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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In the matter of the Complaint of  
MARK S. FRANCIS and WENDY P.  
FRANCIS, as owners of the vessel  
"Fortuna,"  
For exoneration from, or limitation of,  
liability.

Case No.: 16cv1873 H (JMA)

**ORDER COMPELLING  
AQUANEERING, INC. TO COMPLY  
WITH SUBPOENA [ECF NO. 39]**

Presently before the Court is an Ex Parte Application for an Order Compelling Compliance with Third Party Subpoena filed by Claimant-in-Limitation Dale Anderson ("Anderson"), in which Anderson seeks an order compelling third-party Aquaneering, Inc. ("Aquaneering") to comply with his subpoena for the employment records of Bradley D. Tobias ("Tobias"). (ECF No. 39.) Plaintiffs-in-Limitation Mark S. Francis and Wendy P. Francis ("the Francises") filed a response to the application (ECF No. 44), as did Aquaneering (ECF No. 45).

For the reasons set forth below, the Court GRANTS Anderson's ex parte application and ORDERS Aquaneering to comply with the subpoena.

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1 **I. BACKGROUND**

2 The following facts are taken from the Complaint in this matter. On  
3 February 20, 2016, the Francises, the owners of the vessel known as *Fortuna*,  
4 permitted Tobias to take their vessel for his personal use. Also on board were  
5 Tobias's friends, Anderson and Claimant Tatiana Sancheeva. At 6:00 p.m., the  
6 vessel was underway in San Diego Bay, having departed Coronado Landing and  
7 heading toward Shelter Island. While the vessel was transiting in the bay in a  
8 north direction, it struck another vessel, *Hallyon*, owned by Claimant Jason  
9 Anderson. Tobias was ejected from the vessel, which continued its trajectory  
10 and eventually crashed into a chain link fence and rock riprap along the west  
11 shoreline of the U.S. Coast Guard base, with the passengers still on board. The  
12 accident resulted in damage to both vessels and personal injuries to the  
13 passengers. The Francises claim the benefits of exoneration from or limitation of  
14 liability provided for in the Limitation of Liability Act, 46 U.S.C. § 30501 et seq.  
15 The post-casualty value of *Fortuna* is \$7,000. See Compl., ECF No. 1.

16 Anderson and his wife, Ana Anderson, assert a claim of general maritime  
17 negligence against the Francises and Tobias. See Answer, ECF No. 10. The  
18 Andersons contend the accident was caused by the recklessness and negligence  
19 of Tobias, as operator of the *Fortuna*, and that his conduct was in the privity and  
20 knowledge of the Francises. They allege Tobias suffered from alcoholism and a  
21 debilitating disease, multiple sclerosis, which was known to the Francises, and  
22 that he consumed alcoholic beverages the afternoon and evening prior to the  
23 accident. They further assert that Tobias directed the *Fortuna* to the A-9  
24 anchorage, which was full of anchored vessels and is not the route one would  
25 take to Shelter Island. Tobias was allegedly driving at a high rate of speed when  
26 the *Fortuna* collided with the *Hallyon*, which was anchored and unoccupied at the  
27 time. Anderson was thrown from his seat on impact, and sustained major trauma  
28 including an open head wound, fractures, hematomas, a broken jaw, and several

1 facial fractures. Anderson's medical expenses to date exceed \$1,000,000, and  
2 future medical care is anticipated. Id.

3 On June 23, 2017, Anderson served a subpoena upon the custodian of  
4 records for Aquaneering, Tobias's employer, commanding the production of the  
5 following by July 11, 2017:

6 Any and all employment records (with the exception of any financial  
7 related information) from any and all dates pertaining to: Bradley  
8 David Tobias, DOB: September 2, 1973, including, but not limited to,  
9 the following: his personnel file; employment application; worker's  
10 compensation information (excluding any financial information);  
11 termination records; background checks or investigation information;  
12 reprimands; write-ups; disciplinary actions; complaints; and,  
13 correspondence relating to Mr. Tobias's health (including, but not  
14 limited to, correspondence related to Mr. Tobias's diagnosis of  
15 multiple sclerosis and/or affective disorder), his employment status  
16 and/or Mr. Tobias's use of drugs and/or alcohol.

