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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JENNIFER MARIE TUCKER,
Plaintiff,

Case No. 1:17-cv-01761-DAD-SKO

v.

AMCO INSURANCE COMPANY,
Defendant.

ORDER GRANTING MOTION TO
ENFORCE SUBPOENAS
(Doc. 28)

_____ /

ORDER

On June 26, 2019, Defendant filed a motion under Local Rule 251 to enforce subpoenas seeking Plaintiff’s medical records that were served on certain medical providers. (Doc. 28.) On July 17, 2019, pursuant to Local Rule 251(c), Defendant filed a “Statement of Discovery Disagreement Re AMCO’s Subpoenas Seeking Plaintiff’s Medical Records” to which Plaintiff contributed, but did not sign. (Doc. 32.) On July 18, 2019, Plaintiff filed a “Supplement to AMCO’s Statement of Discovery Disagreement Re AMCO’s Subpoenas Seeking Plaintiff’s Medical Records.” (Doc. 34.)

The Court reviewed preliminarily the filings and determined that the matter was suitable for decision without oral argument. Accordingly, the Court vacated the hearing set for July 24, 2019. (Doc. 33.) For the reasons stated below, the motion is granted.

1 **I. RELEVANT BACKGROUND**

2 **A. Procedural Background**

3 Plaintiff filed this case in Fresno County Superior Court on November 11, 2017, alleging
4 breach of contract and breach of the implied covenant of good faith and fair dealing. (Doc. 2 at 15–
5 32.) Defendant removed the case to this court on December 28, 2017. (Docs. 1, 2.) The complaint
6 alleges that Defendant issued an insurance policy to Plaintiff’s father covering his automobile
7 transmission shop, and Plaintiff’s father then passed away. (Doc. 2 at 16.) After Plaintiff’s father’s
8 death, tools were allegedly stolen from the shop, and Plaintiff alleges that Defendant wrongfully
9 refused to pay insurance benefits for her claim related to the stolen tools. (*See id.* at 17, 27–28.)
10 Plaintiff seeks damages for emotional distress caused by Defendant’s failure to pay insurance
11 benefits, and alleges she has “suffered emotional and mental distress and discomfort in an amount
12 not yet fully ascertained.” (*Id.* at 19, 30.)

13 On April 9, 2018, the Honorable Michael J. Seng¹ entered a Scheduling Order setting the
14 non-expert discovery deadline for December 4, 2018, the non-dispositive motions deadline for
15 January 18, 2019, the dispositive motions deadline for February 1, 2019, and a jury trial for August
16 20, 2019. (Doc. 11.) On October 26, 2018, at the parties’ request, the Court continued the non-
17 expert discovery deadline to February 4, 2019, the non-dispositive motions deadline to March 20,
18 2019, the dispositive motions deadline to April 2, 2019, and the trial to September 24, 2019. (Doc.
19 16.)

20 **B. Subpoenas to Medical Providers**

21 On February 4, 2019, Defendant served three Rule 45 subpoenas on medical providers,
22 including (1) Kaiser Permanente, First Street Medical Offices; (2) Kaiser Permanente, Fresno
23 Medical Center; and (3) Fresno Medical Center.² (Doc. 32 at 4–5.) Each of the three subpoenas
24 contained identical document requests stating the following:

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26 _____
27 ¹ Magistrate Judge Seng retired in 2018 and this case was reassigned from Magistrate Judge Seng to the undersigned
28 on April 19, 2018. (Doc. 12.)

² Defendant states that Plaintiff testified during her deposition that “she has a history of mental health issues, which predate her insurance claim to [Defendant]” and “identified medical providers who provided her with treatment for her mental health issues.” (Doc. 32 at 4.)

1 **REQUESTS FOR PRODUCTION**

2 **Request No. 1:**

3 Any and all DOCUMENTS and records pertaining to the care, treatment and
4 examination of PLAINTIFF relating to emotional distress, anxiety, or depression
5 by Dr. Dhillon, or any other provider at Fresno Medical Center, including but not
6 limited to, doctors’ reports, nurses’ reports, licensed clinical social workers’ reports
7 and notes, progress reports, medical, inpatient and outpatient charts and records,
8 emergency room and lab reports from January 1, 2010 to the present.

