IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RANDOM HOUSE, INC., PLAINTIFF	)	
V.	)	CIVIL ACTION NO. 1:11-MC-28 AJT/TCB
THE CENTRAL INTELLIGENCE AGENCY, DEFENDANT	)	

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
PETITION TO ENFORCE SUBPOENA AGAINST THE CENTRAL INTELLIGENCE AGENCY

INTRODUCTION

Plaintiff is the defendant in an action pending in the City of Alexandria Circuit Court entitled *John Peppe v. Random House, Inc.* That action arises under §8.01-40 of the Code of Virginia, which prohibits the use of a person's name or picture for advertising or commercial purposes without first obtaining that person's written consent, and concerns the appearance of a photograph or photographs claimed to depict the plaintiff in certain editions of a book entitled *First In; An Insider's Account of How the CIA Spearheaded the War on Terror in Afghanistan* published by Random House. *See* Exhibit 1 to the plaintiff's Petition; *see also* Plaintiff's Memorandum at p. 1. In the course of discovery in that action, Random House issued a subpoena *duces tecum* to the CIA's Office of General Counsel under the authority of the Circuit Court for the City of Alexandria. Plaintiff's Exhibit 5C. As we will show, under controlling Fourth Circuit law, that subpoena was in excess of the jurisdiction of the Alexandria Circuit Court, and therefore was a nullity, as an agency may not be required to comply with a subpoena

unless it has refused production of documents under its regulations in an arbitrary, capricious, or unlawful manner. The determination of whether an agency has acted in an arbitrary, capricious, or unlawful manner is made through an original action against the federal agency under the Administrative Procedure Act.

Notwithstanding the absence of jurisdiction in the Alexandria Circuit Court, which the General Counsel pointed out, *see* Plaintiff's Exhibit 6 at p. 2, the CIA construed the subpoena and accompanying letter as a request for information under 32 C.F.R.§1905 *et seq.*, the agency's *Touhy* regulations[1], and explained that it would release only those documents that did not reveal classified information, information whose disclosure was prohibited by law, particularly by 50 U.S.C. §§403(i) and (g), or was otherwise privileged. The CIA also pointed out that the Privacy Act of 1974, as amended, prevented it from responding to the plaintiff's request unless and until it received written consent from the individuals about whom records were sought. *Ibid*. On July 7, 2011 the CIA's Office of General Counsel acknowledged receipt of the necessary Privacy Act waivers, and advised Random House that the request and waivers were being forwarded to the agency's Information and Privacy Coordinator for review and processing consistent with the determinations made under its *Touhy* regulations. Plaintiff's Exhibit 8 at p. 1. The CIA also noted that its responses should not be construed as in any way acquiescing in the exercise of jurisdiction by the courts of the Commonwealth. *Id.* at 3. The very next day, Random House filed its petition in this Court.

As we will show, controlling decisions of the Fourth Circuit make it clear that, because the City of Alexandria Circuit Court had no jurisdiction to enforce a subpoena for records from a

[1] *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); *see also* Part I *infra*.

federal agency, this Court gained no greater jurisdiction from plaintiff's petition. Moreover, to the extent that an agency's decision whether to release official information in litigation in State courts may be reviewed at all, that review must be in the federal court. The proper procedure is to file a civil action seeking review under the Administrative Procedure Act, 5 U.S.C. §701 *et seq* ("APA"). Plaintiff's motion is not a complaint, it is unaccompanied by a summons, and has not been served as required by the Federal Rules of Civil Procedure, no administrative record has been compiled, and the period within which the agency may respond has not yet passed.[2] Accordingly, this Court has not acquired jurisdiction over the CIA, and for that reason as well, the plaintiff's motion should be denied.

ARGUMENT

I. The Circuit Court for the City of Alexandria Lacked Jurisdiction To Subpoena Records from the Central Intelligence Agency

The sole document before the Court is the plaintiff's Petition to Enforce the subpoena it caused to be issued by the Circuit Court for the City of Alexandria. Governing decisions of the Fourth Circuit make it clear that the Circuit Court for the City of Alexandria lacked jurisdiction to require the Central Intelligence Agency – or any other federal agency -- to produce documents in response to such a subpoena. Pursuant to 5 U.S.C. § 3012, the "Housekeeping Statute," many agencies, including the CIA, have promulgated so-called *Touhy* regulations regulating their employees' ability to respond to third party subpoenas for official information. *See* 32 C.F.R. §1905 *et seq*. The validity of such regulations was considered and upheld by the Supreme Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). *Touhy* involved an FBI agent held

[2] The Agency reserves any substantive response to the plaintiff's request for documents until, and unless, a proper action under the APA is filed and served.

in contempt because, pursuant to a Department of Justice regulation, he refused to produce certain documents subpoenaed by a state prisoner in a federal habeas corpus proceeding. The Supreme Court affirmed the reversal of the contempt, concluding that the FBI agent's refusal to produce documents in contravention of the DOJ regulation was lawful, and that the regulation centralizing decision making was a valid exercise of Executive authority under the predecessor of the current Housekeeping Statute. *Id*. at 467-68. Thus, such regulations became known as *Touhy* regulations.

