UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS	
UNITED STATES OF AMERICA	
v.)	Criminal No. 08-CR-10223-PBS
ALBERT GONZALEZ,	
Defendant.	2010 MAR 24 2010 MAR 24 U.S. DISTRICT (DISTRICT)
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MOTION TO QUASH DEFENDANT'S SUBPOENA DUCES TECHM

Non-party The TJX Companies, Inc. ("TJX") submits this memorandum in support of its Motion to Quash Defendant's Subpoena *Duces Tecum*. For the following reasons, TJX's motion should be granted.

PRELIMINARY STATEMENT

In a last-minute and last-ditch effort to deflect the Court's attention from the gravity and severity of the offenses he has committed (and to which he has pled guilty), Defendant Albert Gonzalez has contested the amount of loss suffered by TJX as a result of his criminal intrusions (collectively referred to as the "Intrusion") into its computer systems. He argues that TJX has overstated the loss it suffered from the Intrusion, or alternatively that certain of TJX's expenses that comprised part of its loss were discretionary or were the result of its own negligence—and for those reasons, that the offense level attributed to Defendant based on that loss is overstated. Despite making *no* effort to verify these unfounded allegations in the *three months* since he filed his Sentencing Memorandum, Defendant last Thursday served a subpoena *duces tecum* upon

TJX seeking "any and all documents of any description . . . including, but not limited to, invoices paid by it, on which TJX bases its claim that it suffered losses of \$171.5 million" as a result of the Intrusion.¹

It is beyond dispute that Defendant is responsible for criminal computer attacks on an unprecedented scale. While TJX may be among the most prominent of Defendant's victims, it is not the lone victim. There are other corporate victims of other intrusions perpetrated by Defendant in the related cases pending in this District for which Defendant awaits sentencing. Even a listing of all Defendant's corporate victims does not truly reflect the universe of those victimized by his crimes—which rightfully encompasses customers of TJX and the other retailers in the related cases, as well as the financial institutions that issued or processed payment cards as to which data was stolen in the Defendant's intrusions. As the Government made clear in its Sentencing Memorandum, the Court could wholly exclude from consideration the Intrusion-related costs incurred by TJX, and still find that Gonzalez was responsible for actual or intended loss far above the top threshold in U.S.S.G. § 2B1.1. Government's Sentencing Mem. (Docket # 85) at 19.

It is clear that Defendant's subpoena is untimely, and that the material sought by the subpoena is unnecessary for the Court to find that Defendant occasioned an actual or intended loss greater than \$400 million. The fact that Defendant waited three months since filing his sentencing memorandum to putatively seek further information from TJX alone belies any colorable argument that the information is a core component of the factors to be considered by the Court at sentencing. Even were the Court to feel otherwise, Defendant should not be allowed to proceed in the face of such undue delay. Furthermore, Defendant's *ad hominem* attacks on

A copy of the subpoena is attached as Exhibit A to this memorandum.

TJX's business operations should not distract the Court from the reliability of TJX's claimed loss figure, which comports with the previous statements it has made to its shareholders, in its press releases, and in its filings with the Securities and Exchange Commission.

Setting these facts aside, the subpoena also is ridiculously overbroad, calls for confidential and proprietary information and other privileged material, and would impose an undue burden on TJX. Defendant's eleventh-hour subpoena to TJX, an acknowledged victim of his crimes, is a diversion and a sideshow. TJX should not have to expend further time and costs to validate the figures it has presented to the Court, and the subpoena should be quashed for all the reasons herein.

