

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

PATRICK JOHN MCERLAIN,

No. C 13-03232 MMC (LB)

Plaintiff,

**ORDER REGARDING JOINT  
DISCOVERY DISPUTE LETTER FILED  
ON DECEMBER 10, 2013**

v.

PARK PLAZA TOWERS OWNERS  
ASSOCIATION, et al.,

[Re: ECF No. 48]

Defendants.  

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**INTRODUCTION**

The parties dispute whether Plaintiff Nancy McErlain may subpoena certain documents from third-party Coldwell Banker about a defendant in her son's related case. *See* Joint Letter Brief, ECF No. 48. Based on the parties' joint letter brief and their arguments at the hearing on December 19, 2013, the court holds that the certain of the information sought is relevant. The court orders production of the disclosure statement, the agency agreement, and the listing agreement, subject to the privilege review discussed below.

**STATEMENT**

Park Plaza Towers, located at 110 Park Road in Burlingame, California, is a six-story condominium community comprised of 45 condominium units. The common areas of the Property, is under the control of the Park Plaza Towers Owners Association (the "Association"), by and through its Board of Directors. The Association (including its Board and members) are governed by

1 the Association's governing documents, including its Covenants, Conditions and Restrictions  
2 ("CC&Rs")

3 Patrick McErlain, who has been diagnosed with bipolar disorder, lives at Park Plaza Towers in a  
4 unit owned by his mother, Nancy McErlain. In this action, *McErlain v. Park Plaza Towers Owners*  
5 *Association*, No. C13-03232 MMC (LB) the "3232 Action"), he has sued the Association, the  
6 property manager (David Behling), the property management company (Behling Property  
7 Management Corp.), and 10 building residents—including Julie Robles—who may or may not be  
8 members of the Association's Board of Directors (collectively, "Defendants"), for disability  
9 discrimination in violation of federal and state law. Essentially, he alleges that Defendants have  
10 tried to get him to move out of the Park Plaza Towers by actively engaging in disparaging, mocking  
11 and assaultive behavior toward him, encouraging such behavior, or failing to restrain such behavior.  
12 *See generally* First Amended Complaint, 3232 Action, ECF No. 3.

13 Mr. McErlain's mother, Nancy McErlain, also has sued some of Defendants. In her action,  
14 *McErlain v. Park Plaza Towers Owners Association*, No. C13-04384 MMC (LB) (the "4384  
15 Action"), she has sued the Association, Mr. Behling, and Behling Property Management Corp. for  
16 disability discrimination and for breach of the CC&Rs. *See generally* Complaint, 4384 Action, ECF  
17 No. 1.

18 On November 11, 2013, Ms. McErlain served Coldwell Banker, a non-party to this action, with a  
19 document subpoena. 12/10/2013 Letter, ECF No. 48 at 1. Ms. McErlain wants Coldwell Banker to  
20 produce documents between Julie Robles, who formerly owned a condominium unit in the Park  
21 Plaza Towers and who is a defendant in the 3232 Action, and Coldwell Banker, which served as her  
22 real estate broker/agent concerning the sale of her unit. *Id.* Specifically, Ms. McErlain's subpoena  
23 to Coldwell Banker requests Coldwell Banker's "entire file containing all correspondence and  
24 emails between real estate agent Thomas Neel and anyone else affiliated with Coldwell Banker and  
25 Julie R. Robles and anyone else concerning the listing and sale of the property located at 110 Park  
26 Road, No. 102, Burlingame, CA 94010, including your listing agreement with Julie R. Robles, the  
27 sales contract, disclosures, and all sales related documents from the beginning to the present." *Id.*

28 On November 21, 2013, Defendants filed, in the 3232 Action (which is Mr. McErlain's action) a

1 motion to quash Ms. McErlain's subpoena. Motion to Quash, ECF No. 37. But because Ms.  
2 McErlain, rather than Mr. McErlain, served the subpoena, the subpoena presumably relates to the  
3 4384 Action. Thus, Defendants should have filed their motion to quash in the 4384 Action, not the  
4 3232 Action. The district referred the motion to the undersigned for resolution, and the undersigned  
5 promptly dismissed the motion without prejudice and ordered the parties to comply the procedures  
6 for resolving discovery disputes that are outlined in the undersigned's standing order. 12/4/2013  
7 Order, ECF No. 47. Those procedures allow parties to file joint discovery dispute letters, rather than  
8 discovery motions.

