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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

In Re Subpoenas to Michael J. Mandelbrot, Mandelbrot Law Firm, and Asbestos Legal Center, William H. Durham, Plaintiff, vs. Ankura Consulting Group, LLC, Defendant.	Misc. Case No. **ANKURA CONSULTING GROUP, LLC'S [1] NOTICE OF MOTION AND MOTION TO COMPEL AND [2] SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES** *Filed Concurrently: Declaration of John G. Smith; Declaration of Rebecca L. Sciarrino; Proposed Order* **Underlying Action:** *Case No. 2:20-CV-112-KS-MTP* *U.S. District Court (S.D. Miss.)* *Judge: Hon. Keith Starrett*

NOTICE OF MOTION AND MOTION

Please take notice that on January 14, 2022, or on such other date and time as ordered by the Court, Ankura Consulting Group, LLC ("Ankura"), will and hereby does move under Federal Rules of Civil Procedure 37 and 45 for an Order compelling Michael J. Mandelbrot, the Mandelbrot Law Firm, and the Asbestos Legal Center, residents of this judicial district, to produce the full scope of documents sought from them in subpoenas served on November 3, 2021 and November 21, 2021, respectively, in the underlying action of *William H. Durham, M.D. v. Ankura Consulting Group, LLC*, No. 2:20-cv-112-KS-MTP (S.D. Miss. filed June 22, 2020).

This Motion is based on this Notice of Motion and Motion, the attached supporting Memorandum of Points and Authorities, the concurrently-filed Declarations of John G. Smith and Rebecca L. Sciarrino, any reply brief and oral argument of counsel, and any other evidence and argument that is subsequently submitted.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Motion seeks to compel an attorney and his law firms (collectively, the "Subpoena Recipients") in this District to produce relevant and non-privileged documents that have been subpoenaed in conjunction with a federal action in the Southern District of Mississippi in which Ankura Consulting Group, LLC ("Ankura") is the defendant, *William H. Durham, M.D. v. Ankura Consulting Group, LLC*, No. 2:20-cv-112-KS-MTP (S.D. Miss. filed June 22, 2020) (the "Underlying Action"). The documents are a modest number of communications between the plaintiff in the Underlying Action, Dr. William Durham, and the Subpoena Recipients concerning facts and circumstances relevant to the allegations in the plaintiff's complaint. The plaintiff has purportedly produced those of his communications that he kept, without disputing that they are relevant and non-privileged. By its subpoenas to the Subpoena Recipients, Ankura is merely seeking the Subpoena Recipients' corresponding copies of the communications, because it is not apparent that the plaintiff kept and produced a full set.

The Subpoena Recipients have belatedly objected on grounds of undue burden and attorney/client privilege. But the quantity of documents is modest. Further, the plaintiff—that is, the potential "client" who would hold any attorney/client privilege—has never claimed an attorney/client relationship with the Subpoena Recipients, and the communications with the Subpoena Recipients that the plaintiff has produced belie any argument that there was an attorney/client relationship or that the subpoenaed communications were for the purpose of obtaining or providing legal advice.

Counsel for Ankura has met and conferred with the Subpoena Recipients in an attempt to resolve the subpoenas. *See* Declaration of Rebecca L. Sciarrino ("Sciarrino Decl.") ¶¶ 4-8. But the Subpoena Recipients have produced only two documents and no privilege log, while admitting that there are other responsive documents that are being withheld.

Because Ankura seeks only a modest set of relevant and non-privileged documents that can be compiled and produced without undue burden, the Court should grant this Motion to compel a full production of the subpoenaed documents.

II. BACKGROUND

A. The Underlying Action

Asbestos Settlement Trusts ("Trusts") are entities formed in court-ordered bankruptcy reorganizations to hold assets of the bankruptcy estates and resolve asbestos personal injury claims made against those estates. *See generally* 11 U.S.C. § 524(g). The Trusts' court-approved trust distribution procedures authorize the Trusts to conduct audits to help guard against the Trusts' paying claims that are not based on reliable evidence. Ankura, the defendant in the Underlying Action, was hired by a number of Trusts to help conduct such audits. *See* Am. Compl. ¶ 7 (attached as Ex. A to the Declaration of John G. Smith ("Smith Decl.")).

