

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

**UNITED STATES OF AMERICA**

**V.**

**DANIEL DOVE,**

**Defendant.**

**Case No. 2:07cr00015**

**DEFENDANT’S RESPONSE TO THE UNITED STATES’ OBJECTIONS TO  
MAGISTRATE JUDGE SARGENT’S ORDER**

COMES NOW Defendant Daniel J. Dove, by Counsel, in response to the Government's "Motion for Stay" and "Objections Pursuant to Fed. R. Crim. P. 59(a) to United States Magistrate Judge Pamela Meade Sargent's March 26, 2008 Order Granting Defendant's Motion for Subpoena Duces Tecum as to Daniel Dove," (hereinafter *Objections*) whereby the Court granted the Defendant's "Motion for Subpoena Duces Tecum" in regards to the Motion Picture Association of America ("MPAA") pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure:

## I. Introduction.

On December 20, 2007, the Government produced documents to the Defendant that included a referral letter from the Motion Picture Association of America (“MPAA”) to the Federal Bureau of Investigation (“FBI”), pursuant to Rule 16 and the Discovery Order entered in this case on August 29, 2007 (“Discovery Order”). On December 19, 2007, the Government had forwarded copies of electronic discovery materials to experts retained by the Defendant to assist

in the defense of his case. Defendant promptly traveled to Richmond and reviewed said materials from January 1 to January 3, 2008 at the offices of his Counsel.

On January 7, 2008, Defendant and the Government filed a “Consent Motion for Continuance of Trial,” which in large measure was predicated upon the facts that the Government had not completed providing discovery to the Defendant before that date, and, given the complexity of the discovery materials involved in this matter, the Defendant would require ample time to review the discovery provided by the Government. In spite of various attempts by Defendant to expeditiously receive discoverable materials from the Government, see Exhibit “A,” the Government did not forward any additional discovery materials to the Defendant’s experts until February 28, 2008, Exhibit “B,” more than two months after the provision of the original materials. As the Government was aware, the electronic materials provided to the experts would first have to be processed and then transmitted to Defendant’s Counsel, and Defendant would not be able to review the documents until he had the opportunity to travel from his residence in Florida to review the documents at the offices of his Counsel, as required by the Discovery Order in this matter.

Moreover, 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 before he would be able to receive copies thereof, see Exhibit “B,” thereby further delaying the discovery process. Upon Defendant’s request, the Government did, however, make the materials available to the Defendant at the Richmond office of the US Attorney on March 20, 2008. On this same date, Defendant had the first opportunity to review the materials provided to his

experts on February 28, 2008, and received by his Counsel on March 5, at the offices of his Counsel as provided in the Discovery Order.

As a result of the circumstances described above, the provision by the Government to the Defendant of discoverable materials in its possession was still in process on March 25, 2008, see Exhibit “C,” the same date on which Defendant filed his “Motion for Subpoena Duces Tecum.”<sup>1</sup> Defendant submits that he was not in a position to determine the full extent of what additional evidence was required for his defense until the completion of the provision of discovery pursuant to Fed. R. Crim. P. 16 and the Discovery Order applicable to this matter, and until he had the opportunity to review those materials.

Defendant also submits that filing his Motion for Subpoena Duces Tecum would have been premature prior to the completion of Rule 16 discovery, and that waiting to file his motion until the effective completion of, and his review of, discovery from the Government allowed him to winnow out extraneous materials that he would not need for his defense, and to positively identify those materials he would need.

