

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

NORTHEASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
vs.)	5:07-CR-00098-IPJ-PWG
)	
ALEXANDER NOOREDIN LATIFI,)	
and AXION CORPORATION.)	

GOVERNMENT’S MOTION TO QUASH SUBPOENAS AND TO
PRECLUDE DISCOVERY, ADDITIONAL TESTIMONY, AND
DOCUMENT PRODUCTION

Comes now the United States of America, by and through Alice H. Martin, United States Attorney for the Northern District of Alabama, and Jenny L. Smith, Assistant United States Attorney, and moves this Court to quash subpoenas directed to the United States Attorney, specific Assistant United States Attorneys, and agents of various federal agencies. In addition, the United States moves the Court to preclude discovery, additional testimony, and document production. The Court should assess the merits of Latifi’s Hyde Amendment motion based on the record as it now stands or as supplemented for good cause shown with evidence submitted *ex parte* and *in camera* under seal, in accordance with Hyde Amendment.

The Subpoenas and Demands to Date

Prior to the February 12, 2008, hearing addressing timeliness, Latifi sent a letter and affidavit advising the United States Attorney of his intention to subpoena her and Assistant United States Attorneys Angela Debro and David Estes. (Doc. 80, Att. 1). He advised that he was seeking testimony on the following subjects:

Defendant seeks to elicit the testimony of these witnesses as to the factual and evidentiary basis for the Government's indictment and prosecution of charges against Defendant in the above styled action. Specifically, Defendant believes that the testimony of these witnesses will demonstrate that the Government failed to exercise elementary case evaluation and investigative techniques, to wit, by failing to establish the *bona fides* of the signatures on documents forming the basis for its allegations, and that the Government in fact continued to prosecute its case against Mr. Latifi despite being aware of evidence that clearly tended to negate elements of the charged offenses.

(*Id.* at 3).

After that hearing, Latifi served subpoenas on the United States Attorney and Assistant United States Attorneys Debro, Estes, and James Ingram directing them to be present to provide testimony at the upcoming April 14, 2008, hearing. In addition to seeking testimony, Latifi included demands to produce the following documents: “[a]ll correspondence files including, but not limited to, correspondence and communications, notes, and memoranda between yourself and any individual or agency relating to the above-referenced case.”

Latifi has served John S. Schlotterer, Resident Agent in Charge of the National Aeronautics and Space Administration's Office of Inspector General, Office of Criminal Investigations, with subpoenas for hearing testimony along with demands that he bring "the entire investigative file on *U.S. v. Latifi, et al.*" The United States anticipates that Latifi will be serving additional agents from other federal agencies with similar subpoenas.

By letter delivered February 21, 2008, Latifi advised the United States Attorney of his intention to "serve broad discovery on the USA to be utilized in the . . . hearings. . . ." (Attachment 1). He advised that he "intend[s] to review all prosecutive memos and other documentation addressing these cases." (*Id.*). He advised that he intends to examine the United States Attorney and her "staff . . . in connection with Brady material that may or may not have been produced in accordance with applicable law." (*Id.*). He specifically declined to advise the bases for his contention that he is entitled to the "broad discovery" that he is seeking. (*Id.*). In the press, Latifi has advised that the upcoming hearing "will be a mini-trial." (Attachment 2).

Argument

I. The Record Before This Court, as Supplemented for Good Cause Shown, Is Sufficient to Analyze Whether an Award under the Hyde Amendment Is Appropriate.

The United States's response to the demands for testimony and documents during the Hyde Amendment proceedings is necessarily governed by the language in the Hyde Amendment itself, along with the law concerning supplementing the record beyond that developed at trial in the Hyde Amendment context. Disclosing documents and testimony pursuant to subpoenas or discovery is not contemplated by the plain language of the Hyde Amendment, and the caselaw generally fails to support such an approach to assessing these claims.

The Hyde Amendment does not provide an entitlement to discovery and an evidentiary hearing. Instead, the Hyde Amendment provides for an expansion of the record available to the district court for its determination under the Amendment beyond that set forth in the Equal Access to Justice Act. The Hyde Amendment provides as follows:

To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence *ex parte* and *in camera* (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal.

8 U.S.C. § 3006A note (West Supp. 1999) (“Attorney Fees and Litigation Expenses to Defense,” codifying Pub. L. 105-119, Title VI, § 617, 111 Stat. 2519 (Nov. 26, 1997)).

The language of the statute does not provide, suggest, or imply that an applicant under the Hyde Amendment has an automatic right to discovery or to an evidentiary hearing. Instead, this language suggests that a district court has latitude to permit an expansion of the record, for good cause, beyond that available under the EAJA, while at the same time providing necessary safeguards. *United States v. Truesdale*, 211 F.3d 898, 907 (5th Cir. 2000) (stating that this reading of the Hyde Amendment “seems reasonable.”). In fact, the use of the language “for good cause shown” connotes that the receipt of additional evidence by the court is not automatic -- a party seeking to present additional evidence to the court must bear the burden of showing “good cause” for its introduction. *United States v. Schneider*, 395 F.3d 78, 91 (2d Cir. 2005).

Such an interpretation is consistent with the EAJA’s limitation on the scope of the district court’s review process. The Hyde Amendment incorporates the EAJA’s procedures and limitations, except where specifically provided otherwise. Under the EAJA, a district court is limited to looking solely to the record made in the civil

proceeding.¹ According to the Eleventh Circuit, “Congress added this language to ensure that ‘the “substantial justification determination” will not involve additional evidentiary proceedings or additional discovery of agency files, solely for EAJA purposes.’” *United States v. Certain Real Property*, 838 F.2d 1558, 1564-65 (11th Cir. 1988) (citing H.R. Rep. No. 120, 99th Cong., 1st Sess. 13, reprinted in 1985 U.S. Code Cong. & Admin. News 132, 142).

Congress was obviously concerned that the government, in defending itself against allegations of vexatious, frivolous, or bad faith prosecutions, would be faced with disclosing information that should remain confidential for a variety of reasonable considerations -- such as the identity of an informant or undercover agent or classified matters -- or information that it could not disclose without violating the law -- such as matters occurring before a grand jury. Consequently, Congress provided that the district court, for good cause shown, could elect to receive evidence *ex parte* and *in camera*, and would keep evidence and testimony so received under seal. Concluding that the scope of the record in any Hyde Amendment case must be determined by a review of all the facts and circumstances, the district court in *United*

¹“Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.” 28 U.S.C. § 2412(d)(1)(B).

States v. Gardner, 23 F.Supp.2d 1283 (N.D. Okla. 1998), noted that:

There is . . . no authority to support the view that Hyde Amendment applicants should have either sweeping access to sensitive materials or broad powers to compel testimony. To the contrary, a careful reading of the Amendment suggests that Congress was aware of the potentially invasive effect of the statute and sought to put in place an *ex parte* and *in camera* review procedure to protect against the ill-effects of any such invasion. Thus, the Court finds that the Hyde Amendment vests in the Court both the responsibility and the authority to develop the facts in a manner warranted by the circumstances of the case for the purpose of determining whether the conduct of the United States was “vexatious, frivolous, or in bad faith.”

Id. at 1296.

Dicta from other circuit courts of appeals affirms that discovery is not appropriate on Hyde Amendment claims. *See United States v. Schneider*, 395 F.3d 78, 91-92 (2d Cir. 2005); *United States v. Truesdale*, 211 F.3d 898 (5th Cir. 2000). *But see United States v. Lindberg*, 220 F.3d 1120, 1126 (9th Cir. 2000) (noting that the Hyde Amendment “allows the district court to order the production of documents ‘for good cause shown’” but affirming the district court’s denial of defendant’s request for government to produce documents). The same rationale applies to the provision of live testimony or documents.

