UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

TRUDY D'SOUZA,	§	
	§	
Plaintiff,	§	
v.	§	
	§	**EP-15-CV-00256-DCG**
MARMAXX OPERATING CORP.; MARMAXX OPERATING CORP., *d/b/a Marshalls*; **MARMAXX OPERATING CORP.,** *d/b/a The TJX Companies, Inc.*; **MARMAXX OPERATING CORP.,** *d/b/a Marshalls of El Paso-Sunland, TX, Inc.*; **THE TJX COMPANIES, INC.; THE TJX COMPANIES, INC.,** *d/b/a Marshalls*; **MARSHALLS; and MARSHALLS OF EL PASO-SUNLAND, TX,**	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is Defendants Marmaxx Operating Corp.; Marmaxx Operating Corp. d/b/a Marshall's; Marmaxx Operating Corp., d/b/a The TJX Companies, Inc.; Marmaxx Operating Corp. d/b/a Marshall's of El Paso-Sunland, TX, Inc.; The TJX Companies, Inc.; The TJX Companies, Inc., d/b/a Marshall's; Marshall's; and Marshall's of El Paso-Sunland, TX's (collectively, "Defendants") "Motion for Entry of Protective Order Regarding Subpoena Deces Tecum Issued to Dr. Stuart Weil" (ECF No. 56) ("Motion") filed on March 14, 2017. Therein, pursuant to Federal Rule of Civil Procedure ("Rule") 26, Defendants seek protection from a subpoena *duces tecum* that Plaintiff Trudy D'Souza ("Plaintiff") served, pursuant Rule 45, upon Defendants' expert witness Dr. Stuart Weil, M.D., P.A. On March 15, Plaintiff filed a "Response to Defendants' Objections and Responses to Plaintiff's Second Amended Notice of Intent to Take Oral Deposition of Dr. Stuart Weil with Subpoena Duces Tecum" (ECF No. 60)

("Response") and a "Response to Defendants' Motion for Entry of Protective Order Regarding Subpoena Duces Tecum Issued to Dr. Stuart Weil" (ECF No. 61) ("Supplemental Response"). For the reasons that follow, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion.

I. PROCEDURAL HISTORY

This is a premises liability case: Plaintiff alleges that in October 2013, she fell at a Marshall's store located in El Paso, Texas, and suffered injuries to her back, hip, knee, and other parts of her body. On September 20, 2016, Defendants designated Dr. Weil as a testifying expert and produced his expert report. On February 15, 2017, Defendants noticed the deposition of Dr. Weil for March 20, 2017, and the next day, Plaintiff too noticed the deposition of Dr. Weil for the same day. On March 9, Plaintiff served Dr. Weil with the subpoena *duces tecum*, the subject of the instant Motion. In the subpoena, Plaintiff issued twelve Requests for information and documents to Dr. Weil and instructed him to produce them by March 15—four days ahead of the scheduled deposition. On March 14, Defendants filed the instant Motion, and Plaintiff followed by filing a motion to quash Dr. Weil's deposition and for a protective order (ECF No. 58). On March 16, the Court instructed the parties not to go forward with Dr. Weil's deposition until it has an opportunity to address their discovery disputes. Order, ECF No. 62. The Court now addresses them.

II. APPLICABLE LAW

A. Scope of Discovery

Under Rule 26(b),

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties'

> resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1).

Although the scope of discovery is broad, "its processes must be kept within workable bounds on a proper and logical basis for the determination of the relevancy of that which is sought to be discovered." *Jones v. Metzger Dairies, Inc.*, 334 F.2d 919, 925 (5th Cir. 1964). "When the discovery appears relevant the burden is on the party objecting to show that the discovery is not relevant. When relevancy is not apparent, however, it is the burden of the party seeking discovery to show the relevancy of the discovery request." *Cuthbertson v. Excel Indus., Inc.*, 179 F.R.D. 599, 603 (D. Kan. 1998) (brackets, internal quotation marks, and citations omitted).

The scope of discovery is within the sound discretion of the trial judge, *see Freeman v. United States*, 556 F. 3d 326, 341 (5th Cir. 2009), who may "tailor discovery narrowly and . . . dictate the sequence of discovery," *Crawford–El v. Britton*, 523 U.S. 574, 598 (1998). However, the Court must limit discovery, if it determines, on motion or on its own, that "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive" or "the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C). Rule 26(b), although broad, may not be used "as a license to engage in an unwieldy, burdensome, and speculative fishing expedition." *Murphy v. Deloitte & Touche Grp. Ins. Plan*, 619 F.3d 1151, 1163 (5th Cir. 2010).

