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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. CHI MAK, et al., Defendants.	Case No. SACR05-293-CJC **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WILLIAM GERTZ' NOTICE OF MOTION TO QUASH CRIMINAL SUBPOENA** HEARING DATE: June 13, 2008 HEARING TIME: 9:00 a.m. COURTROOM: 9B [Notice of Motion to Quash; Declaration of Charles S. Leeper and [Proposed] Order filed concurrently herewith]

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I. INTRODUCTION

William Gertz, by and through undersigned counsel, hereby moves to quash the April 30, 2008 Subpoena *ad testificandum* and *duces tecum* issued by the Clerk of Court in the above-captioned case. The May 1, 2008 (In Chambers) Order [Dkt. No. 700] which authorized the issuance of this Subpoena (hereinafter "May 1 Order) found that the May 16, 2006 article authored by Mr. Gertz ("the Gertz article") disclosed information within the scope of Fed. R. Crim. P. 6(e) and, therefore, that the Court "must" conduct an investigation of that disclosure. This finding, we respectfully submit, is mistaken. As we demonstrate below, the Gertz article does not reveal "matters occurring before the grand jury" within the meaning of Rule 6(e)(2(B). Rather, the Gertz article addressed what prosecutors – not the Grand Jury – were planning to do, revealed little more than what the prosecutors themselves had already stated in open court, and included information about specific criminal charges contemplated by the prosecutors that the Grand Jury apparently had not considered. As far as the record evidence reveals, the Grand Jury that eventually returned the First Superseding Indictment was not considering such charges at the time the Gertz article was published.

Even assuming *arguendo* that the Gertz article contained some information about matters that had occurred before the Grand Jury, there no longer is any viable motion or request for relief that would justify continuation of a judicial inquiry into the identity of the source(s) for any such reference in the article. The motion that initiated this inquiry is no longer operative, and all defendants have abandoned any right they may have had to seek relief for disclosure of Rule 6(e) information. Certainly, at this stage, continuation of the inquiry is not *necessary*.

In all events, the identity of Mr. Gertz' confidential sources, and the other non-public information sought by the Subpoena, are protected from disclosure by the First Amendment and the common law reporter's privilege that should be enforced under Federal Rule of Evidence 501. Now that these rights and privileges

have been invoked, the burden shifts to the party seeking disclosure to demonstrate a *compelling* need for the protected information. As noted above, there is *no* need to subpoena Mr. Gertz to testify at this stage of the *Chi Mak* case; thus, Mr. Gertz' First Amendment rights and common law privilege should be sustained.

Finally, the Subpoena is unreasonable and oppressive, and does not meet the requirements for enforcement under the principles of Fed. R. Crim. P. 17(c). The Subpoena seeks testimony and documents that are protected by important constitutional and common law interests, and fails to satisfy the Rule 17(c) requirements of specificity and relevancy recognized in *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), among other things.

For all of the foregoing reasons, the Subpoena issued to Mr. Gertz should be quashed.

II. ARGUMENT

A. Neither The Content Of The Gertz Article, Nor Any Evidence Of Record, Provides The Requisite Proof Of A Rule 6(e) Violation.

The very cornerstone of this Court's ongoing inquiry is the premise that the Gertz article (copy attached as Exhibit A) revealed matters "*occurring* before the grand jury" as prohibited by Fed. R. Crim. P. 6(e)(2)(B). *Id.* (emphasis added). We respectfully suggest that this Court's finding in that regard set forth in its May 1 Order is incorrect and should be re-considered. First, the Gertz article reported that "federal prosecutors" would add new charges against the defendants; the article *did not* state that the Grand Jury was then considering the specified new charges, let alone that the Grand Jury would return a true bill on those charges *See* Ex. A. Indeed, the "new charges" described in the Gertz article were not the charges actually returned in the First Superseding Indictment three weeks later. Second, the evidence of record in this matter does not demonstrate that, as of May 16, 2006 when the Gertz article was published, the Grand Jury that returned the First Superseding Indictment was *in fact* considering those specified new charges. Thus,

because the record evidence does not establish a violation of Rule 6(e), the Subpoena issued to Mr. Gertz to give testimony and produce documents that would reveal the identity of his confidential source(s) is unwarranted.

1. The Gertz Article Describes Events That Occurred Outside The Grand Jury, Or That Did Not Occur As Described.

To establish a *prima facie* violation of Rule 6(e) based upon information contained in news reports, "there must be a *clear* indication that the media reports disclose information about 'matters *occurring* before the grand jury.'" *In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 216 (5th Cir. 1980) (emphasis added). Each article must be "parsed" by the District Court to determine if the news report actually contains grand jury matter. *Id.* at 219. Matters occurring before the grand jury are "the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like. [Rule 6(e)] does not require, however, that a veil of secrecy be drawn over all matters occurring in the world that happen to be investigated by a grand jury." *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (en banc); *see also United States v. Dynavac, Inc.*, 6 F.3d 1407, 1413 (9th Cir. 1993).

The disclosure of information about a government investigation, even if that investigation leads to grand jury proceedings, does not violate Rule 6(e). *In re Sealed Case*, 192 F.3d 995, 1002-03 (D.C. Cir. 1999) (per curiam); *United States v. Smith*, 787 F.2d 111, 115 (3d Cir. 1986); *(Lance)*, 610 F.2d 202 at 217 & n.5.; *In re Interested Party*, 530 F. Supp. 2d 136, 143 (D.D.C. 2008). Thus, "[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." *(Lance)*, 610 F.2d at 217; *see also Sealed Case*, 192 F.3d at 1002 ("[p]rosecutors' statements about their investigation . . . implicate the Rule only when they directly reveal grand jury matters").

In *In re Sealed Case*, the D.C. Circuit summarily reversed and dismissed contempt proceedings initiated in the wake of a *New York Times* news article about the Office of the Independent Counsel's ("OIC") investigation of President Clinton. 192 F.3d at 997. The *New York Times* had reported that prosecutors within the OIC wanted to seek an indictment of President Clinton for perjury and obstruction of justice, as soon as the Senate impeachment proceedings were concluded. *Id.* at 997-98. An FBI investigation requested by the OIC revealed that an attorney within the OIC was the source of the *New York Times* article. *Id.* The District Court then ordered the attorney, and the OIC, to show cause why they should not be held in contempt for what the District Court deemed to be a *prima facie* violation of Rule 6(e). *Id.* The OIC noted an interlocutory appeal and sought summary reversal.

The sole issue on appeal in *Sealed Case* was whether the information disclosed to the *New York Times* by the OIC attorney qualified as "matters occurring before the grand jury." In finding a *prima facie* violation of Rule 6(e), the District Court had relied on the language in *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 499-500 (D.C. Cir. 1998), defining "matters occurring before the grand jury" to encompass "not only what has occurred and what is occurring [before the grand jury], but also what is likely to occur." *Sealed Case*, 192 F.3d at 1001. The D.C. Circuit began its analysis by noting that it had cautioned the District Court in an earlier appeal "about the problematic nature of applying so broad a definition [of Rule 6(e) material], especially as it relates to the strategy or direction of the investigation." *Id.* (citations omitted). "It is therefore necessary to differentiate between statements by a prosecutor's office with respect to its own investigation, and statements by a prosecutor's office with respect to a grand jury's investigation, a distinction of the utmost significance upon which several circuits have already remarked." *Id.* at 1002 (citing cases). Considering this precedent, which included *(Lance)*, the D.C. Circuit reasoned that "internal deliberations of prosecutors that do not *directly* reveal grand jury proceedings are not Rule 6(e) material." *Id.* at 1003.

Therefore, the Circuit Court held, disclosing the view of government attorneys that an indictment should be sought on specific charges "does not on its face, or in the context of the article as a whole, violate Rule 6(e)." *Id.*

United States v. Rosen, 471 F. Supp. 2d 651 (E.D. Va. 2007) is the most recent decision to follow *Sealed Case*. The defendants in *Rosen* were named in a superseding indictment charging them with conspiracy to obtain national defense information from a government employee named Franklin, who had previously been indicted for that offense. The *Rosen* defendants moved for a hearing and sanctions for alleged Rule 6(e) violations arising from eighteen news articles about the Franklin investigation. *Id.* at 652-53. One article, a Reuters report, stated that "federal prosecutors planned to announce additional charges against Franklin and to charge defendants, citing 'government sources.'" *Id.* at 653. The superseding indictment was returned later that same day.

The *Rosen* court initially observed that the news reports "cite[d] no grand jury transcripts, reveal[ed] no grand jury testimony, name[d] no grand jury witnesses, and (with the arguable exception of the Reuters story . . .) [did] not reveal the expected course of future grand jury investigation or deliberation." *Id.* at 654. Reviewing the law of a number of Circuits, including the Ninth Circuit, *Rosen* reasoned that Rule 6(e) "protects only the essence of what takes place in the grand jury [and] a disclosure of 'matters before the grand jury' must reveal some 'secret aspect of the inner workings of the grand jury.'" *Id.* (citations omitted). "[E]ven evidence closely related to a grand jury investigation is not a 'matter occurring before the grand jury' unless it was actually presented before the grand jury." *Id.* at 655 (citations omitted). Therefore, even disclosure of "details about the grand jury's likely course in the near future" does not violate Rule 6(e) "unless the disclosure contains details about the grand jury's inner workings or proceedings." *Id.* Applying these principles, the *Rosen* court found that none of the articles at issue,

including the Reuters story, established a *prima facie* violation of Rule 6(e):

> While the . . . Reuters story did report shortly before the indictment that prosecutors planned to announce charges against defendants, thereby arguably disclosing the grand jury's imminent course of conduct, even that story does not contain the details necessary to reflect that a disclosure of the grand jury's inner workings occurred. Thus, the Reuters story does not state that defendants would be indicted by a grand jury, but rather only that they would be charged, i.e., the story is ambiguous as to whether defendants would be indicted or made the subject of a criminal complaint; indeed, the existence of a grand jury is not even mentioned.