17 Griffin Decl., Ex. O. The Francises are the owners and directors of Aquaneering.  
18 Pls.' Statement of Facts in Supp. of MSJ, ECF No. 38-2, No. 2. On July 11,  
19 2017, counsel representing Aquaneering in connection with the subpoena sent a  
20 letter advising that Aquaneering could not unilaterally waive Tobias's privacy  
21 rights in his personnel file. Griffin Decl., Ex. Q. Aquaneering's counsel had been  
22 unable to contact Tobias regarding his willingness to waive his privacy rights due  
23 to his being incarcerated due to a felony conviction relating to the subject  
24 accident. Id., ¶ 3 & Ex. Q. Anderson's counsel sent Tobias a copy of the  
25 subpoena on July 28, 2017, after he had been released from custody and had  
26 resumed living on his boat. Id., ¶ 9. Anderson's counsel requested that Tobias  
27 respond with any objections within 14 days, but no objection was received. Id.  
28 Anderson's counsel spoke with Tobias in person at a restitution hearing on  
August 1, 2017 and via telephone on August 17, 2017; both times, Tobias  
indicated he wanted to confer with Mr. Francis before signing an authorization to

1 release his Aquaneering employment file. Id., ¶ 10. Anderson’s counsel  
2 attempted to contact Tobias by telephone approximately 10-15 times after  
3 issuance of the subpoena to request that he authorize the release of his records  
4 to no avail. Id., ¶ 14. On October 18, 2017, Anderson’s counsel left a final  
5 message for Tobias informing him that the instant motion would be filed and  
6 requesting that he inform counsel whether he had any objections to the  
7 subpoena by October 20, 2017. Id. Anderson’s counsel does not know whether  
8 Tobias ever spoke with Mr. Francis about the matter or if Mr. Francis instructed  
9 Tobias to not execute the release. Id., ¶ 15.

## 11 **II. LEGAL STANDARDS**

12 Discovery is purposefully broad under the Federal Rules of Civil Procedure.  
13 Each party generally has the right to discover “any nonprivileged matter that is  
14 relevant to any party’s claim or defense and proportional to the needs of the  
15 case.” Fed. R. Civ. P. 26(b)(1). Information within the scope of discovery need  
16 not be admissible in evidence in order to be discoverable. Id. Rule 45 allows for  
17 the issuance of subpoenas to produce documents, electronically stored  
18 information, or tangible things. Fed. R. Civ. P. 45(a)(1)(C). A person  
19 commanded to produce documents pursuant to a subpoena may serve on the  
20 party or attorney designated in the subpoena a written objection before the  
21 earlier of the time specified for compliance or 14 days after the subpoena is  
22 served. Fed. R. Civ. P. 45(d)(2)(B). A person subject to or affected by a  
23 subpoena may move to quash or modify a subpoena if it requires disclosure of  
24 privileged or other protected matter, if no exception or waiver applies, or subjects  
25 a person to undue burden. Fed. R. Civ. P. 45(d)(3)(A)(iii), (iv).

26 Federal courts recognize a constitutional right to privacy. Stallworth v.  
27 Brollini, 288 F.R.D. 439, 444 (N.D. Cal. Dec. 21, 2012) (citing Whalen v. Roe,  
28 429 U.S. 589, 599 (1977)). Federal courts also consider privacy rights protected

1 by state constitutions or statutes. Soto v. City of Concord, 162 F.R.D. 603, 616  
2 (N.D. Cal. July 17, 1995). To evaluate privacy objections under either federal or  
3 state law, the Court must balance the party's need for the information against the  
4 individual's privacy right in his employment files. Tierno v. Rite Aid Corp., 2008  
5 WL 3287035, at \*3 (N.D. Cal. July 31, 2008) (citing cases).

### 6 7 **III. DISCUSSION**

#### 8 **A. The Court Deems the Ex Parte Application to be Timely Filed**

9 The Francises argue Anderson's application is untimely as it was filed two  
10 months after the discovery cutoff, prejudicing their right to a fair hearing on their  
11 motion for summary judgment, and that Anderson demonstrated a complete lack  
12 of diligence in obtaining Tobias's employment file. Pls.' Resp., ECF No. 44 at 2.  
13 They contend Anderson had ample opportunity to seek Tobias's authorization for  
14 disclosure of his personnel file at his all-day deposition on June 7, 2017, and had  
15 sufficient time during the discovery period to seek an order compelling  
16 compliance with the subpoena, but chose instead to wait until one week before  
17 their opposition to the Francises' summary judgment motion was due before  
18 seeking a court order. Id.

