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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM J. CANNON,  
  
Plaintiff,  
  
v.  
  
AUSTAL USA LLC AND UNITED STATES OF  
AMERICA,  
  
Defendants.

Case No.: 15cv2582-CAB (BLM)

**ORDER DENYING PLAINTIFF'S  
MOTION TO COMPEL**

**[ECF No. 57]**

Currently before the Court is Plaintiff's February 1, 2017 motion to compel [ECF No. 57-1 ("MTC")] and Defendant's February 8, 2017 opposition to the motion [ECF No. 59 ("Oppo.")]. For the reasons set forth below, Plaintiff's motion to compel is **DENIED**.

**BACKGROUND**

The instant matter was initiated on November 17, 2015 when Plaintiff filed a complaint for negligence pursuant to 46 U.S.C. §§ 742, 781, and 30104, unseaworthiness, maintenance and cure, and LHWCA Section 905(b). ECF No. 1. Plaintiff filed an amended complaint on November 24, 2015. ECF No. 5 ("FAC"). In his FAC, Plaintiff alleges that he sustained several injuries in November 2015 when working aboard the USS Coronado in Mobile, Alabama. FAC at 3. The injuries occurred while Plaintiff and three other employees were attempting to pick up and move lifts. Id. When one or more of the other employees dropped their side of the lift,

1 Plaintiff was left holding an excessive load and injured. Id.

2 Defendant Austal, USA LLC filed a motion to dismiss Plaintiff's complaint on December  
3 11, 2015 [see ECF No. 14] and on December 29, 2015, Plaintiff filed a notice of voluntary  
4 dismissal as to Austal USA LLC [see ECF No. 17] which was entered by the Court on that same  
5 day. ECF No. 18. Defendant USA answered Plaintiff's FAC on January 22, 2016 [see ECF No.  
6 21] and filed a third-party complaint against Defendant Austal USA LLC [see ECF No. 22]. On  
7 February 17, 2016, Defendant Austal, USA LLC filed a motion to dismiss Defendant USA's third-  
8 party complaint or, in the alternative, motion to transfer venue [see ECF No. 33] which was  
9 denied on April 11, 2016. ECF No. 44. Defendant Austal USA, LLC answered Defendant USA's  
10 third-party complaint on April 26, 2016. ECF No. 49. The parties filed a joint motion for a  
11 protective order on December 12, 2016, which was granted on December 14, 2016. ECF Nos.  
12 52-53.

13 On January 24, 2017, counsel for Plaintiff, Mr. Thomas Discon and Mr. Robert Lansden,  
14 counsel for Defendant Austal USA LLC, Mr. Rudy Huerta Lopez, and counsel for Defendant United  
15 States of America, Mr. Frank J. Anders and Ms. Vickey L. Quinn, jointly contacted the court  
16 regarding two discovery disputes. ECF No. 54. In regard to the instant dispute, the Court issued  
17 a briefing schedule. Id. In accordance with that schedule, the parties timely filed their motion  
18 and opposition. See Id.; see also MTC and Oppo.

### 19 **RELEVANT DISCOVERY BACKGROUND**

20 On January 13, 2017, Plaintiff deposed Mr. Danny Wilson, a member of the United States  
21 Navy who worked as the lead electrician's mate on the USS Coronado at the time of Plaintiff's  
22 injury. MTC at 3. During his deposition, Mr. Wilson stated that Plaintiff messaged him sometime  
23 in August 2016 asking Mr. Wilson if he recalled Plaintiff's accident.<sup>1</sup> ECF No. 57-4, Declaration  
24 of Thomas M. Discon ("Discon Decl.") at Exh. 1 (deposition transcript of Mr. Wilson) at 32-34  
25 Mr. Wilson responded that he did not recall the accident, but could "ask around to people that  
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28 <sup>1</sup> According to Plaintiff's MTC, Plaintiff reached out to Mr. Wilson on his own accord and without  
the knowledge of his counsel. MTC at 3.

1 worked back there to see if, you know, they remember anything and they can help you out.”  
2 Discon Decl. at Exh. 1 at 34 (internal quotations omitted); see also MTC at 3. During the  
3 deposition, Plaintiff’s counsel, Mr. Thomas Discon, asked Mr. Wilson for his phone number and  
4 defense counsel, Mr. Frank Anders, objected stating that the request involved private  
5 information. Discon Decl. at Exh. 1 at 26. When Mr. Discon responded that Plaintiff had a right  
6 to the information in order to obtain the messages from Sprint, Mr. Anders directed Mr. Wilson  
7 not to answer. Id. at 26-27. Mr. Discon explained that he was willing to receive the information  
8 off the record and agree to the confidentiality of the number for purposes of the litigation. Id.  
9 at 27. Mr. Anders responded that he would not allow Mr. Wilson to provide the information at  
10 that time. Id.

