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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

POLY-MED, INC.,

Plaintiff,

v.

NOVUS SCIENTIFIC PTE LTD., et al.,

Defendants.

Case No.: 17-CV-649-DMS-WVG

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
COMPEL**

[ECF No. 1]

I. INTRODUCTION

Present before the Court is defendants Novus Scientific PTE LTD, Novus Scientific, Inc., and Novus Scientific AB (collectively “Defendants” or “Novus”) unopposed Motion to Compel an out of district subpoena. (Def.s’ Mot., ECF No. 1.) This ancillary discovery proceeding is related to a subpoena served on nonparty Dr. James Chao (“Chao”) in an underlying action pending in the United States District Court for the District of South Carolina. *See Poly-Med, Inc., v. Novus Scientific PTE LTD, et al*, No. 15-CV-1964-JMC (D.S.C. filed May 8, 2015). Defendants are seeking a court order to compel compliance with the subject subpoena.

Defendants also seek attorney’s fees that have resulted from filing the present Motion. The Court construes this as a motion for contempt sanctions as this is the only sanctions remedy allowed under Rule 45. *See Fed. R. Civ. P. 45(g); Pennwalt Corp. v.*

1 *Durand-Wayland, Inc.*, 708 F.2d, 492, 494 n. 4 (9th Cir. 1983); *see also Molina v. City of*
2 *Visalia*, No. 13-CV-01991-LJO-SAB, 2015 WL 5193584, at *2 (E.D. Cal. Sept. 4, 2015)
3 (“The only authority in the Federal Rules of Civil Procedure to sanction a nonparty to an
4 action for failure to comply with a subpoena is Rule 45(g).”).

5 For the reasons set forth below, the Court **GRANTS** in part and **DENIES** in part
6 Defendants’ Motion. Additionally, the Court issues an **ORDER TO SHOW CAUSE** as
7 to why Chao should not be held in contempt for his failure to comply with the subpoena.

8 **II. RELEVANT BACKGROUND**

9 On May 8, 2015, Plaintiff filed a Complaint in the United States District Court for
10 the District of South Carolina alleging breach of contract, tortious interference with
11 contract, misappropriation of trade secrets, and unfair trade practices. *Poly-Med, Inc., v.*
12 *Novus Scientific PTE LTD, et al*, No. 15-CV-1964-JMC, ECF No. 1. On March 14, 2016,
13 Defendants each filed their Answers as well as Counterclaims against Plaintiff alleging
14 breach of contract, intentional interference with contractual relations, defamation, and
15 unfair trade practices. *Id.*, ECF Nos. 82-84.

16 On November 13, 2016, Chao was served personally with a subpoena *duces tecum*
17 pursuant to Rule 45. (Mallory Decl., Ex. F at 2.) On November 16, 2016, Chao responded
18 by sending an email to Jennifer Mallory, counsel for Defendants. (*Id.*, Ex G at 2.) In this
19 email, Chao indicated he was embarking on a trip to China that would last twelve days,
20 and that he would not be able to respond at the time proscribed in the subpoena. (*Id.*) Chao
21 further explained he had not yet discussed the matter with his attorney and he requested an
22 additional two to three weeks to “properly respond.” (*Id.*) That same day, defense counsel
23 responded and requested Chao direct his attorney to contact defense counsel promptly. (*Id.*)
24 On January 9, 2017, having not received a response from Chao, defense counsel again
25 emailed Chao requesting compliance with the subpoena and warned Chao that Defendants
26 may seek a motion to compel compliance with the subpoena. (*Id.*, Ex. H at 2.)

27 On March 30, 2017, Defendants brought the present Motion. On April 14, 2017, the
28 Court issued an order setting a briefing schedule requiring: (1) Defendants to effect service

1 on Chao on or before April 21, 2017; (2) Chao to file an opposition to Defendants' Motion
2 on or before May 12, 2017; and (3) staying compliance with the subject subpoena pending
3 the Court's ruling on the subject motion. (ECF No. 7.) The scheduling order also granted
4 Defendants leave to file a reply on or before May 19, 2017. (*Id.*) Chao did not file an
5 opposition to the motion. On May 19, 2017, Defendants timely filed a Reply. (Def.s' Reply,
6 ECF No. 11.)