In *Boron Oil Company v. Downie*, 873 F.2d 67 (4th Cir. 1989), as here, subpoenas were issued to a federal agency, there the Environmental Protection Agency, by a West Virginia Circuit Court. The appropriate official of the EPA declined to permit the disclosure sought by the subpoena. EPA moved to quash the subpoenas in the Circuit Court, which denied EPA's motion. *Id*. at 68. EPA then removed the matter to the district court. The district court enforced the subpoena, and EPA appealed. *Id.* at 68-69. The Court of Appeals held that even if the United States or an agency *eo nomine* is not the party to whom the subpoena is directed, a subpoena to a federal official seeking official information is an action against the United States, and is subject to the defense of sovereign immunity, and that state court subpoenas are also subject to federal supremacy. 873 F.2d at 70-71. The Court of Appeals held that therefore the state court had no jurisdiction to compel disclosure from a federal official, and the federal court on removal gained no greater jurisdiction. 873 F.2d at 70. The Court of Appeals reasoned that a subpoena enforcement proceeding against a federal employee or agency to obtain official information is an action the effect of which falls upon the government and seeks to compel it to act. 873 F.2d at 69. Accordingly, a such a proceeding implicates sovereign immunity and is

barred absent an applicable statutory waiver. No such waiver exists in the typical state court subpoena matter involving an Executive agency; thus, state courts lack the power to compel such agencies and their employees to produce government records or other evidence. 873 F.2d at 71. The Fourth Circuit also held that the Constitution's Supremacy Clause (U.S. CONST. art. VI, cl. 2) also undercut a state court's authority to enforce subpoenas against federal agencies and officers. Congress has expressly limited review of federal agency action to the federal courts in the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 702. A state court's assertion of power to decide whether a subpoena should be enforced is, effectively, an assertion of the power of judicial review over a federal agency's decision concerning production of evidence. Such review "directly contravenes 5 U.S.C. § 702," and thereby violates the Supremacy Clause. *Boron Oil Co.*, 873 F.2d at 71.

In *Smith v. Cromer*, 159 F.3d 875 (4th Cir. 1998) a State court subpoena was issued to Assistant United States Attorneys and a DEA Agent by a defendant in a Maryland criminal case. 159 F.3d at 877. As in *Boron Oil*, the case was removed to federal court. Unlike *Boron Oil*, on removal the district court quashed the subpoenas. The State court defendant appealed to the Fourth Circuit, which agreed with the district court that "the doctrine of sovereign immunity divests the district court of jurisdiction to enforce the subpoenas." 159 F.3d at 878. The Court of Appeals held that state courts had no jurisdiction to compel disclosure of official information from federal officials or agencies, and on removal the federal court gained no greater jurisdiction – even though, had a similar case been brought in federal court, a federal court might have had such jurisdiction. 159 F.3d at 879.

In this case, the plaintiff has filed a motion to enforce the Alexandria Circuit Court's

subpoena. But, as *Boron Oil* and *Smith v. Cromer* make clear, under the Supremacy Clause and principles of federal sovereign immunity the Alexandria Circuit Court had no jurisdiction to compel disclosure from the CIA; the subpoena cannot be enforced even though, had the case been pending in federal court, such jurisdiction might have existed. The happenstance that the federal officers or agencies from whom or which disclosure was sought did not remove the action before plaintiff came to this Court on its own motion does not give the State court's subpoena any greater validity: It remains *ultra vires* of the Alexandria Circuit Court's authority, and may not, consistent with *Boron Oil* and *Smith v Cromer* be enforced by a federal court.

Accordingly, the Alexandria Circuit Court lacked jurisdiction to compel disclosure from the CIA, this Court lacks jurisdiction to enforce the state court subpoena, and the plaintiff's motion should be dismissed.

II. This Court Lacks Jurisdiction *In Personam* Over The Central Intelligence Agency Because the Plaintiff Has Neither Filed An Action Under The APA Nor Served that Complaint and a Summons on the Agency

As demonstrated in Part I above, the plaintiff's motion should be denied because the subpoena which the plaintiff seeks to enforce exceeded the jurisdiction of the State court, and the filing of the plaintiff's petition in this Court did not somehow expand that jurisdiction. In addition, the plaintiff's motion should be denied because the Court lacks jurisdiction *in personam* of the CIA. In *Murphy Brothers, Inc v. Michetti Pipe Stringing Inc*., 526 U.S. 344, 350-51 (1999), the Supreme Court noted that

> one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend.
> * * *
> Unless a named defendant agrees to waive service, the summons continues to

> function as the sine qua non directing an individual or entity to participate in a civil action or forgo procedural or substantive rights.

