

3. A ruling from the U.S. District Court for the Western District of Texas declining to compel a non-party to produce metadata for a category of documents that the plaintiff sought for the purpose of selecting the documents she would request from the third party.

In *Pinn v. Consumer Credit Counseling Foundation, Inc.*, No. 1:23-mc-0974-DII, 2023 WL 7288745 (W.D. Tex. Nov. 3, 2023), U.S. Magistrate Judge Susan Hightower addressed whether Plaintiff could compel a third party to produce metadata for a category of documents to allow Plaintiff to select the documents she would then request the third party to produce.

Plaintiff filed a putative class action alleging that Defendants violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, by calling her home telephone number in April 2022. *Id.* at \*1. Defendants claimed that Plaintiff consented to the calls when she visited the website [healthinstantly.org](https://healthinstantly.org) and entered her name and phone number.

During discovery, one Defendant provided Plaintiff with a link from [trustedform.com](https://trustedform.com), a website operated by a company called ActiveProspect that installs a proprietary computer script on websites to record a user's interactions with that website. ActiveProspect claims that these recordings, called certificates, can be preserved and replayed on demand, verifying that a consumer consented to a particular action. The TrustedForm certificates allegedly authenticate the recordings of the consent and allow the certificates to be sold as marketing leads. The link to a certificate produced to Plaintiff during discovery purported to be a recording of Plaintiff visiting [healthinstantly.org](https://healthinstantly.org) in February 2022. Plaintiff denied that she consented to the calls and asserted that her alleged consent and the TrustedForm certificate were inauthentic or fraudulent.

Plaintiff served a subpoena on ActiveProspect seeking (1) customer account information for the ActiveProspect accounts that claimed Plaintiff's TrustedForm certificate and (2) TrustedForm certificates claimed by certain other parties. *Id.* at \*2. Plaintiff also sought to have ActiveProspect produce all metadata from some 590,000 other certificates to allow Plaintiff to sample and select a smaller number of actual certificates for production.

ActiveProspect objected to Plaintiff's subpoena requests on the grounds that they were irrelevant, disproportionate to the needs of the case, and unduly burdensome. In particular, ActiveProspect stated that it had produced documents regarding Plaintiff's TrustedForm certificates but that the remaining certificates would comprise roughly a million documents. In response, Plaintiff argued that she was not seeking the actual TrustedForm certificates but only the metadata for the approximately 590,000 certificates, which had already been compiled, so that she could have a "a representative sample" of certificate metadata (and, ultimately, the corresponding certificates) to adequately challenge the authenticity of the certificate produced for Plaintiff.

Magistrate Judge Hightower began her analysis with a brief description of the legal standard under Federal Rules of Civil Procedure 26 and 45. She explained that under Rule 26(b)(1), the scope of permissible discovery is broad, and a party "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." A discovery request is relevant "when the request seeks admissible evidence or is reasonably calculated to lead to the discovery of admissible evidence." She further explained that under Rule 45(d)(3)(A), a court is required to quash a subpoena if it requires disclosure of privileged or protected information or subjects a person, including a non-party, to an undue burden. *Id.* at \*3.

Applying these standards, Magistrate Judge Hightower denied Plaintiff's motion to compel. She found that, notwithstanding the broad scope of permissible discovery, information must be relevant to a party's claim or defense or appear reasonably calculated to lead to discovery of admissible evidence before the court could require production. Magistrate Judge Hightower agreed with ActiveProspect that Plaintiff's requests were facially overbroad, unduly burdensome, and disproportionate to the underlying litigation because ActiveProspect had already provided documents and declarations relevant to Plaintiff's own alleged consent certificate. Magistrate Judge Hightower declined to compel ActiveProspect, as a third party to the underlying litigation, to produce metadata for hundreds of thousands of additional documents merely so that Plaintiff could select "a representative sample" of comparator certificates.