While courts “are not bound to follow dictum, [they] . . . do accord it any respect it earns through its persuasive value.” *Young v. New Process Steel, LP*, 419 F.3d 1201, 1204 (11th Cir. 2005). The dictum in *Truesdale* and *Schneider* is

persuasive. In *Truesdale*, on appeal, the defendants claimed that the district court abused its discretion by ruling on their Hyde Amendment motion “without granting discovery or a hearing, despite the fact that neither was requested.” 211 F.3d at 907. The Fifth Circuit found no abuse of discretion. *Id.* The Court stated that it did “not read the [Hyde] Amendment as providing for discovery and a hearing as a matter of right.” *Id.* In *Schneider*, the defendant sought to force expansion of the record to include “the memorandum written by the AUSAs who had evaluated his case and who had offered an opinion on whether it should be tried, and to hold a hearing so those AUSAs could be cross-examined.” 395 F.3d at 84. The Second Circuit “affirm[ed] the district court’s refusal to order production of the prosecutors’ memorandum.” *Id.* at 92. The Court stated that “nothing in the words of the statute suggest that the court has the power to order the government to produce materials, either to the defendant or to the court, *ex parte* and *in camera*.” 395 F.3d at 92.

Similarly, a number of district courts have denied Hyde Amendment movants’ requests for discovery. See *United States v. Brvenik*, 487 F.Supp.2d 625, 631 (D. Md. 2007) (denying request to depose the Assistant United States Attorney in order to determine what evidence the Government possessed and the mental state of the Government in proceeding with the prosecution); *United States v. Milloy*, 75 F.Supp.2d 1276, 1277 (D.N.M. 1999) (denying request for a hearing or “discovery

sufficient to determine whether the government's position was vexatious" by concluding that "neither an evidentiary hearing nor discovery is warranted in this case"); *Gardner*, 23 F.Supp.2d at 1296 (rejecting request to conduct depositions of IRS agents and Assistant United States Attorneys).

In light of the foregoing, Latifi is entitled to no discovery concerning his Hyde Amendment claims. Similarly, he is not entitled to adduce testimony at the upcoming hearing. This Court should decide the merits of Latifi's claims using the record as it stands or as supplemented in accordance with the Hyde Amendment. Thus, this Court should issue an order quashing the subpoenas.

II. The Record Before This Court Is Sufficient to Analyze Whether an Award Under the CAFRA Is Appropriate.

The issue before the Court in the Civil Asset Forfeiture Reform Act ("CAFRA") proceedings is whether Latifi "substantially prevailed" in the civil forfeiture proceedings. *See* 28 U.S.C. § 2465(b)(1), discussed in Doc. 47, in 5:06-cv-01102-VEH. This issue is controlled by *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001). According to *Buckhannon*, a party cannot rely on a "catalyst theory," which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 601.

The Supreme Court rejected that theory and ruled that “a ‘prevailing party’ is one who has been awarded some relief *by the court.*” *Id.* at 603 (emphasis added). The Court held that, to achieve “prevailing party” status, a plaintiff must obtain either an “enforceable judgment on the merits” or a “court-ordered consent decree.” *Id.* at 604. Under *Buckhannon*, Latifi cannot be considered a prevailing party as a matter of law. Latifi needs to present no testimony or documents to address this legal standard.

Conclusion

The Court should quash the subpoenas directed to the United States Attorney, specific Assistant United States Attorneys, and agents of various federal agencies. The Court should preclude discovery and other post-judgment evidence gathering and decide the merits of Latifi’s Hyde Amendment motion based on the record as it now stands or as supplemented with evidence *ex parte* and *in camera* under seal, in accordance with Hyde Amendment.

Respectfully submitted this the 4th day of March, 2008.

ALICE H. MARTIN
United States Attorney

/s/ electronic signature
JENNY L. SMITH
Assistant United States Attorney

Certificate of Service

_____ I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and that a copy of the foregoing will be provided to the defendant's attorney of record, via the CM/ECF system, this the 4th day of March, 2008.

/s/ electronic signature

JENNY L. SMITH

Assistant United States Attorney