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

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH H. SMITH and ANTON ZGOZNIK, Defendants.	)))))))))))	CASE NO.: 1:06CR00394 JUDGE ANN ALDRICH **DEFENDANT ANTON ZGOZNIK'S RESPONSE TO MOTION OF UNITED STATES TO QUASH SUBPOENA ISSUED TO HUNTINGTON BANK**

NOW COMES the Defendant, Anton Zgoznik, by and through counsel, and in response to the Motion of the United States to Quash the subpoena issued to third party Huntington National Bank states as follows.

FACTS

Defendant issued a subpoena to Huntington National Bank seeking records maintained by the Bank regarding an account held in the name of Resultant Corporation or Resultant Corp.

There has never been any question that ZJ & Associates, Inc., lka Institutional Financial Advisors, Inc. (ZJA and IFA, respectively) and Institutional Business Solutions, Inc. (IBS) made payments to Mr. Smith. The defense of this case centers on whether Mr. Zgoznik believed he was authorized to make the payments to Mr. Smith and what the Diocese knew about those payments. These issues center upon Father John J. Wright, who for many years was the Financial and Legal Secretariat of the Catholic Diocese of Cleveland (CDC). In that role, Father Wright was the superior of both Mr. Zgoznik and

Mr. Smith. Later, Father Wright became the head of the Catholic Cemeteries' Association. (CCA)

It was a common practice at the CDC to employ off book accounts as a method of compensating CDC employees or persons related to CDC employees, or to pay others through third-party vendors such as the companies that employed Mr. Zgoznik. In fact, Father Wright authorized additional compensation to Mr. Smith via an off-book account of which Mr. Zgoznik was aware, authorized substantial compensation to Thomas Kelley, an employee of CCA, through the companies that employed Mr. Zgoznik, even though Mr. Kelley did not work for the companies that employed Mr. Zgoznik (the mechanics being the same as the payments to Mr. Smith that are at issue in this case). Others at the Diocese were compensated in similar fashion.

It must be remembered that Mr. Zgoznik or ZJA, IFA and IBS provided extensive accounting services to the entire CDC, including many of its parishes and schools, an institution will assets in the billions and significant revenues. In addition, an affiliated company, Alexander Systems, Inc., provided computer services and support, with 24 hour-a-day service, to the CDC, Catholic Cemeteries Association (CCA) many parishes and schools. Combined they had in the range of 35 to 40 employees at any given time, many of whom were professionals, i.e., Certified Public Accountants or Certified Computer Programmers. They were very involved in the "business" of operating the CDC and its constituent organizations, which is not a small job. In this capacity, though not privy to everything at the CDC, Mr. Zgoznik was aware of many "off

book" or otherwise unorthodox methods of providing compensation to employees of the CDC.[1]

Thomas Kelley Payments

Thomas J. Kelley had been a long-time employee of the CDC. Upon his retirement he withdrew his retirement in a lump sum, however, due to personal circumstances, he needed additional funds. Since he had been employed for so long and had a significant amount of knowledge about the Diocese, Father Wright and, arguably, Bishop Pilla, wished to retain Mr. Kelley's services. However, in typical fashion, the Diocese was concerned that, if Mr. Kelley received preferential treatment, regardless of his worth, other employees would demand the same preferential treatment. Father Wright decided that he would pay Mr. Kelley through ZJA. This decision was reduced to writing. That writing is attached as Exhibit A, and was an Agreement dated July 1, 1999 (The Kelley Agreement). In sum, the Kelley Agreement was for two years (although it was extended) and provided for an annual compensation of $88,368.00, payable in bi-monthly installments of $3,682. The Kelley Agreement specifically tells Mr. Kelley to look to ZJ & Associates for payment – ***even though he is specifically not working for them and the Agreement is between only him and "The Catholic Cemeteries Association of the Roman Catholic Diocese of Cleveland.*** Why the strange arrangement? The Agreement says that "[t[his format is being initiated to

[1] By saying this, the Defendant does not necessarily contend that this was bad conduct by the CDC. In most situations there was a legitimate business reason for paying (undervalued employee) and concealing the compensation (preventing dissention), the methods selected might simply have not always been the best practice.

maintain the confidentiality of this contract." Ex. A, at p.1 of 5. The Agreement is signed by Father Wright on behalf of the CDC.

