UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	:	
	:	Criminal Number
v.	:	3:06CR137 (CFD)
	:	
RONALD E. FERGUSON,	:	
CHRISTOPHER P. GARAND,	:	
ROBERT D. GRAHAM,	:	
CHRISTIAN M. MILTON, and	:	
ELIZABETH A. MONRAD	:	
	:	

RULING ON MOTIONS TO COMPEL AND MOTIONS TO QUASH DEFENDANTS' FED. R. CRIM. P. 17(C) SUBPOENAS

Defendants Graham, Ferguson, and Monrad have each issued subpoenas pursuant to Federal Rule of Criminal Procedure 17(c) that have been contested both by the government and the subpoena recipients. For the following reasons, Monrad and Ferguson's motions to compel compliance with these subpoenas are denied, and the subpoena recipients' motions to quash the subpoenas are granted.

A. The subpoenas at issue

This ruling addresses three sets of Rule 17(c) subpoenas: (1) Graham's subpoenas of Jones Day, LLP ("Jones Day") and Linklaters LLP ("Linklaters"); (2) Ferguson's subpoenas of American International Group, Inc., National Union Fire Insurance Company of Pittsburgh, Pennsylvania,[1] and Hartford Steam Boiler Inspection and Insurance Company[2] (collectively,

[1]National Union Fire Insurance Company of Pittsburgh, Pennsylvania is a member company of AIG Group, Inc.

[2]Hartford Steam Boiler Inspection and Insurance Company is a wholly owned subsidiary of AIG Group, Inc.

"AIG"); and (3) Ferguson's subpoena of Berkshire Hathaway, Inc. ("Berkshire Hathaway"), and Monrad's and Ferguson's subpoenas of General Reinsurance Co. ("Gen Re")[3].

Defendant Graham issued a 17(c) subpoena to Jones Day and Linklaters seeking all notes, memoranda, and other materials from interviews conducted by the government or by counsel for Gen Re with John Houldsworth and Richard Napier, who are former Gen Re employees. Jones Day is criminal defense counsel for Napier, and Linklaters is criminal defense counsel for Houldsworth. Both men have already pled guilty to conspiracy to commit securities fraud for their role in the loss portfolio transaction ("LPT") at issue in this case.[4] Both are cooperating with the government, are included on the government's witness list, and are expected to be central witnesses in the government's case in chief. Neither Napier nor Houldsworth has been sentenced. Jones Day, Linklaters, and the government all object to Graham's subpoena on two grounds: (1) Graham failed to demonstrate that the subpoenas request documents properly obtained through a 17(c) subpoena; and (2) the requested documents are privileged attorney work product.

Defendant Ferguson seeks to compel AIG, which not a party to this case, to produce notes

---

[3]Gen Re is a subsidiary of Berkshire Hathaway. Since Ferguson issued the same subpoena to Gen Re and Berkshire Hathaway, for purposes of this ruling the Court will refer to both companies together as "Gen Re."

[4]The LPT at issue here is an allegedly fraudulent two-stage reinsurance transaction between AIG and Gen Re which had the effect of boosting AIG's loss reserves by $250 million in the fourth quarter of 2000 and by $250 million in the first quarter of 2001. At the time of the transaction, defendant Ferguson was the chief executive officer ("CEO") of Gen Re; defendant Garand was a senior vice president and the chief underwriter of Gen Re's finite reinsurance operations; defendant Graham was legal counsel and a senior vice president at Gen Re; defendant Milton was AIG's vice-president of reinsurance; and defendant Monrad was the chief financial officer ("CFO") of Gen Re.

and memoranda created by AIG's lawyers during interviews with AIG employees concerning AIG's internal investigation of the LPT.[5] The subpoena seeks these documents from both AIG's in-house counsel and its outside counsel at the law firm Paul, Weiss, Rifkind, Wharton, & Garrison LLP ("Paul, Weiss"). AIG and the government oppose the subpoena on the ground that it is unenforceable under Rule 17(c), and, alternatively, because the documents it seeks are privileged. Ferguson argues that the subpoena is proper under Rule 17(c) and that neither the attorney-client privilege nor the attorney work product privilege protects the documents it seeks from disclosure.

