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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SCHOULEE CONES, an individual on behalf of herself and all others similarly situated, and DEXTER PASIS, and individual on behalf of himself and all others similarly situated,  
Plaintiffs,  
v.  
PAREXEL INTERNATIONAL CORPORATION and PAREXEL INTERNATIONAL, LLC,  
Defendants.

Case No.: 16cv3084 L (BGS)

**ORDER:**

**(1) GRANTING IN PART PLAINTIFF’S MOTION TO QUASH DEFENDANTS’ SUBPOENA OF WESTERN & SOUTHERN LIFE INSURANCE COMPANY**

**(2) DENYING DEFENDANTS’ EX PARTE MOTION FOR LEAVE TO FILE SUR-REPLY**

[ECF Nos. 70, 79.]

Plaintiff Schoulee Cones (“Plaintiff”) moves to quash a subpoena served on Western & Southern Life Insurance Company (“Western”) by Defendants Parexel International Corporation and Parexel International, LLC. (ECF No. 70.) Defendants have filed an Opposition to the Motion, and Plaintiff has filed a Reply. (ECF Nos. 73, 76.) For the reasons set forth below, the Motion is **GRANTED in part**.

**I. BACKGROUND**

Plaintiff is one of two named plaintiffs in this case pursuing wage and hour claims on behalf of a putative class. (ECF No. 26.) She alleges that she, and others employed

1 by Defendants, were misclassified as exempt from overtime compensation and denied  
2 meal and rest periods and properly itemized wage statements. (ECF No. 26.)

3 Defendants served Western with a subpoena seeking “[t]he deposition transcript of  
4 Schoulee Cones, and changes made by Schoulee Cones to the deposition transcript, along  
5 with all deposition exhibits, taken in *Schoulee Cones v. Western and Southern Life*  
6 *Insurance Company*, United States District Court, Southern District of California, Case  
7 No. 3:17-cv-00925-W-SKC[sic].” (Decl. of James Treglio, ¶ 1, Ex. 1 [ECF No. 70-7].)  
8 The *Western* case was brought by Plaintiff against Western for failing to pay a medical  
9 claim that arose years after she left her employment with Parexel. Her Complaint in that  
10 action alleged that in denying coverage, Western had claimed Plaintiff falsely denied  
11 having been diagnosed with a stroke. There is no dispute that the deposition transcript  
12 covers Plaintiff’s medical history because the claims in that case involved her medical  
13 history. The case has since settled.

## 14 **II. DISCUSSION**

### 15 **A. Legal Standard**

16 Rule 45 allows a party to subpoena a non-party to produce documents. Fed. R.  
17 Civ. P. 45(a)(1)(C); Fed. R. Civ. P. 34(c) (“As permitted in Rule 45, a nonparty may be  
18 compelled to produce documents and tangible things or to permit an inspection”). It must  
19 meet the same relevancy requirements applicable to any discovery sought. The “scope of  
20 discovery through a subpoena is the same as that applicable to Rule 34 and the other  
21 discovery rules.” *ATS Products, Inc. v. Champion Fiberglass, Inc.*, 309 F.R.D. 527, 530  
22 (N.D. Cal. 2015) (“The Advisory Committee Notes to Rule 45 state that ‘the scope of  
23 discovery through a subpoena is the same as that applicable to Rule 34 and the other  
24 discovery rules,’ which in turn is the same as under Rule 26(b).”); *see also Moon v. SCP*  
25 *Pool Corp.*, 232 F.R.D. 633, 636 (C.D. Cal. 2005) (citing Advisory Committee Notes and  
26 finding scope of discovery under Rule 45 is the same as Rule 34).

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1           Upon a timely motion, the court “must quash or modify a subpoena that . . .  
2 requires disclosure of privileged or other protected matter, if no exception or waiver  
3 applies; or subjects a person to undue burden.” Fed. R. Civ. P. 45(d)(3)(A)(iii)-(iv). A  
4 party cannot simply object “to a subpoena served on a non-party, but rather, must seek a  
5 protective order or make a motion to quash.” *See Moon*, 232 F.R.D. at 636; *see also*  
6 *Pennwalt Corp. v. Durand-Wayland Inc.*, 708 F.2d 492, 494 n.5 (9th Cir. 1983) (“[o]nce  
7 the person subpoenaed objects to the subpoena...the provisions of Rule 45(d) come into  
8 play. Then the party seeking discovery must obtain a court order directing compliance.”).  
9 The party moving to quash “bears the ‘burden of persuasion’” under Rule 45(d)(3). *ATS*  
10 *Products, Inc.*, 309 F.R.D. at 531 (N.D. Cal. 2015) (quoting *Moon*, 232 F.R.D. at 637).

