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8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10 SOUTHERN DIVISION

11 UNITED STATES OF AMERICA,
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13 Plaintiff,
14 v.
15 CHI MAK, et al.,
16 Defendants.
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No. SA CR 05-293(B)-CJC
**BRIEF OF DEFENDANT TAI MAK
REGARDING MOTION TO
QUASH SUBPOENA FILED BY
NON-PARTY WITNESS WILLIAM
GERTZ**
DATE: JULY 24, 2008
TIME: 9:00 AM
CTRM: 9B

19
20 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:
21 Defendant Tai Wang Mak hereby files this Brief regarding the Motion to Quash
22 Criminal Subpoena (the "Motion") filed by Non-party Witness William Gertz,
23 currently set for hearing on July 24, 2008 at 9:00 a.m. or as soon thereafter as the
24 matter may be heard by the Court, in Courtroom 9B of the United States District Court
25 for the Central District of California, located at 411 West Fourth Street, Santa Ana,
26 California.
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1 Although defendant Tai Mak has been sentenced in this case and has filed a
2 Notice of Appeal of that sentence, this Brief is filed because defendant Tai Mak, on
3 November 3, 2006, filed a Joinder in a Motion filed by Co-defendant Rebecca Chiu, in
4 which Mr. Mak requested Court intervention into the leaks contained in articles by Mr.
5 Gertz containing information apparently leaked in violation of Federal Rule of
6 Criminal Procedure 6(e) (“Rule 6(e)”). It was following that hearing that, on
7 November 20, 2006, the Court found that a prima facie showing had been made
8 supporting a finding of a Rule 6(e) violation. It was that finding, and the inability of
9 the government to ascertain the identity of the persons responsible for the now-
10 established Rule 6(e) violation, that resulted in the issuance of the subpoena at issue in
11 the Motion. (See May 1, 2008 Minute Order, p. 3).

12
13 DATED: July 20, 2008

LAW OFFICE OF JOHN D. EARLY

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15 By _____
16 JOHN D. EARLY
17 Counsel for Defendant
18 TAI WANG MAK
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I.

3 **INTRODUCTION**

4 Defendant Tai Wang Mak has pleaded guilty, been sentenced, and has filed a
5 Notice of Appeal of that sentence. However, as Tai Mak was the party who initially
6 briefed and argued the issue regarding the Rule 6(e) violation before the Court in
7 November 2006 in his Joinder to Defendant Rebecca Chiu’s Request for Judicial
8 Intervention regarding government leaks, Mr. Mak offers the following brief.

9 II.

10 **PRIMA FACIE SHOWING OF A 6(e) VIOLATION**

11 In November 2006, the Court determined that a *prima facie* showing of a Rule
12 6(e) violation has been made based. Since that hearing, the evidence warranting that
13 finding has only grown stronger, as the government has conceded that, in fact, a Rule
14 6(e) violation occurred. (05/05/08 Minute Order). It is difficult to imagine how a
15 concession by the government that a Rule 6(e) violation has occurred does not rise to
16 the level of a *prima facie* showing that a Rule 6(e) violation has occurred.

17 The government’s admission that there had been a Rule 6(e) violation
18 distinguishes this case from others in which the government disputed (or at least did
19 not concede) that the materials leaked were covered within the ambit of “Grand Jury
20 materials.” See, e.g., In re Sealed Case, 192 F.3d 995 (D.C. Cir. 1999) (Office of
21 Independent Counsel disputed assertion that information given to reporter constituted
22 Grand Jury material or violated Rule 6(e)); United States v. Rosen, 471 F. Supp. 2d
23 651 (E.D. Va. 2007) (government did not concede that Rule 6(e) had been violated).
24 Unlike other cases in which a Court might have to speculate whether certain
25 information was “Grand Jury” information or some other information, or whether a
26 particular Grand Jury was actually considering the information, here we have an
27 express concession by the government that the information leaked was covered by
28 Rule 6(e). At a minimum, the Court had (and has) sufficient information to conclude

1 that a *prima facie* showing has been made that Rule 6(e) was violated – all that is
2 necessary to warrant an inquiry such as the one instituted by the Court.

3 III.

4 THE APPROPRIATENESS OF CONTINUING COURT INVESTIGATION

5 The federal grand jury, expressly referenced in the Fifth Amendment of the
6 Constitution, "has not been textually assigned" to any of the three branches of federal
7 government; rather, it is a "constitutional fixture in its own right," controlled
8 exclusively by no branch of government. United States v. Williams, 504 U.S. 36, 47
9 (1992); U.S. Const. Amend. V. The grand jury "serv[es] as a kind of buffer or referee
10 between the Government and the people." Id.

11 "[T]he proper functioning of our grand jury system depends upon the secrecy of
12 proceedings." Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979).
13 Grand jury secrecy is not simply a function of the Federal Rules of Criminal
14 Procedure; rather, such secrecy is "a long-established policy . . . older than our Nation
15 itself." Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959). The
16 Supreme Court has identified three vital interests served by Grand Jury secrecy: (1)
17 promoting candor of witnesses called before the grand jury; (2) preserving the rights of
18 suspects who are exonerated; and (3) not alerting targets of an investigation of the
19 existence of an investigation. Douglas Oil Co., 441 U.S. at 219. To protect these
20 interests, "[b]oth Congress and the[e] Court have consistently stood ready to defend
21 [grand jury secrecy] against unwarranted intrusion." United States v. Sells
22 Engineering, Inc., 463 U.S. 418, 425 (1983).

23 Regardless of the status of the current status of the case, a District Court has
24 strong institutional reasons to investigate a breach of grand jury secrecy that takes
25 place in a case pending before it. The Grand Jury is unique among institutions. It is
26 specifically mandated by the Constitution, but control over the Grand Jury is not given
27 to any branch of government. Its historical roots as a "buffer" between the power of
28 the executive and the People warrant oversight by the Courts where it appears its

1 functions have been abused – regardless of the status of any particular case. The
2 inherent authority of the Court permits and demands investigation and oversight to
3 ensure the proper functioning of the Grand Jury – including protecting its secrecy.

4 Furthermore, in this case, at least one defendant remains to be sentenced –
5 Rebecca Chiu. Ms. Chiu entered a conditional guilty plea in June 2007. The entire
6 plea was expressly conditional, however, upon the Court, at sentencing, accepting and
7 adopting the Sentencing Guideline calculations contained in the plea agreement
8 between Ms. Chiu and the government. Paragraph 15 of that plea agreement provides
9 that the Court at sentencing will determine whether to be bound by the agreement’s
10 terms, and Ms. Chiu “may withdraw from th[e] agreement and render it null and void if
11 the Court refuses to be bound by this agreement.” If the Court rejects the plea
12 agreement, the case will be re-set for trial, and Ms. Chiu retains all of her rights,
13 including rights to further seek redress for Grand Jury secrecy violations. At a
14 minimum, Ms. Chiu has not entered into a final waiver of her rights. Further, Mr. Chi
15 Mak has appealed his entire conviction and sentence (and Mr. Chi Mak had earlier in
16 the case sought a subpoena of the same reporter, which the Court denied).

17 Courts have strong institutional reasons to investigate Grand Jury improprieties.
18 Where, as here, *prima facie* evidence shows a Rule 6(e) violation (here, even more
19 than just *prima facie* evidence), courts can and should investigate. See, e.g., In re
20 Grand Jury Investigation, 610 F.2d 202, 218 (5th Cir. 1980); Barry v. United States,
21 865 F.2d 1317, 1321 (D.C. Cir. 1989) (holding that once a court finds a *prima facie*
22 case of a Rule 6(e) violation, it “must” conduct a further investigation).

23 Here, the Court took a deferential course, allowing the government to proceed in
24 the first instance. The government reported back to the Court that it had interviewed
25 hundreds of witnesses but was unable to identify the source of the leak. The Court, as
26 a separate branch of government, was not required to allow the matter to end there.
27 The Court certainly has the authority, and the obligation, to continue the investigation.

28 IV.

FIRST AMENDMENT ISSUES

To the extent “First Amendment” / “Reporter’s Shield” issues are raised, Defendant Tai Mak respectfully submits that the issue is not yet ripe -- unless and until a reporter lays a foundation in the form of admissible evidence that would potentially implicate such issues. For example, presumably the reporter, at a minimum, would be required to testify, for each source: (1) that the reporter promised the source confidentiality; (2) the terms of the confidentiality agreement/promise; (3) the date and time of the promise, and whether anyone else was present; (4) that the source has not in any way breached the confidentiality agreement (for example, by lying to the reporter or using the reporter to plant false stories, or by unilaterally identifying himself as the source to third parties); (5) that the reporter has recently confirmed that the source(s) still wish to remain confidential; (6) that the reporter has, in fact, kept the promise of confidentiality and has not revealed the sources’ identity to any person (including editors, co-workers, other sources); (7) that the reporter was acting as a reporter at the time of the promise (and not, for example, acting as a commercial author researching a book for private, personal gain); and (8) that the reporter believes that maintaining confidentiality is necessary, overcoming the public’s and the Court’s right to obtain information regarding leaks of information which violated the law.

V.

CONCLUSION

Rule 6(e) is designed to protect the integrity of the Constitutionally-mandated federal Grand Jury system. The system cannot function properly without secrecy. Here, as the government conceded and the Court found, the system broke down. The Court can and should use the tools available to it to get to the bottom of the violation.

The Moving Party on the Motion recently wrote, in the Response to the United States’ Motion to Continue Hearing Date (at paragraph 6), filed on July 11, 2008: “[T]here are extremely important constitutional rights, as well as other substantial rights, at stake in this matter. It is necessary and appropriate that both parties, as well

1 as the Court, to be apprised of all the facts and circumstances that are relevant to the
2 protection of those rights.” Although written in another context, the words ring true.
3 The improper leak of Grand Jury material puts extremely important constitutional and
4 other substantial rights at stake. It is necessary and appropriate that the parties, the
5 Court, and the public, be apprised of all the facts and circumstances that are relevant to
6 the protection of those rights.

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8 DATED: July 20, 2008

LAW OFFICE OF JOHN D. EARLY

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10 By _____
11 JOHN D. EARLY
12 Counsel for Defendant
13 TAI WANG MAK
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