The plaintiff in the Underlying Action, Dr. William H. Durham, has been hired by lawyers submitting claims to the Trusts. He performs "B-reads" of chest x-rays for the effects of asbestos exposure, and then makes reports that the lawyers use to support those claims. *See id.* ¶ 6. On behalf of the Trusts and pursuant to approved procedures, Ankura audited Dr. Durham's reports. After considering the results of that audit, certain Trusts decided that they would no longer accept claims that relied on medical evidence submitted by Dr. Durham because they deemed such evidence to be unreliable.

Dr. Durham sued Ankura for tortious interference with his business relationship with the law firms who were hiring him, alleging that Ankura conducted a "sham" audit. *See, e.g.*, *id.* ¶¶ 9, 43, 66. Dr. Durham also claimed that Ankura was negligent in its audits, but that claim was subsequently dismissed. *See, e.g.*, *id.* ¶ 73; *Durham v. Ankura Consulting Grp., LLC*, No. 2:20-cv-112-KS-MTP, 2021 WL 91673, at *1 (S.D. Miss. Jan. 11, 2021).

B. The Subpoenas

Mr. Mandelbrot is an attorney who resides in this District and operates the Mandelbrot Law Firm and the Asbestos Legal Center. Smith Decl. ¶ 5. Mr. Mandelbrot specializes in preparing and filing claims with Asbestos Settlement Trusts. *See Mandelbrot v. Armstrong World Indus. Asbestos Pers. Inj. Settlement Tr.*, 618 F. App'x 57, 58 (3d Cir. 2015). As of 2015, Mr. Mandelbrot had submitted "over 13,000 claims on behalf of asbestos claimants to asbestos trusts." *Id.* While the full extent of Mr. Mandelbrot's relationship with Dr. Durham is not

known to Ankura, Mr. Mandelbrot has admitted to one instance in which he has retained Dr. Durham to prepare a report supporting an asbestos claim. Sciarrino Decl. ¶ 5 & Ex. A. Mr. Mandelbrot has also very publicly criticized Ankura about how it has conducted its audits of Dr. Durham and similar doctors, going so far as to falsely accuse Ankura personnel of unethical and illegal conduct. *See, e.g.*, Asbestos Legal Center, *Ankura Consulting LLC – Washington D.C.'s Most Corrupt Company – Misappropriation of Billions in Trust Funds, Sexual Harassment, Racial Discrimination – Does it get any worse than Ankura Consulting LLC?*, MESOTHELIOMA LAWYER BLOG (Oct. 5, 2021), https://www.mesothelioma-lawyerblog.com/lawsuit-alert-dcs-ankura-consulting-group-llc-sued-sexual-harassment-workplace-discrimination/ ("Oct. 5, 2021 Asbestos Legal Center Blog Post"); Asbestos Legal Center, *Corruption in Washington, DC!! Ankura Consulting's Gary Wingo Engages in Insider Dealing/Fraud (Asbestos Trusts)* MESOTHELIOMA LAWYER BLOG (Sept. 14, 2021), https://www.mesothelioma-lawyerblog.com/corruption-in-washington-dc-ankura-consultings-gary-wingo-engages-in-insider-dealing-fraud-asbestos-trusts/.[1] And Mr. Mandelbrot has communicated with Dr. Durham regarding Ankura's audit of Dr. Durham and other facts relevant to the Underlying Action. *See* Smith Decl. ¶¶ 7, 12-13, & Ex. F.

