

1
2
3
4
5
6
7
8
9
10
11
12
13
14

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SAM SAIHUNG LO, an Individual,
Plaintiff,

2:12-cv-01411-GMN-VCF

ORDER

vs.

FEDERAL NATIONAL MORTGAGE
ASSOCIATION d/b/a/ FANNIE MAE; DOE
DEFENDANTS 1 through 10, inclusive; and ROE
ENTITIES 1 through 10, inclusive,
Defendants.

**(Motion To Compel Compliance With
Subpoena Duces Tecum #23)**

15 Before the Court is Plaintiff Sam Saihung Lo's Motion To Compel Compliance With Subpoena
16 Duces Tecum Issued To Jason Abrams Professional Corporation d/b/a Abrams Groups At Luxury
17 Homes of Las Vegas (hereinafter "Abrams"). (#23). Abrams filed an Opposition (#25), and Plaintiff
18 filed a Reply (#27).

19 **I. Background**

20 Plaintiff filed his complaint in the underlying action against Defendants Federal National
21 Mortgage Association d/b/a Fannie Mae; DOE Defendants 1 through 10, inclusive; and ROE entities 1
22 through 10, inclusive (hereinafter "Fannie Mae") in the Eighth Judicial District Court, Clark County,
23 Nevada on June 19, 2012. (#1 Exhibit 2). Plaintiff asserts that, in selling residential property to
24 Plaintiff, Fannie Mae and its agents withheld knowledge of a "mold infestation" affecting the property,
25 rendering it "uninhabitable." *Id.* Plaintiff seeks, *inter alia*, damages in excess of \$10,000 and rescision
of the property sales contract. *Id.*

1
2 On August 9, 2012, Fannie Mae removed the action to this Court based on diversity, pursuant to
3 28 U.S.C. § 1332 (#1), and filed its Answer to the Complaint (#2). On September 21, 2012, the parties
4 submitted a proposed Discovery Plan and Scheduling Order. (#11). On the same day, the Court signed
5 the Discovery Plan and Scheduling Order (#11), setting the deadline for discovery on February 2, 2013,
6 dispositive motions on March 3, 2013, and a Proposed Joint Pretrial Order on April 8, 2013. (#12).

7 On October 1, 2012, Plaintiff served Abrams with a Subpoena Duces Tecum, due by October 15,
8 2012, in connection with the action against Fannie Mae. (#23-1). On October 15, 2012, Plaintiff filed
9 an Affidavit of Service of the Subpoena Duces Tecum on Abrams. (#13). On October 17, 2012,
10 Abrams served Plaintiff with its responses and objections to the Subpoena Duces Tecum. (#23-1
11 Exhibit A). Abrams objected to two of the Subpoena's five document requests on the grounds that they
12 were "over-broad and not properly-tailored to lead to discoverable information. . . [by requesting]
13 information far beyond the scope of relevance for the present litigation." *Id.*

14 On March 20, 2013, Plaintiff filed a Motion for an Order to Show Cause as to Why Abrams
15 Should Not Be Held in Contempt of Court for Failure to Comply with Subpoena Duces Tecum. (#20).
16 No opposition was filed. *Id.* On April 11, 2013, this Court denied the Motion for an Order to Show
17 Cause (#20), and converted the document into a separate Motion to Compel Compliance With Subpoena
18 Duces Tecum Issued to Abrams (#23), with any oppositions due by May 6, 2013, and any reply due
19 fifteen days after service of the Opposition. (#24). On May 6, 2013, Abrams filed a Response in
20 opposition to the Motion to Compel (#23). (#25). On May 16, 2013, Plaintiff filed a Reply in support
21 of its Motion to Compel (#23). (#27).

