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7 Attorney for Subpoened Non-Party,
8 Covenant Aviation Security, LLC

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN MATEO

11 PEOPLE OF THE STATE
12 OF CALIFORNIA,

13 Plaintiff,

14 JOHN PERRY BARLOW,

15 Defendant.

16 **Case No. NM 333376**

17 RESPONSES AND OBJECTIONS OF
18 COVENANT AVIATION SECURITY
19 TO DEFENDANT'S SUBPOENAE
20 DUCES TECUM RE DOCUMENTS

21 [Cal. Ev. Code, § 1561]

22 Hearing/Produc.: 3/23/04
23 Time: : 9:00 A.M.
24 Dept: PH

25 _____/
26 Third-Party Witness and Document Repository, Covenant
27 Aviation Security, LLC ("**Covenant Security**"), responds and
28 objects to Defendant's Subpoenae Duces Tecum, issued January
13 and 20, 2004, and thereafter served on Audrey Deane, as
custodian of records of Covenant Security, as follows:

1 **Objections to Request No. 1.**

2 Covenant Security **objects** to this Request for production
3 of Documents probative of **prior** Complaints, Disciplinary
4 Actions or Punitive Procedures filed or taken against its
5 security screeners involved in the underlying search on the
6 ground of lack of **materiality** of such documents, if any,
7 to the issues in the underlying action of the baggage search:
8 its validity, scope, alleged excessive nature, or the like.

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2 Defendant's supporting declaration of counsel accompany-
3 ing issuance of the subpoenae makes no prima facie showing
4 that the requested documents, if any, are or will be "helpful"
5 (material) to the defense. Nor are they relevant to the sub-
6 ject matter of the action or otherwise likely to lead to the
7 discovery of evidence admissible at trial (or in a suppression
8 hearing) for either substantive or impeachment purposes. What-
9 ever prior instances of discipline may be evidenced in the
10 screeners' personnel files is not and cannot be probative of
11 any of the search issues in the underlying criminal case.

12 Covenant Security further objects to this Request on
13 the ground that it is **overlybroad**: it sweeps within its
14 scope all documentary evidence of screener discipline without
15 limitation of time or definition of probative purpose. The
16 Request is not tailored to the search issues and makes no
17 effort to specifically describe, as required, either the
18 documents or their probative value to the defense.

19 Covenant Security further objects to this Request on
20 the ground that it constitutes an unreasonable and impermiss-
21 ible invasion into the constitutional rights of **privacy**
22 guaranteed to its screener employees.

23 **Response to Request No. 2.**

24 Covenant Security will produce these documents in its
25 possession, custody and control relating to reports and
26 records evidencing the search of Defendant's luggage.

1 **Response/Objections to Request No. 3.**
2 **(Training Manuals and Memoranda relating to**
3 **protocols and procedures governing Covenant's**
4 **baggage searches.)**

5 The Transportation Safety Administration ("**TSA**"), a
6 component of the Department of Homeland Security, has made a
7 determination that all training manuals used in the training
8 of airport security screeners and all memoranda pertaining to
9 the procedures and protocols for performing baggage searches
10 constitute Sensitive Security Information ("**SSI**"), which Cove-
11 nant Security, as an employee/contractor of the TSA, is pro-
12 hibited from producing or releasing pursuant to the proscrip-
13 tive provisions of 49 C.F.R. § 1520.7 (a)-(k). The positions,
14 objections, and concerns of the TSA, as well as its directives
15 to Covenant Security, are articulated in the attached letters
16 of March 18 and March 22, 2004 of its counsel, Tracie L.
17 Brown, Assistant U.S. Attorney for the Northern District of
18 California.

19 In addition, Covenant Security **objects** to the production
20 of a certain Memorandum responsive to this Request and in the
21 possession, control and custody of Covenant Security, consist-
22 of a privileged **attorney-client communication** from TSA attor-
23 neys analyzing TSA's [and thus its employees' and contractors'
24 (Covenant Security's)], legal authority to perform certain of
25 its security operations. This document will not be produced on
26 the ground that it is a privileged legal analysis, as per
27 instructions from the TSA, and the attorneys for this agency,
28 Assistant U.S. Attorney, Tracie L. Brown.

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Response to Request No. 4.

Covenant Security will produce these documents in its possession relating to the "time" line of the activation of the baggage alarm and of the performance of the initial search.