B. Rule 26's Provisions Governing Expert Discovery

Rule 26(a)(2)(A) requires a party to disclose to the other party "the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705."

Fed. R. Civ. P. 26(a)(2)(A).[1] Rule 26(a)(2)(B) provides that expert witnesses generally must provide an expert report that contains:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the *facts or data* considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B).

Rule 26(b)(4)(A) authorizes routine depositions of testifying experts, which "may be conducted only after the report is provided." Fed. R. Civ. P. 26(b)(4)(A). Rule 26(b)(4)(C) extends work product protection to any communications between a party's attorney and its expert witness, except to the extent that they fall within three exceptions: they (i) relate to compensation for the expert's study or testimony, (ii) identify facts or data that the attorney provided and that the expert considered in forming the opinions to be expressed, or (iii) identify assumptions that the attorney provided and that the expert relied upon in forming those opinions, the rule does not provide work-product protection. Fed. R. Civ. P. 26(b)(4)(C)(i)–(iii).

C. Subpoenas *Duces Tecum*

Rule 45 governs discovery from nonparties through the issuance of subpoenas. A subpoena may command a nonparty to "produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control," Fed. R. Civ. P. 45(a)(1)(A)(iii), and command their "production . . . at a place within 100 miles of where the

[1] *Amaya v. City of San Antonio*, No. 5:12-CV-00574-DAE, 2014 WL 3919569, at *2 (W.D. Tex. Aug. 11, 2014) ("Expert witness testimony is governed by Federal Rule of Civil Procedure 26(a)(2) in unison with Federal Rule of Evidence 702, 703, and 705. Rule 26(a)(2) outlines the procedural requirements of disclosure, while Rules 702, 703, and 705 address the qualifications of the expert witness and the substance of the testimony.").

person resides, is employed, or regularly transacts business in person," Fed. R. Civ. P. 45(c)(2)(A).

As with any other forms of discovery, the scope of discovery through a Rule 45 subpoena is governed by Rule 26(b). *See, e.g., Chamberlain v. Farmington Sav. Bank*, No. 3:06CV01437 CFD, 2007 WL 2786421, at *1 (D. Conn. Sept. 25, 2007) (citing, *inter alia*, Fed. R. Civ. P. 45 advisory committee's notes to 1970 amendment (stating "the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules")). Thus, while "Rule 45 does not list irrelevance or overbreadth as reasons for quashing a subpoena[,] . . . the [c]ourt must review . . . subpoenas duces tecum under the relevancy standards set forth in Rule 26(b)." *HDSherer LLC v. Nat. Molecular Testing Corp.*, 292 F.R.D. 305, 308 (D.S.C. 2013). A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad. *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004).

D. Protective Orders

Rule 26(c) governs protective orders and provides, in relevant part: "A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending. . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). Thus, the court may, *inter alia*, "forbid[] the disclosure or discovery"; "limit[] the scope of disclosure or discovery to certain matters"; "prescribe[] a discovery method other than the one selected by the party seeking discovery"; and "specify[] . . . time and place or the allocation of expenses, for the disclosure or discovery." Fed. R. Civ. P. 26(c).

III. DISCUSSION

A. Preliminary Issues

Before addressing Defendants' specific objections to Plaintiff's Requests for information and documents, the Court turns to certain preliminary issues raised by the parties' arguments.

1. The Scope of Expert Discovery

Defendants ask the Court to limit discovery from Dr. Weil to "only the information and documents discoverable from an expert witness under Fed. R. Civ. P. 26(a)(2)." Mot. at 7. Likewise, Defendants object to multiple Requests on the ground that Rule 26(a)(2), more specifically Rule 26(a)(2)(B), does not require Dr. Weil to provide the requested information and/or documents. *E.g.*, *id.* at 4–5; *see also id.* at 3 ("the subpoena . . . requires Dr. Weil to produce documents that are . . . outside the scope of expert discovery under Rule 26(a)(2)"). In essence, Defendants argue that Rule 26(a)(2)(B) imposes an upper limit on what is discoverable from a testifying expert and therefore, that Plaintiff may not obtain the requested discovery through a Rule 45 subpoena *duces tecum*.

