UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARLOS MEDINA,
Plaintiff,

v.

CHRISTOPHER HOLT and
TIMOTHY LENANE
Defendants.

CIVIL ACTION NO. 11-10256-NMG

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO INSPECT INMATE TELEPHONE RECORDS AND IN SUPPORT OF PLAINTIFF'S MOTION TO QUASH AND FOR A PROTECTIVE ORDER

Plaintiff submits this memorandum both in opposition to Defendants' Motions to Inspect Inmate Telephone Records of Plaintiff Carlos Medina [Dkt. 35], nonparty Tomeka White [Dkt. 36], and nonparty Julio Medina [Dkt. 37], and in support of Plaintiff's Motion to Quash and for a Protective Order [Dkt. 38]. Defendants' request for all recorded telephone conversations of each individual, along with other information, over a period of three years, is overbroad. Defendants claim, without any foundation, that discovery of these telephone calls will yield impeachment evidence in the form of prior inconsistent statements and, in the case of Plaintiff, party admissions. Defendants have not shown that any of the calls are relevant to the parties' claims and defenses, much less shown good cause for discovery solely for impeachment material. The request will cause Plaintiff and the nonparties annoyance, embarrassment, and undue burden under Rule 26(c)(1). To the extent the correctional facilities may produce phone calls with Plaintiff's counsel or other attorneys in response to the subpoena, this will invade the attorney-client privilege and work product protection. The Court should deny Defendants' motions, quash the subpoenas, and/or enter a protective order forbidding the requested discovery.

BACKGROUND

This case arises out of an incident on February 28, 2009, in which Plaintiff, who was homeless at the time, alleges that Defendants, two Boston Police officers, assaulted him and broke his nose with a flashlight because they incorrectly believed he was concealing drugs. Tomeka White is a nonparty witness to the incident; Julio Medina, Plaintiff's brother, did not witness the altercation but saw Plaintiff before and after.

A few days after the incident, Plaintiff filed a complaint with the Internal Affairs Division of the Boston Police Department. As part of its investigation, the BPD interviewed Plaintiff, Ms. White, and Julio Medina within two months of the incident. Since that time, all three of these individuals have been and continue to be incarcerated.

Plaintiff filed suit in February 2011. Discovery has closed. The deadline was February 10, 2012, having been extended from December 9, 2011. During discovery, Defendants took the depositions of Plaintiff, Ms. White, and Julio Medina. Defendants also obtained complete CORI information on all three individuals.

On February 10, 2012, the last day of discovery, Defendants filed the motions at issue. The same day, defense counsel prepared subpoenas of Massachusetts Department of Corrections (DOC) and the Suffolk County Sheriff's Department (SCSD), which are returnable March 13 and March 15, 2012.[1] The subpoenas, which Defendants did not attach to their motions, are different from the proposed orders.[2] Defendants' motions and proposed orders seek, for each of the three individuals, from each of two agencies, "all prisoner phone PINs, authorized call lists, visitor logs, prisoner call logs, and all recordings of phone conversations excluding those calls protected by the attorney-client

[1] The record does not reflect when or if they were served on the DOC and SCSD. There is also no indication that copies of the subpoenas, or of Defendants' motions, were sent to Tomeka White and Julio Medina, permitting them to assert any interest they may have in the subpoenaed materials.

[2] The subpoenas are attached. Exhibits 1 and 2 are subpoenas for Plaintiff's records from DOC and SCSD, respectively. Exhibits 3 and 4 are for both nonparties' records from DOC and SCSD, respectively. The last page of each subpoena, Schedule A, describes the materials sought and is identical for all four subpoenas except for the names.

privilege, from February 28, 2009 – present." The subpoenas, however, contain no exception for calls protected by the attorney-client privilege, seeking "a *complete* list of all phone calls … [and] all recordings of any and all telephone conversations."[3]

DISCUSSION

I. The Court Should Deny Defendants' Motion, and Quash the Subpoenas, for Plaintiff's Calls and Records

The Court should quash the subpoenas and deny Defendants' motion for Plaintiff's phone calls. Plaintiff has standing to challenge the subpoenas directed to nonparties because Plaintiff has a "personal right or privilege" regarding the documents sought – the attorney-client privilege for attorney calls, and a privacy interest in avoiding unwarranted disclosure of personal calls. *See Minnesota Sch. Boards Ass'n Ins. Trust v. Employers Ins. Co. of Wausau*, 183 F.R.D. 627, 629 (N.D. Ill. 1999); *Sierra Rutile Ltd. v. Katz*, 90 CIV. 4913(JFK), 1994 WL 185751 (S.D.N.Y. May 11, 1994). Further, "[i]t is well settled … that the scope of discovery under a subpoena is the same as the scope of discovery under Rules 26(b) and 34. Thus, the court must examine whether a request contained in a subpoena is overly broad or seeks irrelevant information under the same standards as set forth in Rule 26(b) and as applied to Rule 34 requests for production." *Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicenter of Haverstraw, Inc.,* 211 F.R.D. 658, 662 (D. Kan. 2003); *see also, e.g., Cofield v. City of LaGrange, Ga.,* 913 F. Supp. 608, 614 (D.D.C. 1996) ("A federal court has the authority to quash a subpoena that seeks material which is clearly irrelevant.")(citing 9A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure: Civil 2d § 2459, at 42 (1995)).