Monrad and Ferguson subpoenaed Gen Re, also a third party here, for two types of documents[6]: (1) notes and reports of interviews conducted by Munger Tolls & Olsen, LLP ("MTO"), Gen Re's outside counsel, with Gen Re employees concerning the LPT as part of an internal investigation, and (2) interview transcripts and attorney notes from an investigation of John Houldsworth's involvement in several reinsurance transactions, conducted for Gen Re by Lovells LLP and A&L Goodbody.[7] Gen Re and the government oppose the subpoenas on the ground that their demands exceed the confines of Rule 17(c) and, alternatively, because the requested materials are privileged attorney work product or attorney-client communications.

B. Legal Standard

---

[5]Ferguson's subpoena also requested many other categories of documents, but compliance with the subpoena's request for this sub-category of documents is the only remaining dispute between the parties.

[6]As with the subpoena Ferguson issued to AIG, these subpoenas also requested many other categories of documents, but compliance with the requests for this sub-category of documents is the only remaining dispute between the parties.

[7]Lovells is a British law firm and A&L Goodbody is an Irish law firm.

Although the defendants contend otherwise, the standard applied to a motion to quash a 17(c) subpoena is well settled. Federal Rule of Criminal Procedure 17(c) is directed to trial witnesses, and provides that "[a] subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered into evidence." The purpose of a 17(c) subpoena is "to implement the Sixth Amendment guarantee that the defendant shall have compulsory process to obtain evidence in the defendant's favor." 25 James Wm. Moore et al., Moore's Federal Practice § 617.08[1] (3d ed. 2007). However, the Supreme Court has warned that a 17(c) subpoena "[is] not intended to provide a means of discovery for criminal cases." United States v. Nixon, 418 U.S. 683, 698 (1974). On a motion to quash a 17(c) subpoena, the subpoena's proponent bears the burden of proving that it should be enforced. Id. at 699-700. The party seeking enforcement of the subpoena must "clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." Id. at 699-700. The considerations underlying these three prongs also include:

> (1) [whether] the documents are evidentiary and relevant; (2) [whether] they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) [whether] the party cannot properly prepare for trial without such production . . . and [whether] the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) [whether] the application is made in good faith and is not intended as a general 'fishing expedition.'

Id. at 699. Enforcement of 17(c) subpoenas are within the sound discretion of the district court. Id. at 702. The district court may also choose to modify the subpoena instead of fully quashing it. See Fed. R. Crim. P. 17(c)(2).

In seeking enforcement of their subpoenas, Graham, Ferguson, and Monrad each assert

that the stringent standard established by the Supreme Court in United States v. Nixon does not apply to 17(c) subpoenas issued to a third party, because doing so would put criminal defendants at an unfair disadvantage to the government. The defendants readily concede that their subpoenas primarily seek impeachment materials, namely prior statements of Houldsworth, Napier, and other individuals on the government's witness list. They also admit that they believe the subpoenas could possibly uncover additional defense witnesses or evidence that could, in turn, lead to exculpatory evidence. Neither of these types of evidence are obtainable through a 17(c) subpoena under Nixon. Nixon, 481 U.S. at 701; United States v. Cherry, 876 F. Supp. 547, 553 (S.D.N.Y. 1995) ("Rule 17(c) can be contrasted with the civil rules which permit the issuance of subpoenas to seek production of documents or other materials which, although not themselves admissible, could lead to admissible evidence."); see United States v. Cuthbertson, 630 F.2d 139, 146 (3d Cir. 1980) (cautioning against the use of 17(c) subpoenas as a "broad discovery device"). The defendants point out that the government possesses broad subpoena power through the grand jury that can readily access documents outside the scope of Nixon, including materials that are not admissible at trial. See United States v. R. Enterprises, 498 U.S. 202, 299-300 (1991) ("the Nixon standard does not apply in the context of grand jury proceedings"). The defendants urge the Court to apply a relaxed standard to their subpoenas, such as that discussed in dicta by another district court within this Circuit in United States v. Nachamie, 91 F. Supp. 2d 552, 561-63 (S.D.N.Y. 2000). The Nachamie court considered using an alternative test to assess the validity of defendants' Rule 17(c) subpoenas issued to third parties: whether the requests (1) would provide information that is material to the defense, and (2) are not unduly oppressive to the subpoena's target. 91 F. Supp. 2d at 563. However,