Id. at 656.

Just like the *New York Times* article at issue in *Sealed Case*, and the Reuters story in *Rosen*, the Gertz article did not reveal *any* information about what occurred before the Grand Jury that returned the First Superseding Indictment. At the most general level, the words "grand jury" do not appear in the Gertz article; the specific events described in the article took place, if at all, *outside* the Grand Jury. For example, the opening paragraph reports that "federal prosecutors are expected to add new charges," but says nothing about consideration of those charges by the Grand Jury. *See* Ex. A at 1. New charges, of course, could have been brought by way of a complaint and warrant under Rules 3 and 4, just as the initial charges were lodged in this matter. *See* Dkt. No. 1. Thus, disclosure of a mere expectation that *prosecutors* will add charges does not necessarily implicate the grand jury process and certainly does not reveal matters "occurring *before* the grand jury." *See, e.g. Sealed Case*, 192 F.3d at 1004 ("the prosecutors may not even be basing their opinion on information presented to a grand jury"); *(Lance)*, 610 F.2d at 217 n.5 (same).[1]

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[1] In describing the scope of the government's leak investigation, this Court noted that the investigators "have broadly defined 'grand jury materials' to include government documents or discussions that refer to or relate to when and if an indictment is going to be returned [and] the nature of the contemplated charges." March 7 (In Chambers) Order [Dkt. No. 406] (hereinafter "March 7 Order") at 2. To the extent that these materials concern actions (*continued on next page*)

The Court's May 1 Order recites that "Mr. Gertz reported that *impending grand jury charges* 'will include a new indictment against Chi Mak, Tai Mak, Mrs. Chiu and a fourth Mak relative.'" *Id.* (emphasis added). However, the italicized language attributed to Mr. Gertz appears nowhere in the Gertz article. Rather, to the extent the Gertz article refers to an anticipated "new indictment," that reference only discloses what government counsel had stated in open court a week earlier.[2] At the May 8, 2006 status hearing, the Court continued the trial date upon receiving the representations of Assistant U.S. Attorney Gregory Staples that the government intended to supersede the pending indictment. *See* Minute Order [Dkt. No. 126]. During the hearing, AUSA Staples remarked that the government's investigation was "going forward," prompting the following colloquy:

> The Court: As you stand there today do you have any present intention of filing a superseding indictment? . . . . I understand that generally investigation is always ongoing until trial, but I didn't know if you are suggesting that you're contemplating maybe filing new charges.

---

contemplated by government attorneys, *Sealed Case, (Lance)* and other authorities cited above make clear that these are not "matters occurring before the grand jury." It was prudent for the investigators to adopt a "broad" definition of information to be treated confidentially and not disseminated to the media during the pre-trial and trial proceedings in Case No. SACR 05-00293-CJC. But the breadth of these prudential measures cannot govern the determination of what information actually occurred "before the grand jury" within the meaning of Rule 6(e)(2)(B). It was the District Court's adoption of just such a "broad" definition of Rule 6(e) that led to the summary reversal in *Sealed Case*. The D.C. Circuit admonished that, "despite the seemingly broad nature of the statements in [the D.C. Circuit's earlier decision in] *Dow Jones* . . . . the phrases 'likely to occur' and 'strategy and direction' must be read in light of the text of Rule 6(e) – which limits the Rule's coverage to 'matters occurring before the grand jury' – as well as the purposes of the Rule." *See Sealed* Case, 192 F.3d at 1001-02.

[2] The seventh paragraph of the Gertz article specifically refers to the representations made during the May 8, 2006 status hearing.

Mr. Staples: That's a fair statement Your Honor. We are.

* * * *

The Court: It sounds to me like you are contemplating bringing more serious charges than the same type of charges.

Mr. Staples: That is correct.

* * * *

The Court: Mr. Staples, the last thing I want to do is necessarily interfere with what your rights and duties are, but at the same time I don't want to prepare for a certain type of case and all of a sudden find out, no, we're going to be litigating a much more dangerous, serious case. Not that this case isn't dangerous or serious.

Mr. Staples: Your Honor, it's a difficult question to answer. What I can say is [the] pending new charges would be based on the evidence already produced to the defense.

* * * *

The Court: Do you anticipate in the near future making a decision, one way or the other, of whether to bring new charges or not? Obviously, it's not carved in stone. But if the powers that are going to analyze this and make a decision one way or the other, is that going to happen in the near future?

Mr. Staples: Yes.

The Court: When is that? Just the time period.

Mr. Staples: I would say that we're talking a matter of weeks.

Transcript, May 8, 2006 Hearing at 7-8, 42 (relevant parts attached as Exhibit B).

The import of the information divulged in open court by AUSA Staples, to anyone familiar with the workings of the federal criminal justice system, is clear. First, the information portends that the line prosecutors intend to seek approval from their superiors to supersede the Indictment by adding more serious charges. Second, those superiors ("the powers") will determine whether to approve the recommended new charges. And third, this process of recommendation and approval will consume a few weeks time. Certainly, a news article reporting essentially the same information is not disclosing "matters occurring before the grand jury."

The Gertz article accurately reported the information received from source(s), but that information concerned the decision-making process within DOJ rather than what would occur before the Grand Jury three weeks later. The first sentence of the Gertz article states that the additional charges to be added by federal prosecutors "as early as this week" would include an "espionage" charge against one of the defendants. Similarly, the article predicts in the fourth, fifth and twelfth paragraphs, respectively, that "[defendants] will be charged with conspiracy . . . and attempted unlawful export of defense articles," "[defendant] Chi Mak . . . will be indicted on charges of unlawful export of defense articles and gathering defense information, an espionage charge," and that "Tai Mak will be charged with aiding and abetting and possession of property to aid a foreign government." These portions of the Gertz article certainly do not reveal matters "occurring before the grand jury" inasmuch as the First Superseding Indictment, which was filed June 7, 2006, did not include *any* of the charges predicted by Mr. Gertz source(s). *See* Dkt. No. 130. In sum, virtually all of the "events" described in the Gertz article and cited in the May 1 Order in support of a finding of a *prima facie* showing of a Rule 6(e) violation did not occur as and when described in the Gertz article, much less occur before the Grand Jury.[3]

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[3] In finding that defendant Rebecca Chiu had made a *prima facie* case of a Rule 6(e) violation, the Court has cited to *In re Motions of Dow Jones & Co.*, and *In re Grand Jury Investigation (Lance)* for the proposition that disclosures which identify *when* an indictment would be presented and the nature of the crimes which would be charged run afoul of the secrecy requirement codified in Rule 6(e). November 20, 2006 (In Chambers) Order [Dkt. No. 299] at 2; May 1 Order at 2. As discussed above at n.1, the D.C. Circuit in *Sealed Case* clarified and narrowed the "seemingly broad" language in *Dow Jones*. Moreover, neither *Dow Jones* nor *(Lance)* concerned descriptions in news media reports of events that did not occur as described. *Cf. In re United States*, 441 F.3d 44, 61 (1st Cir. 2006) (granting government's mandamus petition, finding no basis for trial court's post-indictment investigation of alleged grand jury leak where government demonstrated that news articles "were inaccurate in part and speculative in part."). Furthermore, where as in this case the news reports refer to charges being considered *by prosecutors* – and not, as in *(Lance)*, by the grand jury – Rule 6(e) is simply not implicated. *See, e.g. In re Grand Jury Matter*, 682 F.2d 61, 64 n.4 (3d Cir. 1982) (draft indictments prepared by prosecutors fall outside Rule 6(e), though they "might be based on knowledge of the grand jury proceeding, [] do not reveal any grand jury information on which they might be based.").

We respectfully submit that it is difficult to reconcile the Court's finding that "Ms. Chiu had established a *prima facie* violation of Rule 6(e)," May 1 Order at 1, with the fact that Ms. Chiu's request for relief did not identify the specific portions of the Gertz article that allegedly contained grand jury information. The Request for Judicial Intervention to Protect Constitutional Rights of Rebecca Chiu and one-page supporting Memorandum of Points and Authorities [Dkt. No. 165] ("Request For Judicial Intervention") referred to a single statement in the Gertz article – that Department of Justice officials had approved certain additional charges that would also add another Mak family as a defendant. *Id.* at 3. But Ms. Chiu asserted only that such a disclosure violated the Privacy Act. Her secondary – and entirely conclusory – contention that "it appears the rules of grand jury secrecy have been violated" did not amount to *any* proof of a Rule 6(e) violation, let alone a *prima facie* showing. *See, e.g. Sealed Case*, 192 F.3d at 1003; *(Lance)*, 610 F.2d at 217.

In sum, the Gertz article does not mention the Grand Jury's investigation at all. While the Gertz article does describe actions contemplated by government prosecutors, such information does not fall within the scope of Rule 6(e). The few additional references in the Gertz article to an expected new indictment disclose nothing more than what prosecutors had represented during public pre-trial proceedings. Thus, the Gertz article contains no information subject to Rule 6(e).

2. The Record Evidence Does Not Indicate At All, Let Alone Make Out A Prima Facie Showing, That The Events Reported In The Gertz Article Were Actually Occurring Before The Grand Jury At The Time The Gertz Article Was Published.

