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Via Electronic Filing

June 10, 2008

Honorable Carol Bagley Amon
United States District Court Judge
United States District Court –
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: United States v. Timothy Donaghy
Case No. 07-CR-587-01

Dear Judge Amon:

We respectfully request the Court issue a subpoena under Federal Rule of Criminal Procedure 17(c) for certain documents in the possession of the NBA relating to its request for restitution in this matter. Sentencing in this case is now scheduled for July 14, 2008. A copy of our proposed subpoena is attached hereto.

Introduction

On June 5, 2008, the National Basketball Association ("NBA") sent a letter to United States Probation Officer Brandon T. Maxon and requested that the letter be included in the Pre-sentence Investigation Report ("PSR"). In that letter, the NBA alleges for the first time that Tim Donaghy owes the NBA \$1 million in restitution. The timing of the NBA's letter is rather curious. Sentencing in this matter was originally scheduled for November 9, 2007. Prior to completing its PSR, the United States Probation Department ("USP" or "Probation") sent the NBA a Request for Victim Statement and Affidavit of Loss. PSR ¶ 17. On October 4, 2007, the NBA sent Probation a statement that made no request for restitution from Mr. Donaghy; and apparently the NBA did not return a completed Affidavit of Loss. On May 19, 2008, Mr. Donaghy filed a Sentencing Letter with the Court relating to this matter.

In response to Mr. Donaghy's Sentencing Letter, the NBA has changed its position and now asserts it is owed \$1 million (to the penny) in restitution for, among other things, a purported "internal investigation" conducted by outside counsel. The NBA's \$1 million demand, interestingly, came immediately after Mr. Donaghy raised issues concerning the Government's conduct in this case, and the possible influence exerted by the NBA herein. The NBA, however, provides no support whatsoever for this demand, which appears to be a transparent effort to intimidate Mr. Donaghy. Because of the NBA's submission, the issue of restitution is now before the Court.¹

¹ Mr. Donaghy denies the NBA's entitlement to any restitution beyond what was set out in our Sentencing Letter, and we reserve all of our legal arguments regarding restitution until the time of sentencing.

Legal Argument in Support of Rule 17(c) Subpoena

Federal courts do not have inherent power to order a defendant to make restitution. See *United States v. Reifler*, 446 F.3d 65, 127 (2d Cir. 2006). Rather, a district court's ability to impose restitution is created by statute. See *United States v. Casamento*, 887 F.2d 1141, 1177 (2d Cir. 1989). Subparagraph (b)(4) of 18 U.S.C. § 3663A, authorizes restitution to recompense a victim for certain actual losses and expenses incurred while participating in the Government's investigation and prosecution of the offense of conviction. To determine a restitution amount, the Court must consider only a victim's actual losses "directly resulting from the conduct forming the basis for the offense of conviction." *United States v. Germosen*, 139 F.3d 120, 130-31 (2d Cir. 1998) (reversing a district court's restitution order where it included amounts lost from uncharged relevant conduct) (internal quotation and citation omitted). While a district court may make a reasonable estimate of restitution based on findings of fact, it cannot speculate. See *United States v. Catoggio*, 326 F.3d 323, 329-330 (2d Cir. 2003); see also *United States v. Jaffe*, 314 F. Supp. 2d 216, 227 (S.D.N.Y. 2004) ("At this point, the outcome of civil litigation is speculative and should not affect an order to make restitution."). Evidence in the record must support the findings of fact underlying the district court's determination of a restitution amount. Cf. *Germosen*, 139 F.3d at 130; see also 18 U.S.C. § 3664(a), (d).

Rule 17(c) permits issuance of subpoenas that "order [witnesses] to produce any books, papers, documents, data, or other objects the subpoena designates." The "orderly and desirable procedure" for issuance of a Rule 17(c) subpoena ordering delivery of materials before the proceeding at which they will be used is for the defendant to move the court to invoke its discretion in advance of issuing such a subpoena. *United States v. Gonzalez*, No. 94 CR 134(WK), 2002 WL 31641109, at *1 (S.D.N.Y. Nov. 13, 2002).

To obtain pretrial production of evidence under Rule 17(c), a party must demonstrate: "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" *Gonzalez*, 2002 WL 3164109, at *1 (quoting *United States v. Nixon*, 418 U.S. 683, 700 (1974)).² The document categories set out in the proposed subpoena meet each of these criteria.

