) (concerning interrogatories,  
7 “[b]oilerplate, generalized objections are inadequate and tantamount to not  
8 making any objection at all.”). For example, Health IQ’s first nine document  
9 requests focus on materials in support of Cardwell’s declarations, and to each  
10 one, Zeeto makes the following objections, without including any factual  
11 support:

12 Responding Party objects that this request is overbroad as to  
13 content, scope, and time and constitutes unwarranted annoyance,  
14 embarrassment, and oppression. To comply with the request would  
15 be an undue burden and expense on Responding Party.  
16 Furthermore, the request is calculated to annoy and harass  
17 Responding Party.

18 Responding Party further objects that the request seeks  
19 information subject to the attorney-client privilege and attorney  
20 work-product doctrine.

21 Responding Party further objects that the request is irrelevant to  
22 the subject matter, beyond the scope of permissible discovery, and  
23 not reasonably calculated to lead to the discovery of admissible  
24 evidence from a third party.

25 (ECF No. 1 at 530-31).

26 Next, Health IQ’s fourth through sixth, and eleventh through twelfth  
27 document requests address the issue of coding logs for specified time periods,  
to which Zeeto modifies its categorical objections by stating the following  
meaningless, boilerplate objections:

1 Responding Party objects that this request is vague, ambiguous,  
2 and overbroad as to content, scope, and time and constitutes  
3 unwarranted annoyance, embarrassment, and oppression. To  
4 comply with the request would be an undue burden and expense on  
5 Responding Party. Furthermore, the request is calculated to annoy  
6 and harass Responding Party.

6 Responding Party objects that this request seeks disclosure of  
7 confidential and proprietary business records/information,  
8 including but not limited to financial information and information  
9 containing a third party's private information, disclosure of which  
10 would violate Article I, Sec. I of the California Constitution.

10 Responding Party further objects that the request is irrelevant to  
11 the subject matter, beyond the scope of permissible discovery, and  
12 not reasonably calculated to lead to the discovery of admissible  
13 evidence.

13 (*Id.* at 531-32). Zeeto asserts the same useless objections, sometimes with  
14 very slight additional, generic language, for request numbers: (1) seven  
15 through nine, which seek documents and communications relevant to  
16 Cardwell's declarations, but Zeeto substitutes attorney-client privilege  
17 assertions for the proprietary information objection, (*id.* at 533-35);<sup>1</sup> (2) ten,  
18 seeking documents showing consent Zeeto collected, (*id.* at 535); (3) eleven,  
19 twenty, and twenty-one, seeking web session data and documents including  
20 any investigation for leads Zeeto sold to Cege, (*id.*);<sup>2</sup> (4) fourteen and fifteen,  
21 concerning when Health IQ was removed and added as an affiliated partner,  
22

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23  
24 <sup>1</sup> Zeeto asserts a conclusory attorney-client privilege objection, with no  
25 privilege log, to requests 1-3, 7-9, and 22-24. Similarly, despite the existence  
26 of a Stipulated Protective Order in the underlying case that includes  
27 provisions for nonparties, Zeeto raises a "proprietary and confidential"  
objection for requests 4-6, 10-12, and 14-24. (*See* ECF No. 13 at 9).

<sup>2</sup> Request 13 is not at issue. (ECF No. 1 at 536-37, ECF 1-1 at 11).

1 (*id.* at 537); (5) sixteen, concerning contracts between Zeeto and Cege, (*id.* at  
2 538); (6) seventeen and eighteen, seeking documents, web form submissions  
3 and leads relating to Hoy’s telephone number and name, (*id.* at 539); (7)  
4 nineteen, regarding web forms, leads, and documents for Robert Frueh,<sup>3</sup> (*id.*  
5 at 540); and (8) twenty-two through twenty-four, concerning all  
6 communication regarding Health IQ, Hoy, and this litigation, (*id.* at 542-44).

7 Zeeto has the burden to “clarify and explain its objections” and  
8 “specifically show how each discovery request is objectionable.” *Baier v.*  
9 *Princeton Office Park, L.P.*, 3:08-cv-5296 PGS DEA, 2018 WL 5253288, at \*4  
10 (D.N.J. Oct. 22, 2018) (concerning parties); *see also Scientific Games Corp. v.*  
11 *AGS LLC*, 2:17-cv-00343-JAD-NJK, 2017 WL 3013251, at \*2 (D. Nev. Jul. 13,  
12 2017) (“Conclusory or speculative statements of harm, inconvenience, or  
13 expense are plainly insufficient.”). Zeeto must, but failed to, specifically  
14 detail the basis for each of its objections.

15 Zeeto has provided slightly more detail about its objections in its  
16 opposition brief; however, those explanations are too late. For months,  
17 Health IQ endeavored to understand, narrow, and confer with Zeeto about its  
18 objections, even when Zeeto failed to properly serve its objections to Health  
19 IQ. Zeeto did not articulate any specific grounds for objecting until Health IQ  
20 filed its motion to compel. Even upon consideration of those articulated  
21 grounds, the Court is not persuaded that Zeeto’s objections have merit.

22 *Relevance and Proportionality*

23 To succeed on its Motion, Health IQ must demonstrate that the  
24 discovery it seeks is both relevant to the claims and defenses at issue in its

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25  
26  
27 <sup>3</sup> Robert Frueh is the previous owner of the telephone number associated with  
Plaintiff Hoy. (ECF No. 1 at 7, 17).

1 litigation and that the discovery is proportionate to the needs of the case.  
2 Fed. R. Civ. P. 26(b)(1). This is a particularized analysis as to each specific  
3 request. *Starz Ent., LLC v. MGM Domestic Television Distribution LLC.*, No.  
4 220CV04085DMGKSX, 2022 WL 2230129, at \*8 (C.D. Cal. May 31, 2022).  
5 The Court must examine each of Health IQ’s requests against the  
6 requirements of Rule 26(b)(1), which also defines the proper scope of  
7 discovery from a non-party under Rule 45. *See Gonzales v. Google*, 234  
8 F.R.D. 674, 679 (citing Advisory Committee Notes to the 1970 Amendment to  
9 Rule 45).

10 The Court has already explained to the parties here the relevance of  
11 information and documentation that Health IQ now seeks; it did so even  
12 before Cardwell reversed his position about the disclosure of Health IQ as  
13 Zeeto’s affiliated partner. Health IQ is entitled to better understand the  
14 documents and information that led to Zeeto’s withdrawal of its first  
15 declaration, and the subsequent conclusions that Zeeto reached about  
16 consumers’ consent to contact from Health IQ. The Court finds Health IQ’s  
17 subpoena requests relevant and proportional to the underlying case.

18 *Burdensome, Harassing, Vague, Ambiguous & Non-Specific Objections*

19 District courts have broad discretion to determine whether a subpoena  
20 is unduly burdensome. *See Exxon Shipping Co. v. U.S. Dep’t, of Interior*, 34  
21 F.3d 774, 779 (9th Cir. 1994). A subpoena is unduly burdensome where it  
22 seeks to compel production of documents regarding topics unrelated to or  
23 beyond the scope of litigation. *See Mattel, Inc. v. Walking Mountain Prods.*,  
24 353 F.3d 792, 813–14 (9th Cir. 2003). “[A]n evaluation of undue burden  
25 requires the court to weigh the burden to the subpoenaed party against the  
26 value of the information to the serving party,” and requires the court’s  
27 consideration of “such factors as relevance, the need of the party for the

1 documents, the breadth of the document request, the time period covered by  
2 it, the particularity with which the documents are described, and the burden  
3 imposed.” *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005)  
4 (internal citation and quotation marks omitted); *AngioScore, Inc. v. TriReme*  
5 *Med., Inc.*, No. 12-cv-03393-YGR-JSC, 2014 WL 6706873, at \*2 (N.D. Cal.  
6 Nov. 25, 2014) (“The Court thus exercises its inherent authority under  
7 Federal Rule of Civil Procedure 26(c) which provides that “[t]he court may,  
8 for good cause, issue an order to protect a party or person from annoyance,  
9 embarrassment, oppression, or undue burden or expense” and considers  
10 whether the discovery here poses an undue burden on the non-party.”).

11 The Court has balanced the parties’ needs for the requested documents  
12 and deposition testimony to move forward in the underlying case against any  
13 burden upon Zeeto to produce and explain information and data comprising  
14 Cardwell’s declarations, and the Court concludes that such burdens are  
15 outweighed by the importance of that information to the underlying case.  
16 Health IQ requests documents kept in the ordinary course of business by  
17 Zeeto that are uniquely within Zeeto’s control. The Court rejects Zeeto’s  
18 efforts to pass its obligations onto the third-party verification company,  
19 Jornaya, or to Policyscout. *See, e.g., Henderson v. United Student Aid Funds,*  
20 *Inc.*, No. 13cv1845-JLS (BLM), 2015 WL 4742346, at \*5 (S.D. Cal. July 28,  
21 2015) (“The fact that documents are in the physical possession of a third-  
22 party custodian does not eliminate the responsibility of a responding party to  
23 search for and produce those documents when the party has a legal right to  
24 obtain the documents on demand.”) (citation omitted).

25 Zeeto’s harassing, vague, ambiguous, and non-specific objections  
26 amount to nothing more than generalized labels. They are not tailored to  
27 specific requests and are repeatedly copied verbatim. As such, they are

1 boilerplate objections, tantamount to no objections at all. *Amazing Ins., Inc.*  
2 *v. DiManno*, No. 2:19-cv-01349-TLN-CKD, 2020 WL 5440050, at \*\*4-5 (E.D.  
3 Cal. Sept. 10, 2020) (collecting cases).

