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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRENT ROGER WILKES, Defendant.	Case No. 07CR0330-LAB The Hon. The Honorable Larry A. Burns **OBJECTIONS TO DEFENDANT BRENT WILKES' APPLICATION FOR ISSUANCE OF SUBPOENA PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 17(b) AND (c)** Date: December 11. 2007 Time: 9:00 a.m. Crtrm.: 9

Specially appearing third party witness Allison Hoffman objects to Defendant Brent Wilkes' Application for Issuance of Subpoena Pursuant to Federal Rule of Criminal Procedure 17(b) and (c) on the following grounds:

- 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."

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

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

INTRODUCTION

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

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

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Second, the law is equally clear that efforts to subpoena journalists "must be a last resort after pursuit of other opportunities has failed." *Shoen v. Shoen*, 5 F.3d 1289, 1297 (9th Cir. 1995) ("*Shoen I*"), *quoting Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir. 1974). As a result, even where prosecutors or civil litigants conduct genuine leak investigations, journalists have only been compelled to disclose sources after the completion of an extensive process of questioning other persons with possible knowledge of leaks. The Defendant's effort to subpoena journalists in the first instance is plainly improper.

Finally, courts have only compelled journalists to identify the sources of leaks about pending criminal cases where specific items of highly incriminating evidence were leaked to the press. The nature of the alleged leaks to Allison Hoffman – forecasting an intent to indict shortly before charges were made public, in circumstances where the fact that the defendant was a target of the investigation was already widely known – does not rise to the level of prejudice required to justify the extraordinary step of compelling journalists to both testify and to disclose confidential sources. And the sheer breadth of the subpoena, requiring the production of all of Ms. Hoffman's related notes, e-mails, etc., violates well-established principles cautioning against such intrusion into journalistic work product.

ARGUMENT

A. THE LAW OF THIS CIRCUIT RECOGNIZES A REPORTER'S PRIVILEGE IN CRIMINAL CASES

The Ninth Circuit has repeatedly made clear that it recognizes a reporter's privilege arising under the First Amendment, applicable to both confidential and non-confidential information gathered by a journalist, which may be invoked in response to all judicial subpoenas other than those issued by grand juries. In general terms, the privilege requires that "the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest." *Farr v. Pitchess*, 522 F.2d 464, 468 (1975). *See also Shoen I*, 5 F.3d at 1292; *Pretzinger*, 542 F.2d at 520-21 ("the district judge must balance the interest of confidentiality of news sources against the needs of the criminal justice system to know the identity of the source").

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

B. THE DEFENDANT HAS NOT MADE THE REQUISITE SHOWING OF NEED FOR MS. HOFFMAN'S SOURCES

Applying these well-established guidelines, the Court must first consider whether learning the identities of Ms. Hoffman's sources is truly necessary to resolve the Defendant's motion to dismiss. For example, if the Defendant does not need to know the names of sources to prevail upon his dismissal theory, then the subpoena should not issue. *See Riley v. City of Chester*, 612 F.2d 708, 717 (3d Cir. 1979). Similarly, if a party is unlikely to prevail on their claim even if source identities are disclosed, the privilege must be upheld. *See Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F2d 583, 597 (1st Cir. 1980) ("plaintiff should show that it can establish jury issues on the essential elements of its case not the subject of the contested discovery" before disclosure of confidential sources may be compelled); *Cervantes v. Time, Inc.*, 464 F.2d. 986, 992-93 (8th Cir. 1972); *Blumenthal v. Drudge*, 186 F.R.D. 236, 245 (D.D.C. 1999) (source information allegedly relevant to actual malice element of a public-figure defamation claim need not be disclosed absent proof that plaintiffs were public figures).

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

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

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

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

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

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

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

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

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

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

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

C. THE DEFENDANT HAS NOT EXHAUSTED ALTERNATIVE SOURCES

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

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

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

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

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

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

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

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

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

Shoen I, 5 F.3d at 1294, *quoting Cuthbertson*, 630 F.2d 139. *See also Bursey v. United States*, 466 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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[1] If the Court nonetheless does issue a subpoena, Ms. Hoffman reserves the right to move to quash it.