STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
DOCKET NO. BCD-CV-17-42

F.C. BEACON GROUP, INC., Plaintiff/Counterclaim Defendant, v. CRAIG BLEANGER, RICHARD CRUMB, RACHEL ESCHLE, and BCE PARTNERS, LLC, Defendants/Counterclaim Plaintiff, and MEAGHAN FLOOD and ANCHOR RESEARCH, LLC, Defendants.	ORDER ON DEFENDANTS' MOTION TO QUASH SUBPOENA, PLAINTIFF'S MOTION TO QUASH SUBPOENA AND DEFENDANTS' MOTION TO COMPEL, AND MOTIONS FOR CONFIDENTIALITY ORDER

Before the Court are Defendants' Joint Objection and Motion to Quash Subpoena, Plaintiff's Opposition to and Motion to Quash Subpoena along with Defendants' Motion to Compel, and motions for confidentiality order filed by both Plaintiff and Defendants. Plaintiff F.C. Beacon Group is represented by Attorneys Graydon Stevens, Timothy H. Norton, Raymond P. Austrotas, and Peter M. Vetere. Defendants Craig Belanger, Richard Crumb, Rachel Eschele and BCE Partners are represented by Attorneys Robert W. Kline and Jeffrey Snyder. Defendants Meaghan Flood and Anchor Research, LLC are represented by Attorney Adrianne E. Fouts.

I. Background

Plaintiffs have brought this action seeking recovery for the breach of a non-solicitation agreement, and other causes of action arising from Defendants' resignation from employment by Plaintiff and establishment of new businesses that provide similar consulting services to Plaintiff.

Before the Court are three distinct discovery disputes. Defendants seek to quash a subpoena seeking their cell phone records from Verizon for a period of a year and a half including time both before and after their resignation from employment by Plaintiff. Plaintiff seeks an order of the Court quashing a subpoena for the transcript of the Plaintiff's owner from an earlier action and Defendants seek order of the Court compelling production of the transcript. Both parties seek entry of largely similar confidentiality orders, distinguishable by who would be privy to certain confidential information.

The question underlying all of these disputes is what information is protected from disclosure by M.R. Civ. P. 26(c)(7):

> Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, any justice or judge of the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including without limitation one or more of the following: …(7) that a trade secret or other confidential research development, or commercial information not be disclosed or be disclosed only in a designated way.

There is a presumption that discovery need not be kept confidential which the parties must overcome by showing good cause based on specific demonstration of potential harm in order for a protective order to issue. *Northern Mattress, Inc. v. Town of Fairfield*, CV-94-154, 1995 Me. Super. Lexis 439 (Dec. 13, 1995). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *See* 8 Wright, Miller & Marcus*, Federal Practice and Procedure:* Civil 2d § 2035. The Court is afforded broad discretion in determining whether a protective order is appropriate. *See Northern Mattress, Inc*., *4; *citing Seattle Times v. Rhinehart*, 467 U.S. 20, 36 (1984); *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993); 8 Wright, Miller & Marcus, *Federal Practice and Procedure*: Civil 2d § 2036.

II. Discussion

A. Defendants' Joint Motion to Quash Subpoena

Defendants move the Court to Quash Plaintiff's subpoena issued to Verizon seeking phone records for five phone numbers between July 1, 2016 and January 10, 2018.[1, 2] Four of the five phone numbers are for the cell phones of four individual Defendants. Defendants argue that providing over a year's worth of telephone records, including all personal phone calls made, is overbroad, unduly burdensome, and calculated only to inconvenience and harass the Defendants. Furthermore, Defendants argue that Plaintiffs would potentially learn of confidential communication with clients who are not implicated in this action. Defendants argue that the records subpoenaed include confidential commercial information. Plaintiffs oppose the Motion arguing that the information concerning who Defendants were in contact with both before and after they resigned is highly relevant to the case.

Maine Rule of Civil Procedure 45(c)(2) requires that "a party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." M.R. Civ. P. 45(c)(2).[3] Where the subpoena does impose an undue burden on the person subject to the subpoena, or where the subpoena "requires disclosure of a trade secret or other confidential research, development, or

[1] Plaintiff argues that Defendants do not have standing to move the Court to quash the subpoena because the subpoena seeks documentation from the cell phone providers, not from Defendants individually. Federally, F.R. Civ. P. 45 has been interpreted to confer standing on an individual who has a demonstrated personal interest in the information being subpoenaed. *U.S. Bank Nat'l Ass'n v. James*, 264 F.R.D. 17, 19 (D. Me. 2010). In this case, the phone records the Plaintiffs seek are for cell phones belonging to the Defendants. The Court finds that Defendants have standing to challenge the subpoenas.

[2] Defendants also note that the subpoena was delivered to counsel on January 18, 2018, only eight days before the response date of January 26, 2018 and without accompanying electronic copy as is required of Business and Consumer Court filings. Defendants argue that the subpoena is procedurally deficient.

[3] Plaintiff notes that the question of whether a request is overly burdensome concerns the burden placed upon the subpoenaed party, not a party claiming a privilege. In this case, Verizon has not expressed to the Court that the request is unduly burdensome.

commercial information", the Court may quash the subpoena on timely motion. M.R. Civ. P. 45(c)(3)(A)(iv); M.R. Civ. P. 45(c)(3)(A)(iv)(B)(i).

In *Chabot-Bucher v. John Grover & Dead River Co.,* the defendant was driving a truck that collided with a bicycle as he was on the phone with his attorney for an unrelated matter. *Chabot-Bucher v. John Grover & Dead River Co.,* CV-16-0222, Me. Super. Lexis 178, *1 (June 30, 2017). The attorney sought a court order quashing a subpoena for one month of phone records to his work cell phone. *Id.* *2. The court found that a request for all phone and text messages to the attorney's work cell phone, potentially including "information reflecting contacts between [the attorney] and other individuals and/or clients who are unrelated to this case [was] not reasonably calculated to lead to discovery of admissible evidence in this matter. M. R. Civ. P. 26(b)(l)." *Id*. In that case, the court quashed the subpoena in part, essentially narrowing the scope of the subpoena. *Id*.*4-5.

Even more so than in *Chabot-Bucher*, in this case, the subpoena is very broad. However, the phone records being subpoenaed in this case are seemingly more likely to produce admissible evidence than were the phone records in *Chabot-Bucher*. The subpoena in question seeks a year and a half's worth of phone records for four of the defendants' phones. This potentially includes personal phone calls and text messages, as well as phone calls and messages from clients who may not be implicated in this action, forcing Defendants to turn over valuable client information.

If the Court does not quash the subpoena in its entirety, Defendants ask the Court to limit the subpoena. Based upon an order in a similar case from the District Court for the Eastern District of Missouri, Defendants ask the Court to require Plaintiffs to provide phone numbers of all clients and potential clients relevant to the case and seek any phone records between the

Defendants' numbers and the provided numbers during the requested period. *See Agxplore Int'l, LLC v. Shelley*, No. 1:12-CV-16 SNJL, 2013 U.S. Dist. Lexis 3265.

The Court grants Defendants' request for a narrowing of the subpoena request. The Court finds the current subpoena request overly broad and orders Plaintiff to provide the phone numbers of all clients, potential clients, and Defendants between which Plaintiff seeks phone records.

B. Plaintiff's Opposition to and Motion to Quash BCE's Subpoena/Defendant's Motion to Compel Production of Farrah Deposition Transcript

Defendant BCE issued Plaintiff a subpoena duces tecum for a transcript of a deposition taken in 2008 of Farrah, owner of Plaintiff, from a separate legal action. Because Plaintiff did not have easy access to the transcript, Defendants coordinated delivery of the transcript from opposing counsel in the earlier action to Plaintiff's counsel on the belief that Plaintiff would then provide a copy to Defendants.[4] When Plaintiff did not share the transcript with Defendants, Defendants subpoenaed the transcript. Plaintiff objects[5] and asks the Court to quash the subpoena arguing that a subpoena is not the proper procedural mechanism for discovery of the transcript and because production of the transcript without a confidentiality order in place would unduly burden Plaintiff because it would cause the release of confidential information. Plaintiff does not detail what confidential information is contained in the transcript or how its production would cause undue burden.

[4] Defendants allege that Plaintiff intimated that they would be able to work out the issue of the transcript without a discovery hearing. Plaintiffs have not asserted whether they filed a formal request for production of documents including the transcript prior to issuing the subpoena.

[5] As noted by BCE, Plaintiff filed its objection to subpoena and motion to quash after the deadline for objection. M.R. Civ. P. 45(c)(2)(B).

Unlike the motion to quash above, this subpoena was issued to a party to the lawsuit rather than to a third party. Plaintiffs argue that the Court should not permit the Defendants to use a subpoena rather than seek the transcript through a request for production of documents pursuant to M.R. Civ. P. 34. There is a dearth of Maine caselaw concerning the comparative uses of a request for production of documents pursuant to M.R. Civ. P. 34 and a subpoena duces tecum pursuant to M.R. Civ. P. 45. Plaintiffs cite to 1993 Advisory Notes on M.R. Civ. P. 45 stating that subpoenas are meant to be used to obtain documents in the possession of non-parties.[6] However, that does not necessarily mean that subpoenas may only be issued to nonparties. Both Rules 34 and 45 substantially track their federal counterpart. For that reason, the Court views federal caselaw on the issue as persuasive.