Defendants do not cite any authority, much less any binding authority, in support of their arguments. Plaintiff, on the other hand, cites two Fifth Circuit cases to support her position that Dr. Weil should be required to provide the requested information and documents. *See, e.g.*, Resp. at 3 (citing *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1282–83 (5th Cir. 1974)); *id.* at 6 (citing *Collins v. Wayne Corp.*, 621 F.2d 777, 783 (5th Cir. 1980)). These cases, however, address the scope of the matters into which a party may cross-examine an adverse party's expert witness for impeachment purposes: in *Reyes*, an expert's testimony given in an earlier trial to demonstrate inconsistency, *Reyes*, 498 F.2d at 1282–83, and in *Collins*, an expert's compensation to show bias or interest, *Collins*, 621 F.2d at 783–84. They do not address the issue raised by

Defendants' arguments here. *See Sartin v. Wal-Mart Stores East, L.P.*, No. 1:14-CV-3, 2014 WL 4794542, at *1 (S.D. Miss. Sept. 25, 2014) (observing that *Collins* does not address "how much documentary evidence the experts must produce regarding compensation").

Courts have reached divergent conclusions on the issue. *Compare, e.g., United States v. Bazaarvoice, Inc.*, No. C 13-00133 WHO (LB), 2013 WL 3784240, at *2 (N.D. Cal. July 18, 2013) ("Rule 26(a)(2)(B) governs only disclosure in expert reports, . . . and it does not preclude parties from obtaining further information through ordinary discovery tools."), *and Watkins v. New Palace Casino, LLC*, No. 1:13cv224-HSO-RHW, 2014 WL 12639931, at *1 (S.D. Miss. July 11, 2014) (rejecting the defendant's argument that the plaintiffs "are entitled to discover nothing more about [the defendant's expert witness] than the disclosure which is mandated by [Rule] 26(a)(2)(B) and 26(b)(4)(C)"), *with, e.g., Morriss v. BNSF Ry. Co.*, No. 8:13CV24, 2014 WL 128393, at *7 (D. Neb. Jan. 13, 2014) ("[A]bsent some threshold showing of need, the broad discovery provisions of . . . Rule 45 cannot be used to undermine the specific expert witness discovery rules in Rule 26(a)(2) and (b)(4)"), *and Perry v. United States*, No. 3:96-CV-2038-T, 1997 WL 53136, at *1 (N.D. Tex. Feb. 4, 1997) ("A party may not circumvent the limitations of Rule 26 and gain access to opposing expert evidence via a bare subpoena duces tecum.").

The history of Rule 26's provisions governing expert witness discovery and the accompanying Advisory Committee Notes belie Defendants' suggestion that Rule 26(a)(2)(B) imposes an upper limit. In recent years, the amendments to these provisions have generally trended in favor of greater discovery. In 1970, Rule 26 was amended to provide limited discovery, through interrogatories, of "the subject matter on" and "the substance of facts and opinions to which the expert is expected to testify" at trial.[2] Moreover, upon motion, a court was

[2] *See* Fed. R. Civ. P. 26(b)(4)(A)(i) (1970) ("A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to

authorized to order "further discovery by other means."[3] The amendment "was intended to facilitate cross-examination and rebuttal of experts at the trial." 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2030 (3d ed.). Next, a seismic shift toward greater expert discovery occurred in 1993. That year, Rule 26's provisions governing expert witnesses were amended in two significant ways. First, a party was required to disclose its testifying expert and provide "a written report prepared and signed by the witness," which was required to contain an enumerated list of information and documents.[4] Second, the Rule provided for deposition of expert witnesses as a routine discovery tool.[5] These provisions

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state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.").

[3] *See* Fed. R. Civ. P. 26(b)(4)(A)(ii) (1970) ("Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.").

[4] The *then* Rule 26(a)(2) provided:

> (A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.
>
> (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed. R. Civ. P. 26(a)(2) (1994).