although the Nachamie court analyzed the defendant's subpoenas under this alternative standard, the court ultimately based its ruling on application of the Nixon test.

The Court concludes that the Nixon test applies here. All district courts within this Circuit, including the Nachamie court, have applied Nixon to assess the validity of 17(c) subpoenas issued to third parties.[8] Nachamie, 91 F. Supp 2d at 563 (denying the motion to quash under "either the standard laid out in Nixon or the standard contained in Rule 17(c) itself"); see, e.g., United States v. Forbes, No. 02cr264, 2006 U.S. Dist. LEXIS 50595, at * 10-11 (D. Conn. July 25, 2006); United States v. Vought, No. 05cr268, 2006 U.S. Dist LEXIS 39664, at * 52 (D. Conn. June 15, 2006); United States v. RW Prof'l Leasing Servs. Corp., 228 F.R.D. 158, 161-62 (E.D.N.Y. 2005); United States v. Nektalov, No. S203CR828, 2004 U.S. Dist. LEXIS 13127, at * 4-5 (S.D.N.Y. July 14, 2004); United States v. Jasper, No. 00CR825, 2003 U.S. Dist. LEXIS 3647, at * 4-5 (S.D.N.Y. Mar. 13, 2003); Cherry, 876 F. Supp. at 552-53. The Court agrees with the analysis in these cases, and finds no compelling countervailing reason to employ a lesser standard to the subpoenas at issue here.[9] Application of the Nachamie test to give the defendants

---

[8]The defendants' reliance on a recent decision in the Southern District of New York, United States v. Stein, is inapposite. In that case, although Judge Kaplan discussed the policy behind Rules 16 and 17(c) and cautioned against a blind application of Nixon, he ultimately found that the documents sought by the defendants' subpoenas were within the possession of the government, so they were produceable under Rule 16. United States. v. Stein, 488 F. Supp. 2d 350, 364-66 (S.D.N.Y. 2007). Because of this, Judge Kaplan did not reach the issue of whether the subpoenas should have been analyzed under Nixon. Id. at 366.

[9]In particular, although the Court recognizes that the grand jury is able to obtain materials from third parties during a criminal investigation, the government may not use the grand jury to conduct discovery in a pending criminal case. United States v. Salameh, 152 F.3d 88, 109 (2d Cir. 1998) ("It is improper for the government to use a grand jury subpoena for the sole or dominant purpose of preparing for trial.") (citations and quotation marks omitted); Sara Sun Beale et al., Grand Jury Law and Practice § 9:16 (2d ed. 2004) ("[A]t the time the indictment is returned, the grand jury's investigative role is ended, and the rules of pretrial discovery take

license to obtain possible impeachment materials would eviscerate Rule 17's limitations on criminal discovery, a result for which there is no support in Nixon.[10] See Nixon, 418 U.S. at 698-99 (noting that a Rule 17(c) subpoena "was not intended to provide a means of discovery for criminal cases" and that "[the subpoena's] chief innovation was to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials").

