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United States of America

9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA, ) No. 08CR1171-W  
12 )  
Plaintiff, ) GOVERNMENT’S NOTICE OF MOTION  
13 ) AND MOTION TO STAY ENFORCEMENT  
v. ) AND/OR QUASH SUBPOENAS ISSUED BY  
14 ) DEFENDANT PENDING DETERMINATION  
DAVID C. JACQUOT, ) OF DEFENDANT’S MOTION TO DISMISS  
15 ) FOR SELECTIVE/VINDICTIVE  
Defendant. ) PROSECUTION; MEMORANDUM OF  
16 ) POINTS AND AUTHORITIES; EXHIBITS  
A AND B

17 Date: April 27, 2009  
18 Time: 2:00 p.m.  
Place: Courtroom 7

19  
20 Plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United  
21 States Attorney, and Faith A. Devine, Assistant United States Attorney, hereby files its Motion to Stay  
22 Enforcement and/or Quash Subpoenas Issued by Defendant Pending Determination of Defendant’s  
23 Motion to Dismiss for Selective/Vindictive Prosecution. This motion shall be heard on April 27, 2009  
24 at 2:00 p.m. in Courtroom 7 together with Defendant’s Motion to Dismiss for Selective/Vindictive  
25 Prosecution.

26 It is the Government’s understanding that the Court will hear both the Motion to Quash and the  
27 Motion to Dismiss for Selective Prosecution on April 27, 2009. The Government further understands  
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1 that, if the Court determines that Defendant's subpoenas are proper, the Court will schedule a later date  
2 for the evidentiary hearing.

3 This motion is based upon this notice of motion, the attached memorandum of points and  
4 authorities and Exhibits.

5 DATED: April 13, 2009

Respectfully submitted,

6 KAREN P. HEWITT  
7 United States Attorney

8 /s/ Faith A. Devine  
9 FAITH A. DEVINE  
10 Assistant U.S. Attorney

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 On March 5, 2009, the Defendant filed a Motion for Reconsideration of his Motion to Dismiss  
5 for Selective/Vindictive Prosecution (Document 66). The Government filed its Response and  
6 Opposition on March 23, 2009 (Document 75). Prior to the March 30, 2009 status conference,  
7 Defendant sent subpoenas to certain persons (including high level government officials) expecting them  
8 to produce documents and testify at the status conference in support of his motion. The Government  
9 filed an application to excuse these persons from complying with the subpoenas which was granted by  
10 this Court on March 27, 2009.

11 At the March 30, 2009 status conference, the Court set a motion hearing date of April 27, 2009  
12 for Defendant's Motion to Dismiss. At the status conference, the Court indicated that it quashed  
13 Defendant's subpoenas because it was a status conference and not a scheduled motion hearing. The  
14 Court also stated that Defendant could subpoena witnesses, and that the Court would entertain any  
15 motions to quash those subpoenas on the same day<sup>1/</sup>.

16 Defendant has advised the Government that he intends to re-issue these subpoenas. The  
17 Government learned today that Defendant sent subpoenas to U.S. Supreme Court Justice Stephen Breyer  
18 and U.S. Secretary of the Treasury Timothy Geithner ordering them to appear at the April 27, 2009  
19 motion hearing. The Government expects that additional subpoenas will be served by Defendant prior  
20 to April 27, 2009. Therefore, the Government files the instant motion in which it seeks to stay  
21 enforcement and/or quash any subpoena issued until the Court rules on whether Defendant has made  
22 a credible showing which entitles him to subpoena documents and examine witnesses on the issue of  
23 whether he was selectively prosecuted.

24 As set forth in the Government's Response and Opposition to Defendant's Motion to Dismiss,  
25 and explained in more detail below, the Government contends that Defendant is not entitled to use a  
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28 <sup>1/</sup>Since the Motion to Quash and the Motion to Dismiss are to be heard on the same day, the Government understands that no witnesses will be required to appear until the Court has ruled on whether the subpoenas are proper.

