

1 Siobhan A. Cullen (Bar No. 179838)
DRINKER BIDDLE & REATH LLP
2 333 South Grand Avenue, Suite 1700
Los Angeles, CA 90071-1504
3 Telephone: (213) 253-2300
Facsimile: (213) 253-2301

4 Allen V. Farber (Admitted *Pro Hac Vice*)
5 Charles S. Leeper (Admitted *Pro Hac Vice*)
DRINKER BIDDLE & REATH LLP
6 1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209
7 Telephone: (202) 842-8800
Facsimile: (202) 842-8465

8 Attorneys for
9 WILLIAM GERTZ

10
11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,
14 Plaintiff,
15 vs.
16 CHI MAK, et al.,
17 Defendants.

Case No. SACR05-293-CJC

**WILLIAM GERTZ'S RESPONSE
TO UNITED STATES' MOTION TO
CONTINUE HEARING DATE AND
TO SET NEW BRIEFING
SCHEDULE**

18
19
20 WILLIAM GERTZ ("Gertz") hereby responds to the government's Motion
21 To Continue Hearing Date And To Set New Briefing Schedule [Dkt. No. 751]
22 (hereinafter Motion to Continue") and the accompanying Notice Of Manual Filing
23 Of Ex Parte And In Camera Declaration [Dkt. No. 752] as follows:

24 1. The government has submitted the Declaration of Jay I. Bratt In
25 Support Of Motion To Continue [Dkt. No. 752] ("the Bratt Declaration") *in camera*
26 and *ex parte*. According to the Motion to Continue, the Bratt Declaration sets forth
27 the grounds offered by the government to establish good cause for a further
28

1 extension of the date for filing its response to Gertz's Motion to Quash Subpoena
2 [Dkt. No. 716]. However, the Motion to Continue provides no facts to justify the
3 filing of the Bratt Declaration under seal. Instead, the government summarily
4 asserts that the Bratt Declaration "needs to be *in camera* and *ex parte*." [Dkt. No.
5 751] at 2.

6 2. The analogous Local Civil Rule provides that "[e]xcept when
7 authorized by statute or federal rule, or the Judicial Conference of the United States,
8 no case or document shall be filed under seal without prior approval by the Court."
9 L.R. 79-5.1. No statute or federal rule would appear to authorize the filing of the
10 Bratt Declaration under seal, and in all events the Motion to Continue cites no such
11 authority. L.R. 79-5.1 provides further that "[w]here approval is required, a written
12 application and a proposed order shall be presented to the judge along with the
13 document submitted for filing under seal. The proposed order shall address both the
14 sealing of the application and order itself, if appropriate." *Id.* According to the
15 Notice Of Manual Filing, no such proposed order addressing the grounds that
16 supposedly justify sealing was submitted by the government. [Dkt. No. 752].

17 3. The pending proceedings have been adversarial in character at least as
18 early as March 7, 2007, at which time the Court issued a Minute Order advising,
19 *inter alia*, that Mr. Bratt and agents of the Federal Bureau of Investigation were
20 conducting an investigation of possible violation of laws. Once the Court issued its
21 April 30, 2008 subpoena to Mr. Gertz requiring his appearance before the Court, *ex*
22 *parte* communications with the Court or its staff pertaining to Mr. Gertz would not
23 be permissible. At the very minimum, after filing his Motion to Quash Mr. Gertz,
24 through his counsel, was and is entitled to participate in all communications with the
25 Court relating to the Motion to Quash, unless a statute, federal rule, or the
26 constitutional rights of another party dictate otherwise.

27 4. Mr. Gertz can only speculate about the reasons the government believes
28 the Bratt Declaration "needs to be *in camera* and *ex parte*." If the government is

1 contending that the Bratt Declaration contains information within the scope of Rule
2 6(e), then Mr. Gertz has a particularized need for access to that information in
3 connection with these proceedings as contemplated by Rule 6(e)(3)(E)(i). If the
4 government contends that some other rule, regulation or government interest
5 requires that the information contained in the Bratt Declaration should not be
6 available on the public record, that position can be accommodated by making
7 disclosure of the Bratt Declaration to Mr. Gertz and his counsel subject to the
8 requirements of a protective order.

9 5. By seeking access to the Bratt Declaration, it is not the intention of Mr.
10 Gertz or his counsel to question the integrity of Mr. Bratt, or any other
11 representative of the government. But the cursory assertion in the Motion to
12 Continue that the Bratt Declaration “does not address any of the arguments that Mr.
13 Gertz has raised in support of his motion to quash,” *see* [Dkt. No. 751] at 2, does not
14 adequately address the requirements of L.R. 79-5.1 or Mr. Gertz’s rights as a litigant
15 to participate fully in these proceedings. While the information contained in the
16 Bratt Declaration may not directly address the arguments made in Mr. Gertz’s
17 Motion to Quash, that information may nonetheless bear upon what the government
18 has represented, or may later represent, to the Court regarding the character of the
19 information reported in the May 16, 2006 Gertz article, the need for Mr. Gertz’s
20 testimony, or other matters that may affect the outcome of these proceedings. The
21 Bratt Declaration may also contain information regarding Mr. Gertz or his
22 employer, not directly related to the issues implicated by the Motion to Quash, of
23 which Mr. Gertz should be aware.

24 6. As demonstrated in the Memorandum accompanying Mr. Gertz’s
25 Motion to Quash, there are extremely important constitutional rights, as well as
26 other substantial rights, at stake in this matter. It is necessary and appropriate for
27 both parties, as well as the Court, to be apprised of all the facts and circumstances
28 that are relevant to the protection of those rights.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For all of the foregoing reasons, the Court should either cause the Bratt Declaration to be filed in the public docket of this case, or direct that the government provide a copy of the Bratt Declaration to counsel for Mr. Gertz subject to the terms of an appropriate protective order.

DATED: July 11, 2008

DRINKER BIDDLE & REATH LLP

By: /s/ Charles S. Leeper

Siobhan A. Cullen
Allen V. Farber
Charles S. Leeper

Attorneys for Non-Party Witness
WILLIAM GERTZ

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA }
 } ss.:
COUNTY OF SAN DIEGO
United States of America v. CHI MAK, et al.

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 550 West C Street, Suite 2050, San Diego, CA 92101.

On July 11, 2008 I served on interested parties in said action the within:

- 1. **WILLIAM GERTZ'S RESPONSE TO MOTION TO CONTINUE HEARING AND TO SET NEW BRIEFING SCHEDULE [PROPOSED] ORDER**
- 2. **[PROPOSED] ORDER**

by placing a true copy thereof in sealed envelope(s) addressed as stated below:

Jay Bratt, Esq.
Caroline Krass, Esq.
U.S. Dept. of Justice
National Security Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day in the ordinary course of business.

Executed on July 11, 2008 at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Brooke Freitas
(Type or print name)

Brooke Freitas

(Signature)