Under The Kelley Agreement, ZJA/IFA and IBS paid the following amounts to Mr. Kelley:

Entity	Year				
	1999	2000	2001	2002	2003
ZJ & Assoc. / IFA	$40,502	$84,712	$97,338	$82,089	$15,636
IBS, Inc.	0	0	0	0	$74,271
Totals	$40,502	$84,712	$97,338	$82,089	$89,907

GRAND TOTAL = $394,548

There is no dispute that these payments were made and that they were authorized by at least Father Wright. Mr. Kelley did not work for ZJA/IFA/IBS, he worked for the CDC. He was compensated in this fashion at Father Wright's behest in order to conceal the compensation from others at the CDC. Father Wright even gave Mr. Kelley cost-of-living increases. See Memoranda to Zrino Jukic dated 5/21/01 and 1/7/02 (Exhibit B).[2]

[2] It is important to note that the Defendant is **not** alleging that Mr. Kelley did anything improper or that there was anything improper in retaining him or paying him. The point is that this is often how the CDC did business.

The payments to Mr. Kelley were made in almost the exact same fashion as the payments to Mr. Smith and it is the Defendant's position that Father Wright knew of and authorized the payments to Mr. Smith. The following is an annual breakdown of the payments to Mr. Smith from ZJA/IFA/IBS:

1997	1998	1999	2000	2001	2002	2003
$38,050	$101,735	$111,598	$193,307	$112,753	$114,910	112,275

(Rounded to the nearest whole dollar)

As can be seen, these payments are relatively level except for the first year and the year Mr. Smith succeeded Father Wright as the Financial and Legal Secretariat – 2000 - with greatly increased responsibilities and duties.

Resultant Corporation Payments

Thomas Kelley and Joe Smith were not the only persons the Defendant contends Father Wright authorized being paid through ZJA/IFA/IBS. One of the persons Father Wright authorized ZJA/IFA to make payments to was Don Felkin. Mr. Felkin, who is now deceased, operated a company named Resultant Corporation. Resultant Corporation received some payments directly from the Diocese (See, Ex. C) and also received payments from ZJA/IFA. The purpose of the payments to Resultant Corp., by ZJA/IFA, were, in large part, for personal purposes of Father Wright. It is the belief of the defendant that the Bank records of Resultant Corp. will show that Marilyn Ruane received payments from Resultant Corp. Father Wright, in his August 4, 2005, interview at the United States' Attorney's Office, stated that his "friend" Marilyn was out of work and needed work. He indicated that he is the person who obtained employment for

Marilyn Ruane at Resultant Corp. and accompanied her and Joe Smith to Don Felkin's Office to make arrangements for her employment. (See redacted Memorandum of Interview, dated August 4, 2005, attached as Exhibit D). Zrino Jukic, the sole shareholder of ZJA/IFA, who worked at the Diocese on a daily basis, stated, in his November 19, 2004, interview with the government (memorialized on an FBI Form 302), that Marilyn Ruane was (is) Father Wright's friend. (See redacted Form 302, attached as Exhibit E). Jukic also states that Ms. Ruane was "on the payroll at Resultant but didn't work there." It is the Defendant's belief that there will be other testimony on the point that Ms. Ruane was/is Father Wright's friend and that she did no work at Resultant.[3] Showing that Ms. Ruane received monies from Resultant can be established through the checks written from the accounts in the name of Resultant Corporation. It is the Defendant's belief that that account was held at Huntington Bank.

This is important because, at the instance of Father Wright, ZJA/IFA made payments to Resultant Corporation in a similar fashion as the payments made to Thomas Kelley and Joe Smith.

Initially, the CDC paid Resultant Corporation. At least the following payments were made:

Date	Check No.	Amount
1/30/97	30140	$21,643.09
6/9/97	30771	$28,654.21

See copies attached as Exhibit C, collectively.

[3] Marilyn Ruane was hired by the Catholic Cemeteries Association. She has earned anywhere from $31,500 in 1997 to $81,000 in 2004.

Father Wright was uncomfortable with the fact that these payments were so large and that someone might discover what was going on, so he shifted the payments to Resultant to ZJA/IFA, like the payments to Mr. Kelley and Mr. Smith. ZJA/IFA made the following payments to Resultant Corporation (Exhibit F attached):

Date	Check No.	Amount
7/17/97	1189	$23,236.81
8/20/97	1231	$8,356.21
10/20/97	1289	$13,208.60
10/31/97	1311	$9,557.36
11/19/97	1342	$10,000.00
12/3/97	1378	$3,500.00
12/15/97	1388	$500.00
12/15/97	1389	$3,063.66
2/10/98	1476	$11,468.34
2/10/98	1477	$7,000.00
3/16/98	1516	$20,679.41
4/7/98	1546	$13,807.01
4/22/98	1554	$8,895.62
5/22/98	1600	$10,768.93
6/9/98	1615	$9,780.00
6/25/98	1634	$10,345.54
7/6/98	1655	$4,559.00
7/6/98	1657	$3,994.32
7/20/98	1672	$5,284.96
9/4/98	1714	$9,805.54
9/14/98	1723	$8,960.00
10/12/98	1748	$11,862.86
11/3/98	1811	$8,575.00
11/24/98	1836	$15,995.43
12/3/98	3021	$9,813.31
12/18/98	3053	$6,123.50
1/1/99	3118	$8,303.71
1/8/99	3090	$8,452.33
2/9/99	3145	$3,894.08
3/9/99	3185	$4,786.09
3/9/99	3186	$8,174.72
3/19/99	3213	$9,180.20
TOTAL		$291,932.54

Neither Zgoznik, nor ZJA/IFA received anything for these significant payments. These were made at the behest of Father Wright and were designed, to the best of our knowledge, to provide compensation to Marilyn Ruane, Father Wright's friend.

ARGUMENT

1. The United States Does Not Have Standing to Quash the Subpoena to Huntington National Bank.

A party generally lacks standing to challenge a subpoena issued to a third party absent a claim of privilege or a proprietary interest in the subpoenaed matter. *See United States v. Reyes,* 162 F.R.D. 468, 470 (S.D.N.Y.1995)(citing *Langford v. Chrysler Motors Corp.,* 513 F.2d 1121 (2d Cir.1975)(absent claim of privilege, party usually has no standing to object to subpoena directed at non-party); *In re Grand Jury Subpoena Duces Tecum Dated May 9, 1990,* 741 F.Supp. 1059, 1060 n. 1 (S.D.N.Y.1990)(same), *aff'd,* 956 F.2d 1160 (2d Cir.1992); *Ponsford v. United States,* 771 F.2d 1305, 1308 (9th Cir.1985) (absent proprietary interest in documents sought, no standing to quash)). *See also United States v. Tomison,* 969 F.Supp. 587, 596 (E.D.Cal.1997). The Sixth Circuit takes the same view, *see, United States v. Compton,* 28 F.3d 1214 (6th Cir. 1994) (The district court expressed doubt, and we believe correctly, regarding whether or not . . . [a party] . . . even had standing to challenge the validity of the **subpoenas**. Certainly the . . . [subpoenaed persons] . . . , had they wished, could have challenged the **subpoenas** if compliance would have been unreasonably burdensome.)

The case of *United States v. Nachamie,* 91 F.Supp.2d 552 (SDNY 2000), makes it unmistakably clear that this rule applies to the government as well. In *Nachamie,* the District Court was considering subpoenas issued by defendants in a Medicare billing fraud case. The defendants issued two categories of subpoenas under Rule 17(c),

subpoenas upon billing companies and upon doctors. The Court noted that the government advanced various theories of how it had an interest in the records sought by the subpoenas sufficient to afford it standing to quash. The Court found that the government's arguments regarding "standing based upon its own interest" unavailing. *Nachamie,* at 558. The court held that, absent a showing of a proprietary or privilege interest or some extraordinary interest (such as a subpoena on a person in the witness protection program), which are not present here, that the government had no standing to quash a defendant's subpoena on a third party.

The government has no interest in the documents sought by Mr. Zgoznik's subpoena on Huntington Bank. The documents sought belong to Huntington Bank and were kept in the course of the bank's business activity. They are records of the activity of the account of Resultant Corporation and Ohio for-profit corporation that was operated, to our knowledge, by Don Felkin. The concept of standing would be meaningless if the Court finds the government has standing to challenge this subpoena.

As the Court held in *Nachamie:*

> The documents sought by Hernandez were created by and belong to the parties from whom they were subpoenaed. If the Government had standing to move to quash whenever a subpoena was served on a potential witness, then it could move to quash virtually every Rule 17(c) subpoena merely by claiming that the recipient might become a witness. Surely, the concept of standing was not meant to be so elastic.

Nachamie, at 560.

This Court should also find that the government has no standing to challenge the subpoena issued to Huntington National Bank.

2. <u>The Procedural Posture of the Subpoenas Does Not Provide Standing to the United States.</u>

The Government has argued that there is some procedural defect in the subpoena as a motion was not filed with the Court in advance of the issuance of the subpoena. This is incorrect.

Rule 17(c), in pertinent part, provides:

> **(1) In General**. A Subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

The language of the Rule does not require prior leave of court. The Local Rules for the Northern District of Ohio are silent on the issue of Rule 17(c) subpoenas. The issue of whether the records sought in a subpoena duces tecum are required to be produced in advance of trial "can be raised as well on a motion to quash, a motion that is specifically authorized by Rule 17(c)." *Wright & Miller*, 2 Fed. Prac. & Proc. Crim.3d § 274.

Essentially, what the United States wants is the ability to "weigh in" and express its opinion on subpoenas that it would have no standing to quash by requiring the filing of a motion in advance. This practice would make a defendant fully and completely explain his or her defense theory while the government is not put to the same standard.[4]

It is interesting to note that in the case of *United States v. Nixon,* 418 U.S. 683 (1974), the posture of the case was that a subpoena was issued by the Special Prosecutor to the President and the matter was before the Court not on a motion

[4] While in this particular case, the defendants have been open and clear as to their theory of defense, that is not always the case. In many cases this would harm the defendant's trial strategy.

for a rule 17(c) subpoena, but on a motion to quash by the subpoenaed party. In *United States v. Nachamie,* 91 F.Supp.2d 552 (SDNY 2000), the case was also before the Court on the government's motion to quash after the subpoenas had been issued without a prior motion. In *United States v. Hughes,* 895 F.3d 1135 (6th Cir. 1990), the case was before the Court on a motion to quash, not on a motion to issue the subpoena.[5]

In the end, the only party the defendant must satisfy is the Court. The government simply has no right to offer its opinions regarding the subpoena unless it is the party subpoenaed or can show a significant interest in the documents or information sought. It cannot do so here.

3. **The Defendant has Made the Required Showing to Obtain these Documents Through Subpoena.**

There is some controversy as to what must actually be shown in order to obtain records under Rule 17(c).

The government has stated that the standard that must be satisfied in obtaining records in advance of trial through a subpoena is the four part test expressed in *Nixon,* 418 U.S. 683, which the Sixth Circuit cited with approval in *Hughes,* 895 F.3d 1135, 1146. It is not so clear that this is the correct test in the context of a defendant's use of Rule 17(c) to obtain material from a non-party. The Rule states only that a court may quash a subpoena "if compliance would be unreasonable or oppressive," the judicial gloss that the material sought must be evidentiary-defined as relevant, admissible and specific-may be inappropriate in the context of a defense subpoena of documents from third parties. *Nachamie,* 91

[5] In *Hughes*, it is questionable that the government had standing to quash the subpoena, but it does

F.Supp.2d 552, 563. As one court has noted,

> In *Nixon,* the Supreme Court explicitly avoided answering this question, whether the requesting party is the defendant *or* the Government: "The Special Prosecutor suggests that the evidentiary requirement of *Bowman Dairy Co.* and *Iozia* does not apply in its full vigor when the subpoena duces tecum is issued to third parties rather than to government prosecutors. We need not decide whether a lower standard exists because we are satisfied that the relevance and evidentiary nature of the subpoenaed tapes were sufficiently shown as a preliminary matter to warrant the District Court's refusal to quash the subpoena." *Nixon,* 418 U.S. at 700 n. 12, 94 S.Ct. 3090.
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> The notion that because Rule 16 provides for discovery, Rule 17(c) has no role in the discovery of documents can, of course, only apply to documents in the government's hands; accordingly, Rule 17(c) may well be a proper device for discovering documents in the hands of third parties.
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> *United States v. Tomison,* 969 F.Supp. 587, 593, n.14 (E.D.Cal.1997); *Nachamie, at 563.*

In *Nixon,* the Supreme Court held that production pursuant to Rule 17(c) is appropriate where it is shown that: (1) the documents are evidentiary and relevant; (2) they are not otherwise procurable, with due diligence, in advance of trial; (3) the party cannot properly prepare for trial without such production and inspection in advance of trial; and (4) the application was made in good faith and is not a fishing expedition. *Nixon,* at 699; *Hughes,* 895 F.3d at 1146. Here the documents sought by the subpoena meet all four parts of the Nixon Test..

(1) The Resultant Corp. Bank Records are Evidentiary and Relevant

The Resultant Corp. bank documents show what happened to monies paid to Resultant Corp. by both the CDC and ZJA/IFA. The Indictment charges that Mr. Zgoznik was in control of ZJA/IFA. The disposition of some or all of those

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not appear that the defendant raised the issue of standing.

funds was for the benefit of Marilyn Ruane. Father Wright had a relationship with Marilyn Ruane, whether as a "friend" by his own admission or as a girlfriend by Zrino Jukic's statement. The payment to Resultant Corporation provided no benefit to the Defendant, but did benefit Marilyn Ruane and, indirectly Father Wright. The existence of the payments to Marilyn Ruane support the position that Father Wright knew of the payments to Resultant and authorized them. These payments are in the same fashion and the same time as the payments to Tom Kelley and Joe Smith.