[5] *See* Fed. R. Civ. P. 26(b)(4)(A) (1994) ("A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.").

remain largely intact to this day, with the exceptions of the changes regarding work-product protection that resulted from the Rule's 2010 amendment.[6]

Along with that trend, the Advisory Committee Notes accompanying these amendments demonstrate that other methods of discovery, such as subpoenas *duces tecum*, are permissible to obtain further discovery from a testifying expert. *See* Fed. R. Civ. P. 26 advisory committee's notes to 1993 amendment ("The enumeration in Rule 26(a)[2] of items to be disclosed does not prevent a court from requiring by order . . . that the parties disclose additional information without a discovery request."); Fed. R. Civ. P. 26 advisory committee's notes to 2010 amendment ("*The most frequent method* for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to *all forms* of discovery. . . . Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions."); *see also* 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2031 (3d ed.) ("Ordinarily the 'further discovery' was a deposition of the expert witness, but it did not have to be; the court could order production of documents as well." (discussing Rule 26 as amended in 1970)).

Yet, broadening the scope of expert discovery animates concerns about unfairness of "let[ting] one party have for free what the other party has paid for." *Id.* § 2034. The 1970's amendment sought to ameliorate those concerns by requiring the party seeking further discovery

[6] In 2010, the provisions were amended in the following key aspects: (1) "[T]o limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel," "Rule 26(a)(2)(B)(ii) [was] amended to provide that disclosure include all 'facts or data considered by the witness in forming' the opinions to be offered, rather than the 'data or other information' disclosure prescribed in 1993"; (2) "Rule 26(b)(4)(B) [was] added to provide work-product protection for drafts of expert reports or disclosures"; and (3) "Rule 26(b)(4)(C) [was] added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise." Fed. R. Civ. P. 26 advisory committee's notes to 2010 amendment.

to "pay the expert a reasonable fee for time spent in responding to" the requests for same.[7] So too did the 1993 amendment in allowing routine depositions of testifying experts:[8] The drafters of the amendment contemplated that "the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition." Fed. R. Civ. P. 26 advisory committee's notes to 1993 amendment; *see also* 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2034 (3d ed.) ("Although the 1993 amendment to the rule does expand the obligation to reveal in advance what the expert will say at trial, it does not similarly expand the obligation of the retaining party to foot the bills resulting from this discovery foray.").

Accordingly, in deciding the parties' disputes here, the Court will take a balanced approach. It will permit discovery of documents and information that are not enumerated in Rule 26(a)(2)(B), but have a close nexus to the items enumerated therein—so long as their discovery remains within the bounds of Rule 26(b)(1). *Cf. Hume v. Consol. Grain & Berge, Inc.*, No. 15-935, 2016 WL 7385699, at * 3 (E.D. La. Dec. 21, 2016) ("Scholarly evaluation of the Federal Rules and the impact of inclusion of the proportionality concept within Rule 26(b)(1)'s threshold scope of discovery indicate that non-parties have greater protections." (internal quotation marks and citation omitted)). Moreover, instead of requiring production of certain documents, the Court will require Dr. Weil to provide adequate information about other sources wherefrom Plaintiff may obtain the documents. *See* Fed. R. Civ. P. 26(b)(2)(C) ("On . . . its own, the court

[7] *See* Fed. R. Civ. P. 26(b)(4)(C)(i) (1970) ("Unless manifest injustice would result, . . . the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii).").

[8] *See* Fed. R. Civ. P. 26(b)(4)(C)(i) (1994) (" Unless manifest injustice would result, . . . the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision.").

must limit the . . . extent of discovery otherwise allowed by these rules . . . if it determines that . . . the discovery sought . . . can be obtained from some other source that is . . . less burdensome.").

2. Plaintiff's Request for Information

In the Requests numbered 9 and 10, for example, Plaintiff does not seek documents, but instead requests information (for examples, a list) that closely relate to items listed in Rule 26(a)(2)(B)(v)–(vi). However, the "power to subpoena documents from non-parties . . . is limited to [documents] that already exist and are within the nonparty's possession." *Crawford v. Biolife Plasma Servs. LP,* No. 2:10 CV 24, 2011 WL 2183874, at *4 (N.D. Ind. June 3, 2011; *see also* Fed. R. Civ. P. 45(a)(1)(A)(iii) (A subpoena may command a nonparty to "produce designated documents, electronically stored information, . . . in that person's possession, custody, or control."); *First State Bank of Junction City, Kan. v. Deere & Co.*, No. 86-2308-S, 1991 WL 46375, at *3 (D. Kan. Mar. 15, 1991) (declining to "require [an expert] to create a document in response to a production request"). Accordingly, for purposes of this Motion, the Court will deem Plaintiff's arguments regarding the above-mentioned, and similar, Requests as a motion to compel disclosure of information under Rule 26(a)(2)(B). *See* Fed. R. Civ. P. 37(a)(3)(A) ("If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions").

