

JOHN F. LAURO
Member of FL, NY, & DC Bars
jlauro@laurolawfirm.com

SCOTT J. FLINT
Member of FL Bar
sflint@laurolawfirm.com

GUS M. CENTRONE
Member of FL Bar
gcentrone@laurolawfirm.com

FLORIDA
Bank of America Plaza
101 East Kennedy Blvd.
Suite 3100
Tampa, Florida 33602
P: 813.222.8990
F: 813.222.8991

NEW YORK
1540 Broadway
Suite 1604
New York, New York 10036
P: 646.746.8659
F: 212.938.0858

John F. Lauro, P.A.
WWW.LAUROLAWFIRM.COM

LAURO LAW FIRM

FLORIDA • NEW YORK

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.

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA

V.

TIMOTHY DONAGHY

SUBPOENA IN A CRIMINAL CASE

CASE NUMBER 07-CR-587 (CBA)

TO:

Records Custodian(s)
National Basketball Association, Inc.
645 Fifth Avenue
New York, NY 10022

c/o New York Secretary of State, Statutory Agent
One Commerce Plaza
99 Washington Avenue
Albany, NY 12231

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court

PLACE

Chambers of the Honorable Carol B. Amon
United States District Court, Eastern District of New York
225 Cadman Plaza East
Brooklyn NY 11201

COURTROOM

DATE AND TIME

June 27, 2008 10:00 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s)

See Exhibit A attached hereto.

U.S. MAGISTRATE JUDGE OR CLERK OF COURT

DATE

(By) Deputy Clerk

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

John F. Lauro
Lauro Law Firm
1540 Broadway Suite 1604
New York NY 10036
(646) 746-8659

PROOF OF SERVICE

RECEIVED BY SERVER

DATE PLACE
SERVED

DATE PLACE
SERVED ON (PRINT NAME) FEES AND MILEAGE TENDERED TO WITNES
 YES NO AMOUNT \$_____

SERVED BY (PRINT NAME) TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

EXHIBIT A

INSTRUCTIONS

For the purposes of compliance with this Subpoena:

1. The documents requested herein encompass all documents which are in the possession, custody, or control of the National Basketball Association, Inc. or any of its agents, employees, officers, attorneys, retained law firms and other corporate entities, and/or other persons authorized to act on its behalf; and of any of its parents, affiliates or subsidiaries and any of their agents, employees, officers, attorneys, retained law firms and other corporate entities, and/or other persons authorized to act on the behalf of any such entities; and for which the National Basketball Association, Inc. or any of its affiliates, subsidiaries, agents, employees, officers, attorneys and/or other persons authorized to act on their behalf have the right or ability to request, review, or access such materials. The documents requested herein are to be produced as they are kept in the usual course of business or organized and labeled to correspond to the numbered paragraphs or categories of particular requests. If there are no documents responsive to a particular numbered paragraph and/or category, so state in writing.

2. The documents requested should be provided only during the relevant time period, which is January 1, 2007, to the present.

3. All documents produced from inside the United States are to be accompanied by a certification under Rule 902(11) of the Federal Rules of Evidence, substantially in the form of the certification attached hereto as Exhibit B. All documents produced from outside the United States are to be accompanied with a certification under

Title 18, United States Code, section 3505, substantially in the form of the certification attached hereto as Exhibit C.

4. For each responsive document withheld under a claim of privilege, the following information shall be provided:

(a) whether the document has been previously provided to any outside party in full or in redacted form, including but not limited to the United States Probation Department or Office for the Eastern District of New York, U.S. Department of Justice, any U.S. Attorney's Office, the U.S. Postal Inspection Service, the Federal Bureau of Investigation, or any other agency, office, or bureau of the United States Government, or any officer, agent, or employee of any such department, agency, bureau, or office, or parties in a private lawsuit, mediation, or arbitration;

(b) the nature of the privilege (including work product) that is being claimed and, if applicable, the state rule or law governing such claim;

(c) the identities of all persons who have or had access, or purport to have or have had access, to said document;

(d) the type of document (i.e., letter, memorandum, etc.);

(e) the general subject matter of the document;

(f) the date of the document; and

(g) such information as is sufficient to identify the document including, where appropriate, the document author(s), addressee(s), and where not apparent, the relationship between the author(s) and addressee(s).