9 On December 10, 2013, Ms. McErlain and Defendants filed a joint letter in the 3232 Action.  
10 12/10/2013 Letter, ECF No. 48. Again, it should have been filed in the 4348 action. In it,  
11 Defendants ask the court to quash the subpoena because it seeks information that is irrelevant to the  
12 claims and defenses in this action and because it seeks communications that are protected by the  
13 attorney-client privilege and thus is overbroad. *Id.* at 2.

14 At the December 19, 2013 hearing, Ms. McErlain limited her request to the disclosure statement,  
15 the agency agreement, and the listing agreement only.

## 16 ANALYSIS

### 17 I. LEGAL STANDARD

#### 18 A. Standing and Rule 45 Subpoenas

19 "Ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a  
20 party to the action, unless the objecting party claims some personal right or privilege with regard to  
21 the documents sought." 9A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE &  
22 PROCEDURE § 2459 (3d ed. 2008); *see also Crispin v. Christian Audigier, Inc.*, No. CV 09-09509  
23 MMM (JEMx), 2010 WL 2293238, at \*5 (C.D. Cal. May 26, 2010) (quoting Wright & Miller and  
24 providing additional citations).

#### 25 B. Scope of Rule 45 Discovery

26 Federal Rule of Civil Procedure 45 governs discovery of nonparties by subpoena. The scope of  
27 the discovery that can be requested through a subpoena under Rule 45 is the same as the scope under  
28 Rule 26(b). Fed. R. Civ. P. 45 Advisory Comm.'s Note (1970) ("[T]he scope of discovery through a

1 subpoena is the same as that applicable to Rule 34 and other discovery rules.”); Fed. R. Civ. P. 34(a)  
2 (“A party may serve on any other party a request within the scope of Rule 26(b).”). Unless  
3 otherwise limited by court order, Rule 26(b) allows a party to obtain discovery concerning “any  
4 nonprivileged matter that is relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). This  
5 includes “the identity and location of persons who know of any discoverable matter.” *Id.* “Relevant  
6 information need not be admissible at the trial if the discovery appears reasonably calculated to lead  
7 to the discovery of admissible evidence.” *Id.*

8 A court must protect a nonparty subject to a subpoena if a subpoena “requires disclosure of  
9 privileged or other protected matter” or the subpoena “subjects a person to undue burden.” Fed. R.  
10 Civ. P. 45(c)(3). A court must also limit discovery if it is unreasonably duplicative, if it can be  
11 obtained from a source that is more convenient or less burdensome, or if the burden of producing it  
12 outweighs its likely benefit. Fed. R. Civ. P. 26(b)(2)(C). Moreover, upon motion from a party who  
13 certifies that they have conferred in good faith with the opposing party, a court may also “issue an  
14 order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or  
15 expense[.]” Fed. R. Civ. P. 26(c). The issuing court also may quash a subpoena if it determines that  
16 the subpoena requires disclosure of “a trade secret or other confidential research, development, or  
17 commercial information.” Fed. R. Civ. P. 45(c)(3)(B).

18 “On a motion to quash a subpoena, the moving party has the burden of persuasion under Rule  
19 45(c)(3), but the party issuing the subpoena must demonstrate that the discovery sought is relevant.”  
20 *Chevron Corp. v. Donziger*, 12–MC–80237 CRB (NC), 2013 WL 4536808, at \*4 (N.D. Cal. Aug.  
21 22, 2013) (citing *EON Corp. IP Holdings, LLC v. T-Mobile USA, Inc.*, No. 12–80082 LHK (PSG),  
22 2012 WL 1980361, at \*1 (N.D. Cal. June 1, 2012)).