9 (Doc. 32 at 5.)

10 On February 6, 2019, Plaintiff objected to all three subpoenas as follows:

11 1. The subpoena is in violation of the District Court’s scheduling order
12 which requires all non-expert discovery to be completed by February 4, 2019. See
13 Exhibit “A” attached hereto [Scheduling Order filed April 9, 2018, at p. 2, ¶V – “The
14 parties are ordered to complete all discovery pertaining to non-experts on or before
15 December 4, 2018.”]; see also Exhibit “B” attached hereto [Stipulation to Continue
16 Discovery and Expert Disclosure Deadlines; Order, at pp. 2 – 3, - “The Scheduling
17 Order should be amended to set forth the following new deadlines for discovery and
18 expert disclosures, which extend those deadlines by two months” to February 4,
19 2019.]

20 2. Discovery served so that the responses are not due until after the cut-
21 off date is not enforceable; i.e. a motion to compel will be denied. See Draper v.
22 Coombs, 792 F.3d 915, 924 (9th Cir. 1986). The subject subpoena does seek [sic]
23 production until February 25, 2019, well after the discovery cut-off of February 4,
24 2019, and therefore is unenforceable.

25 3. The subpoena invades the privacy rights of JENNIFER MARIE
26 TUCKER as guaranteed by the California Constitution, Article I, § 1.

27 4. The documents requested are medical records protected from
28 disclosure by the physician-patient privilege and the provisions of the Health
Insurance Portability and Accountability Act relating to the confidential and
protected health information.

5. The subpoena seeks information and documents not relevant nor
reasonably calculated to lead to the discovery of admissible evidence.

6. The subpoena is overly broad and unduly burdensome.

(*Id.* at 5–6.) Plaintiff advised the medical providers that they were prohibited from complying with
the subpoenas “absent authorization from [Tucker’s counsel] or explicit Court order.” (Doc. 32 at
2, 11–12.) There is no indication that any of the three medical providers objected to or otherwise

1 responded to the subpoenas.

2 On June 26, 2019, Defendant filed its motion to enforce the subpoenas. (Doc. 28.)
3 Defendant's motion is now before the court.

4 II. DISCUSSION

5 A. Legal Standard

6 Pursuant to Rule 45 of the Federal Rules of Civil Procedure, a subpoena commanding the
7 production of documents requires the responding party to permit inspection or copying of the
8 materials. Fed. R. Civ. P. 45(a)(1)(D).

9 A nonparty served with a Rule 45 subpoena may challenge the subpoena in two ways: (1)
10 serving objections to the subpoena or (2) filing a motion to quash or modify the subpoena or for a
11 protective order. *See* Fed. R. Civ. P. 45(c)(2), (d). Following service of a subpoena, the nonparty
12 may serve objections “before the earlier of the time specified for compliance or 14 days after the
13 subpoena is served,” and if an objection is made, the serving party may move for an order
14 compelling production or inspection. Fed. R. Civ. P. 45(c)(2)(B). The nonparty may be held in
15 contempt for failing to obey the subpoena without adequate excuse. Fed. R. Civ. P. 45(e). Rule
16 45(d) specifies that a court may quash or modify a subpoena that

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

21 Fed. R. Civ. P. 45(d)(3)(A).

22 A party seeking to challenge a Rule 45 subpoena served on a nonparty cannot simply object
23 to the subpoena; the party must file a motion to quash or modify the subpoena for a protective order.
24 *See California Sportfishing Protection Alliance v. Chico Scrap Metal, Inc.*, 299 F.R.D. 638, 643
25 (E.D. Cal. 2014); *Clair v. Schlachter*, No. 2:13-cv-804-KJM-EFB P (TEMP), 2016 WL 2984107,
26 at *3–4 (E.D. Cal. May 23, 2016). However, a party generally has no standing even to quash a
27 subpoena served upon a nonparty, “except as to claims of privilege relating to the documents being
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1 sought.” *California Sportfishing*, 299 F.R.D. at 643. A party cannot, for example, quash a subpoena
2 served on a nonparty on the basis that the subpoena is overly broad or imposes an undue burden on
3 the nonparty. *See id.*; Fed. R. Civ. P. 45(d)(3)(A).

