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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 Kathryn Ayers, et al.,

12 Plaintiffs,

13 v.

14 James Yiu Lee, et al.,

15 Defendants.

Case No.: 14cv542-BGS (NLS)

**ORDER GRANTING IN PART
PLAINTIFFS' MOTION FOR AN
ORDER REQUIRING FEDERAL
BUREAU OF PRISON
COMPLIANCE WITH SUBPOENAS
[ECF NO. 162]**

16
17 **I. INTRODUCTION**

18 Presently before the Court is Plaintiffs Pamela Bridgen and Hal Blatman's
19 ("Plaintiffs") Motion for An Order Requiring the Federal Bureau of Prisons Compliance
20 with Subpoenas ("Motion") (ECF No. 162), in which Plaintiffs seek to enforce a subpoena
21 served on the Bureau of Prisons to obtain records related to former Defendant James Yiu
22 Lee's ("Lee") communications with Defendant Larissa Ettore ("Ettore") while Lee was in
23 custody at Bureau of Prison facilities. (ECF No. 162.)

24 On May 25, 2017, Plaintiffs filed an Ex Parte Application to Shorten Time for
25 Motion to Compel the United States Department of Justice, Bureau of Prisons ("Bureau of
26 Prisons") to Comply with Subpoenas. (ECF No. 160.) The Court granted the Ex Parte
27 Application (see ECF No. 161) and the underlying Motion was docketed on May 26, 2017.
28 (ECF No. 162.)

1 Pursuant to the Court's Order granting the Ex Parte Application (ECF No. 161),
2 Plaintiffs filed supplemental briefing and a revised subpoena on May 30, 2017. (ECF No.
3 163.) In response, on June 2, 2017 the Bureau of Prisons filed a Statement of Qualified
4 Non-Opposition to Plaintiffs' Motion to Compel Compliance with Subpoenas, in which it
5 maintains that while the Privacy Act, 5 U.S.C. § 552a, bars disclosure of the requested
6 records (ECF No. 164 at 2), it will release them subject to court order pursuant to 5 U.S.C.
7 § 552a(b)(11).

8 That same day, Defendant Ettore filed an Opposition to Plaintiffs' Motion. (ECF
9 No. 165.) This briefing was not required under the Court's Order setting forth the briefing
10 schedule for the Motion. (See ECF No. 161.) Subsequently, Plaintiffs filed a Reply to
11 Defendant Ettore's Opposition to Motion to Compel Compliance with Subpoenas on June
12 4, 2017. (ECF No. 166.)

13 For the reasons set forth below, the Court hereby **GRANTS IN PART** Plaintiffs'
14 Motion to Compel Compliance with Subpoenas (ECF No. 162) subject to the limitations
15 set forth below.

16 **II. BACKGROUND**

17 This action stems from a securities fraud orchestrated by former Defendant Lee. On
18 or about April 19, 2017 and May 5, 2017¹, Plaintiffs issued subpoenas on the Bureau of
19 Prisons for records relating to former Defendant Lee's communications while incarcerated
20 at two of their facilities.² (ECF No. 162-1 at 6-8.) Both subpoenas were served on counsel
21 for Defendant Ettore and former Defendant Lee. (Id.; ECF No. 162-2 at 5-6, 14-15.)
22 Neither Defendant Ettore nor former Defendant Lee filed a motion to quash either of the
23 subpoenas. (See ECF No. 161 at 16.)

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26 ¹ Plaintiffs originally served the Bureau of Prisons with subpoenas pursuant to both Rules 45 and 69. (See
27 ECF No. 162.) However, pursuant to the Court's Order granting the Ex Parte Application (ECF No. 161),
28 Plaintiffs have removed any reference to Rule 69 in the reissued subpoena filed on May 30, 2017. (See
ECF No. 163; ECF No 163, ex. 1.)

² Inmates receive numerous warnings and notices that their emails, in-person visits, and correspondence
are subject to prison surveillance. (ECF No. 161 at 6.)