Ankura's subpoenas to the Mandelbrot Law Firm, the Asbestos Legal Center, and Michael J. Mandelbrot, seek the following categories of documents, for the time period January 1, 2015 to the present:

> 1. Agreements between the Subpoena Recipients and Dr. Durham related to any services that Dr. Durham provided to them.
>
> 2. Documents relating to those agreements.
>
> 3. Documents related the Subpoena Recipients' compensation to be paid to Dr. Durham.
>
> 4. Documents reflecting payments requested by or made to Dr. Durham.
>
> 5. Documents relating to amounts owed or allegedly owed to Dr. Durham for services provided by Durham.
>
> 6. Communications between Dr. Durham and the Subpoena Recipients related to bills or payments for work performed by Dr. Durham.

[1] As set forth separately, Mr. Mandelbrot has also now posted a defamatory and baseless attack on the undersigned, her colleague, and her law firm. *See* Sciarrino Decl. ¶¶ 6, 8 & Ex. C.

7. Documents and communications between the Subpoena Recipients and Dr. Durham related to the facts at issue in the Underlying Action.

Smith Decl. Exs. B-D.

C. The Subpoena Recipients' Responses To The Subpoenas

The Mandelbrot Law Firm and the Asbestos Legal Center subpoenas were served on November 3, 2021. Those subpoenas were returnable on November 12, 2021 at 10:00 am at the law offices of the undersigned. No one appeared to produce the requested documents and no objection was received by the compliance date. Sciarrino Decl. ¶ 2. On November 15, 2021, Mr. Mandelbrot sent the undersigned a short email stating that the subpoenas pose an undue burden and are protected by the attorney/client privilege and the work product doctrine. *Id.* ¶¶ 3-4 & Ex. A. The email did not explain the nature or scope of the supposed attorney/client relationship, and did not provide any information from which the undersigned could evaluate the privilege assertions. Nor did the email explain why the work product doctrine would apply. *Id.* Ex. A.

Each of these requests is targeted to discover information potentially relevant to the Underlying Action, including the nature of the work that Dr. Durham performed in conjunction with claims being submitted to the Asbestos Trusts. Indeed, the Subpoena Recipients have not objected to the subpoenas as seeking irrelevant information. Rather, the Subpoena Recipients have argued: (1) undue burden, and (2) attorney/client privilege and work product. *See id.* (correspondence from Mr. Mandelbrot explaining his objections).

But the only basis for the undue burden claim is that Dr. Durham should have copies of the same documents. And the only basis for the privilege claim is the assertion that the Subpoena Recipients have been operating as Dr. Durham's lawyers. As shown below, neither of these objections is well-taken.

III. ARGUMENT

A. Legal Standard

Federal Rule of Civil Procedure 45 governs subpoenas issued to nonparties. "The scope of discovery under a subpoena issued pursuant to Rule 45 is the same as the scope of discovery allowed under Rule 26(b)(1)—material that is relevant to a claim or defense of any

party." *Playstudios, Inc. v. Centerboard Advisors, Inc.*, No. 2:18-cv-01423-JCM-NJK, 2019 WL 8128168, at *2 (D. Nev. July 18, 2019), adhered to on denial of reconsideration, No. 218CV1423JCMNJK, 2019 WL 6493926 (D. Nev. Dec. 3, 2019); *Nalco Co. v. Chem-Aqua, Inc.*, No. 14–mc–80183 RS (NC), 2014 WL 3420463, at *1 (N.D. Cal. July 10, 2014) ("The Rule 26 relevancy standard also applies to third-party subpoenas.").

"A nonparty seeking to avoid discovery bears the burden of persuasion in opposing a motion to compel." *Cardinali v. Plusfour, Inc.*, No. 2:16-cv-02046-JAD-NJK, 2019 WL 3456630, at *2 (D. Nev. June 20, 2019). "The party opposing discovery has the burden of showing that it is irrelevant, overly broad, or unduly burdensome." *McCall v. State Farm Mut. Auto. Ins. Co.*, No. 2:16-cv-01058-JAD-GWF, 2017 WL 3174914, at *6 (D. Nev. July 26, 2017); *see Am. Broadcasting Cos., Inc. v. Aereo, Inc.*, No. CV-12-80300-RMW, 2013 WL 1508894, at *4 n.48 (N.D. Cal. Apr. 10, 2013) (citing *Goodman v. United States*, 369 F.2d 166, 1659 (9th Cir. 1966)). "To meet its burden of persuasion, the objecting party must provide specific facts that indicate the nature and extent of the burden." *Cardinali*, 2019 WL 3456630, at *2.

