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APPEAL NO. 05-56398

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT G. WRIGHT, JR.,

Plaintiff-Appellant

v.

FEDERAL BUREAU OF  
INVESTIGATION, *et al.*,

Defendants,

JAMES CROGAN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF OF APPELLANT

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## ARGUMENT

**I. If the Court Considers Plaintiff's Allegations as He Has Defined Them Rather than as Crogan and His Counsel Have Attempted to Mischaracterize Them, Then it Is Clear That the Magistrate Judge and District Court's Rulings Must Be Reversed.**

Throughout the course of this litigation, non-party journalist James Crogan ("Crogan") and his counsel have consistently and repeatedly misconstrued and misrepresented both Plaintiff's Privacy Act claim and the facts and circumstances surrounding Plaintiff's claim. Plaintiff has never asserted that his claim rests on allegations that Special Agent Royden R. Rice ("SA Rice") disclosed to Crogan merely that: (1) Plaintiff was subject to an investigation in 1999 by the FBI's Office of Equal Employment Opportunity Affairs in response to another agent's racial discrimination complaint; (2) Plaintiff was subject to an investigation in 1999 by the FBI's Office of Professional Responsibility ("OPR") concerning a sexual harassment complaint made against him by Special Agent Karen Medernach; (3) Plaintiff was subject to an investigation in 2003 by OPR relating to an unauthorized press conference that Plaintiff held on June 2, 2003; or (4) that Plaintiff had a website called "Little Bobby Creations" relating to Plaintiff's side business of selling baby furniture.

Rather, and again contrary to the misrepresentations of Crogan and his counsel, Plaintiff has consistently described the basis of his Privacy Act claim since he first put the FBI on notice of his claim in a July 8, 2003 letter from Plaintiff's counsel at the time, David P. Schippers, to Special Agent in Charge ("SAC") Thomas Knier of the FBI's Chicago Field Office. *See* Excerpts of Record ("ER") at 24-26 (July 8, 2003 Letter from David P. Schippers to Thomas Knier). The Schippers' letter states in pertinent part that Crogan told Schippers that SA Rice disclosed the following information to him about Plaintiff:

- (1) Plaintiff had been involved in ten internal investigations, thus indicating he had a poor record as an agent;
- (2) there were a number of agents in Plaintiff's squad who could provide adverse information about Plaintiff and he (SA Rice) would recommend Crogan be permitted to interview these agents;
- (3) Plaintiff currently was under internal investigation by the FBI;
- (4) Plaintiff maintains a side business and operates a website as part of that side business; and
- (5) the United States Attorney in Chicago, not the FBI, closed criminal and civil cases against terrorist suspect Mohammed

Salah because Plaintiff had not produced sufficient evidence to support any charges.

*Id.* at 24-25 (emphasis added).

Plaintiff's deposition testimony confirms that his lawsuit is based on the information disclosed by SA Rice to Crogan as Crogan related it to Schippers and as Schippers memorialized it in his letter to SAC Knier. In this regard, Plaintiff testified, in pertinent part, as follows:

Q. It's your belief that Special Agent Ross Rice disclosed Privacy Act protected information to James Crogan of L.A. Weekly, is that correct?

A. Correct.

\* \* \*

Q. Okay. Let's go through the Schippers' letter, because I want to understand the full nature of this. And we'll mark this as Number 2. Let me ask you, have you seen this letter before?

A. Yes.

Q. Can you tell me what it is?

A. This is a letter that I requested Mr. Schippers send to Mr. Knier, Special Agent in Charge of the FBI, Chicago Division, regarding

Ross Rice, Special Agent Ross Rice's providing information to the media about myself.

Q. Now, did you see this letter before it was sent?

A. Yes.

Q. Okay. And it is your understanding that this letter is based on one conversation that Mr. Schippers had with Mr. Crogan?

A. Yes.

\* \* \*

Q. He told you that? What I want to know is what Crogan told you?

A. These are the same things he told me. Like I say, he told me all of these things. And, but there were other things that aren't true in here, but I didn't write them down. Just so you understand, the purpose of this letter, I mean I didn't want to file a lawsuit. All I wanted was them stopped. And I figured you send this letter, it will be taken care of. And I'm trying to recall when we filed the lawsuit. A number of weeks had gone by. And there was absolutely no response. And I was getting a little ticked off. So I said, "That's it. If they're going to ignore this, like everything else, file the lawsuit . . . So that's what the

intent of this letter was for, was just to cut it off so he doesn't say anything more to the media.”