1 Following service of the April 19, 2017 subpoena, the Bureau of Prisons informed
2 Plaintiffs that the records sought fell under the protections of the federal Privacy Act, 5
3 U.S.C. § 552(a), and as such could not be produced absent court order. (ECF No. 162-1 at
4 7.) Plaintiffs were also informed they needed to submit a request pursuant to the
5 Department of Justice’s Touhy regulations, 28 C.F.R. §§ 16.21-16.26, to show the
6 relevance of the documents sought. (Id.) Plaintiffs were required to supplement their
7 relevancy showing three times and relied heavily on the pursuit of a “judgment
8 enforcement against [former Defendant Lee]” to establish the relevancy of documents
9 sought that did not involve Defendant Ettore. (Id. at 7-9.) Plaintiffs were informed their
10 revised Touchy request was approved on May 17, 2017. (Id. at 9.) Their Ex Parte
11 Application to Shorten Time regarding the underlying motion to compel was filed May 25,
12 2017. (ECF No. 160.)

13 In the Court’s Order granting Plaintiffs’ Ex Parte Application to Shorten Time, it
14 made clear that it “never authorized discovery related to the enforcement of the prior
15 default judgment entered against former Defendant Lee in this action” and accordingly
16 ordered Plaintiffs “to revise the scope of the subpoena at issue so as to limit it to
17 information relevant to Defendant Ettore and the single cause of action pending against
18 her.” (ECF No. 161 at 2- 3.) Plaintiffs submitted a revised subpoena that no longer
19 referenced Federal Rule of Civil Procedure Rule 69, permitting discovery pursuant to the
20 enforcement of a judgment, but kept the scope of the subpoena identical to the May 5, 2017
21 subpoena. This May 30, 2017 subpoena (“Revised Subpoena”) still encompasses all of
22 former Defendant Lee’s communications while incarcerated. (See ECF No. 163-1 at 4.)

23 In its briefing to the Court, the Bureau of Prisons maintains that while the Privacy
24 Act, 5 U.S.C. § 552a, bars disclosure of the requested records, the Court may issue an order
25 authorizing such disclosure pursuant to 5 U.S.C. § 552a(b)(11). (ECF No. 164 at 1.)
26 Further, it will “comply with the Court’s ruling on the proper scope of the subpoena.” (Id.
27 at 2.)

28 Defendant Ettore opposes the motion to compel compliance with the Revised

1 Subpoena filed by Plaintiffs. She maintains that the scope of the subpoena is overbroad,
2 as it fails to protect “attorney client privileged communication.” (ECF No. 165 at 1-2.)
3 Because counsel for Defendant Ettore also represented former Defendant Lee for a period
4 of time, the categories of attorney client privileged communication that Defendant Ettore
5 is concerned could be disclosed are those between (1) former Defendant Lee and
6 Sharif | Faust lawyers; (2) Defendant Ettore and Sharif | Faust lawyers; and (3) former
7 Defendant Lee, Defendant Ettore, and Sharif | Faust lawyers. (Id. at 4.)

8 Fact discovery closes July 1, 2017 (see ECF No. 156). The Bureau of Prisons has
9 requested five court days to produce any records deemed relevant. (ECF No. 164 at 2.)

10 **III. LEGAL STANDARDS**

11 Federal Rules of Civil Procedure (“Rules”) 26 and 45 govern discovery from
12 nonparties by subpoena. See *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774,
13 779 (9th Cir. 1994) (applying both rules to motion to quash subpoena). Under Rule
14 45(a)(1)(C), a nonparty to a civil suit may be subpoenaed for documents relevant to the
15 suit. A person commanded to produce documents may serve a written objection to the
16 subpoena. Fed. R. Civ. P. 45(d)(2)(B). If the commanded person withholds subpoenaed
17 information under a claim that it is privileged, the person must (1) expressly make the
18 claim, and (2) describe the nature of the withheld documents in a manner that will enable
19 the parties to assess the claim. Fed. R. Civ. P. 45(e)(2)(A). The serving party may, at any
20 time, on notice to the commanded person, move the court for an order compelling
21 production. Fed. R. Civ. P. 45(d)(2)(B)(I).