B. <u>There is No Undue Burden</u>

1. Discovery From Dr. Durham Is Not An Adequate Substitute For The Subpoena Recipients' Documents

While the Subpoena Recipients have argued that all of the requested discovery should be available from Dr. Durham, "there is no general rule that plaintiffs cannot seek nonparty discovery of documents likely to be in defendants' possession." *Viacom Int'l, Inc. v. YouTube, Inc.*, No. C 08-80129 SI, 2008 WL 3876142, at *3 (N.D. Cal. Aug. 18, 2008); *Mowat Constr. Co. v. Dorena Hydro, LLC*, No. 6:14-CV-00094-AA, 2015 WL 13867691, at *2 (D. Or. May 18, 2015). "In many cases, it is important to obtain what should be the same documents from two different sources because tell-tale differences may appear between them; and in many cases when a party obtains what should be the same set of documents from two different sources a critical fact in the litigation turns out to be that one set omitted a document that was in the other set." *Coffeyville Res. Refin. & Mktg., LLC v. Liberty Surplus Ins. Corp.*, No. 4:08MC00017 JLH, 2008 WL 4853620, at *2 (E.D. Ark. Nov. 6, 2008). The case law expressly countenances taking

discovery from both parties to a series of communications, where, as here, the responsive documents in the possession of one of the parties might be different from those in the possession of the other. *Viacom Int'l, Inc.*, 2008 WL 3876142, at *3. Indeed, the documents here are a type "whose completeness is not readily verifiable," which the case law also expressly recognizes is a situation in which "allowing for discovery from both the party and non-party, completeness of discovery is more likely to be achieved." *Software Rts. Archive, LLC v. Google Inc.*, No. 2:07-CV-511, 2009 WL 1438249, at *2 (D. Del. May 21, 2009); *accord Gonzalez-Tzita v. City of Los Angeles*, No. CV 16-0194 FMO (Ex), 2018 WL 10111333, at *2 (C.D. Cal. Sept. 30, 2018).

The facts here illustrate these principles. Ankura sought these documents from Dr. Durham. *See* Smith Decl. ¶ 6 & Ex. E. However, the completeness of the set of documents produced by Dr. Durham cannot be readily verified because the documents that have been sought are what the case law refers to as a "non-well-defined" set—that is, a group of documents whose completeness will not be obvious on its face. *See Software Rts. Archive, LLC*, 2009 WL 1438249, at *2; *Viacom Int'l, Inc. v. Youtube, Inc.*, 2008 WL 3876142, at *2-3 (comparing and contrasting cases that involved "non-well-defined" sets versus cases that involved "well-defined sets of documents" such as a single settlement agreement that could readily be specified and requested). The documents sought from the Subpoena Recipients are a non-well-defined set because "there is no way to determine if all communications" between the Dr. Durham and the Subpoena Recipients "have been produced simply by looking at [Dr. Durham's] production." *Viacom Int'l, Inc.*, 2008 WL 3876142, at *3.

In the meet and confer, the Subpoena Recipients cited only cases with extreme facts not present here. For example, in *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637-38 (C.D. Cal. 2005), the requests "covered a period of more than 10 years and extended far beyond the pertinent geographic region." *Viacom Int'l, Inc.*, 2008 WL 3876142, at *3 (distinguishing *Moon* on these grounds). In *In re Allergan, Inc.*, No. 14-cv-02004-DOC (KES), 2016 WL 5922717, at *8-9 (C.D. Cal. Sept. 23, 2016), the requests not only were duplicative, but also sought "discovery from opposing trial counsel"—a factor that weighed against the duplicative discovery. Also by contrast with the situation here, the relevance of the documents in *Allergan* was "entirely speculative." *Id.*

And *Haworth, Inc. v. Herman Miller, Inc.*, 998 F.2d 975, 978 (Fed. Cir. 1993), involved a request for a single settlement agreement, rather than a non-well-defined document set. *See Viacom Int'l, Inc.*, 2008 WL 3876142, at *3 (distinguishing *Haworth* on this basis).