While, as the Court of Appeals in *Comsat* held, review of an agency's policy decision about whether the best use of its resources was to comply in whole or in part with a subpoena might be available in an action under the APA, the plaintiff has not properly invoked that statute.[3] An action under the APA is instituted, like any other civil action, by the filing of a complaint, and the service on the defendant (and, in the case of an action under the APA against a federal agency, on the Attorney General and the United States Attorney) of that complaint and a summons. *See* Rules 3 and 4(i) of the Federal Rules of Civil Procedure. Here, the plaintiff neither filed a complaint nor served that complaint with a summons as required. Plaintiff may contend that the subpoena it procured under the authority of the City of Alexandria Circuit Court serves as a substitute for the required summons. But any such contention would be wrong for two reasons: *First*, as demonstrated above, the issuing court was without jurisdiction to compel discovery from the CIA, and the plaintiff's filing of its petition in this Court did not somehow exopand the Circuit Court's jurisdiction; and *second*, the Circuit Court subpoena fails to satisfy

[3] If plaintiff were to file and serve an APA action, the CIA would show that it did not act in an "arbitrary" or "capricious" manner in its policy decision about the best use of the agency's resources in response to the plaintiff's subpoena under its *Touhy* regulations. 5 U.S.C. § 706. The bulk of plaintiff's Memorandum contends that the Agency's responses to its subpoena was insufficient as a matter of discovery and the law of privilege. Plaintiff's Memorandum at pp. 14-26. That argument is inapposite. *Comsat* makes clear that even if the plaintiff had filed an action under the APA seeking review of an agency's decision whether to make disclosure under such a subpoena, the issue is not to be decided as a dispute under Federal Rules of Civil Procedure 26 and 27. To the contrary, in the Fourth Circuit, APA review of an agency's decision "whether or not to comply with a third-party subpoena" turns on what the Court held was "essentially a policy decision about the best use of the agency's resources," 190 F.3d at 278. The Fourth Circuit expressly rejected the 9th Circuit's contrary decision in *Exxon Shipping Co. v. U.S. Department of the Interior*, 34 F.3d 774, 778-79 (9th Cir., 1994), which had held that non-party federal agencies must produce evidence in response to the subpoenas of private litigants, subject only to the court's discretionary right to limit burdensome discovery under Rules 26 and 45 of the Federal Rules of Civil Procedure. Plaintiff's reliance on *Moore's Federal* Practice, which in turn relied on the 9th Circuit's *Exxon Shipping Co.* decision for the argument that the Housekeeping Statute and the *Touhy* regulations issued thereunder cannot be the basis for a decision to withhold official information from discovery, Memorandum at 27, is, simply, contrary to controlling Fourth Circuit authority.

the purpose of a summons initiating a civil action in this Caourt as set out by the Supreme Court in *Murphy Brothers, Inc., supra:* it fails to state the time within which the party served must appear and defend in this Court. 526 U.S. at 350-51.[4]

The plaintiff's failure to effect proper service of process requires dismissal of their petition. "Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital International Ltd. v. Rudolf Wolff & Co.* 484 U.S. 97, 104 (1987). "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-445 (1946); *Koehler v. Dodwell*, 152 F.3d 304, 306 (4th Cir.1998) ("a failure to obtain proper service on the defendant deprives the court of personal jurisdiction over the defendant"); *Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc.*, 733 F.2d 1087, 1089 (4th Cir.1984).

Plaintiff appears to rely *Comsat Corporation v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999), to support proceeding by a petition to enforce the State court subpoena, rather than filing a civil action seeking declaratory and injunctive relief under the APA. Memorandum at pp. 28-29. In *Comsat* an arbitrator who was presiding over a dispute between a National Science Foundation grantee and Comsat regarding construction cost overruns issued discovery subpoenas to the Foundation for documents and testimony related to the construction project. The Foundation, relying on its disclosure regulations, declined to comply. 190 F.3d at 271-272. Comsat then filed a petition invoking the Federal Arbitration Act in this Court to

[4] Plaintiff accompanied its petition with a Notice of Hearing setting Friday, July 15, 2011 for a hearing on its petition. No application for emergency relief has been filed explaining any urgency; neither the Local Rules nor any Order of this Court authorizes a hearing on such brief notice.

enforce the subpoena. 190 F.3d at 273. Unlike in this case, however, the Federal Arbitration Act, under which the subpoena in *Comsat* was issued, expressly authorizes such a proceeding:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.
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> * * *
>
> if any person or persons so summoned to testify shall refuse or neglect to obey said summons, *upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators*, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7 (emphasis supplied). The plaintiff can point to no parallel grant of authority to a district court to enforce a State court subpoena by petition because Congress has not granted such authority, either by statute or by provision in the Federal Rules of Civil Procedure. Contrary to the plaintiff's contention, Memorandum at 28-29, the Fourth Circuit's *Comsat* decision, which arose under the Federal Arbitration Act, and therefore did not implicate the Supremacy Clause, did not authorize review of a decision not to disclose official information requested in a state court subpoena by any means other than the filing of an action for declaratory or injunctive relief under the APA.

Accordingly, because the plaintiff has not commenced a civil action by filing a complaint, and has not provided the Court with *in personam* jurisdiction by proper service of process, the Court should dismiss the plaintiff's motion.

/ / /

Conclusion

For the foregoing reasons, the plaintiff's Petition to Enforce the City of Alexandria Circuit Court subpoena should be denied.

Dated: July 13, 2011

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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