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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HONG-NGOC T DAO,
Plaintiff,
v.
LIBERTY LIFE ASSURANCE COMPANY
OF BOSTON,
Defendant.

Case No. 14-cv-04749-SI (EDL)

**ORDER DENYING PLAINTIFF’S
MOTION TO COMPEL WITHOUT
PREJUDICE**

United States District Court
Northern District of California

I. Introduction

Plaintiff Hong-Ngoc Dao (“Dao”) filed this lawsuit against her insurer Liberty Life Assurance Company of Boston (“Liberty”) based on its alleged wrongful denial of a long term disability benefits claim. The case has been referred to this Court for discovery. Now before the Court is Plaintiff’s motion to compel responses to Interrogatories 5, 7 and 10.¹ For the reasons discussed at the hearing on February 16, 2016 and in this Order, the motion to compel is denied without prejudice.

II. Background

While employed as a Research Policy Manager for the University of California Office of the President, Plaintiff purchased supplemental short term and long term disability insurance through a group policy issued by Liberty. In July 2013, Plaintiff stopped working due to a reported increase in migraine headaches and submitted a claim in October 2013. Plaintiff was approved for short-term disability benefits through October 31, 2013 pending receipt of medical

¹ Plaintiff’s moving papers sought to compel responses to several interrogatories and requests for production. However, after the motion was filed the parties further met and conferred and resolved a number of their disputes without Court intervention.

1 records. Plaintiff's leave was extended through January 2014, when Liberty informed Plaintiff
2 that it would begin a long term disability review. The parties dispute whether Plaintiff and her
3 doctors were responsive to Liberty's requests for information during the review. Plaintiff's long
4 term disability claim was denied in August 2014. Plaintiff was informed that she could request
5 review of the denial. In October 2014, after communication with Plaintiff's counsel, Liberty
6 reopened Plaintiff claim and reinstated benefits retroactively.

7 Plaintiff filed suit on October 26, 2014 for breach of contract, breach of the covenant of
8 good faith and fair dealing, fraud, negligent misrepresentation, declaratory relief and unfair
9 competition. In April 2015, the presiding judge granted a stipulation allowing Plaintiff to
10 supplement her complaint. In July 2015, the presiding judge granted in part and denied in part
11 Defendant's motion to withdraw its answer and dismiss the complaint and dismissed the breach of
12 contract claim. The court did not dismiss Plaintiff's claim for declaratory relief regarding certain
13 provisions in the policy, including a challenged discretionary clause and a Social Security offset
14 provision, finding it "prudent to resolve those questions on summary judgment rather than on a
15 motion to dismiss." Dkt. No. 61 at 3. The presiding judge then granted in part a motion for
16 reconsideration, and allowed Plaintiff to file an amended complaint. Dkt. No. 80. Plaintiff filed a
17 first amended complaint on October 13, 2015, then obtained new counsel, and filed this Motion to
18 Compel on November 20, 2015. Thereafter the parties met and conferred and narrowed the scope
19 of their dispute to three interrogatories for which Liberty refuses to provide a response.

20 Apparently, the Social Security Administration has deemed Plaintiff disabled and
21 retroactively awarded her benefits as of July 5, 2013. When Liberty learned of this during the
22 course of this litigation, it informed Plaintiff that her benefits had been overpaid due to a Social
23 Security offset provision in her policy and the overpayment needed to be repaid to Liberty.
24 Plaintiff did not respond and "in August 2015 Liberty began reducing Plaintiff's benefits
25 payments to recoup the overpayment in accordance with the policy terms." Opp. at 4. On January
26 16, 2016, after the close of fact discovery, Plaintiff filed a motion for leave to file a second
27 amended complaint to include additional allegations relating to Liberty's deduction of benefits to
28 offset her Social Security payments. That motion is set to be heard by the presiding judge on

1 February 26, 2016.

2 **III. Legal Standard**

3 This case was filed on October 26, 2014 and Liberty's responses to the discovery requests
4 at issue were served in May 2015. The motion to compel was filed on November 20, 2015 and
5 meet and confer efforts and briefing continued through January 2016. The Federal Rules of Civil
6 Procedure, including Rule 26 at issue here, were amended on December 1, 2015. Given the timing
7 of this case and the discovery at issue, the Court considers whether the amended versions of these
8 rules apply.