11 On December 6, 2016, Plaintiff deposed Mr. Michael Gunter. Mr. Gunter was identified  
12 by Mr. Wilson in August 2016 when Plaintiff reached out to Mr. Wilson and asked him if he could  
13 identify any other Navy or Austal personnel who may have knowledge of Plaintiff’s alleged  
14 accident. MTC at 3; see also Discon Decl. at Exh. 1 at 24, 36-45 and Oppo. at 3. Mr. Gunter  
15 testified that “he had no knowledge of plaintiff’s alleged injury.” Oppo. at 3; see also, ECF No.  
16 59-1, Declaration of Vickey L. Quinn in Opposition to Plaintiff’s Motion to Compel (“Quinn Decl.”)  
17 at Exh. D (deposition excerpts of Michael Gunter).

18 On January 25, 2017, Plaintiff served a Request for Production of Documents on  
19 Defendant USA requesting that Defendant USA produce (1) “any phone text messaging and/or  
20 Facebook messenger messaging between Danny Wilson and William Cannon from August 2016,”  
21 (2) “any phone text messaging and/or Facebook messenger messaging from Danny Wilson to  
22 Calvin Peters from August 2016,” and (3) “any phone text messaging and/or Facebook  
23 messenger messaging from Calvin Peters to Danny Wilson from August 2016.” Quinn Decl. at  
24 Exh. E (Requests for Production of Documents Nos. 55, 58, and 59); see also Oppo. at 4.

25 On February 1, 2017, Plaintiff requested the deposition of Mr. Calvin Peters, another  
26 person Mr. Wilson reached out to after messaging with Plaintiff in August 2016. Oppo. at 3-4;  
27 see also Discon Decl. at Exh. 1 at 34-36.

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1 **PLAINTIFF'S POSITION**

2 Plaintiff seeks an order from the Court requiring Defendant USA to produce “all  
3 information necessary for [Plaintiff] to subpoena a series of Facebook messages and/or cell  
4 phone text message communications between Navy personnel and [Plaintiff], as well as  
5 communications between Navy personnel, in which Navy personnel discussed details  
6 surrounding [Plaintiff]'s accident.” MTC at 2. Specifically, Plaintiff wants Mr. Wilson's phone  
7 number, his phone service provider at the time of Plaintiff's accident, and his Facebook account  
8 login information. Id. at 6. Plaintiff is willing to receive this information subject to a protective  
9 order. Id. at 2. Plaintiff has not requested the desired information in past Requests for  
10 Production because he believes that such a request would be futile given that Mr. Wilson is not  
11 a party to the litigation and has already testified that the phone he would have used to send the  
12 messages at issue was stolen. Id. at 4. Plaintiff also seeks an award of the costs, expenses,  
13 and reasonable attorneys' fees incurred by the filing of this motion. Id. at 7.

14 **DEFENDANT USA'S POSITION**

15 Defendant USA objects to Plaintiff's request and asks the Court to deny Plaintiff's motion  
16 for the following reasons:

17 (1) Plaintiff's request is procedurally deficient as the Motion to Compel came before  
18 any Request for Production of the documents he now seeks to subpoena straight  
19 from the providers; (2) Plaintiff's request is moot since any ruling by the Court  
20 granting his motion would in all likelihood result in a motion to quash filed by  
21 Facebook, as case law demonstrates; and (3) Plaintiff has cited no case law as to  
whether the United States would have the authority to coerce the non-party  
witnesses to provide their private and highly personal protected information.

