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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

Case No. 07CR0330-LAB

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Plaintiff,

The Hon. The Honorable Larry A. Burns

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v.

**OBJECTIONS TO DEFENDANT BRENT
WILKES' APPLICATION FOR
ISSUANCE OF SUBPOENA PURSUANT
TO FEDERAL RULE OF CRIMINAL
PROCEDURE 17(b) AND (c)**

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BRENT ROGER WILKES,

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Defendant.

Date: December 11, 2007

Time: 9:00 a.m.

Crtrm.: 9

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Specially appearing third party witness Allison Hoffman objects to Defendant Brent Wilkes'

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Application for Issuance of Subpoena Pursuant to Federal Rule of Criminal Procedure 17(b) and (c)

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on the following grounds:

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- The Application for a subpoena to Allison Hoffman should be denied because Defendant has failed to meet his heavy burden of showing that her testimony is necessary to decide the motion to dismiss, a heavy burden that can only be met in “the most exceptional cases.”

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- 1 • The Application for a subpoena to Allison Hoffman should be denied because
2 Defendant has not exhausted alternative sources.
- 3 • The Application for a subpoena to Allison Hoffman should be denied because the
4 balancing of all appropriate interests weigh in the favor of Ms. Hoffman.
- 5 • The Application for a subpoena to Allison Hoffman should be denied on the basis of
6 the First Amendment and federal common law.
- 7 • Allison Hoffman hereby incorporates by reference all additional objections asserted by
8 Lisa Myers.

9 The basis for these objections is set forth in the following points and authorities.

10 INTRODUCTION

11 Defendant Brent Wilkes seeks to subpoena Allison Hoffman, an Associated Press reporter, to
12 disclose the identities of confidential government sources quoted in two of her news reports about this
13 case. In this Circuit, the law is clear that to justify such a subpoena the Defendant bears a very heavy
14 burden that can only be met in “the most exceptional cases.” *Shoen v. Shoen*, 48 F.3d 412, 416 (9th
15 Cir. 1995) (“*Shoen II*”), quoting *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981). For any one of a
16 number of reasons, the circumstances of this case do not present one of those exceptional cases.

17 First, the stated purpose of the subpoenas is to support the post-conviction renewal of the
18 Defendant’s motion to dismiss the indictment. However, the very arguments and case law the motion
19 to dismiss raises demonstrate that compelling Ms. Hoffman to name her government sources is
20 unnecessary. The Defendant’s motion to dismiss is grounded on numerous similar cases arising out of
21 media leaks, all of which were resolved without subpoenas to journalists. Indeed, to our knowledge
22 there is no reported instance of a federal court *ever* enforcing a defendant’s request for a journalist to
23 identify a confidential source of a leak, to support a motion to dismiss or other analogous petition. In
24 fact, several cases have explicitly rejected similar requests because they are unnecessary to resolve
25 such motions. See *United States v. Ahn*, 231 F.3d 26, 28-29 (D.C. Cir. 2000); *United States v.*
26 *Pretzinger*, 542 F.2d 517, 520-21 (9th Cir. 1976); *United States v. Calvert*, 523 F.2d 896, 902 n.4 (8th
27 Cir. 1975).

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1 While the Circuit has never spelled out all of the factors to be weighed in the balance when
2 confidential sources are at issue, it has pointed to certain minimum criteria that should always be
3 considered. Thus, the party seeking disclosure must demonstrate that the requested information is
4 necessary for the maintenance of the claim at issue, and is “unavailable despite exhaustion of all
5 reasonable alternative sources.” *Shoen II*, 48 F.3d at 416. See also *United States v. Caporale*, 806
6 F.2d 1487, 1504 (11th Cir. 1986) (requires showing that information is highly relevant, necessary to
7 the proper presentation of the case, and unavailable from other sources”); *United States v.*
8 *Cuthbertson*, 630 F.2d 139 (3d Cir. 1980). Furthermore, the Circuit has emphasized that whether the
9 identities of confidential sources are at issue is an important factor in determining how the balance
10 should be struck, since confidentiality is entitled to the highest degree of protection. *Shoen I*, 5 F.3d at
11 1295-96. Regardless of how the balancing exercise is characterized, the bottom line is that
12 “compelled disclosure is the exception, not the rule.” *Shoen II*, 48 F.3d at 416.

13 **B. THE DEFENDANT HAS NOT MADE THE REQUISITE SHOWING OF NEED**
14 **FOR MS. HOFFMAN’S SOURCES**

15 Applying these well-established guidelines, the Court must first consider whether learning the
16 identities of Ms. Hoffman’s sources is truly necessary to resolve the Defendant’s motion to dismiss.
17 For example, if the Defendant does not need to know the names of sources to prevail upon his
18 dismissal theory, then the subpoena should not issue. See *Riley v. City of Chester*, 612 F.2d 708, 717
19 (3d Cir. 1979). Similarly, if a party is unlikely to prevail on their claim even if source identities are
20 disclosed, the privilege must be upheld. See *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d
21 583, 597 (1st Cir. 1980) (“plaintiff should show that it can establish jury issues on the essential
22 elements of its case not the subject of the contested discovery” before disclosure of confidential
23 sources may be compelled); *Cervantes v. Time, Inc.*, 464 F.2d. 986, 992-93 (8th Cir. 1972);
24 *Blumenthal v. Drudge*, 186 F.R.D. 236, 245 (D.D.C. 1999) (source information allegedly relevant to
25 actual malice element of a public-figure defamation claim need not be disclosed absent proof that
26 plaintiffs were public figures).

27 *Shoen II*, which did not even involve a confidential source, is a good illustration of this
28 principle. Although the plaintiff in *Shoen* claimed that he needed to depose a book author to prove

1 that the defendant made defamatory statements with ill will, the Court quashed the subpoena because
2 even if ill will could be established, it would not prove the actual malice required to establish liability
3 in a public figure defamation case. 48 F.3d at 417.

4 Here, Ms. Hoffman’s testimony simply is not necessary to resolve the defendant’s claim that
5 his conviction should be reversed due to alleged disclosure of grand jury material to the news media.
6 Before trial, the defendant claimed that the indictment against him had to be dismissed because
7 government officials disclosed grand jury material to journalists, and that disclosure must have had a
8 “detrimental impact on the impartiality of the grand jury.” Memorandum in Support of Motion to
9 Dismiss Indictment (“Motion to Dismiss”) at 7. Now, following his conviction by a jury, he similarly
10 asserts that these alleged violations of Rule 6(e) “constitute[] outrageous government misconduct and
11 warrants reversal” of his conviction. Defendant Brent Wilkes’ Application for Issuance of Subpoena
12 (“Application”) at 2.

13 However, for purposes of the instant motion, the defendant does not need the testimony of
14 Ms. Hoffman to establish which government officials disclosed to her the information in the report at
15 issue. As the defendant argued in his pre-trial motion to dismiss the indictment, for the purpose of
16 assessing what was disclosed to a reporter and who disclosed it, the Court must assume that the
17 statements in Ms. Hoffman’s news reports are correct. *See In re Grand Jury Investigation Lance*, 610
18 F.2d 202, 219 (5th Cir. 1980) (quoted in Motion to Dismiss at 4). That means that in resolving
19 defendant’s present claim that his conviction must be reversed, the Court assumes that government
20 officials disclosed to Ms. Hoffman that, as of February 1, 2007, federal prosecutors were preparing to
21 seek indictments against the defendant “within the next few weeks” on charges of bribery and
22 conspiracy. Motion to Dismiss, Ex. A. Ms. Hoffman’s testimony thus is not needed on that topic.
23 Nor is her testimony needed to establish whether or not the information contained in her articles is the
24 kind of information protected by Rule 6(e) – it either is or it is not. And her testimony could not
25 possibly shed any light on “the extent of prejudice the leaks actually caused Mr. Wilkes,” Application
26 at 3, since she has no insight into whether any grand jurors read or were influenced by her news
27 reports.

