BILLY J. WILLIAMS, OSB #901366
United States Attorney
District of Oregon
ETHAN D. KNIGHT, OSB #992984
GEOFFREY A. BARROW
CRAIG J. GABRIEL, OSB #012571
PAMALA R. HOLSINGER, OSB #892638
Assistant United States Attorneys
ethan.knight@usdoj.gov
geoffrey.barrow@usdoj.gov
craig.gabriel@usdoj.gov
pamala.holsinger@usdoj.gov
1000 SW Third Ave., Suite 600
Portland, OR 97204-2902
Telephone: (503) 727-1000
Attorneys for United States of America

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA	**3:16-CR-00051-BR**
v.	
AMMON BUNDY, et al.,	**GOVERNMENT'S MEMORANDUM IN SUPPORT OF CIVIL CONTEMPT**
Defendants,	
GARY HUNT,	
Respondent.	

The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, through Ethan D. Knight, Geoffrey A. Barrow, Craig J. Gabriel, and Pamala R. Holsinger, Assistant United States Attorneys, hereby submits this memorandum in support of this Court's finding that respondent Gary Hunt should be held in civil contempt.

I. Background

On May 11, 2017, this Court issued an Order denying Hunt's Motion to Dismiss and finding that the United States made a "sufficient preliminary showing" that Hunt had "intentionally or knowingly aided and abetted a party to this litigation" in violating this Court's discovery Protective Orders. In this Order, the Court directed the government to file a memorandum that confirms it is seeking a finding of contempt because Hunt knowingly or intentionally aided and abetted a party to this criminal case to violate this Court's Protective Orders (ECF Nos. 342, 1692). The Court directed that the government's memorandum should also set out the appropriate legal standards and a complete and admissible factual record that establishes contempt by the applicable burden of proof. (ECF No. 2095).

The United States is asking this Court to find Gary Hunt in civil contempt for two reasons: (1) Hunt has failed to remove protected discovery material from his website, despite this Court's orders to do so; and (2) to prevent Hunt from further disseminating additional, protected discovery material in violation of the Court's January 11, 2017, Order (ECF No. 1691) and January 11, 2017, Supplement to Protective Order (ECF No. 1692). This Court should hold Gary Hunt in civil contempt and incarcerate him until he complies with this Court's January 11, 2017, Orders.

Civil contempt sanctions may be imposed in court proceedings upon notice and an opportunity to be heard, and "[n]either a jury trial nor proof beyond a reasonable doubt is required." *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 827 (1994). The government is asking this Court to confine Hunt until such time as he removes the material from his website and complies with the Court's three Orders.

II. Argument

a. The January 11, 2017, Order and Supplement to the Protective Order Are Clear; Hunt's Violations Were Knowing and Deliberate

Civil contempt involves "a party's disobedience to a specific and definite court order by failure to take all reasonable steps within the party's power to comply." *Inst. of Cetacean Research v. Sea Shepherd Conservations*, 774 F.3d 935, 945 (9th Cir. 2014). This Court's Orders are specific and definite.

In November 2016, Hunt began disclosing information verbatim from Federal Bureau of Investigation (FBI) FD-1023 reports that contained information from FBI Confidential Human Sources (CHSs). In addition to disclosing details of the reports, Hunt identified the names of people he believed to be the CHSs working for the FBI. These reports were provided in discovery to the twenty-six defendants being prosecuted in *United States v. Bundy, et al*., Case No. 3:16-cr-00051-BR. The reports were provided in discovery pursuant to a Protective Order (ECF No. 342), and each page of those reports was marked "Dissemination Limited by Court Order" in the lower, left-hand corner. The Protective Order prohibited dissemination beyond defendants and persons employed by their attorneys of record who are necessary to assist in preparation for trial. Regardless of how Hunt obtained them or precisely who on the defense team he obtained them from, the fact remains that the materials he has posted on his website are the same materials the government produced to the defense under the terms of this Court's Protective Order.[1]

[1] Although it is unclear how this argument addresses jurisdiction, Hunt's argument that this Court cannot order him to remove the protected discovery materials from his website because the government has not identified the principal who gave him the documents fails. Provided the evidence establishes a violation of this Court's Protective Order, the government need not prove

On January 5, 2017, Hunt was provided a cease and desist letter from the United States Attorney's Office advising Hunt that he was in possession of discovery material in violation of a Protective Order. The letter enclosed a copy of this Court's Protective Order. On January 6, 2017, the government filed a Motion to Enforce Protective Order. (*See* Mot. with attached cease and desist letter, ECF No. 1680; Aff. of Special Agent Ronnie Walker, ECF No. 1681). On January 10, 2017, the government filed a Supplemental Memorandum (ECF No. 1689), along with a second Affidavit of Special Agent Walker (ECF No. 1690). As part of that Memorandum, the government updated the Court with information that Hunt's violation of the Protective Order was ongoing.

On January 11, 2017, this Court issued an Order Granting in Part Government's Motion to Enforce Protective Order. (ECF No. 1691). In that five-page written order, this Court directed Hunt to remove all protected material from his website within 24 hours. This Court enjoined Hunt from further disseminating material covered by the Protective Order. The Court also filed a Supplement to the original Protective Order making it clear that the original Protective Order applied to all third-parties including Hunt. This Court's original discovery Order was directed to the parties and their legal teams; this Court's subsequent Order further clarified that the protections afforded the discovery covered by the Order extended to nonparties as well. (ECF No. 1692).

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the identity of the principal. *See United States v. Clark*, 980 F.2d 1143, 1146 (8th Cir. 1992) (holding that government need not identify principal to sustain an aiding and abetting conviction). The document stamps appearing on Hunt's website clearly reveal the unlawful source traces back to this Court's Protective Order.

b. Hunt Aided and Abetted a Party in Violating the Protective Order

Regardless of whether the focus is on this Court's original Order or its subsequent Order, the law recognizes that "[a] party may also be held liable for knowingly aiding and abetting another to violate a court order." *Inst. of Cetacean Research*, 774 F.3d at 945. Contempt extends to nonparties who aid and abet parties subject to the court's order. *Goya Foods, Inc. v. Wallack Management Co.*, 290 F.3d 63, 75 (1st Cir. 2002). "[T]hose who have knowledge of a valid court order and abet others in violating it are subject to the court's contempt powers." *Inst. of Cetacean Research*, 774 F.3d at 948 (citing *Roe v. Operation Rescue*, 919 F.2d 857, 871 (3d Cir. 1990)).

Contempt applied to a nonparty under an aiding and abetting theory involves two elements: (1) the nonparty "must know of the judicial decree, and nonetheless act in defiance of it;" and (2) the nonparty must have taken the challenged action "for the benefit of, or to assist, a party subject to the decree." *Goya Foods*, 290 F.3d at 75. To establish liability for aiding and abetting contempt of a court order, the government must "demonstrate that [Hunt] violated the court's order by clear and convincing evidence." *Inst. of Cetacean Research*, 774 F.3d at 945 (quoting *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993)).

To the extent Hunt professes that he did not believe that this Court's Orders applied to him, "those who know of the [judicial] decree, yet act unilaterally, assume the risk of mistaken judgments." *Goya Foods*, 290 F.3d at 75. And this Court may fairly infer that any "mistake" on Hunt's part was not in good faith; each protected document that the government disclosed to the Bundy defense teams pursuant to this Court's Protective Order was stamped "Dissemination

Limited by Court Order." The documents themselves, therefore, made patently clear that they were nonpublic. When Hunt nevertheless posted them on his website, he knowingly violated this Court's Orders. When he refused to remove the documents after this Court's subsequent Order, his contumacious conduct was even more sharply apparent. This Court's Orders were clear and unambiguous; no fair claim can be made that confidential documents produced under the terms of this Court's Protective Orders were publishable.

c. Applicable Burden of Proof & Remedies

Civil contempt must be proved by clear and convincing evidence. *United States v. Conces*, 507 F.3d 1028, 1042 (6th Cir. 2007). Once proven, this Court enjoys "wide discretion in its choice of sanctions." *Goya Foods*, 290 F.3d at 77. Sanctions are appropriate to "protect the due and orderly administration of justice and maintain the authority and dignity of the court." *Id*. at 78.

"The district court has inherent authority to fashion the remedy for contumacious conduct," and "incarceration is among the authorized remedies." *Conces*, 507 F.3d at 1043 (internal citation omitted). The Supreme Court has recognized that civil contempt designed to coerce compliance with a court order may involve custody or a fine; the character of the contempt proceeding remains civil so long as compliance will purge or reduce the sanction. *Bagwell*, 512 U.S. at 828-31. With civil contempt, the contemnor "carries the keys of his prison in his own pocket." *Conces*, 507 F.3d at 1043 (quoting *Bagwell*, 512 U.S. at 828).

The government is asking this Court to confine Hunt until such time as he removes the material from his website and complies with the Court's three Orders.

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III. Factual Basis for Finding of Contempt

The government has established via the Declarations of Special Agent Walker that Hunt had notice of this Court's discovery Protective Orders. Indeed, he posted this Court's orders on his website and detailed his view of their meaning. The government also established via uncontroverted affidavits of FBI Special Agents Walker and Jason Kruger that Hunt intended to assist defendants in *United States v. Bundy* by disclosing the confidential discovery and seeking to reveal the identities of confidential sources in direct contravention of this Court's Orders.

The following facts and evidence have been proffered to this Court in previous court filings; these facts establish Hunt's contempt by clear and convincing evidence:

1. Hunt was in Oregon during the occupation of the Malheur National Wildlife Refuge on January 28, 2016, when he had contact with the Burns Police Department. (*See* Walker Aff. 4, ECF No. 1681).
2. Hunt published an article titled "Burns Chronicle No 41"[2] on November 16, 2016, stating that the Operation Mutual Defense Advisory Board was comprised of five members including Hunt and Ryan Payne. Payne was a leader of the armed occupation at the Malheur National Wildlife Refuge and participated in the armed stand-off at Bunkerville, Nevada. Payne has pled guilty in both Oregon and Nevada and is pending sentencing. (*See* Walker Aff. 6-7, ECF No. 1681).
3. Hunt published an article titled "Burns Chronicle No 44" on November 25, 2016, which details Hunt's investigation into a CHS who was identified in the

[2] Counsel for Hunt has advised he will not object to the admissibility of the articles posted by Hunt on Outpost of Freedom blog at http://outpost-of-freedom.com.

September/October 2016 trial. Hunt cites information provided in twelve CHS discovery reports. In his article Hunt states: "When I obtained access to the CHS Reporting Documents (form 1023), it was simply a matter of matching dates, statement, etc., to determine which of the reports were from MM. This required communication with those who were at the Refuge, ***though not still in custody***, to verify certain things that became key to unlocking the necessary proof of MM's role as an informant." (Emphasis added). Clearly Hunt is working with the defendants in the Bundy prosecution who were provided the discovery pursuant to the Protective Order. (*See* Walker Aff. 8, ECF No. 1681).

4. On January 5, 2017, Special Agent Matthew Catalano met with Hunt and provided him with the letter from the United States Attorney's Office demanding Hunt cease and desist public dissemination of the protected material within 24 hours. Hunt informed Special Agent Catalano that he had two more articles outing CHSs in their final review stage before he uploads them. Hunt stated it was ***necessary to out the CHSs so they could serve as defense witnesses in the next trial***. (Emphasis added). (*See* Walker Aff. 10, ECF No. 1681).

