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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN MATEO

11 PEOPLE OF THE STATE OF CALIFORNIA,

12 Plaintiff,

13 v.

14 JOHN PERRY BARLOW,

15 Defendant.

Case No. NM 333376

**UNITED STATES TRANSPORTATION
SECURITY ADMINISTRATION'S
MOTION FOR A PROTECTIVE
ORDER**

Date: May 13, 2003
Time: 2:00 p.m.

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19 The Transportation Security Administration ("TSA" or "the Government"), through the
20 United States Attorney's Office, Northern District of California, appears in the above-
21 captioned state action to file a motion for a protective order concerning certain documents,
22 records, and testimonial evidence.¹ The defendant in this matter has issued a subpoena *duces*
23 *tecum* seeking copies of: "all reports, memorandums, accounts, briefs, communications,
24 messages, notes, review, or records pertaining to the search of Mr. Barlow's luggage, and or his
25 case," "all training manuals or memorandum pertaining to protocols or procedures for

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27 ¹ The United States Attorney's Office for the Northern District of California is authorized
28 pursuant to 28 U.S.C. § 517 to "attend to the interests of the United States in a suit pending . . . in
a court of a State, or to attend to any other interest of the United States."

1 performing baggage searches,” “any document detailing the time of the initial search of Mr.
2 Barlow's luggage,” and “any audio and/or video recordings, as well as any recordings taken of
3 the x-ray images of Mr. Barlow's luggage taken before, during, and/or after the search of Mr.
4 Barlow's luggage.” See Defendant’s Subpoena *duces tecum*, attached hereto as Exhibit A.²
5 Likewise, the People of the State of California (“the State”) have issued a subpoena for
6 testimony from the airport screener, Sandra Ramos, who initially discovered the alleged
7 contraband in the defendant’s luggage. It is anticipated that both the State and the defendant
8 will wish to elicit testimony from the airport screener at the hearing on May 13, 2004.

9 TSA moves for a protective order in order to prevent the improper disclosure of either
10 testimonial or documentary information that is protected from disclosure by statute and
11 regulation. Certain information contained in the reports of TSA, as well as the standard
12 operating procedures and policies pertaining to the performance of baggage searches may not
13 be disclosed under applicable federal law. The Government’s position is set forth with
14 specificity below.

15 Factual Background

16 On September 15, 2003, the defendant, John Barlow, was at the San Francisco
17 International Airport. Prior to boarding his flight, defendant checked his luggage with Delta
18 Airlines. The bag proceeded through baggage screening where contract screeners of the TSA
19 screened it for loaded firearms, explosives, or incendiaries. See 49 U.S.C. § 44901, *et seq*; 49
20 C.F.R. §1540.111(c). The defendant’s checked baggage alarmed as it passed through an
21 explosive detection system. As a result, TSA contract screener Sandra Ramos conducted a hand
22

23 ² In addition to the items mentioned above, the subpoena also seeks other items that
24 Covenant Aviation Security has produced and are not challenged by the instant motion. The
25 subpoena *duces tecum* was served on the custodian of records for Covenant Aviation Security,
26 TSA contract screeners. Covenant Aviation Security performs screening of passengers and
27 baggage at the airport in question pursuant to 49 U.S.C. § 44919 and are considered Federal
28 Government contract employees. See *infra*. It should be noted that certain items sought in the
subpoena, such as training manuals from TSA, as well as any audio/video recordings and X-ray
images, are either not in the possession, custody or control of Covenant Aviation Security or
simply do not exist.

1 search of the luggage to resolve the alarm. During the course of the additional screening of the
2 defendant's luggage, batteries, wires, and an Ibuprofen bottle were discovered. Upon further
3 inspection of the items, marijuana was found in the Ibuprofen bottle.

4 Regulatory and Statutory Authority of the Transportation Security Administration

5 By way of background, Congress, in response to the terrorist attacks of September 11,
6 2001, enacted the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, on
7 November 19, 2001. ATSA created the TSA. TSA prescribes policies and regulations on civil
8 aviation security, including with regard to passenger, baggage, and cargo screening at all airports
9 in the United States. 49 U.S.C. § 44901, *et seq.* The TSA now handles aviation security matters
10 formerly handled by the Federal Aviation Administration. 49 U.S.C. § 44901, *et seq.*

11 A special provision of ATSA, 49 U.S.C. § 44919, requires the establishment of a pilot
12 program under which, upon approval of an application submitted by an operator of an airport, the
13 screening of passengers and property at the airport under 49 U.S.C. § 44901 is carried out by the
14 screening personnel of a qualified private screening company under a contract entered into with
15 the TSA. The San Francisco International Airport is part of that pilot program. On October 10,
16 2002, the TSA awarded Contract Number DTSA20-03-C-00560 to Covenant Aviation Security,
17 LLC. Under the contract, Covenant Aviation Security provides passenger and baggage security
18 screening services at the San Francisco International Airport. The security screeners at San
19 Francisco International Airport are therefore TSA contractor employees.

