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

UNITED STATES OF AMERICA

Plaintiff.

v.

JOSEPH H. SMITH, *et al.*

Defendants.

) Case No.: 1:06CR394

) JUDGE ANN ALDRICH

) CATHOLIC DIOCESE OF CLEVELAND'S,
) BISHOP ANTHONY M. PILLA'S,
) CATHOLIC CEMETERIES
) ASSOCIATION'S AND CATHOLIC
) UNIVERSE BULLETIN'S OPPOSITION
) TO DEFENDANT SMITH'S MOTION TO
) ORDER PRODUCTION
)
)
)

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BACKGROUND

The Diocese and related entities have produced over 11,000 pages of documents to the government in connection with this case, which the U.S. Attorney's Office has represented were produced to defendants Smith and Zgoznic. Defendant Smith now seeks to compel those entities to locate and produce thousands of additional pages of irrelevant or privileged documents.

According to Smith, an attorney and CPA, he is entitled to the documents to show that he had a good faith belief that he could engage in a kick-back scheme with defendant Zgoznic because others supposedly engaged in similar conduct.

Defendant Smith's argument lacks merit for at least two reasons. First, the "good faith defense" does not permit a defendant to point to the supposed wrongdoing of others to justify his own conduct. There is a significant difference between a defendant attempting to show that he believed he was acting within the law, which is what the good faith defense is about, and a defendant attempting to show that the laws should not apply to him because others supposedly engaged in similar wrongful conduct. *See generally* Kevin F. O'Malley et al., Federal Jury Practice and Instructions § 19.06 (5th ed. 2000) (A defendant's good faith belief in the propriety of his or her actions when a defendant purposefully violates the law based on that belief is not a good faith defense). *See also* Sixth Circuit Pattern Criminal Jury Instructions § 10.04 cmt. (2005) (noting that Sixth Circuit instruction on the fraud-good faith defense is based on the instruction in Federal Jury Practice and Instructions). Defendant Smith's attempt to uncover a supposed pattern of wrongdoing by others at the Diocese unquestionably falls within the latter category.

Second, even if there were merit to defendant Smith's assertion that alleged conduct of others somehow excuses his actions — and there is not — the transactions identified in the draft subpoena are not remotely similar to the kick-back schemes in which defendant Smith engaged.

Indeed, despite his assertion that he knows about, or participated in, the transactions because of his position as chief financial and legal officer at the Diocese, he offers nothing other than conclusory arguments that the transactions are similar. He most assuredly has not made the requisite showing of relevance and admissibility. *See United States v. Nixon*, 418 U.S. 683, 699-700 (1974) (setting forth the requirement that the defendant show that (1) requested documents are relevant and evidentiary; (2) the requests are specific; and (3) the requests are made in good faith and are not intended as a fishing expedition). *Accord United States v. Hughes*, 895 F.2d 1135, 1146 (6th Cir. 1990); *United States v. Komisaruk*, 885 F.2d 490, 495 (9th Cir. 1989) (holding that subpoena for irrelevant documents was properly quashed).

To the contrary, there should be no doubt that defendant Smith is on a fishing expedition. The transactions identified by defendant Smith run the gamut from a loan to a person in financial need (on which she has been making payments for 11 years), to payment of a stipend to a woman with eight children who was, through no fault of her own, in dire financial straits, to reimbursement of employee expenses, to a competitive grant award, and to straightforward commercial transactions for the provision of goods or services. One thing the transactions are not: they are not similar to the ones in which defendant Smith engaged. No matter what spin he tries to put on them, or how he chooses to characterize them, he cannot make them something they are not.

Moreover, defendant Smith's "good faith defense" argument does not, as he seems to think it does, entitle him to the production of any document he decides to request. As one court aptly noted, the good faith defense does not "require that any evidence, no matter how tangential,

irrelevant or otherwise inadmissible, must be admitted simply because the defendant claims that it establishes his good faith.” *United States v. Longfellow*, 43 F.3d 318, 321-22 (7th Cir. 1994).¹

Nor, under governing Sixth Circuit precedent, may a nonparty be compelled to produce documents pursuant to a Rule 17(c) subpoena that are sought only to impeach a government witness. *Hughes*, 895 F.2d at 1146. *See also United States v. Cuthbertson*, 630 F.2d 139, 144 (3d Cir. 1980). Thus, defendant Smith’s arguments that he supposedly needs certain documents because of “credibility” issues provides no legal basis for compelling production now.

In large part, what defendant Smith’s draft subpoena seeks are documents that are not relevant, material or evidentiary. Item Nos. 1 through 12, 14 through 18, 20 and 21 represent nothing more than a fishing expedition for documents that he apparently believes will taint others. In reality, although some of the documents are personal, they do not do what Smith says they do. And they most assuredly have no relevance to his own alleged criminal wrongdoing. Smith’s Motion is nothing more than a sad and desperate attempt to disparage those with whom he formally worked with the hope it will somehow excuse his conduct.

