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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT C. K. PENG,

Plaintiff,

v.

NORTHWESTERN MUTUAL LIFE
INSURANCE CO.,

Defendant.

Case No. 17-cv-01760-SI

ORDER RE DISCOVERY DISPUTE

Re: Dkt. Nos. 25, 26, 27

In this insurance action, plaintiff Robert C. K. Peng alleges claims for breach of contract and breach of the covenant of good faith and fair dealing against defendant Northwestern Mutual Life Insurance Company for its handling of his claims for benefits under three “regular occupation” disability insurance policies. Amended Complaint (Dkt. No. 12). Plaintiff seeks *inter alia* an award of past disability benefits, future disability benefits until his policies terminate, and emotional distress damages. Dkt. No. 24-1 at 5-6. Among other affirmative defenses, defendant alleges that plaintiff “fraudulently misrepresented and or concealed material information in his application for the insurance coverage issued by Northwestern Mutual such that the coverage is subject to rescission.” Answer (Dkt. No. 17). Specifically, defendant claims that plaintiff “denied any psychiatric diagnosis and any mental health treatment in the past ten years” on his February 8, 1996 application for a disability insurance policy. Dkt. No. 26-1 at 2-4.

Now before the Court is the parties’ first discovery dispute, which was discussed during the July 7, 2017 case management conference. Dkt. Nos. 25, 26, 27.¹ Plaintiff seeks to quash or

¹ On July 3, 2017, a “joint” statement of discovery dispute was filed by plaintiff. Dkt. No. 25. However, on July 6, 2017, defense counsel filed a declaration stating that she did not authorize the version of the dispute that was filed, and attached as an exhibit the version that she purportedly did authorize. Dkt. No. 26. Plaintiff’s counsel then filed a declaration explaining his

1 modify several subpoenas served by defendant on non-party Kaiser Permanente.² Dkt. No. 25.
2 According to the parties, these subpoenas seek “all psychiatric documents,” “all psychological,
3 psychotherapy and/or counseling records,” “all medical records,” “all medication and prescription
4 records,” “all communications,” and “billing and payment records” related to plaintiff from
5 “January 1, 2012 to the present,” and “from on or prior to February 8, 1996.” Dkt. No. 25 at 2;
6 Dkt. No. 26-1 at 1.

7 “[P]re-trial discovery is ordinarily ‘accorded a broad and liberal treatment.’” *Shoen v.*
8 *Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993). “Parties may obtain discovery regarding any
9 nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs
10 of the case Information within this scope of discovery need not be admissible in evidence to
11 be discoverable.” Fed. R. Civ. P. 26(b)(1). A court must limit the scope of discovery when:

- 12 (i) the discovery sought is unreasonably cumulative or duplicative,
13 or can be obtained from some other source that is more convenient,
14 less burdensome, or less expensive;
- 15 (ii) the party seeking discovery has had ample opportunity to obtain
16 the information by discovery in the action; or
- 17 (iii) the proposed discovery is outside the scope permitted by Rule
18 26(b)(1).

19 Fed. R. Civ. P. 26(b)(2)(C).

20 Pursuant to Federal Rule of Civil Procedure 45(a)(1)(C), a party may serve upon a non-
21 party a subpoena, commanding the non-party to produce documents. Upon receipt of the
22 subpoena, the non-party may file a motion to quash or modify the subpoena with the issuing court.
23 Fed. R. Civ. P. 45(d)(3); *S.E.C. v. CMKM Diamonds, Inc.*, 656 F.3d 829, 832 (9th Cir. 2011).
24 “Ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a
25 party to the action, unless the objecting party claims some personal right or privilege with regard

26 version of events. Dkt. No. 27. Under these circumstances, the Court treats docket number 25 as
27 plaintiff’s statement and docket number 26-1 as defendant’s statement. In the future, the parties
28 shall meet and confer telephonically or in person before filing a joint discovery dispute pursuant to
the Court’s standing order.

² At the CMC, the parties stated that there are nine subpoenas to various Kaiser facilities,
but none were produced to the Court.

1 to the documents sought.” *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 973 (C.D.
2 Cal. 2010). Under Rule 45(d)(3), the district court must quash or modify a subpoena that:

- 3 (i) fails to allow a reasonable time to comply;
- 4 (ii) requires a person to comply beyond the geographical limits
5 specified in Rule 45(c);
- 6 (iii) requires disclosure of privileged or other protected matter, if no
7 exception or waiver applies; or
- 8 (iv) subjects a person to undue burden.