C. Analysis[11]

1. The Graham Subpoena

Applying the Nixon test to Graham's subpoena, the Court concludes that it is unenforceable because the materials it seeks fail Nixon's admissibility requirement. Graham has provided no basis upon which the Jones Day and Linklaters attorney notes and memoranda could be admitted at trial.[12] Rather, Graham seeks these materials only because they could contain

---

effect to govern the extent to which the parties may use the legal process to obtain information about the case."). In light of this, the claimed disparity between the power of the government and criminal defendants to obtain documents to prepare for trial is not sufficiently significant to justify abandoning the stricter Nixon requirements.

[10]In Nixon, the Supreme Court explicitly refused to address whether a different standard applies to 17(c) subpoenas directed to a third party instead of to the government. 418 U.S. at 700 n.12. In upholding the subpoenas' enforcement, however, the Nixon Court noted that the evidence the subpoenas sought from the third party did satisfy the stringent relevancy and admissibility requirements the Court imposed for 17(c) subpoenas generally. Id. As discussed below, the defendants here made no such preliminary showing of admissibility and relevance.

[11]Although the parties' briefs raised important questions concerning attorney-client privilege, attorney work product privilege, and the waiver of those privileges, because the Court concludes that none of the subpoenas is enforceable under Nixon, the Court need not address those questions here.

[12]Graham conceded that any statements Napier or Houldsworth made during the interviews with Gen Re or the government were not during the course of or in furtherance of the alleged conspiracy charged in this case. See Fed. R. Evid. 801(d)(2)(E). Thus, unlike the statements sought in Nixon, the statements here would not be admitted as substantive evidence,

impeachment material to be used during his cross-examination of Napier and Houldsworth at trial. As mentioned above, impeachment materials are not properly obtained through a 17(c) subpoena. Nixon, 481 U.S. at 701. Nixon requires the subpoena's proponent to provide a specific basis for the admissibility of the documents sought; mere "evidentiary value,"—meaning otherwise inadmissible evidence that could be used for cross-examination purposes—is insufficient. Forbes, 2006 U.S. Dist. LEXIS 50595 at *10-11 & n.12 (rejecting "evidentiary value" to be sufficient under Nixon and holding that "Rule 17(c) subpoenas 'may be used solely to secure specifically identified evidence for trial that is relevant and admissible.'" (quoting United States v. Libby, 432 F. Supp. 2d 26, 35 (D.D.C. 2006))). Since Graham made no such showing of admissibility here, his subpoena is unenforceable.

The Court further notes that this subpoena also fails Nixon's requirement that the material sought is not otherwise available to the defendant in advance of trial. The substance of the documents Graham seeks will be made available to him through the government's Jenks Act disclosures, currently scheduled for seven weeks prior to jury selection. Jones Day and Linklaters's represented to the Court that Napier and Houldsworth were not accompanied by counsel during the interviews Gen Re conducted as part of its internal investigation. Because of this, Graham now seeks only the Jones Day and Linklaters attorney notes and memoranda pertaining to the government's interviews of Napier and Houldsworth. Since both men are on the government's witness list, the government must disclose any statements they made during those interviews pursuant to their Jenks Act obligations. See 18 U.S.C. § 3500. This further

---

but could only be used as prior inconsistent statements to impeach Napier and Houldsworth.

renders the enforcement of Graham's subpoena unnecessary and inappropriate under Nixon.[13]

2. The Monrad and Ferguson Subpoenas of Gen Re

The subpoenas Monrad and Ferguson issued to obtain Gen Re's attorneys' notes and memoranda from its internal investigation of the LPT are also unenforceable under Nixon. As with the Graham subpoena, Monrad and Ferguson provide no basis for the admissibility of the materials they seek other than their "evidentiary value" for impeachment purposes. For the reasons discussed above, this provides an insufficient justification for the subpoenas' enforcement. See Forbes, 2006 U.S. Dist. LEXIS 50595 at * 10-11 & n.12; Libby, 432 F. Supp. 2d at 35; Cherry, 876 F. Supp. at 552-53.

