

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

UNITED STATES OF AMERICA)	
)	
v.)	
)	CASE NO. 2:07CR00015
DANIEL DOVE,)	
)	
Defendant)	

**UNITED STATES' REPLY IN SUPPORT OF ITS OBJECTIONS TO
UNITED STATES MAGISTRATE JUDGE PAMELA MEADE SARGENT'S
MARCH 26, 2008 ORDER GRANTING MOTION FOR SUBPOENA DUCES TECUM
AS TO DANIEL DOVE**

I. Introduction

Defendant's Response to the United States' objections to Magistrate Judge Sargent's Order granting Defendant's motion for the issuance of a subpoena duces tecum to the Motion Picture Association of America ("MPAA") mischaracterizes both the progression of discovery in this matter and the scope of Defendant's requested subpoena. First, Defendant had possession of the MPAA's referral letter for approximately three months before he brought his motion. While Defendant claims that the delay was due, in part, to his expectation of receiving additional Rule 16 discovery, Defendant was well aware that those materials consisted of bulk DVDs and CDs – most of which contained pirated movies and software – that were seized from his residence. Since those materials came from Defendant's residence, he knew they were not materials in the MPAA's possession. Second, while the Government does not argue that Defendant is precluded from seeking some materials from the MPAA by way of a Rule 17(c) subpoena, the Government does object to the breadth of Defendant's proposed subpoena. The Government became aware

of the scope of Defendant's requests only after Defendant filed his March 25 Motion for issuance of the subpoena. Finally, Defendant's Response makes clear that he is attempting to use the Rule 17(c) discovery for an improper purpose – general discovery – rather than just discovery concerning the pending charges against him. Accordingly, the Government requests that the Court reverse the March 26 Order granting Defendant's motion in its entirety, or, in the alternative, limit the scope of his subpoena.

II. Defendant's Delay In Seeking Issuance of the Subpoena Was Not Predictated on Outstanding Discovery

While the Government will not belabor the issue of discovery timing, it is necessary to address Defendant's claim that his delay in seeking issuance of a Rule 17(c) subpoena was due to his late receipt of discovery materials. The government acknowledges the complexity of discovery in this matter, which has involved providing courtesy copies of data in multiple electronic formats to the defense. However, Defendant's claim that "on February 28, 2008, the Government did not provide copies of materials seized directly from Mr. Dove's residence to the Defendant's expert, but instead informed Defendant that he would be required to travel to Washington DC to review the materials" mischaracterizes the status of discovery. (Def's Resp. at 2). In fact, the Government had provided courtesy copies of the hard drives seized from Defendant's residence to Defendant's expert on December 19, 2007. See Attachment A. Also on that date, the Government provided the Defense with courtesy copies of hard drives seized from a co-conspirator, containing message board chat logs of Defendant's communications with other co-conspirators concerning their criminal activity. Finally, the Government's December 19 production included a copy of the Elite Torrents web server and "tracker" database possessed

by the Government, which contains logs of uploads, downloads and administrative activities performed by members of the conspiracy, including Defendant.

The Government's February 28 inspection offer concerned the hundreds of recordable DVDs and CDs that had been seized from Defendant's residence – not the hard drives which had been produced to Defendant's expert months earlier. Rather than copying these hundreds of disk, the Government provided an inventory to defense counsel and offered to make them available for inspection. When defense counsel requested the disks be made available for inspection in Richmond, Virginia, where he – although not his client – resides, the Government agreed as a courtesy. The review of those disks had no bearing on Defendant's pending motion.

III. The Government Did Not Agree to Defendant's Request for the Issuance of a Subpoena Duces Tecum

Defendant complains that the Government did not object on March 20 when Defendant's counsel informed DOJ Trial Attorney Tyler Newby of his intent to seek issuance of a subpoena duces tecum to the MPAA. In fact, Trial Attorney Newby told Defendant's counsel the Government's view that criminal discovery was not as broad as civil discovery. Furthermore, Defendant did not identify the requests or the scope of the requests that would be contained in his proposed subpoena until Defendant filed his March 25 motion. Upon reviewing the breadth of those requests, the Government promptly began preparing its objections.