9 Fed. R. Civ. P. 45(d)(3)(A). The party seeking to quash a subpoena bears the “burden of
10 persuasion.” *In re Apple Inc.*, No. 12-mc-80013 JW, 2012 WL 1570043, at *1 (N.D. Cal. May 2,
11 2012); *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005).

12 As to the records from “January 1, 2012 to the present,” the Court first determines whether
13 the information sought is relevant. *See* Fed. R. Civ. P. 26(b). Plaintiff argues that this information
14 is not relevant because: (1) his claims are based on a physical, rather than mental, disability; and
15 (2) whether defendant’s conduct was reasonable is purportedly “determined on the basis of the
16 information known or reasonably available to it at the time of termination.” Dkt. No. 25 at 3
17 (citing *Austero v. National Casualty Co. of Detroit, Michigan*, 84 Cal. App. 3d 1, 32 (1978);
18 *Wilson v. 21st Century Ins. Co.*, 42 Cal.4th 713 (2007)). Defendant, on the other hand, contends
19 that the requested information is relevant to plaintiff’s claims for ongoing disability benefits and
20 emotional distress damages. Dkt. No. 26-1 at 4. It also claims that it tendered to plaintiff payment
21 of disability benefits “explicitly based on the evaluation of both his physical and psychiatric
22 conditions,” and that plaintiff previously authorized the disclosure of his psychiatric records. *Id.*
23 The Court agrees with defendant that the requested records are relevant.

24 Next, the Court examines whether the sought information is privileged. Based on the cases
25 cited by plaintiff, it appears that he is claiming the psychotherapist-patient privilege. Because this
26 case arises under diversity jurisdiction, state law governs privilege. *See* Fed. R. Evid. 501.
27 California law provides a privilege for confidential communications between a patient and his
28 psychotherapist. Cal. Evid. Code § 1014. However, “[t]here is no privilege . . . as to a

1 communication relevant to an issue concerning the mental or emotional condition of the patient if
2 such issue has been tendered by . . . [t]he patient.” Cal. Evid. Code § 1016.

3 Also, the California Constitution affords a broad right of privacy. Cal. Const. art. I, § 1.
4 “This right is ‘interrelated’ with, but is ‘broader’ than the psychotherapist-patient privilege; the
5 latter has been called ‘one aspect of the [constitutional] right of privacy.’” *Smith v. Equinox*
6 *Holdings, Inc.*, No. 14-CV-00846-LB, 2015 WL 628361, at *2 (N.D. Cal. Feb. 12, 2015) (citing
7 *Davis v. Super. Ct.*, 7 Cal. App. 4th 1008, 1013 (1992)). The right to privacy “may be abridged to
8 accommodate a compelling public interest,” such as “the historically important state interest in
9 facilitating the ascertainment of truth in connection with legal proceedings.” *Id.* (internal citations
10 omitted).

11 Plaintiff argues that he has not waived the privilege by bringing a “garden variety claim for
12 emotional distress damages because he does not intend to introduce physician testimony or present
13 evidence regarding any treatment.” Dkt. No. 25 at 2-3. The Court, however, finds that plaintiff
14 has put his medical records, including his psychiatric records, sufficiently at issue to waive the
15 privilege by seeking an award of past and future disability benefits. Therefore, the requested
16 records from January 1, 2012 to the present are discoverable. Additionally, concerning the records
17 sought “from on and prior to February 8, 1996,” plaintiff agreed during the July 7, 2017 CMC to
18 the production of records from the 10 years before his February 8, 1996 application. In light of
19 plaintiff’s agreement and defendant’s claim that the application asked for 10 years of information,
20 the Court finds that production of records from the 10 years leading up to the application is also
21 warranted.

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In sum, the Court declines to quash the subpoenas, but modifies the dates for the requested information to “January 1, 2012 to the present date, and from on or 10 years prior to February 8, 1996.” The parties shall designate the materials produced pursuant to the subpoenas as confidential. Lastly, the Court notes that this order determines only that the requested documents are discoverable; it does not decide whether such documents are ultimately admissible.

IT IS SO ORDERED.

Dated: July 14, 2017



SUSAN ILLSTON
United States District Judge