9 One court has recently addressed the issue of how to apply the amended rules to cases
10 pending before their December 1, 2015 effective date. See CAT3, LLC v. Black Lineage, Inc.,
11 No. 14 CIV 5511 (AT) (JCF), 2016 WL 154116, at *4-5 (S.D.N.Y. Jan. 12, 2016). That court
12 stated that:

13
14 In transmitting the proposed rules amendments to Congress on April 29, 2015,
15 Chief Justice John G. Roberts included an order providing in part that "the
16 foregoing amendments to the Federal Rules of Civil Procedure shall take effect on
17 December 1, 2015, and shall govern in all proceedings in civil cases thereafter
18 commenced and, insofar as just and practicable, all proceedings then pending."
19 2015 US Order 0017. This order is consistent with the relevant statutory provision,
20 which states in part:

21 "The Supreme Court may fix the extent to which such rule [of procedure or
22 evidence] shall apply to proceedings then pending, except that the Supreme Court
23 shall not require the application of such rule to further proceedings then pending to
24 the extent that, in the opinion of the court in which such proceedings are pending,
25 the application of such rule in such proceedings would not be feasible or would
26 work injustice, in which event the former rule applies." 28 U.S.C. § 2074(a).

27 Id. The CAT3 court concluded that, "both the Supreme Court's order and the governing statute
28 create a presumption that a new rule governs pending proceedings unless its application would be
unjust or impracticable." Id. (citing 2015 US Order 0017; 28 U.S.C. § 2074(a)). The issue before
the Court in CAT3 was sanctions under Rule 37(e), and whether to apply the previous version or
the current version of the rule to a case pending before its effective date. The court reasoned that
because the amended version of the rule does not place a greater substantive obligation on parties
preserving ESI, and is in some respects more lenient as to the sanctions that can be imposed for
violation of the preservation obligation, there would be no inequity in applying it to a pending

1 case. Id.

2 Here, the previous version of Rule 26(b)(1) provided in pertinent part that:

3 Unless otherwise limited by court order, the scope of discovery is as follows:
4 Parties may obtain discovery regarding any nonprivileged matter that is relevant to
5 any party's claim or defense – including the existence, description, nature, custody,
6 condition and location of any documents or other tangible things and the identity
7 and location of persons who know of any discoverable matter. For good cause, the
8 court may order discovery of any matter relevant to the subject matter involved in
9 the action. Relevant information need not be admissible at trial if the discovery
10 appears reasonably calculated to lead to the discovery of admissible evidence. All
11 discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

8 As amended effective December 1, 2015, Rule 26(b)(1) provides that:

9 Unless otherwise limited by court order, the scope of discovery is as follows:
10 Parties may obtain discovery regarding any nonprivileged matter that is relevant to
11 any party's claim or defense and proportional to the needs of the case, considering
12 the importance of the issues at stake in the action, the amount in controversy, the
13 parties' relative access to relevant information, the parties' resources, the
14 importance of the discovery in resolving the issues, and whether the burden or
15 expense of the proposed discovery outweighs its likely benefit. Information within
16 this scope of discovery need not be admissible in evidence to be discoverable.

14 Fed. R. Civ. P. 26(b)(1). In discussing the impact of this amendment, one court of this district has
15 recently explained that, “No longer is it good enough to hope that the information sought might
16 lead to the discovery of admissible evidence. In fact, the old language to that effect is gone.
17 Instead, a party seeking discovery of relevant, non-privileged information must show, before
18 anything else, that the discovery sought is proportional to the needs of the case.” Gilead Scis., Inc.
19 v. Merck & Co, Inc., No. 5:13-CV-04057-BLF, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016).

20 The Rules Committee has made clear in its Notes on the 2015 Amendments that “[t]he
21 present amendment restores the proportionality factors to their original place in defining the scope
22 of discovery” and “reinforces the Rule 26(g) obligation of the parties to consider these factors in
23 making discovery requests, responses or objections.” See Fed. R. Civ. P. 26, advisory
24 committee’s note to 2015 amendment. The Committee further explained that “[r]estoring the
25 proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the
26 court and the parties to consider proportionality.” Id. Thus, while the language of the Rule has
27 changed, the amended rule does not actually place a greater burden on the parties with respect to
28 their discovery obligations, including the obligation to consider proportionality, than did the

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1 previous version of the Rule. Thus, it would not be “unjust” or “inequitable” to apply the
2 amended version of Rule 26 to this discovery dispute.

3 **IV. Discussion**

4 A. Meet and Confer

5 Defendant argues that Plaintiff did not properly meet and confer before filing this motion.
6 While the meet and confer efforts should have been more robust prior to the filing of the motion,
7 after it was filed, the parties met and conferred, stipulated to continue briefing and hearing dates
8 while they resolved some of the issues raised in the motion, and ultimately resolved some of their
9 disputes. Therefore, the motion will not be denied for failure to meet and confer.