We believe we have demonstrated above that the Gertz article, when considered in the context of information contained in the docket of Case No. SACR 05-00293-CJC and the statements of prosecutors made in open court, disclosed no matters occurring before the Grand Jury. Alternatively, we respectfully submit that no party to this proceedings has made the required *prima facie* showing of a Rule 6(e) violation that is necessary to subject Mr. Gertz to a judicial inquiry. No

evidence has been produced by Ms. Chiu, nor by the government "leak" investigation described in the May 1 Order, that the matters described in the Gertz article actually were *occurring* before the Grand Jury at the time the article was published. Before journalists are compelled to identify confidential sources, the record should contain evidence, and not mere assumptions, that the news article at issue contained actual grand jury information.

"[A] hearing on a claimed Rule 6(e) violation will not be held absent a showing of a *prima facie* Rule 6(e) violation." *Rosen*, 471 F. Supp. 2d at 656. Here, the evidence of record regarding the origin and character of the information contained in the Gertz article is razor thin. As discussed above, apart from the Gertz article itself, Ms. Chiu has provided nothing more than conclusory assertions of a Privacy Act violation and an "apparent" Rule 6(e) violation. *See* Request For Judicial Intervention [Dkt. No. 165] at 3. The evidence of record regarding the results of the government's leak investigation is limited to information recited in two of this Court's orders. In its March 7 Order, the Court "provide[d] Ms. Chiu and the other defendants with a summary of the government's response as well as a report on the government's investigation into this matter." *Id.* at 1. However, the March 7 Order recognized that the government's investigation had not then progressed beyond the appointment of prosecutors and agents from the District of Columbia to conduct the investigation and develop measures to prevent further dissemination of information to the media about the *Chi Mak* case. *Id.* at 1-2. The March 7 Order identified the newly appointed lead investigator, Assistant U.S. Attorney Jay Bratt, and described the preventive measures implemented in the underlying case, but cited no evidence that the Gertz article compromised information about events that actually were occurring *before* the Grand Jury. *Id.*

The only other record reference to the results of the government's leak investigation is contained in the May 1 Order. [Dkt. No. 700]. Although the government's investigation is described therein as "comprehensive," involving the

interviews of "over 500 persons of interest," the May 1 Order does not identify *any* matter "occurring before the grand jury" that the investigation showed had been disclosed to Mr. Gertz. Significantly, the docket in Case No. SACR 05-00293-CJC contains no entry for a written report or response by the government that memorializes the actual evidence developed during its leak investigation.

In these circumstances, there is simply no *evidence* contained in the record proving, or even tending to prove, that actual grand jury information was disclosed to Mr. Gertz. For example, it is unknown, as far as the record demonstrates, whether the Grand Jury that returned the First Superseding Indictment had even heard testimony or received other evidence pertaining to the *Chi Mak* case prior to the May 16, 2006 publication of the Gertz article. It appears from the record that two different grand juries considered the charges contained in the Indictment, and the First Superseding Indictment, respectively. *Compare* Indictment [Dkt. No. 34] (February 2005 Term) and First Superseding Indictment [Dkt. No. 130] (February 2006 Term). Thus, it very well may be that, as of May 16, 2006, the prosecutors in the *Chi Mak* case had not yet presented evidence or recommended criminal charges to the February 2006 Grand Jury. In that event, the information in the Gertz article attributed to "U.S. government officials" indisputably would not concern matters actually *occurring* before the Grand Jury. *See, e.g. In re Sealed Case*, 250 F.3d 764, 772 (D.C. Cir. 2001) ("Rule[] 6(e)(2) . . . speak[s] in the present tense of 'matters *occurring* before the grand jury.") (emphasis in original).[4]

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[4] It is of no moment to the issue at hand that some of the charges described in the Gertz article were eventually included in a Second Superseding Indictment that was returned over *five months later* by a different grand jury than had returned the initial Indictment, or the First Superseding Indictment. *See* Second Superseding Indictment [Dkt. No. 263] (October 2005 Term). There is no evidence of record that *any* grand jury was considering these charges at the time of the Gertz article, much less that the October 2005 Term Grand Jury was considering those charges in May. Thus, the statements in the Gertz article regarding prosecutors' plans to add new charges cannot be considered matters *occurring* before the grand jury at the time the Gertz article was published.

The record *does* reveal that much evidence was gathered by the investigators regarding the activities of defendants through means other than the grand jury process, well before defendants were even arrested. At the outset of the *Chi Mak* proceedings, Federal Bureau of Investigation ("FBI") Special Agent James E. Gaylord submitted a detailed, twenty-seven page affidavit to support the Criminal Complaint and provide probable cause to search a number of premises, vehicles and other locations. *See* October 28, 2005 Complaint [Dkt. No. 1], Attachment. This affidavit reveals that the FBI utilized a variety of investigative techniques, including electronic surveillance, to gather evidence against the defendants. The search warrants executed by the FBI yielded additional evidence. All of this evidence comprises non-6(e) information, and was available to be utilized by the prosecutors to formulate their charging strategy as they contemplated the appropriate scope of a superseding indictment in May 2006. Indeed, prior to the Gertz article the prosecutors announced that the "new charges would be based on the evidence already produced to the defense." May 8, 2006 Hearing (Ex. B) at 8.

As the Court knows, it is the practice of many federal prosecutors to obtain approval from superior officials before seeking an indictment on more serious charges. Indeed, DOJ policy *requires* that such approval be obtained from National Security Division ("NSD") officials in Washington, D.C. in cases, like the *Chi Mak* case, involving national security information. *See United States Attorneys Manual* § 9-90.020. Typically, such approval requests are made through submission of a memorandum prepared by the front-line prosecutors, often referred to as a "pros memo," to which a draft proposed indictment is attached. Such pros memos in national security cases are usually transmitted through the Criminal Division Chief, the United States Attorney for the District in which the investigation is pending, various officials within the NSD, the Deputy Assistant Attorney General (NSD), and possibly even the Assistant Attorney General (NSD). Each of these superior officials would be apprised, through the pros memo, of the charges the line

prosecutors proposed to recommend to a grand jury. But little or none of the information contained in the pros memo may constitute actual matters "occurring before the grand jury." Rather, the pros memo may describe evidence derived by federal agents using means other than the grand jury, along with the prosecutors' recommendations regarding the criminal charges which the evidence will support.

On the current record, there is no evidence that the information conveyed to Mr. Gertz by "U.S. government officials" was actually subject to Rule 6(e), as opposed to being the assessment of the line prosecutors of the additional criminal charges warranted by the evidence gathered by the FBI. The prosecutors' assessments could well have been made prior to the time that *any* proceedings had occurred before the Grand Jury which returned the First Superseding Indictment. *See, e.g. Sealed Case*, 192 F.3d at 1004 ("the prosecutors may not even be basing their opinion on information presented to a grand jury"). This scenario is entirely consistent with the prosecutors' public statement a month before the First Superseding Indictment that the new charges would be based on evidence already provided to the defense. Indeed, the fact that the information contained in the Gertz article about the *anticipated* new charges was inconsistent with the *actual* charges in the First Superseding Indictment confirms that Mr. Gertz only received information from his source(s) regarding the prosecutors' *expectations*, rather than about matters actually occurring before the Grand Jury.

In all events, no evidentiary hearing on an alleged Rule 6(e) violation is warranted unless a *prima facie* showing of a violation is made. *Sealed Case,* 192 F.3d at 1004 n.12 (absent a *prima facie* showing, it is unnecessary to incur "the burden and distraction of an evidentiary hearing to rebut the allegations of a Rule 6(e) violation"); *Barry v. United States*, 865 F.2d 1317, 1321 (D.C. Cir. 1989); *Rosen*, 471 F. Supp. 2d at 656. The record contains no evidence even remotely approaching a *prima facie* showing. For this reason alone, the Subpoena issued to

Mr. Gertz is unwarranted and should be quashed, making it unnecessary for the Court to reach the constitutional and common law questions addressed below.

B. Even If Some Portion Of The Information Reported In The Gertz Article Was Arguably Within The Scope Of Rule 6(e), There Is No Longer Any Legal Basis For Conducting A Judicial Inquiry To Ascertain The Source(s) Of That Information.

We demonstrated in Section II.A above that the information contained in the Gertz article pertained to matters that were not occurring before the Grand Jury and, in a number of instances, did not occur as discussed in the article. But assuming *arguendo* that some phrase in the Gertz article referred to a matter occurring before the Grand Jury, there is no viable request for relief that would justify continuation of a judicial inquiry into the identity of the source(s) for that information. Although this proceeding was initiated at the instance of defendant Chiu, neither Chiu nor any of her co-defendants have any viable interest that would be furthered by compelled disclosure of Mr. Gertz' confidential source(s). Stated another way, the *Chi Mak* defendants have all waived any rights that might have been vindicated by identifying the source(s) of the alleged grand jury leak.

The only other colorable interest that may be raised in considering whether the Subpoena issued to Mr. Gertz should be enforced is the general interest in securing the secrecy of grand jury proceedings. But that interest is less compelling in any case once an indictment is returned. Here, the indictment has been returned and all trial proceedings concluded. In these circumstances, especially where most, if not all, of the statements contained in the Gertz article – as demonstrated in Section II.A above – clearly fall outside the scope of Rule 6(e), a continuation of the judicial inquiry initiated at the request of defendant Chiu is not warranted.

1. The Chi Mak Defendants Have Waived Any Right To Assert That The Subpoena Issued To Mr. Gertz Should Be Enforced.

In explaining why the Court believes it "must" conduct further investigation into the source(s) for the Gertz article, the May 1 Order refers to the motion filed by defendant Chiu by which she asked the Court to remedy an alleged breach of her

privacy. May 1 Order at 2 (citing *Barry*, 865 F.2d at 1321). But the Chiu motion and the companion requests of her co-defendants are no longer viable. In any event the reasoning of *Barry* is limited to its unique facts which are markedly different than the circumstances here.