5. All documents produced shall be provided in their entirety notwithstanding the fact that portions thereof may contain information not requested. All interim as well as final versions of the document shall be produced, and all versions or copies that are not identical to the original or other produced copy of the document, whether due to handwritten notations, modifications, changes, amendments, revisions or otherwise, shall be produced and/or otherwise treated as a separate document.

6. If any requested document has been destroyed or discarded, or is no longer in existence, that document is to be identified by stating:

- (a) its date of destruction or discard;
- (b) the manner and reason for its destruction or discard; and
- (c) the identity of the document's last custodian and of each person responsible for the document's destruction or unavailability.

7. If any requested document was, but no longer is in the NBA's possession, state all circumstances of its disposition and whether any copy is in the possession, custody or control of some other person or entity and indicate why the document or a copy cannot be produced.

8. Where anything has been deleted from a document produced:

- (a) specify the nature of the material deleted;
- (b) specify the reason(s) for the deletion; and
- (c) identify the person(s) responsible for the deletion.

9. If any request herein cannot be complied with in full, it shall be complied with to the extent possible with an explanation as to why full compliance is not possible.

10. The requests shall be deemed continuing so as to require further and prompt supplemental production if, between the date hereof and the time of a hearing on the NBA's request for restitution, any additional documents come into the National Basketball Association's possession, custody or control or into the possession, custody or control of its agents or representatives, including any attorneys, accountants and advisors.

11. All references to the singular shall be deemed to include the plural, and all references to the plural shall be deemed to include the singular.

12. All references to masculine gender shall be deemed to include the feminine and the neuter.

13. Requests for e-mails include those stored or archived on the user's personal hard drive(s), any shared or public network drives, as well as those recoverable from back-up tapes or similar such data compilations.

14. References to any governmental department, agency, office, or bureau should be read to include any person employed thereby and acting within any official capacity as an executive, officer, agent, or employee.

DEFINITIONS

Unless otherwise noted, the terms set forth below are defined as follows:

1. The "NBA" shall mean and include, individually or collectively, as the case may be: the National Basketball Association, Inc.; any of its agents, employees, officers, attorneys, retained law firms and other corporate entities, and/or other persons authorized to act on its behalf; and any of its parents, affiliates or subsidiaries and any of

their agents, employees, officers, attorneys, retained law firms and other corporate entities, and/or other persons authorized to act on the behalf of any such entities.

2. "Government" shall mean the United States Probation Department or Office for the Eastern District of New York, the U.S. Department of Justice, any United States Attorney's Office, the Federal Bureau of Investigation, and any other agency, office, or bureau of the United States Government, including any officer, agent, or employee thereof.

3. "Document" shall have the broadest meaning permitted by the rules of the Court, and should include any hard-copy, electronic or computerized data compilation, including correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records or notes of meetings of conferences, note pads, notebooks, notes, opinions, reports, financial or statistical statements or compilations, analyses, confirmations, publications, articles, books, pamphlets, manuals provisions, desk reviews, audits, rate sheets, circulars, microfilm, microfiche, studies, logs, surveys, diaries, charts, graphs, bulletins, photostats, speeches, data sheets, pictures, photographs, illustrations, blueprints, films, drawings, plans, tape recordings, videotapes, disks, diskettes, hard drives, network drives, data tapes or readable computer-produced interpretations or transcriptions thereof, electronically transmitted messages ("e-mail") (including any information contained in any computer, even if not yet printed out), voice mail messages, interoffice communications, and any other writings, papers, and tangible things of whatever description whatsoever. Non-identical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such

copy, or otherwise), and drafts, whether printed or recorded (through sound, video, or other electronic, magnetic, or digital recording system) should each be treated and produced as separate documents for these purposes.

4. “And” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside its scope.

5. “Any” includes “all” and vice versa.

6. “Concerning” shall mean relating to, referring to, describing, evidencing, reflecting or constituting.

7. “Including” shall mean “including but not limited to.”

