UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUAN CARLOS VERA , Plaintiff, vs. JAMES O'KEEFE III, et al., Defendants.	CASE NO. 10cv1422-L (MDD) ORDER DENYING PLAINTIFF'S MOTION TO QUASH THIRD PARTY SUBPOENAS OR FOR A PROTECTIVE ORDER [DOC. NO. 69]

Before the Court is Plaintiff's motion to quash third party subpoenas or, in the alternative, for a protective order, filed on March 12, 2012. (Doc. No. 69). Defendant Giles responded on March 15, 2012. (Doc. No. 71). The subpoenas were issued pursuant to Fed.R.Civ.P. 45 for the deposition testimony of Mr. Acosta and Mr. Lagstein. The subpoena for Mr. Lagstein included a demand for production of documents. The depositions are scheduled for Monday, March 19, 2012, in San Diego.

Plaintiff asserts that his counsel was not given adequate notice of the depositions, is not available on March 19 and notified counsel for Defendants of his unavailability on that date prior to the date being selected. Defendant claims that the notice provided was adequate, that counsel for Plaintiff did not specifically exclude March 19 prior to its selection and that, in any event, Plaintiff lacks standing to move to quash the subpoenas under Rule 45(c)(3). Plaintiff and Defendant have submitted copies of their

correspondence as exhibits in support of their respective positions. For the reasons provided below, Plaintiff's motion is **DENIED**.

Discussion

As a preliminary matter, the Court finds that Plaintiff lacks standing to quash the subpoenas under Rule 45. Rule 45(c)(3) governs motions to quash or modify a subpoena. It provides that a court must modify or quash a subpoena that fails to allow a reasonable time to comply; requires a non-party to travel more than 100 miles (except for trial within the state); requires disclosure of privileged materials; or, subjects a person to undue burden. *See* Fed.R.Civ.P. 45(c)(3)(A)(i-iv). The Rule also provides for the circumstances in which a court may modify or quash a subpoena. Those circumstances are when the subpoena requires disclosure of trade secrets; disclosure of certain expert opinions; or, requires a non-party to incur substantial expense to travel more than 100 miles to attend a trial. *See* Rule 45(c)(3)(B)(i-iii).

Courts have consistently provided that, as a general rule, "a party has no standing to quash a subpoena served upon a third party, except as to privilege." *See, e.g. Deployment Medicine Consultants, Inc., v. Pipes, et al.,* 2011 WL 811579 *2 (S.D. Cal. March 2, 2011); *In re Remec, Inc. Securities Litigation,* 2008 WL 2282647 *2 (S.D. Cal. May 30, 2008). Plaintiff has not alleged that the taking of these depositions nor the disclosure of the attendant subpoenaed materials involve disclosure of privileged or private information or otherwise imposes any burden within the scope of Rule 45(c)(3). Accordingly, Plaintiff lacks standing to move to quash these subpoenas.

Plaintiff also claims to have received inadequate notice of the depositions, under Rule 45, relying upon Rule 45(b)(1), which requires that prior to serving a subpoena requiring the production of documents, a party must provide notice to all other parties. In this case, Plaintiff was notified of the subpoenas, one for deposition and one for deposition with production of documents, after they were served. Defendant claims that the pre-serving notice requirement of Rule 45(b)(1) applies only where the subpoena seeks production of documents independently of a deposition relying upon the Advisory

Committee Notes to the 1991 Amendments to Rule 45. Defendant further asserts that the notice of deposition required under Rule 30(b), which includes a provision regarding the simultaneous production of documents, is all that is required.

The Court finds that Defendant has the better of the argument. The Advisory Committee Notes to the 1991 Amendments, which added the notice requirement to Rule 45(b)(1), states:

> A provision requiring service of prior notice pursuant to Rule 5 of compulsory pretrial production or inspection has been added to paragraph (b)(1). The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things. *Such additional notice is not needed with respect to a deposition because of the notice imposed by rule 30 or 31.* But when production or inspection is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced.