IV. Defendant's Proposed Subpoena Would Constitute a Fishing Expedition

The Government submits that there is no basis to depart from the standard for the issuance of a Rule 17(c) subpoena set forth in United States v. Nixon, 418 U.S. 683, 671 (1974). Under that standard, the key inquiries with respect to Defendant's motion are whether the breadth of the proposed subpoena constitutes a fishing expedition, and whether the desired

information constitutes admissible evidence. As is further evident from the proposed subpoena and from Defendant's Response, neither factor favors issuance of Defendant's motion.

First, and most problematic, is the breadth of Defendant's proposed subpoena. While it is arguable that a subpoena more narrowly crafted to seek documents referencing Defendant or reflecting statements made by or to Defendant would not run afoul of Rule 17(c) and the Nixon standard, Defendant's proposed subpoena seeks much more. For example, Defendant seeks "all documents . . . relating to the investigation by the MPAA into the Elite Torrents web-site . . ."; "all documents . . . relating to communications between the MPAA and the individuals who claimed to run www.elitetorrents.org . . ."; and "copies of all data copied from data contained on any and all servers used by www.elitetorrents.org . . .". These categorical requests go beyond merely seeking evidence relating to the Defendant and the charges against him. They instead cover the entirety of a third party's investigation of an organization of which Defendant was a member, regardless of whether those materials reflect on the Defendant. This is the type of overreaching third party discovery rejected by United States v. Fowler, 932 F.2d 306, 311-12 (4th Cir. 1991), where the defendant, a government contractor charged with conversion of classified documents, sought documents relating to the government agency's audits and investigations of other contractors.

Second, Defendant has not demonstrated how documents in the MPAA's possession that do not contain communications by or with Defendant or otherwise reference Defendant would be relevant and admissible. Defendant's claim that "the obviously close cooperation between the MPAA and FBI" may "reveal an agency relationship so that the Defendant can, if appropriate, raise constitutional challenges" is unpersuasive. See Response at 7. The authority Defendant

cites in support of this argument, United States v. Karake, 281 F. Supp. 2d 302, 306 (D.D.C. 2005), concerned whether a foreign sovereign government may have been in a joint venture with the United States, an issue clearly not at play here. Defendant's motion is otherwise silent on what "constitutional challenge" may arise, or even what evidence may cause such a challenge to arise. Similarly, Defendant fails to detail how any communications between MPAA and the operators of www.elitetorrents.org that do not reference Defendant are relevant to the charges against him.

Several of the document categories sought by Defendant are not tied to Defendant's participation in the Elite Torrents organization, unlike the requests in In re: Martin Marietta Corp., on which Defendant relies. See 856 F.2d 619, 621 (4th Cir. 1988). In that case, the defendant, a former Martin Marietta employee, was charged with conspiring to defraud the U.S. Department of Defense relating to his alleged fraudulent characterization of travel rebates paid to a Martin Marietta subsidiary, resulting in the U.S. government over-reimbursing Martin Marietta. Defendant served an initially overbroad Rule 17(c) subpoena on his former employer, seeking 15 categories of documents, which the trial court limited in scope after Martin Marietta filed a motion to quash. The dispute was further narrowed to three categories of documents sought by the defendant: audit reports the defendant was accused of manipulating, witness statements and interview notes concerning those reports, and correspondence and notes regarding an administrative settlement between Martin Marietta and the government, which included an agreement that Martin Marietta would no longer fund the defendant's defense. Id. at 622. Each of these narrow categories dealt with the specific charges against the defendant.

The materials sought by Defendant Dove are in a different posture. In In Re: Martin Marietta, the defendant sought documents under the control of his former employer that he was accused of manipulating and concerning the company's statements regarding the defendant's role. Here, Defendant Dove is seeking information regarding the MPAA's overall investigation of Elite Torrents and communications with other members of Elite Torrents, in addition to materials relating specifically to him. If Defendant is permitted to issue a subpoena at all, it should be limited to documents reflecting Defendant's participation in the organization.

V. Conclusion

For the reasons stated above, the Government respectfully submits that the March 26 Order granting Defendant's motion for issuance of a Rule 17 subpoena should be reversed. In the alternative, the Government requests that the Court narrow the categories set forth in Defendant's proposed subpoena to include only those documents referencing Defendant or consisting of communications by Defendant, as set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF, which will then send a notification of such filing (NEF) to the following:

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