Chiu filed her Request For Judicial Intervention, alleging that the Gertz article caused injury to her rights under the Privacy Act and the U.S. Constitution, on June 9, 2006. [Dkt. No. 165]. Chiu also filed a supplemental request for discovery and for an evidentiary hearing. [Dkt. No. 241]. Chiu's co-defendants joined her request for a hearing. [Dkt. Nos. 287, 290, 295, 296]. On November 20, 2006, the Court denied Chiu's request for discovery and to participate in an evidentiary hearing. *Id.* [Dkt. No. 299] at 2. The Court expressly found that the identity of Mr. Gertz' sources was not relevant to any issue of prejudice to Ms. Chiu (and presumably as to the co-defendants as well) or her right to a fair trial. *Id.* at 3 n.2. Rather, the Court reasoned, any potential prejudice resulting from the Gertz article could be prevented by remedial measures employed during jury selection. *Id.* However, the Court did conclude that Chiu's Request For Judicial Intervention made out a *prima facie* violation of Rule 6(e) which, based upon the Court's reading of the *Barry* decision, triggered a "duty" on the part of the Court to investigate further. *Id.* at 2. But the inquiry undertaken by the Court at that time was limited to directing the government to report, on or before January 5, 2007, on its investigation of any communications between government officials and Mr. Gertz, and the measures implemented to prevent any such further communications. *Id.*[5]

The trial of Chi Mak commenced in March 2007. Prior to jury selection, the government and the defendant filed a joint Jury Questionnaire. [Dkt. No. 432]. The Jury Questionnaire contained several inquiries designed to identify any prospective

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[5] The government apparently made an interim report to the Court on January 5, 2007, and obtained an extension of time to complete its investigation. *See* [Dkt. No. 321] (Under Seal).

juror who had been exposed to publicity regarding the *Chi Mak* case. *Id.* at 3-5. One such inquiry specifically sought to elicit information about exposure to "any books or articles appearing in the Washington Times newspaper written by Bill Gertz." *Id.* at 5. As far as the record reveals, a *petit jury* satisfactory to defendant Chi Mak was impaneled. Following the jury's guilty verdict, defendant Chi Mak filed a Motion For Judgment Of Acquittal And/Or New Trial. *See* [Dkt. No. 589]. That Motion raised no argument concerning the Gertz article or otherwise complaining about prejudicial publicity. The Court denied that Motion on January 7, 2008. *See* [Dkt. No. 655]. Defendant Chi Mak then filed a Motion To Dismiss For Failure To Disclose Exculpatory Evidence Prior To Trial, which likewise did not assert any issues based upon the Gertz article. *See* [Dkt. No. 662]. The Court denied this additional post-trial challenge on March 24, 2008, *see* [Dkt. No. 680], and Chi Mak was sentenced that same day. *See* [Dkt. No. 688].

It is evident from the foregoing review of the relevant docket entries that any potential harm to Chi Mak's fair trial rights flowing from pre-trial publicity was addressed through measures implemented by the parties and the Court during jury selection. It is also clear that Chi Mak did not challenge the First Superseding Indictment or raise any objection to the conduct of his trial based upon the information contained in the Gertz article.[6]

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[6] For these reasons, the circumstances here are entirely different than those in *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), where a reporter unsuccessfully sought habeas relief after being ordered by a state trial judge, at the conclusion of the widely-publicized Charles Manson trial, to testify about his sources for a mid-trial story revealing lurid and sensational details from a witness statement the trial judge had ruled inadmissible. Manson and his co-defendants had objected to this highly prejudicial publicity and continued to pursue relief post-trial for injury to their fair trial rights allegedly caused by the government's misconduct. *See, e.g. People v. Manson*, 61 Cal. App. 3d 102, 139-40, 132 Cal. Rptr. 265, 285 (1976). In affirming dismissal of the reporter's habeas petition, the Ninth Circuit expressly acknowledged the "power of the [state] court to enforce its duty and obligation relative to the guarantee of due process to the defendants in the ongoing trial." *Farr*, 522 F.2d at 469. In contrast, in the *Chi Mak* case "the identity of [Gertz' sources] is not relevant, either now or in the future, to the issue of prejudice, not is it necessary for [defendants] to prepare for trial." November 20 Order at 2 n.2.

As for Chi Mak's co-defendants, any residual interests they may have had in determining the identity of the source(s) for the Gertz article were extinguished in connection with their respective guilty pleas. This Court accepted pleas of guilty by Tai Mak [Dkt. No. 578], Yui Mak [Dkt. No. 579], Fuk Li [Dkt. No. 580], and Rebecca Chiu [Dkt. No. 584]. Each of the plea agreements contains the identical provision by which the defendant abandoned all rights to challenge, or otherwise to seek relief for, the disclosure of information reported in the Gertz article. For example, in paragraph 9 of her Plea Agreement, Rebecca Chiu agreed that: "By pleading guilty, defendant also gives up any and all rights to pursue any affirmative defenses, Fourth Amendment or Fifth Amendment claims, *and any other pretrial motions that have been filed or could be filed.* Id. [Dkt. No. 584] at 7 (emphasis added). Thus, the motion that launched this inquiry into the source(s) of the information contained in the Gertz article, Chiu's Request For Judicial Intervention [Dkt. No. 165], has effectively been withdrawn.

The foregoing review of relevant docket entries demonstrates that none of the defendants preserved any right to complain of the reporting by Mr. Gertz as it relates to the *Chi Mak* case. In these circumstances, the decision cited by the Court as giving rise to a "duty" to investigate the alleged disclosure of Rule 6(e) information to Mr. Gertz, *Barry v. United States*, is inapposite. Marion Barry, then the Mayor of Washington, D.C., was the subject of a long-running federal investigation into corruption within the District of Columbia government. Barry's Rule 6(e) complaint identified a series of news articles regarding the ongoing investigation and the grand jury's interest in particular conduct of the Mayor and his subordinates. 865 F.2d at 1319. Mayor Barry, who had not yet been indicted, sought injunctive relief, contending that the investigation and the publicity associated with it were hampering his ability to govern. *Id.* It was in this context that the D.C. Circuit held that, once a *prima facie* showing of a Rule 6(e) violation is made, the District Court "must" conduct further investigation. *Id.* at 1321. And, the

investigation contemplated by *Barry* was one directed at determining whether *remedial* relief – "order[ing] the Government to take steps to stop any publicity emanating from its employees" – would be necessary. Unlike Mayor Barry, Chiu and her co-defendants have not preserved any claim of ongoing harm to their constitutional or other substantial rights, so there is no need for the Court to continue its inquiry to determine the need for remedial relief.[7]

In sum, there is no extant constitutional challenge by any defendant that warrants the issuance of the Subpoena to Mr. Gertz. In these circumstances, it is not "necessary" for this Court – in place of or in addition to the Department of Justice – to investigate the source of the information contained in the Gertz article.

2. *The General Interest In Securing Grand Jury Secrecy Is Not Sufficient Justification For The Court To Continue Its Inquiry Regarding The Source(s) For The Gertz Article.*

A District Court has inherent supervisory power to regulate proceedings pending before it, as well as the conduct of parties to the proceeding. If a sufficient showing is made that a possible Rule 6(e) violation has occurred during a grand jury investigation, or post-indictment but pre-trial, District Courts have the authority to direct the government to determine whether its personnel were responsible for disclosing Rule 6(e) information, and whether preventative and/or remedial measures are necessary. But once the proceedings have concluded, and where no party has preserved an objection to the possible Rule 6(e) violation, it is respectfully submitted that a District Court should not rely upon its inherent supervisory authority to continue an investigation of the alleged grand jury leak.

It is well-settled that several distinct interests are served by conducting grand jury proceedings in secret:

> First, if pre-indictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily,

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[7] Likewise, Chiu did not seek imposition of contempt sanctions against government officials, an omission which distinguishes this case from *(Lance)*.

> knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Butterworth v. Smith, 494 U.S. 624, 630, 110 S. Ct. 1376, 108 L. Ed. 2d 572 (1990) (citations omitted). None of these interests was impaired by the information contained in the Gertz article – no witnesses were identified, and at the time of the Gertz article all of the named *Chi Mak* defendants were incarcerated or electronically monitored, making it nearly impossible for them to flee or exert undue influence. And, because all of the *Chi Mak* defendants were convicted, no risk exists that an exonerated party will be held up to public ridicule. Not only were no secrecy interests impaired by the Gertz article at the time it was published, but now – as in all cases post-indictment – the interests favoring grand jury secrecy have become much less compelling. *Douglas Oil Co. v. Petrol Stops NW*, 441 U.S. 211, 218-19, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979); *In re United States*, 441 F.3d 44, 61 (1st Cir. 2006) (secrecy concerns "largely gone" post-indictment, so no basis for further investigating alleged grand jury leak).

The combination of these factors – the conclusion of all trial proceedings in this case, the absence of any surviving due process or other fair trial challenge, the lack of harm to any fair trial rights, and the diminished grand jury secrecy interests that exist at this stage of the case – taken together counsel strongly against this Court's exercise of its supervisory authority to continue the investigation of the source(s) of the Gertz article. When faced with similar circumstances, another District Court within the Ninth Circuit recently declined to exercise its supervisory authority to investigate what was a far clearer and compelling incidence of a grand jury leak. In *United States v. Wilkes*, No. 07cr0330-LAB, 2007 WL 4258349 (S.D. Cal. Dec. 3, 2007), the defendant applied for authorization to issue subpoenas to

reporters under Fed. R. Crim. P. 17(b) and (c) in connection with a hearing on defendant's motion to set aside the jury's guilty verdicts because of alleged grand jury leaks. *Id.* at *2-3. The *Wilkes* court first held that since potential jurors were questioned during *voir dire* regarding any knowledge of the news article that reported the alleged grand jury information, there was no surviving interest of the defendant that could be vindicated post-trial. *Id.* at *4 ("[t]he verdicts returned by an impartial trial jury in this case vitiated any possible prejudice caused by the grand jury leaks."). The *Wilkes* court went on to consider whether it should exercise its inherent authority to subpoena the reporters and otherwise investigate the alleged leaks. *Id* at *4-5. After taking account of the fact that the interests in grand jury secrecy were diminished at the post-trial stage of the case, and constraints imposed by separation of powers principles, the *Wilkes* court sustained the reporters' objections to the subpoenas, denied the other subpoenas requested by defendant, and declined to investigate the alleged disclosure of grand jury information. *Id.* at *5.