Here, all of the documents sought by Mr. Donaghy are "evidentiary and relevant" to the restitution issue. For instance, to address the NBA's claim for an even \$1 million in

² Rule 17(c) subpoenas may be issued in conjunction with sentencing hearings. *Gonzalez*, 2002 WL 31641109, at *1.

restitution, Mr. Donaghy is entitled to documents relating to whether: 1) the NBA actually incurred fees and expenses, if any, that could be recovered under Section 3663A(b)(4); 2) the NBA's restitution claim includes fees and expenses that are not recoverable under the limiting authority of Section 3663A(b)(4); and 3) the NBA's internal investigations concern the misconduct of employees unrelated to Mr. Donaghy.³

For example, document categories 1 through 4 of the proposed subpoena bear on this Court's calculation of the NBA's alleged actual loss, recoverable, if at all, under Section 3663(A)(b)(4). As part of its restitution claim, we believe that the NBA also apparently includes significant sums that, as a matter of law, could not be recovered under Section 3663A. Nevertheless, the documents requested should include all bills and payments for purported legal services and expenses. Because the NBA has not specified the amounts it is claiming for each category listed in its June 5 letter and has failed to provide any documentation supporting its claim, the documents are also necessary to identify the portion of the NBA's claim that may or may not be attributable to amounts falling within Section 3663A.

Document categories 5 through 6 of the proposed subpoena request NBA communications with the Government; documents relating to the NBA's cooperation with the Government; and documents generated as a result of the internal investigations conducted by the NBA. See *In re Martin Marietta Corp.*, 856 F.2d 619, 622 (4th Cir. 1988) (where the Fourth Circuit reversed the district court's decision to excise from a Rule 17(c) subpoena defendant's request for former employer's internal audit papers, finding the "audit is clearly of evidentiary value" under the *Nixon* factors). The documents in these categories will assist this Court in parsing out the activities of counsel and consultants, as well as other expenses, that are not statutorily authorized to be recompensed under law.

Further, document categories 7 through 10 of the proposed subpoena request, among other things, NBA communications with USP and other Government agencies with respect to the NBA's victim impact statement and claim for restitution. For eight months, the NBA took the apparent position that it was not owed any restitution. Now, only after Mr. Donaghy's Sentencing Letter, the NBA has made an unsubstantiated claim for \$1 million. The documents in these categories will shed light on any justification the NBA provided concerning its restitution claim, which came months after the originally-scheduled date of sentencing in this case.

All the proposed documents fall within the remaining *Nixon* factors – they are sought for possible introduction at the sentencing hearing and are in the sole possession of the NBA; and, in addition, Mr. Donaghy has no other way to procure them. Indeed, obtaining the documents in advance of sentencing will avoid unreasonable delay and

³ It appears that, as part of its request for restitution, the NBA seeks fees relating to the gambling activities of other referees as well as activities of the league that were the subject of a federal investigation unconnected to any purported misconduct by Mr. Donaghy.

contribute to a more efficient sentencing hearing. We anticipate that there will be a significant number of documents responsive to the proposed subpoena, and obtaining these documents in advance of sentencing will allow counsel to tailor its presentation to this Court. The subpoena is being sought in good faith to obtain documents necessary to address and rebut fully the restitution claim submitted by the NBA. The proposed subpoena will ensure that the Court has all the information it needs to exercise its discretion with respect to restitution.⁴

Finally, as the Court is aware, Mr. Donaghy initiated full and complete cooperation with federal authorities at the very beginning of the investigation. That cooperation was communicated to the NBA, thus obviating any need to conduct an "internal investigation" of Mr. Donaghy's conduct. Indeed, we believe that the documents requested herein will demonstrate that the "internal investigation" actually focused on the activities of other NBA employees; and thus, the cost of such an investigation would not be recoverable under law.

Therefore, we respectfully request that the Court issue the proposed subpoena.⁵

Respectfully,

John F. Lauro

John F. Lauro

JFL/gmc

cc: AUSA Jeffrey A. Goldberg
AUSA John D. Buretta

⁴ The proposed subpoena should present no hardship to the NBA, since in the June 5 letter to Mr. Maxon, the NBA offered to provide "further detail" supposedly supporting its restitution claim.

⁵ Counsel respectfully requests that no hearings in this matter be held from June 16 – 23, because the undersigned will be lead counsel in the arbitration proceeding in Florida in the matter of *Bagley v. Northeast Securities, Inc., et al.*, FINRA Case No. 07-02242, and is then scheduled to attend a friend's wedding in Hawaii.