22 Although relevance under Rule 26 is not listed as a consideration in Rule 45, “courts
23 have incorporated relevance as a factor when determining motions to quash a subpoena.”
24 *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005) (citation omitted); see
25 *Greenspan v. Cty. of San Diego*, No. 13CV210-LAB DHB, 2014 WL 171653, at *1 (S.D.
26 Cal. Jan. 9, 2014) (first noting that the records at issue “are clearly relevant to the Plaintiff’s
27 case”) The scope of discovery is limited to information “that is relevant to any party’s
28 claim or defense and proportional to the needs of the case[.]” Fed. R. Civ. Proc. 26(b)(1).

1 In general, a party to an action has no standing to quash a subpoena served on a third
2 party except as to “claims of privilege relating to the documents being sought.” California
3 Sportfishing Prot. All. v. Chico Scrap Metal, Inc., 299 F.R.D. 638, 643 (E.D. Cal. 2014);
4 see also Hawaii Reg'l Council of Carpenters v. Yoshimura, No. CV 16-00198 ACK-KSC,
5 2017 WL 738554, at *2 & n.3 (D. Haw. Feb. 17, 2017) (summarizing history of this rule
6 in the Ninth Circuit).

7 The Privacy Act generally prohibits federal government agencies from disclosing
8 private records “contained in a system of records” without authorization of the “individual
9 to whom the record pertains.” 5 U.S.C. § 552a(b). However, the Privacy Act contains
10 numerous exceptions, one of which authorizes the disclosure of such records “pursuant to
11 the order of a court of competent jurisdiction.” 5 U.S.C. § 552a(b)(11). Records that may
12 otherwise be protected by the Privacy Act may still be discovered through litigation if
13 ordered by a court. S.E.C. v. Gowrish, No. C 09-05883 SI, 2010 WL 1929498, at *2 (N.D.
14 Cal. May 12, 2010). The test of discoverability in such a circumstance remains Rule 26’s
15 relevance standard. See Hassan v. United States, No. C05-1066C, 2006 WL 681038, at *2
16 (W.D. Wash. Mar. 15, 2006) (“a party can invoke discovery of materials protected by the
17 Privacy Act through the normal discovery process and according to the usual discovery
18 standards, and the test of discoverability is the relevance standard of Rule 26(b)(1) of the
19 [Federal Rules of Civil Procedure]”)

20 **IV. DISCUSSION**

21 In its Order granting the Ex Parte Application, the Court ordered Plaintiffs “to revise
22 the scope of the subpoena at issue so as to limit it to information relevant to Defendant
23 Ettore and the single cause of action pending against her.” (ECF No. 161 at 3.) Plaintiffs
24 submitted the Revised Subpoena in which they removed any reference to Rule 69;
25 however, the contents of the records requested in the Revised Subpoena remain the same
26 as listed in the May 5, 2017 subpoena and include no language targeting records related to
27 former Defendant Lee’s communications with Defendant Ettore. Instead, Plaintiffs request
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1 Visitor logs showing **all** visitors for Prisoner [Lee]; copies of **all** emails sent
2 and received by Prisoner and in the absence of emails, screen prints of
3 records reflecting emails sent and received; copies of **all** correspondence
4 sent and received by Prisoner; and copies of **all** existing tape recordings of
Prisoner’s conversations including telephone calls and visits.

5 (ECF No. 163-1 at 4 [emphasis added].) Further, they request “Documents related
6 to the review and approval of those seeking visitation rights with Prisoner and rights to
7 send and receive email from Prisoner[] . . . include[ing] any documents that provide a list
8 of approved visitors and email partners.” (Id.)

9 As the Court made clear in its Order granting the Ex Parte Application, the sole cause
10 of action before the Court is Plaintiffs’ claim against Defendant Ettore for alleged
11 violations of the Nevada Securities Act, Nev. Rev. Stat. § 90.660(4). (ECF No. 161 at 2;
12 see ECF Nos. 65, 136-37, 140, 146, 157.) Despite the Court providing Plaintiffs with an
13 opportunity to tailor the scope of the Revised Subpoena to the single claim at issue
14 regarding Defendant Ettore, they failed to do so. Instead, Plaintiffs attempt to explain the
15 relevance of all communications made by former Defendant Lee while in custody. (See
16 ECF No. 163 at 2-3.) They maintain that such communications would “provide[] highly
17 probative evidence of [Defendant] Ettore’s state of mind in connection with her
18 involvement with [former Defendant Lee] and her consistent pattern of aiding and abetting
19 [former Defendant Lee] in his fraud and enterprise in violation of Nevada statute.” (Id. at
20 2.)

21 Given that the communications sought are for the admitted purpose of establishing
22 Defendant Ettore’s state of mind, the only relevant communications at issue would be those
23 between former Defendant Lee and Defendant Ettore. Accordingly, the Court limits the
24 scope of the Revised Subpoena as follows:

25 Visitor logs showing **Larissa Ettore’s visits to Prisoner**; copies of all emails
26 sent **by Prisoner to Larissa Ettore, received by Prisoner from Larissa**
27 **Ettore, and sent by Prisoner that Larissa Ettore was copied on**, and in
28 the absence of emails, screen prints of records reflecting **the**
aforementioned categories of emails sent and received; copies of all

1 correspondence sent **by Prisoner to Larissa Ettore and received by**
2 **Prisoner from Larissa Ettore**; and copies of all existing tape recordings of
3 Prisoner's conversations **with Larissa Ettore** including telephone calls and
4 visits.³

5 Plaintiffs' request for "[d]ocuments related to the review and approval of those
6 seeking visitation rights with Prisoner and rights to send and receive email from
7 Prisoner[] . . ." is also limited to only those documents related to Defendant Ettore
8 becoming an "approved visitor and email partner." (See ECF No. 163-1 at 4.)

9 In light of these revisions limiting the scope of the subpoena to communications
10 between former Defendant Lee and Defendant Ettore, Privacy Act concerns regarding the
11 materials produced pursuant to the subpoena should be assuaged. See Hassan, 2006 WL
12 681038, at *2 ("as long as the information sought is relevant and otherwise discoverable,
13 Defendant's 'privacy' objection cannot defeat Plaintiffs' requests"). As discussed above,
14 communications between former Defendant Lee and Defendant Ettore could evidence her
15 state of mind regarding the fraudulent scheme and her involvement. Accordingly, they are
16 relevant to the state securities act claim Plaintiffs have brought against Defendant Ettore.

17 As noted above, Defendant Ettore has expressed concern regarding the potential
18 disclosure of communications subject to the attorney client privilege. Although the Court
19 acknowledges that no formal motion to quash or for a protective order was filed by
20 Defendant Ettore, see Hawaii Reg'1, 2017 WL 738554, at *2, in light of both Plaintiffs' and
21 the Court's revisions to the subpoena, the Court construes Defendants' Opposition (ECF
22 No. 165) as a timely motion to quash the Revised Subpoena. See Anderson v. Clawson,
23 No. C 13-0307 LHK (PR), 2014 WL 3725856, at *2 (N.D. Cal. July 25, 2014) (construing
24 filed objection/opposition to an opposing party's subpoena as a motion to quash).

25 Under the Court's revised subpoena, conversations between (1) former Defendant
26 Lee and counsel, and (2) Defendant Ettore and counsel would be not be included. The only
27 scenario in which a communication could be subject to the attorney client privilege and

28 ³ Revisions are noted in **bold**.