1 Rule 17 subpoena to circumvent the strict standards he must meet under U.S. v. Armstrong, 517 U.S.  
2 456, 468 (1996) in order to obtain discovery to make out a selective prosecution claim. Under well  
3 settled Supreme Court and Ninth Circuit law, a defendant is required to present “clear evidence” that  
4 a “federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory  
5 purpose”. Defendant fails to present any evidence that individuals of a different race, religion or other  
6 arbitrary classification were not prosecuted and that he was selected for prosecution on the basis of race,  
7 religion or the exercise of a constitutional right. Since he has failed to establish either of these elements,  
8 and Armstrong prohibits him from conducting discovery on this issue, he should not be entitled to  
9 conduct an irrelevant sideshow by examining witnesses at the April 27, 2009 motion hearing.

10 Furthermore, even assuming Defendant has made a credible showing which allows him to  
11 conduct discovery on this issue, the witnesses that Defendant seeks to examine are not witnesses that  
12 will assist him in proving discriminatory effect or discriminatory motive. Defendant has selectively  
13 chosen high level government officials who have publicly admitted that their tax returns were subject  
14 to scrutiny by the Internal Revenue Service<sup>2/</sup>. These individuals are not in a position to testify about  
15 decisions made by the IRS or other governmental entities relating to whether they should have been  
16 criminally prosecuted and were not. Defendant’s subpoenas to these individuals are irrelevant and  
17 improper under established precedent that recognizes the need to control subpoenas of high government  
18 officials to prevent unnecessary disruption of government business.

## 19 II.

### 20 FACTS

21 Defendant is an attorney who obtained a J.D. from Georgetown University Law Center and a  
22 L.L.M in Taxation from University of Washington School of Law. He is charged in a two count  
23 Indictment with filing false tax returns in the years 2001 and 2002. The Government expects to prove  
24 at trial that 39 checks deposited into his law firm corporate bank account constitute income that should  
25 have been reported on his law corporation tax returns in the years 2001 and 2002. The provable tax loss  
26 for criminal purposes is approximately \$89,000.

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<sup>2/</sup>It is uncertain why Defendant served a subpoena to Justice Breyer.

1 **III.**

2 **ARGUMENT**

3 **A. The Government Has Standing to Challenge the Subpoenas Issued by Defendant**

4 “A party has standing to move to quash a subpoena addressed to another if the subpoena  
5 infringes upon the movant's legitimate interests”. United States v. Rainieri, 670 F.2d 702, 713 (7th Cir.  
6 1982)(“ The prosecution's standing rested upon its interest in preventing undue lengthening of the trial,  
7 undue harassment of its witness, and prejudicial over-emphasis on [the subpoenaed party’s]  
8 credibility.”)

9 In this case, the Government has a legitimate interest in preventing Defendant from using Rule  
10 17 subpoenas to circumvent the strict discovery requirements set forth by the U.S. Supreme Court in  
11 U.S. v. Armstrong, 517 U.S. 456 (1996). With respect to the subpoenas issued to U.S. Supreme Court  
12 Justice Breyer, Secretary of the Treasury Timothy Geithner and Congressman Charles Rangel, the  
13 Government has an interest in ensuring that official government and judicial business being conducted  
14 by these individuals is not unnecessarily disrupted by requiring them to respond to improper  
15 subpoenas<sup>3/</sup>.

16 The Government also has an interest in ensuring that Defendant does not use the Rule 17  
17 subpoena process to threaten, coerce, or intimidate third persons to interfere with the due administration  
18 of Title 26. See, 26 U.S.C. § 7212 (“whoever corruptly... endeavors to intimidate or impede any officer  
19 or employee of the United States acting in an official capacity under this title, or in any other way  
20 corruptly... obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title  
21 shall...be imprisoned not more than 3 years”). As explained in Section III. D below, it appears that  
22 Defendant’s attempt to subpoena Timothy Geithner and Charles Rangel was designed to improperly  
23 coerce them into using their official capacities to influence decisions made by the U.S. Department of  
24 Justice and the U.S. Attorney about this case.