ARGUMENT

I. DEFENDANT'S SUBPOENA IS UNTIMELY UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 17(c)

Defendant's subpoena should be considered invalid under Fed. R. Crim. P. 17(c), as it is not a pre-trial request. As the Supreme Court held in *United States* v. *Nixon*, 418 U.S. 683 (1974), Rule 17(c) was not intended to provide a general means of discovery for criminal cases, and "its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of the subpoenaed materials." *Id.* at 698-99 (*citing Bowman Dairy* v. *United States*, 314 U.S. 214 (1951)) (emphasis original). Defendant's subpoena reflects just the sort of belated and irrelevant "fishing expedition" that the *Nixon* Court considered inappropriate, and it should be quashed as procedurally time-barred under Rule 17(c). *Id.* at 700; *see also United States* v. *Henry*, 482 F.3d 27, 30 (1st Cir. 2007) ("[T]he defense may use [Rule 17] subpoenas before trial to secure admissible evidence but not as a general discovery device."); *United States*

² TJX argues that the subpoena is equally invalid on grounds of undue burden and Defendant's undue delay in seeking this information. See Section IV, infra.

v. Chew, 284 F.3d 468, 470 (3d Cir. 2002) ("To the extent that Chew's motion was pursuant to Rule 17, it was untimely because it was brought well past the conclusion of trial. Rule 17 serves the economical purpose of expediting trials by governing the issuance of pre-trial subpoenas.") (emphasis added); United States v. Justice, 14 Fed. Appx. 426, 432 (6th Cir. 2001) ("Rule 17(c) authorizes the issuance of a subpoena for the production of documentary evidence at trial, but is not intended to be used for discovery.")

II. THE INFORMATION SOUGHT BY THE SUBPOENA IS NOT RELEVANT TO DEFENDANT'S SENTENCING

While TJX has submitted a Victim Impact Statement in this matter attesting to the approximately \$171.5 million in losses it has suffered as a result of the Intrusion, further details about TJX's loss are wholly unnecessary to the Court's determination of the amount of loss to be attributed to Defendant under U.S.S.G. § 2B1.1. As Application Note 3(F)(i) to that section of the Sentencing Guidelines provides, in cases involving stolen credit or debit cards, loss is quantified as a minimum of \$500 per stolen payment card. In its Annual Report on Form 10-K for the fiscal year ended January 27, 2007, filed with the Securities and Exchange Commission, TJX reported that data relating to at least 11.2 million unexpired payment cards were stolen during the Intrusion. Defendant has not questioned this number. Applying the \$500 per card minimum to these cards alone would yield a Guidelines loss well above the \$400 million threshold. Applying an estimated aggregate credit limit for all these cards as the attributable "intended loss," as suggested by *United States* v. *Alli*, 444 F.3d 34, 38-39 (1st Cir. 2006), Defendant's intended loss would exceed \$400 million if the average credit limit for these 11.2 million unexpired cards were only \$36.\frac{3}{2}\$ As the Government notes in its sentencing

³ Given that the average credit limit of the cards at issue in the *Alli* decision was over \$9,000, using a \$36 figure likely massively *underestimates* the loss attributable to Defendant. *See Alli*, 444 F. 3d at 38-39.

memorandum, the Court also could apply the Guidelines' minimum \$500 per card to the over one million cards Defendant stole from retailer DSW alone (thus ignoring both TJX's claimed loss and any calculation based on payment card data stolen from TJX) and *still* be well above the \$400 million threshold. *See* Gov't Sentencing Mem. at 18-19. In short, the extraordinary financial loss occasioned by the Defendant so exceeds \$400 million that the Court has numerous paths it can choose by which to make that finding—and none of those paths would or could be altered one bit by any information that might be gleaned from the further material sought by Defendant's subpoena of TJX.⁴

III. THE LOSS CLAIMED BY TJX IS ACCURATE AND REASONABLE, DESPITE DEFENDANT'S UNFOUNDED VICTIM-BLAMING ALLEGATIONS

In his Sentencing Memorandum, despite his protestations about assuming responsibility for his actions, Defendant challenges the loss claimed by TJX by two untrue and irrelevant arguments. First, he claims the loss is overstated on the basis that the figure is in part "the consequence of [TJX's] own negligence." Defendant's Sentencing Mem. (Docket # 76) at 14.5 TJX firmly denies that it was negligent, but it is not on trial in this proceeding. Defendant's responsibility for the loss suffered by TJX is not mitigated by accusations against TJX. Second, Defendant further challenges TJX's loss on the basis that TJX could not have suffered severe damage from the Intrusion, because its stock value rose between January 2007 and November 2009. TJX's stock price is totally irrelevant to the amount of its loss. Stock price is a function of