4 **B. Analysis**

5 **1. Enforcement of the Subpoenas**

6 Plaintiff contends Defendant’s motion to enforce the subpoenas should be denied because
7 the subpoenas were untimely served and the motion was untimely filed; the motion is improper
8 under Rule 45 as directed at Plaintiff, and the subpoenas are improper under Rule 45 because
9 Defendant failed to give Plaintiff prior notice; and Defendant failed to meet and confer prior to filing
10 the motion. (Doc. 32 at 13.) The Court will address each contention in turn.

11 **a. Timeliness of the Motion and the Subpoenas**

12
13 As an initial matter, the Court finds that Defendant’s motion is timely filed. The Scheduling
14 Order entered on April 9, 2018 states that “[a]ll non-dispositive pre-trial motions, including any
15 discovery motions, shall be filed no later than January 18, 2019.” (Doc. 11 at 3.) The court later
16 extended the non-dispositive motion filing deadline to June 26, 2019. (Doc. 27.) Defendant’s
17 motion was filed on June 26, 2019, and was therefore timely.

18
19 The Court further finds that the subpoenas themselves were timely served. The non-expert
20 discovery deadline, as extended by the Court’s October 26, 2018 Order, was February 4, 2019.
21 (Doc. 16 at 3.) There is no language in the Scheduling Order to suggest that subpoenas or other
22 discovery requests must be served in a manner that permits compliance prior to the non-expert
23 discovery deadline.³ Thus, as the subpoenas were served prior to the close of non-expert discovery,
24 the Court finds the subpoenas were timely served. *See Lin v. Win Woo Trading, LLC*, No. 14-cv-
25 02639-KAW, 2016 WL 661029, at *2 (N.D. Cal. Feb. 18, 2016).

26
27 ³ Magistrate Judge Seng’s Scheduling Order set the original non-expert discovery deadline for December 4, 2018, and
28 provided that all discovery motions were to be filed by January 18, 2019. (Doc. 11 at 2–3.) This implies that
compliance with discovery requests could be accomplished after December 4, 2018 non-expert discovery deadline and
before the January 18, 2019 discovery motion deadline and, if the compliance was inadequate, could be addressed in a
discovery motion filed by the January 18, 2019 deadline. (Doc. 11 at 2–3.)

1 **b. Alleged Procedural Defects**

2 As to Plaintiff’s contention that the subpoenas were procedurally defective because
3 Defendant failed to give Plaintiff prior notice before serving them, in violation of Rule 45(a)(4), the
4 Court finds that any violation of the notice requirement does not prevent enforcement of the
5 subpoenas. Rule 45 provides that “[i]f the subpoena commands the production of documents,
6 electronically stored information, or tangible things or the inspection of premise before trial, then
7 before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be
8 serve on each party.” Fed. R. Civ. P. 45(a)(4). “[T]he point of prior notice is to allow the opposing
9 party an opportunity to object or to serve a subpoena for additional materials.” *Fujikura Ltd. v.*
10 *Finisar Corp.*, No. 15-mc-80110-HRL (JSC), 2015 WL 5782351, at *4 (N.D. Cal. Oct. 5, 2015);
11 *see also Bonzani v. Shinseki*, No. 2:11-cv-00007-EFB, 2014 WL 2521849, at *3 (E.D. Cal. June 4,
12 2014). If opposing counsel receives notice “with sufficient time to object, they are not prejudiced
13 by a violation of Rule 45 notice requirement.” *Fujikura*, 2015 WL 5782351, at *4.

