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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Portland Division

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMMON BUNDY, et al.,

Defendants.

GARY HUNT,

Respondent.

3:16-cr-00051-BR

MEMORANDUM OF LAW

CERTIFICATE OF COMPLIANCE

This Memorandum of Law complies with the applicable word-count limitation under LR 7-2(b) because it contains 2026 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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INTRODUCTION

Gary Hunt, by his attorneys, Michael E. Rose, Creighton & Rose, PC, hereby appears specially to contest the jurisdiction of this court to have issued its Supplemental Orders directed at him (Dkt. 1692), and its Order to show cause why he should not be held in contempt for the alleged violation of the Order(s) (Dkt. 1691)

This court issued an order to show cause why Gary Hunt should not be held in contempt for the online posting of materials that he allegedly received in violation of a protective order in *United States v. Patrick, et al.*, USDCt No. 3:16-cr-00051-BR, a case arising out of the occupation of the Malheur Wildlife Refuge. Mr. Hunt was not a party to that case and engaged in no relevant acts within the State of Oregon. It is Mr. Hunt's position that this court does not have the jurisdiction to have issued either the Supplemental Order or the Order to Show Cause.

PERSONAL JURISDICTION

As noted, Mr. Hunt was not a party to the underlying case in which the protective order was issued. He was, as a legal matter, a complete stranger to the case. He also has been, at all times relevant, a resident of Los Molinas, in the Eastern District of California.

Personal jurisdiction in this case, is, essentially, circumscribed by the requirements of the due process clause.[1] Initially, "[f]or a defendant to be subject to general *in personam* jurisdiction,

[1] Where, as here, there is no applicable federal statute governing personal jurisdiction, the law of the state in which the district court sits applies. *See Hylwa, M.D., Inc. v. Palka*, 823 F.2d 310, 312 (9th Cir. 1987). *See* FRCP4(k)(2). Under Oregon Law, ORCP 4L provides for jurisdiction "in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States."

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it must have such continuous and systematic contacts with the forum that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice." *Reebok Int'l v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir. 1995), *citing Core-Vent Corp. v. Nobel Indus*. AB, 11 F.3d 1482, 1485 (9th Cir. 1993); *see Lake v. Lake*, 817 F.2d 1416, 1420-21 (9th Cir. 1987). There is nothing in the record to suggest that Mr. Hunt has any such relationship with this forum so as to warrant the exercise of general *in personam* jurisdiction.

That, of course, does not end the inquiry. Where the defendant has not had continuous and systematic contacts with the state sufficient to subject him or her to general jurisdiction, a three-part test has been applied to determine whether the defendant has sufficient connection with the forum to sustain personal jurisdiction as a due process mater.

> "(1) The nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.* it must be reasonable."

Lake, 817 F2d at 421; *reiterated in Core-Vent*, 11 F.3d at 1485; *Reebok*, 49 F.3d at 1391.[2] The first two parts of the test determine whether there are sufficient "minimum contacts" between the individual and the forum jurisdiction.

On the record in this case, there is insufficient evidence that such minimum contacts exist. Mr. Hunt was an investigative journalist and blogger who, as part of his profession,

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[2]*Reebok* is probably not the best example. While it does accurately summarize the standards for personal jurisdiction, the case itself was actually decided on rather narrower grounds, *viz*., the conflict between domestic law and the law of Luxembourg, the domicile of the defendant. *Reebok, id.*, at 1391-4.

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investigated matters relating to the conduct of the Federal government during the occupation of the Malheur Wildlife Refuge in the fall and winter of 2016. The activities prohibited by the terms of the Supplemental Protective Order, and complained of in the Order to Show Cause, were things that Mr. Hunt wrote while back home in California. While those writings may have related to events in Oregon, they were in no way directed towards Oregon or its residents. See Declaration of Gary Hunt. Rather, the information obtained in Oregon was merely exemplary of how the Federal Government comports itself. Nor can Mr. Hunt in any way be characterized as "aiding and abetting" anything or anybody. There is no admissible evidence in the record that Mr. Hunt obtained any information from anyone who was bound by the terms of the protective order, and there is nothing to suggest that he aided or abetted anything or anyone else in any other relevant regard. Neither can it be said that by writing and posting, while in California, the results of his investigations, he purposefully availed himself of any privilege extended by the state of Oregon, or invoked the benefits and protections of its laws, or had anything else to do with the State of Oregon or its laws. *See Wright v. Yackley*, 459 F.2d 287, 290 (9th Cir. 1972) (acts that are sufficient to establish minimum contacts are those "performed by a nonresident for the very purpose of having their consequences felt in the forum state." (emphasis added). As such, the first element of the test fails on its own terms: there were insufficient contacts between the allegedly contumacious activity and the forum to warrant the exercise of this Court's personal jurisdiction over Mr. Hunt, either to issue to him specially a Supplemental Protective Order, without first giving him an opportunity to respond prior to its issuance, or to Order him to Show Cause why he shouldn't be held in contempt for allegedly violating its terms.

Even if it may be concluded that there are sufficient minimum contacts to support the

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court's exercise of personal jurisdiction over Mr. Hunt, however, the exercise of jurisdiction over the non-party, non-resident is additionally subject to the requirement of fairness, justness and reasonableness.

> "Once 'minimum contacts' . . .have been established, our final duty involves considering several factors such that the maintenance of the action does not 'offend 'traditional notions of fair play and substantial justice.'' *International Shoe*, 326 U.S. at 316 *(quoting Milliken v. Meyer*, 311 U.S. at 463); *see Haisten*, 784 F.2d at 1400. In other words, the assertion of jurisdiction must be reasonable. *Id*. We evaluate seven factors to determine the reasonableness of a forum's exercise of jurisdiction: (1) the burden on the defendant, (2) existence of an alternative forum, (3) convenient and effective relief for the plaintiff,(4) the forum state's interest in adjudicating the suit, (5) efficient resolution of the controversy, (6) purposeful interjection, and (7) conflicts with sovereignty. *Brand*, 796 F.2d at 1075; *Pacific Atlantic Trading Co. v. The M/V Main Express*, 758 F.2d 1325, 1329-31 (9th Cir. 1985)."

Those factors weigh heavily against a finding of jurisdiction. As noted in the Declaration of Gary Hunt, finding jurisdiction in the District of Oregon would be unduly economically burdensome for him. The government certainly could just as easily have sought injunctive relief against him in the District in which Mr. Hunt lives and blogs, namely, the Eastern District of California. *See*, *e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971), in which injunctive relief was sought by the United States against the New York Times, in the district of publication in New York, and against the Washington Post, in its District of publication, the DC District Court, to restrain publication of the *Pentagon Papers*. Litigation of the question in the District of residence or publication would certainly have been, in many ways, simpler and more efficient, in that it would not have required a challenge to the personal jurisdiction of the court regarding the Order to Show Cause.[3] The circuitous route that the issue has taken up to the point

[3] To be candid, however, the question of whether the court had a basis for issuing the Supplemental Order to Mr. Hunt would have needed to be litigated.

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of the issuance of the Order to Show Cause suggests that there was a certain lack of certainty regarding how to go about it.[4] Finally, as has been discussed above, Mr. Hunt's "interjection" was directed not at anything in particular having to do with the Oregon but with the activities of the Federal government in general, one typical example of which was unfurling in Oregon.

There is, to be sure, the countervailing factor of enforcing the authority of this court, which consideration in not insubstantial. On the other hand, this court's authority may actually be enhanced be declining jurisdiction in this case and letting the government pursue a less contentious remedy.[5]

SUBJECT MATTER JURISDICTION

The burden is on the plaintiff to establish the subject matter jurisdiction of the court. *See United States v. United Mine Workers of America*, 330 U.S. 258, 291 (1947). In the absence of subject matter jurisdiction, there was and is nothing that the parties or the circumstances could do to confer jurisdiction on the district court. *See, e.g., Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) ("[A] court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct").

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[4] Most simple, perhaps, would have been to serve Mr. Hunt with plaintiff's Motion for a Supplemental Protective Order, give him an opportunity to respond by way of special appearance on the jurisdictional grounds that the court wanted clarified by plaintiff, and then, if warranted, serve him with a Supplemental Order and a Cease and Desist letter. At that point, he would either comply or the government, if it chose, could have sought injunctive relief in the eastern District of California. .

[5] Due process also requires, at a minimum, notice that one is subject to an order. *See, e.g., Jones v. Flowers*, 547 U.S. 220, 235 (2006). The initial Protective Order (Dkt. 342) was not directed specifically at one in Mr. Hunt's position, hence the issuance of the Supplemental Order (Dkt. 1692).

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In this case, the Supplemental Protective Order seeks to prohibit Mr. Hunt from publishing online certain of his investigative pieces. A prior restraint such as this comes to the court "'bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see also Near v. Minnesota*, 283 U.S. 697 (1931). The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

The court relied on the case of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) for the conclusion that:

> "because a Court enforcing its own prohibition on the dissemination of discovery materials is not the type of prior restraint that requires exacting scrutiny (*see Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)) and because a qualified press privilege is not implicated by an order that prohibits Hunt from disseminating protected discovery materials."

Dkt. 1900 at 3.

The Court in *Rhinehart* was considering the First Amendment implications of a protective order that limited disclosure of discovery materials, including financial information, of a private individual and the organization that he led. That is a far cry from disclosure of materials that shines a light on the activities of the Federal government, and, in particular, its covert surveillance activities directed at its citizens. The First Amendment has protected the dissemination of such materials even when it has been classified for national security reasons. *See*, *e.g.*, *New York Times*, *supra*.

CONCLUSION

For all of the foregoing reasons, this court should determine that it has no jurisdiction

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over either or both of the person of Mr. Hunt or the subject matter of this proceeding and dismiss the within proceeding.

Respectfully submitted 21 April, 2017

/s/ *Michael E. Rose*
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Portland Division

UNITED STATES OF AMERICA,	
Plaintiff,	**3:16-cr-00051-BR**
v.	**DECLARATION OF GARY HUNT**
AMMON BUNDY, et al.,	
Defendants.	
GARY HUNT,	
Respondent.	

I, Gary Hunt, declare as follows:

I began as a journalist in February 1993 by publishing a tabloid, semi-monthly, newspaper titled "Outpost of Freedom". On March 5, 1993, I went to Waco, Texas, to investigate and cover the events then occurring, regarding the Branch Davidian Church. Absent from my resources, I published via fax-networking. After that event, there were calls for me to speak at numerous locations around the country regarding those events. Consequently, I continued publishing via fax-networking, with readership in the tens of thousands, until mid 1995. At that point, I began publishing on the Internet, still under the title, "Outpost of Freedom". I have continued, to this date, though in 2009 I converted to WordPress blog format rather than the somewhat archaic html language, as the former is very time consuming to properly publish. The original (htm) formatted articles are still maintained on my website, and date from February 1993.

I have used the same byline for the past twenty-four years. And, I am an advocate of First Amendment Freedom of the Press. I have studied many court decisions regarding that sacred right and responsibility, and have endeavored to stay within the confines of, the proper role of the press.

None of what I have written about the events and circumstances regarding the occupation of the Malheur National Wildlife Refuge (MNWR) were written in Oregon. Nothing that was written in either the Burns Chronicles or Freedom of the Press series were published in Oregon, at least by me. I cannot speak to what others may have done with my work, though I grant copyright privilege to all, condition on properly sourcing and not editing my work.

My purpose in writing the articles in question were not intended to impact Oregon or anything going on there. I had no doubt that the information being brought out might be used by someone in Oregon, just as it might be used by someone in New York, for whatever purpose they might have. As a reporter, reporting facts, I have no specific intention of that nature. My intention is to inform the general public as to certain facts and occurrences, so that they might judge the activities of their government. Through those many years of reporting, my readership has acquired nationwide coverage, and many readers in other Western nations.

I am not aware of having any "minimal contacts" with anybody in Oregon, though I seldom question where someone is located when I contact them during the course of an investigation. In this day and age, even a telephone area code is not indicative of their location or residence. My contacting people in the course of the investigation was with those who might have factual information to aid in that investigation.

As a conscientious reporter, it is my responsibility to provide proof when allegations such as would appear to be just that, allegations, with substance to provide veracity to those articles. To do less would be, at best, unprofessional.

As indicated on paperwork filed in California, during my incarceration, I have no income. I live and work at my office in Los Molinos, California. If we are to consider fair and balanced, it would be an undue burden on me to have to litigate this matter in Oregon. It would be unfair to hold me to justice in a foreign court, when, if there is jurisdiction, it should be in the forum in which I reside and in which the acts complained of allegedly occurred. Quite simply, it would be an economic burden to travel over 450 miles (8 hours), one way, to another jurisdiction.

A question was raised, in various Court documents (public records), regarding "aiding and abetting". It seem quite crucial to the government's case, so much so that it was documented three times, as if a Facebook post were absolute proof of "aiding and abetting". However, I had no intention of aiding and abetting anyone in the commission of any criminal act nor of the violation of any order of the court. The government never stated, simply implied, who I might have aided and abetted, though they provide no facts nor any identification of the person aided and abetted, nor of the criminal act necessary for the nexus necessary to bring me within the jurisdiction of this Court.

During the course of this entire affair, I had no intention of violating any law. I was aware of the Court's Protective Order (Doc. 342), and I understood that I was not among the class of people identified as subject to the Order.

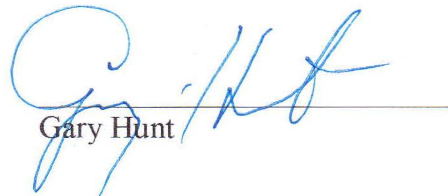
The Cease and Desist letter was dated January 5, 2017, though it was delivered to me on January 6, 2017.

I stated my case to both FBI SA Catalano, as to the inapplicability of the letter to my situation, and in a new series generated by that letter, Freedom of the Press.

From January 5 through January 11, I continued my research and investigation. On that date, I was apprised of the Supplemental Protective Order.

I hereby declare that the above statements in support of Plaintiff's Motion for Leave to File Amended Complaint are true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Dated this 21st day of April, 2017.



Gary Hunt