



Ms. Bardach previously received a subpoena requiring her to produce the same materials at a November 15, 2010, hearing in this case. She complied with that subpoena by production of all responsive materials, with the exception of the painting given to her by Mr. Posada. She instead provided the Government at that time with a photograph of the painting. Mr. Reardon did not insist on production of the painting at the November 15 hearing, but advised he would issue a trial subpoena for the painting and then issued the attached subpoena on January 10, 2011. Mr. Reardon refused to agree that photographs of the painting could be produced in lieu of the painting or substituted in the record for the painting if the painting were offered in evidence. He has indicated that he wants the painting placed in the evidentiary record and maintained in evidence until the conclusion of the case.

Photographs of the painting at issue are attached as an exhibit to this motion. Ms. Bardach can testify that the attached photographs accurately depict the painting and the photographs may be enlarged to demonstrate the actual size of the painting to the jury. The framed painting is 33 inches by 27 inches or approximately six square feet. The photographs of the painting depict both sides of the painting prior to its being framed, including the dedication on the reverse side of the painting. The dedication is now partially obscured by the frame, so the photographs provide a clearer and better depiction of the painting than the framed painting itself.

Federal Rule of Criminal Procedure 17(c)(2) provides that on “motion made promptly, the court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive.” The rule “leaves broad discretion in the district court by allowing the trial judge to weigh numerous factors, including materiality, relevancy, and competency.” *United States v. Hathcock*, 441 F.2d 197, 199-200 (5th Cir. 1971); *United States v. Bearden*, 423 F.2d 805, 809-810 (5th Cir. 1970); *Gevinson v. United States*, 358 F. 2d 761, 766 (5th Cir. 1966).

Requiring Ms. Bardach to transport the painting from Santa Barbara, California, to El Paso, is unreasonable and oppressive because (1) the painting is irrelevant to any material issues in this case, (2) the photographs provide an adequate substitute for the painting, (3) transportation of the painting creates a significant risk that it will be damaged or lost, and (4) introduction of the painting into evidence and maintenance of it in the record in this case would deprive Ms. Bardach of her personal property for a substantial period of time in the absence of any justification for doing so.

Conclusion

The Court should modify the subpoena so that Ms. Bardach need not produce the painting at trial or, if she is required to produce the painting at trial, the Court should allow the attached photographs of the painting to be substituted in evidence and direct the Clerk to return the painting to Ms. Bardach at the time that she is released as a witness.

Respectfully submitted,

Hunton & Williams LLP  
Attorneys for Ann Louise Bardach

By s/ Thomas R. Julin

Thomas R. Julin & Jamie Z. Isani  
*Admitted Pro Hac Vice*  
1111 Brickell Avenue - Suite 2500  
Miami, FL 33131  
305.810.2516 tjulin@hunton.com

Charles A. Gall & Dionne C. Rainey  
Western District of Texas Members  
1445 Ross Avenue - Suite 3700  
Dallas, TX 75202  
214.468.3368 fax 3599 cgall@hunton.com

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF, without the attached exhibits, and have sent a copy of the following via e-mail:

John Williams VanLonkhuyzen  
U.S. Department of Justice  
10th Constitution Ave. NW  
Washington , DC 20530  
(202) 307-1102  
john.van.lonkhuyzen@usdoj.gov

Rebekah Lee Sittner, Esq.  
Bridget Behling  
Timothy J. Reardon, III  
Jerome J. Teresinski  
Counterterrorism Section, National Security Division  
United States Department of Justice  
950 Pennsylvania Ave., NW  
Washington, D.C. 20530  
(202) 514-7146 Fax: (202) 514-8714  
rebekah.sittner@usdoj.gov  
bridget.behling@usdoj.gov  
t.j.reardoniii@usdoj.gov  
jerome.teresinski@usdoj.gov

Jose Luis Gonzalez  
Assistant United States Attorneys  
700 E. San Antonio Street  
Suite 200  
El Paso, TX 79901  
(915) 534-6884 Fax: 915/534-3418  
patricia.acosta@usdoj.gov  
jose.gonzalez3@usdoj.gov

Arturo V. Hernandez  
Arturo V. Hernandez, P.A.  
2937 S.W. 27th Avenue - Suite 101  
Miami, FL 33133  
305.443.7527 Fax 446.6150  
avhlaw@bellsouth.net

Felipe D.J. Millan  
2630 Montana Avenue  
El Paso, TX 79903  
915.566.9977 Fax 562.6837  
fdjmillan@yahoo.com

Rhonda A. Anderson  
Rhonda A. Anderson, P.A.  
2655 South LeJeune Road, Suite 540  
Coral Gables, FL 33134  
randersonlaw@gmail.com

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: None.

s/ Thomas R. Julin

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Thomas R. Julin