20 TSA has the authority to prohibit the disclosure of information obtained or developed in
21 carrying out security activities if it determines that disclosure of such information would be
22 detrimental to the safety of persons traveling in transportation. 49 U.S.C. § 114(s); 49 U.S.C. §
23 40119(b)(1)(C). Pursuant to this authority, TSA issued Federal regulations governing this
24 information, known as Sensitive Security Information, or "SSI." Those regulations are found at
25 49 C.F.R. Part 1520. The need to protect SSI stems primarily from the extent to which that
26 information, if compromised, would reveal a systemic vulnerability of the aviation system or
27 aviation facilities to attack. 49 C.F.R. § 1520.7(h).

1 Further, TSA regulations prohibit the disclosure of SSI except to those with an
2 “operational need to know.” 49 C.F.R. § 1520.5(b). A person has a need to know if he needs the
3 information to carry out approved or directed security duties, manage or supervise persons
4 carrying out such duties, or represent and advise airport operators or persons who receive SSI in
5 connection with a judicial or administrative proceeding. *Id.* Parties in state or federal court
6 litigation and members of the public do not fall within the “need to know” category. Thus, in
7 this case, the defendant does not fall within the “need to know” category.

8 Certain information sought to be elicited by testimony and documents – specifically, the
9 policies and procedures for conducting searches during passenger screening – falls within the
10 definition of SSI and is therefore protected from disclosure. *See* 49 U.S.C. § 114(s); 49 C.F.R.
11 §§ 1520.7(a), (b), (c) and (j).

12 The screening procedures and the training manuals (which reveal the screening
13 procedures) are by regulation SSI and cannot be released pursuant to 49 C.F.R. §§ 1520.7(a),
14 (b), (c) and (j). Subsection (j) provides that “specific details of aviation security measures
15 whether applied directly by TSA or entities subject to the [regulations],” such as Covenant
16 Aviation Security screeners, are protected as SSI. 49 C.F.R. § 1520.7(j). The screening
17 procedures and training manuals are also protected under 49 C.F.R. § 1520.7(a) as they contain
18 information relating to the Airport’s standard security program and “comments, instructions, or
19 implementing guidance pertaining thereto.” Likewise, subsection (b) protects “Security
20 Directives and Information Circulars under § 1542.303 or § 1544.305 of this chapter, and any
21 comments, instructions, or implementing guidance pertaining thereto.” 49 C.F.R. § 1520.7(b).
22 The training manuals and documents setting forth TSA’s standard operating procedures for
23 security screening would contain such security directives and information circulars. In addition,
24 subsection (c) prohibits disclosure of “[a]ny selection criteria used in any security screening
25 process, including for persons, baggage.” 49 C.F.R. § 1520.7(c). As previously noted, defendant
26 has requested “any document detailing the time of the initial search of Mr. Barlow's luggage.”
27 Although the time of the initial search of the defendant’s luggage is not protected under the

1 foregoing regulations, any information contained in such a report detailing general screening
2 procedures and policies would be protected under 49 C.F.R. §§ 1520.7 (a), (b), (c) and (j).

3 The disclosure of the foregoing information by documents or testimony would
4 unacceptably increase the risk to the traveling public. The requested information contains
5 procedures on aviation security measures that could assist a potential hijacker or terrorist in
6 circumventing aviation security procedures intended to protect the traveling public. If terrorists,
7 hijackers, or any other person with a nefarious purpose learn the methods that screeners employ
8 to screen passengers' checked baggage, it would make it easier to penetrate the system and
9 introduce a loaded firearm, explosive, or incendiary onto a plane. Indeed, whether with ill-intent
10 or not, the very real possibility exists that the information could be disseminated, potentially
11 causing grave harm to the traveling public or, at the very least, eroding the security measures in
12 place.

