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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HARJIT MAHIL,

Plaintiff,

v.

OPTION CARE ENTERPRISES,
INC.,

Defendants.

Case No.: 20cv1559-BEN-MDD

**ORDER GRANTING
DEFENDANT'S MOTION TO
COMPEL PRODUCTION OF
PLAINTIFF'S UNREDACTED
MEDICAL RECORDS**

[ECF No. 21]

Before the Court is a discovery dispute motion brought by Option Care Enterprises, Inc. (“Defendant”) seeking production of Harjit Mahil’s (“Plaintiff”) unredacted medical records. (ECF No. 21). Plaintiff argues production is not warranted because the redacted information is irrelevant and privileged. (*Id.*). For the reasons stated herein, the Court finds that Plaintiff has not met her burden of “clarifying, explaining, and supporting” her objections based on relevance and privilege. *DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal 2002) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)). Instead, Plaintiff provides conclusory assertions regarding her purported bases for her objections. She submits no specific

1 information identifying any sensitive material contained in the medical
2 records. Instead, her counsel asserts, in a conclusory fashion, that the
3 redacted information is “irrelevant” and “private.” The conclusory assertions
4 do not meet Plaintiff’s burden to justify continued redaction in light of the
5 protections contained in the protective order. (*See* ECF No. 10). Accordingly,
6 the Court **GRANTS** Defendant’s request.

7 **I. FACTUAL BACKGROUND**¹

8 Plaintiff, who has generalized anxiety disorder, began working as a
9 pharmacist for Defendant on March 27, 2017. (ECF No. 1, hereinafter
10 “Compl.” ¶¶ 19, 35). Defendant’s employees, including Plaintiff, were “forced
11 to forgo their meal and rest breaks (or to remain on duty while attempting to
12 take a break), work significant amounts of overtime, and remain on call after
13 hours and on weekends to keep up with the demand.” (Compl. ¶ 16).
14 Plaintiff notified her supervisor in April 2018 of several missed meal breaks.
15 (Compl. ¶ 26). Defendant did not provide premium pay for the breaks and
16 did not ensure subsequent meal breaks were taken. (*Id.*). As such, Plaintiff
17 began asking for premium pay each time she missed a meal break. (*Id.*).

18 Beginning in October 2019 and after voicing her concerns about
19 being overworked and unable to take rest and meal breaks at a staff meeting,
20 Defendant began reprimanding Plaintiff for failing to take her breaks.
21 (Compl. ¶¶ 30-32). Plaintiff “began clocking out for meal breaks” even
22 though she was not able to take them because she was afraid she would be
23 reprimanded or lose her job. (Compl. ¶ 32).

24 On October 18, 2019, while covering for another employee Plaintiff
25

26
27 ¹ These facts, taken from the Complaint, should not be construed as findings of fact by the Court.

1 “accidentally missed two deliveries.” (Compl. ¶ 33). Plaintiff’s supervisor
2 reprimanded her for missing the deliveries. (*Id.*). On October 23, 2019,
3 Plaintiff’s supervisor gave her a verbal disciplinary warning for “disorderly
4 conduct” stemming from this incident. (Compl. ¶ 34). Plaintiff subsequently
5 suffered a panic attack and left work early to see her doctor. (Compl. ¶ 35).
6 Plaintiff’s doctor prescribed her new medication to control her anxiety and
7 wrote a note excusing her from work that day and the next for a medical
8 condition. (*Id.*). Plaintiff provided the note to Defendant and took the
9 recommended days off. (*Id.*).

10 On October 29, 2019, Plaintiff had a follow-up appointment with
11 her doctor regarding her anxiety. Plaintiff’s anxiety “was still not under
12 control,” and “[s]he felt extremely stressed, was suffering from abdominal
13 pain, and everything felt hard to do” (Compl. ¶ 36). Her doctor
14 recommended she take a month of medical leave, but Plaintiff declined. (*Id.*).
15 On October 30, 2019, Plaintiff’s supervisor gave her another disciplinary
16 warning for “minor offenses” that purportedly occurred on September 14,
17 2019 when another employee mispackaged patients’ deliveries. (Compl. ¶
18 37).