With respect to Item No. 13, although the Center for Pastoral Leadership (“CPL”) questions the relevance of the Request, it is not objecting to it because it has produced all documents in its possession, custody and control that relate to the Zgoznic entities.

¹ In addition, a defendant’s good faith must exist at the time the allegedly wrongful conduct began. Therefore, transactions subsequent to those in which Smith engaged cannot be used by him to support a good faith defense.

Finally, subparts a through c of Item No. 19 seek documents that are protected by the attorney/client privilege and/or work product doctrine and are therefore not subject to production.² That Item is discussed at length below.

RESPONSE TO SPECIFIC REQUESTS

Each of the requests set forth in the draft subpoena is addressed below.³

I. DOCUMENTS ALLEGEDLY RELATING TO "ADDITIONAL COMPENSATION" (Item Nos. 1 Through 7 Of The Draft Subpoena).

Item 1. DOCUMENTS RELATING TO A LOAN TO MARIA MILOS.

Objections:

The Diocese objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary.

² Subpart d calls for "[c]orrespondence between the CDC or its agents and the government concerning the CDC Internal Investigation." The only correspondence with the government is correspondence regarding the production of documents. Therefore, it is not correspondence "concerning the CDC Internal Investigation." In any event, that correspondence is in the custody of the government and, to the extent it is discoverable, can be produced by the government.

³ In a number of instances, the draft subpoena includes three-digit check numbers. During the relevant time period, the Diocese never issued a check with a three-digit number. *See* Draft Subpoena Item Nos. 3, 6, 18. It was eventually determined that the three-digit numbers were used as "holding numbers" when the Diocese's accounting system was converted to a new system in 1997. Those numbers, however, are not actual check numbers. Therefore, unless the payee and the dollar amount of the check is known, it is not possible to locate the requested information. Even with that information, it may not be possible to locate the documents if there is more than one check for the same dollar amount. This is so because the Diocese does not have a table that shows both the three-digit "holding number" used in 1997 and the actual check number.

Although the Diocese cannot be certain as to the source of the three-digit numbers in defendant Smith's Motion, it appears likely that they came from computer information that was transmitted to Zgoznic entities when they were doing work for the Diocese. If so, neither defendant Smith nor Zgoznic has authority to use that information. Moreover, there are Diocesan documents attached as Exhibits to Smith's Motion, as well as information derived from Diocesan documents, that were not produced by the Diocese or the government. The Diocese asked defendants' attorneys to identify the source of the documents and information. (*See* Exhibit A.) They have refused to respond. To the extent defendants are engaging in the unauthorized taking and use of the Diocese's confidential information, that practice must stop, and the records must be returned.

Basis For Objections:

Defendant Smith argues that he is entitled to these documents because the transaction at issue evidences “additional compensation” to an employee and is supposedly similar to the kick-back scheme for which he was indicted. (Smith Motion at 5-6.) Defendant Smith is wrong on both counts. The Milos transaction is a loan transaction. Therefore, it does not evidence “additional compensation.” Moreover, it is not at all similar to the transactions in which defendant Smith engaged.

In 1996, due to certain financial hardships facing Maria Milos, the Diocese loaned her \$63,000 at an eight percent interest rate for a term of 15 years.⁴ Ms. Milos has made regular payments on the loan. There is simply no similarity between receiving a loan from an employer at the going interest rate and paying it back in regular installments and the transactions at issue in this case.

The requested documents are not relevant, material, or evidentiary, and this Court should so hold.

Item 2. DOCUMENTS RELATING TO KENNICK DIE AND MOLD AND BASILICA MEMORIAL PRODUCTS LLC.

Objections:

Catholic Cemeteries Association (“CCA”) objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary. CCA also objects on the grounds that the Request is unreasonable and oppressive. While there is no legal basis for this Request, CCA did, at the prosecutor’s request, produce documents evidencing all payments by both CCA and Basilica to Kennick. There is certainly no basis for compelling it to produce

⁴ Ms. Milos was a secretary for the Diocese and is currently employed by Catholic Cemeteries Association, a related entity.

additional documents, including virtually all of Basilica's financial documents for a period of six years.

Basis For Objections:

Defendant Smith originally asserted that he was entitled to documents regarding payments to Kennick because the payments were authorized by Father Wright and the transactions were similar to those in which defendant Smith engaged. He was wrong. There is no similarity. Moreover, he has the documents evidencing those payments.⁵ He now wants more, but he offers no justification—and there is none—for compelling CCA to produce “the general ledger, cash disbursements journal, annual statement of activity (“Income Statements”) and a list of officers and directors of Basilica Memorial Products, Inc. from 1999-2005.” That is nothing more than a fishing expedition and a burdensome one at that.