## 11           **B. Analysis**

12           Plaintiff moves to quash the subpoena arguing it seeks private medical information  
13 that is irrelevant to the claims<sup>1</sup> in this wage and hour case. (Mot. at 2.) Defendants  
14 oppose the Motion, arguing Plaintiff has waived her privacy rights in her medical  
15 information and that her deposition testimony regarding her medical condition is relevant.  
16 More specifically, Defendants assert her medical history is relevant to her adequacy to  
17 serve as a class representative. Additionally, Defendants argue her credibility is  
18 potentially undermined both by Western’s claim that Plaintiff made false representations  
19 in procuring insurance and Plaintiff seeking expedited proceedings in the Western case  
20 based on her medical condition, but not doing so in this case. (Opp’n at 5-6.)

### 21           **1. Standing**

22           As an initial matter, the Court finds Plaintiff does have standing to challenge the  
23 subpoena under Rule 45(d)(3)(A)(iii) based on disclosure of potentially privileged or  
24 protected matter. A party that is not the recipient of a subpoena has standing to challenge  
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26 <sup>1</sup> Discovery in this case was bifurcated between class and merits discovery. (ECF No. 43  
27 at 2.) The parties were only allowed to conduct class discovery at the time this subpoena  
28 was issued. In this respect, the discovery would also need to be relevant to class  
certification to be within the scope of discovery authorized at that time.

1 the subpoena “where its challenge asserts that the information is privileged or protected  
2 to itself.” *See Diamond State Ins. Co. v. Rebel Oil Co., Inc.*, 157 F.R.D. 691, 695 (D.  
3 Nev. 1994) (distinguishing a challenge based on privilege or protected matter from a  
4 vagueness challenge) (citations omitted); *Knoll v. Moderno, Inc.*, No. 12-mc-80193 SI,  
5 2012 WL 4466543, at \*2 (N.D. Cal. Sept. 26, 2012) (“[A] party moving to quash a non-  
6 party subpoena has standing when the party has a personal right or privilege in the  
7 information sought to be disclosed.”). Because Plaintiff claims the subpoena requires  
8 disclosure of potentially protected matter, her medical history, she has standing to  
9 challenge the subpoena on that basis under Rule 45(d)(3)(iii).<sup>2</sup> *See* Fed. R. Civ. P.  
10 45(d)(3)(A); *see also Chevron v. Donzinger*, 2013 WL 4536808, at \*4 (N.D. Cal. Aug.  
11 22, 2013); *see also Third Degree Films, Inc. v. Does 1-108*, No. DKC 11-3007, 2012 WL  
12 669055, at \*2 (D. Md. Feb. 28, 2012)

## 13 2. Waiver

14 Although the parties dispute whether Plaintiff has waived her right of privacy in  
15 her medical information, they agree that a plaintiff could waive their right of privacy in  
16 their medical history<sup>3</sup> by bringing claims that put their medical history at issue.

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18 <sup>2</sup> Plaintiff additionally challenges the subpoena based on undue burden. Defendants  
19 argue she does not have standing to challenge the subpoena based on under burden under  
20 Rule 45(d)(3)(A)(iv). Because the Court finds Plaintiff can challenge the subpoena based  
21 on Rule 45(d)(3)(A)(iii) based on disclosure of “privileged or protected matter,” and  
22 grants the motion to quash on that basis, the Court need not address whether Plaintiff has  
standing to raise undue burden or reach that analysis.

23 <sup>3</sup> Defendants do not dispute in any substantive argument or analysis that Plaintiff has a  
24 right of privacy in her medical history. This is understandable as courts do recognize  
25 individuals have a right of privacy in their medical history. *EEOC v. Serramonte*, 237  
26 F.R.D. 220, 223 (N.D. Cal. 2006); *Ragge v. MCA/Universal Studios*, 165 F.R.D. 601, 604  
27 (C.D. Cal. 1995); *Anderson v. Abercrombie and Fitch Stores, Inc.*, 06CV991-WQH  
28 (BLM), 2007 WL 1994059, at \*4 (S.D. Cal. July 2, 2007); *Wilkins v. Maricopa Cnty.*,  
CV-09-1380-PHX-LOA, 2010 WL 2231909, \*3 (D. Ariz. June 2, 2010); *see also*  
*Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1269 (9th Cir.  
1998) (“The constitutionally protected privacy interest in avoiding disclosure of personal  
matters clearly encompasses medical information and its confidentiality.”).

