

4. An order from the U.S. District Court for the Northern District of Florida denying a motion to compel collection of health data from mobile devices, finding that it would not be proportional to the needs of the case in light of the burdens of collection as compared to the reliability and potential utility of the data collected.

In *In re: 3M Combat Arms Earplug Products Liability Litigation*, 2022 WL 4448917 (N.D. Fla. September 23, 2022), U.S. Magistrate Judge Gary R. Jones denied a motion to compel collection of health data from Apple and other devices, finding that collection of the data would not be proportional to the needs of the case in light of the burdens of collection as compared to the reliability and potential utility of the data collected.

In discovery, Defendants requested that certain Plaintiffs produce “All data and electronically stored information regarding your hearing and hearing health from Any and All smartphones, tablets, Apple Watches, hearing aids, or other electronic devices.” *Id.* at *1. To facilitate production of this data, Defendants provided Plaintiffs with written instructions on how to locate information stored by the operating system (iOS) for Apple smart devices as well as how to capture the information by taking a screenshot.

When certain Plaintiffs refused to produce “noise exposure data automatically recorded by the operating systems for Plaintiffs’ smartphones and smartwatches,” Defendants moved to compel, claiming that noise exposure data was highly relevant to Plaintiffs’ hearing injury claims and could be collected with minimal burden on Plaintiffs. Plaintiffs opposed the motion, primarily on proportionality and timeliness grounds, arguing that Defendants had not shown Plaintiffs used or possessed any post-2019 iOS devices where such data might be stored and that the request invaded the privacy of Plaintiffs and their families by intruding unnecessarily into sensitive health areas outside of the scope of discovery.

Magistrate Judge Jones first addressed the nature of iOS Apple health data, noting that “[c]entral to the issue of whether production of the data is proportional is to first define the nature and scope of the data and what information the data provides and what information the data does not provide.” *Id.* at *2. He explained that on devices where Apple Health Data is enabled, the devices have the capability to record “Environmental Sound Levels,” which Apple describes as “sounds in your environment measured in A-Weighted decibels (dB)” recorded when the Noise App on an Apple Watch is synched to the iOS device. Apple devices also capture “Headphone Audio Levels” data representing the “volume of your headphone audio measured in A-Weighted decibels (dB).”

Magistrate Judge Jones noted that “these measurements are most accurate when using Apple or Beats headphones” and “[a]udio played through other headphones or speakers connected via a wire can [only] be estimated based on the volume of your device.” In addition to the limitation on the accuracy of the data where headphones other than Apple or Beats are used, the iOS system captures Headphone Audio Levels decibel data only when the device is connected to an external output device, such as headphones, Bluetooth speakers, built-in automobile speakers, or home audio speaker systems. Importantly, the data does not distinguish which external source registered the decibel reading when the data is collected and viewed through industry standard collection and review tools such as Cellebrite and Elcomsoft Phone Breaker.

Magistrate Judge Jones further explained that although the Headphone Audio Levels visible on the iPhone identify the connected device by the name associated with the device—so arguably the data may exist on the iPhone somewhere else—the instructions Defendants provided to Plaintiffs for the self-collection of the data did not provide instructions to click on any links that would provide this information and did not instruct Plaintiffs to screenshot the information. According to Magistrate Judge Jones, the “bottom line is that the accuracy of the data is suspect if headphones other than Apple or Beats are used and the data collected and reviewed using industry standard collection and review tools do not identify whether the data was generated by car speakers, headphones, or connected [Bluetooth] speakers.”

Magistrate Judge Jones also noted that there are significant problems when collecting the health data when using industry standard tools, such as Cellebrite and Elcomsoft. *Id.* at *3. Notably, when collecting the data, the tools collect all health data and not just hearing data. So, when collecting, the data collection tools also collect the following health data stored in the iOS devices: (1) Activity, which includes exercise tracker and step count; (2) Body Measurements; (3) Menstrual Cycle Tracking; (4) Heart, including blood pressure and heart rate; (5) Mindfulness; (6) Nutrition; (7) Respiratory; and (8) Sleep, symptoms and other data manually inputted by the iOS user.