*See* ER at 7, 17, 18, 21, 22 (Wright Deposition).

Crogan argues that Plaintiff gave up his Privacy Act claim based on the information SA Rice disclosed to Crogan and Crogan subsequently related to Schippers. Focusing on a snippet from Plaintiff's deposition testimony to exclusion of the remainder of Plaintiff's testimony and the record evidence in this case, Crogan argues that Plaintiff scaled back his claim in his deposition to only the four statements erroneously relied upon by the Magistrate Judge (“Magistrate”) and affirmed by the District Court. *See* Appellee Brief at 17-20. Crogan's argument holds no weight because the portion of Plaintiff's deposition Crogan relies upon to make this argument was specifically referencing damages and because Crogan fails to take into account Plaintiff's other testimony at his deposition, which clearly indicated that Plaintiff's Privacy Act claim is based on the information disclosed by SA Rice to Crogan as set forth in the Schippers' letter. As noted, Plaintiff clearly and unambiguously testified in his deposition that the information that SA Rice disclosed to Crogan, as related by Crogan to Schippers and as memorialized in Schippers' letter, was and is the basis of Plaintiff's grievance against the FBI and the gravamen of Plaintiff's Privacy Act

claim. Indeed, Plaintiff reaffirmed this basis for his lawsuit in his Supplemental Responses to Defendants' First Set of Interrogatories, which, importantly, expressly supplemented his deposition. *See* Appellee's Supplemental Excerpts of Record ("SER") at 285-287 (Plaintiff's Supplemental Response to Defendants' First Set of Interrogatories at Response to Interrogatory Nos. 3 and 4) ("These responses supplement and, where indicated, amend the information provided by Plaintiff in his initial responses to Defendant's First Set of Interrogatories, executed and served on June 21, 2004, and in his deposition taken on November 15, 2004").

Likewise, in a Joint Stipulation, Plaintiff clearly and unambiguously set forth the same precise disclosures he alleges SA Rice made to Crogan and about which Plaintiff seeks to compel Crogan to provide evidence. *See* SER at 5, 6 (Joint Stipulation Regarding Plaintiff's Motion to Compel Non-Party Journalist James Crogan to Testify at Deposition and Produce Documents Pursuant to Subpoena *Duces Tecum* and for Attorney's Fees and Costs at 2, 3). Plaintiff subsequently set forth a description of these same allegations in a Supplemental Memorandum, filed on March 29, 2005 (*see* ER at 119, Trial Court Docket Number 7 [Plaintiff's Supplemental Memorandum of Law filed under L.R. 37-2.3 at 1]) and a Memorandum of Points and Authorities in Support of Motion for

Review, filed on June 29, 2005 (*see* ER at 119, Trial Court Docket Number 12 [Plaintiff's Memorandum of Points and Authorities in Support of Motion for Review of Magistrate's June 10, 2005 Ruling at 3]).

No where in any of Plaintiff's submissions has Plaintiff ever alleged that SA Rice violated the Privacy Act merely by making the four statements referenced by Crogan and his counsel and which formed the basis of the Magistrate and District Court's rulings at issue here. Just as Crogan and his counsel misled the Magistrate and District Court, Crogan and his counsel try to mislead this Court when they reiterate this same mischaracterization of Plaintiff's Privacy Act claim. This Court should not, respectfully, be swayed by such erroneous arguments. And certainly, a plaintiff – not a third party witness or his counsel – should be allowed to define the essential nature of his own claim.

The Magistrate found that Plaintiff satisfied the first two prongs of the three-prong test laid out in *Schoen v. Schoen*, 48 F.3d 412 (9<sup>th</sup> Cir. 1995) ("*Schoen II*") and the District Court affirmed that finding. *See* ER at 96, 101-104. The Magistrate's conclusion that Plaintiff failed to satisfy the third prong of the *Schoen II* test was based on the erroneous finding that Plaintiff's Privacy Act claim was centered on the four points erroneously described by Crogan and his counsel. *Id.* at 98. If this Court considers Plaintiff's allegations as he has defined them rather

than as Crogan and his counsel have attempted to mischaracterize them, then it is clear that the Magistrate and District Court's rulings must be reversed and Crogan must be required to testify at deposition and produce the requested documents as this evidence is clearly relevant to an important and indeed crucial issue in the case.

