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# UNITED STATES DISTRICT COURT

1. **XXX DISTRICT OF XXX**

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1. IN RE GRAND JURY SUBPOENA
2. DATED XXXX 15

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# I. INTRODUCTION

Case No:

# JOINT MOTION SEEKING ORDER TO COMPLY WITH GRAND JURY SUBPOENA DATED XXX

[Filed In Conjunction With An Application To File This Motion **Under Seal**; Declaration of Pamela L. Johnston; Proposed Order]

[Proposed] Order filed concurrently

[FILED UNDER SEAL PURSUANT TO FED. R. CRIM. PROC. 6(e)(5),(6)]

1. On or about XXX, a federal grand jury sitting in the XXX District of XXXa
2. issued a subpoena (“Subpoena”) to XXXX seeking documents regarding XXX.
3. (*See* Declaration of Pamela Johnston (“Johnston Decl.”), Ex. A). Moving party
4. YYYYY is the subpoenaed party and is the parent company of YYYYY, which, in
5. turn, is the parent company of Moving party YYYYY (Johnston Decl. ¶¶ 3-4, Exs.
6. B, C). The third Moving Party is the United States of America. Because this
7. motion concerns a grand jury subpoena and a federal investigation involving
8. persons or entities whose reputations could be unfairly tainted and marred if this
9. filing were to be made public at this time, the moving parties ask this Court to seal
10. all of the papers filed in connection with this motion, to seal any order issued, and
11. to hold any hearing under seal and without public access. Sealing these papers is
12. required by Federal Rule of Criminal Procedure 6(e)(5), (6); *see also Douglas Oil*
13. *Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 218 n. 8 (1979) (noting
14. that one of the several interests promoted by grand jury secrecy is the protection of
15. the accused from disclosure of the accusations made against him before the grand
16. jury). No notice has been given to the contracting parties of this motion. Should
17. the Court require notice to be given to the contracting parties, the government
18. would want to be heard first on that issue.
19. As set forth more fully below, YYYYY is bound by competing duties and
20. obligations. (*See* Johnston Decl., Exs. A, B & C). On one hand, YYYYY has an
21. obligation to comply with a federal Grand Jury Subpoena. (*See* Johnston Decl.,
22. Ex. A). On the other hand, YYYYY owes a duty of confidentiality to the parties
23. with which it has contractual obligations pursuant to binding confidentiality
24. provisions in contracts. (*See* Johnston Decl., Exs. B, C).
25. As such, the moving parties request an order from this Court permitting
26. YYYYY (1) to produce documents responsive to the Subpoena without regard to
27. the confidentiality provisions, and (2) if necessary, testify before the grand jury.

# II. FACTUAL BACKGROUND

1. On XXXX, a duly impaneled federal Grand Jury issued a subpoena to
2. YYYYY. (Johnston Decl., Ex. A). The Subpoena demands that specified
3. documents be produced to the Grand Jury. (*Id.*). At least two responsive
4. documents, contracts between YYYYY and other parties, include confidentiality
5. provisions that forbid or limit YYYYY’s ability to disclose the documents,
6. information contained in those documents, and/or information about the
7. contracting parties to third parties. (Johnston Decl. ¶¶ 3-4, Exs. B, C).3 The
8. confidentiality provisions in the two contracts do not contain the usual “savings”
9. clause often contained in confidentiality provisions; that is, these particular
10. contract terms do not contain any carve-out or exception for disclosures made
11. pursuant to a subpoena or as otherwise required by law. (*See id*.).4 Because of the
12. wording of these provisions, they have purposefully not been quoted in this motion
13. and have not been served on or provided to the government, but are available to the
14. Court to review. *See* Exs. B and C.
15. In a letter accompanying the Subpoena, the U.S. Attorney’s Office requested
16. that YYYYY not “disclose the existence of or compliance with the subpoena for an
17. indefinite period of time or until the [U.S. Attorney’s] Office notifies you that the
18. investigation has been completed or until a court orders disclosure.” (Johnston
19. Decl., Ex. A). On XXXX, YYYYY requested that the U.S. Attorney’s Office
20. withdraw its request regarding the disclosure of the existence or compliance with
21. the Subpoena. (Johnston Decl. ¶ 5). However, while the U.S. Attorney’s Office
22. recognizes that it cannot bind a witness to such secrecy, the government is still
23. requesting that YYYYY not disclose the existence or contents of the Subpoena at
24. this time. (*Id.*). Regardless, even if the U.S. Attorney’s Office were to withdraw its
25. request, there is no guaranty that the contracting parties would waive or alter
26. YYYYY’s duty of confidentiality owed to the contracting parties before the due
27. date for compliance with the Subpoena. The first production of documents must
28. be provided by XXX, according to the government.