19 “By December 24, 2019, [Plaintiff] was still suffering from severe
20 anxiety, experiencing insomnia, and having difficulty concentrating and
21 performing her job duties due to [Defendant’s] wage and hour violations and
22 retaliation.” (Compl. ¶ 38). Plaintiff had also recently learned that another
23 pharmacist planned to resign. (*Id.*). Fearing that Plaintiff would have to
24 pick up the resigning pharmacist’s workload, Plaintiff saw her doctor who
25 again recommended taking medical leave. (*See id.*). Plaintiff took a note to
26 Defendant certifying her need for a medical leave of absence from December
27 24, 2019 to February 4, 2020. (*Id.*). Defendant approved Plaintiff’s leave on

1 December 26, 2019 under the Family Medical Leave Act (“FMLA”) and
2 California Family Rights Act (“CFRA”). (Compl. ¶ 39).

3 On January 10, 2020, Plaintiff was terminated “under the guise of
4 an alleged reduction in force.” (Compl. ¶ 40). Two weeks later, Defendant
5 advertised online for a full-time pharmacist in the San Diego branch.
6 (Compl. ¶ 42). Shortly thereafter, Defendant hired back a former staff
7 pharmacist. (*Id.*). As a result of Defendant’s conduct, Plaintiff alleges that
8 she “has suffered lost wages and benefits and emotional distress.” (Compl. ¶
9 43).

10 Accordingly, on August 12, 2020, Plaintiff filed a complaint against
11 Defendant raising eleven causes of action: (1) FMLA interference; (2) CFRA
12 interference; (3) CFRA retaliation; (4) disability/perceived disability
13 discrimination; (5) retaliation for requesting reasonable accommodation; (6)
14 failure to prevent discrimination and retaliation; (7) failure to provide rest
15 breaks or pay premiums; (8) failure to provide meal breaks or pay premiums;
16 (9) retaliation; (10) wrongful termination in violation of public policy; and (11)
17 unlawful and unfair competition. (Compl. ¶ 2).

18 **II. RELEVANT PROCEDURAL BACKGROUND**

19 On February 11, 2021, Plaintiff testified at her deposition that she
20 “temporarily suffered from severe emotional distress” from January 10, 2020
21 to November 2020. (ECF No. 17 at 11). Plaintiff contends that she still
22 suffers from “continuing ‘garden variety’ emotional distress.” (*Id.* at 8).

23 On February 26, 2021, Plaintiff disclosed seven of her treating
24 physicians as non-retained experts—Dr. Kaylan Graham, Dr. Preeti Mathur,
25 April L’Heureux, LMFT, Joyce Prince, LMFT, Dr. Brandon Niemeier, Dr.
26 Cara Niemeier, and Tatiana Baroni—that will “testify about Plaintiff’s
27 mental disability, emotional distress, and the treatment she received for her

1 mental disability and emotional distress as a result of the claims alleged in
2 this action.” (ECF No. 17-3).

3 On March 9, 2021, Defendant served subpoenas for the production
4 of documents on Scripps Clinic Carmel Valley and Community Psychiatry
5 seeking Plaintiff’s medical records. (ECF No. 21-1, hereinafter “Durazo
6 Decl.” ¶ 3). On March 29, 2021, the parties agreed to a first look agreement
7 wherein the medical providers would first submit Plaintiff’s medical records
8 to Plaintiff’s counsel. (Durazo Decl. ¶ 4). Plaintiff’s counsel was permitted to
9 review the records, redact information, and transmit the redacted records,
10 along with a privilege log, to Defendant’s counsel. (*Id.*). On April 3, 2021,
11 Defendant served a subpoena for the production of documents on Sharp Mesa
12 Vista Hospital seeking Plaintiff’s medical records. (Durazo Decl. ¶ 3). These
13 documents were subject to the same first look agreement. (Durazo Decl. ¶ 4).

14 Pursuant to the first look agreement, Plaintiff received 336 pages of
15 Scripps Clinic records dated March 2, 2016 to April 12, 2021, 217 pages of
16 Community Psychiatry records dated January 20, 2020 to December 8, 2020,
17 and 440 pages of Sharp Mesa Vista Hospital records dated April 23, 2020 to
18 July 8, 2020. (Rangel Decl. ¶ 13).