Additionally, many of the documents the subpoenas seek from the Lovells investigation also fail Nixon's relevancy requirement. 418 U.S. at 699-701. Although part of the Lovells investigation concerned Houldsworth's role in the LPT, much of that investigation focused on his involvement in other transactions under scrutiny by Australian regulators. The Lovells materials

[13]Although the Court finds the Graham subpoena unenforceable under Nixon, Graham would not be entitled to the materials he seeks even if the subpoena satisfied the Nixon test. The work product of criminal defense counsel is highly privileged when made during the course of a representation. United States v. Doe, 959 F.2d 1158, 1166 (2d Cir. 1992) ("In a criminal case, except for scientific or medical reports, documents made by a defendant's attorneys or their agents in connection with the case are not discoverable."). This is because "[t]he interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the through preparation and presentation of each side of the case." United States v. Nobles, 422 U.S. 225, 238 (1975). "Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital." Id. Other district courts within this Circuit have also declined to order the type of disclosure Graham seeks when faced with nearly identical facts. See, e.g., United States v. Jacques Dessange, Inc., No. S299CR1182, 2000 WL 310345, at *3 (S.D.N.Y. Mar. 27, 2000) ("While it is understandable that [the defendant] seeks all possible material that may be of use to impeach this important trial witness, this desire alone is an insufficient ground for compelled disclosure of this kind of privileged material.").

pertaining to transactions other than the LPT are irrelevant here, and render those portions of the Monrad and Ferguson subpoenas further deficient under Nixon.

3. Ferguson's Subpoena of AIG

Finally, Ferguson's subpoena of AIG is also unenforceable under Nixon because he provided no basis for the admissibility of the materials he seeks. Ferguson also wishes to use his subpoena to obtain impeachment materials for trial. Although Ferguson argues that his substantial need for impeachment material mandates the subpoena's enforcement,[14] a 17(c) subpoena may not be used to obtain impeachment material or material that merely could lead to additional admissible evidence. Nixon, 481 U.S. at 701; Cherry, 876 F. Supp. at 553. Absent any showing that the materials specified in the subpoena constitute admissible evidence, it is unenforceable.[15]

D. Conclusion

The Court concludes that these four subpoenas are unenforceable because they seek

---

[14]Ferguson identifies these needs to be uncovering potential cross-examination material for government witnesses, identifying potential defense witnesses, understanding the testimony of government witnesses from AIG and Paul, Weiss, learning "what Mr. Greenberg [AIG's former CEO] may have said to avoid being indicted," and the right to access the "best evidence" of what witnesses know about the transaction. Mem. of Law in Supp. of Def. Ferguson's Mot. To Compel AIG to Comply with Rule 17(c) Subpoenas, at 23-28.

[15]Additionally, the Court finds Ferguson's assertion that AIG's files contain exculpatory statements by potential government witnesses to be an inadequate basis for enforcing his subpoena. Ferguson seeks to obtain AIG's notes from interviews with six potential witnesses identified in the government's Brady letter as having made exculpatory statements during government interviews, on the theory that they likely also made exculpatory statements to AIG's counsel during its internal investigation. However, the "mere hope" of finding exculpatory material is insufficient to justify enforcement of a 17(c) subpoena. Cuthbertson, 630 F.2d at146. Since Ferguson's purported need for exculpatory materials actually seems to be little more than speculation as to the contents of AIG's files, the Court declines to enforce the subpoena on this basis.

materials outside the proper scope of a Rule 17(c) subpoena. Accordingly, AIG's motion to quash [docket # 467], Gen Re's cross-motion to quash [docket # 471], Jones Day's motion to quash [docket # 430], and Linklaters's motion to quash [docket # 427] are granted. The government's motion to quash [docket # 416] is denied as moot. Ferguson's motions to compel [docket #s 419, 437] and Monrad's motion to compel [docket # 435] are denied.

SO ORDERED this 26th day of September, 2007, at Hartford, Connecticut.

/s/ Christopher F. Droney
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE