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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KENNETH J. MOSER, individually
and on behalf of all others similarly
situated,

Plaintiff,

v.

HEALTH INSURANCE
INNOVATIONS, INC. et al.,

Defendants.

No. 3:17-cv-1127-WQH-KSC

ORDER

HAYES, Judge:

The matter before the Court is Plaintiff’s Partial Objection to Magistrate’s Order Concerning Discovery. (ECF No. 133).

I. Background

On December 21, 2018, the United States Magistrate Judge issued the Order Re Joint Motion for Determination of Discovery Dispute Re: Document Requests and Interrogatories Served on Plaintiff by Defendant Health Insurance Innovations, Inc. (hereafter “Discovery Order”) (ECF No. 118). Plaintiff objected to Interrogatories 12 and 23, and Request for Production 39, which sought certain information regarding past TCPA lawsuits Plaintiff has filed and settled. The Discovery Order overruled Plaintiff’s objections, finding:

Although evidence of a party’s involvement in prior litigation may not be admissible at trial to show litigiousness, evidence of a party’s prior acts in the course

1 of prior litigation may be admissible if relevant to other
2 disputed issues such as motive, state of mind, and
3 credibility. *See, e.g., Gastineau v. Fleet Mortgage Corp.*,
4 137 F.3d 490, 495-496 (7th Cir. 1998); (concluding in an
5 employment discrimination case that evidence obtained
6 from other lawsuits the plaintiff filed against prior
7 employers was inadmissible to show litigiousness but was
8 admissible on issues of motive, mental state, and
9 credibility); *Outley v. City of New York*, 837 F.2d 587,
10 591-595 (2d Cir. 1988) (concluding inconsistent
11 statements made by the plaintiff in prior lawsuits were
12 properly admitted as impeachment evidence but evidence
13 of the plaintiff's prior litigation history to show
14 litigiousness was prejudicial because the case turned on
15 the plaintiff's credibility). *But see D'Lil v. Best Western*
16 *Encina Lodge & Suites*, 538 F.3d 1031, 1039-1040 (9th
17 Cir. 2008) (stating that courts considering cases involving
18 alleged violations of the Americans with Disabilities Act
19 "must be particularly cautious about affirming credibility
20 determinations that rely on a plaintiff's past ADA
21 litigation" because these cases are typically pursued by a
22 small group of professional plaintiffs "who view
23 themselves as champions of the disabled"). *See also*
24 *Graham v. Casey's Gen. Stores*, 206 F.R.D. 251, 256 (S.D.
25 Ind. 2002); *Travers v. Travenol Labs., Inc.*, 94 F.R.D. 92,
26 93-94 (N.D. Ill. 1982).

19 In this Court's view, HII has adequately identified the
20 relevance of the types of documents and information it
21 seeks in response to Interrogatory Nos. 10, 12, and 23 and
22 Document Request Nos. 36, 37, and 39. Contrary to
23 plaintiff's assumption, HII does not simply seek
24 information about his prior involvement in TCPA or
25 similar matters in order to discredit him as a professional
26 plaintiff or litigious person. Rather, HII seeks the
27 information in an attempt to uncover evidence on matters
28 of credibility. Despite his burden to do so, plaintiff has not
adequately supported his argument that HII seeks
information that is irrelevant in response to Interrogatory
Nos. 10, 12, and 23 and Document Request Nos. 36, 37,
and 39.

Id. at 29-30.

1 On January 11, 2019, Plaintiff filed the Partial Objection to Magistrate’s
2 Order Concerning Discovery. (ECF No. 133). On January 23, 2019, Defendant
3 filed a Response. (ECF No. 135). On January 30, 2019, Plaintiff filed a Reply.
4 (ECF No. 136).

5 **II. Contentions**

6 Plaintiff contends that the Discovery Order “is erroneous as to the very limited
7 issue of ordering the production of private confidential settlement agreements and
8 communications and that the value does not outweigh he [sic] considerable burden.”
9 *Id.* at 2. Plaintiff asserts that “responding would be extremely burdensome
10 compared to the relevance and value of the responses.” *Id.* at 3.

11 Defendant contends that Plaintiff’s objections are untimely and that Plaintiff
12 “has failed to articulate any timely or compelling reason” to overturn the Discovery
13 Order. (ECF No. 135 at 2). Defendant contends that the Discovery Order correctly
14 overruled Plaintiff’s objections because Plaintiff’s credibility is a “central issue”
15 material to both his individual claims and his ability to adequately represent a class.
16 *Id.* at 3, 8.