**II. Crogan Has Wholly Failed to Direct this Court to Any Evidence in the Record Demonstrating That Somewhere in the Public Domain Is the Information Disclosed by SA Rice.**

Crogan argues that because limited information about these four assertions was already in the public domain, Plaintiff does not have a viable Privacy Act claim, and, thus, the evidence Plaintiff sought from Crogan could not be clearly relevant to an important issue. *See Appellee Brief at 22, 27-31, 37-39.* Crogan's argument has no merit, however, because Plaintiff's claim is not limited solely to these four factual assertions and, importantly, Crogan has wholly failed to direct this Court to any evidence in the record demonstrating that somewhere in the public domain is information about Plaintiff being subject to a combined total of ten internal investigations. What is more, despite the fact that it is irrelevant that in certain, isolated instances, limited information about individual internal investigations involving Plaintiff may have been placed in the public domain, as the statement by SA Rice that Plaintiff has been the subject of a combined total of

ten internal investigations is the basis for Plaintiff's Privacy Act claim, Crogan has failed to even direct this Court to evidence in the record that somewhere in the public domain is information about Plaintiff being subject to ten individual internal investigations. Indeed, Crogan concedes that he could only locate six such internal investigations referenced in the public domain, falling far short of the ten internal investigations unlawfully disclosed by SA Rice to Crogan.

Likewise, Crogan has wholly failed to direct this Court to any evidence in the record demonstrating that somewhere in the public domain is information about the U.S. Attorney in Chicago closing criminal and civil cases against Salah because Plaintiff had not produced sufficient evidence to support any charges,<sup>1</sup> nor information about Plaintiff, as an FBI agent, maintaining a side business selling baby furniture on the internet.<sup>2</sup> Indeed, Crogan only makes an unelaborated

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<sup>1</sup> In fact, Crogan's own evidence submitted below, ironically two articles written by Crogan himself, demonstrate that Plaintiff refused to disclose publically why the Salah investigation was terminated. *See* SER at 153-159.

<sup>2</sup> Plaintiff's website made no reference to his being an FBI agent, and, in fact, Plaintiff's permission to operate a side business was conditioned on him not disclosing the fact that he is a FBI agent. Plaintiff's request and the FBI's subsequent authorization allowing him to operate a side business are contained in records kept in Plaintiff's personnel file. Thus, when SA Rice disclosed to Crogan that Plaintiff, an FBI agent, operated a side business and directed Crogan to Plaintiff's website, he provided information from Plaintiff's personnel file that had not been previously publically disclosed.

conclusion that this information is in the public domain. *See* Appellee Brief at 22. Crogan makes no effort whatsoever to direct this Court to evidence in the record that establishes that this information could be found in the public domain in June of 2003. Thus, even assuming Crogan is correct that Plaintiff cannot maintain a Privacy Act claim if the information at issue was already in the public domain – an assertion which Plaintiff demonstrated in his initial brief is contrary to law – Crogan must be required to comply with the subpoena because there is no evidence of record demonstrating that the above-referenced information was already in the public domain.

**III. The Information Disclosed by SA Rice Was Not Personal Opinion Simply Based on Personal Observation and Knowledge Independent of Any Protected Record.**

Crogan also argues that SA Rice’s statements to Crogan that Plaintiff “had a poor record as an agent,” that there were a number of agents in Plaintiff’s squad who could provide “adverse information” about Plaintiff, and that Plaintiff “is not to be believed” and is “misguided” are statements of opinion and thus not actionable under the Privacy Act. Crogan’s argument holds no weight because these statements are not statements of opinion but instead statements based on records maintained by the FBI, including the reports of internal investigation to which Plaintiff has been subjected that are contained in Plaintiff’s personnel file.

This Court has clearly stated that the Privacy Act safeguards individuals from the unwarranted use and dissemination of personal information contained in federal agency records as occurred in this case. *See Wilborn v. Dept of Health and Human Servs.*, 49 F.3d 597, 600-01 (9th Cir. 1995). Even SA Rice himself admitted in his deposition in this case that it would be improper to disclose personal information regarding an employee's performance issues to the media. *See* SER at 115.