2. The Burden of Compliance Here Would Be Small

The Subpoena Recipients have made no undue burden argument beyond their argument that Dr. Durham should have the relevant documents. Indeed, the document categories are limited and the quantity of corresponding documents that Dr. Durham has produced shows that compliance here will not be burdensome. A non-party "cannot rely on a mere assertion that compliance would be burdensome and onerous without showing the manner and extent of the burden and the injurious consequences of insisting upon compliance with the subpoena." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2463.1 (3d ed.). "For a burdensomeness argument to be sufficiently specific to prevail, it must be based on affidavits or other evidence showing the exact nature of the burden." *Blagman v. Apple Inc.*, No. CV 13-8496-PSG (PLAx), 2014 WL 12607841, at *3 (C.D. Cal. Jan. 6, 2014). Although Mr. Mandelbrot has adduced no evidence of burden, his statements and positions during the meet-and-confer process confirm that any burden would be slight: Mr. Mandelbrot admitted that the only responsive documents in his possession are emails. Sciarrino Decl. ¶ 5. Compiling the responsive documents therefore requires no more than a keyword search of his email account. Also, Mr. Mandelbrot has recently stated that he plans to contact Dr. Durham, review Dr. Durham's document production, and then compare that production to his own responsive emails to determine whether there are any emails omitted from Dr. Durham's production. *See* Sciarrino Decl. Ex. B. Under this plan, Mr. Mandelbrot will be substantively reviewing two sets of documents rather than simply electronically searching his emails based on sender and recipient, a simpler task.

3. The Subpoena Recipients Are Not Disinterested in the Underlying Action

Finally, in considering the burden or expense on a non-party, "'it is relevant to inquire whether the putative non-party actually has an interest in the outcome of the case ….'" *Software Rts. Archive, LLC*, 2009 WL 1438249, at *2. Here, the Subpoena Recipients have

themselves clearly shown that they have an interest in the outcome of the Underlying Action. They have publicly and falsely attacked Ankura's integrity, the quality of its audits, and the bona fides of its personnel. *See* Smith Decl. ¶ 13; *see*, *e.g.*, Oct. 5, 2021 Asbestos Legal Center Blog Post. The documents that Dr. Durham has produced also show that the Subpoena Recipients are "closely aligned with" Dr. Durham." *Aquastar Pool Prods. Inc. v. Paramount Pool & Spa Sys.*, No. CV-19-00257-PHX-DWL, 2019 WL 250429, at *3 (D. Ariz. Jan. 17, 2019). Those documents reflect that Mr. Mandelbrot actively encouraged Dr. Durham to file the Underlying Action, and that he and Dr. Durham have exchanged thoughts on the facts and circumstances at issue. In sum, "this is not a situation … where a non-party is burdened by a subpoena relating to litigation to which it … has no or only a peripheral interest." *Peskoff v. Faber*, No. CIV A. 04-526 (HHK/JMF), 2006 WL 1933483, at *3 (D.D.C. July 11, 2006).