Finally, Defendant is puzzled by the Government’s opposition to his Motion, given that he informed the Government of his intent to file said Motion for a subpoena to the MPAA on March 20, 2008, during the review of discovery materials at the US Attorney’s Office in Richmond, where he was given no indication whatsoever that the Government would oppose such a motion. Defendant notes that given it’s foreknowledge of Defendant’s intentions, the Government would have sooner expressed its opposition to a subpoena once the Motion for the subpoena was filed. Moreover, Defendant finds it difficult to comprehend the Government’s

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<sup>1</sup> Defendant notes that he did not receive the faxed cover letter for said materials until after he filed his motion. Defendant also notes that on March 20, 2008, he inquired of the Government as to the whereabouts of two optical disks that he recalls were in the disk bays of two of the computers taken from his residence during the search thereof. To date, he has neither received those disks nor any accounting from the Government as to their location.

suddenly vociferous opposition to his Motion, when said Motion is issued to a third party and has no apparent tangible effect on the Government.<sup>2</sup>

In addition, Defendant submits that the time provided for compliance with the subpoena is ample,<sup>3</sup> given the circumstances of the case, and that the MPAA has evidently previously compiled and organized the relevant materials and thus the burden of producing them will not be unbearable,<sup>4</sup> and that any delay in the issuance and service of the subpoena only would serve to frustrate Defendant's efforts to procure evidence highly relevant to his defense.

Defendant acknowledges receiving the materials referenced by the Government in its *Objections*, as indicated above, but submits that the only discovery item clearly identifiable and identified as coming from the MPAA is the referral letter attached to his "Motion for Subpoena Duces Tecum." Defendant notes that none of the other materials provided indicate overtly or by implication that they are from the MPAA, and that the relevance and significance of the materials referenced in the MPAA referral letter is evident from the contents thereof. For example, of great significance to the Defendant's defense is the referral letter "under separate cover," that the MPAA states it provided to the Government laying out in detail its allegations against the Defendant.<sup>5</sup> Defendant specifically requested a copy of the separate referral letter for Mr. Dove in an email to the Government on March 21, 2008, Exhibit "F," to which query the Government has provided no response.

Defendant notes that the Government asserts that it has provided "the materials that are both relevant and necessary for his preparation at trial." *Objections* at 6. Whether or not the

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<sup>2</sup> Although Defendant recognizes the Government's standing to challenge the issuance of a subpoena duces tecum.

<sup>3</sup> For example, the Government has itself previously requested documents pursuant to a subpoena duces tecum where the return was requested only four days after it filed its motion. Defendant cites to the example of the "Motion for Production of Documents Responsive to Subpoena Duces Tecum on or Before June 15," United States of America v. Martin News Agency, Inc., Exhibit "D."

<sup>4</sup> See Exhibit "E," also attached in part as Exhibit "A" to "Defendant's Motion for Subpoena Duces Tecum."

<sup>5</sup> "Defendant's Motion for Subpoena Duces Tecum," at p. 2, n. 2.

Government is in fact still in possession of the separate referral letter for Mr. Dove and the Government deems it material or not, the Defendant submits that the evidence he requests is in fact material to preparing an adequate defense to the serious allegations made against him. The referenced letter and the other materials he has requested for the Subpoena Duces Tecum are relevant and necessary for his preparation for trial, and apparently the Government is not in possession of or has not provided highly material evidence in this case.

The referral letter referenced by and attached to the “Defendant’s Motion for Subpoena Duces Tecum” as Exhibit “A,” and hereto as Exhibit “E,” is not a simple and short letter of referral requesting the FBI to investigate suspicious activity, but instead marks the completion a criminal investigation by a non-governmental party, and makes numerous specific references to concrete allegations against the Defendant and [www.elitetorrents.org](http://www.elitetorrents.org), the organization to which he is alleged to have belonged, and asserts to have significant facts and evidence supporting those allegations.<sup>6</sup> The letter is essentially a criminal indictment of the Defendant and the organization to which is alleged to have belonged, prepared independently by a non-governmental third party, and the Defendant has a right to review the substance underlying that quasi indictment that served as the foundation of the current matter.

## **II. Argument.**

The Defendant refers to and relies on the argument made in his “Motion for Subpoena Duces Tecum,” which Motion the Court granted for good cause shown.