As discussed more fully below in the section concerning Plaintiff's motion for a protective order, Defendants have not shown that any of the phone calls or other information sought contain any information relevant to this lawsuit. It is pure speculation that the calls contain prior inconsistent statements or relevant admissions. To discern whether any such statements exist will

[3] Exhibits 1-4, Schedule A (emphasis in originals).

require listening to every phone call (most of which are likely in Spanish) over a several-year period, an undue burden and expense, as well as an invasion of Plaintiff's privacy. To the extent compliance with the subpoenas results in production of phone calls from Plaintiff's counsel, or from Plaintiff's criminal attorneys, this would violate the attorney-client privilege.

II. The Court Should Enter a Protective Order Prohibiting Discovery of All of the Requested Records for Plaintiff and Both Nonparty Witnesses

The Court should deny all of Defendants' motions and enter a protective order under Rule 26(c) with respect to all of the requested calls and records. Courts have recognized Rule 26 as an appropriate vehicle for parties to challenge improper subpoenas to nonparties. *See, e.g., Mfr. Direct, LLC v. Directbuy, Inc.*, 2007 WL 496382, at *3 (N.D. Ind. Feb. 12, 2007) ("weight of authority" permits such challenges) (collecting cases); *G.K. Las Vegas Ltd. P'ship v. Simon Prop. Group, Inc.*, 2007 WL 119148, at *3 (D. Nev. Jan. 9, 2007) (collecting cases); *see also Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 636 (C.D. Cal. 2005) (permitting party to challenge subpoena, even though nonparty subject of subpoena had not objected, where "the subpoena is overbroad on its face and exceeds the bounds of fair discovery"). A protective order is appropriate here because the subpoenas exceed the scope of relevance under Rule 26(b)(1), and will cause annoyance, embarrassment and undue burden and expense under Rule 26(c)(1).

A. Defendants have not shown that any of the requested calls or records are relevant.

Discovery in a civil case is subject to the limitations of Rule 26(b)(1). Without a showing that the materials sought are relevant to any party's claim or defense, they are not subject to discovery. *See Surles v. Air France*, 2001 WL 1142231, at *2 (S.D.N.Y. Sept. 27, 2001) ("[T]he information sought by Defendant does not become relevant merely because Defendant speculates that it might reveal useful material."). Defendants have not even made this minimal showing, much less the "good cause" required for discovery solely to unearth potential impeachment material, their avowed

purpose. *See Dzanis v. JPMorgan Chase & Co.,* 2011 WL 5979650, at *6 (S.D.N.Y. Nov. 30, 2011) (finding no good cause to discover potential impeachment material where the request is speculative) (collecting cases).

Defendants' request for recordings of all phone calls, along with all prisoner phone PINs, authorized call lists, visitor logs, and prisoner call logs, for a three-year period is overbroad. The subpoenas contain no limitation as to subject matter, and Defendants do not identify any basis for supposing that the records contain relevant information. Courts have repeatedly rejected this kind of "fishing expedition." *See, e.g., Martinez v. Rycars Const., LLC*, 2010 WL 4117668, at *2 (S.D. Ga. Oct. 18, 2010) (denying request for plaintiff's "cellphone records of every telephone call to and from anyone" for a two year period) (collecting cases); *Pendlebury v. Starbucks Coffee Co.,* 2005 WL 2105024, at *2 (S.D. Fla. Aug. 29, 2005) (denying request for "[a]ll invoices, statements, or call logs that reflect calls, text messages, electronic mail, or other communications made to or from a cellular telephone, Blackberry, pager, or other portable communications device owned or used by plaintiffs during the period June 2001-present"); *Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 34 F. Supp. 2d 47, 52 (D.D.C. 1998) (denying request for all "telephone, facsimile, and mail records showing communication … regarding the issues in this case" as "tremendously overbroad").