19 The initial scheduling order in this case included a fact discovery cutoff of  
20 June 16, 2017. See ECF No. 27. On April 27, 2017, the Court continued the fact  
21 discovery cutoff to August 15, 2017 pursuant to a joint motion filed by the parties.  
22 See ECF No. 32. The timing of discovery motions before this Court is not  
23 determined by the discovery cutoff date, but rather is set forth in the  
24 undersigned's Chambers Rules. The Chambers Rules provide that if parties are  
25 not able to resolve a dispute through the meet and confer process, counsel shall,  
26 within 45 days of the date upon which the event giving rise to the dispute  
27 occurred, file a joint statement entitled "Joint Motion for Determination of  
28 Discovery Dispute." For written discovery, the event giving rise to the discovery

1 dispute is the service of the response. If a party fails to provide a discovery  
2 response, the event giving rise to the discovery dispute is the date the response  
3 was due. See Chambers Rules.

4 Here, the response to the subpoena was due on July 11, 2017. Griffin  
5 Decl., Ex. O. As such, any discovery motion relating to the subpoena was due to  
6 be filed by August 25, 2017. On August 22, 2017, Anderson's counsel, Ms.  
7 Griffin, notified the Court that she and Aquaneering's counsel had stipulated to  
8 continue the deadline to file a discovery motion relating to the subpoena to  
9 September 21, 2017, in the hopes that Tobias would authorize release of his  
10 personnel file, given that he had authorized the release of his medical records.  
11 Griffin Decl., ¶ 12. On September 13, 2017, counsel again stipulated to continue  
12 the discovery motion filing deadline to October 20, 2017, as the parties planned  
13 to attend mediation on October 16, 2017. Id., ¶ 13. Ms. Griffin contacted the  
14 undersigned's chambers that same day to request the Court's approval of  
15 counsel's new stipulated deadline. The undersigned's law clerk advised Ms.  
16 Griffin advised that if the deadline were continued to October 20, 2017, it would  
17 not be possible for the discovery motion to be decided prior to the filing of  
18 dispositive motions, as the deadline for the hearing on dispositive motions was  
19 November 13, 2017, necessitating that moving papers be filed no later than  
20 October 16, 2017. After Ms. Griffin assured the Court that would not present a  
21 problem, the Court authorized the extension and directed that the discovery  
22 motion be filed as an ex parte application instead of a "joint motion for  
23 determination of discovery dispute," as Aquaneering is not a party to this action.  
24 Ms. Griffin notified all counsel of the extension and requested that any objections  
25 to the continuance be made immediately. Griffin Decl. in Supp. of Reply, ¶ 3. No  
26 party objected. Id.

27 The Francises thereafter filed a motion for summary judgment on  
28 September 27, 2017, with a hearing date of November 13, 2017. See ECF No.

1 38. After filing the instant ex parte application on October 20, 2017, Anderson  
2 filed an ex parte application for relief under Fed. R. Civ. P. 56(d), in which he  
3 requested a continuance of the hearing on the Francises' motion for summary  
4 judgment until such time as this Court has ruled on the motion to compel  
5 compliance with subpoena. See ECF No. 41. No opposition was filed in  
6 response to the application, and the Honorable Marilyn L. Huff granted a  
7 continuance of the hearing to January 8, 2018. Id. Anderson's response to the  
8 summary judgment motion is currently due by December 1, 2017. Id.

9       The Court disagrees that Anderson acted with a "complete lack of  
10 diligence" with respect to the subpoena. Even if Anderson's counsel did not seek  
11 Tobias's authorization to release his employment records during his June 2017  
12 deposition, counsel certainly made many attempts to do so thereafter during the  
13 discovery period. Additionally, while it could be said that Anderson delayed  
14 somewhat in bringing the instant motion, the Court finds he acted in good faith in  
15 doing so. Anderson obviously hoped to not have to bring the motion, and chose  
16 to twice stipulate to continue the filing deadline while attempting to preserve  
17 resources and reach a resolution which would not necessitate court intervention.  
18 He initially hoped Tobias would sign an authorization allowing the release of his  
19 employment file, and then hoped the case would settle at mediation. As neither  
20 of these occurred, Anderson was forced to proceed with this motion. It cannot be  
21 said Anderson was dilatory in seeking an order compelling compliance with the  
22 subpoena; indeed, this Court granted permission to Anderson to file the instant  
23 motion by October 20, 2017, to which the Francises did not object.<sup>1</sup> The delay  
24 resulting from considering the ex parte application is not lengthy, and is not the  
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26 <sup>1</sup> While the undersigned granted the extension with the qualification that any briefing and  
27 hearings before the district judge should not be disturbed, it is still the case that Anderson had  
28 permission to file his motion on October 20, 2017. In any event, the district judge granted  
Anderson's motion pursuant to Rule 56(d) to continue the deadlines relating to the Francises'  
summary judgment motion.