10 B. INTERROGATORY NOS. 5 AND 7:

11 Interrogatory No. 5:

12 IDENTIFY all disability insurance policies (group or individual) issued by YOU from 2010
13 through to the present that contain a Social Security Administration benefits offset provision.

14 Liberty’s Response:

15 Liberty Life objects on the ground the request seeks information that is neither relevant nor
16 calculated to lead to the discovery of admissible evidence. Liberty objects to this request as being
17 unduly burdensome and harassing. Liberty Life further objects to this request on the grounds that
18 this is overbroad as to time and scope, vague and ambiguous as to "Social Security Administration
benefits offset provision", and seeks confidential financial information of third parties. Defendant
further objects that the documents requested are protected from disclosure pursuant to California
Insurance Code § 791.13 et seq. and the request invades the privacy rights of third parties.

19 Interrogatory No. 7:

20 State in U.S. dollar amounts the total reduction in benefit payments YOU have made in reliance
21 on any Social Security Administration offset provision in any disability insurance policy issued by
YOU in the state of California for each year from 2010 through the present.

22 Liberty’s Response:

23 Liberty Life hereby objects to this request on the grounds that that this is overbroad as to time and
24 scope, vague and ambiguous, burdensome and harassing, and seeks confidential, proprietary
25 commercial information and/or trade secrets. Liberty Life further objects on the ground the request
26 seeks information that is neither relevant nor calculated to lead to the discovery of admissible
27 evidence. Liberty Life also objects to this interrogatory as violating Federal Rule of Civil
28 Procedure 33(a)(1), which requires that "all discrete subparts" of an interrogatory be counted
as separate interrogatories. Each subpart in this interrogatory therefore constitutes a separate
interrogatory and is treated as such. See Waterbury v. Scribner, 2008 U.S. Dist. LEXIS 53142 at
*7-8 (E.D.Cal. May 8, 2008) ("Plaintiffs requests for the separate years from 2004 through to
the present are separate and distinct. Interrogatories 2, 3 and 4 will be treated as five separate
interrogatories, for a total of fifteen (15) interrogatories.").

1 1. Boilerplate Objections

2 Liberty's objections to these interrogatories are non-specific and boilerplate. Rule 33(b)(4)
3 requires that "[t]he ground for objecting to an interrogatory must be stated with specificity. Any
4 ground not stated in a timely objection is waived unless the court, for good cause, excuses the
5 failure."² Liberty's boilerplate objections are insufficient and could be deemed waived.
6 However, Plaintiff has not argued for waiver, and instead the parties have met and conferred in
7 detail about the merits of the objections and the substance of the objections has been fully briefed.
8 The Court therefore will not deem Liberty's objections waived for lacking specificity, but cautions
9 both sides to comply with the requirement set forth in the federal rules that the grounds for
10 objections be stated with specificity.

11 2. Proportionality and Relevance

12 Liberty opposes Plaintiff's motion to compel a response to Interrogatory No. 5 in part on
13 the grounds that the burden of this request outweighs any potential advantage to Plaintiff because
14 providing a response to this interrogatory would require it to manually review all 946 policies
15 issued since 2010 to identify which contain a Social Security offset provision. Liberty estimates
16 that, if someone could review each of these 946 policies in ten minutes, it would still take 157.7
17 hours to complete this task. McGee Decl. ¶ 4. With respect to Interrogatory No. 7, Liberty
18 provides a declaration estimating that providing a response to this interrogatory would require it to
19 manually review 161,427 claim files to identify those where a Social Security offset was taken and
20 then calculate the amount of the offset. Liberty estimates that, if someone could review each of
21 these 161,427 claim files and make this calculation in ten minutes, it would still take 26,904.5
22 hours (or approximately 672 weeks, or 13 years) to complete this task. McGee Decl. ¶ 5.
23 Liberty points out that the only actual financial damage currently alleged is a \$2,000 loan from
24 Plaintiff's boyfriend that she has been unable to repay. See Tucker Decl. Ex. 10.

25 Plaintiff argues in general terms that Liberty undervalues her case because she has alleged

26 _____
27 ² Unlike Rule 34, which was amended on December 1, 2015 to require specific objections for
28 requests for production, Rule 33 governing interrogatory responses previously included the
requirement of specificity. Thus, there is no question that Liberty was and is required to object
with specificity regardless of the rules amendments.