3. Place of Production

Plaintiff's subpoena instructs Dr. Weil to produce the requested documents and information at the offices of Plaintiff's attorney in El Paso, Texas. Mot., Ex. C at 1. Defendants object, stating that Dr. Weil resides and works in Houston, Texas, which is more than 100 miles from El Paso. *Id.* at 6. Plaintiff responds that her counsel indicated to defense counsel that

production could be made in Houston and that Plaintiff would arrange for the documents to be delivered. Suppl. Resp. at 4.

"A subpoena may command . . . production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(2)(A). "Under the current rule," however, "parties often agree that production, particularly of electronically stored information, be transmitted by electronic means. Such arrangements facilitate discovery, and nothing in these amendments limits the ability of parties to make such arrangements." Fed. R. Civ. P. 45 advisory committee's notes to 2013 amendment.

Accordingly, insofar as the Court overrules Defendants' objection to a Request for documents, the parties shall confer and agree on a proper place and a cost-effective method of production, including electronic means. Further, insofar as the Court overrules Defendants' objection to a Request for information (as opposed to documents), Defendants and/or Dr. Weil shall provide the requested information using the same method by which they provided Dr. Weil's expert report to Plaintiff.

B. The Court's Ruling on Defendants' Objections to Specific Requests

Defendants do not object to the Requests numbered 4, 7, and 10. Accordingly, the Court will not address them here.

Request No. 1

Plaintiff requests: "A copy of your entire file including, but not limited to [various documents and things], and any and all items or things within his care, custody or control which are related in any way to his investigation of this matter and any opinions herein." Mot., Ex. C at 3. Defendants propose that Dr. Weil will "make his entire file in this matter available for

inspection and copying by Plaintiff and Defendants at the time of his deposition in this case." Mot., Ex. C at 3, ECF No. 56-3. The Court finds Defendants' proposal reasonable. Accordingly, the Court sustains Defendants' objection to this Request to the extent it seeks production in El Paso and in advance of deposition.

Request No. 2

Plaintiff requests: "A copy of any technical paper, book, treatise or learned article authored in whole or in part by the deponent which relates to the subject about which the deponent will testify at the trial of this lawsuit." Mot., Ex. C at 3. Defendants represent that all of Dr. Weil's publications are listed in his resume. Def.'s Mot for Leave to File Docs. Under Seal at 2, ECF No. 69. According to his resume, some of his publications were published in books (or treatises), some in technical journals, and yet others in not readily discernible materials; moreover, some of his publications date back to as early as 1987. *See id.*, Ex. A. Defendants argue that Dr. Weil is not required to produce copies of these publications, Mot. at 4. Plaintiff responds that the documents may contain Dr. Weil's opinions on the same subject about which Dr. Weil will testify and therefore may contain statements inconsistent with those in his report. Resp. at 3.

The Court sustains Defendants' objection to this Request. However, Dr. Weil shall provide Plaintiff—at least 7 days prior to his deposition—adequate information about the publishers, organizations, and/or institutions from which Plaintiff may obtain copies of the publications that Dr. Weil authored *in the previous 10 years*. *See* Fed. R. Civ. P. 26(a)(2)(B)(iv) (providing that a testifying expert's report must contain "the witness's qualifications, including *a list of all publications* authored in the previous 10 years").

Request No. 3

Plaintiff requests: "A copy of any technical paper, book, treatise or learned article not authored by the deponent which [1] he relies upon as the basis of his opinions or [2] has provided to anybody in connection with this lawsuit." Mot., Ex. C at 3. Defendants maintain that Dr. Weil's report states his opinions and the basis for those opinions, and that Dr. Weil "is not required to produce each and every publication which he may have relied upon for his opinions." Mot. at 4. Defendants do not state any objection to Plaintiff's request for the publications that Dr. Weil may have provided to someone in connection with this lawsuit. Plaintiff requests the documents to the extent they played any part in the development, foundation, or basis of his opinions. Resp. at 3–4.