C. <u>The Requested Documents are Not Privileged</u>

The November 15, 2021 email belatedly objecting to the entity subpoenas contained a conclusory, single-sentence privilege objection. Sciarrino Decl. Ex. A. When pressed, the Subpoena Recipients simply described Mr. Mandelbrot as Dr. Durham's "attorney (consultant) since 2017" and listed five generalized categories of supposedly privileged documents. *Id.*

This is wholly insufficient. Rule 45 requires that privilege-based objections must "describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." Fed. R. Civ. P. 45(e)(2)(A)(ii); *accord N.L.R.B. v. Fresh & Easy Neighborhood Mkt., Inc.*, 805 F.3d 1155, 1163 n.4 (9th Cir. 2015). "The burden of proof is on the party seeking to establish that the privilege applies." *United States v. Blackman*, 72 F.3d 1418, 1423 (9th Cir. 1995). "Boilerplate, generalized objections are inadequate and tantamount to making no objection at all." *Exobox Techs. Corp. v. Tsambis*, No. 2:14-CV-501-RFB-VCF, 2014 WL 4987903, at *3 (D. Nev. Oct. 7, 2014). Indeed, courts often hold that "[a] nonparty withholding subpoenaed information on the grounds of privilege must serve a privilege log describing the nature of the documents withheld so that the other parties may assess the privilege claimed." *Realtek*

Semiconductor Corp. v. LSI Corp., No. 5:14-mc-80197-BLF-PSG, 2014 WL 4365114, at *2 (N.D. Cal. Sept. 3, 2014).

The Subpoena Recipients have not met these standards. They have provided only a boilerplate, generalized objection. This alone is reason to overrule the privilege objection. This is not a mere technical point. In the Underlying Action, Dr. Durham—the supposed "client" in the purported attorney/client relationship—has not contended that any such relationship existed. Smith Decl. ¶ 13. He has freely produced his communications with the Subpoena Recipients. *Id.* And those communications belie any suggestion of an attorney client relationship, or that the communications at issue constitute requests for the provision of legal advice or the provision of legal advice. *See IP Co., LLC v. Cellnet Tech., Inc.*, No. C08-80126 MISC MMC (BZ), 2008 WL 3876481, at *2 (N.D. Cal. Aug. 18, 2008) (attorney/client privilege protects only "communications between lawyers and their clients made for the purpose of securing legal advice"). For example, one of Mr. Mandelbrot's emails to Dr. Durham is a March 2020 communication in which Mr. Mandelbrot sent Dr. Durham someone else's lawsuit against the Trusts, and gave Dr. Durham permission to "share with your lawyers"—not the language that would naturally be used by a person who was himself acting as Dr. Durham's attorney. Smith Decl. Ex. F at DURHAM - 000385. Further, far from seeking legal advice, this and other emails merely involve Mr. Mandelbrot and Dr. Durham communicating about their respective experiences with Ankura and the Trusts. For example, in one email Mr. Mandelbrot expressed to Dr. Durham that the "Trusts 'banned' you … just as they did my office …". *Id.* at DURHAM - 000870. The emails also show that Mr. Mandelbrot actively encouraged Dr. Durham's filing the Underlying Action, though he did not represent Dr. Durham in preparing or filing the complaint. *Id.* In another email, Dr. Durham stated to Mr. Mandelbrot, "I need a plaintiff lawyer"; instead of offering to serve in that role, Mr. Mandelbrot merely encouraged Dr. Durham "not to throw in the towel." *Id.* at DURHAM - 000870-871.

Finally, even if there were an attorney/client relationship, which there is not, any privilege has been waived because Dr. Durham has produced many of the requested communications, just as he produced his communications with other law firms about his dispute

with Ankura. *See, e.g.*, Smith Decl. ¶¶ 7, 14 & Ex. F. *See Gomez v. Vernon*, 255 F.3d 1118, 1131-32 (9th Cir. 2001) ("The privilege may be waived by the client … by turning over privileged documents.").

The claim of work product protection should be summarily dismissed. Rule 26(b)(3) "limits its protection to one who is a party (or a party's representative) to the litigation in which discovery is sought." *In re Cal. Pub. Utils. Comm'n*, 892 F.2d 778, 781 (9th Cir. 1989). Mr. Mandelbrot and his law firms are not parties (or parties' representatives) in the Underlying Action.

IV. CONCLUSION

For the foregoing reasons, Ankura's motion to compel should be granted.

DATED: December 9, 2021

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