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5 Attorney for Defendant
JOHN FRY

6
7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
9 SAN FRANCISCO DIVISION

10
11 UNITED STATES OF AMERICA,) Case No.: CR 3-19-70176 LB
12)
13 Plaintiff,) **DEFENDANT’S EX-PARTE**
14 vs.) **EMERGENCY REQUEST FOR AN**
15) **IMMEDIATE STATUS CONFERENCE**
16 JOHN FRY,) **HEARING, STAY OF PROCEEDINGS**
17) **PENDING INVESTIGATION**
18) **REGARDING SOURCE OF**
19 Defendant.) **GOVERNMENT LEAKS AND ORDER TO**
20) **SHOW CAUSE AND DECLARATION IN**
) **SUPPORT THEREOF WITH [PROPOSED]**
) **ORDER SETTING HEARING**
)
) Date: February ___, 2019
) Time: TBA, Court: Hon. Laurel Beeler
)

21
22 Defendant, JOHN FRY, by and through his attorney, Gail Shifman, files this Ex-Parte
23 Emergency request for an immediate status conference hearing, stay of proceedings pending
24 investigation regarding source of government leaks and order to show cause and declaration in
25 support thereof for the reasons set forth below.

26 On February 21, 2019, Defendant John Fry made his initial appearance on a sealed
27 complaint before this Court. At the hearing, the complaint was unsealed, an appearance bond

28 **DEFENDANT’S EX-PARTE EMERGENCY REQUEST FOR AN IMMEDIATE STATUS CONFERENCE**
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1 issued, and a preliminary examination set on March 13, 2019. *Dkt.* #3.

2 Immediately following this initial appearance, undersigned counsel was greeted by a
3 media report containing government leaks concerning the charges filed against Mr. Fry revealing
4 alleged confidential plea discussions, including possible disposition, and confidential grand jury
5 matters, provided to at least one media outlet by a “person familiar with the talks.”

6
7 Fry's hearing date was pushed back several times as federal prosecutors were
8 engaged with Fry's attorney on plea negotiations, according to a person
9 familiar with the talks. As of Thursday, Fry declined to plead to felony
charges in exchange for probation.

10 As a result, prosecutors will seek an indictment of Fry on February 28, this
11 person said, and are expected to seek two additional charges, including
12 misuse of a Social Security number and misuse of a government computer.

13 See, Exhibit A, <https://www.cnn.com/2019/02/21/politics/michael-cohen-tax-returns/index.html>.

14 These leaks came from either the Justice Department, USAO, Treasury Department, or
15 both, because no one from the defense team has spoken with the media, and significantly, were
16 not aware of any grand jury dates or witnesses appearing before the grand jury. This was not the
17 first time that the Justice Department, USAO, Treasury Department, or both, engaged in an
18 ongoing attempt to impede and obstruct justice and to prevent Mr. Fry’s right to a fair trial, in
19 violation of the Constitution, applicable Justice Department policies and federal laws as well as
20 a contempt of court, as previous leaks occurred on February 13, 2019 when government sources
21 revealed “Prosecutors with the US attorney's office in the Northern District of California are
22 leading the criminal investigation, one of the people said, and criminal charges in the case could
23 be announced soon” at a time when the Complaint was still under seal. See, Exhibit B,
24 [https://www.cnn.com/2019/02/13/politics/michael-cohen-personal-bank-records-
25 charges/index.html](https://www.cnn.com/2019/02/13/politics/michael-cohen-personal-bank-records-charges/index.html)

26 Additional media outlets also reported on the case on February 21, 2019, that included
27 copies of the earlier **sealed** copy of the Complaint along with the sealed and unexecuted
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1 Summons, both of which could only have come from those within the government having access
2 pursuant to Magistrate Judge Beeler’s sealing order, Dkt. #2, which includes the United States
3 Attorney’s Office, the U.S. Department of Treasury, and the Treasury Inspector General for Tax
4 Administration (“TIGTA). See, Exhibit C, <https://www.axios.com/michael-cohen-bank-records-irs-leak-michael-avenatti-6a43b43d-50c2-4b17-ae4-e6e59a47bb48.html>. See also, *Dkt.* ## 1 &
5
6 2.