Plaintiff relies on Rule 26(a)(2)(B)(ii), which requires disclosure of "the facts or data considered by the witness in forming [his opinions]." Fed. R. Civ. P. 26(a)(2)(B)(ii). According to the Advisory Committee Notes, "facts or data" should be construed broadly and Rule 26(a)(2)(B)(ii) covers any fact or data not only relied upon but also considered by a testifying expert:

> The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of *any material considered by the expert*, from whatever source, that *contains factual ingredients*. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, *not only those relied upon by the expert*.

Fed. R. Civ. P. 26 advisory committee's notes to 2010 amendment (emphasis added).[9]

[9] *See also* Fed. R. Evid. 703 ("An expert may base an opinion *on facts or data in the case* that the expert has been made aware of or personally observed." (emphasis added)); Fed. R. Evid. 703 advisory committee's notes to 1972 adoption ("Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness with opinions based thereon traditionally allowed. . . . The second source, presentation at the trial, also

Plaintiff has failed to show that the requested publications contain any facts or data and that Dr. Weil considered them in forming the opinions. Accordingly, the Court sustains Defendants' objection to this Request.

Request No. 5

Plaintiff requests: "A copy of all correspondence, telephone conversation notes and any and all records dealing with his communications with the attorneys in this case." Mot., Ex. C at 3. Citing Rule 26(b)(4)(C), Defendants argue that Plaintiff is not entitled to "all correspondence." Mot. at 4–5. Plaintiff appears to agree. Pl.'s Resp. to Def.'s Objs. at 4 (citing Rule 26(b)(4)(C)). Accordingly, Dr. Weil shall produce—at least 7 days prior to his deposition—all documents that are responsive to this Request, excluding any attorney-expert communications that fall outside the purview of the three enumerated exceptions under Rule 26(b)(4)(C).

Request No. 6

Plaintiff requests: "A copy of all correspondence, telephone conversation notes and any and all records dealing with his communications with any persons and/or experts with regard to technical matters in which he has been asked to provide technical testimony in this lawsuit." Mot., Ex. C at 3. Defendants' only objection is: "To the extent this includes communications with Defendants' attorneys, those communications are privileged." Mot. at 5.

Accordingly, Dr. Weil shall produce—at least 7 days prior to Dr. Weil's deposition—all documents that are responsive to this Request, excluding any attorney-expert communications that fall outside the purview of the three enumerated exceptions under Rule 26(b)(4)(C). *See* Fed. R. Civ. P. 26 advisory committee's notes to 2013 amendment ("[I]nquiry about

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reflects existing practice. . . . The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception.").

communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by [Rule 26(b)(4)(C)]."). Dr. Weil need not produce documents that are otherwise privileged or protected, but in such cases, he must follow the proper procedures set forth in Rule 26(b)(5) and notify Plaintiff at least 7 days prior to his deposition.

Request Nos. 8 & 9

By Request No. 8, Plaintiff requests "[a]ny file and deposition of any case in which you have been an expert witness," and by Request No. 9, Plaintiff requests "[a] list with name, style and court, attorney's name, address and phone number of all cases in which you have been an expert for the last 10 years." Mot., Ex. C at 3. Defendants object on the ground that Rule 26(a)(2) requires only a list of cases in which Dr. Weil has testified for the past four years, Mot. at 5, and that Dr. Weil's expert report includes "a list of cases in which he has *testified by deposition* between 2014 and 2016," *id.* at 5 (emphasis added). Plaintiff complains that Dr. Weil provided a very limited disclosure of cases dating back to only 2014 (less than 4 years), without names and phone numbers of counsel, or any indication of which party Dr. Weil provided testimony for. Resp. at 3. Plaintiff moreover posits that any file or deposition in a previous case is likely to lead to discovery of relevant and probative impeachment evidence. *Id.* at 5.

A testifying expert's report must contain, "a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition." Fed. R. Civ. P. 26(a)(2)(B)(v). Courts have interpreted this provision as follows:

> The information to be disclosed is "cases" in which the witness has testified. The identification "cases" at a minimum should include the courts or administrative agencies, the names of the parties, the case number, and whether the testimony was by deposition or at trial. Such information should be sufficient to allow a party to review the proceedings to determine *whether relevant testimony* was given. With this information, a party should be able to determine the type of claim presented and locate any recorded testimony.