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<sup>3/</sup>Although Defendant stated at the March 30, 2009 Status Conference that he has subpoenaed these government officials in their personal capacity, it is not clear that the scope of his desired examination and request for documents is so limited. The Department of Justice, Office of the United States Attorney is counsel to these persons in their official capacity.

1           **B. Defendant’s “Selective Prosecution” Motion is Meritless, and He Cannot Use A**  
2           **Rule 17 Subpoena To Circumvent Controlling Supreme Court Precedent**

3           As the Government’s Response and Opposition to Defendant’s Motion to Dismiss makes clear,  
4 Defendant’s “selective prosecution” motion lacks merit. “A selective prosecution claim is not a defense  
5 on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought  
6 the charge for reasons forbidden by the Constitution.” United States v. Armstrong, 517 U.S. 456, 463  
7 (1996). By raising such a claim, a defendant “asks a court to exercise judicial power over a ‘special  
8 province’ of the Executive.” Id. at 464 (citation omitted). Given the “broad discretion” afforded  
9 prosecutors to fulfill their duty of enforcing the criminal laws, “the presumption of regularity supports  
10 their prosecutorial decisions, and in the absence of clear evidence to the contrary, courts presume that  
11 they have properly discharged their official duties.” Id. (citations omitted). Indeed, the Supreme Court  
12 has cautioned that the decision to prosecute “is particularly ill-suited to judicial review,” Wayte v.  
13 United States, 470 U.S. 598, 607 (1985), and that even inquiring into why certain charges were brought  
14 “impair[s] the performance of a core executive function.” Armstrong, 517 U.S. at 465. “In the ordinary  
15 case, so long as the prosecutor has probable cause to believe that the accused committed an offense  
16 defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a  
17 grand jury, generally rests entirely in his discretion.” Id. at 464 (citing Bordenkircher v. Hayes, 434 U.S.  
18 357, 364 (1978)).

19           Given the presumption that the prosecutor has acted properly, a defendant raising a claim of  
20 selective prosecution must present “clear evidence” that the “federal prosecutorial policy had a  
21 discriminatory effect and that it was motivated by a discriminatory purpose.” Id. at 465 (citation  
22 omitted). To prove discriminatory effect, the defendant must come forward with “clear evidence” that  
23 similarly situated individuals were not prosecuted. Id.; United States v. Arenas-Ortiz, 339 F.3d 1066,  
24 1068 (9th Cir. 2003). Assuming the defendant meets this burden, he then must come forward with “clear  
25 evidence” of discriminatory purpose, i.e., “that he was selected for prosecution on the basis of an  
26 impermissible ground such as race, religion, or the exercise of constitutional rights.” United States v.  
27 DeTar, 832 F.2d 1110, 1112 (9th Cir. 1987).

28           Accordingly, the Supreme Court requires defendants to meet a very strict standard before  
permitting discovery to make out a selective prosecution claim. To make out a claim for selective

1 prosecution discovery, the defense must make “a credible showing of different treatment of similarly  
2 situated persons.” Armstrong, 517 U.S. at 470; see also id. at 468 (noting that the “rigorous standard  
3 for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for  
4 discovery in aid of such a claim”). “Mere allegations” are simply not enough. See, e.g., United States  
5 v. Bourgeois, 964 F.2d 935, 941 (9th Cir. 1992). Moreover, the defense cannot use Rule 17(c)  
6 subpoenas to circumvent long-standing rules concerning discovery for a selective prosecution claim set  
7 out by the Supreme Court in Armstrong. See, e.g., United States v. Gist, 2008 WL 2522347, at \*2-3  
8 (M.D. Pa. June 20, 2008) (holding that because defendant had failed to meet the Armstrong standard,  
9 defendant not entitled to use Rule 17(c) subpoenas for that information); United States v. Garcia, 1999  
10 WL 318363, at \*2-3 (D. Kan. Feb. 19, 1999) (Armstrong standard applies to Rule 17(c) subpoenas  
11 seeking information for selective prosecution motion); United States v. Skeddle, 178 F.R.D. 167, 171  
12 (N.D. Ohio 1996) (to the same effect).