(Emphasis added). Accordingly, the Court finds that Plaintiff was not entitled to pre-service notice of the deposition subpoena issued to Mr. Lagstein which also required the simultaneous production of documents. Plaintiff's further argument, that he was entitled to 14 days notice of the Lagstein deposition under Rule 45(c)(2)(B) is similarly unavailing. By its terms, the Rule provides 14 days for the person commanded to produce documents - Mr. Lagstein - to object to the production. He has not done so and, as discussed above, Plaintiff is without standing to move to quash or modify the Lagstein subpoena.

Plaintiff also claims that he received inadequate notice of the depositions under Rule 30(b). Rule 30(b) requires "reasonable written notice" to every other party. The notice here was provided on March 7, 2012, twelve (12) days prior to the scheduled depositions on March 19, 2012. The Court finds that there was considerable discussion between counsel about scheduling all of the San Diego depositions in the same time period. The deposition of Plaintiff is scheduled for March 20, 2012, in San Diego. Defendant asserts that the notice was reasonable.

This Court finds that twelve days notice of the depositions of these third-party witnesses, neither of which is asserted to be lengthy or complex, is sufficient notice under the Rule.

More troubling is Plaintiff's motion for a protective order. Regardless of the Court's rulings regarding compliance with Rules 45 and 30, the Court has the authority under Rule 26(c)(1) to enter orders, for good cause, to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. Plaintiff claims that Defendant was on notice that Plaintiff's counsel was not available on March 19 and that the Court should not condone this type of oppressive behavior. Defendant claims that it was not informed of counsel's unavailability until after notifying counsel of the depositions.

Plaintiff's counsel asserts that he told counsel for Defendants that he would not be available on March 19 when he proposed to them, by email, various dates in February, March and April for the deposition of Plaintiff. According to counsel for Plaintiff, the dates that he proposed were February 20, 24; March 22, 23, 26, 27, 29 and 30; and April 3-5. The email was not produced. Defendant claims that the first notice she received of counsel's unavailability on March 19 was by letter dated March 7. (Doc. No. 71, Exh. 9). The letter supports the view that counsel for Plaintiff did not previously notify counsel for Defendants of his unavailability on March 19. Specifically, in his letter, counsel for Plaintiff stated: "I am informed that you subpoenaed Mr. Lagstein for a deposition on March 19, 2012. *No one had consulted me regarding my availability on that date.*" (Emphasis added). Had counsel for Plaintiff previously told counsel for Defendants that he was not available on the 19th, it would have been logical to remind them of it in his letter.

Moreover, if counsel for Plaintiff is claiming that by not including March 19 as an available date for the deposition of Plaintiff he impliedly was putting counsel for Defendants on notice of his unavailability, that assertion is undermined by the fact that the deposition of Plaintiff later was scheduled for March 20, a date also not

mentioned in the February 13 email. No objection has been raised regarding the deposition on the 20th.

Finally, a review of the docket and correspondence reveals that counsel for Plaintiff has had co-counsel in this case. Plaintiff's firm is identified as Iredale & Yoo. Attorney Julia Yoo has appeared with Mr. Iredale according to the docket in this case. (Doc. Nos. 14, 17, 35). Ms. Yoo appears to have authored and sent the email agreeing to the deposition of Plaintiff on March 20. (Doc. No. 71, Exh. 8). Plaintiff's counsel has not explained why she cannot cover these depositions on March 19.

Accordingly, the Court does not find good cause to enter a protective order in this case requiring the depositions of Messrs. Lagstein and Acosta to be rescheduled.

Conclusion

For the foregoing reasons, Plaintiff's motion to quash or for a protective order is **DENIED**. The depositions scheduled for March 19, 2012, will proceed absent an Order to the contrary from the District Judge assigned to this case. Merely lodging an objection to this Order will not serve to stay the depositions.

IT IS SO ORDERED.

DATED: March 16, 2012

Hon. Mitchell D. Dembin
U.S. Magistrate Judge