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1 Indeed, the very cases relied on by the defendant in his motion to dismiss the indictment amply
2 demonstrate that courts do not need the testimony of the journalists involved to resolve claims for
3 dismissal or reversal based on media leaks. Defendant cites several “leak” cases in his motion to
4 dismiss, which in turn discuss another half-dozen similar cases arising out of pre-indictment media
5 leaks. Yet not a single one of those cases even suggests that testimony from the journalists who
6 received the information was necessary to resolve a motion to dismiss the indictment, or a motion for
7 sanctions.

8 For example, in *In re Grand Jury Investigation Lance*, 610 F.2d at 207-11, former federal
9 Budget Director Bert Lance alleged that government officials revealed information about a grand jury
10 investigation into his activities. In deciding whether Lance had established a prima facie case of
11 violation of Rule 6(e), the court considered a number of factors, including evidence provided by the
12 government and the nature of the requested relief, but did not assert that testimony from the recipients
13 of the alleged leaks was needed. *See id.* at 216-20. Nor did any of roughly half-dozen leak cases
14 *Lance* discussed. *See id.* at 214-17. Similarly, in *United States v. Eisenberg*, 711 F.2d 959, 963 (11th
15 Cir. 1983), there was no suggestion that testimony from journalists was necessary in deciding the
16 proper relief for disclosure of secret grand jury material by government officials to reporters. *See also*
17 *United States v. Marcello*, 508 F. Supp. 586, 596-98 (E.D. La. 1981) (no mention of testimony from
18 news media recipients of alleged leak of grand jury material in deciding that an evidentiary hearing on
19 defendants’ motion to dismiss was not needed).

20 Moreover, Ms. Hoffman’s testimony is unnecessary because even if she provided the exact
21 testimony the defendant seeks – the names of government officials who provided her with the
22 information in the February 1 report – it is very unlikely that reversal of defendant’s conviction would
23 be warranted. A violation of grand jury secrecy, standing alone, does not warrant reversal of a
24 conviction or dismissal of an indictment. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254
25 (1988). Reversal is only permitted if defendant can prove that the violations of Rule 6(e) substantially
26 prejudiced the grand jury’s decision to indict. *Id.* (“[A]s a general matter, a district court may not
27 dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the
28 defendants.”); *see also, e.g., Lance*, 610 F.2d at 219 (a “criminal defendant who seeks to obtain

1 dismissal of an indictment . . . bears a heavy burden in attempting to justify such relief.”). It is highly
2 unlikely that the basic information allegedly disclosed here would have substantially influenced the
3 grand jury’s decision to indict the defendant.

4 Moreover, the fact of a conviction normally renders moot any possible taint that might be
5 alleged in the grand jury process. *See, e.g., United States v. Mechanik*, 475 U.S. 66, 73 (1986) (“[T]he
6 petit jury’s verdict rendered harmless any error in the charging decision that might have flowed from
7 the violation.”); *United States v. Benjamin*, 812 F.2d 548, 553 (9th Cir. 1986) (the prejudice of “an
8 erroneous charging decision by the grand jury, for violations of Rule 6(e), . . . is wiped out by the petit
9 jury’s [guilty] verdict”), *vacated on other grounds*, 490 U.S. 1043 (1989). Whether the alleged leaks
10 at issue could support reversal of the conviction is an issue between the parties and the Court, not
11 Ms. Hoffman. The salient point for purposes of the motion to subpoena Ms. Hoffman is that the Court
12 does not need to know the names of Ms. Hoffman’s sources to make that determination.