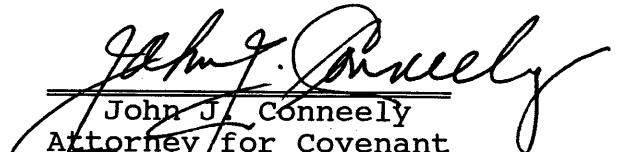
Response to Request No. 5.

[Audio/Video Recordings (including X-ray images) taken during, pre and post search of Defendant's luggage.]

Covenant Security does not have have in its possession custody, or control any of the documents, or things responsive to this Request: audio/video recordings or x-ray images, taken at any time, of, or pertaining to the search of, Defendant's luggage.

The TSA has made a determination that any audio or video recordings, including any x-ray images of or relating to the search of Defendant's luggage, constitutes SSI and has instructed and prohibited Covenant from producing any such items pursuant to 49 C.F.R. 1520.7 (a)-(k), all as set forth in the attached letters of its counsel.

Dated: March 23, 2004.



John J. Conneely
Attorney for Covenant
Aviation Security, LLC



U.S. Department of Justice
United States Attorney
Northern District of California

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San Francisco, California 94102

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March 18, 2004

Via Facsimile and U.S. Mail

Omar Figueroa, Esq.
506 Broadway
San Francisco, CA 94133

Re: *People of the State of California v. John Parry Barlow*, San Mateo Municipal
Court Case No. NM 333376A)

Dear Mr. Figueroa:

I am the Assistant U.S. Attorney handling the above-referenced matter on behalf of the U.S. Transportation Security Administration ("TSA"), a component of the U.S. Department of Homeland Security ("DHS").

I understand that you have issued a subpoena to Covenant Security for certain documents. As I believe you know from conversations with Anthony Graefe, Esq., counsel for Covenant, many of the documents that you have requested implicate serious security concerns of the federal government.

Federal agencies, including the DHS and TSA, have promulgated regulations that prohibit an agency employee from responding to requests for official information in legal proceedings without permission from the agency. Such regulations are known as *Touhy* regulations, in reference to the Supreme Court case that upheld a federal agency's authority to refuse to comply with a subpoena of a federal employee. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1952). Pursuant to *Touhy*, an employee may not be held in contempt for failing to provide the demanded information if the employee is acting in compliance with a lawful order from a superior. *Id.*

TSA, a component of DHS, operates under the DHS *Touhy* regulation at 6 C.F.R. Part 5, Subpart C. The regulation prohibits current and former TSA employees – including contractors such as Covenant Security – from responding to demands¹ in legal proceedings² for documents or

¹ Includes subpoenas, orders, or other requests or demands of Federal or state judicial or quasi-judicial authority, whether civil or criminal in nature, or requests for depositions, affidavits, admissions, responses to interrogatories, document production, or other litigation-related matters, pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or applicable state rules. 6 C.F.R. § 5.41(a)(2).

² Encompasses all pre-trial, trial, and post-trial stages of all judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards, or

testimony³ that would reveal official information without prior approval. 6 C.F.R. § 5.41(c) (including contractors as “employees” for purposes of Subpart C); 6 C.F.R. § 5.44 (“No employee . . . shall, in response to a demand or request, including in connection with any litigation, produce any document or any material . . . unless authorized to do so by the Office of the General Counsel or the delegates thereof, as appropriate”). No one from DHS or TSA has yet authorized disclosure of any of the documents requested in your subpoena.

In addition to the *Touhy* concerns addressed above, the government is also concerned that your broad subpoena may implicate Sensitive Security Information (SSI). SSI is subject to a statutory and regulatory scheme for protection.⁴ TSA statutory authority to protect SSI derives from 49 U.S.C. § 114(s), which provides in pertinent part that:

notwithstanding [the Freedom of Information Act], the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under [49 U.S.C. §§ 44901 *et seq.*] if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation.

The need to protect SSI stems primarily from the extent to which the information, if compromised, would reveal a systemic vulnerability of the transportation system or vulnerability of the transportation facilities that would make it more likely for terrorists to succeed in their attacks. *See Public Citizen v. FAA*, 988 F.2d 186 (D.C. Cir. 1993) (affirming the Federal Aviation Administration’s (FAA) authority to promulgate sensitive security regulations involving airport procedures without public notice and comment and to prohibit the disclosure of such information).

other judicial or quasi-judicial bodies or tribunals, whether criminal, civil, or administrative in nature. The term does not include claims by present or former TSA employees, or applicants for TSA employment, for which jurisdiction resides with the U.S. Equal Employment Opportunity Commission (EEOC); the U.S. Merit Systems Protection Board (MSPB); the Office of Special Counsel (OSC); the Federal Labor Relations Authority (FLRA); the Foreign Service Labor Relations Board; the Foreign Service Grievance Board, or a labor arbitrator operating under a collective bargaining agreement between TSA and a labor organization representing TSA employees; or their successor agencies or entities. 6 C.F.R. § 5.41(d).

³ Includes all information of any kind, however stored, that is in the custody and control of TSA, relates to information in the custody and control of TSA, or was acquired by TSA employees as part of their official duties or because of their official status within TSA while such employees were employed by or served on behalf of TSA. 6 C.F.R. § 5.41(e).

⁴ TSA has authority to protect Sensitive Security Information (SSI) from public disclosure pursuant to 49 U.S.C. §§ 114(s) and 40119(b)(1), and 49 C.F.R. Part 1520.

Categories of information that constitute SSI are set out in 49 C.F.R. § 1520.7. The following items are SSI:

- Selection criteria;
- Security programs;
- Screening procedures;
- Technical specifications for devices that detect threats;
- Procedures to test screening equipment;
- Certain details of Transportation Security Regulations violations (*e.g.* in an Enforcement Investigative Report);
- The identity of TSA or FAA special agent who conducted an investigation or inspection;
- Aviation security measures;
- Certain video surveillance tapes;

- Location at which particular screening methods/equipment are used;

- Threat images and descriptions of threat images for threat image projection systems; and

- Information in a vulnerability assessment that has been authorized, approved, or funded by DOT, irrespective of the mode of transportation.

This list is provided to assist in identifying SSI, and is not exhaustive. Access to SSI is limited to persons with an “operational need to know,” as set forth in TSA regulations. *See* 49 C.F.R. § 1520.5(b). Members of the public, including defendants in criminal cases, acting *pro se* or otherwise, do not fall within this “need to know” category. *See id.*

The right of the government to withhold SSI from the public, where disclosure would be detrimental to the public interest, has been judicially upheld. *See Torbet v. United Airlines*, 298 F.3d 1087 (9th Cir. 2002) (affirming district court’s order requiring the FAA to produce SSI *in camera* for inspection after defendant demanded copies of certain security procedures that were SSI); *Gray v. Southwest Airlines*, 33 Fed. Appx. 865, 2002 U.S. App. Lexis 6442 (9th Cir. 2002) (affirming lower court’s protective order which denied *pro se* defendant access to certain records containing SSI); *Public Citizen, Inc. v. FAA*, 988 F.2d 186 (D.C. Cir. 1993) (upholding FAA’s rulemaking concerning SSI under the Administrative Procedures Act); *Ospina v. TWA*, 975 F.2d 35 (2d Cir. 1992) (protecting SSI from public release, recognizing the “importance of the information in this case to the security and safety of commercial airlines”). Release of SSI is made on a “need to know” basis by TSA legal counsel in accordance with TSA regulation and policy.

Any demand for testimony of documents from a contract screener such as Covenant Security is reviewed by TSA legal counsel to determine whether SSI is involved. TSA legal counsel may determine that SSI may be released in appropriate circumstances, subject to the

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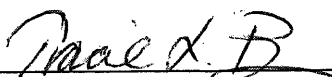
appropriate protections. *See id.*; *see also Mariani v. United Airlines, Inc.*, 2002 U.S. Dist. Lexis 13369 (S.D.N.Y. 2002) (ordering all proceedings sealed in action in which SSI was at issue); *United States v. Moussaoui*, 2002 U.S. Dist. Lexis 11088 (E.D.Va. 2002) (ordering defense counsel not to disclose to defendant any SSI that the defense obtained in discovery); *United States v. Bell*, 464 F.2d 667 (2d Cir.1972) (holding that trial court's exclusion of defendant and the public from that portion of a suppression hearing dealing with the necessarily confidential hijacking "profile" abridged neither the Sixth Amendment right to confrontation nor the right to a public trial); *United States v. Slocum*, 464 F.2d 1180, 1183 (3d Cir. 1972) (*in camera* proceedings excluding defendant and all other courtroom persons while taking evidence of the hijacking profile was appropriate and not reversible error); *United States v. Lopez*, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971) (over defense counsel's objections, defendant was excluded from his suppression hearing, and the courtroom cleared during the portion where sensitive details of the hijacking profile were discussed).

TSA has not yet determined which documents requested in your subpoena are disclosable by Covenant Security and which cannot be disclosed because they constitute SSI. This letter is meant only to inform you of the applicable law as well as the federal government's interest in your subpoena and the serious security concerns it raises.

Please feel free to contact me with any questions.

Sincerely,

KEVIN V. RYAN
United States Attorney



TRACIE L. BROWN
Assistant United States Attorney

cc: Linda Karlson, Esq. (TSA)
Anthony Graefe, Esq.
Jack Conneely, Esq.



U.S. Department of Justice

United States Attorney
Northern District of California

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San Francisco, California 94102

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March 22, 2004

Via Facsimile and U.S. Mail
Omar Figueroa, Esq.
506 Broadway
San Francisco, CA 94133

Re: *People of the State of California v. John Parry Barlow*, San Mateo Municipal
Court Case No. NM 333376A)

Dear Mr. Figueroa:

I write to follow up on our brief conversation of March 19 and my letter dated March 18. Along with that letter, this letter sets forth the United States Transportation Security Agency's (TSA) and Department of Homeland Security's (DHS) position with respect to your subpoena to Covenant Security.

As I believe you understand, TSA and DHS (collectively, "the federal government") have a statutory responsibility to ensure that Sensitive Security Information ("SSI") is not released by any TSA employee or contractor. See 49 U.S.C. § 114(s); 49 C.F.R. § 1520.7; 6 C.F.R. § 5.41(c). As stated in my March 18 letter, many of the broad categories described in your subpoena raise serious security concerns of the federal government. It is my understanding, however, that Covenant Security does not actually have possession, custody or control of many documents responsive to your subpoena. Of the few responsive documents I understand to be in Covenant's possession, custody or control, there is one document that the federal government considers to be an attorney-client privileged communication: a memorandum from TSA attorneys analyzing TSA's (and thus its contractors') legal authority to perform certain of its security operations. That privileged legal analysis will not be produced.

In addition, it is my understanding that Covenant Security may have additional objections separate and apart from those of the federal government (e.g., materiality and privacy concerns). Those objections will be asserted by Covenant Security's counsel.

Please feel free to contact me with any questions. I look forward to meeting you at the hearing tomorrow morning.

Sincerely,

KEVIN V. RYAN
United States Attorney



TRACIE L. BROWN
Assistant United States Attorney

cc: Linda Karlson, Esq. (TSA)
Anthony Graefe, Esq.
Jack Conneely, Esq.

PROOF OF SERVICE

I am a citizen of the United States, over the age of eighteen and not a party hereto. My business address is 1611 Borel Place, San Mateo, California 94402.

On March 23, 2004 I caused to be served on all interested parties the following:

*Responses and objections of Covenant Security to Subpoense Officer Teague
Declaration of Audrey Deane to Response to Subpoense*

By Fax Transmission on said date to the following number(s)

By Mail by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid and by depositing the said envelope in the United States Mail in San Mateo, California on said date, addressed to the addressee(s) below:

By Personal Hand-Delivery by placing a true copy thereof in a sealed envelope and causing such envelope to be delivered to the offices of the addressee(s). *Personal Service at Courthouse, Northern: 1050 Old Minion Rd. So. S.F., CA.*

By Federal Express enclosing a copy thereof in a sealed envelope and causing the same to be delivered to Federal Express for overnight courier service and delivery to the office(s) of the addressee(s).

ADDRESSED TO:

*Omar Figueroa, ESP.
506 Broadway
San Francisco, CA 94133*

*Tracie L. Brown ESP.
Assistant U.S. Attorney
10th Floor, 450 Golden Gate Ave
San Francisco, CA 94102*

I declare under penalty of perjury that the foregoing is true and correct and that I executed this Declaration under the laws of the State of California this 23rd day of _____ in San Mateo, California.

John J. Conneely
John J. Conneely