

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

RICHARD G. CONVERTINO,

Petitioner,

v.

Case No. 07-x-50598  
Hon. Robert H. Cleland

UNITED STATES DEPARTMENT OF  
JUSTICE, et al,

Respondents.

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**MOTION OF NON-PARTY MEDIA  
RESPONDENTS TO QUASH SUBPOENA AND  
DISMISS, AND/OR FOR PROTECTIVE ORDER**

Non-party media respondents Detroit Free Press, Inc. and its reporter David Ashenfelter (collectively "Free Press respondents") move, pursuant to FRCP 26(c) and 45(c)(3)(A)(iv), to quash the subpoenas issued from this Court in a pending District of Columbia civil action seeking privileged and confidential newsgathering materials and dismiss, and/or for a protective order that discovery shall not be had and dismiss, for the following reasons:

1. Petitioner Richard G. Convertino is a former assistant United States attorney for the Eastern District of Michigan. Convertino was indicted on multiple felony counts of obstruction of justice and lying to a federal judge on March 29, 2006, and awaits trial in this District before the Hon. Arthur J. Tarnow. *United States of America v Richard G. Convertino*, Criminal No. 2:06-cr-20173.

2. Prior to his indictment in this District, Convertino on February 13, 2004, filed a civil action in the District Court for the District of Columbia, *Convertino v United States Department of Justice, et al*, Civil No. 1:04-sv-00236 RCL, assigned to Hon. Royce C. Lamberth. In that action, Convertino claimed that unknown persons in the Justice Department had leaked defamatory information about him to reporter Ashenfelter of the Detroit Free Press in violation of the Privacy Act. That case was stayed pending the government's completion of its criminal investigation of Convertino from August 16, 2004 until February 23, 2006.

3. In late April and early May, 2007, Convertino issued subpoenas in his D.C. civil action to Ashenfelter and to the Free Press, seeking confidential and privileged information. Pursuit to FRCP 45 (c)(2)(B), the Free Press respondents each served written objections to these subpoenas on multiple grounds, including privilege under the First Amendment, common law and statute. (Were this action to proceed, Free Press respondents would assert those privileges by motion to this Court.)

4. On July 6, 2007, Convertino filed this miscellaneous action, as a motion to compel production in the D.C. civil action, directed to the Free Press respondents.

5. On November 13, 2006, however, in response to Convertino's own refusal to permit discovery in his D.C. civil case, claiming that to do so would prejudice his Fifth Amendment rights in the E.D. Michigan criminal case, the Justice Department moved to compel discovery, asking the D.C. court to dismiss Convertino's action if he continued to refuse. On December 11, 2006, Convertino cross moved in the D.C. civil action to stay all proceedings, or, in the alternative, that only he should be allowed to take discovery (the "motion to bifurcate").

6. On August 8, 2007, D.C. District Judge Lamberth denied Convertino's "motion to bifurcate"; denied without prejudice the government's motion to compel discovery, and granted Convertino's motion to stay all proceedings in the D.C. civil case.

Additionally, Judge Lamberth ordered:

This stay shall terminate upon entry of a verdict in that case [the related criminal proceedings], or disposition of that case, whichever occurs first.

The order staying the D.C. civil action is Exhibit A.

7. Free Press respondents are informed that Judge Tarnow has not set a firm trial date in the criminal case.

8. Free Press respondents further believe that, should Convertino be convicted, his civil action against the Justice Department, in which he seeks this discovery against Free Press respondents, could not proceed, and would be dismissed.

Accordingly, the subpoenas to Free Press respondents should be quashed and this action be dismissed, because no discovery is permitted in the underlying D.C. District Court civil action.

On August 2 and 3, 2007, counsel met and conferred by email. Counsel for Convertino on August 3, 2007, agreed to dismiss this action, but has subsequently changed his mind and refuses to do so.

WHEREFORE, David Ashenfelter and Detroit Free Press, Inc., ask that the subpoenas issued to them in the D.C. civil action be quashed, and this action in the E.D. Michigan be dismissed. Alternatively, they ask for a protective order that no discovery may be taken and this action be dismissed.

s/Herschel P. Fink

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Dated: August 31, 2007

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**MEMORANDUM IN SUPPORT OF MOTION OF NON-PARTY  
MEDIA RESPONDENTS TO QUASH SUBPOENA  
AND DISMISS, AND/OR FOR PROTECTIVE ORDER**

**Introduction**

Petitioner Richard G. Convertino is seeking privileged and confidential newsgathering materials in a civil action pending in the District Court for the District of Columbia from the non-party media respondents Detroit Free Press, Inc. and its reporter David Ashenfelter ("Free Press respondents"). Convertino has filed a motion to compel discovery in this Court. However, because the D.C. District Court has stayed the D.C. civil action and prohibited Convertino from taking discovery pending the outcome of a felony criminal proceeding against Convertino in this District - - and because Convertino's conviction in that case would likely also end his civil lawsuit - - the subpoenas which Convertino is seeking to enforce in this action should be quashed, and this action dismissed.