Crogan's string cite of cases allegedly supporting his argument – all of which are non-binding – are unavailing. *See* Appellees' Brief at 21. Each one of Crogan's cases is distinguishable from the instant case as the information disclosed in his cases was simply based on personal observation and knowledge independent of any protected record, unlike the information disclosed in the instant matter which was based on protected records. Thus, as SA Rice disclosed personal information regarding Plaintiff's performance as an FBI agent that he obtained from FBI files, Plaintiff's claims under the Privacy Act are actionable and Crogan must be made to comply with the subpoena.

**IV. The Fact That Information Is a Matter of Public Domain Is *Not* a Defense to a Privacy Act Claim.**

In Plaintiff's initial brief, he demonstrated that the fact that information is a matter of public domain is *not* a defense to a Privacy Act claim. See Appellant's Brief at 24-31. Plaintiff demonstrated how his position is supported by a straightforward textual analysis of the Privacy Act, as there is no exception to the Privacy Act's unambiguous prohibition on disclosure of information because the information was previously made available to the public, including information made public by the complainant. *Id.* Crogan ignores this unambiguous statutory language and erroneously argues to the contrary. In doing so, Crogan relies upon several distinguishable and unpersuasive cases, some of which do not even address the Privacy Act at all.

For instance, Crogan relies upon *Ash v. United States*, 608 F.2d 178 (5th Cir. 1979). *Ash* is not on point because it involved the publication within a military chain of command of information from a nonjudicial proceeding open to all personnel in the chain of command, not a disclosure of information from records maintained within a system of records. Crogan also relies upon *Federal Deposit Insurance Corp. v. Dye*, 642 F.2d 833 (5<sup>th</sup> Cir. 1981), *Krowitz v. Dep't of Agric.*, 641 F. Supp. 1536 (W.D. Mich. 1986), *King v. Califano*, 471 F. Supp. 180

(D.D.C. 1979), and *Pellerin v. Veteran's Admin.*, 790 F.3d 1553 (11<sup>th</sup> Cir. 1986).

Among other obvious grounds on which these cases are readily distinguishable, all four cases stand for the proposition that the disclosure of information to an individual who was already aware of the information being disclosed does not constitute a violation of the Privacy Act. Crogan has not demonstrated this to be the case here. Indeed, Crogan has wholly failed to direct this Court to any evidence in the record demonstrating that he was aware of any of the specific disclosures that form the basis of Plaintiff's Privacy Act lawsuit before SA Rice disclosed the information to him.<sup>3</sup> Lastly, Crogan relies upon *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), *Paul v. Davis*, 424 U.S. 693 (1976), *William E. Schrambling Accountancy Corp. v. U.S.*, 937 F.2d 1485 (9<sup>th</sup> Cir. 1991), *Gates v. Discovery Communications, Inc.*, 34 Cal. 4<sup>th</sup> 679 (2004), and *Sipple v. Chronicle Publishing Co.*, 154 Cal. App. 3d 1040 (1984). These cases are inapposite because they are not even Privacy Act cases. Thus, Crogan's arguments should be rejected and he must be made to comply with the subpoena.

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<sup>3</sup> Of course Crogan could not do so because, as Plaintiff clearly demonstrated in Section II above, the information disclosed by SA Rice to Crogan that forms the basis of Plaintiff's Privacy Act lawsuit was not in the public domain prior to SA Rice unlawfully disclosing the information to Crogan in late June or early July 2003.

**V. Crogan's Assertion of the Journalist's Qualified First Amendment Privilege Must Yield to Plaintiff's Overriding Need for Crogan's Testimony and Documents.**

In a last ditch effort, Crogan argues that the balancing of the interests dictate that he should not have to comply with Plaintiff's subpoena. *See* Appellee's Brief at 39-42. Crogan's argument has no merit. In striking a balance between a litigant's right to discovery and a journalist's qualified privilege, the "absence of confidentiality" is "a factor that diminishes the journalist's, and the public's, interest in non-disclosure." *Schoen v. Schoen*, 5 F.3d 1289 (9th Cir. 1993) ("*Schoen I*"). There is no concern here about protecting the identity of a confidential source or protecting the confidentiality of information provided by a source.

The identity of Crogan's source – SA Rice – is both well known and undisputed. SA Rice readily admitted that he spoke with Crogan in late June or early July, 2003, and Crogan told both Schippers and Plaintiff during this same time period that SA Rice was his source. *See* ER at 49-74 (Rice Deposition), 29-46 (Schippers Deposition), 7-23 (Wright Deposition), and 24-26 (July 8, 2003 Letter from David P. Schippers to Thomas Knier).