Wallace v. Hounshel, No. 1:06-cv-01560-RLY-TAB, 2008 WL 2184907, at *1–*2 (S.D. Ind. May 22, 2008) (citing cases) (emphasis added). "Having access to other cases in which the expert witness has testified allows the opposition to obtain prior testimony of an expert and potentially, to identify inconsistent positions taken in previous cases for use in cross-examination. This testimony may also be useful . . . in ascertaining the legitimacy of [the] expert." *Arnold v. City of San Antonio*, No. SA-07-CA-877-XR, 2009 WL 780671, at *3 (W.D. Tex. Mar. 24, 2009) (quoting *Wallace*, 2008 WL 2184907, *3).

The Court overrules in part Defendants' objection to Request No. 9. Defendants and/or Dr. Weil shall provide Plaintiff—at least 7 days prior to Dr. Weil's deposition—a list of all cases in which, during the previous *four* (not ten) years, including 2013, Dr. Weil testified not only by deposition *but also at trial*. For each case, the list must also include the name and last known contact information of counsel with whom Dr. Weil primarily interacted with.

The Court however sustains Defendants' objection to Request No. 8. It finds that Plaintiff's request for "any file" is overbroad. Armed with the additional information that Dr. Weil would provide under Request No. 8, Plaintiff should exercise due diligence and attempt to obtain the transcripts of Dr. Weil's prior testimony from other sources.

Request No. 11

Plaintiff requests: "All compensation you have earned as an expert witness for the years 2015 and 2016." Mot., Ex. C at 3. Defendants object to this Request on the ground that under Rule 26(a)(2)(B), a party is entitled to discovery of a statement of the compensation to be paid to an expert in the case, not other lawsuits. The Court overrules that objection. *See Sartin*, 2014 WL 4794542, at *1 (finding that a party is entitled to discover from the other party's expert information regarding "the approximate percentage of total income derived from providing

retained expert services over the past two years"). Accordingly, Dr. Weil shall provide Plaintiff—at least 7 days prior to Dr. Weil's deposition—the information sought in this Request.

Request No. 12

Plaintiff requests: "All contracts and agreements you have with any insurance company and defense firm for the year 2015 to present." Defendants object that the documents are beyond the scope of information discoverable from an expert under Rule 26 and further that, they include documents that are protected under Rule 26(b)(4)(C). Mot. at 5–6. Plaintiffs respond that the requested documents are relevant to any bias in the opinions proffered by Dr. Weil and further that the type of information in a retainer agreement is generally not privileged. Resp. at 7.

An expert must disclose "the compensation to be paid for the study and testimony in the case." Fed. R. Civ. P. 26(a)(2)(B)(iv). Further, work-product protection does not cover any communications that "relate to compensation for the expert's study or testimony." Fed. R. Civ. P. 26(b)(4)(C)(i); *see also* Fed. R. Civ. P. 26 advisory committee's notes to 2010 amendment (The work-product doctrine does not protect "[a]ny communications about additional benefits to the expert, such as further work in the event of a successful result in the present case"). The objective of these provisions is "to permit full inquiry into . . . potential sources of bias." Fed. R. Civ. P. 26 advisory committee's notes to 2010 amendment. The Court finds that the production of the requested documents would further that objective in this case. *See id.* ("In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi)."). Accordingly, the Court overrules Defendants' objection to this Request. Dr. Weil shall produce—at least 7 days prior to his deposition—the documents that are responsive to this Request insofar as they are in his custody and possession.

C. Potential Sanctions

Although Defendants produced Dr. Weil's expert report in September 2016 and noticed Dr. Weil's deposition in mid-February 2017, Plaintiff waited until ten days before the deposition to serve Dr. Weil with the subpoena and gave him six days to comply with it. Defendants, for their part, filed the instant Motion on the day before the documents' production was due. It also appears that the parties could have amicably resolved—without resorting to the Court—their disputes over the vast majority of the Requests. In ruling on this Motion, the Court has resisted the temptation to sanction the parties for their last-minute maneuvering as well as their apparent lack of cooperation. Going forward, however, should the Court be called upon to resolve any further discovery disputes, it will not hesitate to sanction the non-prevailing party found to have acted unreasonably.

IV. CONCLUSION

According, the Court **GRANTS IN PART and DENIES IN PART** Defendants' "Motion for Entry of Protective Order Regarding Subpoena Deces Tecum Issued to Dr. Stuart Weil" (ECF No. 56). The parties and Dr. Weil **SHALL COMPLY** with the instructions and orders provided elsewhere in this Memorandum Opinion and Order.

So ORDERED and SIGNED this 7th day of April 2017.

DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE