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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANIEL JANG,

Plaintiff,

v.

SAGICOR LIFE INSURANCE
COMPANY, ET AL.,

Defendant.(s).

Case No. EDCV 17-1563-JGB (KKx)

MEMORANDUM AND ORDER
GRANTING MOTION FOR
RECONSIDERATION

I.

INTRODUCTION

On December 21, 2018, Defendants¹ filed a Motion to Compel Plaintiff Daniel Jang (“Plaintiff”) to produce Verizon cellular telephone records from February 1, 2015 through April 24, 2015 and, alternatively, for evidentiary sanctions (“Motion to Compel”). ECF Docket No. (“Dkt.”) 157, Motion; Dkt. 158, Joinder. On January 3, 2019, the Court denied Defendants’ Motion to Compel without prejudice as

¹ The Court herein refers to Life Insurance Company of the Southwest (“LSW”), National Life Group (“NLG”), National Life Holding Company (“NLH”), NLV Financial Corporation (“NLV Financial”), National Life Insurance Company (“National Life”) collectively as the “National Defendants.” The Court herein refers to Sagikor Life Insurance Company (“SLIC”), Sagikor Financial Corporation Limited (“Sagikor Financial”), Sagikor Life, Inc. (“Sagikor Life”), and Sagikor USA collectively as the “Sagikor Defendants.” The National Defendants and Sagikor Defendants are collectively referred to herein as “Defendants.”

1 premature. Dkt. 160. Defendants have now filed a Motion for Reconsideration of
2 the January 3, 2018 Order (“Motion for Reconsideration”). Dkt. 174. For the
3 reasons discussed below, Defendants’ Motion for Reconsideration and Motion to
4 Compel are GRANTED.

5 II.

6 BACKGROUND

7 On June 13, 2017, Plaintiff initiated the instant action by filing two cases in
8 state court alleging bad faith rescission of life insurance policies. On August 3, 2017,
9 the Sagicor Defendants removed the action against them to this Court. Dkt. 1. On
10 August 7, 2017, the National Defendants removed the action against them to this
11 Court. EDCV 17-1585-JGB (KKx), Dkt. 1. On November 9, 2017, the cases against
12 the National and Sagicor Defendants were consolidated under the lead case number,
13 EDCV 17-1563-JGB (KKx). Dkt. 42.

14 On November 27, 2017, the National Defendants filed an Answer. Dkt. 36.
15 On December 13, 2017, the Sagicor Defendants filed an Answer. Dkt. 37.

16 On March 5, 2018, the Court held a scheduling conference and set a discovery
17 cut-off of October 29, 2018 and a jury trial for March 5, 2019. Dkts. 39, 40.

18 On September 18, 2018, the Court granted in part Plaintiff’s application to
19 amend the Scheduling Order and continued the discovery cut-off to December 31,
20 2018, the dispositive motion hearing cut-off to March 11, 2019, and the jury trial to
21 May 7, 2019. Dkt. 115.

22 On November 20, 2018, Defendants served Plaintiff with Request for
23 Production, Set Two, No. 7, which states: “Please produce all telephone records
24 reflecting calls made to/from (213) 605-2868 between February 1, 2015 through April
25 24, 2015.” Dkt. 157-1, Declaration of Jeffrey D. Farrow in support of Motion to
26 Compel (“Farrow MTC Decl.”), ¶ 22, Ex. N.

27 On December 21, 2018, Defendants filed the Motion to Compel Plaintiff to
28 produce Verizon cellular telephone records from February 1, 2015 through April 24,

1 2015 in response to Request for Production, Set Two, No.7, and, alternatively, for the
2 following evidentiary sanctions:

3 a. That Plaintiff cannot offer any evidence or testimony regarding
4 his communications with his father between February 1, 2015 through
5 April 24, 2015; and

6 b. That the finder of fact will be instructed as follows: “On
7 multiple occasions between February and April 2015, Daniel Jang
8 telephoned a telephone number in South Korea that was in the name of
9 a South Korean hospital.”

10 Dkts. 157, 158. On December 26, 2018, Plaintiff filed an Opposition stating service
11 had not been completed until November 28, 2018 and agreeing to respond by
12 December 28, 2018. Dkt. 159. Hence, on January 3, 2019, the Court denied
13 Defendants’ Motion to Compel without prejudice as premature because of Plaintiff’s
14 representation that he would respond to the discovery request by December 28, 2018.
15 Dkt. 160.