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# III. THE PARTIES REQUEST THAT THE COURT ISSUE AN ORDER

1. **PERMITTING YYYYY TO COMPLY WITH THE GRAND JURY**
2. **SUBPOENA**
3. A grand jury subpoena issued through normal channels, as the instant
4. Subpoena appears to be, is presumed to be reasonable. *United States v. R.*
5. *Enterprises, Inc.*, 498 U.S. 292, 301 (1991). Moreover, if valid, a grand jury
6. subpoena places the subpoenaed party “under a duty to make in good faith all
7. reasonable effort to comply with it.” *United States v. Ryan*, 402 U.S. 530, 534
8. (1971). Through the instant motion, YYYYY is seeking to comply with the
9. Subpoena. However, YYYYY has contractual obligations that require keeping
10. certain information confidential and the provisions at issue contain no exception
11. for disclosures pursuant to grand jury subpoenas. (Johnston Decl. ¶¶ 3-4, Exs. B,
12. C). YYYYY is requesting relief from this Court in order to comply with the
13. Subpoena.

# A. The Subpoena “Trumps” Contractual Confidentiality Provisions

1. The All Writs Act provides:
2. “The Supreme Court and all courts established by Act of
3. Congress may issue all writs necessary or appropriate in
4. aid of their respective jurisdictions and agreeable to the
5. usages and principles of law.” 28 U.S.C. § 1651(a).
6. The Supreme Court has “repeatedly recognized the power of a federal court
7. to issue orders under the All Writs Act as may be necessary or appropriate to
8. effectuate and prevent the frustration of orders it has previously issued in its
9. exercise of jurisdiction otherwise obtained: This statute has served since its
10. inclusion, in substance, in the original Judiciary Act as a legislatively approved
11. source of procedural instruments designed to achieve the rational ends of
12. law.” *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977)
13. (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969) and quoting *Price v.*
14. *Johnston*, 334 U.S. 266, 282 (1948)) (internal quotation marks omitted). “‘Unless
15. appropriately confined by Congress, a federal court may avail itself of all auxiliary
16. writs as aids in the performance of its duties, when the use of such historic aids is
17. calculated in its sound judgment to achieve the ends of justice entrusted to
18. it.’” *New York Tel. Co.*, 434 U.S. at 173 (quoting *Adams v. United States ex rel.*

6 *McCann*, 317 U.S. 269, 273 (1942)).

1. Here, as the face of the Subpoena establishes, it was “issued” by Deputy
2. Clerk XXX, Clerk of the Court, on “application of the United States of America.”
3. (Johnston Decl., Ex. A). The Subpoena, which operates like an order from this
4. Court, commands the Custodian of Records of YYYYY to produce certain
5. documents. (*Id.*). Accordingly, this Court may avail itself of the All Writs Act, its
6. inherent authority, and case law applying such powers in order to grant the relief
7. that the parties are requesting.
8. Here, the moving parties seek an order permitting YYYYY to produce the
9. attached documents and those documents encompassed by the confidentiality
10. provision in response to a grand jury subpoena despite YYYYY’s representation
11. that those documents contain confidentiality provisions that prohibit such
12. disclosure. When a duty of confidentiality and a grand jury subpoena are at odds,
13. the grand jury subpoena should be found to control. There have been many
14. contexts under which a grand jury subpoena has been found to have supremacy
15. over other similar obligations, orders, and statutes. As such, the relief YYYYY
16. seeks is reasonable, appropriate, and permitted by law.
17. For example, in *In re Grand Jury Subpoena Served On Meserve, Mumper &*
18. *Hughes*, 62 F.3d 1222 (9th Cir. 1995), the Ninth Circuit adopted a *per se* rule
19. favoring grand jury subpoenas over **court orders**(protective orders) issued by
20. district courts in civil cases pursuant to Federal Rule of Civil Procedure 26. *Id.*at
21. 1226; *see also In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013, 1020
22. (11th Cir. 1993) (adopting *per se* rule that grand jury subpoenas trump protective
23. orders); *cf. In re Grand Jury*, 286 F.3d 153, 163 (3rd Cir. 2002) (creating
24. rebuttable presumption that grand jury subpoenas trump protective orders). In
25. order words, the Ninth Circuit permitted district courts to reconcile the conflicting
26. obligations for a party between a protective order issued by a court requiring the
27. party to maintain the confidentiality of certain records and a grand jury subpoena
28. requiring the production of the confidential documents. The Ninth Circuit reasoned
29. that such a *per se* rule gives “deference to the grand jury’s independent role”
30. without “allowing protective orders to be enforced at the expense of grand jury
31. subpoenas” because that “would yield little benefit, at great cost.” *Id.* Further, the
32. Ninth Circuit noted that allowing protective orders in civil cases to thwart the
33. historical investigative powers of the grand jury and, in effect, grant immunity
34. from the grand jury’s reach was not a desired result nor one that Congress had
35. considered in enacting the Federal Rules of Civil Procedure. *See id.* at 1226-27.
36. Also, in *In re Grand Jury Subpoena*, 198 F. Supp. 2d 1113 (D. Ak. 2002),
37. the district court found that an Alaska **statute** requiring that documents maintained
38. by the state labor department be kept confidential could not prevent the state labor
39. department from complying with a grand jury subpoena. *Id.* at 1117. It held that
40. the portions of the state statute that criminalized disclosure of confidential
41. information must “give way” when the disclosure was pursuant to a federal grand
42. jury subpoena. *Id.* In this circumstance, the district court reconciled the
43. subpoenaed party’s state statutory obligation with the subpoenaed party’s federal
44. grand jury obligation by permitting it to produce documents to a federal grand
45. jury. The grand jury subpoena was held to trump the state confidentiality
46. obligation.
47. Similarly, confidentiality agreements between two private parties are no
48. more favored, nor are they owed more deference, than a protective order issued by
49. a district court or a statute enacted by a state legislature. Moreover, here, as in the