4 *Attorney-Client Privilege*

5 Rule 45(e)(2)(A)(ii) requires that, “[a] person withholding subpoenaed  
6 information under a claim that it is privileged” must “describe the nature of  
7 the withheld documents, communications, or tangible things in a manner  
8 that, without revealing information itself privileged or protected, will enable  
9 the parties to assess the claim.” Fed. R. Civ. P. 45(e)(2)(A)(ii). Because Zeeto  
10 provides no specific attorney-client privilege argument within its objections  
11 or in the briefing (ECF No. 6 at 12), Zeeto fails to establish that attorney-  
12 client privilege applies here. *See United States v. Richey*, 632 F.3d 559, 566  
13 (9th Cir. 2011) (“The party asserting the attorney-client privilege has the  
14 burden of establishing the relationship and privileged nature of the  
15 communication.”).

16 *Trade-Secret Privilege*

17 Likewise, Zeeto’s argument that trade secrets would be disclosed  
18 through a compelled production is not sufficiently supported. Zeeto does not  
19 specify which requested documents contain trade secrets and provides no  
20 authority to support its argument. Zeeto has the initial burden to establish  
21 that this information is subject to trade-secret protection under Rule 45. *See*  
22 *Orthofix, Inc. v. Hunter (In re Subpoena of DJO, LLC)*, 295 F.R.D. 494, 497  
23 (S.D. Cal. 2014) (“Once the nonparty shows that the requested information is  
24 a trade secret or confidential commercial information, the burden shifts to  
25 the requesting party[.]”) (citing Rule 45(d)(3)(C)(i) and (ii)).

26 The Court overrules Zeeto’s objections to the subpoena *duces tecum* and  
27 orders Zeeto to comply to all Health IQ’s document requests within 21 days.

1 If Zeeto fails to comply with this Court’s order, Health IQ is directed to  
2 inform this Court so that a show cause hearing or order may be filed  
3 pursuant to Rule 45(g).

4 (ii) Zeeto Shall Comply with Health IQ’s Subpoena for Deposition  
5 Testimony

6 Rule 45(g) permits a court “for the district where compliance is  
7 required” to “hold in contempt a person who, having been served, fails  
8 without adequate excuse to obey the subpoena or an order related to it.” Fed.  
9 R. Civ. P. 45(g). The advisory committee notes to Rule 45 state, “[i]n civil  
10 litigation, it would be rare for a court to use contempt sanctions without first  
11 ordering compliance with a subpoena.” Fed. R. Civ. P. 45(g) advisory  
12 committee’s note to 2013 amendment.

13 A subpoenaed organization must designate one or more persons to  
14 “testify about information known or reasonably available to the  
15 organization.” Fed. R. Civ. P. 30(b)(6). The Federal Rules of Civil Procedure  
16 do not permit Zeeto to object to the subpoena for deposition testimony. *See*  
17 *Abbot v. Kidder, Peabody & Co.*, No. 97 C 3251, 1997 WL 337228, \*3 (E.D. Ill.  
18 June 16, 1997) (finding that written objections to service of subpoena did not  
19 excuse nonparty from attending deposition absent a motion to quash or a  
20 protective order).

21 Zeeto’s excuse for refusing to comply with the subpoena for deposition  
22 testimony was that its deponent resided in California, not Delaware. (ECF  
23 No. 6 at 8). Zeeto’s remedy was to file a motion to quash or modify, or for  
24 protective order, but Zeeto failed to do so. Health IQ has in turn asked this  
25 Court to compel the deposition here, where Zeeto’s deponent resides.

26 The Court agrees with Health IQ and orders Zeeto’s compliance with  
27 the subpoena for deposition testimony to occur in this district, where the



1 deponent is located. Fed. R. Civ. P. 45(c)(1). Zeeto shall make Cardwell, or  
2 an appropriate designated witness, available for deposition within 30 days of  
3 producing the documents ordered herein. Unless the parties agree to conduct  
4 a remote deposition, the deposition shall occur in this district, within 100  
5 miles of where Cardwell resides or regularly conducts business for Zeeto.  
6 Fed. R. Civ. P. 45(c)(1); *see Gordy v. Granlund*, No. 19-MC-80180-JSC, 2019  
7 WL 3753184, at \*2 (N.D. Cal. Aug. 8, 2019) (ordering nonparty's compliance  
8 with a subpoenaed deposition prior to any consideration for a show cause  
9 order under Rule 45(g)).

10 **IV. Conclusion**

11 The Court **GRANTS** Health IQ's motion to compel Zeeto's response to the  
12 subpoenas for document production and deposition testimony. (ECF No. 1).  
13 Zeeto shall produce the subpoenaed materials within 21 days of this Order,  
14 and the parties shall set a deposition to occur within 30 days of such  
15 production. If the parties cannot agree upon electronic production of  
16 documents or a remote video deposition, then compliance shall occur where  
17 Zeeto's documents are located and where its deponent resides, in this district  
18 pursuant to Rule 45.

19 **IT IS SO ORDERED.**

20 Dated: November 29, 2022



21 Hon. Mitchell D. Dembin  
22 United States Magistrate Judge  
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