We respectfully suggest that there is even greater reason here than existed in *Wilkes* for this Court to decline to exercise its supervisory authority to investigate the alleged grand jury leaks. As explained in Section II.A above, the information in the Gertz article did not concern events occurring before the grand jury. Moreover, as discussed in Section II.B.1, in this case, unlike in *Wilkes*, no party has preserved an objection to the alleged disclosure of grand jury information. In sum, because the grand jury interests implicated by the Gertz article are *de minimus*, if not non-existent, and no interest of any *Chi Mak* defendant will be furthered by continued inquiry, the Subpoena issued to Mr. Gertz is unwarranted and should be quashed.

C. The First Amendment Interests of the Press and Public Outweigh Any Residual Interest in Compelling Disclosure Of A News Source.

Even if some limited information covered by Rule 6(e) was disclosed in the Gertz article, the remaining public interest in determining the source of that disclosure is quite modest in this situation and must be balanced against the First

Amendment rights of the press and the public. The First Amendment rights of Mr. Gertz and the reading public should prevail over the general public interest in ascertaining the identity of any alleged Rule 6(e) violator in these circumstances.

As the Court is aware, the Supreme Court has held that a reporter may be compelled to testify before a grand jury investigating the commission of a crime. *See Branzburg v. Hayes*, 408 U.S. 665, 700-01, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972). A grand jury subpoena is not involved here, however, and *Branzburg*'s holding does not apply.

Branzburg nonetheless recognized that news gathering is protected by the First Amendment. *See id.* at 681 ("[n]or is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated"). Based on *Branzburg*, the Ninth Circuit has held that the First Amendment provides a qualified privilege for journalists to protect news sources in judicial proceedings, including criminal ones outside the context of a grand jury investigation. *See Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975) (violation of gag order during criminal trial); *see also Shoen v. Shoen*, 48 F.3d 412, 414-15 (9th Cir. 1995) ("*Shoen II*") (discovery in civil case); *Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th Cir. 1993) ("*Shoen I*") (same); *United States v. Pretzinger*, 542 F.2d 517, 520-21 (9th Cir. 1976) (per curiam) (tip to reporter about impending drug arrest).

The journalist's privilege "is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.'" *Shoen I*, 5 F.3d at 1292 (quoting *Herbert v. Lando*, 441 U.S. 153, 183, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979) (Brennan, J., dissenting)). This First Amendment shield "protects journalists against compelled disclosure in all judicial proceedings, *civil and criminal alike*." *Id.* (citing *Farr*) (emphasis added).

The Ninth Circuit has held that the First Amendment privilege and the need for disclosure of confidential source and related information must be "judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest." *Farr*, 522 F.2d at 468. Once the privilege is properly invoked, "the burden shifts to the requesting party to demonstrate a sufficiently compelling need for the journalist's materials to overcome the privilege." *Shoen I*, 5 F.3d at 1296. "At a minimum, this requires a showing that the information sought is not obtainable from another source." *Id.* "In other words," the requesting party "must demonstrate that she has exhausted all reasonable alternative means for obtaining the information." *Id.* (citing *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981)).[8]

In *Farr*, the state trial judge presiding over the highly publicized murder trial of Charles Manson and his "family" had held a reporter in contempt after he refused to identify the source that provided a copy of a witness statement to the reporter. The witness statement, which had been ruled inadmissible, had been distributed only to the attorneys of record and was subject to a protective order. In the middle of the trial, the reporter published a story based on the witness statement about Manson's plans to murder several "show business personalities." *See Farr*, 522 F.2d at 466. After the trial ended, the state trial judge held a series of post-trial hearings in which all of the "then living attorneys involved" in the case denied, "*under oath,*" having

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[8] This threshold requirement of exhaustion is also the first element of a three-part test that the requesting party must satisfy in at least civil cases in the Ninth Circuit. The reporter's privilege will yield only if the information sought is: "(1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." *Shoen II*, 48 F.3d at 416. The Ninth Circuit's test is designed to "ensure that compelled disclosure is the exception, not the rule." *Id.* This test applies even to non-confidential information. *Id.* The presence of a confidential source, as in this matter, will raise the bar against compelled disclosure even higher. *See id.* (noting that lack of a confidential source "may be an important element in balancing . . . the need for the material sought against the interest of the journalist in preventing production in a particular case") (quoting *Shoen I*, 5 F.3d at 1295-96)).

given the statement to the reporter. When the reporter refused to divulge his source's identity, the trial judge held him in contempt. *See id.* (emphasis added).

On an appeal from denial of a petition for *habeas corpus*, the Ninth Circuit weighed the reporter's First Amendment privilege against the criminal defendants' constitutionally-guaranteed rights to "due process by means of a fair trial." *See Farr*, 522 F.2d at 469. The Ninth Circuit held that the interest in the "power of the court to enforce its duty and obligation relative to the *guarantee of due process* to the defendants in the *on-going trial*" tilted the balance in favor of upholding the order requiring disclosure of the reporter's confidential source. *Id.* (emphasis added).

Application of the *Farr* balancing test favors the First Amendment privilege that Mr. Gertz asserts. Here, unlike in *Farr*, no government attorneys or agents have been put under oath to deny being the source of the information. Instead, as the Court's May 1 Order indicates, the government has only "*interviewed* . . . persons of interest." *Id.* at 2 (emphasis added). Unsworn interviews are no substitute for sworn statements or depositions. Indeed, the Ninth Circuit has suggested that only testimony under oath from alternative sources will meet the exhaustion requirement. *See Shoen I*, 5 F.3d at 1297 (citing *Farr*). Other authorities recognizing the exhaustion requirement have held that depositions first must be taken, and the correct questions asked. *See Zerilli*, 656 F.2d at 714 ("as many as 60 depositions might be a reasonable prerequisite to compel disclosure"); *Carey v. Hume*, 492 F.2d 631, 636, 639 (D.C. Cir. 1974) (same); *see also In re Roche*, 448 U.S. 1312, 1316, 101 S. Ct. 4, 65 L. Ed. 2d 1103 (1980) (Brennan, J., in chambers) (65 depositions); *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5, 8-9 (2d Cir. 1982) (though "hundreds" of depositions had been taken, court found "no indication" that correct question had ever been asked). Indeed, the *(Lance)* court found that in each of the six cases it reviewed involving an alleged Rule 6(e) violation sworn statements were submitted by the government denying the alleged misconduct. 610 F.2d at 219-20.

Nor would it be appropriate to dispense with the requirement that other witnesses be called to testify before requiring Mr. Gertz to do so simply because of the large number of potential witnesses. As discussed above in Section II.A., the results of the government's investigation have not been made part of the record in this matter. Presumably, however, the government interviews of "over 500 persons of interest" revealed the identities of the much smaller pool of government officials who had knowledge, as of May 16, 2006 (the date of the Gertz article), that the line prosecutors had recommended, or planned to recommend, the addition of specified criminal charges. In the event that the government interviews did not reveal this information, it would be readily available from Gregory Staples and Craig Missakian, the line prosecutors on the *Chi Mak* case, who should be the first witnesses called to testify in the event the Court continues to be of the view that it "must" conduct a further investigation. *See* May 1, 2008 Order [Dkt. No. 700] at 2.

In addition, unlike in *Farr*, all the *Chi Mak* defendants have waived their right to complain about any threat to their fair trial and other constitutional rights. Stated another way, the constitutional fair trial interests that may at one time have been at issue in this case have disappeared. Nor does the general interest in enforcement of Rule 6(e)(2)(B) outweigh the First Amendment rights being asserted by Mr. Gertz. As discussed in Section II.B.2 above, forcing disclosure of the reporter's source here would not promote any of the four interests served by grand jury secrecy. *See Douglas Oil Co.*, 441 U.S. at 218-19 (describing interests); *see also Butterworth*, 494 U.S. at 630-31 (recognizing that interests served by grand jury secrecy must be balanced against First Amendment rights).

The government's relevant policy and its own public statements also support the conclusion that the Subpoena issued to Mr. Gertz should be quashed. The Department of Justice regulations governing issuance of subpoenas to the press recognize that, "in every case," the government's approach "must be to strike the proper balance between the public's interest in the free dissemination of ideas and

information and the public's interest in effective law enforcement and the fair administration of justice." *See* 28 C.F.R. §50.10(a) (2006). "The Department seeks to 'provide protection' for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function." *See* 28 C.F.R. § 50.10. The regulations require that "[a]ll reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media"; that in criminal cases the information sought be "essential" to a successful investigation; that subpoenas should be used, except in "exigent circumstances," only to verify published information and surrounding circumstances that "relate to the accuracy of" the published information, and that the approval of the Attorney General be obtained for any subpoena to a reporter. *See id.* § 50.10(b), (e), (f)(a), (f)(4).

In line with this policy, over more than three decades the Department of Justice has authorized subpoenas to the news media "only in the most serious cases." *See* Statement of James B. Comey, Deputy Attorney General, U. S. Department of Justice, for the Committee on the Judiciary, United States Senate, Concerning Reporters' Privilege Legislation (July 20, 2005) (copy attached as Exhibit C) at 2. Because the Department "carefully balances" the public's interest in the free dissemination of ideas and information with its interest in effective law enforcement, authorizations to subpoena reporters have been limited to "little more than a handful," and only in circumstances "linked closely to significant criminal matters that directly affect the public's safety and welfare." *Id.* at 2, 4.

Maintaining the confidentiality of Mr. Gertz' sources would have no adverse impact on the investigation of the defendants here, all five of whom have been convicted, and would not impede prosecution of any offense that "directly affect[s] the public's safety and welfare." *Id.* Nor do any "exigent" circumstances exist here of the kind contemplated by the DOJ guidelines. Mr. Gertz, instead, exercised his "responsibility to cover as broadly as possible controversial public issues," as

contemplated by the DOJ regulations. *See* 28 C.F.R. § 50.10. Reporting on the intention of prosecutors to bring new charges against already indicted individuals and one other suspect in a national security case, based in part on a prosecutor's statement in open court, is at the heart of a reporter's duty to the public.

At this stage of the *Chi Mak* case the public has only a modest need, at most, to vindicate the interest in securing grand jury secrecy, even if the information at issue were subject to Rule 6(e) (which it is not). No "important and compelling need for disclosure" of confidential source information, *see Farr*, 522 F.2d at 469, exists in this situation. Moreover, the failure to exhaust alternative sources of information – the testimony or sworn statements of government attorneys – presents a glaring contrast to the procedure followed in *Farr* and the preference for sworn testimony expressed in *Shoen I*, emphasizing the relative weakness of the case for disclosure here. Therefore, the First Amendment privilege protecting Mr. Gertz' confidential source and other unpublished information should prevail.

D. The Interests Served by the Reporter's Privilege Based on Federal Common Law Also Outweigh the Need for Disclosure of Mr. Gertz' Confidential Source(s).

This Court should recognize a reporter's privilege against compelled disclosure of confidential sources and unpublished information on the basis of federal common law. The reasoning in the Supreme Court's decision in *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996), logically requires the recognition of a common law reporter's privilege. This common law privilege, like the First Amendment privilege, requires that the Subpoena be quashed.

Rule 501 of the Federal Rules of Evidence provides that privileges in federal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *See* F.R.E. 501; *see also Jaffee*, 518 U.S. at 8 (Rule 501 "authorizes federal courts to define new privileges by interpreting 'common law principles . . . in light of reason and experience'"). In adopting Rule 501, Congress "did not freeze the law

governing the privileges of witnesses in federal trials," but "rather directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee*, 518 U.S. at 9 (citations omitted).[9]

In *Jaffee*, the Supreme Court held that the federal common law of privilege should develop using a three-part analysis: (1) whether important public and private interests would be served by the proposed privilege; (2) whether the interests that the privilege serves outweigh the need for probative evidence; and (3) whether the states have recognized a similar privilege. *See id.* at 9-15. The *Jaffee* decision confirmed the existence of a federal common law psychotherapist-patient privilege based on the need, in particular, for confidentiality in successful psychotherapy. *See id.* at 10-12, 17-18. The psychotherapist-patient privilege, the Supreme Court found, is "rooted in the imperative need for confidence and trust." *Id.* at 10 (citation omitted). The privilege also serves the public interest by facilitating good mental health, a "public good of transcendent importance." *Id.* at 11. The evidentiary benefit from denying the privilege would have been "modest," the Court found, and noted that, without a privilege, much of the material that would otherwise have been protected by it would never come into being, since patients would not confide in psychotherapists. *Id.* at 12. The fact that "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege" confirmed the high court's decision to recognize it under federal common law. *Id.*

Jaffee held that the recognition of that privilege in state legislation is equally as reflective of "reason and experience" as judicial decisions would be. "[I]t is appropriate to treat a consistent body of policy determinations by state legislatures

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[9] The Ninth Circuit has not addressed the recognition of a reporter's privilege under federal common law outside the context of a grand jury subpoena and not at all since *Jaffee*. The two Ninth Circuit decisions declined to find such a privilege in the context of grand jury subpoenas on the basis of *Branzburg*. *See Lewis v. United States*, 517 F.2d 236, 238 (9th Cir. 1975); *see also In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397, 403 (9th Cir. 1993) (rejecting "scholar's privilege" in grand jury context).

as reflecting both 'reason' and 'experience.' That rule is properly respectful of the States and at the same time reflects the fact that once a state legislature has enacted a privilege there is no longer an opportunity for common-law creation of the protection." *Jaffee*, 518 U.S. at 13 (citations omitted).[10]

Application of the *Jaffee* factors here requires recognition of a federal common law privilege for journalists not to disclose their confidential sources and other unpublished information. The reporter's privilege undeniably serves important private and public interests – both the private interest of the reporter in doing his or her job well, and, more fundamentally, the essential public function of informing the public about government and other areas of social importance.

Reporters, like psychotherapists, depend "upon an atmosphere of confidence and trust," *Jaffee*, 518 U.S. at 10, to elicit important information. A reporter's ability to promise confidentiality to sources greatly enhances her ability to gather news, and disclosure of sources "would greatly hinder reporters' ability to gather and report news in the future." *See New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457, 497 (S.D.N.Y. 2005), *vacated on other grds*, 459 F.3d 160 (2d Cir. 2006). "Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability[, as] journalists frequently depend on

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[10] At least two District Courts in the Ninth Circuit have recognized new privileges at federal common law on the basis of *Jaffee*. *See Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164, 1180-81 (C.D. Cal. 1998) (mediation); *In re Grand Jury Proceedings, Unemancipated Minor Child*, 949 F. Supp. 1487, 1497 (E.D. Wash. 1996) (parent-child). Many other federal courts outside the Ninth Circuit have also recognized new privileges following *Jaffee*. *See, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003) (settlement negotiations); *NSB Technologies, Inc. v. Specialty Direct Marketing, Inc.*, No. 03 CV 2323, 2004 WL 1918708 (N.D. Ill. Aug. 20, 2004) (litigation); *In re RDM Sports Group, Inc.*, 277 B.R. 415 (N.D. Ga. 2002) (mediation); *Sheldone v. Pennsylvania Turnpike Comm'n*, 104 F. Supp. 2d 511 (W.D. Pa. 2000) (mediation); *Weekoty v. United States*, 30 F. Supp. 2d 1343 (D.N.M. 1998) (self-critical analysis in context of physicians' morbidity and mortality conferences); *In re Air Crash Near Cali, Colombia on Dec. 20, 1995*, 959 F. Supp. 1529 (S.D. Fla. 1997) ("self-critical analysis" for FAA safety program); *United States v. Lowe*, 948 F. Supp. 97 (D. Mass. 1996) (rape counseling).

informants to gather news, and confidentiality is often essential to establishing a relationship with an informant." *Zerilli*, 656 F.2d at 711 (footnotes omitted).

Lack of protection for the identity of a news source will in most instances result in the source providing a reporter with only information that those who control government wish to be public, rather than information revealing underlying issues and even the larger truth.[11] An inability to promise confidentiality to sources with any degree of certainty will cause them to be less candid, and far less information will be revealed to the public. *See, e.g., United States v. LaRouche Campaign*, 841 F.2d 1176, 1181 (1st Cir. 1988) (disclosure of confidential sources or information "would clearly jeopardize the ability of journalists and the media to gather information and, therefore, have a chilling effect on speech"); *United States v. Marcos*, No. 87 CR 548, 1990 WL 74521 at *2 (S.D.N.Y. June 1, 1990) ("[E]ffective gathering of newsworthy information in great measure relies upon the reporter's ability to secure the trust of news sources. Many doors will be closed to reporters who are viewed as investigative resources of litigants").

Often the only sources available on topics such as government corruption, espionage, terrorism, intelligence operations and national defense are those who will not allow their names to be disclosed. *See, e.g., Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979) ("A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis"). This is especially true with respect to investigative reporting, which usually deals with matters on which sources are often unlikely to receive official approval to talk to the press. *See Baker v. F & F Investment*, 470 F.2d 778,

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[11] *Jaffee* does not require proponents of a privilege to produce scientific studies or other empirical evidence demonstrating the privilege's benefits. Instead, it reasoned its way in a logical fashion to the existence of the psychotherapist-patient privilege. *See Jaffee*, 518 U.S. at 10 (reasoning that, based on the need for "frank and complete disclosure of facts, emotions, memories and fears" in psychotherapy, "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment").

782 (2d Cir. 1972) ("[c]ompelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis . . . . The deterrent effect such disclosure is likely to have upon future 'undercover' investigative reporting . . . threatens freedom of the press and the public's need to be informed").

A reporter's privilege would also reduce the need for the press to be concerned about future subpoenas and would thereby increase its capacity to focus on its mission of gathering and disseminating the news. The Ninth Circuit has "recognize[d] that routine court-compelled disclosure of research materials poses a serious threat to the vitality of the newsgathering process." *Shoen II*, 48 F.3d at 416 (citing *LaRouche Campaign*, 841 F.2d at 1182). As the First Circuit has observed in the context of a criminal defendant's subpoena for unpublished press materials:

> To the extent that compelled disclosure becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding disclosure requests or compliance therewith rather than to the basic function of providing news and comment.

See LaRouche Campaign, 841 F.2d at 1182. In either event, the threat of third party subpoenas will hinder the press in achieving its core purpose of providing news about public affairs.