13 The right of the government to withhold SSI from the public, where disclosure would be
14 detrimental to the public interest, has been judicially upheld. *See Torbet v. United Airlines*, 298
15 F.3d 1087 (9th Cir. 2002) (affirming district court's order requiring the defendant to produce SSI
16 *in camera* for inspection after passenger plaintiff demanded copies of certain security procedures
17 that were SSI); *Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35 (2d Cir. 1992) (upon request by
18 the United States the trial court permitted: 1) portions of the trial closed to the public due to the
19 sensitivity of the aviation security information at issue; 2) the United States to receive an initial
20 opportunity to redact portions of the trial transcript containing sensitive airline security
21 information before the press reviewed the daily transcripts; and 3) some exhibits to be made
22 available to the public while others, namely, those concerning sensitive information, to be filed
23 under seal); *Gray v. Southwest Airlines*, 33 Fed. Appx. 865, 2002 U.S. App. Lexis 6442 (9th Cir.
24 2002) (unpublished opinion affirming lower court's protective order which denied *pro se*
25 plaintiff passenger access to certain records containing SSI); *Mariani v. United Airlines, Inc.*,
26 2002 U.S. Dist. Lexis 13369 (S.D.N.Y. 2002) (TSA permitted to intervene in litigation, now
27 known as *In re September 11 Litigation*, in order to protect SSI); *see also Public Citizen*

1 *Families of Pan-Am.103/Lockerbie v. Federal Aviation Administration*, 988 F.2d 186, 187-89
2 (D.C. Cir. 1993) (D.C. Court of Appeals held that the FAA, upon a challenge by an aviation
3 consumer group, had statutory authority to promulgate security-sensitive regulations involving
4 airport procedures without notice and comment, and to prohibit the disclosure of such
5 information).

6 Further, courts have upheld the exclusion of defendants from the courtroom when
7 sensitive security information has been discussed. *See United States v. Slocum*, 464 F.2d 1180,
8 1183 (3rd Cir. 1972) (*in camera* proceedings excluded the defendant and the public while taking
9 evidence of a hijacking profile was appropriate and not reversible error); *United States v. Bell*,
10 464 F.2d 667 (2d Cir. 1972) (holding that a trial court's exclusion of the defendant and the public
11 from that portion of the suppression hearing dealing with the necessary confidential hijacking
12 "profile" did not violate the defendant's Fifth and Sixth Amendment Constitutional right to a
13 public trial and the right to confront the witnesses against him abridged neither the Sixth
14 Amendment right to confrontation nor the right to a public trial); *United States v. Lopez*, 328 F.
15 Supp 1077, 1084 (E.D.N.Y. 1971) (court closed the courtroom at the suppression hearing during
16 testimony regarding sensitive airline security materials and defense counsel was enjoined from
17 revealing any of the information in the sealed portion of the hearing); *United States v.*
18 *Moussaoui*, 2002 U.S. Dist. Lexis 11088 (E.D.Va. 2002) (ordering defense counsel not to
19 disclose to defendant any SSI that the defense obtained in discovery).

20 The defendant in the instant matter claims that the search of his luggage was "illegally
21 intrusive, as beyond the purview of a security search." *See* Defendant's Declaration of Counsel
22 in Support of Subpoena *Duces Tecum* at 2. The defendant further argues that because the search
23 exceeded the "federal mandate" the "training manuals, instruction books, and other evidence is
24 material and necessary to establish [his] defense." *Id.* at 3.

25 As a threshold matter, TSA's general policies, training requirements and procedures are
26 in fact irrelevant to the precise question at issue: whether the specific search by the individual
27 screener who opened the defendant's bag violated the Fourth Amendment. The legal
28

1 determination regarding the Fourth Amendment will thus focus on what one specific contract
2 screener did in this instance – not on TSA’s policies or procedures with respect to airport
3 screening generally.³