Nor can Crogan validly claim an interest in maintaining the confidentiality of information provided by SA Rice. Crogan's conversation with SA Rice was not

“off the record,” as Schippers’ July 8, 2003 letter confirms. *See* ER at 24-26 (July 8, 2003 Letter from David P. Schippers to Thomas Knier). SA Rice also readily admitted speaking to Crogan and telling him that Plaintiff was then under internal investigation by the FBI. *See* ER at 74 (Rice Deposition). In fact, far from expecting confidentiality, it appears that SA Rice expected Crogan to publish the unlawfully disclosed, Privacy Act-protected information about Plaintiff. *See* ER at 74, 75 (Rice Deposition). Moreover, in addition to disclosing SA Rice’s identity to Schippers and Plaintiff, Crogan readily disclosed the substance of his conversation with SA Rice to Schippers and Plaintiff. *See* ER at 29-46 (Schippers Deposition), 7-23 (Wright Deposition), and 24-26 (July 8, 2003 Letter from David P. Schippers to Thomas Knier). Thus, nothing about the conversation between SA Rice and Crogan was confidential – except, of course, the Privacy Act-protected information about Plaintiff that SA Rice disclosed unlawfully. The absence of any confidentiality weighs heavily in favor of compelling Crogan to testify.

Other factors weigh in favor of compelling Crogan to testify about his conversations with SA Rice, Schippers, and Plaintiff in late June or early July 2003. The fact that SA Rice was engaging in unlawful conduct, *i.e.*, violation of the Privacy Act, and that Crogan’s assertion of the journalist’s qualified First Amendment privilege would conceal SA Rice’s alleged violations, weigh heavily

in Plaintiff's favor. Sustaining a journalist's qualified First Amendment privilege is questionable at best under such circumstances, as it effectively operates to protect a wrongdoer who has violated the law.

For example, in *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003), *aff'd*, 413 F.3d 53 (D.C. Cir. 2005),<sup>4</sup> the court was confronted with an issue somewhat similar to the issue presented here. In *Lee*, accused Chinese spy Wen Ho Lee sued several federal agencies, including the FBI, alleging that the agencies had disclosed information pertaining to him by name, without obtaining his consent or assuring its accuracy, to persons not authorized to receive such information, namely, several reporters. The information at issue was contained in records amassed by the agencies in the course of their investigation of the theft and transfer of classified U.S. nuclear weapons secrets from the Los Alamos nuclear weapons laboratory to the Peoples Republic of China. These records pointed to Lee as a prime suspect. After attempting to discover the identity(ies) of the reporters' source(s) through alternative means, Lee sought to depose the

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<sup>4</sup> The U.S. Court of Appeals for the District of Columbia Circuit ("DC Circuit") affirmed the district court's contempt finding as to four of the five journalists who refused to testify. The DC Circuit found insufficient evidence to uphold the contempt finding against a fifth journalist because the evidence showed that he never refused to answer questions covered by the discovery order. *See Lee*, 413 F.3d at 63, 64.

reporters themselves. The reporters asserted the journalist's qualified First Amendment privilege and moved to quash.

The court in *Lee* held that the qualified First Amendment privilege must yield to Lee's interest in having evidence available for his use at trial. 287 F. Supp. 2d at 24. The court declared:

It does not detract from the importance of the First Amendment principle at stake to conclude that, in the instant case at least, the reasons for concealing from the plaintiff possible governmental complicity (if such there were) in the revelation to the news media of private, personal, and acutely hurtful information about Dr. Lee do not outweigh Dr. Lee's interest in having the evidence for use at trial.

*Id.*

The instant case is even more compelling than *Lee* because the identity of the source of the information at issue – SA Rice – is known and undisputed. Rather than disclosure of the identity of a confidential source, what Plaintiff seeks to compel from Crogan – the only witness to SA Rice's unlawful disclosures – is direct, admissible evidence confirming the accuracy of what Crogan told Schippers and Plaintiff about his conversation with SA Rice. The First Amendment should not be permitted to shield SA Rice from confirmation of his complicity in the Privacy Act violations in this case, especially in this instance, where SA Rice's identity is known, the substance of what he conveyed to Crogan

is known, and all Plaintiff requires is for Crogan to provide direct, admissible evidence confirming the accuracy of what he already has stated to both Schippers and Plaintiff.

In this same regard, Justice White, writing for the majority in *Branzburg v. Hayes*, 408 U.S. 665, 691-92 (1972), noted:

It would be frivolous to assert – and no one does in these cases – that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news source to violate valid criminal laws . . . Thus we cannot seriously entertain the notion that the First Amendment protects a newsman’s agreement to conceal the criminal conduct of his source or evidence thereof . . . .

Likewise, the journalist’s qualified First Amendment privilege cannot be used by Crogan to conceal a violation of the Privacy Act, which carries criminal, in addition to civil, penalties. *See* 5 U.S.C. § 552a(g), (i).

The fact that requiring Crogan to testify will aid in the enforcement of a federal statute also weighs in favor of ordering Crogan to testify. In *Branzburg*, Justice White also noted that “[i]t is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.” 408 U.S. at 682. Plaintiff’s discovery of the information disclosed by SA Rice to Crogan certainly will aid in the enforcement of a federal statute of general applicability, namely, the

Privacy Act. It will enable Plaintiff to hold the government accountable for disseminating Privacy Act-protected information about him.

Finally, the fact that Crogan obviously possesses Privacy Act-protected information that he lawfully is not entitled to possess also weighs in favor of overruling Crogan's assertion of the journalist's qualified First Amendment privilege. In *Branzburg*, Justice White further noted that "[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." 408 U.S. at 684. Similarly, the court in *Lee* declared that "[i]nformation subject to the Privacy Act is *ipso facto* not available to the public generally; consequently, a reporter who possesses such information does so without a right, whether or not he came by it unlawfully." 287 F. Supp. 2d at 24. Crogan must, respectfully, be compelled to comply with Plaintiff's subpoena.<sup>5</sup>

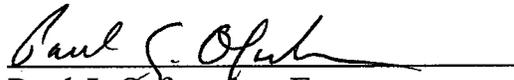
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<sup>5</sup> In a footnote, Crogan argues in the alternative that his testimony would be cumulative, despite both the Magistrate and District Court finding otherwise. *See* Appellee's Brief at 42 n. 11. To the contrary, Crogan's testimony would not be cumulative as there is a direct and significant dispute of fact between the deposition testimony of Schippers and Plaintiff, as well as Schippers' contemporaneous letter to SAC Knier, on the one hand, and SA Rice's deposition testimony on the other hand, concerning what information SA Rice told Crogan about the same conversation. For instance, although Schippers and Plaintiff testified that Crogan told them that SA Rice informed Crogan that Plaintiff had been the subject of ten internal FBI investigations and that Plaintiff was removed from the Salah investigation because he failed to perform, SA Rice denied in deposition telling Crogan any of this

**CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests that the Court reverse the Magistrate and District Court's rulings and grant Plaintiff's motion to compel Crogan to testify and produce documents pursuant to Plaintiff's subpoena.

Respectfully Submitted,

  
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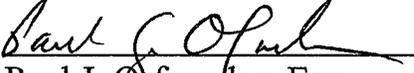
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information. See ER at 29-46 (Schippers Deposition), 7-23 (Wright Deposition), 24-26 (July 8, 2003 Letter from David P. Schippers to Thomas Knier), and 69, 70, 73, 74, 78 (Rice Deposition).

**CERTIFICATE OF COMPLIANCE PURSUANT TO  
F.R.APP. 32(a)(7)(c) AND CIRCUIT RULE 32-1  
FOR CASE NUMBER 05-56398**

I certify that pursuant to Fed.R.App.P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached **Reply Brief of Appellant** is proportionally spaced, has a typeface of 14 points or more and contains 4,987 words.

12/22/05  
Date

  
Paul J. Orfanedes, Esq.

**CERTIFICATE OF SERVICE**

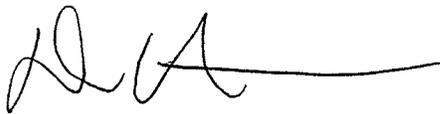
I hereby certify that on December 22, 2005 two true and correct copies of the foregoing **Reply Brief of Appellant** were served, via first class U.S. mail, postage prepaid, on the following:

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I hereby certify that on December 22, 2005 one true and correct courtesy copy of the foregoing **Reply Brief of Appellant** was served, via first class U.S. mail, postage prepaid, on the following:

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