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<sup>6</sup> The complete referral letter with appendices is 58 pages long. Although it implicates Mr. Dove as a major conspirator and criminal violator of copyright, none of the appendices attached to the letter lay out the specifics for the foundation of the allegations against Mr. Dove. Defendant submits that it is imperative that he have access to the facts and evidence supporting the allegations against him in the referral letter, and that the separate referral letter relating to him is of utmost evidentiary value to the preparation of his defense.

According to the Government, it has provided all “relevant and material evidence” from the MPAA, and it has generally provided all “relevant and necessary” evidence to the Defendant. Under Rule 16 and the Discovery Order the Government is required to provide all material evidence. Because the Government claims to have provided all necessary evidence pursuant to Rule 16 and the Discovery Order, the Defendant must presume that the Government is acting in good faith, and that it has no further material evidence necessary to the preparation of Defendant’s defense in its possession. See United States v. Marshall, 132 F.3d 63, 67-68 (D.C. Cir. 1998).

The Defendant is entitled to inculpatory and exculpatory items material to the preparation of his defense. Marshall, 132 F.3d at 67-68. The Defendant’s request is clearly not a fishing expedition where he is throwing his hook in the water and hoping to catch something, anything. In this instance, the fish have already been caught and placed in a cooler, not by the Government but by a third party, and the Defendant has a right to see the contents of the cooler: Defendant has knowledge of the existence of evidence that he knows is material to his defense. The inculpatory materials he seeks are those used to establish the very foundation of the allegations against him in this case. The exculpatory materials he seeks are those pertaining to his intent to commit a criminal act, the degree of his involvement and intentions in relation to the alleged conspiracy, and those relating to communications between the Defendant and other particular individuals--the founders and System Operators--in the organization that is alleged to have been a conspiracy: the individuals identified in the Defendant’s requests were acting as agents of the MPAA for a significant period of time, and implicated Mr. Dove as an alleged conspirator.

The contents of the referral letter from the MPAA to the FBI and of the “Application and Affidavit for Search Warrant,” make it clear that the MPAA was communicating and cooperating

with the founders and “System Operators” of [www.elitetorrents.org](http://www.elitetorrents.org) for a number of months before the referral was made to the FBI. The communications that the Defendant seeks between the MPAA and those individuals have a direct inculpatory and exculpatory bearing on the communications he made with the same founders and “System Operators” of [www.elitetorrents.org](http://www.elitetorrents.org), and which have been and presumably will be used against him by the Government. For example, some of the alleged communications cited to by the FBI in the “Application and Affidavit for Search Warrant,” Exhibit “G”, were obtained through the efforts of the System Operators of [www.elitetorrents.org](http://www.elitetorrents.org). The Defendant requests communications between the MPAA and specific individuals: Rudy O. Corella, using the username, “Krylon,” was a founder and System Operator of [www.elitetorrents.org](http://www.elitetorrents.org). The communications that the Defendant requests date from the period in which the MPAA was communicating and cooperating with, and, by its own admission, directing some activities of, founders and “System Operators,” of [www.elitetorrents.org](http://www.elitetorrents.org).<sup>7</sup> The individual with the usernames “Werd” and “Root” was also a System Operator.

With regards to communications between the MPAA and government agencies, Defendant submits that the obviously close cooperation between the MPAA and FBI warrants production to the Defendant of those documents, because this evidence “may demonstrate cooperation between the United States and [the MPAA] sufficient to reveal an agency relationship so that the Defendant can, if appropriate, raise constitutional challenges.” See United States v. Karake, 281 F. Supp. 2d 302, 306 (D.D.C. 2005), *cited by* United States v. Abu Ali, 395 F. Supp. 2d 338, 381 (E.D. Va. 2005). In fact, significant portions of the “Application and Affidavit for Search Warrant,” directly quoted and paraphrased much of the contents of the

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<sup>7</sup> Exhibit “G,” at 7-8; Exhibit “E,” at 2.

referral letter from the MPAA to the FBI with regards to the allegations against [www.elitetorrents.org](http://www.elitetorrents.org).<sup>8</sup>