4 Furthermore, contrary to the defendant’s assertion, the search in question did not exceed
5 the “federal mandate.” Administrative searches at airports have long been upheld. *United States*
6 *v. Bulacan*, 156 F.3d 963 (9th Cir. 1998) (administrative search upon entering federal office
7 building upheld as long as the search serves a narrow, compelling administrative purpose and the
8 intrusion is limited in scope to meet the needs of that administrative purpose); *United States v.*
9 *Doe*, 61 F.3d 107 (1st Cir. 1995) (a more thorough hand search permitted to rule out inconclusive
10 x-ray results); *United States v. \$124,570*, 873 F.2d 1240 (9th Cir. 1989) (airport searches should
11 not be used as a general search for evidence of other crimes, however such evidence is
12 admissible if discovered as part of a legitimate administrative search); *United States v. Davis*,
13 482 F.2d 893 (9th Cir. 1973) (warrantless searches of carry-on baggage and passengers are
14 permitted if the searches are limited to detecting weapons and explosives and passengers are
15 given notice so that they may avoid a search by not flying); *Torbet*, 298 F.3d at 1089 (airport
16 screening search is reasonable if it is no more intrusive than necessary to find weapons and
17 explosives; it is confined in good faith to that purpose; and passengers may avoid the search by
18 electing not to fly);⁴ *see also People v. Owens*, 134 Cal. App. 3d 144 (1982) (administrative

19 ³ To illustrate the point, assume that the contract screener deviated from TSA’s
20 policies and procedures in effecting the search at issue. The question of whether there was a
21 constitutional violation would depend on whether that deviation did or did not violate the Fourth
22 Amendment, and TSA’s policy would obviously be irrelevant to that determination. Likewise,
23 assume that the contract screener followed TSA’s general policies and procedures to the letter.
24 Again, the legal analysis would focus on whether the screener’s actions – regardless of whether
25 or not they were dictated by TSA’s policies and procedures – did or did not violate the Fourth
26 Amendment. Accordingly, the proper focus for the parties and the Court should be on what the
27 specific contract screener did with the defendant’s bag in this instance, not on what the
28 Government’s policies on airport screening generally provide.

⁴ Notably, the Ninth Circuit in *Torbet* held that even a *random* search of baggage
that had passed an x-ray scan without arousing suspicion of explosives or weapons did not
violate the Fourth Amendment. *Torbet*, 298 F.3d at 1088. The Court explained that because
“firearms and explosives can be small and easily concealed,” a search after an x-ray that did not
conclusively “rule out every possibility of dangerous contents” was permissible under the Fourth
CASE NO. NM 333376

1 search valid where controlled substance discovered in pill bottles); *People v. Dooley*, 64 Cal.
2 App. 3d 502 (1976); *People v. Farlow*, 52 Cal. App. 3d 414 (1975). In the instant matter, TSA
3 contract screener Ramos discovered the marijuana in question while attempting to resolve an
4 alarm on the defendant's checked luggage (i.e., to determine whether the bag contained
5 prohibited items by statute and regulation, such as loaded firearms, explosives, or incendiaries)
6 as such the search did not exceed the Federal mandate to search all checked baggage. Since
7 explosives or incendiaries may be potentially contained in any object, the search of the Ibuprofen
8 was narrowly tailored, reasonable, and necessary for the TSA contract screeners to carry out their
9 security functions.

10 Further, the defendant has not established that he is entitled to the materials, which are
11 protected by statute and regulation, and thus they do not need to be produced. First, the evidence
12 requested by the defendant does not need to be produced pursuant to Cal. Pen. Code § 1054.1.
13 Second, the evidence is not material and necessary to establish the defendant's defense. Third,
14 the material is protected under 49 C.F.R. Part 1520 as SSI.

15 First, Cal. Pen. Code § 1054.1 requires the production of the names and addresses of
16 prosecution witnesses, statements of the defendant, relevant real evidence seized or obtained, the
17 existence of a felony conviction of any material witness, exculpatory evidence, and relevant
18 written or recorded statements of witnesses. The information requested by the defendant does
19 not fall under the purview of the discovery requirements under section 1054.1. The items sought
20 by the defendant -- documents that are policies and procedures for conducting searches during
21 passenger screening -- do not exculpate the defendant in any means. The training manuals are
22 simply the procedures by which screening is generally conducted.

23 Second, the defendant has failed to establish that the evidence is material and necessary to
24 establish his defense. The defendant cannot obtain these documents and other items by making
25 conclusory arguments regarding materiality. Materiality is established on "a showing there is a
26 reasonable probability that, had the evidence been disclosed to the defense, the result of the
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28 Amendment. *Id.* at 1089-90 (internal quotation and citation omitted).