1 bad faith, misrepresentations and related causes of action, so a trier of fact could award her
2 significant tort damages in excess of actual damages. However, she does not give an estimate of
3 the value of her case. She also asserts that it “defies credulity” that a large nationwide insurance
4 company does not have automated records that could be electronically searched, but does not
5 provide any evidence to refute Liberty’s declaration.

6 As discussed during the hearing, neither side has adequately addressed the issue of
7 proportionality or discussed the factors listed in amended Rule 26. The Court has given
8 preliminary consideration to the proportionality of the discovery sought in light of the Rule 26
9 factors. On the one hand, as to the relative importance of the issues at stake, this is a
10 straightforward individual benefits determination challenge, not a civil rights, First Amendment or
11 other case implicating important public rights on a broad scale; the amount in controversy appears
12 modest given Plaintiff’s \$2,000 in actual damages; it is not clear that the discovery sought is
13 necessary or even especially important to resolving the issues in this litigation; and the burden of
14 production is great. On the other hand, as to the parties’ relative resources, Plaintiff is a disabled
15 individual and Liberty is a large insurance company, and there is no indication that Plaintiff would
16 otherwise have access to the information she seeks if discovery is not ordered. On balance, it
17 appears that the burden and expense of the broad discovery as propounded outweighs its likely
18 benefit.

19 Nonetheless, as the Court pointed out at the hearing, it is not necessary to definitively
20 resolve the questions of relevance and proportionality at this time. The parties agree that the issue
21 of the Social Security offset provision is a purely legal question upon which the presiding judge
22 has not yet ruled. Considerations of relevance and proportionality turn largely on how the
23 presiding judge ultimately rules on this legal question. Specifically, if the Social Security offset
24 provision is found to be *legal*, than discovery into the frequency of its application to other insureds
25 is entirely irrelevant. If the Social Security offset provision is found to be *illegal*, then the
26 discovery sought by Plaintiff through interrogatories 5 and 7 may arguably have some marginal
27 relevance to Plaintiff’s claim for bad faith and enhanced damages. However, Liberty has
28 presented undisputed evidence that collecting this discovery would be highly burdensome.

1 Furthermore, so far Plaintiff has not made any proposals to focus its requests more narrowly to
2 alleviate the burden, nor has Defendant made any proposals of its own for doing so. Whether or
3 not the burden is proportional to the needs of the case as a whole, considering the factors listed in
4 Rule 26, depends in the first instance on how the presiding judge rules on the overarching legal
5 question. Therefore, the Court suggested at the hearing that the most efficient course of action is
6 to deny this motion to compel without prejudice, at least until the presiding judge rules on the
7 legality of the Social Security offset provision, and the parties agreed.

8 B. INTERRTOGATORY NO. 10

9 Interrogatory No. 10:

10 IDENTIFY all disability insurance policies (group or individual) issued by YOU in the state of
11 California from 2010 through the present that contain or contained a grant of discretionary
12 authority to YOU.

13 Liberty's Response:

14 Liberty Life objects on the ground the request seeks information that is neither relevant nor
15 calculated to lead to the discovery of admissible evidence. Liberty objects to this request as being
16 unduly burdensome and harassing. Liberty Life further objects to this request on the grounds
17 that this is overbroad as to time and scope, vague and ambiguous to "grant of discretionary
18 authority" and seeks confidential financial information of third parties. Defendant further objects
19 that the documents requested are protected from disclosure by California Insurance Code section
20 791.13 et seq. and the request invades the privacy rights of third parties.

21 1. Boilerplate Objections

22 As discussed above with respect to Interrogatories 5 and 7, Liberty's objections to
23 Interrogatory 10 are non-specific and boilerplate. The Court will not deem Liberty's objections
24 waived for lacking specificity, but cautions both sides to comply with the requirement set forth in
25 the federal rules that the grounds objections be stated with specificity.

26 2. Proportionality and relevance

27 As with discovery relating to the Social Security offset provision discussed above,
28 considerations of proportionality and relevance of discovery relating to the challenged
discretionary clause turn on how the presiding judge rules on the legal question of the propriety of
this contract provision. If the clause is legal, no discovery into other insureds is warranted, but the
result may be different if the presiding judge deems the discretionary clause illegal. Therefore, as
above, the parties accepted the Court's suggestion that it would be most efficient to deny this

1 portion of the motion to compel without prejudice until they have a ruling on the legality of the
2 discretionary clause.

3 For the foregoing reasons, the motion to compel is denied without prejudice.

4
5 **IT IS SO ORDERED.**

6 Dated: February 23, 2016

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9 ELIZABETH D. LAPORTE
United States Magistrate Judge

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