⁴ TJX respectfully disagrees with Defendant's argument in his Sentencing Memorandum that a finding of \$400 million overstates the loss that should be attributed to him because Defendant realized only minimal gain from his thefts. See Defendant's Sentencing Mem. at 10-13. Since loss is defined under the Guidelines as the greater of actual or intended loss, see U.S.S.G. § 2B1.1, Application Note 3(A), and since Gonzalez indisputably stole data pertaining to tens of millions of payment cards from the computer systems of TJX and other corporate victims with the intent of selling "dumps" of that data as quickly as possible, his success at effectuating such sales is irrelevant to the instant calculation.

⁵ Lest the Court misconstrue Defendant's intention in these and other *ad hominem* attacks on TJX, Defendant hastens to add that "this is not an attempt to 'blame the victim." Defendant's Sentencing Mem. at 14. Perhaps that is so, although Defendant's subsequent unfounded allegations throughout the memorandum of TJX's "carelessness" and "negligence" might lead a reasonable reader to conclude the opposite.

many factors, including overall company performance and the myriad decisions made by investors in the market. It should be noted, however, that TJX's stock price was achieved after public disclosure of the amount of the loss included in its Victim Impact Statement.⁶

Neither of these arguments by Defendant provides sufficient basis to uphold Defendant's subpoena. In fact, the amount of TJX's loss comprised part of its audited financial statements and was included in its filings with the Securities and Exchange Commission under the Securities Act of 1934, as amended, and in its press releases, and a false or misleading statement of this loss could have exposed TJX to substantial liability. As TJX reported to the Securities and Exchange Commission, the \$171.5 million loss figure reflects only cash costs resulting directly from the Intrusion that were incremental to costs TJX would otherwise have incurred. This calculation comports with U.S.S.G. § 2B1.1, Application Notes 3(A)(i) and 3(A)(iv), providing that actual loss includes all "reasonably foreseeable pecuniary harm" that resulted from the offense, defined as "pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense." In offenses under 18 U.S.C. § 1030, such as those committed by Defendant, actual loss is construed more broadly and includes "any reasonable cost" borne by a victim, "regardless of whether such pecuniary harm was reasonably foreseeable." U.S.S.G. § 2B1.1, Application Notes 3(A)(v)(III) (emphasis added). The loss claimed by TJX in its public filings and its Victim Impact Statement is accurate and reasonable, and the information sought by Defendant's subpoena is cumulative and unnecessary.

⁶ TJX wishes to clarify one point made by the Government in its Sentencing Memorandum. While TJX's stock price did experience small movement in the months after TJX first announced the Intrusion, there is no basis to conclude that such movement was caused by the Intrusion or the absorption by the market of knowledge about the Intrusion.

IV. DEFENDANT'S SUBPOENA IS UNREASONABLE, OPPRESSIVE, OVERLY BURDENSOME, AND UNDULY DELAYED

Under Fed. R. Crim. P. 17(c)(2), the Court has the power to quash a subpoena that is unreasonable or oppressive. *See, e.g., United States* v. *Catalan-Roman*, 585 F.3d 453, 462 (1st Cir. 2009). The parallel civil rules provide that a district court *shall* quash or modify a subpoena that "subjects a person to undue burden," and that the court further "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." Fed. R. Civ. P. 45(c)(3)(A)(iv); Fed. R. Civ. P. 26(c). Because, as shown below, compliance with the instant subpoena would impose a wholly undue burden on TJX, the subpoena should be quashed.

In requiring "any and all documents and records of any description, both hard-copy and electronic, including, but not limited to, invoices paid" for all \$171.5 million of loss claimed by TJX, Defendant has requested a mountain of material. As TJX set forth in its Victim Impact Statement, it immediately dedicated substantial resources to investigating and evaluating the Intrusion and developing a prompt and effective response. Significant numbers of TJX employees devoted their time to this effort (*none* of whose costs are reflected in TJX's claimed loss figures), as did over 50 outside computer experts retained by TJX's counsel. In addition to the very substantial costs for investigating and containing the Intrusion and implementing changes to TJX's computer system in response to the Intrusion, TJX necessarily incurred costs for communicating with customers about the Intrusion. A substantial portion of TJX's customers use payment cards to complete their transactions at TJX's stores, and providing these customers a safe and secure shopping environment is extremely important to TJX. The Intrusion required a prompt and thorough response by TJX to preserve the integrity of the shopping experience at its stores and to maintain the trust and confidence of its customers.

