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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA	**3:16-CR-00051-BR**
v.	
AMMON BUNDY, et al.,	**GOVERNMENT'S REPLY TO RESPONDENT'S OPPOSITION TO 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 reply to

respondent's Opposition to the Government's Memorandum in support of this Court's finding that respondent Gary Hunt should be held in civil contempt.

In this reply the government wants to reiterate two important points. First, the lawful orders this Court issued direct Hunt to remove *protected discovery material* from his website.[1] They do not restrain in any way Hunt's ability to report on whatever material he has received in violation of the original Protective Order. When Hunt complains that this Court's orders "prohibit" him from publishing "certain investigative pieces," his factual premise is simply inaccurate. Second, the justification for the original Protective Order continues because there is an ongoing need to protect cooperating witnesses regardless of the status of the trial.

At the hearing on August 23, 2017, the government intends to call Federal Bureau of Investigation (FBI) Special Agent Jason Kruger to identify the blog postings and evidence of respondent's aiding and abetting the violation of the Protective Order and FBI Special Agent Matthew Catalano who personally served all of this Court's Orders on respondent Hunt.

I. There Is No Prior Restraint Issue or Qualified Press Privilege

A. There Is No Prior Restraint Issue Presented Here

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). This substantial government interest is unrelated to any suppression of expression and outweighs

[1] Hunt agrees that this Court had authority to issue the orders and that it continues to have the authority to enforce the orders. (Hunt Mem. 2, ECF No. 2173).

Hunt's First Amendment rights. No one has challenged the legitimacy of the Court's Protective Order, and to permit a party to end-run the Order by passing the information to a blogger threatens to undermine criminal discovery and the interests identified in *Roviaro*—i.e., if we cannot protect the confidentiality of our law enforcement informants, we cannot expect their cooperation in future investigations.

We are not asking this Court to restrain Hunt's ability generally to write about the case—or even the informants—we only want him to observe this Court's Order, which means that he cannot publish the discovery material subject to the Court's Order. This discovery material was not in the public domain in any form. This Court should be able to enforce its Protective Order and prohibit wide dissemination of discovery which includes confidential FBI reports. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny). Besides *Seattle Times Co.* there are no cases that discuss the prior restraint issue in the context of sealed and protected discovery information in the context of a criminal trial.

Hunt does not contest any of the factual bases for the government's contempt request; he neither claims that he was unaware of this Court's orders nor does he challenge the government's claim that a party violated the orders. Instead, his objection rests on his claim that the government lacks sufficient proof that he specifically knew that a party was the source or that he specifically intended to help that party further that party's contumacious purpose.

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But direct proof is not required. The government has identified evidence (Gov't Mem. 7-10, ECF No. 2126) from which this Court may fairly infer that Hunt knew that a party must be the source of the discovery material (i.e., the Bates stamps clearly identifying the documents as subject to this Court's Protective Order). Moreover, there is substantial, circumstantial evidence that Hunt intended to further the party's purpose, which was to frustrate the Protective Order and to deter citizens from cooperating with the government.

B. No Qualified Press Privilege Is Implicated Here

Although the Ninth Circuit recognized a qualified press privilege in *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993), the doctrine simply does not apply to the matter before this Court. The government is not seeking the testimony of third-party Gary Hunt to identify the source or sources of the protected discovery information. The government sought to investigate that on its own. The government is merely seeking the removal of protected discovery material that this Court has ordered protected. No privilege is implicated.

Finally, even if this case were subject to a balancing test, the government's interests far outweigh any First Amendment interest Hunt may assert. First, we need to protect our confidential sources for all of the valid reasons identified in *Roviaro.* Second, the Court has a significant interest in enforcing the terms of its own Protective Orders. Without enforcement, Hunt's defiance threatens to undermine our ability to exchange discovery in future criminal cases.

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II. Necessity of Original Protective Order Continues

This Court has the authority to issue protective orders protecting criminal discovery and, specifically, confidential source information. As noted above, 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.*

As stated in the Government's Memorandum in Support of Civil Contempt, this Court reviewed unredacted FBI reports of thirteen CHSs that the defense sought to identify and found that there was not any information that was relevant and helpful to the defense. The Court properly 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, remain real. In addition, disclosure of FBI 1023s could negatively affect ongoing investigations.

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 has failed to remove protected discovery from his website despite this Court's orders that he do so and he should be precluded from further disseminating protected discovery materials. Until he agrees to comply with this Court's orders, he should be incarcerated.

Dated this 4th day of August 2017.

Respectfully submitted,

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s/ Pamala R. Holsinger
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