22 **II. Motion to Compel**

23 **A. Plaintiff's Argument**

24 Plaintiff asserts that the court should overrule Abrams' objections and compel it to "provide full
25 and complete answers or responses to each of Plaintiff's document requests" because Abrams (1) "has

1
2 failed to reasonably provide the requested documentation relevant to the issues involved in the matter;”
3 (2) has “unreasonably delayed” in producing the requested documents; and (3) has not made its
4 “[o]bjections to the requested documentation. . . in good faith.” (#27). Plaintiff contends that Abrams
5 “seeks to hide behind the fact that it provided approximately 100 pages of discoverable information” to
6 avoid producing documents “at the heart of this dispute.” *Id.* As Abrams was “the managing agent” and
7 “the listing agent” for the property at issue, Plaintiff believes that there was “clearly relevant
8 information contained in all of [Abrams’] documents in reference to the Property. . . [h]owever,
9 [Abrams] has failed to provide those documents.” *Id.*

10
11 Plaintiff argues that Abrams’ original response for production did not comply with the Federal
12 Rules of Civil Procedure governing discovery as evidenced by the fact that it “was still producing
13 ‘newly found’ documents even as the drafting of the Opposition to Plaintiff’s Motion occurred.” *Id.*
14 Plaintiff states that, had he “not brought the present Motion, he would still not be privy to the documents
15 ‘newly’ discovered and produced by [Abrams].” *Id.* Plaintiff claims that Abrams’ untimely production
16 of additional documents is an “unnecessary and unreasonable delay” occurring “almost 217 days” since
17 the initial discovery request and implies that Abrams has not disclosed “additional relevant information
18 vital to Plaintiff’s case.” *Id.*

19
20 Plaintiff cites Rule 26(b)(1) of the Federal Rules of Civil Procedure to support his assertion that
21 his contested discovery requests were “in compliance with FRCP 45.” *Id.* Plaintiff emphasizes that,
22 under the “liberal discovery rules” of Rule 26, Abrams cannot object “to respond[ing] to Plaintiff’s
23 document requests. . . on the ground[s] of relevance” because “any nonprivileged matter that is relevant
24 to any party’s claim or defense” may be discoverable. (#23); *see* FED R. CIV. P. 26. In light of this
25 “broadly worded rule,” Plaintiff views Abrams’ objections as “an attempt to evade the well founded
procedures of the discovery process.” (#27).

1
2
3 **B. Abrams' Argument**

4 Abrams requests that the court deny Plaintiff's Motion to Compel (#23) because (1) Plaintiff's
5 discovery requests contained "poor wording and over-broad language" that made compliance with the
6 requests unfeasible; (2) Rule 26(b)(1) does not allow "unlimited discovery on virtually anything;" and
7 (3) Abrams has "fully satisfied" its duties in responding to the Subpoena Duces Tecum, pursuant to Rule
8 45(d). (#25). Abrams asserts that Plaintiff is engaged "in an open-ended fishing expedition," requesting
9 documents that go "way beyond the scope of the present case and well beyond the possession. . . of
10 [Abrams]." *Id.* The breadth of Plaintiff's discovery requests, according to Abrams, "include virtually
11 any document, anywhere that would have anything to do with any real estate transaction that [Abrams]. .
12 . has ever had anything to do with over the past three (3) years." *Id.*

13 Abrams argues that it is impossible to comply with Plaintiff's discovery requests because the
14 language of the Subpoena includes terms like "the property," without specifically defining what these
15 terms mean. *Id.* Abrams claims that these terminological ambiguities forced it to "guess as to what the
16 [discovery] Request is actually seeking." *Id.* Despite asserting that it did not know what was requested
17 by Plaintiff's Subpoena, Abrams states that it has provided "over one hundred pages of documents,
18 accounting for nearly everything that [Abrams] possessed relating to the property that sits at the center
19 of this case." *Id.* By providing these documents, Abrams argues that it has "fully satisfied its
20 obligations pursuant to. . . FRCP 45," which requires "a copy of each document within [Abrams']
21 possession as kept in the ordinary course of business." *Id.*

22 Abrams contends that Plaintiff has misapplied the discovery standard established by Rule
23 26(b)(1). *Id.* Although Rule 26 "allows for a party to conduct discovery of evidence that may be
24 irrelevant at trial," Abrams asserts that the rule is not a "blank check' to force nonparties to act as
25 [Plaintiff's] unpaid private investigators." *Id.* Abrams claims that it has met the "relevant" standard

1
2 under Rule 26 by providing “nearly every document in [its] possession. . . that had anything to do with
3 the subject matter of the litigation.” *Id.*