7 As the Justice Department’s Manual provides, the DOJ’s work “involves non-public,
8 sensitive matters” the dissemination of which “could violate federal laws, ... and individual
9 privacy rights; jeopardize an investigation or case; prejudice the rights of a defendant; or unfairly
10 damage the reputation of a person. “*Justice Manual*, 1-7.100. There can be little doubt that
11 disclosure of information concerning an ongoing case, particularly disclosures concerning secret
12 grand jury proceedings and any information regarding the possibility, or not, of a plea of guilty
13 to an offense charged and any alleged disposition, coupled with the gratuitous inclusion in the
14 Complaint of statements that Mr. Fry allegedly made during the course of the investigation is
15 prejudicial to Mr. Fry, a clear violation of law, and clear violations of DOJ policies. See, *Justice*
16 *Manual*, 1-7.610, California Rule of Professional Conduct 5-110, and the Special
17 Responsibilities of a Prosecutor, 28 U.S.C. § 530B(a), Federal Rules of Criminal Procedure
18 6(B)(2), ((3), and Rule 410. See, also, U.S. District Court, Northern District of California, Local
19 Rule 11-4.

20 These government leaks are prejudicial to Mr. Fry’s right to a fair trial and due process
21 and contaminates any potential jury pool. Moreover, they rise to the level of hypocrisy given
22 that these government leakers are investigating and prosecuting an alleged leak - - giving them
23 motivation for a vindictive prosecution, as appears to be occurring. They also give rise to a
24 violation of the Court’s Order, *Dkt.* # 2, and a finding of contempt of court.

25 On behalf of Mr. Fry, we made a request to the USAO for the immediate cessation of
26 inflammatory, inappropriate and prejudicial extrajudicial statements of the government, its
27 agencies and agents that are substantially likely to interfere with the rights of the accused to a
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1 fair trial by an impartial jury. We also demanded that the government initiate and complete an
2 independent investigation into those who are leaking information from the investigation and case
3 to the media and to provide full discovery to the defense of the government's investigation of
4 these leaks and the removal of those involved from further involvement, knowledge and ability
5 to access any and all information and discovery in this matter and other appropriate remedies.

6 Fundamental fairness requires that the Court hold an immediate status hearing where it is
7 requested (1) that the Court refer an investigation to the Department of Justice to determine the
8 source of the leaks,, (2) that the Court issue a stay of proceedings including grand jury
9 proceedings pending an independent Department of Justice investigation into the source of the
10 leaks, that may determine whether the USAO, Northern District of California should be recused
11 from this matter, (3) that the Court issue an Order to Show Cause why the government should
12 not be held in contempt of court for violating the Court's Order issued on February 4, 2019, (4)
13 among other remedies. Due process concerns and fundamental fairness require an independent
14 investigation into the source of these government leaks because the source of these leaks can not
15 be trusted to prosecute Mr. Fry for an alleged leak, irony notwithstanding.

16 Dated: February 22, 2019

Respectfully submitted,

17 /s/ Gail Shifman

18 _____
19 GAIL SHIFMAN

20 Attorneys for Defendant
21 JOHN FRY

DECLARATION OF GAIL SHIFMAN

I, Gail Shifman, declare under penalty of perjury as follows:

1. I am an attorney duly licensed to practice law in the State of California and before this Court. I represent defendant John Fry in this matter.
2. No one on the defense team has communicated at any time with any member of the media regarding any matter in this case or its investigation.
3. No one on the defense team has any knowledge of any grand jury dates regarding this case or its investigation.
4. No one on the defense team has any knowledge of any witnesses scheduled to appear before the grand jury regarding this case or its investigation.
5. No one on the defense team knows the identities of any of the grand jurors sitting on this case or its investigation.
6. Attached hereto, as Exhibit A, is a true and correct copy of *IRS analyst charged in leak of Michael Cohen's bank records*, published on February 21, 2019 on www.cnn.com.
7. Attached hereto, as Exhibit B, is a true and correct copy of *Justice Department investigating leak of confidential Michael Cohen bank records*, published on February 23, 2019 on www.cnn.com.
8. Attached hereto, as Exhibit C, is a true and correct copy of *IRS analyst charged with leaking Cohen bank records to Michael Avenatti*, published on February 21, 2019 on www.axios.com.

Executed this 22nd day of February, 2019, at San Francisco, California.

/s/ Gail Shifman

GAIL SHIFMAN
Attorney for Defendant

[PROPOSED] ORDER

This matter having come before the Court upon Defendant's Ex-Parte emergency motion for immediate hearing, and the Court finding good cause,

IT IS ORDERED that a hearing is set for February ____, 2019 at _____ o'clock before the Honorable Laurel Beeler.

Dated: February ____, 2019

Hon. Laurel Beeler
United States Magistrate Judge