1 Defendants argue a “plaintiff waives his or her rights to preclude discovery of private  
2 information when that information is ‘directly relevant to the plaintiff’s claim and  
3 essential to the fair resolution of the lawsuit.’” (Opp’n at 8 (citing *Vinson v. Sup. Ct.*, 43  
4 Cal. 3d 833, 842 (1987)).) Plaintiff, although arguing there was not a waiver here, agrees  
5 that it could be waived if the claims asserted put Plaintiff’s medical history at issue.  
6 (Mot. at 6.)

7 The Court agrees that a plaintiff can waive their privacy right in their medical  
8 history by putting that medical history at issue in a case or when it is directly relevant to  
9 the litigation. See *EEOC v Cheesecake Factory, Inc.*, 2017 WL 3887460, \*7 (Sept. 6,  
10 2017 W.D. Wash.) (summarizing district court decisions finding “the right to privacy in  
11 medical records is waived when the plaintiff’s medical condition is ‘at issue’ in the  
12 lawsuit.”); *Tylo v. Superior Court*, 55 Cal. App. 4<sup>th</sup> 1379, 1387 (Cal. Ct. App. 1993)  
13 (“[T]he court must construe the concept of waiver narrowly and a compelling public  
14 interest is demonstrated only where the material sought is directly relevant to the  
15 litigation.”) (citations omitted). A waiver generally occurs when a plaintiff asserts a  
16 claim or seeks damages that put their physical or mental health at issue. See *Doe v. City*  
17 *of Chula Vista*, 196 F.R.D. 562, 569 (S.D. Cal. 1999) (finding a plaintiff relying on her  
18 emotional health to seek severe emotional distress damages put her emotional health at  
19 issue, waiving patient-psychotherapist privilege); *Vinson v. Superior Court*, 43 Cal. 3d  
20 833, 842 (1987) (A plaintiff waives his or her rights to preclude the discovery of private  
21 information when that information is directly relevant to the plaintiff’s claim and  
22 essential to the fair resolution of the lawsuit.”) (citations omitted). The party seeking the  
23 constitutionally protected information bears the burden of establishing that the  
24 information is directly relevant to the claims at issue.<sup>4</sup> *Tylo*, 55 Cal. App. 4<sup>th</sup> at 1387.

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26 <sup>4</sup> Neither party specifically addresses whether state or federal privilege law applies in this  
27 instance where there are both federal and state claims asserted and there is no assertion  
28 that the privilege information is connected to any of the claims in the case. However, the  
distinction is not critical here. As discussed more fully below, the Court finds that to the

1           However, even when there is a waiver, its scope is limited to what is at issue in the  
2 case or directly relevant to the litigation. *Id.* at 570 (limiting scope to that information  
3 “essential to a fair trial”); *Wilkins v. Maricopa Cnty.*, No. CV-09-1380-PHX-LOA, 2010  
4 WL 2231909, \*3 (D. Ariz. June 2, 2010) (“[A] litigant’s waiver of privacy rights by  
5 putting private matters at issue in a lawsuit is limited to the private information that is  
6 relevant to the lawsuit.”). The waiver should be construed narrowly. *Anderson*, 2007  
7 WL 1994059, \*4 (“Where one party claims his opponent has waived this protection by  
8 filing suit, the court must construe the concept of waiver narrowly and a compelling  
9 public interest is demonstrated only where the material sought is directly relevant to the  
10 litigation”) (citations and quotations omitted).

11                           **a)     Waiver Based on Claims**

12           Here, there is no waiver based on Plaintiff’s claims. Plaintiff’s wage and hours  
13 claims do not put her medical history at issue. She is not seeking damages for any  
14 emotional distress or any asserting any claims that result in any physical injury or  
15 disability that might put her medical history at issue. Defendants do not attempt to argue  
16 her medical history is relevant to her claims.<sup>5</sup> Rather, Defendants primarily argue  
17 Plaintiff has put her medical history at issue by seeking to represent a class.

18                           **b)     Waiver Based on Adequacy to Represent Class**

19           Defendants argue Plaintiff’s medical history is relevant, or put at issue in this case,  
20 because she is seeking to represent a class and her adequacy to do so depends on her  
21 health and her credibility. Plaintiff argues a plaintiff’s health and credibility are not  
22 considerations in determining if a plaintiff is adequate to represent a class.

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24 \_\_\_\_\_  
25 extent there is any waiver based on adequacy for class certification, its scope is limited to  
26 the extent it is “put at issue” or “directly relevant” to Plaintiff’s ability to prosecute the  
27 case.

28 <sup>5</sup> The Court addresses separately Defendants’ assertion, in an *Ex Parte* Request to file a  
Sur-Reply, that Plaintiff’s deposition in the *Western* case included testimony about her  
employment at Parexel.

1 Class certification requires, in addition to other requirements, named plaintiffs that  
2 “will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4);  
3 *Evon v. Law Office of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012) (citing *Hanlon*  
4 *v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). “Resolution of two questions  
5 determines legal adequacy: (1) do the named plaintiffs and their counsel have any  
6 conflicts of interest with other class members and (2) will the named plaintiffs and their  
7 counsel prosecute the action vigorously on behalf of the class?” *Hanlon*, 150 F.3d at  
8 1020.

9 Defendants do not cite any authority from the Ninth Circuit or any district courts  
10 finding waiver of a plaintiff’s privacy rights in their medical history based on a plaintiff  
11 seeking to serve as a class representative. In this respect, Defendants have moved beyond  
12 waiver by asserting claims that put medical history at issue into waiver based solely on  
13 seeking to represent a class. However, Defendants do cite two cases that suggest a  
14 plaintiff’s health and life span could impact their adequacy to serve as a class  
15 representative. In *Sloan v. BorgWarner, Inc.*, the court rejected one of three class  
16 representatives based on the representative’s testimony that “he was ‘in bad health,’ can’t  
17 hardly handle’ traveling long distances, and was ‘not able to’ serve as a class  
18 representative in a prior related case in 2006 due to a heart condition.” 263 F.R.D. 470,  
19 475 (E.D. Mich. 2009). And, in *Trautz v. Weisman*, the court found a plaintiff’s death  
20 “render[ed] him incapable of satisfying the adequacy requirements.” 846 F. Supp. 1160,  
21 1162 (S.D. N.Y. 1994). Plaintiff cites cases finding plaintiffs adequate despite serious  
22 health issues. The court in *In re Countrywide Financial Corp. Securities Litigation* found  
23 a plaintiff adequate despite chronic health problems, including a medically induced coma  
24 that delayed both his deposition and the close of class certification discovery. 273 F.R.D.  
25 586, 606-608 (C.D. Cal. 2009). In *Connor v. Automated Accounts, Inc.*, the court found a  
26 plaintiff adequate to represent the class despite poor memory and health because she  
27 understood her role as a class representative and was willing to participate. 202 F.R.D.  
28 265, 270 (E.D. Wash. 2001). And, in *Steiner v. Ideal Basic Indus., Inc.*, the court found a

1 plaintiff undergoing dialysis every other day whose deposition had to be taken in his  
2 home because he was unable to travel was adequate despite those limitations. 127 F.R.D.  
3 192, 195 (D. Colo. 1987). These cases were all addressing whether plaintiffs were  
4 adequate representatives, rather than whether defendants were entitled to a plaintiff's  
5 medical history based on adequacy. However, they are instructive in that they indicate  
6 that a court might consider a plaintiff's health for purposes of adequacy when it interferes  
7 with their ability to prosecute a class action. This suggests a plaintiff might be putting  
8 their health at issue, at least to some extent, based on the adequacy inquiry. However, as  
9 discussed more fully below, the scope of that inquiry is limited.

10 Putting aside the case addressing the death of a plaintiff, in each case the court  
11 considered a plaintiff's health issues in the context of delays in the case, ability to sit for a  
12 deposition, and ability to travel. Essentially, the courts considered their health to the  
13 extent it impacted their ability to participate and do what class representatives need to do.