4 Abrams also argues that it did not untimely respond to Plaintiff’s Subpoena and that its late
5 disclosures were supplements to the documents it previously produced that were found during a “further
6 investigation” of its records. *Id.* Abrams states that during a telephone conversation between its
7 counsel and Plaintiff’s counsel, it was led to believe that “no Motion [would be] forthcoming and that
8 additional time would be allowed” for Abrams to continue its investigation to produce documents. *Id.*
9 Abrams claims that the Motion to Compel (#23) was unexpected because its counsel’s office records
10 “show no further correspondence. . . from Plaintiff’s Counsel prior to the filing of the present motion.”
11 *Id.*

12 C. Relevant Law

13 The purpose of discovery as allowed by the Federal Rules of Civil Procedure is to provide the
14 parties with a panoply of devices that serve “to narrow and clarify the basic issues between the parties”
15 and to “ascertain[] the facts, or information as to the existence or whereabouts of facts, relative to those
16 issues.” *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). As this Court has previously stated:

17 A Rule 45 subpoena must fall within the scope of proper discovery under
18 Fed.R.Civ.P. 26(b)(1), which limits discovery to ‘any matter, not
19 privileged, that is relevant to the claim or defense of any party in the
20 pending action ...’” *Olde Towne Dev. Group, LLC v. Matthews*, 2009 WL
21 2021723, *1 (M.D.La. July 9, 2009). Relevance within the meaning of
22 Rule 26(b)(1) is considerably broader than relevance for trial purposes.
23 See *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978) (citation
24 omitted). For discovery purposes, relevance means only that the materials
25 sought are reasonably calculated to lead to the discovery of admissible
evidence. *Id.* “If a subpoena falls outside the scope of permissible
discovery, the Court has authority to quash or modify it upon a timely
motion by the party served ...” *Olde Towne Dev. Group, LLC*, 2009 WL
2021723, * 1.

WideVoice Communications, Inc. v. Qwest Communications, Inc., 2012 WL 1439071, *4.

1
2 Rule 45, which governs Subpoenas Duces Tecum, is thus read in *pari materia* with Rule 26,
3 governing scope of discovery, Rule 34, governing production of documents, and Rule 37, governing
4 sanctions for failure to cooperate with discovery. FED. R. CIV. P. 81(a)(5); *see Boeing Airplane Co. v.*
5 *Coggeshall*, 280 F.2d 654, 658 (D.C. Cir. 1960); *Tiedman v. Am. Pigment Corp.*, 253 F.2d 803, 808 (4th
6 Cir. 1958).

7 Although the Rules at one time had been read so as to encourage “fishing expeditions,” *see*
8 *Hickman*, 329 U.S. at 507, the Advisory Committee, in the 2000 Amendment to Rule 26(b)(1),
9 narrowed the scope of discovery to “material relevant to the parties’ claims or defenses,” emphasizing
10 that the parties “have no entitlement to discovery to develop new claims or defenses that are not already
11 identified in the pleadings.” FED. R. CIV. P. 26. Despite these changes, “most courts which have
12 addressed the issue find that the Amendments to Rule 26 still contemplate liberal discovery, and that
13 relevancy under Rule 26 is extremely broad.” *U.S. E.E.O.C. v. Caesars Entm’t, Inc.*, 237 F.R.D. 428,
14 431 (D. Nev. 2006) (citations omitted). The semantic differences between the previous iteration of Rule
15 26 and its amended successor should not supersede the greater purpose of discovery; “[t]hus, counsel
16 should be forewarned against taking an overly rigid view of the narrowed scope of discovery.”
17 *Thompson v. Dep’t of Hous. & Urban Dev.*, 199 F.R.D. 168, 172 (D. Md. 2001).

18 The courts have a duty to protect a person subject to a Subpoena from undue burden or expense.
19 FED. R. CIV. P. 45. Under Rule 45(c)(2)(B), a non-party who has been served with a Subpoena Duces
20 Tecum may object to the request to produce documents. *Id.* Once an objection has been raised, the non-
21 party “is not obligated to comply with the subpoena.” *Forsythe v. Brown*, 281 F.R.D. 577, 587 (D. Nev.
22 2012) *report and recommendation adopted*, 3:10-CV-00716-RCJ, 2012 WL 1833393 (D. Nev. May 18,
23 2012). “If the parties are unable to resolve their dispute, the serving party may file a motion to compel.”
24 *Id.* A non-party who objects to a Subpoena Duces Tecum for being unduly burdensome or onerous has
25 the burden of establishing that claim by showing “the manner and extent of the burden and the injurious

1
2 consequences of insisting upon compliance with the subpoena.” *See Goodman v. United States*, 369
3 F.2d 166, 169 (9th Cir. 1966); 9A Charles Alan Wright et al., *Federal Practice and Procedure* § 2463.1
4 (3d ed. 2013).

