

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

UNITED STATES OF AMERICA)	
)	
v.)	
)	
DANIEL DOVE,)	Case No. 2:07cr00015
)	
Defendant.)	
)	

**DEFENDANT’S MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL COMPLIANCE WITH SUBPOENA
BY THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

COMES NOW Defendant Daniel J. Dove, by Counsel, in support of his Motion to Compel Discovery forthwith from the Motion Picture Association of America, Inc. (hereinafter “MPAA”):

I. Facts.

1. On April 16, 2008, upon Motion of the Defendant pursuant to Fed. Rule Crim. P. 17 and upon oral and written argument by counsel for the Defendant and for the Government, this Court ordered that the Defendant’s Motion for a Subpoena Duces Tecum to the MPAA be granted as to “all documents either referencing the defendant or reflecting communications by or with the defendant.”

2. On May 5, 2008, this Court issued a Subpoena pursuant to the Court’s Order of April 16, 2008, commanding the production of “[a]ll documents or objects in the possession of the [MPAA] dating from August 1, 2004 to the present referencing Daniel Dove or reflecting communications by or with Daniel Dove,” from the MPAA by May 19, 2008, to be produced in the Clerk’s Office of the Court at Abingdon. Exhibit “A.”

3. On May 9, 2008, the afore-mentioned Subpoena was legally served on the MPAA. Exhibit "B."

4. The MPAA failed to respond to the Subpoena by May 19, 2008.

5. The MPAA failed to file a motion to quash prior to or on May 19, 2008.

6. On May 19, 2008, the MPAA served by US Mail its "Objections and Responses" pursuant to Fed. R. Crim. P. 17 and Fed. R. Civ. Pro. 45 to the Subpoena on counsel for the Defendant and for the Government. Exhibit "C." The Certificate of Service stated that the document was mailed on May 19, although it was not internally metered until May 20, 2008. At 8:43 p.m. EDT on May 19, 2008, the MPAA transmitted by email a copy of its objections to counsel for Defendant.

7. Counsel for Defendant conferred with the MPAA to expedite the production of documents pursuant to the Subpoena, and was informed that the MPAA would forward to Counsel all responsive documents that it had located after a thorough search of its database and information held by MPAA employees who are or were involved with the MPAA investigation of Dove. See Exhibit "D."

8. Counsel received the documents forwarded by the MPAA on May 30, 2008. Exhibit "E."

9. The documents received by Counsel for Defendant do not appear to be a complete production of materials in the possession of the MPAA "dating from August 1, 2004 to the present referencing Daniel Dove or reflecting communications by or with Daniel Dove." In addition, the MPAA redacted a significant portion of the documents produced without explanation. Exhibit "E," at pp. 3-4.

II. Argument.

10. The MPAA did not follow proper procedure for responding to the Subpoena.¹

11. The MPAA did not timely respond or object to the Subpoena.²

12. The documents produced by the MPAA were not a complete response to the Subpoena.

13. The MPAA asserted defenses that are not applicable to the Subpoena. First and foremost, the MPAA did not assert a basis for its General or Specific objections based on alleged claims of attorney/client and work product privilege. Second, the MPAA did not provide a foundation for its assertion that a response to the Subpoena would be overly burdensome.

14. The Defendant has knowledge of documents generated by the MPAA that reference “duffman” or McCalister,” which are usernames known by the MPAA to have been used by Daniel Dove in communications relating to EliteTorrents.org, but which documents the MPAA did not produce in its response to the Subpoena.

15. In its production of documents to the Defendant, the MPAA redacted a significant portion of one communication without providing any reason or justification for the redaction: Counsel for the Defendant inquired as to the reason for the redaction, but has received no reply to the request for clarification. Exhibit “F.” Defendant submits that Rule 17(c) requires a Motion to Quash in the event of an assertion by the target of a subpoena duces tecum that requested material is privileged, but that no such motion was made in this instance. See In re Martin Marietta Corp. v. Pollard, 856 F.2d 619, 622 (4th Circ. 1988). Defendant further submits

¹ Pursuant to Fed. R. Crim. P. 17(c), the proper avenue to object to compliance with a subpoena is to file a motion to quash.

² The MPAA did not respond in any manner before the time for compliance had passed. See supra ¶ 6. Defendant submits that Fed. R. Civ. P. 45 does not apply to this matter, but in the event that the Court should find that Fed. R. Civ. P. 45 is applicable, that Rule requires objections to be filed “before the earlier of the time specified for compliance or 14 days after the subpoena is served.” Fed. R. Civ. P. 45(c)(2)(B).

that direct submission of responsive documents to the Court as contemplated in Rule 17(c) and ordered by the Court in this Subpoena, but not complied with by the MPAA, allows for sufficient control by the Court for the review and evaluation of documents or portions thereof that might or might not be protected by privilege.

16. Finally, in addition to failing to follow the proper procedures for responding to the Subpoena and objecting to compliance therewith, the MPAA has provided neither the Court nor the Defendant any information, much less to speak of sufficient information, to assess any potential claims for privilege and the validity of those claims.

WHEREFORE, the Defendant respectfully prays that this Honorable Court compel the MPAA to fully comply forthwith with the Subpoena issued to the MPAA in this matter, or otherwise hold the MPAA in contempt and enforce such remedies as the Court deems appropriate.

Respectfully submitted,
Daniel J. Dove

By: /s/ Michael B. Gunlicks
Counsel

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CERTIFICATE OF SERVICE

1). I hereby certify that on June 2nd, 2008, I caused to be electronically filed the above and foregoing **DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL COMPLIANCE WITH SUBPOENA** with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

Tyler G. Newby, Esq.
Computer Crime & Intellectual Property
Section, Criminal Division
US Department of Justice
Suite 600
1301 New York Avenue, N.W.
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Jay Prabhu, Esq.
U.S. Attorney's Office
Eastern District of Virginia
2100 Jamieson Ave.
Alexandria, VA 22314

2). I hereby certify that on June 2nd, 2008 I served by US Mail and by electronic mail a copy of the foregoing on counsel for the Motion Picture Association of America, Inc:

Orit H. Michiel, Esq.
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/s/ Michael B. Gunlicks
Attorney for Defendant