CASE NO. NM 333376

US TSA's MTN FOR A PROTECTIVE ORDER

1 proceeding would have been different, a reasonable probability being a probability sufficient to
2 undermine confidence in the outcome.” *People v. Marshall*, 13 Cal. 4th 799, 842 (1996)
3 (citations omitted). The defendant has the burden to establish substantial materiality. *People v.*
4 *Andrus*, 226 Cal. App. 3d 73, 80 (1990). The defendant therefore must present specific facts
5 which would establish that the Government is in possession of information that is material and
6 helpful to his defense. The defendant’s conclusory allegations are insufficient to meet this
7 burden and he has failed to establish that the items in question are material and necessary to his
8 defense.

9 Finally, as previously stated, the items sought are protected by regulation. The policies
10 and procedures for conducting searches during passenger screening are protected from
11 disclosure pursuant to 49 U.S.C. § 114(s); 49 C.F.R. §§ 1520.7(a), (b), (c) and (j).

12 Conclusion

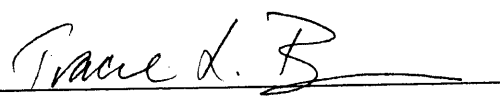
13 In view of the foregoing, the Court should utilize the following procedure: 1) the court
14 should require the defendant to make a *prima facie* showing of materiality; 2) if the defendant
15 makes a requisite *prima facie* showing of how the requested evidence (documentary or
16 testimonial) is material, then the court should conduct an *ex parte, in camera* review of the
17 information in question; 3) if after the *ex parte, in camera* review, the court determines that the
18 requested evidence is in fact material, the Government will be willing to allow production of
19 the evidence on the condition that the court orders that the information will be disclosed *in*
20 *camera* and under seal, in the presence of the Court, necessary court staff and attorneys only.

21 Additionally, if the court should determine that production of the information is
22 warranted and should the prosecution and/or defense counsel intend to use SSI material or seek
23 to elicit testimony implicating SSI from any witness in any proceeding, the Government seeks
24 a protective order: (1) sealing the Courtroom when the items are revealed or testimony is
25 introduced regarding SSI; (2) limiting the audience to the Court and its Courtroom personnel,
26 the attorneys, and the jury during such; (3) sealing the transcript of testimony, direct, cross-
27 examination, re-direct and cross, concerning the SSI; (4) sealing the items or returning them to

1 the Government after the trial; and (5) issuing a limiting instruction to the jury that they cannot
2 disclose the contents and/or portions of the items or testimony to persons outside the jury.
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6 DATED: April 22, 2004

Respectfully submitted,
KEVIN V. RYAN
United States Attorney

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10 TRACIE L. BROWN
Assistant United States Attorney
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing a copy of the following:

United States Transportation Security Administration's Motion for a Protective Order

People of the State of California v. John Perry Barlow
C NM 333376

to be served this date upon the party in this action by placing a true copy thereof in a sealed envelope, and served as follows:

FIRST CLASS MAIL by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

CERTIFIED MAIL (#) by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

PERSONAL SERVICE (BY MESSENGER)

FEDERAL EXPRESS

FACSIMILE (FAX)

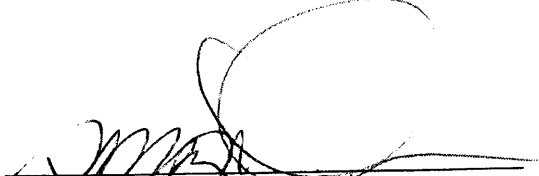
HAND-DELIVERED

to the party addressed as follows:

OMAR FIGUEROA, ESQ.
506 Broadway
San Francisco, CA 94133

AARON FITZGERALD, ESQ.
Deputy District Attorney
County of San Mateo
1050 Mission Road
South San Francisco, CA 94080

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on April 22, 2004 at San Francisco, California.


STEPHANIE MIXUHARA
Legal Assistant

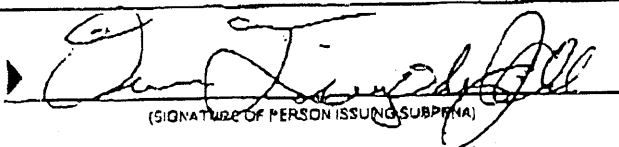
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address) Omar Figueroa, Esq. #196650 506 Broadway San Francisco, CA 94133-4507		TELEPHONE NO. 415/986-5591	FOR COURT USE ONLY
ATTORNEY FOR (Name) JOHN PERRY BARLOW			
Insert name of court, judicial district or branch court, if any, and post office and street address: Superior Court of California County of San Mateo 1050 Mission Road South San Francisco, CA 94080			
Title of case The People of the State of California v. John Perry Barlow			
SUBPENA (CRIMINAL OR JUVENILE) CRIMINAL		CASE NUMBER NM 333376	
<input checked="" type="checkbox"/> DUCES TECUM			