19 In the end of April and beginning of May, Plaintiff transmitted a
20 privilege log and redacted medical records to Defendant. (Durazo Decl. ¶¶ 6-
21 11). Plaintiff produced 180/336 pages of Scripps Clinic records, including all
22 medical records relating to Plaintiff’s anxiety disorder, all 217 pages of
23 Community Psychiatry records, and all 440 pages of Sharp Mesa Vista
24 Hospital records. (Rangel Decl. ¶ 14). Plaintiff explained in her privilege
25 logs that the withheld records and redactions are irrelevant and private
26 information, such as “unrelated medical ailments and medications, routine
27 medical tests, . . . family medical history, third-party financial information,

1 and background information about [Plaintiff's] childhood.” (*Id.* ¶ 15).

2 Plaintiff's attorney declares that Plaintiff did not redact “any information
3 relating to [Plaintiff's] emotional distress symptoms such as insomnia,
4 nightmares, and depression, or her treatment and medications for her
5 anxiety and emotional distress, and has also not redacted information
6 relating to her potential alternate stressors.” (*Id.* ¶ 19).

7 On May 10, 2021, counsel for Plaintiff and Defendant agreed to
8 create a detailed chart outlining a sample of Plaintiff's redacted records and
9 detailing the parties' positions relating to the medical record redactions at
10 issue. (Durazo Decl. ¶ 12).

11 **III. LEGAL STANDARD**

12 Federal Rule of Civil Procedure 26(b) permits relevant and
13 proportional discovery. Fed. R. Civ. P. 26(b)(1). “Information within this
14 scope of discovery need not be admissible in evidence to be discoverable.” *Id.*

15 “Under Federal Rule of Evidence 501, federal common law
16 generally governs claims of privilege.” *Wilcox v. Arpaio*, 753 F.3d 872, 876
17 (9th Cir. 2014). “But in a civil case, state law governs privilege regarding a
18 claim or defense for which state law supplies the rule of decision.” Fed. R.
19 Evid. 501. “Where . . . the same evidence relates to both federal and state law
20 claims” Ninth Circuit courts are not bound by state law on privilege. *Wilcox*,
21 753 F.3d at 876. “The party who resists discovery has the burden to show
22 that discovery should not be allowed, and has the burden of clarifying,
23 explaining, and supporting its objections.” *DIRECTV, Inc.*, 209 F.R.D. at 458.

24 **IV. ANALYSIS**

25 Plaintiff contends that the redacted portions of her medical records
26 are not relevant to any of her claims and that they are protected by her right
27 to privacy and the psychotherapist-patient and physician-patient privileges.

1 (ECF No. 21). Defendant contends the information is relevant to Plaintiff's
2 FMLA and emotional distress claims. (*Id.* at 18). Defendant also asserts
3 that Plaintiff waived the psychotherapist-patient privilege, the physician-
4 patient privilege is inapplicable because federal law applies, and the interest
5 in the information outweighs any privacy interests. (*Id.* at 18-24).

6 **A. Relevance**

7 As the party resisting discovery, Plaintiff bears the burden of
8 showing that the discovery should not be allowed, “and has the burden of
9 clarifying, explaining, and supporting its objections.” *DIRECTV, Inc.*, 209
10 F.R.D. at 458. Plaintiff seeks emotional distress damages and, under a
11 separate cause of action, must show that she was entitled to leave under the
12 FMLA because of her generalized anxiety disorder. (*See generally*, Compl.).
13 Plaintiff's medical records are relevant to those claims.

14 Plaintiff has not adequately explained the contents of the
15 redactions. (*See* Durazo Decl., Exhibits E, G, and I; *see also* ECF No. 29,
16 hereinafter “Exhibit J”). Plaintiff only provides conclusory assertions
17 regarding her purported bases for her objections. (*See* Exhibit J). For
18 example, Plaintiff explains that the redactions include “unrelated and
19 irrelevant” medical records, such as vaccinations, lab results, medical
20 screenings, medications, medical history, “routine healthcare maintenance,”
21 and physical injuries. (*See generally, id.*). With respect to her
22 psychotherapist records, Plaintiff contends the redacted information includes
23 “unrelated, irrelevant, and private” information, such as family history,
24 information about Plaintiff's background and childhood, physical injuries, a
25 “legal history comment from 2007,” and “third-party financial information
26 related to Plaintiff's mother's estate.” (*See generally, id.*). Plaintiff's legal
27 conclusions that the information is irrelevant, and her vague categorizations

1 of nonspecific medical information does not meet her burden to justify the
2 continued redaction of this information.