Reporters also have a professional obligation to honor promises of confidentiality, as required by the ethics codes of the major national organizations of journalists. *See, e.g.*, American Society of Newspaper Editors' Statement of Principles, Art. VI ("Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly") (attached hereto as Exhibit D); Radio-Television News Directors Ass'n Code of Ethics and Professional Conduct, under heading "Integrity" ("Journalists should keep all commitments to protect a confidential source") (attached hereto as Exhibit E); Society of Professional Journalists Code of Ethics, under heading "Seek Truth and Report It" ("Keep

promises" to confidential sources) (attached hereto as Exhibit F). This private interest must be counted among those in support of a privilege.

The reporter's privilege also serves very substantial *public* interests that are part of the foundation of our democratic society. *See Shoen I*, 5 F.3d at 1292 (noting society's interest in protecting news gathering process to justify First Amendment privilege) (internal quotations omitted). The Ninth Circuit has further observed, in a case involving grand jury subpoenas, that the "public interests in First Amendment freedoms that stand or fall with the rights that these witnesses advance for themselves" are "far weightier than" the not insignificant personal rights of journalists. *See Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972).

> Freedom of the press was not guaranteed solely to shield persons engaged in newspaper work from unwarranted governmental harassment. The larger purpose was to protect public access to information. . . . . In the context of litigation, vindication of these public rights secured by the First Amendment is primarily committed to persons who are also asserting their individual constitutional rights.

Id. at 1083-84.

The Constitution "specifically selected the press . . . to play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 219, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966) (citation omitted). "[W]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); *see Garrison v. Louisiana*, 379 U.S. 64, 77, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) (noting the "paramount public interest in a free flow of information to the people concerning public officials, their servants"). Freedom of the press is a right created "not for the benefit of the press so much as for the benefit of all of us." *Time, Inc. v. Hill*, 385 U.S. 374, 389, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967).

The Third Circuit, which recognized a reporter's privilege under Rule 501, has emphasized the public interests it serves:

> The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information . . . to the public.

Riley, 612 F.2d at 714 (citations omitted); *see also United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980) (extending privilege to criminal cases).

In sum, the public and private interests in protecting the confidentiality of a reporter's sources are undeniably of great importance to our society. The reporter's privilege clearly satisfies the first element of the *Jaffee* analysis.

The interests served by a reporter's privilege outweigh the evidentiary costs, meeting the second component of the *Jaffee* analysis. As in psychotherapy, confidentiality is critical for journalism's success. *Jaffee*'s conclusion as to the evidentiary price of rejecting the psychotherapist-patient privilege applies to the reporter's privilege as well: source disclosures "would surely be chilled," and "much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being." *See Jaffee*, 518 U.S. at 11-12.

As in *Jaffee,* therefore, "the likely evidentiary benefit that would result from the denial of the privilege is modest." *See id.* at 12. The absence of a reporter's privilege, however, will reduce the flow of significant information to the press and public, information that otherwise likely would never be divulged or reported. The harm to the public from this disruption of confidential source relationships and consequent reduction in information would be enormous. Articles such as that authored by Mr. Gertz which depend on confidential sources would not appear, and the public would know much less about its own government.

The relevant policy decisions of the states form a consensus here that a reporter's privilege should exist, satisfying the third *Jaffee* requirement. *See id.* at 12-13 ("[T]he policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one")

(citations omitted). "The existence of a consensus among the States indicates that 'reason and experience' support recognition of" a privilege. *Id.* at 13. In light of overwhelming state law recognition of a privilege, denial of a parallel federal privilege also "would frustrate the purposes of the state legislation that was enacted to foster these confidential communications," the Court declared. *See id; see also United States v. Chase,* 340 F.3d 978, 983, 986 (9th Cir. 2003) (en banc) (in refusing to recognize a "dangerous patient exception" to psychotherapist-patient privilege, Ninth Circuit stressed both *Jaffee's* emphasis on states' experiences and that the proposed exception "would weaken state confidentiality laws" and devalue promises of confidentiality).

All but one of the 50 states and the District of Columbia recognize some form of reporter's privilege. Thirty-two states and the District have "shield laws" that provide either an absolute or a qualified privilege to protect the identity of a reporter's source.[12] Another 17 states have established a reporter's privilege in some context.[13] The only state without some form of reporter's privilege, Wyoming, has remained silent on the issue.

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[12] *See* Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300-.390; Ariz. Rev. Stat. Ann. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Const. art. I, § 2(b), Cal. Evid. Code § 1070; Colo. Rev. Stat. § 13-90-119; Conn. Gen. Stat. § 52-146t; Del. Code Ann. tit. 10, §§ 4320-26; D.C. Code Ann. §§ 16-4702, 4703; Fla. Stat. Ann. § 90.5015; Ga. Code Ann. § 24-9-30; 735 Ill. Comp. Stat. Ann. 5/8-901 to 8-909; Ind. Code. Ann. §§34-46-4-1, 34-46-4-2; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-1454; Md. Code Ann., Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws Ann. § 767.5a, 767A.6; Minn. Stat. Ann. §§ 595.021-.025; Mont. Code Ann. §§ 26-1-902, 26-1-903; Neb. Rev. Stat. §§ 20-144 to 20-147; Nev. Rev. Stat. Ann. §§ 49.275, 49.385; N.J. Stat. Ann. §§ 2A:84A-21.1 to 21.5; N.M. Stat. Ann. § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat. § 8-53.11; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code Ann. §§ 2739.04, 2739.12; Okla. Stat. Ann. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510-.540; 42 Pa. Const. Stat. Ann. § 5942(a); R.I. Gen. Laws §§ 9-19.1-1 to 9-19.1-3; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208.

[13] *See De Roburt v. Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981) (civil diversity suit); *State v. Salsbury*, 924 P.2d 208 (Idaho 1996) (criminal); *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977) (civil); *In re Pennington*, 581 P.2d 812 (Kan. 1978) (criminal); *In re Letellier*, 578 A.2d 722 (Me. 1990) (grand jury); *Ayash v. Dana-Farber Cancer Institute*, 822 N.E.2d 667 (Mass. 2005) (civil); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991) (grand jury);
(*continued on next page*)

California has adopted a forceful shield law in its constitution which forbids adjudging a reporter in contempt for (1) "refusing to disclose the source of any information procured . . . for publication in a newspaper . . ." or (2) "for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." *See* Cal. Const. art. 1, § 2(b); *see also* Cal. Evid. Code § 1070 (same). The shield is "*absolute* rather than qualified in immunizing a newsperson from contempt for revealing unpublished information obtained in the newsgathering process." *Miller v. Superior Court*, 21 Cal. 4th 883, 890, 89 Cal. Rptr. 2d 834 (1999) (emphasis in original). The only exception to the shield law's protection against contempt arises "on a showing that nondisclosure would deprive the defendant of his federal constitutional right to a fair trial." *Id.* at 891. But, "a newsperson should not be held in contempt for refusing to disclose news sources or unpublished information absent specific findings demonstrating that disclosure of the information sought is necessary to avert an *actual threat* to the defendant's right to a fair trial." *See In re Willon*, 47 Cal. App. 4th 1080, 1097, 55 Cal. Rptr. 2d 245, 257 (6th Dist. 1996) (emphasis added).

State ex rel. Classic III, Inc. v. Ely, 954 S.W.2d 650 (Mo. Ct. App. 1997) (civil); *State v. Siel*, 444 A.2d 499 (N.H. 1982) (criminal); *Opinion of the Justices*, 373 A.2d 644 (N.H. 1977) (civil statutory proceeding); *Hopewell v. Midcontinent Broadcasting Corp.*, 538 N.W.2d 780 (S.D. 1995) (civil); *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675 (Tex. Ct. App. 1991) (civil); *Spooner v. Town of Topsham*, 937 A.2d 641 (Vt. 2007) (civil); *State v. St. Peter*, 315 A.2d 254 (Vt. 1974) (criminal); *Brown v. Virginia*, 204 S.E.2d 429 (Va. 1974) (criminal); *Clemente v. Clemente*, No. 01-81, 2001 WL 1486150 (Va. Cir. Ct. Nov. 4, 2001) (civil); *Clampitt v. Thurston County*, 658 P.2d 641 (Wash. 1983) (civil); *State v. Rinaldo*, 673 P.2d 614 (Wash. Ct. App. 1983) (criminal); *Wisconsin ex rel. Charleston Mail Ass'n v. Ranson*, 488 S.E.2d 5 (W. Va. 1997) (criminal); *State ex rel. Hudok v. Henry*, 389 S.E.2d 188 (W. Va. 1989) (civil); *Zelenka v. State*, 266 N.W.2d 279 (Wis. 1978) (criminal); *Kurzynski v. Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995) (civil). Mississippi and Utah trials courts have recognized a reporter's privilege in several contexts. *See* Edward L. Carter, *Reporter's Privilege in Utah*, 18 BYU J. Pub. L. 163 (2003) (discussing six Utah trial court decisions); Reporters Committee for Freedom of the Press, *The Reporter's Privilege Compendium* (2002), available at http://www.rcfp.org/privilege/index.php?op=browse&state=MS (last visited June 2, 2008) (collecting unpublished trial court orders from Mississippi recognizing a qualified privilege under Fifth Circuit jurisprudence).

California elevated the shield law to constitutional status in 1980, a move that "manifested the intent to afford newspersons the highest level of protection under state law . . . ." *See Playboy Enters., Inc. v. Superior Court*, 154 Cal. App. 3d 14, 27-28, 201 Cal. Rptr. 207, 218 (2d Dist. 1984). Even a court's interest in controlling its own officers and processes could not prevail over the reporter's shield in state court in California. *See Willon*, 47 Cal. App. 4th at 1094-95.

