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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION  
13

14 In re GRAND JURY SUBPOENA, dated )  
February 1, 2006, )  
15 )  
16 JOSHUA WOLF, )  
17 Subpoenaed Party. )  
18 )  
19 )

No. CR 06-90064 WHA  
UNITED STATES' *EX PARTE* REQUEST  
FOR ORDER TO SHOW CAUSE WHY  
JOSHUA WOLF SHOULD NOT BE HELD  
IN CIVIL CONTEMPT

20  
21 The United States of America by Kevin V. Ryan, United States Attorney for the Northern  
22 District of California, and through undersigned counsel, requests pursuant to 28 U.S.C. § 1826(a)  
23 that the Court issue an order directing Joshua Wolf (“Wolf”) to show cause, on or before  
24 Thursday, July 20, 2006, why he should not be held in civil contempt for failure to testify before  
25 Grand Jury 06-1 on June 15, 2006, as commanded by a duly issued order of this Court.<sup>1</sup>  
26

27 <sup>1</sup> Government counsel obtained the July 20<sup>th</sup> date by contacting the Court’s clerk prior to filing  
28 this motion.

1 This motion is brought *ex parte* pursuant to Criminal Local Rule 47-3, Federal Rule of  
2 Criminal Procedure 47, and *United States v. Hawkins*, 501 F.2d 1029 (9<sup>th</sup> Cir. 1974). This  
3 request allows Wolf more than a reasonable amount of time, i.e. 13 days, to prepare for the  
4 hearing. Local Rules require 14 days notice for motions in criminal cases, but allow *ex parte*  
5 motions when other rules permit. Crim. L.R. 47-3(b). Federal Rule of Criminal Procedure 47  
6 only requires 5 days notice for motions and allows the court to set a different period upon *ex*  
7 *parte* application for good cause. Fed. Rule Crim. Pro. 47(c). In *Hawkins*, the Ninth Circuit  
8 noted that a contemnor is entitled to “notice and a reasonable time” to prepare his defense  
9 *Hawkins*, 501 F.2d at 1031. In holding that the one day notice for *Hawkins* was reasonable given  
10 the straightforward issues, the Ninth Circuit also stated that:

11 This court, when considering the amount of time reasonably necessary to prepare a  
12 defense, has recognized that a reasonable time will vary according to the circumstances of  
13 each case. We have held that five days will generally be necessary when the alleged  
14 contemnor's defense raises legal issues of some complexity or there is an indication that  
15 an evidentiary hearing may be required. However, in some cases all the important issues  
16 will have been raised by the time of the immunity hearing, and it will be apparent that the  
17 actual contempt can raise no new issues. If so, the witness may have had adequate time to  
18 prepare even though very little time elapses between the alleged contempt and the  
19 contempt hearing.

20 *Hawkins*, 501 F.2d at 1031 (internal quotations and citations omitted.). Likewise, there are no  
21 complex issues here, as Wolf has already raised his bases for refusing to testify in a Motion to  
22 Quash the Subpoena and during an oral motion to compel his testimony before this Court on June  
23 15, 2006. Thus, the notice allowed herein is entirely reasonable and the government respectfully  
24 requests the Court issue the Order to Show Cause forthwith.

#### 25 I. FACTS IN SUPPORT OF MOTION

26 On or about February 1, 2006, a grand jury subpoena was served upon Wolf directing him  
27 to appear before Grand Jury 06-1 and to bring and produce certain materials. (Declaration of  
28 Jeffrey Finigan ¶2). Wolf's subsequent efforts to quash the subpoena were denied. (Finigan  
Dec. ¶¶4-6.) Accordingly, on June 12, 2006, the grand jury subpoena with a new appearance  
date was served upon Wolf. (Finigan Dec. ¶7). The subpoena directed Wolf to appear in United  
States District Court for the Northern District of California in San Francisco, California at 9:30

1 a.m. on June 15, 2006 to testify before the grand jury and to bring with him all of the records and  
2 materials set forth in the attachment to the subpoena. [\*\*\*\*\*  
3 **Redacted Per Court Order of July 21, 2006** \*\*\*\*\*  
4 \*\*\*\*\*] The parties then immediately appeared before this Court, and  
5 after hearing argument from both sides, this Court ordered Wolf to comply with the grand jury  
6 subpoena. (Finigan Dec. ¶9.) Wolf then returned to the grand jury room and continued to refuse  
7 to comply with the subpoena in defiance of this Court’s order. (Finigan Dec. ¶10.)

8 **II. ARGUMENT**

9 **A. Legal Standard**

10 When a witness fails to comply with a subpoena or court order calling for the witness’s  
11 testimony before a grand jury, that witness is subject to summary confinement for civil contempt  
12 until he is willing to give testimony. Title 28, United States Code, Section 1826(a) states, in  
13 pertinent part:

14 Recalcitrant Witnesses

15 (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury  
16 of the United States refuses without just cause shown to comply with an order of the court  
17 to testify or provide other information, including any book, paper, document, record,  
18 recording or other material, the court, upon such refusal, or when such refusal is duly  
brought to its attention, may summarily order his confinement at a suitable place until  
such time as the witness is willing to give such testimony or provide such information.  
No period of such confinement shall exceed the life of –

- 19 (1) the court proceeding, or  
20 (2) the term of the grand jury including extensions, before which such refusal to  
comply with the court order occurred, but in no event shall such confinement exceed  
eighteen months.