13 Defendant has not come close to meeting his threshold burden for discovery set out by the  
14 Supreme Court. To suggest that Timothy Geithner, Charles Rangel, and Tom Daschle are “similarly  
15 situated” ignores reality. Even assuming it is true that these individuals were not prosecuted for tax  
16 crimes and should have been prosecuted, this does not establish that Defendant was treated differently  
17 than other persons who are “similarly situated”. Defendant claims, without any legal authority, that  
18 “ordinary citizens” are a protected class and that he is a member of that class. Even assuming the law  
19 recognized this classification as constitutionally protected, Defendant fails to acknowledge that there  
20 are countless cases against “ordinary citizens” that are not prosecuted. As a tax attorney, Defendant  
21 is well aware of the countless “ordinary citizens” with tax issues that come under scrutiny by the IRS.  
22 Some of these cases are pursued criminally while a large number are pursued through the civil process.  
23 Therefore, Defendant’s claim that the decision to prosecute him had a “discriminatory effect” lacks  
24 merit.

25 Furthermore, and more importantly, Defendant fails to show that the decision to prosecute him  
26 was based upon a discriminatory motive. As set forth in the Government’s Opposition Memorandum,  
27 Defendant’s argument that he was prosecuted in retaliation for the prosecutor suffering an “alleged  
28 humiliating defeat” in civil litigation not only falls short of establishing discriminatory motive but is  
patently false. As the Ninth Circuit has stated, “in contrast to [Defendant’s] characterizations, the long

1 history of conflict between [Defendant] and the IRS suggests the appropriateness of initiating criminal  
2 action, not an appearance of vindictiveness”. United States v. DeTar, 832 F.2d 1110, 1112 (9th Cir.  
3 1993).

4 The Supreme Court, the Ninth Circuit and other federal courts have repeatedly rejected showings  
5 far more credible than the one set forth in this case. See, e.g., Armstrong, 517 U.S. at 470 (holding that  
6 statistical study and affidavits did not make out colorable selective prosecution claim); United States  
7 v. Arenas-Ortiz, 339 F.3d 1066, 1069-70 (9th Cir. 2003) (rejecting extensive statistical analysis as  
8 insufficient under Armstrong); In re United States, 397 F.3d 274, 284-85 (5th Cir. 2005) (granting  
9 mandamus review and reversing district court’s discovery order in a death penalty case because  
10 defendant’s study was insufficient – “[a] much stronger showing, and more deliberative analysis, is  
11 required before a judge may permit open-ended discovery into a matter that goes to the core of a  
12 prosecutor’s function and implicates serious separation of powers concerns.”); United States v. Bass,  
13 536 U.S. 862, 863-64 (2002) (summarily reversing Sixth Circuit’s discovery order in death penalty case  
14 because of inadequate showing of similarly situated persons); United States v. Hughes, 2006 WL  
15 3246571, at \*5 (N.D. Tex. 2006) (personal vendetta by law enforcement against defendant “does not  
16 raise an actionable selective prosecution claim under Armstrong”).

17 Therefore, because Defendant has failed to make a credible showing that he was selectively  
18 prosecuted, he should not be permitted to require Justice Breyer, Timothy Geithner, Charles Rangel,  
19 Tom Daschle, or any other person, to produce documents and/or be examined at the motion hearing.

20 **C. Defendant Cannot Use Rule 17 as a Discovery Device**

21 Rule 17(c) is “not intended to provide a means of discovery for criminal cases,” but was meant  
22 “to expedite the trial by providing a time and place before trial for the inspection of subpoenaed  
23 materials.” United States v. Nixon, 418 U.S. 683, 698-99 (1974). As the Third Circuit has described:  
24 “Courts must be careful that Rule 17(c) is not turned into a broad discovery device, thereby undercutting  
25 the strict limitation of discovery in criminal cases found in Fed. R. Crim. P. 16.” United States v.  
26 Cuthbertson, 630 F.2d 139, 146 (3d Cir. 1980) (Cuthbertson I); see also United States v. Haldeman, 559  
27 F.2d 31, 75 (D.C. Cir. 1976) (Rule 17(c) “is not a discovery device, [it] confines a subpoena duces  
28 tecum to admissible evidence, [and] authorizes the quashing of the subpoena if it is ‘unreasonable or  
oppressive.’”).