1 fall within scope of the newly revised subpoena, is if the communication were between
2 former Defendant Lee, Defendant Ettore, and Sharif | Faust lawyers.

3 As represented by Plaintiffs' counsel, the Bureau of Prisons maintains that there are
4 no privileged communications in the production. (ECF No. 166-1 ¶ 7; ECF No. 166 at 2-
5 4.) However, based on Plaintiffs' briefing and supporting declarations from counsel, the
6 Bureau of Prisons takes this position because they claim that by using the prison's
7 communication systems, former Defendant Lee would have waived the privilege as to any
8 communications that could have been protected.⁴ (ECF No. 166-1 ¶¶ 7-8; ECF No. 166 at
9 2, 10-11; ECF No. 162-1 at 14-15.) It is unclear whether there are in fact any
10 communications within the production that are between former Defendant Lee, Defendant
11 Ettore, and counsel from Sharif | Faust during their representation of former Defendant Lee
12 and Defendant Ettore that could be subject to attorney client privilege.⁵

13 However, neither Defendant Ettore nor her counsel has provided details as to when
14 such communications took place. (See ECF No. 165.) This lack of specificity, when
15 counsel would likely be in the possession of at least some details as to the dates and in what
16 manner such communications occurred, leads the Court to believe that no such recorded
17 communications between former Defendant Lee, Defendant Ettore, and counsel from
18 Sharif | Faust took place. To the extent that a production pursuant to the subpoena as
19 revised by the Court would include communications between Former Defendant Lee,
20 Defendant Ettore and counsel from Sharif | Faust during the time period at issue, the Bureau
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22 ⁴ The Court acknowledges that both the Bureau of Prisons and Plaintiffs maintain that "federal case law
23 holds that there is no expectation of confidentiality or privacy with the use of surveilled prison
24 communication media, including phone calls, emails, and meetings in general visitors rooms" and that
25 "attorney-use of such media in communications with clients constitutes a waiver of privilege." (ECF No.
26 166 at 4; see also ECF No. 162-1 at 9-11.) As it is unclear whether there are any communications that
27 could possibly even be subject to the attorney client privilege under the subpoena as revised by the Court,
28 the Court declines to address this issue at this time.

⁵ Former Defendant Lee filed a motion to substitute himself in, pro se, in place of Matthew Faust of
Sharif | Faust. (ECF Nos. 82-83.) Accordingly, on July 29, 2016, Faust was terminated as counsel for
former Defendant Lee. (ECF No. 84.) Thus, if any conversations or communications between former
Defendant Lee, Defendant Ettore, and counsel from Sharif | Faust occurred after July 29, 2016, they would
not be subject to the attorney client privilege.

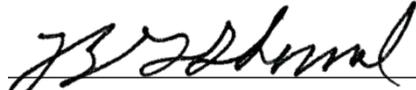
1 of Prisons **is to withhold any such communications from the production** and file a
2 notice informing the Court of the existence of such communications by close of business
3 on **Monday, June 9, 2017**. If such a notice is filed, the Court will then set a telephonic
4 status conference with the parties to discuss further briefing and possible in camera review.

5 **V. CONCLUSION**

6 For the reasons set forth above, the Court **GRANTS IN PART** Plaintiffs' Motion
7 for An Order Requiring Federal Bureau of Prison Compliance with Subpoenas (ECF No.
8 162). In keeping with the Court's instructions limiting the scope of the Revised Subpoena
9 set forth above and directing the Bureau of Prisons to withhold any communications
10 between Defendant Ettore, Defendant Lee and counsel from Sharif | Faust during the time
11 period of former Defendant Lee and Defendant Ettore's representation, the Bureau of
12 Prisons shall comply with the subject subpoena on or before **Thursday, June 15, 2017**.

13 **IT IS SO ORDERED.**

14 Dated: June 8, 2017

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16 Hon. Bernard G. Skomal
17 United States Magistrate Judge
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