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (NAME):
 Audrey Dean, Or the appropriate custodian of records for Covenant Security--SPO
 1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time, and place shown in the box below
 UNLESS you make a special agreement with the person named in item 3:

a. Date: March 23, 2004	Time: 9:00 a.m.	<input checked="" type="checkbox"/> Dept.: PH	<input type="checkbox"/> Div.:	<input type="checkbox"/> Room:
b. Address: Superior Court of California-County of San Mateo 400 Government Center, Redwood City, CA 94063				

2. AND YOU ARE
- a. ordered to appear in person.
 - b. not required to appear in person if you produce the records described in the accompanying affidavit and a completed declaration of custodian of records in compliance with Evidence Code sections 1560, 1561, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose your original declaration with the records. Seal them. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and number, your name and date, time, and place from item 1 (the box above). (3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy of your declaration to the attorney or party shown at the top of this form.
 - c. ordered to appear in person and to produce the records described in the accompanying affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records is required by this subpoena. The procedure authorized by subdivision (b) of section 1560, and sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena.
 - d. ordered to make the original business records described in the accompanying affidavit available for inspection at your business address by the attorney's representative and to permit copying at your business address under reasonable normal business hours, conditions during normal business hours.
3. IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:
- a. Name: **Omar Figueroa, Esq.**
 - b. Telephone number: **415-986-5591**
4. WITNESS FEES: You may be entitled to witness fees, mileage, or both, in the discretion of the court. Contact the person named in item 3 AFTER your appearance.

DISOBEDIENCE OF THIS SUBPENA MAY BE PUNISHED BY A FINE, IMPRISONMENT, OR BOTH. A WARRANT MAY ISSUE FOR YOUR ARREST IF YOU FAIL TO APPEAR.

FOR COURT USE ONLY	Date: January 13, 2004	 (SIGNATURE OF PERSON ISSUING SUBPENA)
		Omar Figueroa (TYPE OR PRINT NAME)
		Attorney for Defendant (TITLE)

(See reverse for proof of service)

Form Adopted by Rule 682
 Judicial Council of California
 682(a)(1)(b) (Rev. January 1, 1991)

SUBPENA
(CRIMINAL OR JUVENILE)

Penal Code, § 1326 et seq
 Welfare and Institutions Code, §§ 341, 824, 1727

1 OMAR FIGUEROA #196650
2 506 Broadway
3 San Francisco, CA 94133
4 Telephone: 415/986-5591
5 Facsimile: 415/421-1331

6 Attorney for Defendant
7 JOHN BARLOW

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN MATEO

10 PEOPLE OF THE STATE OF CALIFORNIA, NO. NM 333376

11 Plaintiff,

DECLARATION OF COUNSEL
IN SUPPORT OF SUBPOENA
DUCES TECUM

12 v.

13 JOHN BARLOW,

14 Defendant.

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16
17 Defendant JOHN BARLOW hereby requests production of the following:

- 18 1) A true, legible, and durable copy of all complaints,
19 disciplinary actions, or punitive procedures filed against
20 Covenant Security employees: Sandra Ramos, Kenneth Lewis,
21 and Donald Pyle.
- 22 2) A true, legible, and durable copy of all reports,
23 memorandums, accounts, briefs, communications, messages,
24 notes, reviews, or records pertaining to the search of Mr.
25 Barlow's luggage, and or his case.
- 26 3) A true, legible, and durable copy of all training manuals
27 or memorandums pertaining to protocols or procedures for
28 performing baggage searches.
- 4) A true, legible, and durable copy of any document detailing
the time of the initial search of Mr. Barlow's luggage.

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5) A true, legible, and durable copy of any audio and/or video recordings, as well as any recordings taken of the x-ray images of Mr. Barlow's luggage taken before, during, and/or after the search of Mr. Barlow's luggage on September 15, 2003.

Please send this material, via expedited delivery:

Criminal Division-Clerk's Office
Superior Court of California
County of San Mateo
1050 Mission Rd.
South San Francisco, CA 94080

Phone: (650) 877-5773

DECLARATION OF COUNSEL

I, OMAR FIGUEROA, declare:

I am an attorney licensed to practice in the State of California and I am counsel of record for defendant John Barlow in this matter.