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1. cases discussed above, the confidentiality provisions are interfering with the work
2. of a grand jury, which is supposed to be given great deference by the courts.

# B. Confidentiality Provisions That Fail To Allow For Production To

1. **A Federal Grand Jury Are Voidable As Against Public Policy**
2. Typically, Courts are loathe to interfere with contractual agreements. *See*
3. *e.g., Morta v. Korea Ins. Corp.,* 840 F.2d 1452, 1460 (9th Cir. 1988) (“[C]ourts
4. will respect the agreements people reach and resolve disputes thereunder according
5. to objective principles that do not favor one class of litigant over another”).
6. However, many types of contracts and/or contract provisions have been declared
7. void or unenforceable when honoring the contract and/or contract provisions
8. would be against public policy. *See e.g., Coyote Pub., Inc. v. Miller*, 598 F.3d 592,
9. 603 (9th Cir. 2010) (acknowledging that surrogacy contracts and contracts for sale
10. of organs or children are unenforceable and contrary to public policy); *Jewel*
11. *Companies, Inc. v. Pay Less Drug Stores Northwest, Inc.*, 741 F.2d 1555, 1563
12. (9th Cir. 1984) (acknowledging that contract in which a corporate director attempts
13. to bind his discretionary vote violates public policy and is void); *Singhal v. Mentor*
14. *Graphics Corp.*, 2007 WL 7143978, \*3 (N.D. Cal. 2007) (acknowledging that a
15. contract obligating an employee to violate antitrust laws would be void as against
16. public policy). Rights of parties to make and enforce agreements between
17. themselves, therefore, are restricted by the “transcendent rule that denies
18. enforceability to a private contractual provision which would . . . gravely violate
19. paramount requirements of public interests.” *Northwest Airlines, Inc. v. Alaska*

23 *Airlines, Inc.*, 351 F.2d 253, 256 (9th Cir. 1965).

1. The confidentiality provisions in the contracts at issue are not *per se* against
2. public policy. There is nothing untoward or against public policy about parties
3. electing to keep the terms of their contractual relationship private. However, these
4. particular confidentiality provisions do not have any “saving language,” that is,
5. they have no language that automatically allows either party to disclose the
6. contracts or information encompassed by the contracts if required by law or a
7. grand jury subpoena. (Johnston Decl. ¶¶ 3-4, Exs. B, C). In so far as the
8. confidentiality provisions bar YYYYY from complying with the Subpoena, the
9. provisions should be deemed unenforceable as against public policy to the limited
10. extent of responding to the Subpoena.
11. Grand juries and grand jury subpoenas are of paramount importance to the
12. public interest. “The investigation of crime by the grand jury implements a
13. fundamental governmental role of securing the safety of the person and property of
14. the citizen. The role of the grand jury as an important instrument of effective law
15. enforcement necessarily includes an investigatory function with respect to
16. determining whether a crime has been committed and who committed it. When a
17. the grand jury is performing its investigatory function into a general problem area
18. society’s interest is best served by a thorough and extensive investigation.” *United*
19. *States v. Calandra*, 414 U.S. 338, 344 (1974) (internal citations, alterations, and
20. quotation marks omitted). As such, there is a strong public policy in favor of
21. allowing a grand jury to conduct a comprehensive investigation and in subpoenaed
22. parties complying with grand jury requests whenever possible. Given the
23. important public interest served by grand jury subpoenas and grand juries in
24. general, a contract provision barring or prohibiting a subpoenaed party from
25. complying or cooperating with an investigation presents a significant public policy
26. problem.
27. Based on the foregoing reasons, the parties request an order from this Court
28. permitting YYYYY (1) to produce documents responsive to the Subpoena without
29. regard to the confidentiality provisions, and (2) if necessary, testify before the
30. grand jury regarding the same.

# IV. CONCLUSION

1. For the foregoing reasons, the moving parties request an underseal order
2. from this Court permitting YYYYY (1) to produce documents responsive to the
3. Subpoena without regard to the confidentiality provisions, and, (2) if necessary,
4. testify before the grand jury.

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Dated: **FOLEY & LARDNER LLP**

5 PAMELA L. JOHNSTON

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1. By:

PAMELA L. JOHNSTON

1. Attorneys for Moving Parties

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