1 Accordingly, “Rule 17(c) may be used to obtain only evidentiary materials.” United States v.  
2 Cherry, 876 F.Supp. 547, 552 (S.D.N.Y. 1995). Rule 17(c) “is designed as an aid for obtaining relevant  
3 evidentiary material that the moving party may use at trial.” Cuthbertson I, 630 F.2d at 144. Thus,  
4 “Rule 17(c) can be contrasted with the civil rules which permit the issuance of subpoenas to seek  
5 production of documents or other materials which, although themselves not admissible, could lead to  
6 admissible evidence.” Cherry, 876 F.Supp. at 553. Even “naked exculpatory material held by third  
7 parties that does not rise to the dignity of admissible evidence simply is not within” Rule 17(c) United  
8 States v. Cuthbertson, 651 F.2d 189, 195 (3d Cir.1981) (“Cuthbertson II”).

9 In this case, Defendant has used Rule 17 to subpoena records from Timothy Geithner, Charles  
10 Rangel and Tom Daschle. These records are irrelevant to this case and not admissible. Therefore, the  
11 subpoenas for these records should be quashed.

12 **D. Assuming Arguendo that Defendant Has Met His Threshold Burden Under**  
13 **Armstrong, Defendant’s Subpoenas to the Judiciary and Government Officials Are**  
14 **Improper**

15 Relying on the U.S. Supreme Court decision in United States v. Morgan, 313 U.S. 409, 421-422  
16 (1941), the Eleventh Circuit ordered the U.S. District Court to quash a subpoena directed to the  
17 Commissioner of the Food and Drug Administration. The defendants in that case, similar to the  
18 Defendant here, subpoenaed the Commissioner to support their claim that they were selectively  
19 prosecuted. In re United States (Kessler), 985 F.2d 510, 512 (11th Cir. 1993). In reaching its decision,  
20 the Eleventh Circuit noted that “high ranking government officials have greater duties and time  
21 constraints than other witnesses”. Id. at 512. The Court further noted that a high ranking government  
22 officials’ “time is very valuable” and that “[t]his concern about a high official’s time constraints is  
23 particularly relevant to selective prosecution claims.” Id. The Court concluded that “because of the  
24 time constraints and multiple responsibilities of high officials, courts discourage parties from calling  
25 them as witnesses and require exigent circumstances to justify a request for their testimony.” Id.

26 Other circuits have followed the reasoning of the Eleventh Circuit. In re United States, 197 F.3d  
27 310, 313-314 (8th Cir.1999)(defendant was not entitled to subpoena the Attorney General and the  
28 Deputy Attorney General of the United States because he failed to show that these high government  
officials “possessed information essential to his case which is not obtainable from another source”); In

1 re FDIC, 58 F.3d 1055, 1062 (5th Cir. 1995)(“We think it will be the rarest of cases..in which  
2 exceptional circumstances can be shown where the testimony is available from an alternate witness”).

3         These legal principles should be applied in the instant case. To support his selective prosecution  
4 claim, Defendant singles out two high government officials and one former U.S. Senator who have  
5 publicly admitted that their tax returns were subject to IRS scrutiny. Even assuming that Defendant has  
6 met his threshold burden under Armstrong, these individuals are not in a position to testify about  
7 whether they should have been prosecuted and, if so, the reasons why they were not prosecuted.  
8 Furthermore, with respect to Timothy Geithner, it is well known that his tax situation was discussed at  
9 length in his Senate confirmation hearings. Thus, Defendant can simply introduce the relevant portions  
10 of these congressional hearings and does not need to disrupt the official business of the U.S. Department  
11 of the Treasury by requiring Secretary Geithner to appear at the motion hearing in this case. The  
12 Government does not know why U.S. Supreme Court Justice Breyer is the latest target of Defendant’s  
13 frivolous pursuit. However, it is clear that this subpoena is irrelevant and improper.