**Pertinent Facts**

Free Press respondents are moving, pursuant to FRCP 26 (c) and 45 (c)(3)(A)(iv), to quash the subpoenas issued to them in the underlying D.C. civil action and for dismissal of this miscellaneous action, or, alternatively, for a protective order that discovery not be had and this action be dismissed.

Convertino is a former assistant United States Attorney for the Eastern District of Michigan. Convertino was indicted on March 29, 2006, on multiple felony counts of obstruction of justice and for lying to a federal judge and awaits trial in this District before the Hon. Arthur J. Tarnow. *United States of America v Richard G. Convertino*, Criminal No. 2:06-cr-20173.

Prior to his indictment in this District, Convertino on February 13, 2004, filed a civil action in the District Court for the District of Columbia, *Convertino v United States Department of Justice, et al*, Civil No. 1:04-cv-00236 RCL, assigned to Hon. Royce C. Lamberth. In that action, Convertino claimed that unknown persons in the Justice Department had leaked defamatory information about him to reporter Ashenfelter of the Detroit Free Press in violation of the Privacy Act. That case was stayed pending the government's completion of its criminal investigation of Mr. Convertino from August 16, 2004 until February 23, 2006.

In 2006 Convertino issued subpoenas from the D.C. District Court to the current parent company of the Free Press, Gannett Company, seeking to compel Gannett to produce documents - - including Ashenfelter's notes in Michigan - - that might reveal Ashenfelter source(s) for his story about Convertino.

In response to that D.C. subpoena of Gannett, Ashenfelter commenced a declaratory judgment action on September 12, 2006 in this District, claiming that the information sought from Gannett was privileged pursuant to the First Amendment, common law and statute, and that the privilege belonged to him, and not to Gannett, and could only be sought from him in the Eastern District of Michigan, where he resides and works, pursuant to FRCP 45(a)(2). That action was assigned to Hon. Patrick J. Duggan. *Ashenfelter v Convertino*, Civil Action No. 2:06-cv-14016. Subsequently, Convertino agreed to dismiss the subpoena issued to Gannett in the District of Columbia, and Ashenfelter agreed to voluntarily dismiss without prejudice the action assigned to Judge Duggan on May 17, 2007.

In late April and early May, 2007, Convertino issued new subpoenas in his D.C. civil action directly to Ashenfelter and to the Free Press, seeking the same confidential and privileged information. Pursuant to FRCP 45 (c)(2)(B), the Free Press respondents each served written objections to these subpoenas on multiple grounds, including privilege under the First Amendment, common law and statute.

On July 6, 2007, Convertino filed this miscellaneous action in this District as a motion to compel production in the D.C. civil action, directed to the Free Press respondents.

On November 13, 2006, however, in response to Convertino's own refusal to permit discovery in his D.C. civil case, in which he claimed that to do so would prejudice his Fifth Amendment rights in the E. D. Michigan criminal case, the Justice Department moved to compel discovery, also asking the D.C. court to dismiss Convertino's action if he continued to refuse. On December 11, 2006, Convertino cross moved in the D.C. civil

action for a stay of all proceedings, or, in the alternative, that only he should be allowed to take discovery (the “motion to bifurcate”).

On August 8, 2007, D.C. District Judge Lamberth denied Convertino’s “motion to bifurcate”; denied without prejudice the government’s motion to compel discovery, and granted Mr. Convertino’s motion to stay all proceedings in the D.C. civil case. Additionally, Judge Lamberth ordered:

This stay shall terminate upon entry of a verdict in that case [the related criminal proceedings], or disposition of that case, whichever occurs first.

The order staying the D.C. civil action is Exhibit A to the motion.

Free Press respondents are informed that Judge Tarnow has not set a firm trial date in the criminal case. Free Press respondents further believe that, should Mr. Convertino be convicted, his civil action against the Justice Department, in which discovery is sought against Free Press respondents, could not proceed, and would be dismissed.

### ARGUMENT

#### **The D. C. Case Is Stayed and May Never Resume, and, Accordingly, These Subpoenas Should Be Quashed, and This Action Dismissed**

The subpoenas to the Free Press respondents should be quashed and this action dismissed pursuant to FRCP 45(c)(3)(A)(iv), because respondents would be subjected to undue burden, or, alternatively, a protective order be entered that no discovery be taken, and this action dismissed pursuant to FRCP 26(c)(1), because Convertino has been prohibited from taking discovery by the D.C. District Court, and his civil action, in which this discovery is sought, has been stayed pending completion of his criminal proceeding.

Judge Tarnow has set no firm trial date in the criminal proceeding against Convertino, and, should he be convicted, his civil cause of action would likely never proceed.

Accordingly, principles of judicial economy and this Court's inherent power to control its docket strongly support entry of an order dismissing this action and quashing the subpoenas, and/or ordering that no discovery shall be taken and this action be dismissed.

**Conclusion**

David Ashenfelter and Detroit Free Press, Inc., ask that the subpoenas issued to them in the D.C. civil action be quashed, and this action in this Court be dismissed.

s/Herschel P. Fink  
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Dated: August 31, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that on August 31, 2007, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Lenore M. Ferber.

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