5 If the objecting party makes such a showing, the court will weigh the burden placed on the
6 subpoenaed party against the prejudice that would be endured by the requesting party. *See Moon v. SCP*
7 *Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005). Factors the court considers in its evaluation include:
8 (1) the relevance of the requested information to the action’s claims or defenses; (2) “the need of the
9 party for the documents;” (3) “the breadth of the document request;” (4) “the time period covered by”
10 the request; and (5) “the particularity with which the documents are described and the burden imposed.”
11 *Id.* (citation omitted). At its most expansive, the court may order the subpoenaed party to produce all
12 documents within its “care, custody, and control as those terms are defined under prevailing Ninth
13 Circuit law.” *Eastridge Pers. of Las Vegas, Inc. v. Du-Orpilla*, 2:06 CV 00776 KJD PA, 2007 WL
14 1232229 (D. Nev. Apr. 26, 2007). Within this circuit, “[c]ontrol is defined as a legal right to obtain
15 documents upon demand.” *United States v. Int’l Union of Petroleum & Indus. Workers, AFL-CIO*, 870
16 F.2d 1450, 1452 (9th Cir. 1989).

17 **D. Discussion**

18 Abrams has objected to Plaintiff’s Subpoena Duces Tecum on the grounds that it “imposes an
19 onerous burden upon the nonparty [Abrams].” (#25). The burden is thus on Abrams to show how and
20 to what extent the subpoena burdens or injures it. *See Goodman*, 369 F.2d at 169. Abrams’ Opposition
21 (#25) repeatedly expresses that Plaintiff’s subpoena is overly broad; however, relatively little is written
22 about how Abrams is actually harmed by the document requests. Central to Abrams’ argument is that
23 key terms in Plaintiff’s Subpoena are undefined, including “the property” in “Examining Request No. 2”
24 and “No. 3,” and that these ambiguities prevented it from complying exactly with Plaintiff’s requests.
25 *Id.*

1
2
3 Although Abrams is correct that “Document Request”¹ Nos. 2 and 3 do not define “the
4 property,” Abrams fails to mention that in the immediately preceding “Document Request No. 1,”
5 Plaintiff specifically defines “the property” as “Old Republic Escrow No. 5115023013-LR for the
6 property located at 7950 W. Flamingo Rd. #2140, Las Vegas, Nevada 89147, (the “Property”) for which
7 you were the listing seller/agent.” (#23-1). The Court finds it apparent that one could easily recognize
8 that “the property,” as mentioned in subsequent “Document Requests,” refers to the aforementioned
9 property that is the subject of this action. Abrams’ objection that the Subpoena is over-broad is
10 overruled.

11 Abrams makes an additional argument that the requests “sought documents way beyond the
12 scope of the present case and well beyond the possession, custody, or control of [Abrams].” (#25).
13 These statements misapply the law and belie Abrams’ assertion that it has satisfied its duties to respond
14 to the Subpoena by providing “every document that [Abrams] had in his possession related to the
15 property that is the subject of the present case.” *Id.*

16 The subject of this action is a residential unit of property that had sustained water damage and
17 had subsequently developed mold. (#23). Although Abrams is not a party to the action, as a property
18 manager of the unit, its relationship to the action is immediate and relevant. The disputed “Document
19 Request” Nos. 2 and 3 in Plaintiff’s Subpoena seek to discover information within Abrams’ control,
20 beginning 21 months before Plaintiff purchased this residential unit, concerning the extent to which the
21 water damage was known. (#23-1). While the Court agrees with Abrams that the scope of discovery is
22 not infinite, the limitations imposed by the original requests are sufficiently narrow to comport with the
23 amended language of Rule 26. *See* FED. R. CIV. P. 26.

