UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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United States of America, 03 Cr. 717 (MGC)

- against - MEMORANDUM OPINION

Martha Stewart and Peter Bacanovic,

Defendants.

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Cedarbaum, J.

The Government has applied for two subpoenas duces tecum pursuant to Federal Rule of Criminal Procedure 17(c). The first subpoena is addressed to the law firm of Wachtell, Lipton, Rosen & Katz ("Wachtell, Lipton"), attorneys for defendant Martha Stewart. The other subpoena is addressed to defendant Peter Bacanovic.

The proposed subpoena to Wachtell, Lipton seeks eleven categories of documents, which fall into four groups: (1) documents concerning statements Martha Stewart made in the two interviews that are the basis for the false statements and obstruction of justice counts of the Indictment; (2) documents concerning communications between Stewart's lawyers and the U.S. Attorney's Office, the SEC, and Peter Bacanovic; (3) documents concerning Stewart's involvement in preparing two letters and two

of the public statements that form the basis of Count Nine of the Indictment; and (4) Wachtell, Lipton's billing records and records of payment relating to Stewart's sale of ImClone stock.

The proposed subpoena to Peter Bacanovic seeks material that Bacanovic and his lawyer removed from Bacanovic's office when he was suspended by Merrill Lynch in June 2002. Specifically, the Government seeks four categories of documents: (1) documents relating to the SEC investigation of Bacanovic; (2) Bacanovic's client communications database and other business and client contacts; (3) Bacanovic's business expense records; and (4) Bacanovic's regulatory compliance materials and professional licenses.

For the reasons that follow, the Government has not made a sufficient showing with regard to many of the items sought.

Discussion

In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court adopted Judge Weinfeld's four-part test governing what a party seeking a pre-trial subpoena duces tecum must show to obtain it:

> (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."

Id. at 699-700 (quoting United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y 1952) (Weinfeld, J.)) (footnote omitted). The Nixon Court abbreviated the test as comprising three hurdles: relevancy, admissibility, and specificity. Id. at 700. The Nixon Court pointed out, as many subsequent courts have affirmed, that the purpose of Rule 17(c) is not to enable parties to conduct discovery, but "to expedite trial by providing a time and place before trial for the inspection of subpoenaed materials." Id. at 698-99 (citing Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951)).

I. The Proposed Subpoena Directed to Wachtell, Lipton

Apart from the fact that the Government has not made the showing required by Nixon, nine of the eleven categories of documents sought from Wachtell, Lipton are on their face either protected as work product or attorney-client privileged.

With respect to attorneys' notes or materials prepared in connection with representing Martha Stewart during the Government's investigation preceding the Indictment in this case, the Government has not made an adequate showing of the need for any of the documents requested. For at least four of the

categories of documents, Government lawyers were involved in the communications in question and have their own notes. With respect to the fifth category -- documents concerning communications with Peter Bacanovic -- Wachtell, Lipton has submitted an affidavit stating that it possesses no such documents.

The Government's argument that the existence of the Indictment in this case eliminates attorney-client privilege or work product protection with regard to evidence relating to statements charged in the Indictment is not persuasive. The crime-fraud exception does not provide the broad elimination of attorney-client privilege and work product protection that the Government seeks. As Judge Winter pointed out in In re Richard Roe, "the crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud. If it did, the privilege would be virtually worthless because a client could not freely give, or an attorney request, evidence that might support a finding of culpability." In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995). Instead, confidential communications must be in furtherance of the criminal or fraudulent conduct for the crime-fraud exception to apply. See id. If the law were otherwise, every defendant accused of a crime involving the making of false statements to a government agency would lose the protection of

the attorney-client privilege with respect to prior statements to his lawyer concerning the same subject matter. Although an indictment may provide probable cause to believe that the crime charged was committed, an indictment, standing alone, does not provide probable cause to believe that Stewart's communications with her lawyers were in furtherance of the conduct charged in the Indictment.

With respect to items ten and eleven, which request billing records, these documents are not privileged, see In re Grand Jury Subpoena Duces Tecum Served on Gerald L. Shargel, 742 F.2d 61, 62 (2d Cir. 1984), and accordingly any such documents should be produced.

II. The Proposed Subpoena Directed to Peter Bacanovic

With respect to the first three categories of materials sought from Peter Bacanovic, the Government has not met its threshold burden of demonstrating their relevance or admissibility, in part because of the lack of specificity in the requests. Accordingly, I do not reach the defendant's invocation of the Fifth Amendment for most of the requests.

With respect to the items characterized as professional licenses and compliance materials, the Government argues that they are relevant to Bacanovic's awareness of the confidentiality

requirements of Merrill Lynch and the securities industry. The Government's claim of relevance thus depends on the fact that the documents were produced by Bacanovic from his files. Clearly such an act of production is testimonial, and may not be compelled. See United States v. Hubbell, 530 U.S. 27, 36 (2000).

Conclusion

For the foregoing reasons, the Government's application is denied, except with respect to the proposed subpoena to Wachtell, Lipton for billing records.

SO ORDERED.

Dated: New York, New York
December 29, 2003

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MIRIAM GOLDMAN CEDARBAUM

United States District Judge