Magistrate Judge Jones identified several other issues with collecting health data, including that Defendants’ instructions applied only to iOS devices (not hearing aids or Android devices), that the instructions require knowledge of the Settings and Health Application features in the iPhone, that the data produced through a screenshot is limited, and that Apple iPhones have automatically recorded and stored data related to sound levels only since the release of iOS 13 in 2019. As a result of these and other issues, Magistrate Judge Jones concluded that the cost of collecting and reviewing the data would likely be much more than the cost of the limited self-collection proposed by Defendants.

Magistrate Judge Jones next turned to the applicable legal standards, particularly Rule 26(b)(1) of the Federal Rules of Civil Procedure, under which parties may obtain discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” *Id.* at *4. Rule 26 provides six factors to consider regarding proportionality: (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties’ relative access to relevant information; (4) the parties’ resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. This analysis often means “that the burden of responding to discovery lies heavier on the party who has more information, and properly so.” *Id.* (quoting Fed. R. Civ. P. 26(b) advisory committee’s note (2015 amendment)).

Under these standards, Magistrate Judge Jones concluded that Defendants had failed to establish that the noise exposure data would be important to resolving the issues in this case and that the burden and expense of collecting and reviewing the hearing data outweighed the likely benefit. Therefore, Defendants’ motion to compel failed on proportionality grounds.

Magistrate Judge Jones noted several issues with respect to the utility of the requested data. First, he found that Defendants had not shown that the relevant Plaintiffs possessed an Apple device capable of storing the information they sought. He noted that Defendants did not request an interrogatory that each Plaintiff disclose the year and model of their iPhone or other electronic device, and therefore it was “highly speculative as to how many Plaintiffs, if any, currently have post[-]2019 iOS devices.” Second, Magistrate Judge Jones found that even if a Plaintiff possessed a post-2019 iOS device, collection and review of the data with industry-standard tools would result in the production of other private health data of the user and potentially of nonparties with whom the user shared a phone or other device, such as family members. Third, Magistrate Judge Jones found that none of the requested hearing data would identify who was using the device when hearing data registered, how the device was being used, or where the device was located in relation to the user when the hearing data registered. *Id.* at *5.

Magistrate Judge Jones also focused on the fact that the reliability and usefulness of the hearing data was further diluted because the requested data did not disclose whether the user was using headphones, a Bluetooth speaker, an automobile speaker through use of Carplay, or some other connected device. This information would be critical because the difference between hearing data registered while using Apple earplugs and hearing data registered while the device was connected to speakers outside “are worlds apart.” In addition, the noise alert data Defendants sought did not provide evidence of exposure to hazardous noise, only of instances when the iOS device automatically reduced noise that may have exceeded 85 dB.

Magistrate Judge Jones also found issues with the reliability of the requested data, noting that the quality and accuracy of the recording of the data by the device depends on the age and wear and tear of the device and on how the device is held and positioned. And because built-in microphones have limited dynamic range and low frequency response, there is a significant variance across devices and apps, even in iOS devices.

Turning to burden, Magistrate Judge Jones found that the burden and expense of producing the data far outweighed any likely benefit. *Id.* at *6. He “strongly doubt[ed] that any of the Plaintiffs—most of whom are not forensically familiar with iOS devices—would be able to navigate the self-collection protocol without expert assistance.” And while forensic collection of an iOS device can be accomplished remotely, review of the data, including removal of any nonhearing health data, would increase the expense and burden. Thus, even remote collection would involve the same time and expense that is typically involved in collecting, reviewing, and producing text messages and photos from an iOS device.

Magistrate Judge Jones denied Defendants’ motion to compel as disproportional in light of the burdens associated with collecting the data because it would reflect, at best, data about the device itself and not data about how the Plaintiffs were affected by noise generated by the device.