13 Indeed, in the relatively few reported instances where a criminal defendant sought to compel
14 disclosure of a journalist’s confidential source to support motions to dismiss an indictment or suppress
15 key evidence, courts have concluded that disclosure was not necessary to resolve those motions. In
16 *Calvert*, 523 F.2d 896, the defendant sought to appeal his conviction by arguing that the district court
17 should have compelled a journalist to identify the source of a pre-indictment leak by the government.
18 The Eight Circuit found that even assuming the leak originated from a prosecutor, the level of
19 prejudice posed by it could not support reversal of the conviction. *See id.* at 902 n.4. Likewise, in
20 *Pretzinger*, 542 F.2d 517, the defendant argued that the source of a leak tipping a reporter off to the
21 location of the defendant’s imminent arrest should be identified, to demonstrate that police should
22 have obtained a warrant to search the defendant’s vehicle. The Court found disclosure of the source to
23 be unnecessary, because the surrounding facts demonstrated that a warrant was not required anyway.
24 And in *Ahn*, 231 F.3d 26, after details of the defendant’s arrest were leaked to reporters, he sought to
25 identify the leakers to prove that the government violated its duty of good faith in connection with a
26 plea agreement. The Court affirmed that it was appropriate to have quashed the subpoena, because
27 disclosure of the source was not “essential and crucial” to the determination of the ultimate question
28 of guilt or innocence. *See id.* at 28-29.

1 While the facts of each of these cases naturally differ, collectively they demonstrate the
2 reluctance of federal courts to compel journalists to disclose confidential sources in the service of
3 long-shot motions to dismiss an indictment or reverse a conviction. The Defendant's request here
4 should meet the same fate. By its own terms the disclosure of Ms. Hoffman's sources is not necessary
5 to resolve the pending motion. At a minimum, the probability that disclosure of her sources will make
6 a material difference in the outcome of this prosecution is so low that the extraordinary step of
7 compelling her to disclose their identities is not warranted. On balance, the "need for disclosure,"
8 *Farr*, 522 F.2d at 468, is not sufficiently acute to justify making this subpoena to be the first of its
9 kind we know of to be issued and enforced by a federal court.

10 **C. THE DEFENDANT HAS NOT EXHAUSTED ALTERNATIVE SOURCES**

11 Even if the Defendant could somehow make the requisite showing of need to know the specific
12 identities of government sources, it is far too premature to even consider the question of whether
13 issuing subpoenas to reporters might be appropriate. At a minimum, the reporter's privilege requires
14 that "the requesting party demonstrate that she has exhausted all reasonable alternative means for
15 obtaining the information." *Shoen I*, 5 F.3d at 1296. Disclosure from a journalist must be "the end,
16 and not the beginning, of the inquiry." *Carey*, 492 F.2d at 638. In other words, such disclosure may
17 only be pursued as "a last resort after pursuit of other opportunities has failed." *Id.* at 639. *See also*
18 *Lenhart v. Thomas*, 944 F. Supp. 525, 530 (S.D. Tex. 1996) (compelled disclosure "should be the last
19 resort for obtaining information") (citing *Zerilli*). "Only when the journalist appears to be the only
20 individual with the relevant and critical information has the journalist been required to disclose the
21 source of the information." *Tripp v. Dep't of Def.*, 284 F. Supp. 2d 50, 61 (D.D.C. 2003).

22 As a result, federal courts, including those supervising leak investigations or lawsuits
23 challenging leaks, have consistently rebuffed attempts to subpoena reporters at the outset, before all
24 other reasonably available potential sources of a leak are questioned under oath. *See, e.g., Zerilli*, 656
25 F.2d 705; *Riley*, 612 F.2d 708; *Tripp*, 284 F. Supp. 2d 50; *Lenhart*, 944 F. Supp. 525; *In Re Williams*,
26 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd*, 963 F.2d 567 (3d Cir. 1992) (en banc) (quashing grand jury
27 subpoena issued to reporter who published leaked grand jury information, issued before all other
28 potential sources were questioned).

