IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Sean McClendon,	)	
	)	No. 22-cv-5472
Plaintiff,	)	
	)	*(Judge Coleman)*
-vs-	)	
	)	*(Magistrate Judge Valdez)*
City of Chicago, et al.,	)	
	)	
Defendants.	)	

RESPONSE TO OBJECTIONS TO MAGISTRATE JUDGE'S ORDER

The Court should overrule defendants' objections to the discovery ruling of the Magistrate Judge for the reasons set out below.

1. Defendants seek review of the discretionary ruling of the Magistrate Judge that the "slight potential relevance" of recorded phone calls "is outweighed by Plaintiff's privacy interest." (ECF No. 82 at 3, quoting from Order of January 18, 2024, ECF No. 74 at 7.)

2. The Magistrate Judge "enjoy[s] extremely broad discretion in controlling discovery," *Jones v. City of Elkhart, Inc.*, 737 F.3d 1107, 1115 (7th Cir. 2013), and that discretion includes the power "to curtail the expense and intrusiveness of discovery and trial." *Gehring v. Case Corp.*, 43 F.3d 340, 342 (7th Cir. 1994).

3. This Court's review of the Magistrate Judge's order is "constrained." *Hassebrock v. Bernhoft*, 815 F.3d 334, 340 (7th Cir. 2016).

Under 28 U.S.C. § 636(b)(1)(A), the Court may reverse only when the Magistrate's ruling is "clearly erroneous or contrary to law." Defendants do not meet this high standard.

4. Defendants are unable to explain their conclusory assertion that statements plaintiff may have made in phone calls following his arrest "are highly relevant." (ECF No. 82 at 6.) This inability to explain why the phone calls "are highly relevant" is not surprising.

a. As the Magistrate Judge observed in the first order rejecting discovery of phone calls, this is not a case with "evidence of recantations." (Transcript of Proceedings, August 8, 2023, ECF No. 59 at 6:7.) Defendants seek the phone calls in this case to corroborate or contradict plaintiff's deposition testimony that he stated in these calls that he had been framed. This deposition testimony, however, is not admissible at trial.

b. First, any prior consistent statement that plaintiff may have made is inadmissible in plaintiff's case in chief. FED R. EVID. 801(d)(1).

c. Second, while plaintiff's statements are not hearsay if offered against him under Rule 801(d)(2), defendants fail to show that these statements would be relevant. The defendants made this

showing in the principal case on which defendants rely, *Velez v. Chicago*, No. 18-cv-8144, 2021 WL 3231726 (N.D. Ill., July 29, 2021). That case involved recantations and the defendants persuaded Magistrate Judge Cole that the phone calls would show that "plaintiff was orchestrating efforts to get other witnesses to swear out – and how to phrase – affidavit in his behalf." *Id.* at *2. Defendants failed to make a similar showing before Magistrate Judge Valdez in this case.

5. The Magistrate Judge in this case carefully applied the legal standard set out in its first ruling on discoverability of jail and prison phone calls:

> THE COURT: But you don't get there until you demonstrate that the information is, you know, not a fishing expedition, that there is a toehold of information to give me, so that I can assure myself that there is a reasonable likelihood that there's go[ing] to be discoverable information. Making generalized arguments does not do that for me.

(Transcript of Proceedings, August 8, 2023, ECF No. 59 at 7:19-8:9.)

6. Defendants do not challenge the finding that they had advanced only "generalized arguments." Nor do defendants challenge the legal standard the Magistrate Judge first applied in this case in in its ruling of August 8, 2023, and applied in the challenged ruling. Defendants appear to acknowledge that they forfeited any challenge to that rule when they failed

to file any objection until February 2, 2024, well beyond the 14-day time limit. FED. R. CIV. P. 72(a).

7. This Court has repeatedly recognized that it may only overturn orders on "routine discovery" by a Magistrate Judge if it "is left with the definite and firm conviction that a mistake has been made." *E.g.*, *Lute v. Transunion*, LLC, No. 1:18-CV-07451, 2020 WL 13518679, at *2 (N.D. Ill. Apr. 13, 2020); *Randle-El v. City of Chicago*, No. 13 CV 6607, 2014 WL 7054160, at *2 (N.D. Ill. Dec. 12, 2014).

8. "If the Court finds there are two permissible views, it should not overturn the decision solely because it would have chosen differently than the magistrate judge." *Lute*, 2020 WL 13518679, at *2.

9. As the Seventh Circuit explained in a case cited in *Lute*, "We will not reverse a determination for clear error unless it strikes us as wrong with the force of a 5 week old, unrefrigerated, dead fish." *S Industries, Inc. v. Centra 2000, Inc.*, 249 F.3d 625, 627 (7th Cir. 2001).

10. An alternative basis for overruling defendants' objections is their lack of diligence. Defendants rest their argument on the testimony plaintiff gave at his deposition on October 30, 2023, but defendants waited until December 22, 2023 to begin conferring with plaintiff about the issue. (ECF No. 70 at 2.) Accordingly, the Magistrate Judge did not rule until

January 19, 2024, and defendants did not file their objections until February 2, 2024, after the close of fact discovery.[1]

The Court should therefore overrule defendants' objections.

Respectfully submitted,

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[1] A contested motion to extend the fact discovery deadline is pending. (ECF No. 80.)