17 **III. Legal Standard**

18 A district court judge “may designate a magistrate judge to hear and
19 determine any pretrial matter pending before the court” with a limited number of
20 exceptions. 28 U.S.C. § 636(b)(1)(A). “A judge may reconsider any pretrial
21 matter . . . where it has been shown that the magistrate judge’s order is clearly
22 erroneous or contrary to law.” *Id.* Rule 72(a) of the Federal Rules of Civil
23 Procedure states,

24 When a pretrial matter not dispositive of a party’s claim or
25 defense is referred to a magistrate judge to hear and decide,
26 the magistrate judge must promptly conduct the required
27 proceedings and, when appropriate, issue a written order
28 stating the decision. A party may serve and file objections
to the order within 14 days after being served with a copy.
A party may not assign as error a defect in the order not

1 timely objected to. The district judge in the case must
2 consider timely objections and modify or set aside any part
3 of the order that is clearly erroneous or is contrary to law.

4 Fed. R. Civ. P. 72(a).

5 Matters concerning discovery generally are considered nondispositive of the
6 litigation and reviewed under the clearly erroneous standard. *See, e.g., FDIC v.*
7 *Fidelity & Deposit Co. of Md.*, 196 F.R.D. 375, 378 (S.D. Cal. 2000) (“The ‘clearly
8 erroneous’ standard applies to the magistrate judge's factual determinations and
9 discretionary decision made in connection with non-dispositive pretrial discovery
10 matters.”). “Review under the clearly erroneous standard is significantly
11 deferential, requiring a definite and firm conviction that a mistake has been
12 committed.” *Concrete Pipe & Prod. v. Constr. Laborers Pension Trust*, 508 U.S.
13 602, 623 (1993) (quotation omitted); *see also Hernandez v. Tanninen*, 604 F.3d
14 1095, 1100 (9th Cir. 2010).

15 **IV. Ruling of the Court**

16 The Discovery Order was issued on December 21, 2018. Pursuant to Rule
17 72(a) of the Federal Rules of Civil Procedure, Plaintiff had fourteen days, or until
18 January 4, 2019, to file objections to the Discovery Order. Plaintiff’s objections
19 were filed on January 11, 2019. Plaintiff’s objections are untimely. The Court will
20 consider Plaintiff’s untimely objections, however, because the disclosure of
21 settlement agreements could implicate the interests of third parties who did not have
22 an opportunity to object.

23 Under Rule 26 of the Federal Rules of Civil Procedure, a defendant is entitled
24 to discovery regarding any “nonprivileged matter that is relevant to any party’s
25 claim or defense and proportional to the needs of the case” Fed. R. Civ. P.
26 26(b)(1). Plaintiff seeks to certify and represent a class of plaintiffs asserting claims
27 against Defendant. Defendant seeks information regarding past settlements because
28 it may lead to admissible information relevant to Plaintiff’s motive, state of mind,

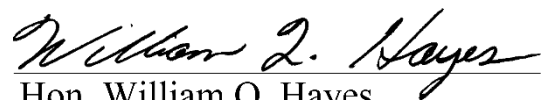
1 or credibility. The interrogatories in question require Plaintiff to “identify and
2 describe” all communications Plaintiff has sent to other parties complaining of
3 TCPA violations, the amounts of any monetary settlements Plaintiff has received,
4 and the identities of parties with whom Plaintiff has settled. (ECF No. 133 at 2–3).
5 By overruling Plaintiff’s objection, the Magistrate Judge necessarily found that
6 Defendant’s request was proportional to the needs of this case. The Court has
7 reviewed Plaintiff’s briefing and does not have a “definite and firm conviction” that
8 the Magistrate Judge’s determination was mistaken. *See Concrete Pipe & Prod.*,
9 508 U.S. at 623. Plaintiff’s objection is overruled.

10 To the extent that Interrogatory 23 and Request for Production 39 require
11 Plaintiff to disclose settlement agreements that contain a confidentiality provision,
12 Plaintiff must produce such settlement agreements to the Magistrate Judge *in*
13 *camera* for a determination of what, if any, procedures are necessary to allow third
14 parties to assert any privacy rights they may have under the agreements. Plaintiff
15 shall produce all other information not subject to a confidentiality provision
16 forthwith.

17 **V. Conclusion**

18 IT IS HEREBY ORDERED that Plaintiff’s Partial Objection to Magistrate’s
19 Order Concerning Discovery (ECF No. 133) is OVERRULED. Plaintiff must
20 produce any settlement agreements containing a confidentiality provision to the
21 Magistrate Judge *in camera* for a determination of what, if any, procedures are
22 necessary to allow third parties to assert any privacy rights they may have under the
23 agreements. Plaintiff shall produce all other information not subject to a
24 confidentiality provision forthwith.

25 Dated: April 11, 2019

26 
27 Hon. William Q. Hayes
28 United States District Court