21 (b) No person confined pursuant to subsection (a) of this section shall be admitted to bail  
22 pending the determination of an appeal taken by him from the order for his confinement if  
23 it appears that the appeal is frivolous or taken for delay. Any appeal from an order of  
confinement under this section shall be disposed of as soon as practicable, but not later  
than thirty days from the filing of such appeal.

24 The standard for finding a party in civil contempt under Section 1826 is well-settled. The  
25 United States, as the moving party, “bears the ultimate burden of showing by clear and  
26 convincing evidence that the [witness] violated a specific and definite order of the court.” *F.T.C.*  
27 *v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999); *United States v. Powers*, 629 F.2d  
28 619, 626 n.6 (9th Cir. 1980). However, initially, the United States is only required to make a

1 *prima facie* showing of contempt. See *N.L.R.B. v. Trans Ocean Export Packing, Inc.*, 473 F.2d  
2 612, 616 (9th Cir. 1973).

3 The Ninth Circuit set forth the elements of a *prima facie* showing of civil contempt in *In*  
4 *the Matter of Battaglia v. United States*, 653 F.2d 419 (9th Cir. 1981). First, there must be an  
5 authorized request for information. See *id.* at 422. Second, the information sought must be  
6 relevant to the proceeding. See *id.* Third, the information sought must not already be in the  
7 government's possession. See *id.* Fourth, the witness must have failed to comply with the  
8 request. See *id.*

9 Once the United States has made a *prima facie* showing of contempt, the burden shifts to  
10 the witness to produce evidence of his inability to comply with the order. See *Trans Ocean*  
11 *Export Packing*, 473 F.2d at 616. "To satisfy this burden, the [witness] must show categorically  
12 and in detail why he is unable to comply." *Id.* (internal quotations and citations omitted). "If the  
13 witness fails to meet this burden of producing evidence, then the government's *prima facie* case  
14 is sufficient to meet the burden of proof for finding of contempt." *Id.* (internal quotations and  
15 citations omitted).

### 16 **B. Application**

17 \_\_\_\_\_ The United States has met its initial burden of making a *prima facie* showing that Joshua  
18 Wolf is in civil contempt for his willful failure to comply with this Court's order requiring him to  
19 testify before Grand Jury 06-1 and to produce materials requested in the subpoena.

20 The United States has provided the Court with a copy of the Grand Jury subpoena calling  
21 for the testimony of Joshua Wolf, thus showing that there is an authorized request for  
22 information. The information sought by the government from Mr. Wolf is relevant to its  
23 investigation. Wolf possesses material – in addition to what the government has already obtained  
24 – related to the protest activities of July 8, 2005. (Finigan Dec. ¶2.) Finally, the information  
25 sought from Mr. Wolf is not within the United States' possession given his refusal to testify  
26 before the grand jury or to produce the materials set forth in the attachment to the subpoena.

27 Three judges – this Court, the Hon. Maxine M. Chesney, U.S. District Court Judge, and  
28 the Hon. Maria-Elena James, U.S. Magistrate Judge – have considered and rejected Wolf's

1 alleged bases for refusing to comply with the subpoena. Wolf has had a full opportunity to brief  
 2 his arguments and he was provided with a full hearing before Judge James. Wolf failed to raise  
 3 his Fifth Amendment basis in any of his previous briefs and raised it for the first time before this  
 4 Court on June 15, 2006. Nevertheless, that argument was properly rejected by this Court on the  
 5 grounds that Wolf’s counsel failed to meet its burden in establishing a reasonable basis for Wolf  
 6 to assert the Fifth Amendment. A witness must show “that the testimony sought would support a  
 7 conviction under a federal criminal statute or furnish a link in the chain of evidence needed to  
 8 prosecute the claimant for a federal crime. The privilege is validly invoked only where there are  
 9 substantial hazards of self-incrimination that are real and appreciable, not merely imaginary and  
 10 unsubstantial.” *United States v. Brown*, 918 F.2d 82, 84 (9<sup>th</sup> Cir. 1990) (citations and internal  
 11 quotations omitted). Wolf’s counsel articulated nothing to support such a finding.

12 In light of the foregoing facts, the Court should find that the United States has met its  
 13 *prima facie* burden of demonstrating that Wolf is in civil contempt of the Court’s compulsion  
 14 order. Wolf now bears the burden of showing, categorically and in detail, why he is unable to  
 15 comply with the Court’s orders, despite having been ordered to do so.

16 **III. CONCLUSION**

17 For the reasons stated, the United States requests, pursuant to 28 U.S.C. § 1826(a), that  
 18 the Court issue the Order to Show Cause filed herewith directing grand jury witness Joshua Wolf  
 19 to show cause, on or before July 20, 2006, why he should not be held in civil contempt for failing  
 20 to testify before Grand Jury 06-1 on June 15, 2006, as commanded by a duly issued order of this  
 21 Court.

22  
 23 DATED: July 21, 2006 \_\_\_\_\_ KEVIN V. RYAN  
 24 United States Attorney \_\_\_\_\_

25 \_\_\_\_\_  
 26 \_\_\_\_\_ /s/  
 27 JEFFREY R. FINIGAN  
 28 Assistant United States Attorney