3 Defendant is entitled to review Plaintiff's medical records to
4 determine whether she was entitled to rights under the FMLA and to
5 evaluate her emotional distress damages claims. The Court, therefore, finds
6 that Defendant has established the relevancy of the requested information.
7 Plaintiff's relevancy objection is **OVERRULED**.²

8 **B. Choice of Law**

9 Next, the Court must determine whether state or federal privilege
10 law applies to Plaintiff's redacted medical records. If the redacted medical
11 records relate to Plaintiff's state law claims only, then state privilege law
12 applies. *Wilcox*, 753 F.3d at 876-77. If, however, the records relate to
13 Plaintiff's federal and state law claims, then federal privilege law applies. *Id.*

14 Plaintiff argues that the medical records relate only to her state law
15 claims. (ECF No. 21 at 28). Defendant counters that the medical records
16 also relate to Plaintiff's federal law claim for FMLA interference. (*Id.* at 18).
17 Specifically, Defendant contends the records relate to whether Plaintiff's
18 generalized anxiety disorder qualifies as a serious health condition under the
19 FMLA. (*Id.* at 18). Because the parties agree that the records relate at least
20 to the state law claims, the Court only analyzes whether they relate to
21 Plaintiff's FMLA interference claim.

22 Under the FMLA, a "serious health condition" is "an illness, injury,
23 impairment, or physical or mental condition that involves . . . continuing
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25
26 ² Plaintiff would prefer the Court conduct an *in camera* review of the records prior to
27 compelling production of the unredacted medical records at issue. However, an
inadequate demonstration of the contents of the redactions does not require the Court to
fill in the blanks with an *in camera* review.

1 treatment by a health care provider.” 29 U.S.C. § 2611(11). The medical
2 records at issue are dated from December 27, 2017 to December 29, 2020.
3 (See Exhibit J). The first and last medical records reference Plaintiff’s
4 generalized anxiety disorder. (See *id.*). Although the records pre-date
5 Plaintiff’s termination in January 2020, they do relate to Plaintiff’s FMLA
6 interference claim because they provide discoverable information regarding
7 whether Plaintiff’s generalized anxiety disorder is a mental condition that
8 involves “continuing treatment by a health care provider.” 29 U.S.C. §
9 2611(11). As a result, the Court finds that the medical records relate to state
10 and federal law claims and that federal law on privilege applies.

11 **C. Plaintiff’s Objections**

12 Plaintiff objects to production of her unredacted medical records on
13 the grounds that they are protected by the psychotherapist-patient privilege
14 and the right to privacy.³ (ECF No. 21). The Court addresses each objection
15 in turn.

16 *1. Psychotherapist-Patient Privilege*

17 “[C]onfidential communications between a licensed psychotherapist
18 and her patients in the course of diagnosis or treatment are protected from
19 compelled disclosure under Rule 501 of the Federal Rules of Evidence.”
20 *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). This privilege may be waived by
21 the patient. *Id.* at 15 n.14. Courts in the Ninth Circuit follow one of three
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23
24 ³ In arguing that state privilege law applies, Plaintiff argued that the physician-patient
25 privilege protected her from disclosing the unredacted medical records. (ECF No. 21 at
26 28). The Court declines to address this argument because federal privilege law applies
27 and no physician-patient privilege exists under federal common law. See *In re Grand Jury
Proceedings*, 867 F.2d 562, 564 (9th Cir. 1989) (noting the Ninth Circuit’s refusal to adopt
a physician-patient privilege), abrogated on other grounds by *Jaffee v. Redmond*, 518 U.S.
1 (1996).

1 different approaches to determine whether a plaintiff has waived the
2 psychotherapist-patient privilege. Under the broad approach, a plaintiff
3 waives the privilege merely by alleging emotional distress in the complaint.
4 *Fitzgerald v. Cassil*, 216 F.R.D. 632, 636 (N.D. Cal. 2003). A plaintiff waives
5 the privilege under the middle approach by alleging either a separate tort of
6 distress or unusually severe emotional distress (*i.e.*, more than garden
7 variety emotional distress). *Id.* at 637. Under the narrow approach, a
8 plaintiff waives the privilege by affirmatively relying on the psychotherapist-
9 patient communication. *Id.* at 636.