1 By contrast, even in the context of grand jury investigations of potentially criminal leaks,
2 federal courts have only ordered journalists to disclose sources after a lengthy investigation of all
3 other potential sources of that information proved to be fruitless. For example, in *Farr* disclosure was
4 ordered “only after the court held a series of hearings, at which each of the attorneys still alive denied,
5 under oath, that he was the source of the leak.” *Shoen I*, 5 F.3d at 1296. In the recent BALCO case,
6 disclosure was ordered only after a nearly two-year long investigation had failed to identify the source
7 of leaked grand jury transcripts – and even then the contempt orders entered against the journalists
8 ultimately proved to be unnecessary, since the source was identified by other means. *In re Grand Jury*
9 *Subpoenas*, 438 F.Supp.2d 1111, 1120 (N.D. Cal. 2006). See also *In re Grand Jury Investigation,*
10 *Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006) (six-month grand jury investigation preceded the
11 issuance of subpoenas to reporters); *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2006)
12 (plaintiff first spent a year deposing over 25 witnesses); *In re Special Proceedings*, 373 F.3d 37 (1st
13 Cir. 2004) (special prosecutor deposed or interviewed 20 witnesses before issuing a subpoena to a
14 journalist).

15 The Defendant’s Application asking this Court to immediately issue subpoenas to journalists
16 stands the reporter’s privilege on its head. On these grounds alone, the subpoenas should not issue.

17 **D. OTHER CONSIDERATIONS ALSO WEIGH AGAINST ISSUING THE**
18 **SUBPOENA TO MS. HOFFMAN**

19 Other considerations also favor a denial of the request to subpoena Ms. Hoffman. While we
20 recognize that all leaks are of serious concern to the Court, the very nature of a balancing test
21 recognizes that these disputes implicate legitimate interests on both sides. To that end, when courts
22 have ordered journalists to testify and identify sources in the course of leak investigations, the “leak”
23 at issue invariably consisted of highly incriminating, obviously prejudicial, specific items of evidence
24 that bear no reasonable comparison to Ms. Hoffman’s reporting at issue here. For example, *Farr*
25 involved the disclosure of the written confession of one of the defendants, that had been deemed
26 inadmissible at trial. The *Miller* case involved the leak of a covert CIA agent’s identity. *In re Special*
27 *Proceedings*, 373 F.3d 37 involved the leak of a surveillance tape showing the defendant accepting
28 bribes. The BALCO case involved the leak of dozens of pages of actual testimony before the grand jury.

1 By contrast, Defendant seeks to subpoena Ms. Hoffman because, two weeks before
2 indictments were returned, her reporting disclosed that “prosecutors were preparing to seek an
3 indictment against Mr. Wilkes.” Application at 5. It is not entirely clear that disclosure of this
4 information about the intentions of prosecutors, rather than the substance of any grand jury
5 proceeding, constitutes a violation of Rule 6(e). *See, e.g., Lance*, 610 F.2d at 217 (“A discussion of
6 actions taken by government attorneys or officials e.g., a recommendation by the Justice Department
7 attorneys to department officials that an indictment be sought against an individual does not reveal any
8 information about matters occurring before the grand jury.”). But even assuming that it did, the
9 degree of prejudice created under the circumstances of this case, if any, is not remotely comparable to
10 the kinds of disclosures that have led courts, on rare occasion, to permit subpoenas to be issued to
11 journalists as part of a leak investigation.

12 Finally, the subpoena requested is extremely broad in its scope, requiring production of all of
13 Ms. Hoffman’s notes, e-mails, etc. related to the two articles at issue. Not only would production of
14 this material itself identify confidential sources, the Ninth Circuit has emphasized that:

15 the compelled production of a reporter's resource materials can constitute a significant
16 intrusion into the newsgathering and editorial processes. Like the compelled disclosure
17 of confidential sources, it may substantially undercut the public policy favoring the
free flow of information that is the foundation for the privilege.

18 *Shoen I*, 5 F.3d at 1294, quoting *Cuthbertson*, 630 F.2d 139. *See also Bursey v. United States*, 466
19 F.2d 1059 (9th Cir. 1972).

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CONCLUSION

For the foregoing reasons, Ms. Hoffman respectfully requests that the Court decline to issue a subpoena to her.¹

Respectfully submitted,

DATED: November 29, 2007

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

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Witness Allison Hoffman

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¹ If the Court nonetheless does issue a subpoena, Ms. Hoffman reserves the right to move to quash it.