14 Here, Plaintiff served improper objections to the subpoenas on February 6, 2019—two days
15 after the subpoenas were served on the medical providers. (Doc. 32 at 7.) Thus, Plaintiff was not
16 prejudiced by any violation of Rule 45’s notice requirement, and the Court finds any violation of
17 the notice requirement does not prevent enforcement of the subpoenas. *See Fujikura*, 2015 WL
18 5782351, at *4.

19 Next, the Court is unconvinced by Plaintiff’s contention that the motion should be denied
20 because it is procedurally defective as addressed to Plaintiff instead of the medical providers that
21 were served with the subpoenas. As noted above, under Rule 45, a person commanded to produce
22 documents may serve written objections to the subpoena. Fed. R. Civ. P. 45(d)(2)(B). After written
23 objections are served, the party serving the subpoena may not access the requested documents absent
24 a court order, “but may at any time move for an order to compel document production.” *Id.*; *see*
25 *also* Fed. R. Civ. P. 37(a); *Clair*, 2016 WL 2984107, at *4. The court “may hold in contempt a
26 person, who having been served, fails without adequate excuse to obey the subpoena or an order
27 related to it.” Fed. R. Civ. P. 45(g). “District courts have ‘broad discretion to manage discovery
28 and to control the course of litigation under Federal Rule of Civil Procedure 16.’” *Hunt v. County*

1 of Orange, 672 F.3d 606, 616 (9th Cir. 2012) (quoting *Avila v. Willits Env'tl. Remediation Trust*, 633
2 F.3d 828, 833 (9th Cir. 2011)).

3 Here, Defendant served the subpoenas on the three medical providers on February 4, 2019,
4 and Plaintiff served objections to the subpoenas on February 6, 2019. (Doc. 32 at 2.) Defendant
5 represents, and Plaintiff does not dispute,⁴ that contemporaneously with serving her objections,
6 Plaintiff “prevented the medical providers from producing documents” and advised the medical
7 providers that they were prohibited from producing documents without a court order or
8 “authorization from [Plaintiff’s counsel].” Doc. 32 at 12–13. Thus, Defendant states it is not
9 seeking an order compelling the medical providers to produce documents or holding the medical
10 providers in contempt, but simply an order enforcing the subpoenas and “overruling [Plaintiff’s]
11 objections”⁵ such that the medical providers will be permitted to produce documents responsive to
12 the subpoenas. (Doc. 32 at 12.) Thus, the Court finds that under the circumstances of this case, and
13 based on Defendant’s representations to the Court, the motion is properly filed.

14 **c. Meet and Confer Efforts**

15 Finally, the Court will not deny the motion based on Plaintiff’s contention that Defendant
16 failed to engage in the meet-and-confer process prior to filing the motion. The parties’ filings reflect
17 that Defendant attempted to meet and confer with Plaintiff regarding this motion first on June 25,
18 2019, and then continued to reach out to Plaintiff’s counsel to no avail until July 16, 2019, when
19 Plaintiff’s counsel responded. (Doc. 32 at 12; *see also* Doc. 32-1.) There appears to be some fault
20 on both sides for the lack of communication, and the Court will not deny the motion on that basis.

21
22 **2. Plaintiff’s Objections to the Subpoenas**

23 As noted above, Plaintiff also objected to the subpoenas themselves on various grounds on
24 February 6, 2019, and the parties submitted the language of Plaintiff’s objections with the Joint
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⁴ Although Plaintiff’s counsel did not sign the Joint Statement of Discovery Dispute, he filed a “Supplement to
28 AMCO’s Statement of Discovery Disagreement Re AMCO’s Subpoenas Seeking Plaintiff’s Medical Records” on July
18, 2019, in which he addressed any issues with the representations in the Joint Statement. (*See* Doc. 34.)

⁵ The Court explained above why an order “overruling” Plaintiff’s improper objections is inappropriate.