Basilica was established as a limited liability company in 1999 for the purpose of developing, manufacturing and marketing cemetery products. Its sole member was CCA. The reason for establishing Basilica had nothing to do with “concealment.” To the contrary, use of the limited liability organizational structure was determined to be the most practical method of establishing a for-profit affiliate of CCA. The structure permitted CCA to be the sole member of the LLC, thereby allowing management of the LLC by the CCA. In addition to those benefits, the LLC structure allowed the CCA to voluntarily declare, as taxable, income generated through the sale of products. As such, CCA would not be taking advantage of its not-for-profits status when it sold cemetery products.

⁵ As noted in the Government's Opposition, defendant Smith's assertion that Father Wright attempted to conceal these payments by making payments through Basilica is groundless. CCA was originally asked to produce the documents relating to payments by CCA to Kennick. It did so. When it was subsequently asked to produce documents relating to payments by Basilica to Kennick, it did that as well.

Kennick provided the mold for one of these products, a flush bouquet folder. In fact, Kennick was chosen by the manufacturer of the bouquet holder, not by CCA. In short, the transactions with Kennick were commercial transactions for which CCA obtained a product that it sold. There is no similarity between Kennick transactions and the ones in which defendant Smith engaged. And there is no support of the “concealment” assertion.

Defendant Smith is on a fishing expedition. He received the documents he wanted. Now, without any explanation, he wants more. His Request should be denied.

Item 3. DOCUMENTS RELATING TO TRANSACTIONS ALLEGEDLY AUTHORIZED BY FATHER WRIGHT.

Objections Relating To The Diocese Transactions:

The Diocese objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

The draft subpoena lists four checks that supposedly represent “additional compensation” to CDC employees that were allegedly authorized by Father Wright. Assuming Father Wright authorized the payments (which would not be unusual given that he was chief financial officer at the time), that does not make the documents relevant to this case. Moreover, the information available to date indicates that the transactions have no similarity to the ones at issue here. One of the checks represents the award of a Tabor Grant — a grant which is awarded based on applications that are submitted and reviewed by a committee. A second check is for a charitable account.

Without a showing by defendant Smith, as opposed to conclusory assertions, that the transactions at issue have a relationship to the charges against him, his Motion to compel as to these items should be denied.

Objections Relating To CCA Transactions:

CCA objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

The four CCA payments listed in the draft subpoena relate to payments for vehicles that, consistent with CCA's policy, were provided to two CCA employees — Andrej Lah and Robert Winnicki — due to the nature of their positions with CCA. The payments most assuredly did not involve kick-backs from vendors. They were straightforward purchases of vehicles provided to employees pursuant to the terms of their employment. The documents are not relevant or material to any issue in this case.

**Item 4. DOCUMENTS RELATING TO ALLEGED "ADDITIONAL COMPENSATION"
FOR FATHER WRIGHT.**

Objections Relating To CCA Transactions:

CCA objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

Once again, defendant Smith tries to equate his receipt of kick-backs to straightforward transactions of the CCA. And once again, there is no similarity. The payment to Ford Credit is for a plow truck that is currently assigned to the Lorain Cemetery. The payments to the Race Chaplaincy of America, an organization that provides religious services to race track employees, are donations by the CCA. Defendant Smith has made no showing, nor can he, that the transaction are similar to those in which he engaged. His motion to compel regarding this Request should be denied.

Objections Relating To The Diocese Transactions:

The Diocese objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

For the same reasons as stated above, even assuming the two listed transactions represent additional compensation for Father Wright, such compensation is not relevant to the charges against defendant Smith. Moreover, the Diocese, after a diligent search, could not locate any documents relating to the 1992 Provident Bank transaction. Apparently defendant Smith has the information as he attached the money order to his Motion.

Item 5. DOCUMENTS RELATING TO PAYMENTS TO MRS. RENEE BALS.

Objections:

The Diocese objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

One of the missions of any religious organization, including the Catholic Church, is to assist persons in need. In the case of Mrs. Bals, her husband, who at one time was a deacon in the Catholic Church, engaged in wrongful conduct for which he was prosecuted in Lake County. Because of his conduct, he lost his license to teach. Mrs. Bals, the mother of eight children, suffered significant financial hardship as a result of her husband's wrongdoing. The Diocese assisted Mrs. Bals financially for a period of time, and IRS Forms 1099 were issued in connection

with that assistance. Once again, the payments have no similarity to the kick-backs at issue in this case.⁶

Item 6. DOCUMENTS RELATING TO ALLEGED COMPENSATION PAID TO RELATIVES.

Objections Relating To Payments By The Diocese:

The Diocese objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

With respect to the Diocese, this item lists checks to Orion Consulting and to Stephen Keefe. Each has persons associated with them who are related to persons associated with the Diocese; thus, there is a family connection. But what defendant Smith has not shown, and cannot show, is that either failed to provide the services for which each was retained. Each did. Moreover, there is nothing illegal about hiring relatives. And the sole reason defendant Smith offers for seeking the documents is the family connection. That does not make the requested documents relevant. This Court should so hold and deny defendant Smith's request for the documents.

Objections Relating To Payments By CCA:

CCA objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

Defendant Smith's request for Wright Landscaping documents is even more egregious. Although Father John Wright shares the same last name as Wright Landscaping, there is no known

⁶ Defendant Smith also is wrong regarding his suggestion that only Father Wright was involved in the decision to provide temporary assistance to Mrs. Bals. Others were involved in that decision.

relationship between Father Wright and persons who owned or operated Wright Landscaping. But even if there were, as discussed above, there is nothing wrong with hiring a relative to provide services. In this case, Wright Landscaping provided snowplowing services for some of the Catholic Cemeteries within the Diocese. There is no basis, and defendant Smith has not shown one, for compelling production of these documents.

Item 7. FATHER WRIGHT'S "CONFIDENTIAL" AND "SECRET" FILES.

Objections:

The Diocese objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

Defendant Smith argues that he is entitled to access to Father Wright's files⁷ under the guise of determining: (1) whether any disciplinary action was taken against Father Wright for certain financial transactions and (2) whether there is evidence of unidentified conduct that would reflect on his credibility. As previously noted, Rule 17(c) cannot be used to obtain documents solely for impeachment purposes. *E.g., Hughes*, 895 F.2d at 1146.

Furthermore, as to the former request, there are no such documents in Father Wright's file.⁸ As to the latter request, defendant Smith provides no specifics. He has, however, offered to provide information to the Court *in camera* if requested to do so. For now, therefore, it is impossible to know to what defendant Smith is referring. Whatever he has in mind, however,

⁷ The description of the files maintained for priests within this Diocese has changed. There is no longer a separate "Confidential" file for priests. Moreover, there never was a "secret" file for Father Wright.

⁸ The file was reviewed in connection with defendants' prior request for Father Wright's file. If the Court requests an affidavit regarding the lack of any such documents in Father Wright's file, one will be provided.

there is nothing in Father Wright's file that goes to his credibility regarding any of his obligations as Legal and Financial Secretary for the Diocese or as Director of Catholic Cemeteries.

Defendant Smith has advanced no basis, and there is none, that would justify granting him access to the file maintained by the Diocese relating to Father Wright's priesthood. The Request for the file should be denied.

II. DOCUMENTS ALLEGEDLY RELATING TO "OFF-BOOK ACCOUNTS"
(Items 8 Through 10 Of The Draft Subpoena).

Defendant Smith argues that he is entitled to documents relating to the existence of "off-book" accounts — not just at the Diocese, but at the approximately 230 parishes within the Diocese as well, each of which maintains its own set of financial records. He never explains how the existence of such accounts, especially at the parish level, relates to the charges against him. Without a specific connection between those charges and the supposed off-book accounts, the Diocese should not be required to respond to these Requests.

**Item 8. DOCUMENTS RELATING TO FINANCIAL REVIEWS OF THE PARISHES
AND ALL OF THE DIOCESE'S CONSTITUENT ENTITIES FOR FOURTEEN YEARS.**

Objections:

The Diocese objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary. The Diocese also objects on the grounds that the Request is unreasonable and oppressive.

Basis For Objections:

Defendant Smith argues that he is entitled to (1) documents relating to financial reviews of the Diocese's approximately 230 parishes (referred to in the draft subpoena as "Agreed Upon Procedures") and (2) management letters issued by the independent public accounts for the Diocese and all of its constituent organizations for the past 13 years, because they supposedly will

show the use of "off-book accounts." He provides no explanation as to why, assuming such accounts exist, information relating to them is relevant or material to the case against him. For example, he does not assert, nor can he, that any one of the supposed accounts relate to any of the transactions at issue in the indictment.

Indeed, if, as he asserts, everyone was aware of the accounts, including the auditors, there could not possibly be any attempt to conceal or hide them. Without something more than mere hyperbole, the Diocese should not be required to compile, review and produce the volume of documents called for by this Request.

Item 9. DOCUMENTS RELATING TO A MERRILL LYNCH ACCOUNT MAINTAINED BY THE OFFICE OF CATHOLIC EDUCATION OF THE DIOCESE OF CLEVELAND.

Objections:

The Diocese objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

Defendant Smith asserts that he is entitled to all information about this account because it is an "off-book" account. As discussed immediately under Item 7 above, whether any particular account was or was not an "off-book account" is not relevant to the issues in this case. Moreover, the account, which was closed in 2006, was not an "off-book" account. Therefore, the premise upon which defendant Smith's Motion is based is erroneous. His Motion with respect to this Request should be denied as well.