14         It is no coincidence that Defendant has singled out Secretary Geithner and Congressman Rangel.  
15 In his opposition to the Government’s Application to Excuse Compliance with the first subpoenas he  
16 issued, Defendant attached letters he wrote to Secretary Geithner and Congressman Rangel informing  
17 them of his intent to subpoena them. A reading of these letters shows that Defendant is threatening to  
18 use the subpoena process and disseminate derogatory information about their personal tax issues to the  
19 media if he does not get the same treatment from the IRS that they received. The patently offensive  
20 language contained in both letters is as follows:

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22             “If the government fails to stipulate to the description in regard to you found in my  
23 pleadings, I will be issuing you a subpoena on or about 23 March 2009”

24             “I bear no ill will towards you, and do not desire that you to be prosecuted, nor do I want  
25 this to escalate to a situation where you are subpoenaed to ‘copy cat’ hearings in  
26 hundreds of tax cases throughout the country. I simply want to be treated as fairly as you  
27 have been. As a courtesy, I am sending you a copy of the pleadings to prepare for the  
28 inevitable media attention that this will bring.” Document 81, pgs. 6-10.

1 After sending these letters, Defendant created a vindictive prosecution blog on his law firm web  
2 page which contains false and misleading statements about this case<sup>4/</sup>, a copy of his Motion to Dismiss  
3 which is referred to as “The Geithner Motion”, and links to all of the frivolous pleadings he has filed  
4 in this case which have been rejected by this Court. See, Exhibit A. Defendant also issued his own  
5 press release reporting that Geithner and Rangel were subpoenaed to testify on March 30, 2009. See,  
6 Exhibit B. It is clear from these actions that Defendant is improperly using the subpoena process and  
7 the threat of public embarrassment to Geithner and Rangel in order to coerce them into influencing  
8 decisions made by the U.S. Attorney about this case.

9 **IV.**

10 **CONCLUSION**

11 For all of the foregoing reasons, the Government respectfully requests that the Court stay the  
12 enforcement and/or quash any subpoenas issued by Defendant until the court rules on his Motion to  
13 Dismiss.

14  
15 DATED: April 13, 2009

Respectfully submitted,

16 KAREN P. HEWITT  
United States Attorney

17  
18 /s/ Faith A. Devine  
FAITH A. DEVINE  
Assistant U.S. Attorney  
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26 <sup>4/</sup> On his blog, Defendant represents that the prosecutor in this case is under review for  
27 disciplinary action. This is untrue. Defendant sent a letter to the U.S. Department of Justice, Office of  
28 Professional Responsibility containing false and frivolous allegations against the prosecutor which were  
previously rejected by this Court. The Government contends that this frivolous complaint is an attempt  
to corruptly impede the U.S. Attorney’s ability to prosecute this case. See, United States v. Rosnow,  
977 F.2d 399, 410 (8th Cir. 1992)(submission of frivolous federal tort claim against IRS investigator  
sufficient to sustain conviction for violation of 26 U.S.C. § 7212).

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, )  
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 Plaintiff, )  
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 v. )  
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 DAVID C. JACQUOT., )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Case No. 08cr1171-W

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Faith A. Devine, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of GOVERNMENT’S NOTICE OF MOTION AND MOTION TO STAY ENFORCEMENT OF SUBPOENAS ISSUED BY DEFENDANT PENDING DETERMINATION OF DEFENDANT’S MOTION TO DISMISS FOR SELECTIVE/VINDICTIVE PROSECUTION on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies him.

David Jacquot - dave@jacquotlaw.com

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

Executed on April 13, 2009.

s/ Faith A. Devine  
FAITH A. DEVINE