5. In an Affidavit submitted in support of the Government's Motion for an Order to Show Cause (ECF Nos. 1788, 1789), Special Agent Walker described another article Hunt posted dated January 12, 2017, where Hunt quoted extensively from each of the three Court Orders (ECF Nos. 342, 1691, 1692). That article is attached to Special Agent Walker's Affidavit and is titled "Freedom of the Press #4 – The Order." In that article Hunt states: "So let's get real. The government gave out redacted copies

of the 1023 forms. The defense could not call any witnesses who had been informants. Obviously the information the government, and Judge Anna Brown, were willing to allow the defense was totally insufficient for them to prepare their defenses, especially with regard to possible exculpatory testimony those informants might have provided. The Judge, well let's just go with Brown, from this point on, disregarded the fact that two of the government's informants testified. Terri Linnell came forward voluntarily, against the wishes of the Prosecution, and testified for the defense. A diligent effort by the defense teams in tracking down Fabio Monoggio, another informant, whose testimony also was beneficial to the defense. Both gave testimony, which may well have turned the tide on the jury's verdict. ***This testimony would have been denied the defense under the enforcement of the Protective Order*** and the subsequent statement on October 18." (Emphasis added). (*See* Aff. of SA Walker and attached article 3, ECF No. 1789). The clear intent of Hunt's disclosure of protected discovery material was to assist the charged defendants. Moreover, Hunt was unquestionably aware of this Court's Protective Orders when he publicly disclosed material subject to those orders.

6. In a March 2, 2017, radio interview Hunt spoke about the "1023s, the discovery I received," that was under a protective order of March 24, 2016. (*See* Aff. of SA Kruger and attached transcript of interview, ECF No. 2001).

7. Hunt published an article "Freedom of the Press #11 – Aiding, But Not Abetting" on March 2, 2017, in which he brags that defendants in "Ammon Bundy, et al., Group 2 trial, currently being heard in Portland, Oregon, have benefitted as a consequence of

> what I have published. They have subpoenaed, to the best of my knowledge, [WK] and [AV] to testify. So, they have been *aided*, though *not abetted*, by my articles." He goes on to say "there can be little doubt that identities of the informants may provide exculpatory testimony, to the benefit of the defendants." (*See* attached article "Freedom of the Press #11 – Aiding, But Not Abetting").

IV. Necessity of Original Protective Order Continues

This Court has the authority to issue protective orders protecting criminal discovery and, specifically, confidential source information. The substantial government interest in protecting confidential sources is long established. *See Roviaro v. United States*, 353 U.S. 53 (1957). The Supreme Court recognized that preserving informants' confidentiality served important purposes: "the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Id.* at 59. Moreover, the need to preserve the confidential sources' identities does not end with trial. *See, e.g.*, *In Re Perez*, 749 F.3d 849, 856-58 (9th Cir. 2014) (reversing a district court that refused to protect employee-informant identities because the court erred in focusing on the timing of their statements). The government needs to protect confidential sources for all of the valid reasons identified in *Roviaro.*

This Court reviewed unredacted FBI reports of thirteen CHSs that the defense sought to identify at the first trial. The Court found that there was not any information in the unredacted reports that was relevant and helpful to the defense and denied their motion. (ECF No. 1453). The discovery regarding the CHSs should not be released publicly simply because three of the CHSs were identified at trial. The protection of the CHS information should not end because

the trial is over. The threats to the confidential sources, especially the twelve CHSs who were not identified at either trial in this case, remains real. In addition, disclosure of FBI 1023s could negatively affect ongoing investigations.

If the 1023s that Hunt has been using to attempt to "out" FBI informants were made public, then the CHSs would be subject to threats, intimidation, and harassment. (*See* Aff. of Special Agent Katherine Armstrong in Support of Motion for Protective Order, ECF No. 246). The government has not confirmed that Hunt's identifications of CHSs from the discovery are accurate. Nevertheless, Hunt and others who might seek to emulate him need to be deterred from violating this Court's Protective Orders. Without consequences, this Court's discovery orders would be toothless. In some cases, violations may not carry significant consequences, but in this case they do because they threaten the safety of citizens who came forward to assist the government's investigation.

Consequently, Hunt should be held in civil contempt. He should be incarcerated until he agrees to remove protected discovery material from his website.

Dated this 12th day of June 2017.

Respectfully submitted,

BILLY J. WILLIAMS
United States Attorney

s/ Pamala R. Holsinger
ETHAN D. KNIGHT, OSB #992984
GEOFFREY A. BARROW
CRAIG J. GABRIEL, OSB #012571
PAMALA R. HOLSINGER, OSB #892638
Assistant United States Attorneys