Regardless of whether the Nixon test or a less stringent standard applies to the Defendant's subpoena request, Defendant has a "Sixth Amendment guarantee that an accused have compulsory process to secure evidence in his favor." In Re: Martin Marietta Corp., 856 F.2d 619, 621 (4<sup>th</sup> Cir. 1988), *citing* California v. Trombetta, 467 U.S. 479, 485 (1984), and Defendant submits that he has established that the materials he seeks are evidentiary, and that their provision would not be unreasonable or oppressive, to allow him to prepare an adequate defense at trial to the charges against him. Production of these materials sufficiently in advance of trial will prevent interruptions and delays that would otherwise be required to permit the Defendant to review the documents produced. By requiring the production of the items on or before April 11, 2008, the Defendant was attempting to ensure sufficient time to review the materials in preparation of trial and to raise any issues or concerns about the production at the pre-trial conference set for 1:30 p.m. on April 14, 2008.

The Defendant emphasizes that he specifically referenced the Court's obligation to review subpoena duces tecum requests in his "Motion for Subpoena Duces Tecum," and that the Court weighed the facts and argument submitted by the Defendant in making its decision to grant the Order, as mentioned therein. By no means did the Defendant intend to somehow misrepresent the holding of United States v. Vinodchandra Modi, Etc., et al., 2002 U.S. Dist. LEXIS 1965 (W.D.Va. 2002), but rather he suggests that regardless of whether the cited comment made by the Court in that case was dicta,<sup>9</sup> it was significant, given the context and outcome of that case, that the Court positively referenced and gave support to the argument of

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<sup>8</sup> *Cf.*, e.g., Exhibit "G," pp. 6-12, 16-20, and Exhibit "E," pp. 3-8, 13-17.

<sup>9</sup> "There might be a case where the witness' independence from the government would suggest a more relaxed test." Vinodchandra Modi, 2002 U.S. Dist. LEXIS 1965 at \*7.



the special prosecutor in United States v. Nixon, 418 U.S. 683 (1974), that there might be circumstances where the evidentiary requirement announced in Nixon “does not apply in its full vigor when the subpoena duces tecum is issued to third parties rather than to government prosecutors.” Nixon, 418 U.S. at 699, n. 12. It is evident but significant, and Defendant would emphasize, that this point was made and argued by a prosecutor in the Nixon case.

Thus, the Defendant repeats his assertion that pursuant to Fed. R. Crim. P. 17(c) his subpoena request should only be limited in whole or in part in the event that this Court finds that compliance with the requested subpoena or a portion thereof is “unreasonable or oppressive.” Defendant submits that his request is not unreasonable or oppressive, particularly given the contents of Exhibits “E” and “G.”

Moreover, as argued by the Defendant in his “Motion for Subpoena Duces Tecum,” he does satisfy the standards elucidated in Nixon in the event that Nixon should be found to apply to his request. Defendant notes that cases cited by the Government in its *Objections* presented clear instances where a defendant’s request was in actuality a wide-cast net that sought items that were not material evidence, and those requests lacked a solid foundation for requesting them.<sup>10</sup> To the contrary, Defendant’s discovery requests in this instance are in fact as or more detailed than those alluded to in the case of In Re: Martin Marietta Corp., 856 F.2d 619 (4<sup>th</sup> Cir. 1988), in which the subpoena request was granted in part where the defendant sought numerous “categories” of documents. 856 F.2d at 620-22.