24 Relying almost exclusively in its Opposition (#25) upon the argument that Plaintiff’s Subpoena
25 is broader than allowed under Rules 26 and 45, Abrams has failed to meet its burden of establishing that

¹In Abrams’ Opposition, what Abrams calls “Examining Requests” are actually titled “Document Requests” in Plaintiff’s Subpoena. In an effort to maintain consistency through the discussion portion of this order, the Court will refer to these requests as “Document Requests.”

1
2 the document requests are unduly burdensome or onerous and did not present arguments that production
3 of the requested documents was prohibitively expensive or professionally embarrassing. The Court
4 recognizes that Plaintiff has a legitimate need for the requested documents related to his cause of action,
5 limited to a single unit of residential property within a three-year period, concerning the unit's water
6 damage and Abrams' management of the unit during that period.

7
8 Abrams expresses concern in its Opposition (#25) that Plaintiff's Subpoena will "essentially
9 enlist [Abrams] as Plaintiff's own, unpaid private investigator," in searching for documents it has never
10 possessed. (#25). Such a demand would undisputedly be an abuse of discovery. The Court cannot
11 impose upon and does not expect parties to perform duties beyond the scope of the Rules. When
12 discovery requests are overreaching in their demands, the Court will construe the requests so as to
13 adhere to the appropriate Rules; thus, where Plaintiff's requests fail to specify whose documents are to
14 be produced, the Court will enforce the Subpoena only to the extent that the documents are within the
15 responding party's control, as defined by the Ninth Circuit.

16 To illustrate how Abrams should read Plaintiff's Subpoena Duces Tecum, the Court will
17 examine "Document Request No. 3," that states in full:

18 Please produce any and all documents and reports concerning any and all
19 inspections (including mold inspections) of the Property from January 1,
20 2010 to the present.

21 The language "any and all documents and reports" is read within the context of Rule 34(a),
22 which explains that "*any* designated documents or electronically stored information. . . stored in *any*
23 medium from which information can be obtained," and "*any* designated tangible things; or. . . entry onto
24 designated land possessed or controlled by the responding party," are subject to discovery. FED. R. CIV.
25 P. 34. (emphasis added). The language "concerning any and all inspections (including mold
inspections) of the Property from January 1, 2010 to the present" designates what documents are subject
to this discovery request; that is, Plaintiff is requesting that Abrams produce any documents (1) related

1
2 to the residential unit that is the subject of this action, (2) concerning any inspections (including but not
3 limited to those conducted regarding the water damage and mold infestation) of this property, (3) that
4 Abrams' controls or has the legal right to obtain (whether or not they are currently in Abrams'
5 possession), and (4) dating from January 1, 2010 until today.

6 Having clarified Plaintiff's document requests, the Court orders Abrams to fully comply with the
7 Subpoena Duces Tecum by supplementing its previously produced documents as is needed. Upon
8 completion of this supplementation, Abrams must serve Plaintiff with an affidavit affirming, under
9 penalty of perjury, that it has produced all documents requested by the Subpoena. If Abrams determines
10 that it has already produced all documents required by this order, it must serve Plaintiff with the same
11 affidavit affirming, under penalty of perjury, that it has produced all documents requested by the
12 Subpoena.

13 Accordingly and for good cause shown,

14 IT IS ORDERED that Plaintiff Sam Saihung Lo's Motion To Compel Compliance With
15 Subpoena Duces Tecum (#23) is GRANTED.

16 IT IS FURTHER ORDERED that:

- 17
- 18 1. Jason Abrams Professional Corporation d/b/a Abrams Groups At Luxury Homes of Las
19 Vegas must fully comply with the Subpoena Duces Tecum, as modified herein, by June
20 17, 2013.
 - 21 2. Upon completion of this supplementation, Jason Abrams Professional Corporation d/b/a
22 Abrams Groups At Luxury Homes of Las Vegas must serve Plaintiff with an affidavit
23 affirming, under penalty of perjury, that it has produced all documents requested by
24 Plaintiff's Subpoena Duces Tecum.
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

3. If Jason Abrams Professional Corporation d/b/a Abrams Groups At Luxury Homes of Las Vegas determines that it has already produced all documents required by this order, it must serve Plaintiff with an affidavit affirming, under penalty of perjury, that it has produced all documents requested by the Subpoena.

DATED this 10th day of June, 2013.



CAM FERENBACH
UNITED STATES MAGISTRATE JUDGE