TJX also incurred costs in responding to claims by acquiring banks and payment card companies, associations and issuers with respect to the Intrusion; fines imposed by payment card companies and associations by reason of the Intrusion; investigating and responding to investigations by, and complying with settlements with, Canadian privacy officials, the Federal Trade Commission and 41 state Attorneys General in the United States; and responding to inquiries by U.K. privacy officials. Just listing the various subject matters and proceedings to which TJX was forced to respond as a result of the Intrusion shows how expansive a production Defendant's subpoena contemplates.

The subpoena is additionally objectionable because it encompasses a significant amount of material protected by the attorney-client and attorney work product privileges, as well as confidential and proprietary information relating to TJX's processing of customer transactions and information revealing the design, operation and architecture of its computer system. In the civil context, Fed. R. Civ. P. 45(c)(3)(A)(iii) requires that a subpoena be guashed if it requires "disclosure of privileged or other protected matter." Federal Rule of Civil Procedure 26(c)(1)(G) also allows the court to protect a party or person from being forced to reveal trade secrets and confidential commercial information from discovery. TJX, like any large retailer, remains a target for cybercrime. Since discovering the Intrusion, TJX has taken steps designed to further strengthen the security of its computer system and has implemented an enhanced program with respect to data security. Nevertheless, it is important that the details of TJX's computer system and data security program, which it has carefully protected, should remain confidential to protect against this risk, and certainly should not be disclosed to an admitted hacker. Such protection from disclosure is especially warranted when the party seeking such information cannot establish that the information is relevant and necessary to the action. See ITT Electro-Optical Prods. Div.

of ITT Corp. v. Elec. Tech. Corp., 161 F.R.D. 228, 231 (D. Mass. 1995) ("If proof of relevancy or need is not established, discovery [of trade secrets and confidential information] should be denied.") Defendant has made no such showing.

Even if all privileged and confidential information were withheld, the subpoena still would cover a substantial volume of responsive documents and records. Yet Defendant waited until March 18, 2010 to serve his absurdly overbroad subpoena, three months after filing the sentencing memorandum in which he first contested TJX's loss figures. See Docket Entry 76 (showing that Defendant's sentencing memorandum was filed on December 18, 2009). More incredibly, Defendant gave TJX one week to respond to the subpoena, directing it to appear with the requested material at the sentencing hearing scheduled for March 25, 2010. While the subpoena rightfully should be quashed on grounds of overbreadth alone, its unreasonableness is exacerbated given Defendant's undue delay in seeking the information and patently unrealistic time period for response. See, e.g., Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998) ("Concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs" when reviewing the reasonableness of a subpoena); United States v. Henry, 482 F.3d 27, 30 (1st Cir. 2007) (quashing Rule 17 subpoenas that were "extremely broad and unrealistic, especially as eve-of-trial demands"). Even if Defendant were to show that the material he requests is relevant and necessary to his sentencing (which, in TJX's view, he cannot), he simply has waited too long—the subpoena should be quashed for Defendant's undue delay in seeking the information.

CONCLUSION

In his subpoena to TJX, Defendant seeks material that is not relevant to his sentencing; material which is cumulative to the Victim Impact Statement already submitted by TJX and

therefore unnecessary; and privileged, proprietary, and other confidential material to which

Defendant is not entitled. His subpoena further is unreasonable, oppressive, and unduly delayed.

For these and all other reasons set forth herein, TJX's Motion to Quash should be granted.

Respectfully submitted,

THE TJX COMPANIES, INC.

By its attorney,

Dated: March 24, 2010

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and that paper copies will be sent to any indicated as non-registered participants, on March 24, 2010.

Dated: March 24, 2010

Cori A. Lable