1 result of neglect or disrespect for the Court or the other parties. The impact on  
2 the proceedings is minimal, and the Francises are not unduly prejudiced.  
3 “Prejudice requires greater harm than simply that relief would delay resolution of  
4 the case.” Lemoge v. United States, 587 F.3d 1188, 1196 (9th Cir. 2009). The  
5 Court will therefore address the merits of the instant motion.

6 B. Tobias Did Not Challenge the Subpoena

7 A party that is not the recipient of a subpoena has standing to challenge the  
8 subpoena “where its challenge asserts that the information is privileged or  
9 protected to itself.” Belling v. DDP Holdings, Inc., 2013 WL 12140986, at \*3  
10 (C.D. Cal. May 30, 2013) (citing Diamond State Ins. Co. v. Rebel Oil Co., Inc.,  
11 157 F.R.D. 691, 695 (D. Nev. 1994)). Tobias has standing to challenge the  
12 subpoena as it seeks his personnel files. He has not, however, done so. He has  
13 not moved to quash the subpoena, to modify the subpoena, or for a protective  
14 order. See Fed. R. Civ. P. 45(d)(3)(A); Fed. R. Civ. P. 26(c).<sup>2</sup>

15 C. Anderson’s Need for the Information Sought Outweighs Tobias’s Privacy  
16 Interests

17 The Francises’ assertion that the documents sought are irrelevant is  
18 without merit. Clearly, there may be information in Tobias’s personnel files  
19 relevant to this case. “The Limitation of Liability Act limits shipowner liability  
20 arising from the unseaworthiness of the shipowner’s vessel or the negligence of  
21 the vessel’s crew unless the condition of unseaworthiness or the act of  
22 negligence was within the shipowner’s ‘privity or knowledge.’” In re Bowfin M/V,  
23 339 F.3d 1137, 1138 (9th Cir. 2003) (per curiam). “‘Privity or knowledge’ may be  
24 active or constructive; therefore, in addition to showing a lack of actual  
25 knowledge or the cause of the loss, the owner must also demonstrate that it has  
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27 <sup>2</sup> The Francises, as the plaintiffs-in-limitation in this action and as the owners of Aquaneering,  
28 have provided no argument or authority that they have standing to challenge the subpoena,  
and indeed have not challenged the subpoena.



1 'avail[ed] itself of whatever means of knowledge are reasonably necessary to  
2 prevent conditions likely to cause losses.'" Washington State Dept. of Transp. v.  
3 Sea Coast Towing, Inc., 148 Fed. Appx. 612, 613 (9th Cir. 2005) (citing  
4 Waterman Steamship Corp. v. Gay Cottons, 414 F.2d 724, 732 (9th Cir. 1969)).  
5 The determination of what the Francises knew or should have known about  
6 Tobias and whether he could safely operate their vessel is a key issue in this  
7 litigation. Documents relating to a background check or lack thereof, driver's  
8 license check or lack thereof, criminal history, performance reviews, medical  
9 and/or disability issues, insurance coverage issues, disciplinary proceedings,  
10 history of being under the influence of drugs or alcohol, and complaints are  
11 relevant to the Francises' knowledge of whether Tobias could safely operate the  
12 vessel, as well as the credibility of the Francises and Tobias as witnesses.  
13 Although the Francises argue Tobias's 2006 motor vehicle accident and 2007  
14 misdemeanor charge are inadmissible, discovery need not be admissible in  
15 evidence in order to be discoverable. Fed. R. Civ. P. 26(b)(1).

16 The importance of the information sought outweighs Tobias's privacy  
17 interests, particularly given that the subpoena does not seek any of Tobias's  
18 personal financial information, and because the parties can enter into a stipulated  
19 protective order to lessen the impact the disclosure will have on Tobias's privacy.  
20 The Court therefore requires the parties to enter into a stipulated protective order  
21 which limits the dissemination of the documents in the personnel file and allows  
22 use of the documents for purposes of this litigation only. Such a protective order  
23 will amply protect Tobias's privacy interests. See, e.g., Soto, 162 F.R.D. at 616  
24 (stating that "[a] carefully drafted protective order could minimize the impact of . .  
25 . disclosure").

#### 27 **IV. CONCLUSION**

28 For the reasons set forth above, Aquaneering's objection to the subpoena

1 served by Anderson is **OVERRULED**. The parties shall prepare a stipulated  
2 protective order and file a request for entry of the protective order forthwith.  
3 Aquaneering is **ORDERED** to produce Tobias's personnel file pursuant to the  
4 stipulated protective order by November 22, 2017. No further discovery is  
5 permitted.

6 **IT IS SO ORDERED.**

7 Dated: November 15, 2017

8   
9 Honorable Jan M. Adler  
United States Magistrate Judge

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