The District of Columbia, where Mr. Gertz is employed, has also adopted a very protective shield law. The statute absolutely prohibits a court from compelling a newsperson to disclose the identity of any source of news or information procured while in a news gathering or disseminating capacity, "whether or not the source has been promised confidentiality." *See* D.C. Code §§ 16-4702(1), -4703(b). Publication or other dissemination of a source will not waive the privilege. *Id.* § 16-4704. Disclosure of unpublished information other than the identity of a source may be required only upon a showing, by clear and convincing evidence, that: (1) the information is relevant to a significant legal issue before the court or other body with subpoena power; (2) the information could not, with due diligence, be obtained by any alternative means, and (3) there is an overriding public interest in the disclosure. *See id.* §§ 16-4702(2), -4703(a). The D.C. statute accords "total protection to news sources, whether confidential or not, and whether disclosed to others or not." *Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 336 (D.D.C. 1994).

The near-total protection for news sources in this situation under the laws of California and the District of Columbia, and the national consensus among the states, confirm that this Court should recognize a reporter's privilege under federal common law. The privilege should be absolute and prohibit disclosure of a source's identity under all circumstances. An absolute privilege would be consistent with the critical need for confidentiality in the reporter-source relationship. Similar to the situation in *Jaffee*, a balancing test would "eviscerate" the effectiveness of the privilege by "[m]aking the promise of confidentiality contingent upon a trial judge's

later evaluation" of the relative weights of the need for confidentiality and the need for disclosure. 518 U.S. at 17 (regarding psychotherapist-patient privilege).

Though the *Jaffee* decision left open the "full contours" of the psychotherapist-patient privilege for case by case determination, it emphasized that "the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected.'" *See id.* at 18 (citations omitted). An "uncertain" or widely variable privilege "is little better than no privilege at all." *Id.* The same reasoning applies to the reporter's privilege.

Even if the Court declines to find an absolute privilege, it should, at a minimum, recognize a qualified reporter's privilege using standards that already exist in the Ninth Circuit, in criminal and civil hearings, for the First Amendment privilege. This would require the requesting party to show a "sufficiently compelling need" for the journalist's information and materials to overcome the privilege, and a showing that "all reasonable alternative means for obtaining the information" have been exhausted. *See Shoen I*, 5 F.3d at 1296. The presence of a confidential source, as in this matter, should require a heightened showing of need. *See Shoen II*, 48 F.3d at 416. As discussed in the previous section, no sufficient or compelling need exists for the forced disclosure of Mr. Gertz' source and his unpublished documents. None of the interests in grand jury secrecy are implicated. Nor are any exigent circumstances involved, as the DOJ's guidelines would require.

In contrast, the public interest in preserving the confidentiality of the reporter's source and unpublished material is substantial. The Gertz article reported on the progress of a prosecution involving the alleged leak of sensitive defense information to a foreign power, a matter of significant public concern.

This Court should follow the *Jaffee* analysis. Giving due regard to the strong protection for a reporter's sources provided under California and District of Columbia law, the Court should recognize and apply a federal common law privilege for confidential sources and information and quash the Subpoena here.

E. The Subpoena Is Unreasonable And Oppressive, And Should Be Quashed Under The Principles Of Rule 17.

The Subpoena is unreasonable and oppressive, and cannot properly be enforced under the principles of Federal Rule of Criminal Procedure 17. In addition to violating the privileges described above, the Subpoena seeks production of an impermissibly broad set of documents and information that are actually irrelevant to a violation of Federal Rule of Criminal Procedure 6(e).

To compel production of documents under Rule 17(c), the proponent "must clear three hurdles: (1) relevancy; (2) admissibility; and (3) specificity." *Nixon*, 418 U.S. at 700; *see also United States v. Eden*, 659 F.2d 1376, 1381 (9th Cir. 1981) (same). Rule 17(c) is "not intended to provide a means of discovery for criminal cases." *Nixon*, 418 U.S. at 698 (citations omitted); *see also United States v. MacKey*, 647 F.2d 898, 901 (9th Cir. 1981) (same). Nor may a Rule 17(c) subpoena be used for "a blind fishing expedition seeking unknown evidence." *United States v. Reed*, 726 F.2d 570, 577 (9th Cir. 1984).

A subpoena under Rule 17(c) may be quashed "if compliance would be unreasonable or oppressive." *See* Fed. R. Cr. P. 17(c)(2). Enforcing or quashing Rule 17(c) subpoenas is within the discretion of the trial court. The ruling will not be disturbed on appeal unless found to be arbitrary or without support in the record. *Nixon*, 418 U.S. at 702; *Reed*, 726 F.2d at 577.

The Subpoena here fails to comply with *Nixon*'s requirement of specificity, at a minimum. The Subpoena also flunks the relevancy requirement. It is otherwise unreasonable and oppressive, both as to the testimony and documents sought, in light of the First Amendment and common law privileges, as well as the lack of actual evidence of a Rule 6(e) violation or other legal basis for the Subpoena.

1. The Request for Documents Is Insufficiently Specific.

The Subpoena's document demand is too broad to pass muster under *Nixon* and the case law following it in the Ninth Circuit. The Subpoena uses the broadest terms – "[a]ll records referring or relating to the article" – to request documents, and

fails to describe any particular document or type of document sought. The request contains no time limitation. The accompanying definitions and instructions define "records" in the broadest possible way, and include all forms in which a document is stored and all non-duplicate copies and versions. *See* April 30, 2008 Subpoena.

The document request constitutes an impermissible "fishing expedition" for any and all documents that may have anything to do with the Gertz article, regardless of whether the documents relate in any way to the alleged violation of Rule 6(e). Therefore, the Subpoena's document request is insufficiently specific.

2. The Subpoena Does Not Seek Relevant Documents.

The Subpoena to Mr. Gertz calls for production of a broad category of documents: "All records referring or relating to the article titled 'New Charges Expected in Defense Data Theft Ring,' which was published in *The Washington Times* on May 16, 2006." *See* April 30, 2008 Subpoena. There is no reasonable likelihood that the information sought will be relevant to an inquiry into a violation of Rule 6(e), since the Gertz article contained no grand jury information.

As demonstrated in Section II.A above, neither the Gertz article nor any other evidence of record provides proof of a Rule 6(e) violation. The article did not state that the grand jury was considering any new charges, but only mentioned that "federal prosecutors" would add new charges against the then-current defendants and one other individual. The description of the additional charges and the number of defendants were inconsistent with the content of the First Superseding Indictment. Nor does any evidence of record show that, as of the date of the Gertz article, the grand jury that returned the First Superseding Indictment was then considering the new charges described in the article.

In sum, the Subpoena's document request is not demonstrably relevant to any violation of Rule 6(e).

3. *The Subpoena, Including The Command For Mr. Gertz To Testify, Is Unreasonable And Oppressive For Other Reasons As Well.*

The Subpoena is also unreasonable and oppressive in light of both the First Amendment and common-law privileges discussed above *and* the lack of sufficient proof of a Rule 6(e) violation or other legal basis on which to require Mr. Gertz' testimony or the production of unpublished documents. The Ninth Circuit has applied the "unreasonable and oppressive" standard of Rule 17(c) to subpoenas *ad testificandum*, in addition to subpoenas *duces tecum*. *See United States v. Bergeson*, 425 F.3d 1221, 1224, 1225 (9th Cir. 2005). In *Bergeson*, the Ninth Circuit held that Rule 17(c)(2) requires a "discretionary, case-by-case inquiry" in applying the principles of that Rule to quash a grand jury subpoena for a lawyer to provide testimony against her client on an unprivileged topic. *See id.* at 1225-27. In doing so, the Ninth Circuit relied in part on Department of Justice guidelines on issuance of such subpoenas. *See id.* at 1226.

Here, the Subpoena's demand that Mr. Gertz testify about the identity of his confidential source and other unpublished information, and produce unpublished documents, runs contrary to the First Amendment and common-law privileges discussed above. Those privileges by themselves require that the Subpoena be deemed unreasonable and oppressive. In addition, there is no record evidence of an actual Rule 6(e) violation, and no surviving interest in redressing any violation that may have occurred. The Subpoena's directive that Mr. Gertz appear and testify and produce unpublished documents is therefore unreasonable and oppressive for those reasons as well.

III. CONCLUSION

We respectfully submit that the Subpoena issued to Mr. Gertz should be quashed on the basis of several independent grounds. First, we have shown that the Gertz article does not contain any information subject to Rule 6(e). Alternatively,

there has been no *prima facie* showing – by any proponent of this inquiry – of a Rule 6(e) violation; thus, no hearing on the claimed violation is required.

Second, there is no extant motion or other viable request for a hearing on the claimed Rule 6(e) violation and, consequently, no legal basis for the inquiry in which Mr. Gertz has been subpoenaed to testify. The inherent authority of the Court to supervise proceedings pending before it and the conduct of the parties is no longer a proper basis for continuation of this inquiry inasmuch as the interests in securing grand jury secrecy are diminished at this stage of the case and, in any event, the parties' fair trial rights have been fully protected by other measures.

Third, the First Amendment interests of Mr. Gertz and the public in the protection of confidential sources are entitled to substantial weight. Alternatively, the common law reporter's privilege, and the important free press interests served by that privilege, should be recognized in these proceedings to protect the identity of Mr. Gertz' source(s) and all other unpublished information. Where, as here, there is no longer a *need* to identify the source of the alleged Rule 6(e) violation, any proponent of disclosure cannot carry the burden of overcoming these substantial constitutional and common law interests.

Finally, the Subpoena issued to Mr. Gertz fails the requirements of Rule 17, and the principles underlying the Rule recognized in *United States v. Nixon* and its progeny. Alternatively, the Subpoena is unreasonable and oppressive given the significant constitutional and common law interests which will be undermined if the Subpoena is enforced.

In view of all of the foregoing, we respectfully submit that the Subpoena issued to Mr. Gertz should be quashed.

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