Defendants cite extensively to a case from the United States District Court for the District of New Mexico. The overall trajectory of the quoted law is that federal courts have consistently allowed the issuance of subpoenas to parties to the suit in certain circumstances. *United States v. 2121 Celeste Rd. SW*, 307 F.R.D. 572 (D.N.M. 2015). However, the beginning of the quoted section reads: "A majority of district courts have held, however, that a subpoena may be served on another party so long as it is not used to circumvent rule 34 or the other discovery rules." *Id*. 588. Additionally, one of the District Courts taking the minority view that F.R. Civ. P. 45 is applicable only to non-parties is Massachusetts, which held that "it is evident to this Court that Rule 45, to the extent it concerns discovery, is still directed at non-parties and that Rule 34 governs the discovery of documents in the possession or control of the parties themselves." *Hasbro, Inc. v. Serafino*, 168 F.R.D. 99, 100 (D. Mass. 1996).

[6] However, as argued by Defendants, the advisory note goes on to explain that the changed language was meant to "spare the necessity of a deposition of the custodian of evidentiary material required to be produced." M.R. Civ. P. 45, advisory committee's notes 1993.

Regardless of whether the Law Court would choose to adopt the majority or the minority view on whether M.R. Civ. P. 45 may be used as a tool for obtaining documents from and/or appearances of parties to the action, there appears to be broad federal agreement that Rule 45 should not be used to circumvent Rule 34. In this case, Defendants argue that they sought the deposition transcript for the preliminary injunction hearing, and time did not permit a request for production of documents prior to the date of hearing. Defendants issued the subpoena on January 12, 2018 in hopes of receipt by January 30, 2018. Defendants contend that this was therefore not an "attempt to subvert." The Court accepts the representation that Defendants issued the subpoena because there was insufficient time to seek the transcript through Rule 34 before the January 30, 2018 hearing.

As to Plaintiffs argument that it would be unduly burdened by the production of the transcript without a confidentiality order in place, Defendants respond that there is a confidentiality order in place pursuant to the scheduling order, and that whatever confidentiality order is entered by the Court pursuant to the parties' motions for entry of such would apply to the transcript. Without further explanation by Plaintiff as to the confidential nature of the transcript and the undue burden that could be caused by its production, the Court finds that the transcript is discoverable.

C. Plaintiff's Motion for Entry of Discovery Confidentiality Order

Plaintiff and Defendants separately move the Court for entry of a confidentiality order. Both parties have submitted proposed confidentiality orders. The submitted confidentiality orders are largely the same, both based upon the Court's form order, with one notable exception. The parties dispute who should be permitted to review documents deemed by either party to be "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER". Plaintiff seeks a confidentiality

order that allows the parties to designate representatives to review confidential documents. Defendants seek a confidentiality order allowing designation of certain documents to a second, heightened level of confidentiality as reviewable by "attorney's eyes only".

Plaintiff argues that no attorney, or individual employee for that matter, has the requisite knowledge of customer relations and business operations to be able to properly review all of the confidential documents. Plaintiff contends that allowing each party to designate an appropriate representative to review documents according to the subject of the document would be the most effective process. Furthermore, Plaintiff argues that substantial due process rights are implicated by denying a party the right to review discovery documents and denying an attorney the ability to speak openly with his or her client about the discovered documentation. Plaintiff cites to a case out of the D.C. Circuit Court of Appeals finding that a court abused its discretion by entering a protective order which was understood to prevent a party's counsel from discussing the information obtained in discovery with that party. "District courts must be equally chary of issuing protective orders that restrict the ability of counsel and client to consult with one another during trial or during the preparation therefor. Such orders arguably trench upon constitutional interests at least as important as those infringed by restrictions on public dissemination of information." *Doe v. District of Columbia*, 697 F.2d 1115, 1119 (D.C. Cir. 1983).

Defendants, on the other hand, argue that the documents that Plaintiff seeks to discover, including Defendant's cell phone records, are highly proprietary. Defendants argue that information obtained may include names of Defendants clients and potential clients, and other confidential information. Defendants also argue that allowing for a separate "attorney's eyes

only" designation would prevent disputes that may arise by allowing parties broad discretion in designating their "representative".

Neither party has clearly outlined for the Court what confidential information warrants such protections beyond those offered by a standard confidentiality order. Therefore, the Court enters a standard confidentiality order.

III. Conclusion

Defendant's Motion to Quash the Verizon Subpoena is granted in part and denied in part. The Court orders Plaintiff to specify the phone numbers of any client, potential client, or other Defendant for which it seeks record of communication with originally subpoenaed phone numbers.

The Court denies Plaintiff's Motion to Quash the Farrah Deposition Transcript Subpoena, and grants Defendants' Motion to Compel the Transcript.

The Court enters a separate confidentiality order.

The Clerk is directed to incorporate this Order into the docket by reference in accordance with M.R. Civ. P. 79(a).

DATE: May 4, 2018

/s
Michaela Murphy
Justice, Superior Court