16 However, on January 7, 2019, Defendants’ counsel had not yet received any
17 response to Request for Production, Set Two, No. 7, and, therefore, sent Plaintiff’s
18 counsel an email requesting an emailed copy of the response. Dkt. 174-1, Declaration
19 of Jeffrey D. Farrow in support of Motion for Reconsideration (“Farrow Decl.”), ¶ 2,
20 Ex. A. On the morning of January 8, 2019, Plaintiff’s counsel responded to
21 Defendants’ counsel’s January 7, 2019 email by stating he did not believe Defendants’
22 claim to have not received a copy of the responses which were mailed “before”
23 December 28, 2018 and requiring Defendants to “conduct [a] reasonable inquiry”
24 before he would ask his assistant to re-send the responses. *Id.* ¶ 3, Ex. B.
25 Defendants’ counsel responded within fifteen minutes re-stating Defendants had not
26 received the responses and again requesting that Plaintiff email them copies of the
27 responses. *Id.* ¶ 4, Ex. C. In the evening of January 8, 2019, Plaintiff’s counsel
28 emailed Defendants’ counsel stating the parties had not agreed to electronic service of

1 discovery and refusing to send email copies of the response to Request for
2 Production, Set Two, No. 7, but agreeing to have his assistant re-send the response
3 via US mail. *Id.* ¶¶ 5-6, Exs. D, E.

4 On January 14, 2019, Defendants' counsel emailed Plaintiff's counsel informing
5 him Defendants still had not received a copy of the response to Request for
6 Production, Set Two, No. 7 and again requesting an emailed copy of the response. *Id.*
7 ¶ 8, Ex. G. Plaintiff did not respond.

8 Hence, on January 16, 2019, Defendants filed the instant Motion for
9 Reconsideration of the January 3, 2018 Order accompanied by a declaration from
10 Defendants' counsel stating Defendants still had not received a copy of the response
11 to Request for Production, Set Two, No. 7. Dkt. 174; Farrow Decl, ¶ 9.

12 On January 23, 2019, Plaintiff filed an Opposition. Dkt. 178. Plaintiff attached
13 to his Opposition declarations from Plaintiff's counsel (Dkt. 178-2), Plaintiff (Dkt.
14 178-3), and Plaintiff's counsel's assistant (Dkt. 178-4), along with a copy of a
15 verification of Plaintiff's Response to Request for Production, Set Two, No. 7 signed
16 by Plaintiff on December 26, 2018 (Dkt. 178-1, Ex. B) and a Proof of Service of
17 Plaintiff's Response to Request for Production, Set Two, No. 7 signed by Plaintiff's
18 counsel's assistant on December 28, 2018 (Dkt. 178-1, Ex. C). In the declaration of
19 Plaintiff's counsel's assistant, Seoyoung Yang, Plaintiff states for the first time that on
20 December 26, 2018, Plaintiff served a response to Request for Production, Set Two,
21 No. 7 by U.S. mail.² Dkt. 178-4, Declaration of Seoyoung Yang ("Yang Decl."), ¶ 3,
22 Ex. C.

23 On January 28, 2019, Defendants filed a Reply supported by a declaration from
24 Defendants' counsel stating Defendants still have not received a copy of the response
25 to Request for Production, Set Two, No. 7. Dkt. 180-1, Ex. B; Dkt. 180-1
26 Declaration of Jeffery Farrow ("Farrow Reply Decl."), ¶ 3.

27
28 ² Notably missing from Plaintiff's Opposition is a copy of the actual response to
Request for Production, Set Two, No. 7.

1 The matter thus stands submitted.

2 **III.**

3 **DISCUSSION**

4 **A. MOTION FOR RECONSIDERATION**

5 **1. Applicable Law**

6 Pursuant to Local Rule 7-18:

7 A motion for reconsideration of the decision on any motion may be
8 made only on the grounds of (a) a material difference in fact or law from
9 that presented to the Court before such decision that in the exercise of
10 reasonable diligence could not have been known to the party moving for
11 reconsideration at the time of such decision, or (b) the emergence of
12 new material facts or a change of law occurring after the time of such
13 decision, or (c) a manifest showing of a failure to consider material facts
14 presented to the Court before such decision.

15 L.R. 7-18.

16 **2. Analysis**

17 Here, in denying Defendants' Motion to Compel, the Court relied on Plaintiff's
18 representation that he would respond to Request for Production, Set Two by
19 December 28, 2018 (and the logical inference that Defendants would receive a
20 response shortly thereafter). Defendants provide new material facts that could not
21 have been known to them at the time of the Court's decision or occurred after the
22 time of the Court's decision. Specifically, Defendants still have not received a copy of
23 Plaintiff's response. Farrow Decl., ¶ 9; Farrow Reply Decl., ¶ 3. In addition, Plaintiff
24 has refused to email Defendants a copy of the response.

25 Hence, the Court finds reconsideration of the January 3, 2019 Order is
26 appropriate and necessary and, therefore, grants Defendants' Motion for
27 Reconsideration.

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1 **B. MOTION TO COMPEL**

2 **1. Applicable Law**

3 Federal Rule of Civil Procedure 26(b) provides that parties may obtain
4 discovery regarding:

5 any nonprivileged matter that is relevant to any party's claim or
6 defense and proportional to the needs of the case, considering the
7 importance of the issues at stake in the action, the amount in
8 controversy, the parties' relative access to relevant information, the
9 parties' resources, the importance of the discovery in resolving the
10 issues, and whether the burden or expense of the proposed discovery
11 outweighs its likely benefit.

12 Fed. R. Civ. P. 26(b)(1). Relevant information "need not be admissible in evidence to
13 be discoverable." *Id.* A court "must limit the frequency or extent of discovery
14 otherwise allowed" if "(i) the discovery sought is unreasonably cumulative or
15 duplicative, or can be obtained from some other source that is more convenient, less
16 burdensome, or less expensive; (ii) the party seeking discovery has had ample
17 opportunity to obtain the information by discovery in the action; or (iii) the proposed
18 discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P.
19 26(b)(2)(C).

20 "A party seeking discovery may move for an order compelling an answer, . . .
21 production, or inspection." Fed. R. Civ. P. 37(a)(3)(B)(iii), (iv).

22 **2. Analysis**

23 Here, the information sought by Defendants in Request for Production, Set
24 Two, No. 7 is highly relevant. Defendants seek Plaintiff's Verizon phone records for
25 a short three-month period that would reflect whether Plaintiff had communication
26 with his father and/or the South Korean Hospital during February 1 to April 24,
27 2015. Dkt. 174 at 9. Defendants argue such records are relevant to Plaintiff's claim
28 that his father was never at any medical facility in South Korea. *Id.* Plaintiff does not

1 appear to dispute relevance and in fact implicitly concedes relevance by arguing the
2 issue of whether he contacted his father during that period is case dispositive because
3 it will prove Plaintiff's father received medical treatment in South Korea. Dkt. 178 at
4 16. Moreover, Plaintiff does not claim production would be burdensome, nor does
5 the Court find it would be so.³ The Court, therefore, finds Defendants have satisfied
6 their burden to show production of the phone records is relevant and proportional to
7 the needs of the case. See Fed. R. Civ. P. 26(b).

8 In light of the declaration presented by Plaintiff that he served a response, the
9 Court cannot find Plaintiff has failed to respond at this time. However, Plaintiff's
10 counsel's refusal to ensure Defendants receipt of the response is not well taken.
11 Therefore, Plaintiff shall provide Defendants with a copy of the response to Request
12 for Production, Set Two, No. 7, without objection and including all responsive
13 documents, **by means to ensure** Defendants receive a copy **no later than 4:00 p.m.**
14 **on Monday, February 25, 2019.**⁴ Based on Plaintiff's claim to have served the
15 responses on December 26, 2018, he should have no difficulty meeting this deadline.
16 The Court strongly recommends email and/or personal service.⁵

17 C. EVIDENTIARY SANCTIONS

18 1. Applicable Law

19 When a party fails to obey an order to provide or permit discovery, Federal
20 Rule of Civil Procedure 37(b)(2)(A)(I) permits courts to issue an order "directing that
21 the matters embraced in the order or other designated facts be taken as established for
22

23 ³ Plaintiff has waived all objections to Request for Production, Set Two. Plaintiff
24 does not claim to have served objections, but rather a "response". See Dkt. 178-3,
25 Declaration of Daniel Jang, ¶ 3, Ex. B. Moreover, Plaintiff's failure to object to the
26 Request for Production, Set Two in his Opposition to Defendants' Motion to Compel
27 or Motion for Reconsideration is construed as waiver of any objections. L.R. 7-12.

28 ⁴ The discovery cut-off is accordingly extended for this limited purpose.

⁵ The Court recognizes that Defendants are interested in the metadata regarding when
Plaintiff created the documents to prove Plaintiff has deceived the Court. Defendants
argue in the Reply to the Motion for Reconsideration that Plaintiff has a history of
backdating documents. At this time, however, the Court's focus is ensuring
Defendants receive copies of critical documents to move this case towards resolution.

1 purposes of the action, as the prevailing party claims.” Fed. R. Civ. P. 37(b)(2)(A)(I).
2 Additionally, “[c]ourts are invested with inherent powers that are governed not by rule
3 or statute but by the control necessarily vested in courts to manage their own affairs
4 so as to achieve the orderly and expeditious disposition of cases.” Unigard Sec. Ins.
5 Co. v. Lakewood Eng’g & Mfg. Corp., 982 F.2d 363, 368 (9th Cir. 1992) (internal
6 quotation omitted). Those inherent powers include “the broad discretion to make
7 discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial.”
8 Id. (internal quotation and modification omitted).

9 To justify the imposition of case-dispositive sanctions, the Court must find that
10 the discovery violations were due to “willfulness, bad faith, or fault of the party.”
11 Commodity Futures Trading Commission v. Noble Metals International, Inc., 67 F.3d
12 766, 770-71 (9th Cir. 1995), cert. denied, 519 U.S. 815, 117 S. Ct. 64, 136 L. Ed. 2d 26
13 (1996) (citations and internal quotations omitted); see also Societe Internationale v.
14 Rogers, 357 U.S. 197, 212, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958). Disobedient
15 conduct not outside the control of the litigant is all that is required to demonstrate
16 willfulness, bad faith, or fault. Henry v. Gill Industries, Inc., 983 F.2d 943, 948-49
17 (9th Cir. 1993); see also Fair Hous. of Marin v. Combs, 285 F.3d 899, 905 (9th Cir.
18 2002) (same). In evaluating the propriety of sanctions, the Court considers “all
19 incidents of a party’s misconduct.” Adriana International Corp. v. Thoeren, 913 F.2d
20 1406, 1411 (9th Cir. 1990), cert. denied, 498 U.S. 1109, 111 S. Ct. 1019, 112 L. Ed. 2d
21 1100 (1991) (citation omitted).

22 The Ninth Circuit has articulated a five-part test for evaluating whether a
23 party’s requested evidentiary sanctions are appropriate: (1) the public’s interest in
24 expeditious resolution of litigation; (2) the court’s need to manage its dockets; (3) the
25 risk of prejudice to the party seeking sanctions; (4) the public policy favoring
26 disposition of cases on their merits; and (5) the availability of less drastic sanctions.
27 Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 348 (9th Cir. 1995).

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1 **2. Analysis**

2 In the event Plaintiff fails to comply with this Court's order regarding
3 production set forth above, the Court finds evidentiary sanctions are appropriate.
4 Although the declaration of Plaintiff's counsel's assistant, Seoyoung Yang, asserts
5 Plaintiff served a response to Defendants' Request for Production, Set Two, on
6 December 26, 2018, Yang Decl., ¶ 3, Ex. C, Defendants have not received a copy of
7 the response. Farrow Decl., ¶ 9. Moreover, despite Defendants having informed
8 Plaintiff on no less than three occasions that they have not received the responses and
9 request for Plaintiff to email the responses, Plaintiff has refused to do so. Most
10 recently Plaintiff failed to respond entirely to Defendants' January 14, 2019
11 communication.

12 Turning to the factors outlined by the Ninth Circuit, the first two factors --
13 public interest in expeditious resolution of litigation and the court's need to manage
14 its docket -- weigh in favor of evidentiary sanctions. Plaintiff has needlessly delayed
15 the action by refusing to ensure Defendants timely receive a copy of his response.
16 Plaintiff's refusal to produce documents which clearly exist and failure to abide by this
17 Court Order will prevent the expeditious resolution of litigation and hinders the
18 Court's ability to move this case toward disposition. See Carson Cheng v. AIM
19 Sports, Inc., No. CV10-3814-PSG (PLAx), 2011 WL 13175663, at *11 (C.D. Cal. Aug.
20 23, 2011) (granting evidentiary sanctions).

21 The third factor -- prejudice to Defendants -- also weighs in favor of
22 evidentiary sanctions. The fact discovery cut-off was December 31, 2018 and the
23 dispositive motion hearing cut-off is March 11, 2019. Dkt. 115. Plaintiff's refusal to
24 comply with his discovery obligations prejudices Defendants' ability to defend this
25 action and adequately prepare for trial. Id. (finding without the responsive
26 documents, "Plaintiffs are prejudiced and will have difficulty preparing their case for
27 trial").

1 The fourth factor -- resolution of cases on their merits -- always weighs against
2 default. See Dreith, 648 F.3d at 788. However, Plaintiff has been less than
3 forthcoming with his production of documents in this case, to the detriment of
4 Defendants, and at the risk of “interfer[ing] with the rightful decision of the case.”
5 Adriana Int’l Corp. v. Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990). Therefore, on
6 balance, the fourth factor weighs in favor of issuing evidentiary sanctions against
7 Plaintiff. See Carson Cheng, 2011 WL 13175663, at *11.

8 The fifth factor -- availability of less drastic sanctions -- also weighs in favor of
9 evidentiary sanctions. The record demonstrates Plaintiff has been given numerous
10 opportunities to comply with its discovery obligations and produce the responsive
11 records. In addition, the lesser sanction previously imposed by this Court on
12 September 10, 2018 – payment of Defendants’ reasonable expenses incurred in having
13 to oppose thirteen Motions to Compel – has been ignored. Hence, there is no reason
14 to believe that the imposition of lesser sanctions will be any more successful than in
15 the past. See Carson Cheng, 2011 WL 13175663, at *11 (finding evidentiary sanctions
16 were the appropriate next step consistent with the court’s “progressive discipline”
17 approach).

18 Finally, Plaintiff’s refusal to serve the discovery response in a manner to ensure
19 receipt by Defendants shows Plaintiff’s discovery violation is due to “willfulness, bad
20 faith, or fault of the party.” Commodity Futures Trading Commission, 67 F.3d at
21 770-71; Henry, 983 F.2d at 948-49; Fair Hous. of Marin, 285 F.3d at 905.

22 Therefore, the Court finds the evidentiary sanctions proposed by Defendants,
23 set forth below, will help to remedy some of the prejudice to Defendants caused by
24 Plaintiff’s failure to produce the documents responsive to Request for Production, Set
25 Two, No. 7.

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IV.

ORDER

IT IS THEREFORE ORDERED:

(1) Defendants' Motion for Reconsideration is GRANTED;

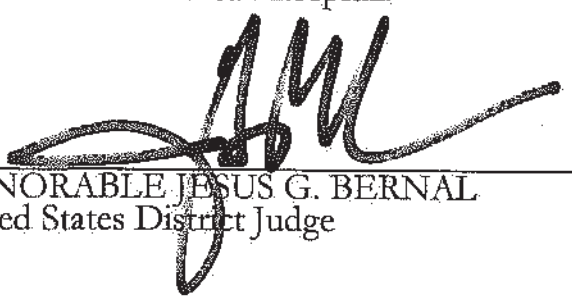
(2) Defendants' Motion to Compel is GRANTED; and

(3) (A) Plaintiff shall provide Defendants with a copy of the response to Request for Production, Set Two, No. 7, without objection and including all responsive documents, by means calculated to ensure Defendants receive a copy no later than 4:00 p.m. on Monday, February 25, 2019, and (B) if, by February 13, 2019 at 4:01 p.m., Plaintiff has not provided a copy of his response, including all telephone records responsive to the above request, the following evidentiary sanctions will automatically take effect:

i. Plaintiff cannot offer any evidence or testimony regarding his communications with his father between February 1, 2015 through April 24, 2015; and

ii. The finder of fact will be instructed as follows: "On multiple occasions between February and April 2015, Daniel Jang telephoned a telephone number in South Korea that was in the name of a South Korean hospital."

Dated: February 29, 2019


HONORABLE JESUS G. BERNAL
United States District Judge

Presented by:



KENLY KIYA KATO
United States Magistrate Judge