Given the circumstances of this case, and the detailed allegations made by the referral letter from the MPAA as well as the specific evidentiary materials to which it refers, Defendant submits that he has established good cause under the Nixon standard for the issuance of the

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<sup>10</sup> For example, in the case of United States v. Fowler, 932 F.2d 306 (4<sup>th</sup> Cir. 1991), the Defendant clearly requested materials not material to his case, the production of which would severely burden the parties to whom the requested was directed, and which request arguably meant to harass the subjects of the request.

requested subpoena: (1) the materials requested are materially evidentiary and relevant, as clearly indicated by the referral letter from the MPAA to the FBI attached to his “Motion for Subpoena Duces Tecum” as Exhibit “A” and hereto as Exhibit “E;” (2) the materials are not otherwise reasonably procurable in advance of trial, as Defendant has not received any of these items from the Government and has no other practicable means of obtaining the requested information; (3) these materials are essential for the Defendant to properly prepare for trial as they are directly related to the foundation of the allegations against him, see Exhibit “E,” and pre-trial inspection will assist to prevent any potential for unreasonable delays at trial; and, (4) the Defendant makes this Motion in good faith to obtain information not otherwise available to him, and his application is not intended as a fishing expedition, as evidenced by the contents of Exhibit “A” to,<sup>11</sup> and supported by the substance of, his “Motion for Subpoena Duces Tecum.”

Defendant’s request is not made in the “mere hope of discovering favorable evidence,” United States v. Vinodchandra Modi, Etc., et al., 2002 U.S. Dist. LEXIS 1965, \*9 (W.D.Va. 2002) (*cites omitted*), but rather in this case, Defendant has knowledge that these materials exist and that he is not in possession of them and that they are material to his defense.<sup>12</sup> The term “material,” includes not only exculpatory evidence, but also inculpatory evidence necessary to the Defendant to adequately prepare for trial. United States v. Marshall, 132 F.3d 63, 67-68 (D.C. Cir. 1998).

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<sup>11</sup> And attached hereto as Exhibit “E.”

<sup>12</sup> Defendant submits that his request is not limited to materials to impeach witnesses, as suggested by the Government, and that the Government has identified no witnesses that it believes the Defendant would hypothetically intend to impeach with the requested materials. *Objections*, at p. 4.

### III. The Government's Objections.

Defendant submits that the quantity and quality of the discovery provided by the Government, as well as the delay in providing the materials after a continuance was granted in part for the completion and review of discovery in this case, support his request. See supra at pp. 1-3. Moreover, if there is in fact a victim or there are victims as alleged in this case, it is not the MPAA but its constituent members that would constitute said victim or victims and by no means is the Defendant attempting to "harass a victim." See Objections, at p. 5.

The relevance of the materials requested by the Defendant is obvious given the contents of the referral letter from the MPAA, and the Defendant submits that they are essential to his defense and that he is to his knowledge not in possession of any of the materials cited to by the MPAA in its seven page referral letter, i.e. quasi indictment. This is not a general attempt to "browse through the MPAA's files, in the hopes of finding something interesting,"<sup>13</sup> but rather a limited request to review specific materials that the MPAA compiled, generated, organized, and studied to reach an independent and definitive conclusion that the Defendant was criminally liable for his alleged activities as a member of [www.elitetorrents.org](http://www.elitetorrents.org).

Finally, Defendant cannot accept the Government's blanket assertion and assurance that the Defendant is in possession of all "the materials that are both relevant and necessary at trial," when it is obvious and within Defendant's knowledge that key pieces of evidence relevant to his defense are not in his possession and that he requires them to adequately prepare his defense, and that evidence is evidently in the possession of a third party.

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<sup>13</sup> *Objections*, at pp. 5-6.

#### **IV. Control of Process by the Court.**

Finally, Defendant submits that the Court has the power to oversee and control the review and any reproduction of these materials by the Defendant in such a manner as it deems proper under the circumstances, and that Defendant does not seek these materials for any other purpose than to adequately prepare his defense in this matter.

WHEREFORE, the Defendant respectfully prays that this Honorable Court overrule the Government's Objections, and direct the Clerk to issue the Subpoena Duces Tecum as requested and Ordered on behalf of the Defendant.

Respectfully submitted,  
Daniel J. Dove

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 4<sup>th</sup>, 2008, I caused to be electronically filed the above and foregoing **DEFENDANT'S RESPONSE TO THE UNITED STATES' OBJECTIONS TO MAGISTRATE JUDGE SARGENT'S ORDER** with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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