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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO DIVISION

21 In re GRAND JURY SUBPOENAS TO
MARK FAINARU-WADA
22 AND LANCE WILLIAMS

Case No. CR-06-90225 MISC-JSW

**OPPOSITION OF MARK FAINARU-WADA
AND LANCE WILLIAMS TO
GOVERNMENT'S RENEWED
ADMINISTRATIVE MOTION TO FILE
UNDER SEAL; [PROPOSED] ORDER**

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1 *San Francisco Chronicle* reporters Mark Fainaru-Wada and Lance Williams (the
2 “Reporters”) respectfully submit this response to the government’s RENEWED
3 ADMINISTRATIVE MOTION TO FILE UNDER SEAL both its opposition brief and the
4 Hershman Declaration and exhibits.

5 **I. THE BRIEF**

6 As this Court is well aware, on June 21, 2006, the government filed with this Court and
7 distributed to dozens of media organizations a purportedly “redacted” version of its brief in
8 opposition to the Reporters’ motion to quash that, with a few simple clicks of the computer
9 mouse, could be viewed by all in its full, unredacted form. Thereafter, media entities across the
10 country published reports detailing the contents of the government’s filing, *see e.g.*, Adam
11 Liptak, *Prosecutors Can’t Keep a Secret in Case on Steroid Use*, N.Y. Times, June 23, 2006, at
12 A18, and in some cases posting on the Internet the brief in its unredacted form. *See*
13 http://www.nytimes.com/packages/pdf/national/20060622balco_doc.pdf (June 22, 2006).
14 Today, the government’s unredacted opposition brief is readily available for anyone in the world
15 to download and review.

16 In response, on June 29, 2006, this Court appropriately denied the government’s request
17 to file the opposition brief and supporting documents under seal, finding that “the Government
18 admittedly did not act to fully protect the redacted portions from public disclosure.” Order
19 Denying Without Prejudice Sealing Application, dated June 29, 2006. Now the government
20 seeks a second bite at the apple, requesting without any support or justification that this Court
21 place under seal material that the government itself has already made publicly available. In
22 doing so, the government asks this Court to perform the impossible by taking information that is
23 now in the public domain, having been widely reported and debated, and placing it under lock
24 and key. There is no way now to make secret the information at issue – the genie is forever out
25 of the bottle – and this Court should not sanction the government’s attempts to do so. If the
26 Court were to seal this document, the courthouse files would be the only place where the
27 information would be secret and unavailable to the public, which defies common sense.

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1 *Federal Grand Jury Proceedings 03-01*, 337 F. Supp. 2d 1218, 1220-21 (D. Or. 2004) (finding
2 government’s Rule 6(e) argument moot because material witness’s identity had been publicly
3 known); *cf. Doe v. FBI*, 218 F.R.D. 256, 257, 260 (D. Colo. 2003) (finding judge was not
4 entitled to proceed in litigation under seal where underlying information was “published to the
5 world”). The government has made no showing as to why its request is necessary or could not
6 be more narrowly tailored.

7 **II. HERSHMAN DECLARATION AND EXHIBITS**

8 Nor does the government make any showing supporting its request to seal the Hershman
9 Declaration and accompanying exhibits. The large majority of the exhibits attached to Mr.
10 Hershman’s Declaration are publicly filed documents – court transcripts, newspaper articles, and
11 a transcript of testimony delivered to the United States Congress – to which no confidentiality
12 can even arguably attach. *See* Hershman Declaration Exhibits A, B, U, BB, DD, HH. To the
13 extent that the Hershman Declaration contains e-mail exchanges between one of the Reporters
14 and Mr. Conte, *see* Hershman Declaration Exhibits C-T, V-Z, CC, the substance of those
15 communications has already been publicly disclosed by the government in its poorly “redacted”
16 opposition brief. Opposition Br. at 4 -14. To be sure, the Reporters would not have opposed or
17 challenged any finding by the Court that certain portions of the Hershman Declaration or
18 supporting exhibits contain, as the government claims, information about “a number of
19 targets/subjects” of its investigation, assuming the information had not been previously made
20 public and the government made a specific and compelling showing of need to this Court.
21 (Motion at 2) However, in two submissions to the Court seeking sealing, the government has not
22 identified any compelling reason supported by specific facts, as required, so as to enable the
23 Court to make the necessary findings. *See* Local Rule 79-5(a). For that reason, we respectfully
24 submit the entire Declaration and its exhibits should remain unsealed and that this Court should
25 deny the government’s renewed motion.

26 However one views the government’s protestations that its release to the public of its
27 “redacted” brief was inadvertent, it can hardly be disputed that the government should have been
28 more careful. Yet despite its own conduct the government now asks this Court to become the

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[PROPOSED] ORDER

The Court having considered the government’s Renewed Administrative Motion to File Under Seal, the Opposition of Mark Fainaru-Wada and Lance Williams to the government’s renewed motion, and the papers submitted therewith and arguments raised therein, and good cause appearing, IT IS HEREBY ORDERED THAT the government’s motion is DENIED and the Declaration of Brian D. Hershman, the attached exhibits, and the unredacted version of the Government’s Opposition to the Motion to Quash are not to be filed under seal.

DATED: _____

HON. JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE