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17	UNITED STATES DISTRICT COURT	
18	NORTHERN DISTRICT OF CALIFORNIA	
19	SAN FRANCISCO DIVISION	
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21	In re GRAND JURY SUBPOENAS TO MARK FAINARU-WADA	Case No. CR-06-90225 MISC-JSW
22	AND LANCE WILLIAMS	OPPOSITION OF MARK FAINARU-WADA AND LANCE WILLIAMS TO
23		GOVERNMENT'S RENEWED ADMINISTRATIVE MOTION TO FILE
24		UNDER SEAL; [PROPOSED] ORDER
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San Francisco Chronicle reporters Mark Fainaru-Wada and Lance Williams (the "Reporters") respectfully submit this response to the government's RENEWED ADMINISTRATIVE MOTION TO FILE UNDER SEAL both its opposition brief and the Hershman Declaration and exhibits.

I. THE BRIEF

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

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

1	The Court has ordered the government to comply with Local Rules 79-5(b) and 7-11 if it
2	chose to pursue this motion at all. See Order Denying Without Prejudice Sealing Application at
3	1. It is the black letter law that a strong presumption exists in favor of access to court records
4	and therefore a party seeking to seal documents bears a heavy burden. See Oregonian
5	Publishing Co. v. District Court, 920 F.2d 1462, 1465-66 (9th Cir. 1990); Local Rule 79-5(a)
6	Commentary ("As a public forum, the Court has a policy of providing to the public full access to
7	papers filed in the Office of the Clerk."). As this Court has made clear:
8	
9	"As a public forum, the Court will only entertain requests to seal that establish good cause and are narrowly tailored to seal only the particular
10	information that is genuinely privileged or protectable as a trade secret or otherwise has a compelling need for confidentiality counsel should
11	not attempt to seal entire pleadings or declarations without a particularized
12	showing explaining why the request could not be more narrowly tailored.  Any order granting a request to seal shall direct the sealing of only those
13	portions of documents or pages that contain the information requiring confidentiality. All other portions of such documents shall remain in the
14	public file. See generally N.D. Cal. Local Rule 79-5."
15	Pabst v. Maxtor Corp., No. C 05-80042 JSW, 2005 WL 578107, at *1 (N.D. Cal. March 10,
16	2005) (White, J.). The presumption of openness can be overcome only if the government
17	articulates specific facts that sealing serves a compelling interest, that in the absence of sealing
18	there is a substantial probability that the compelling interest would be harmed, and that there are
19	no alternatives that would adequately protect the compelling interest. See Oregonian Publishing
20	Co., 920 F.2d at 1466-67 (granting press access to improperly sealed plea agreement based on
21	movant's insufficient showing). "The court must not base its decision on conclusory assertions
22	alone, but must make specific factual findings." <i>Id</i> .
23	Here, the Government admits that it filed a brief that was "subject to manipulation" and
24	that its unredacted brief has been distributed for public review. Now that the information has
25	been publicly disseminated, it is difficult to imagine what compelling confidentiality interest
26	exists sufficient to overcome the presumption of access. See, e.g., Virginia Dep't of State Police

v. The Washington Post, 386 F.3d 567, 579 (4th Cir. 2004) (unsealing documents where

information had already become public knowledge), cert. denied, 544 U.S. 949 (2005); In re

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

## II. HERSHMAN DECLARATION AND EXHIBITS

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

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

1	only entity in America to treat the copy of the "redacted" brief in its possession as sealed. In	
2	light of the vast public dissemination of the information at issue, and the absence of any specific,	
3	factual showing by the government in support of sealing, the Reporters respectfully request that	
4	this Court deny the government's renewed request to file under seal the unredacted version of its	
5	Opposition to the Motion to Quash, the Declaration of Brian D. Hershman and its attached	
6	exhibits.	
7	Respectfully Submitted	
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9	Steven M. Bauer Sadik Huseny	
10	LATHAM & WATKINS LLP	
11	Dated: July 7, 2006 By: /S/	
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13	Jonathan R. Donnellan (pro hac vice) Kristina E. Findikyan (pro hac vice)	
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1	[PROPOSED] ORDER		
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3	The Court having considered the government's Renewed Administrative Motion to File		
4	Under Seal, the Opposition of Mark Fainaru-Wada and Lance Williams to the government's		
5	renewed motion, and the papers submitted therewith and arguments raised therein, and good		
6	cause appearing, IT IS HEREBY ORDERED THAT the government's motion is DENIED and		
7	the Declaration of Brian D. Hershman, the attached exhibits, and the unredacted version of the		
8	Government's Opposition to the Motion to Quash are not to be filed under seal.		
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0	DATED:		
1	HON. JEFFREY S. WHITE UNITED STATES DISTRICT JUDGE		
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