7 **III. MOTION TO COMPEL**

8 Under Rule 45(a)(1)(C), a nonparty to a civil suit may be subpoenaed for documents
9 relevant to the suit. A nonparty served with the subpoena *duces tecum* may serve the
10 propounding party with a written objection within fourteen days after service or before the
11 time of compliance, if less than fourteen days. Fed. R. Civ. P. 45(d)(2)(B). "A nonparty's
12 failure to timely make objections to a Rule 45 subpoena generally requires the court to find
13 that any objections have been waived." *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 636
14 (C.D. Cal. 2005).

15 Chao has raised no objections to the subject subpoena. Rather, Chao requested
16 additional time to consult with counsel before replying to the subpoena. That occurred over
17 five months ago. Chao was then ordered to respond to this motion to compel - another
18 opportunity to explain why he has failed to respond to the subpoena. Chao disregarded the
19 Court's order and offered no explanation for his unresponsiveness nor any objections to
20 the subpoena. Thus, Chao has waived any objections he may have had with the subject
21 subpoena.

22 Therefore, Defendants' Motion to Compel is **GRANTED**.

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1 **IV. ORDER TO SHOW CAUSE**

2 **A. Properly Issued and Served Subpoena**

3 A subpoena served pursuant to Federal Rule of Civil Procedure 45 shall “command
4 each person to whom it is directed to ... produce designated documents, electronically
5 stored information, or tangible things in that person’s possession, custody, or control.” Fed.
6 R. Civ. P. 45(a)(1)(A)(iii). A subpoena also must state the court from which it issued,
7 the title of the action and its civil number, and set out the text of Rule 45(d) and (e). Fed.
8 R. Civ. P. 45(a)(1)(A)(i), (ii), and (iv). Serving a subpoena requires “delivering a copy to
9 the named person,” which is often interpreted to mean personal service. Fed. R. Civ. P.
10 45(b)(1); see *Prescott v. Cnty. of Stanislaus*, No. 10–cv–00592 JLT, 2012 WL 10617, at
11 *3 (E.D.Cal. Jan. 3, 2012) (a majority of courts interpreting “delivering” to require personal
12 service).

13 It is undisputed that Chao was served with a subpoena commanding him to produce
14 certain documents and that he failed to comply with the subpoena. The subpoena served
15 on Chao complied with the substantive requirements of Rule 45. The subpoena indicated
16 it was issued by the United States District Court for the District of South Carolina, stated
17 the title of the action along with the civil action number, and set out the text of Rule 45(d)
18 and (e). The subpoena commanded Chao to produce the requested documents to Jennifer
19 Mallory at 3579 Valley Centre Dr., Suite 300, San Diego, California, a place within 100
20 miles of Chao’s residence. (*Id.*, Ex. E at 5.) The subpoena was served personally on Chao
21 on November 13, 2016. (*Id.*, Ex. F at 2.) Chao acknowledged service of the subpoena in an
22 email to defense counsel. (*Id.*, Ex. G at 2.) Chao has not properly complied with or objected
23 to the subpoena to date. (Def.s’ Reply at 2.)

24 **B. Contempt Proceedings for Non-Compliance with a Valid Subpoena**

25 Pursuant to Rule 45(g), a court may “hold in contempt a person who, having been
26 served, fails without adequate excuse to obey the subpoena or an order related to it.” Fed.
27 R. Civ. P. 45(g). “[A] subpoena *duces tecum* is itself a court order, and noncompliance may
28 warrant contempt sanctions.” *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 494

1 n. 5 (9th Cir. 1983).

2 A contempt charge against a nonparty may be either of a criminal or a civil nature.
3 *See Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir. 1983). “The
4 primary purpose of criminal contempt is to punish past defiance of a court’s judicial
5 authority, thereby vindicating the court. *Id.* (citing *Shillitani v. United States*, 384 U.S. 364,
6 369 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); *see also Gompers v. Bucks*, 221 U.S. 418, 441,
7 31 S.Ct. 492, 55 L.Ed. 797 (1911)). It may include fines payable to the court and it also may
8 include jail time. *See, e.g., Shillitani*, 384 U.S. at 368.