B. The requested discovery will cause annoyance, embarrassment, and undue burden.

Disclosure of the records will create an undue burden and subject Plaintiff and the nonparty witnesses to annoyance and embarrassment. Rule 26(c)(1). Allowing this type of request would unfairly subject parties and nonparty witnesses who happen to be incarcerated to invasive scrutiny of their personal lives based solely on the fact that they are incarcerated. The fact that inmates do not have a reasonable expectation of privacy in their phone calls for constitutional purposes, and that these calls may be subject to a grand jury subpoena or subpoena in a criminal case, *see Matter of Grand Jury Subpoena,* 454 Mass. 685, 687-89 (2009), is not dispositive. The calls are not freely available to the

public; as Defendants' motion attests, a court order is required to obtain them. *See Tompkins v. Detroit Metro. Airport,* 2012 WL 179320, at *2 (E.D. Mich. Jan. 18, 2012) (denying defendants' request for non-public portions of plaintiff's Facebook page even though the information was "not privileged, nor is it protected by common law or civil law notions of privacy," because "Defendant does not have a generalized right to rummage at will" through nonpublic information without threshold showing of relevance).[4]

Further, to the extent the subpoenas seek, or may result in, the production of conversations protected by the attorney-client privilege or work product doctrine, it is improper.[5] Even if the facilities are instructed not to produce privileged materials, it is doubtful that they would devote the time and effort to identifying which calls are privileged and which are not.[6]

Similarly, without listening to every conversation, there is no way of knowing whether it will contain prior inconsistent statements from anyone, or, from Plaintiff, relevant admissions.[7]

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[4] If Plaintiff had subpoenaed all phone records of both Defendants since the date of the incident, as well as all such records from the nonparty police officer and EMT witnesses, hoping to find impeachment material, such requests would be equally objectionable under the Federal Rules, even though subscribers have no reasonable expectation of privacy in these records. *See Smith v. Maryland,* 442 U.S. 735 (1979).

[5] Plaintiff's counsel's conversations with Plaintiff are obviously privileged, as would be any conversations the nonparty witnesses may have had with their attorneys. Plaintiff's counsel spoke once on the phone with Ms. White. This conversation, discovery of which would reveal counsel's mental impressions, opinions, or legal theories, Rule 26(b)(3), is protected by the work-product doctrine. *See Connolly Data Sys., Inc. v. Victor Technologies, Inc.*, 114 F.R.D. 89, 96 (S.D. Cal. 1987) (holding conversations between lawyer and nonparty witness to be nondiscoverable work product); *Phoenix Nat. Corp., Inc. v. Bowater United Kingdom Paper Ltd.,* 98 F.R.D. 669, 671 (N.D. Ga. 1983) (same); *Ford v. Philips Electronics Instruments Co.,* 82 F.R.D. 359, 361 (E.D. Pa. 1979) (same).

[6] Of course, if the facilities did listen to the calls to ascertain whether they were privileged, this would itself violate the privilege. While the facilities are not supposed to record attorney phone calls, it is Plaintiff's counsel's understanding, based on conversations with a criminal defense attorney familiar with this issue, that such calls are sometimes inadvertently recorded.

[7] Defendants' alternative request, for the PIN numbers, visitor logs, and all call logs "as well as permission to seek leave to come back for a court order on certain phone calls," Dkt. 35 ¶ 9; Dkt. 36 ¶ 10; Dkt. 37 ¶ 10, suffers from the same defect. The identity of the people Plaintiff and the nonparties spoke to on particular occasions will give no indication about the substance of these conversations. *See Pendlebury v. Starbucks Coffee Co.,* 2005 WL 2105024, at *2 (S.D. Fla. Aug. 29, 2005) ("It is unclear to the Court … how such records are reasonably likely to provide the information Defendant seeks; the records will only indicate whether a call or other communication was made, and not the substance of those communications."); *Martinez v. Rycars Const., LLC*, CV410-049, 2010 WL 4117668, at *2 (S.D. Ga. Oct. 18, 2010) (rejecting similar attempt to obtain list of all calls as "go-fish discovery").

Plaintiff's and Julio Medina's primary language is Spanish; production of their phone calls will require Plaintiff's counsel to expend substantial additional time and expense merely to learn their content. These burdens far outweigh the purely speculative "benefit" of the proposed discovery. Rule 26(b)(2)(C)(iii). This is especially so since all three individuals have not only been deposed in this case, but also gave recorded interviews to the BPD soon after the incident. Defendants already have prior inconsistent statements with which to impeach Plaintiff and the two witnesses. This is not likely a large damages case given the identity of the Plaintiff, who was homeless and addicted to drugs at the time of the incident; the substantial burden of the requested discovery is unjustified.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motions to Inspect Inmate Telephone Records of Plaintiff Carlos Medina [Dkt. 35], nonparty Tomeka White [Dkt. 36], and nonparty Julio Medina [Dkt. 37], and allow Plaintiff's Motion to Quash and for a Protective Order [Dkt. 38].

RESPECTFULLY SUBMITTED,
Plaintiff Carlos Medina,
By his attorneys,

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CERTIFICATE OF SERVICE
I certify that on this day a true copy of the above document was served upon the attorney of record for each party via ECF.

Date: February 24, 2012 /s/ David Milton
David Milton