10 Plaintiff has waived her psychotherapist-patient privilege under
11 each of the three approaches. First, Plaintiff has alleged emotional distress
12 in the Complaint. (Compl. ¶ 43) (“Because of Option Care’s conduct, Ms.
13 Mahil has suffered . . . emotional distress.”). Second, Plaintiff seeks more
14 than garden variety emotional distress. (ECF No. 18) (“Plaintiff testified at
15 her deposition that she ‘temporarily suffered from severe emotional distress’
16 from January 10, 2020 to November 2020.”). Third, Plaintiff will rely on the
17 psychotherapist patient communication. Plaintiff disclosed Dr. Mathur, April
18 L’Heureux, LMFT, and Joyce Prince, LMFT as non-retained experts who will
19 “testify about Plaintiff’s mental disability, emotional distress, and the
20 treatment she received for her mental disability and emotional distress”
21 (ECF No. 17-3, Exhibit C). Accordingly, the Court **OVERRULES** Plaintiff’s
22 objection based on the psychotherapist-patient privilege.

23 2. *Right to Privacy*

24 Plaintiff contends that the redacted information is protected by her
25 right to privacy. As an initial matter, a party’s right to privacy was taken
26 into consideration by the Supreme Court in *Jaffee* when articulating the
27 psychotherapist-patient privilege. The Supreme Court “expressly rejected

1 the approach in which a court ‘balanced’ the evidentiary need for the
2 communications against the patient’s privacy concerns.” *Fritsch v. City of*
3 *Chula Vista*, 196 F.R.D. 562, 565 (S.D. Cal. 1999)(citing *Jaffee*, 518 U.S. at 7,
4 17-18). Accordingly, the Court only determines whether the right to privacy
5 prevents disclosure of the remaining non-psychotherapist medical records.

6 Plaintiffs have a right to privacy in the confidentiality of their
7 medical records. *Soto v. City of Concord*, 162 F.R.D. 603, 618 (N.D. Cal.
8 1995). The right to privacy is neither a recognized privilege nor an absolute
9 bar to discovery. Rather, the right to privacy is subject to the balancing of
10 needs. *See Seaton v. Mayberg*, 610 F.3d 530, 539 (9th Cir. 2010). Courts
11 must balance the following factors to determine whether the interest in
12 obtaining the information requested outweighs the individual’s privacy
13 interests: “(1) the type of information requested, (2) the potential for harm in
14 any subsequent non-consensual disclosure, (3) the adequacy of safeguards to
15 prevent unauthorized disclosure, (4) the degree of need for access, and (5)
16 whether there is an express statutory mandate, articulated public policy, or
17 other recognizable public interest militating toward access.” *Id.*

18 The unredacted medical records are relevant and important to
19 establishing whether Plaintiff’s generalized anxiety disorder is a serious
20 health condition. Also, “[Defendant] must be free to test the truth of
21 [Plaintiff’s] contention that she is emotionally upset because of [Defendant’s]
22 conduct. Once [Plaintiff] has elected to seek such damages, she cannot fairly
23 prevent discovery into evidence relating to the element of her claim.” *Fritsch*,
24 196 F.R.D. at 568-69 (emphasis in original). Further, there is a protective
25 order governing confidential materials in this case. (See ECF No. 10). This
26 protective order addresses confidentiality and privacy concerns. *See Dowell*
27 *v. Griffin*, 275 F.R.D. 613, 617, 620 (S.D. Cal. 2011) (finding privacy concerns

1 can ordinarily be addressed with a protective order). Considering the
2 competing interests, and based on the information before the Court, the
3 protective order in this case was designed for and adequately protects the
4 privacy and confidentiality rights of Plaintiff and any third parties mentioned
5 in the medical records. As such, the Court **OVERRULES** Plaintiff's
6 objections based on the right to privacy.

7 **V. CONCLUSION**

8 Based on the foregoing, the Court **GRANTS** Defendant's request,
9 **OVERRULES** Plaintiff's objections, and **ORDERS** Plaintiff to produce
10 unredacted versions of the pages specified in Exhibit J to Defendant on or
11 before **July 6, 2021**.

12 **IT IS SO ORDERED.**

13 Dated: June 21, 2021



14 Hon. Mitchell D. Dembin
15 United States Magistrate Judge