8. “Person” or “persons” shall mean natural persons, proprietorships, corporations, partnerships, trusts, joint ventures, groups, associations, organizations, and all other entities.

DOCUMENTS SUBPOENAED

1. All documents concerning legal or consulting services provided to and expenses incurred on behalf of the NBA with respect to any investigation or prosecution conducted by the Government regarding Timothy Donaghy, including all documents concerning a request for payment of the fees and expenses incurred by outside counsel “to represent the NBA in responding to and participating in the prosecution of [matters relating to Timothy Donaghy], and to attend proceedings related to [such matters].”

2. All documents concerning legal or consulting services provided to and expenses incurred on behalf of the NBA “to conduct an internal investigation of the scope

of [Timothy Donaghy's] misconduct and to advise on employment issues arising from [Timothy Donaghy's] misconduct," including all documents concerning a request for payment of the fees and expenses incurred by outside counsel and consultants to conduct any internal investigation.

3. All documents concerning any of the "[t]ransportation and expenses incurred in connection with the work of outside counsel, including for interviews of fifty-seven NBA referees conducted by outside counsel as part of its investigation."

4. All documents concerning the payment of any invoice, statement, bill, or request for payment with respect to the matters described in categories 1 through 3, immediately above.

5. All documents concerning the NBA's response to or participation in, or provision of assistance with any investigation or prosecution conducted by the Government with respect to Timothy Donaghy, including documents concerning any communications between the NBA and the Government regarding the NBA's response to, participation in, or provision of assistance with any such investigation or prosecution of Timothy Donaghy.

6. All documents concerning any NBA internal investigation "of the scope of [Timothy Donaghy's] misconduct" and of "employment issues arising from [Timothy Donaghy's] misconduct," including all documents concerning any internal investigation conducted on behalf of the NBA; the "interviews of fifty-seven NBA referees conducted by outside counsel as part of its investigation"; and all communications between the NBA and the Government concerning Timothy Donaghy.

7. All documents concerning communications between the NBA and the Government with respect to any victim statement or claim for restitution to be submitted on behalf of the NBA, including all documents concerning any communications relating to the Request for Victim Statement and Affidavit of Loss sent to David B. Anders by the United States Probation Department and the letter dated October 4, 2007, by Joel M. Litvin to the United States Probation Department.

8. All documents concerning communications between the NBA and the Government regarding any claim or contention by the NBA of loss or damages suffered as a result of any alleged conduct of Timothy Donaghy, including any documents concerning communications with respect to any claim or request of restitution by or for the benefit of the NBA as to any alleged losses or damages suffered in connection with any purported conduct by Timothy Donaghy.

9. All documents concerning communications between the NBA and the Government with respect to the NBA's decision to seek restitution as a result of any alleged conduct by Timothy Donaghy or concerning any matter relating to the resolution of criminal prosecutions of Mr. Donaghy or any alleged co-conspirators.

10. All documents concerning the calculation of purported loss that the NBA claims as restitution under the Mandatory Victim Restitution Act.

EXHIBIT B

CERTIFICATION PURSUANT TO FED. R. EVID. 902(11)
(documents maintained within the United States)

I, _____, am
a _____ [Name] _____ [Title]

of _____ . As such, I am a duly authorized custodian
of _____ [Company]

records. I hereby certify that the attached documents, which are:

[Insert general description]

are domestic records that were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; that such records were kept in the course of a regularly conducted business activity; that the regularly conducted business activity made such records as a regular practice; and that such records are [originals] [duplicates of originals]. [Strike one]

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____
[City, State]

[Date]

[Signature]

[Printed name]

EXHIBIT C

CERTIFICATION PURSUANT TO 18 U.S.C. § 3505
(documents maintained outside the United States)

I, _____, am
a _____ [Name] _____ [Title]

of _____. As such, I am a duly authorized
custodian of

[Company]
records. I hereby certify that the attached documents, which are:

[Insert general description]

are foreign records that were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; that such records were kept in the course of a regularly conducted business activity; that the business activity made such records as a regular practice; and that such records are [originals] [duplicates of originals]. [Strike one]

As used herein, the term "foreign record" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a country other than the United States.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____
[City, State/Country]

[Date]

[Signature]

[Printed name]