1 Statement of Discovery Dispute. (See Doc. 32 at 5–6.) Plaintiff’s objections are procedurally
2 improper, as Plaintiff is a party seeking to challenge a Rule 45 subpoena served on a nonparty, and
3 her challenges to the subpoenas are more appropriately asserted in a motion to quash. See *California*
4 *Sportfishing*, 299 F.R.D. at 643. However, for the sake of judicial economy the Court will construe
5 the objections in the context of a motion to quash and will address their substance.⁶

6 First, Plaintiff’s first two objections—that the subpoenas were untimely and improperly
7 served under the Scheduling Order—and her objections that the subpoenas seek irrelevant
8 information and are unduly burdensome and overly broad, fail because Plaintiff lacks standing to
9 challenge the subpoenas on those bases. See *California Sportfishing*, 299 F.R.D. at 643 (“a party
10 has no standing to quash a subpoena served upon a third party, except as to claims of privilege
11 relating to the documents being sought.”).

12 As to Plaintiff’s objections that the requested information is privacy-protected under
13 California law, privileged, or confidential health information protected by the Health Insurance
14 Portability and Accountability Act (HIPAA), the Court finds that Plaintiff’s challenges on those
15 bases lack merit. Plaintiff waived any privilege related to her mental health records from the
16 relevant time period by seeking damages for emotional distress and alleging she has “suffered
17 emotional and mental distress and discomfort in an amount not yet fully ascertained.” (Doc. 2 at
18 19, 30); see *E.E.O.C. v. California Psychiatric Transitions*, 258 F.R.D. 391, 399 (E.D. Cal. 2009).
19 Plaintiff also waived her privacy rights under California law related to the requested information by
20 filing this case and alleging emotional distress. See *Vinson v. Superior Court*, 43 Cal.3d 833, 842
21 (1987) (“Plaintiff’s present mental and emotional condition is directly relevant to her claim and
22 essential to a fair resolution of her suit; she has waived her right to privacy in this respect by alleging
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27 ⁶ In the motion, Defendant requests an order enforcing the subpoenas and requests that the Court “overrule” Plaintiff’s
28 objections to the subpoenas in the process. (Doc. 28 at 1–2.) As Plaintiff’s objections were improperly asserted in the
first place, and are not properly before the Court, the Court cannot “sustain” or “overrule” the improper objections, but
can only determine the appropriateness of enforcing the subpoenas.

1 continuing mental ailments.”).

2 Plaintiff’s challenge based on HIPPA similarly fails. “HIPPA permits disclosure of
3 protected health information pursuant to a court order or discovery request when the ‘healthcare
4 provider receives satisfactory assurance from the party seeking the information that reasonable
5 efforts have been made by such party to secure a qualified protective order.” *Allen v. Woodford*,
6 No. CV-F-05-1104 OWW LJO, 2007 WL 309485, at *5 (E.D. Cal. Jan. 30, 2007) (citing 45 C.F.R.
7 § 164.512(1)(e)(ii)(b)). A protective order is “HIPPA compliant” if it (1) prohibits use or disclose
8 of the protected health information “for any purpose outside of the litigation” and (2) requires that
9 the information be destroyed at the end of the case. *Lopez v. Flores*, No. 1:08-cv-01975-LJO-JLT,
10 2013 WL 1151948, at *5 (E.D. Cal. Mar. 19, 2013) (citing 45 C.F.R. § 164.512(1)(e)(v)). Here, the
11 Court entered a qualified protective order meeting both those criteria on April 5, 2018, (Doc. 9), and
12 Defendant has agreed to stipulate that any records produced by the medical providers are covered
13 by the protective order. (Doc. 32 at 8.)

14
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16 **III. CONCLUSION AND ORDER**

17 Based on the foregoing, it is HEREBY ORDERED:

18 Defendant’s motion to enforce subpoenas, (Doc. 28), is GRANTED. The February 4, 2019
19 subpoenas served on Kaiser Permanente, First Street Medical Offices; Kaiser Permanente, Fresno
20 Medical Center; and Fresno Medical Center, SHALL be enforced.

21
22 IT IS SO ORDERED.

23 Dated: August 8, 2019

24 */s/ Sheila K. Oberto*
25 UNITED STATES MAGISTRATE JUDGE