22 Oppo. at 6.

23 **DISCUSSION**

24 The parties contacted the Court about this dispute on January 24, 2017, Plaintiff served  
25 the relevant discovery requests on January 25, 2017, and the instant motion was filed on  
26 February 1, 2017. MTC; see also Oppo. Defendant USA's responses to the discovery requests  
27 are due on February 27, 2017. Oppo. at 5. Accordingly, Plaintiff's motion to compel is  
28 premature. The Court will not compel Defendant USA to respond to Plaintiff's requests when

1 Defendant USA's time to respond to the requests has yet to expire. As of this moment, there is  
2 nothing for the Court to compel. See Metzler Contracting Co. LLC v. Stephens, 642 F. Supp. 2d  
3 1192, 1201 (D. Haw. 2009) (denying plaintiff's motion to compel without prejudice and finding  
4 that plaintiff's motion to compel was premature because he filed it before Defendant's response  
5 was due); see also Dean v. Gonzales, 2013 WL 506260, at \*4 (E.D. Cal. Feb. 8, 2013) (denying  
6 pro se plaintiff's motion to compel discovery where plaintiff's motion was filed just four days  
7 after he propounded discovery on defendants who had thirty days to serve their answers and/or  
8 objections) and Rivera v. Bell, 2007 WL 9635868, at \*1 (D. Mont. Oct. 23, 2007) (finding  
9 plaintiff's motion to compel to be premature and denying plaintiff's motion to compel "[s]ince  
10 30 days had not elapsed from the date of [plaintiff]'s interrogatories until the time he filed his  
11 motion to compel [and] the Court [could] not conclude that [defendant] had failed to answer  
12 the interrogatories as of the date of [plaintiff]'s motion to compel"). While Plaintiff may be  
13 correct that his discovery request does not yield the information he seeks, making the request  
14 and the subsequent meet and confer efforts are important aspects of the federal discovery  
15 process. Permitting a party to avoid the task of properly requesting discovery simply because  
16 he anticipates that his attempt will be futile, and to seek relief directly through the courts would  
17 undermine the Federal Rules and make the discovery process very inefficient and time  
18 consuming. Accordingly, the Court **DENIES** Plaintiff's motion to compel the production of the  
19 identified information. Because Plaintiff apparently has propounded discovery seeking some or  
20 all of the identified information, the Court finds it appropriate to raise some additional problems  
21 with Plaintiff's current motion.

22 First, Plaintiff has failed to provide any law regarding the scope, procedure, or limitations  
23 of the Stored Communications Act and the potential impact of that Act on his discovery requests  
24 and intended subpoenas. Second, Plaintiff has failed to explain how he is going to ensure that  
25 he does not receive and review confidential, private, privileged, and/or irrelevant  
26 communications belonging to the non-parties when he subpoenas their communications. Third,  
27 Plaintiff has failed to analyze his request in light of Federal Rule of Civil Procedure ("Fed. R. Civ.  
28 P.") 26. The scope of discovery under the Federal Rules of Civil Procedure is defined as follows:

1 Parties may obtain discovery regarding any nonprivileged matter that is relevant  
2 to any party's claim or defense and proportional to the needs of the case,  
3 considering the importance of the issues at stake in the action, the amount in  
4 controversy, the parties' relative access to relevant information, the parties'  
5 resources, the importance of the discovery in resolving the issues, and whether  
6 the burden or expense of the proposed discovery outweighs its likely benefit.  
7 Information within this scope of discovery need not be admissible in evidence to  
8 be discoverable.

9 Fed. R. Civ. P. 26(b)(1). Here, Plaintiff failed to explain how his request for the information  
10 necessary to access the personal text messages and Facebook communications of non-party  
11 witnesses who are members of the United States Navy is proportional to the needs of this case.  
12 The evidence presented to the Court provides little, if any, support for Plaintiff's implied  
13 argument that there are relevant text or Facebook communications as Mr. Wilson merely  
14 indicated that after Plaintiff messaged him, he contacted other Navy personnel to see if anyone  
15 remembered the incident. Discon Decl. at Exh. 1 at 34. Mr. Wilson did not recall anyone  
16 remembering the incident, the identified employees - Messrs. Wilson, Gunter and Peters – have  
17 been or will be deposed, and Mr. Wilson and Mr. Gunter both denied knowledge of the incident.  
18 Discon Decl. at Exh. 1 at 34; see also Quinn Decl. at Exh. D. As such, Plaintiff has not established  
19 the relevance of the requested information nor the proportional need for the information.

20 Because Plaintiff's motion to compel is premature, the Court **DENIES** Plaintiff's motion  
21 for discovery and his request for an award of the costs, expenses, and reasonable attorneys'  
22 fees incurred by the filing of this motion. If Plaintiff's current discovery requests are  
23 unsuccessful, Plaintiff must address in both his meet and confer efforts and any motion to  
24 compel, the issues raised by the Court.

25 **IT IS SO ORDERED.**

26 Dated: 2/23/2017

27   
28 Hon. Barbara L. Major  
United States Magistrate Judge