Mr. Barlow is presently facing criminal charges in San Mateo County arising out of the search of his luggage at San Francisco Airport. Specifically, he has been charged with five misdemeanor violations including: three counts of violating Health & Safety Code Sections 11377(A), one count of violating Business and Profession Code 4140, and one count of violating Health and Safety Code §11357(B) on or about September 15, 2003, at the San Francisco Airport.

Mr. Barlow intends to present a defense that the initial search of his luggage was illegally intrusive, as beyond the purview of a security search. Code of Federal Regulations §1544.203(a) requires that every aircraft operator create a "security program to prevent or deter the

1 carriage of any unauthorized explosive or incendiary
2 onboard aircraft in checked baggage." CFR §1544.203(a)
3 Furthermore, subsection (c) of the same statute clarifies
4 that its purpose is to "ensure that all checked baggage is
5 inspected for explosives and incendiaries before loading it
6 on its aircraft." CFR §1544.203(c) In this case, the search
7 clearly extended beyond the search for undeclared firearms
8 and incendiary devices. Because the scope of this search
9 exceeded the federal mandate, the search was unlawful. For
10 this reason the training manuals, instruction books, and
11 other evidence requested is material and necessary to
12 establish this defense. Similarly, any materials such as
13 audio and/or video that recorded the search of Mr. Barlow
14 luggage is requested for the same reasons. The relevant
15 Police Reports are attached as Exhibit A.

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Summary of Facts

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According to police reports, on September 15, 2003 at
about 6:55 a.m. Officer Wurdinger responded to a dispatch
request from Covenant Security at the San Francisco Airport.
(Exhibit A pg.2) This is likely erroneous however, as the
time of arrest is listed as 7:30 a.m. on the San Mateo
County Arrest Report/Booking Sheet (Exhibit A pg.7), but is
listed as 7:45 a.m. on Officer Wurdinger's San Francisco
Police-Airport Bureau report. (Exhibit A pg.3) The
documents subpoenaed may be able to shed light on this
material issue.

1 Officer Wurdinger reports receiving information from
2 Covenant Security that they had searched Mr. Barlow's
3 luggage and found a small amount of possible marijuana, and
4 other potential contraband. (Exhibit A pg.2) However, the
5 filed police report omits information regarding the fact
6 that Mr. Barlow's bag was illegally searched beyond the
7 permissible scope allowed for security purposes. During
8 screening, a Covenant Security guard searched Mr. Barlow's
9 luggage beyond the legal scope of airport security.
10 inspections. This can be seen from Officer Wurdinger's
11 report. It states that "As S/Barlow's bag came through,
12 Ramos saw wires and batteries in the X-ray that appeared
13 suspicious to her. She opened the bag and began to search
14 it. Inside she found that the batteries and wires were not
15 threats, but as she searched she saw what appeared to be
16 marijuana and other possible contraband." (Exhibit A pg.2)
17 This clearly illustrates that Covenant Security employee
18 Sandra Ramos was no longer investigating a potential danger,
19 but was in fact searching the luggage without cause.

20 Although the police report would lead one to believe
21 otherwise, the contraband was not found through visual
22 detection, this was not the case. The contraband was found
23 in the bottom of an Ibuprofen bottle, after luggage screener
24 Ramos emptied out all of the Ibuprofen. The Ibuprofen
25 bottle was never mentioned as being suspected as a potential
26 bomb when Sandra Ramos chose to search the bag. This
27 demonstrates the severe degree to which this search went
28 beyond the stated purpose of a security search. As such, it

1 is clear that the scope of this initial search was illegal
2 and unjustified, since it was unrelated to security
3 concerns.

4 The police officers handling this case omitted all
5 information regarding the illegal, over-intrusive search by
6 Covenant Security employees from the police report. Officer
7 Wurdinger omitted any mention of where and under what
8 circumstances the contraband was found in order to hide
9 evidence of an illegal search and seizure. Similarly, the
10 other officers who participated in the arrest excluded this
11 evidence by neglecting to file police reports. This
12 improper police procedure necessitates that defendant be
13 provided with true and accurate information regarding the
14 initial search.
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17 I declare under penalty of perjury that the foregoing is true
18 and correct, and that this declaration is executed on March 5,
19 2004, at San Francisco, California.
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JOHN BARLOW