9 Civil contempt, on the other hand, is meant to “compel obedience with a court order,
10 or to compensate the contemnor's adversary for the injuries resulting from the non-
11 compliance.” *Falstaff Brewing Corp.*, 702 F.2d at 778 (internal citation omitted). “The
12 district court has wide latitude in deciding whether there has been contemptuous defiance
13 of one of its orders.” *Stone v. City of San Francisco*, 968 F.2d 850, 856 (9th Cir.1992).

14 To establish civil contempt, Defendants must show by clear and convincing evidence
15 that Chao violated a specific order of the court. If Defendants satisfy that burden, the
16 burden shifts to Chao to show that he took every possible step to comply with the subpoena
17 and to articulate reasons why compliance was not possible. *See FTC v. Enforma Natural*
18 *Products, Inc.*, 362 F.3d 1204, 1211 (9th Cir. 2004) (“In a civil contempt action, the
19 moving party has the burden of showing by clear and convincing evidence that the
20 contemnors violated a specific and definite order of the court. The burden then shift to the
21 contemnors to demonstrate why they were unable to comply.”); *see also Donovan v.*
22 *Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983) (to satisfy this burden a contemnor is
23 required to show categorically and in detail why they were unable to comply with the
24 court’s previous order). In considering the contemnor's reasons why compliance was not
25 possible, the court may consider a history of noncompliance and a failure to comply despite
26 the pendency of a contempt motion. *See Stone*, 968 F.2d at 856–57. If a contemnor has
27 “performed all reasonable steps within [his] power to insure compliance with the court’s
28 orders” he should not be held in contempt. *Id.* at 856. However, “[i]ntent is irrelevant to a

1 finding of civil contempt” and thus “good faith is not a defense.” *Id.*

2 Defendants have established that Chao violated a specific and definite order of the
3 court by failing to comply with the subject subpoena, as well as failing to comply with the
4 Court’s Order to file a Response to Defendants’ present motion. Accordingly, the Court
5 issues an Order to Show Cause why contempt sanctions should not issue. *See Morutia-*
6 *Johnson v. City of Fresno*, No. 14-CV-00127-LJO-SKO, 2015 WL 1021123, at *3 (proper
7 procedure for nonparty subpoena compliance is to issue an order to show cause); *see also*
8 *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, at 1325 (9th Cir. 1998) (finding that a
9 district court should not impose contempt sanctions solely on the basis of affidavits unless
10 those affidavits are uncontroverted).

11 Defendants’ request for sanctions is, at this point, premature and is thus **DENIED**.

12 **V. CONCLUSION**

13 For the reasons set forth above, **IT IS HEREBY ORDERED**:

14 1. Defendants’ unopposed Motion to Compel is **GRANTED**. Chao shall comply
15 with the subject subpoena on or before **June 14, 2017**¹.

16 2. Defendant’s Motion for sanctions is **DENIED** as premature.

17 3. Chao is **ORDERED** to personally appear on **July 10, 2017** at **9:00 a.m.** before
18 United States Magistrate Judge William V. Gallo, United States Courthouse,
19 Courtroom 2A, Second Floor, 221 West Broadway, San Diego, California to SHOW
20 CAUSE why he should not be held in contempt for his failure to comply with the
21 subpoena.

22 4. Chao shall file a Declaration in response to this Order explaining his failure to
23 comply with the subpoena on or before **June 26, 2017**. This Declaration shall not
24 exceed **five pages**, excluding exhibits.

25 5. Defendants shall file a Reply to the Declaration that includes their attorney’s fees
26 related to the filing of the present motion and responding to this Order on or before
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28 ¹ This Order lifts the stay that was emplaced by the Court’s scheduling order. (*See* ECF No. 7 at 2.)

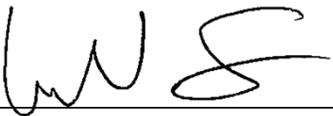
1 **July 3, 2017**. The Reply shall not exceed **five pages**, excluding exhibits. Defendants
2 must appear at the OSC hearing.

3 6. Failure to comply with this Order may subject Chao to contempt sanctions,
4 including monetary sanctions; and

5 7. Defendants shall personally serve this Order on Chao on or before **May 31, 2017**,
6 and file proof of service forthwith.

7 **IT IS SO ORDERED.**

8 Dated: May 25, 2017

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11 Hon. William V. Gallo
12 United States Magistrate Judge
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