## 23 **II. APPLICATION**

24 As an initial matter, the court finds that Ms. Robles—but not Defendants as a group—has  
25 standing to ask the court to quash the subpoena. The documents Ms. McErlain seeks from Coldwell  
26 Banker are Ms. Robles’s communications with her real estate agent. The court also notes that Ms.  
27 McErlain does not contend that Ms. Robles lacks standing here. Accordingly, the court construes  
28 the arguments made by Defendants as ones made by Ms. Robles only.

1 As for the substantive arguments, the court first addresses Ms. Robles's privilege argument. In  
2 short, the court finds it unpersuasive. First, Ms. Robles has provided no reason why these requested  
3 communications might include privileged ones. Rather, in a single sentence, she merely says that  
4 the subpoena asks for communications from "anyone" that are in the "entire file," and those  
5 communications "could" include privileged ones. Second, even if there are privileged  
6 communications, and as Ms. McErlain agreed at the hearing, Ms. Robles can withhold any  
7 privileged communications and produce a privilege log.

8 And although it is a close call, the court also is not persuaded by Ms. Robles's relevance  
9 argument. It is Ms. McErlain's burden to show relevance, and the court believes that she has, albeit  
10 barely. Ms. McErlain claims, essentially, that the Association, Mr. Behling, and Behling Property  
11 Management Corp. discriminated against her son. She contends that Ms. Robles was one of the  
12 residents at the Park Plaza Towers who instigated and carried out discriminatory activity on behalf  
13 of the Association's Board of Directors. 12/10/2013 Letter, ECF No. 48 at 3. She explains that on  
14 May 30, 2013, Ms. Robles obtained a restraining order against her son, and Ms. Robles sold her unit  
15 shortly thereafter. *Id.* She argues that the requested communications are relevant because, for  
16 example, "[t]he subpoenaed file should contain a disclosure statement, per Calif. Civil Code section  
17 1102, filled out personally by Ms. Robles, in which she discloses 'all known material or significant  
18 items affecting the value or desirability of the property.'" *Id.* Ms. McErlain "expects" that Ms.  
19 Robles filled out the disclosure statement before May 2013, and Ms. McErlain wants to see  
20 "[w]hether [Ms.] Robles'[s] descriptions of her situation with [Mr.] McErlain in her disclosure  
21 statement differ from those in" her other testimony. *Id.* The disclosure statement, she argues, "is  
22 relevant not only to [Ms.] Robles'[s] credibility, but also to her motivation in discriminating against  
23 [Mr. McErlain], obtaining the restraining order, and sending multiple email and letter reports to the  
24 [Association's Board of Directors], the police, fellow neighbors, and the courts about [Mr.  
25 McErlain], encouraging them to discipline and/or arrest him." *Id.* At the hearing, she also noted  
26 that the agency agreement and the listing agreement are relevant to timing.

27 Other than saying that Ms. McErlain's requests have nothing to do with her claims, Ms. Robles  
28 makes no real attempt to argue why Ms. McErlain's explanation is not persuasive. Instead, she

1 asserts that Ms. McErlain's subpoena is a "fishing expedition" that seeks to "punish" and "humiliate"  
2 her. *Id.* at 2-3. The court cannot see, however, how the disclosure of some communications relating  
3 to the sale of her unit is humiliating or would punish her, and given Ms. McErlain's explanation,  
4 also does not believe that the subpoena is merely a "fishing expedition."

5 Accordingly, the court finds that the information requesting by Ms. McErlain's subpoena could  
6 lead to the discovery of admissible evidence and denies Ms. Robles's request for an order quashing  
7 the subpoena. As discussed at the hearing, the court limits the discovery to be produced to the  
8 disclosure statement, the agency agreement, and the listing agreement. Coldwell Banker may  
9 produce them through Ms. Robles's counsel, who can conduct a privilege review. In doing so, she  
10 must follow the procedures set forth in the undersigned's standing order. And if there is private  
11 information in the agreements, counsel must meet and confer to see if they can implement a process  
12 to protect that information. Given the agreements are relevant to timing, the court is confident that  
13 the parties can address this issue.

14 **CONCLUSION**

15 This disposes of ECF No. 48.

16 **IT IS SO ORDERED.**

17 Dated: December 19, 2013

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20 LAUREL BEELER  
21 United States Magistrate Judge  
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