The defendant is charged with fraud. The fraud alleged centers on the payments to Joe Smith which were made in the same fashion as the Resultant Corp. payments and Tom Kelley payments. Fraud is a specific intent crime. The Sixth Circuit's Pattern Jury Instructions, at §10.01, regarding mail fraud, make this clear. They state, in pertinent part:

> For you to find the defendant guilty of mail fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:
>
> (A) First, that the defendant ***[knowingly*** participated in] [devised] [intended to devise] a scheme [to defraud] [to obtain money or property by false or fraudulent pretenses, representations or promises];
>
> (B) Second, that the scheme included a material misrepresentation or concealment of a material fact;
>
> (C) Third, ***that the defendant had the intent to defraud***; and
>
> (D) Fourth, that the defendant [used the mail] [caused another to use the mail] in furtherance of the scheme. (emphasis supplied)[6]

[6] Specifically, in this case, the Defendant is also charged with "honest services" fraud under 18 U.S.C. § 1346. In light of the Second Circuit's En Banc opinion in the case of *United States v. Rybicki*, 354 F.3d 124 (2nd Cir. 2003), *cert. denied*, 543 U.S. 809 (2004), it may be a defense to "honest services" fraud that the employer "knew of or was aware of the conduct."

Good faith is a defense. The Pattern Jury Instruction at § 10.04 specifically addresses good faith and states that it is a complete defense.

The existence of the Resultant Corporation payments and the Tom Kelley payments, establish that it was a practice to provide compensation to others through ZJA/IFA and that such practice was open and known to Father Wright, if not devised by him. It supports a defense of authorization and the defense of good faith. This is admissible to corroborate the Defendant's testimony.

(2) The Resultant Corp. Bank Records are not Otherwise Procurable, with Due Diligence, in Advance of Trial.

This point is straightforward. The records sought are kept at Huntington National Bank. Absent a subpoena, Huntington National Bank will not surrender the records. Don Felkin and his wife have passed away. It is our understanding that they had no children. Their house was raised after their deaths. Unless the government has previously obtained these records through a grand jury subpoena[7], the Defendant has no other way to obtain them.

(3) The Defendant Cannot Properly Prepare for Trial Without the Resultant Corp. Records Maintained by Huntington Bank Without Production and Inspection in Advance of Trial.

Clearly, the Defendant has established a prima facie connection between ZJA, Resultant Corporation, Father Wright and Marilyn Ruane. However, the documents at Huntington will unquestionably close the loop and fill in any gaps between Father Wright's statement and the payments by ZJA. Additionally, the checks drawn on the Resultant corporation bank account, while, to the best of the Defendant's knowledge, would show payments directly to Marilyn Ruane, may

show payments to a company or entity associated with Marilyn Ruane, which will then require additional trial preparation. If the documents show such a set of circumstances, then, if they are returned on the day of trial, a recess would be necessary. Not having them in advance of trial would slow the trial of this case.

(4) The Application was Made in Good Faith and is not a Fishing Expedition.

As the facts set forth in this motion, along with the supporting documentation show, this request is a carefully thought out request that is based upon facts known to the Defendant, documentation of the transactions at issue, and statements by persons who have firsthand knowledge of the circumstances surrounding the transactions reflected in these documents. Contrary to assertions by the government or the CDC's counsel, it is not the intent of the Defendant to embarrass anyone, let alone the CDC or Father Wright, the man who married the Defendant and his wife and baptized his son. The Defendant is trying to defend himself against very, very serious charges brought against him by the government, who had years and the benefit of the compulsion of grand jury subpoenas to obtain and evaluate records.

[7] If this were the case, the government should be ordered to turn them over to the Defendant regardless of whether the government intends to use them at trial or considers them relevant.

CONCLUSION

Given the need of the Defendant for the records sought in the subpoena prior to trial, and the reasons stated above, the Government's Motion to Quash the Subpoena issued to Huntington National Bank seeking documents regarding Resultant Corporation under Rule 17(c) should be DENIED and the Court should enter an Order Ordering Huntington National Bank to comply with the subpoena duces tecum forthwith.

Respectfully submitted,

/s/ Robert J. Rotatori
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CERTIFICATE OF SERVICE

A true copy of the foregoing Response to United States' Motion to Quash the Subpoena Issued to Huntington National Bank will be served via the Court's electronic filing system to those listed therein.

/s/ J. Scott Broome
J. Scott Broome
One of the attorneys for Defendant