14 As a threshold issue, nothing in these cases or any authority provided by  
15 Defendants indicates that just seeking to represent a class opens up a plaintiff's entire  
16 medical history to a defendant when the claims in the case have no relation to a plaintiff's  
17 medical history.<sup>6</sup> Nor have Defendants cited any authority indicating that seeking to  
18 represent a class is alone a basis to inquire into a plaintiff's health at all, absent some  
19 history of delays or other issues in the case as a result of a plaintiff's health issues.

20 Defendants do not identify any instances where Plaintiff's health has delayed this case.

21 Defendants do not dispute that Plaintiff was deposed in this case over three days or that  
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24 <sup>6</sup> In *Plumlee v. Pfizer*, the court found a waiver based, in part, on class certification issues,  
25 but the case involved a prescribed medication for depression the plaintiff had taken for  
26 three years and the plaintiff claimed did not work. Case No. 13CV414 LHK, 2014 WL  
27 690511, at \*4 (N.D. Cal. Feb . 21, 2014). The substantive issues identified by the court  
28 that the plaintiff's medical history was directly relevant to included typicality,  
predominance, and whether plaintiff was a member of the class. *Id.* Her medical history  
was intertwined with the issues of class certification in a way not present in this wage and  
hour case.



1 she traveled from San Diego to Los Angeles for a portion of her deposition.<sup>7</sup> However,  
2 for purposes of this Motion, the Court is willing to assume that even without prior issues  
3 or delays related to a plaintiff's health, a plaintiff's health may be put at issue by seeking  
4 to represent a class because it might impact their ability to prosecute the case on behalf of  
5 a class.

6 As to the scope of the waiver, even assuming Plaintiff has put her health at issue by  
7 seeking to represent a class, any waiver on that basis is not broad enough to encompass  
8 the entirety of Plaintiff's deposition in another case that includes medical history well  
9 beyond the area put at issue by adequacy, *i.e.* prosecute the case. For example,  
10 Defendants emphasize Plaintiff has indicated in her filings in the *Western* case that she  
11 was suffering from an aggressive cancer with a prognosis of six months to live. But,  
12 even assuming the adequacy inquiry puts her life expectancy at issue, any waiver is still  
13 only as to matters that bear on adequacy. If anything, Defendants might be entitled to  
14 inquire as to her ability to travel or sit for a deposition despite her illness or treatment. It  
15 does not give Defendants wholesale access to the entirety of Plaintiff's medical history or  
16 even the medical history set out in her deposition in the *Western* case where her medical  
17 history was very much at issue because of the nature of the claims and defenses at issue  
18 in that case. Any health inquiry must still be tied to Plaintiff's ability to vigorously  
19 pursue the case on behalf of a class.

20 This is evident from the cases discussed above that both parties rely on. The one  
21 case Defendants rely on where the plaintiff is living, as Plaintiff currently is, the court  
22 found him inadequate because he could not travel and had been unable to represent a  
23 class previously because of a heart condition. As to those Plaintiff relies on, the courts  
24 were clearly only considering the plaintiff's health to the extent it impacted their ability  
25 to vigorously pursue the case, including delays in discovery as a result of their health,  
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28 <sup>7</sup> Based on the briefing, it does not appear the inquiry into her health was prompted by  
anything she did or did not do in this case.

1 being deposed, and ability to travel despite health issues. The medical history that goes  
2 to these issues is limited. Assuming there is one at all, it is a narrow window. In  
3 contrast, the deposition testimony Defendants seek was given in a case where Plaintiff's  
4 medical history was a significant issue, far exceeding the limited inquiry that might be  
5 appropriate in assessing whether Plaintiff will live to the completion of the case or her  
6 health issues will hamper her participation in the case going forward. This means  
7 Defendants are seeking medical history in excess of any waiver based on adequacy.

8 This raises the question of why Defendants are seeking this information through a  
9 third-party subpoena of a deposition given in a different case where Plaintiff's medical  
10 history was a significant issue. In moving to quash the subpoena, Plaintiff emphasizes  
11 that this issue arose during Plaintiff's deposition.<sup>8</sup> Defendants asked Plaintiff about her  
12 medical condition and treatment during her deposition in this case and her counsel  
13 objected. Defendants did not pursue it further. In a footnote in their brief, Defendants  
14 argue their abandonment of this issue during Plaintiff's deposition did not constitute a  
15 waiver of their right to issue a third-party subpoena to obtain her medical history through  
16 a deposition in another case. The Court agrees Defendants did not waive their right to  
17 pursue this information through a different method of discovery, including this subpoena.

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20 <sup>8</sup> Plaintiff relies on the meet and confer that took place regarding Plaintiff's medical  
21 history at her deposition as satisfaction of the meet and confer requirement for purposes  
22 of the dispute as to the subpoena at issue in this Motion. Defendants accurately note that  
23 the undersigned's Chambers Rules regarding resolution of discovery disputes, including  
24 the meet and confer requirement, apply to Rule 45, although Defendants' reliance on  
25 Civil Local Rule 26.1 is misplaced given it does not apply to Rule 45. However, Plaintiff  
26 is also correct that the Court did previously indicate to counsel, when addressing another  
27 dispute as to a third-party subpoena, that a motion to quash would be the appropriate  
28 course to challenge a third-party subpoena. In doing so, the Court did not intend to  
suggest that the parties were not still required to meet and confer before filing a motion to  
quash. Given the confusion, the Court will not deny the Motion on this basis, particularly  
when it would involve disclosure of Plaintiff's medical history. However, the Court  
expects counsel will meet and confer regarding any issue before bringing it before the  
Court.

1 However, because the subpoena seeks an entire deposition, including significant medical  
2 history, beyond the scope of any waiver based on adequacy, it must be quashed.<sup>9</sup>

3 Defendants also argue Plaintiff has waived her privacy right in her medical history  
4 because she has publically disclosed her illness in the *Western* case in bringing that action  
5 and in filings in that case, as well as by disclosing her illness to friends, family, and the  
6 public. Plaintiff's Complaint in the *Western* case and a filing seeking an earlier date for  
7 an Early Neutral Evaluation conference in that case disclosed Plaintiff's diagnosis and  
8 prognosis. Plaintiff has also disclosed her illness and some details regarding her  
9 condition and treatment to friends, family, and even the public in seeking financial  
10 assistance with the cost of her medical care through a gofundme page. However,  
11 Defendants have not cited any authority indicating that a disclosure of some medical  
12 information outside this case, that she has never relied on in this case, constitutes a  
13 waiver as to her entire medical history in this case. This would mean filing a case against  
14 an insurer for failing to provide coverage for a specified illness or disclosing you are ill  
15 and receiving treatment would open up your entire history to anyone. This is not a  
16 situation where Plaintiff has publicized her medical history in a way that benefits her in  
17 this case or relied on it in this case in any way and then tried to prevent defendants from  
18 getting a fuller picture from a full medical history. Again, the critical inquiry is whether  
19 she has put it at issue or that it is directly relevant in *this* case. As discussed above,  
20 assuming the adequacy inquiry alone puts her health at issue, then she has implicitly  
21 waived her right of medical privacy, but only to the extent of the adequacy inquiry, *i.e.*  
22 ability to prosecute the case.

23 Defendants additionally argue they are entitled to the deposition transcript because  
24 it may shed light on Plaintiff's credibility. Again, for purposes of this argument, the  
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28 <sup>9</sup> Defendants have waived their right to raise a discovery dispute as to Plaintiff objections  
at her deposition on November 28, 2017. It would be untimely.

1 Court will assume that Plaintiff's credibility is even a factor in assessing adequacy.<sup>10</sup>  
2 First, Defendants argue her seeking expedited proceedings in the *Western* case based on  
3 her diagnosis and prognosis and not doing the same in this case suggests she is lying in  
4 one or the other. This is speculative and does not justify access to Plaintiff's entire  
5 deposition in a case that is only related to this one in the sense that Plaintiff filed it and it  
6 was pending at the same time. Additionally, to the extent there is anything to be drawn  
7 seeking expedited proceedings in an individual case seeking coverage for a health issue  
8 and not seeking it in a wage and hour class action, Defendants are free to point out this  
9 discrepancy as a reflection on Plaintiff's credibility. However, this does not justify  
10 access to Plaintiff's entire deposition in an unrelated case. Second, Defendants argue that  
11 *Western's* claim that it denied her medical coverage because she made a  
12 misrepresentation on her application for insurance, *i.e.* not disclosing a stroke, goes to her  
13 credibility. Again, assuming a Plaintiff's credibility is actually factored into the Ninth  
14 Circuit's two-part adequacy inquiry, it does not justify what Defendants are seeking here.  
15 Defendants want to review the entirety of Plaintiff's deposition in a case where her  
16 medical history was a significant issue to obtain information about a different defendant's  
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18 <sup>10</sup> Some courts find it is not:

19 Credibility is not a requirement of a class representative. Only in very rare  
20 circumstances, will a plaintiff's lack of credibility undermine her adequacy  
21 as a class representative - petty credibility challenges do not suffice. 'For an  
22 assault on the class representative's credibility to succeed, the party  
23 mounting the assault must demonstrate that there exists admissible evidence  
24 so severely undermining plaintiff's credibility that a fact finder might  
25 reasonably focus on plaintiff's credibility, to the detriment of the absent class  
26 members' claims.' The standard is extremely difficult to satisfy, and is  
27 typically reserved for 'flagrant cases where putative class representatives  
28 'display an alarming unfamiliarity with the suit, display an unwillingness to  
learn about the facts underlying their claims, or are so lacking in credibility  
that they are likely to harm their case.'"

*Romo v. GMRI, Inc.*, 2013 U.S. Dist. LEXIS 56898, \*6 (C.D. Cal. Feb. 16,  
2013) (quoting *Dubin v. Miller*, 132 F.R.D. 269, 272 (D. Colo. 1990) and *In  
re Frontier Ins. Grp., Inc. Sec. Litig.*, 172 F.R.D. 31, 47 (E.D.N.Y.1997)).

1 unproven allegations made in an unrelated, closed, and settled case. Western's unproven  
2 allegation that Plaintiff did not disclose a stroke to justify its denial of coverage does not  
3 justify giving Defendants in a wage an hour case access to Plaintiff's medical history.

4 Finally, in the Motion to Quash, Plaintiff asserts that the deposition transcript in  
5 the *Western* case was subject to a protective order in that case. Defendant disputes this in  
6 Opposition. Plaintiff did not address it further in her Reply brief. The Court is not  
7 inclined to attempt to decipher whether Plaintiff's deposition in an unrelated, settled, and  
8 closed case was or was not subject to a protective order, particularly when Defendants  
9 have not cited any authority indicating that this would alter the waiver analysis above.

### 10 **3. Plaintiff's Testimony as to Parexel**

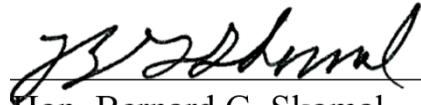
11 As to Plaintiff's deposition testimony in the *Western* case, Plaintiff concedes that if  
12 Plaintiff had described her job duties at Parexel in the deposition, her statements might be  
13 relevant. Plaintiff then denies she did. Defendants dispute this and seek to file a sur-  
14 reply indicating that counsel for Western has indicated that the transcript contains  
15 approximately ten pages of transcript in which Parexel is referenced. (ECF 79.)  
16 Although it seems unlikely, these two things are not necessarily contradictory. Plaintiff's  
17 deposition transcript could include information about her employment at Parexel without  
18 discussing her job duties. Regardless, Defendants are not entitled to the entire transcript  
19 demanded in the subpoena on this basis. The sur-reply Defendants seek to file would  
20 also not resolve this issue. Defendants would just file a sur-reply that would only provide  
21 information about a conversation with another attorney about the substance of Plaintiff's  
22 testimony that concern her employment and job duties at Parexel. Given Plaintiff's  
23 testimony about her employment at Parexel might be relevant to her claims in this case,  
24 Plaintiff shall provide Defendants with a redacted copy of her deposition transcript in the  
25 *Western* case that discloses the portions of her testimony that address in any way her  
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1 employment with Parexel.<sup>11</sup> If there is no testimony regarding Parexel, Plaintiff's  
2 counsel shall provide Defendants with a declaration to that effect.

3 **CONCLUSION**

4 The Motion to Quash is **GRANTED** in part as set forth above. The *Ex Parte*  
5 Request to File a Sur-Reply is **DENIED**.

6 Dated: June 20, 2018

7   
8 Hon. Bernard G. Skomal  
9 United States Magistrate Judge

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27 <sup>11</sup> The Court notes that because Plaintiff's testimony about her employment at Parexel  
28 would not be privileged, Plaintiff lacks standing under Rule 45(d)(3)(iii) to move to  
quash it.