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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
DAVID NEWLAND (1),  
JAMES DOLAN (4),  
BRUCE LOVELESS (5),  
DAVID LAUSMAN (6),  
STEPHEN SHEDD (7), and  
MARIO HERRERA (8),  
  
Defendants.

Case No.: 17CR0623-JLS  
  
**ORDER DENYING MOTION TO QUASH  
SUBPOENA**

Pending before the Court is Non-Party Movants Audiation Inc. and Project Brazen Pte. Ltd.’s (“Movants”) Motion to Quash Defendant’s Subpoena to Produce Documents, Information, or Objects in a Criminal Case (ECF 635-2). The Court has considered the motion, Defendants’ joint response in opposition, Movants’ reply and the applicable legal authorities. For the reasons set forth below, the Court will deny the motion to quash the subpoena.

**Background**

Defendants Newland, Dolan, Loveless, Lausman, Shedd, and Herrera are former U.S. Navy officers charged with conspiracy and bribery in connection with a ship husbanding company, Glenn Defense Marine Asia (“GDMA”), owned by Leonard Glenn Francis (“Francis”). The indictment in this case is voluminous, but loosely described, Defendants are charged with using their official positions in the Navy to advance GDMA’s

1 ship husbanding business in exchange for benefits provided by Francis. A jury trial is  
2 scheduled to begin on February 7, 2022.

3 Francis is charged elsewhere and in 2015 pled guilty to conspiracy to commit  
4 bribery, bribery, and conspiracy to defraud the United States. Francis has not been  
5 sentenced yet and it is publicly known that he is cooperating with the government with  
6 respect to the charges in the instant case. The indictment in this case, filed more than two  
7 years after Francis' guilty plea, is presumably based, at least in significant part, on  
8 information provided to the government by Francis.

9 Movant Project Brazen is the owner and creator of a podcast series investigating the  
10 corruption scandal in the U.S. Navy carried out by Francis in the years leading up to  
11 Francis' 2013 arrest. Mot. to Quash, ECF 635 at 2. Movant Audiation is the production  
12 studio hired by Project Brazen to produce and "shop" the podcast for distribution. *Id.* at 3.  
13 According to Movants, Francis was interviewed by the podcast host, Thomas Wright, a  
14 reporter and co-founder of Project Brazen, for over 20 hours. *Id.* at 2. The first two  
15 episodes of the podcast were released online on October 5, 2021, and the next seven  
16 episodes were released weekly thereafter. *Id.* at 3.

17 After the release of several episodes of the podcast, Defendant Dolan, joined by the  
18 remaining defendants, filed a motion to compel the production of copies of the recordings  
19 of the Francis interviews, or in the alternative, for a pretrial subpoena *duces tecum*  
20 compelling their production. ECF 597. The government responded that neither the United  
21 States nor Francis possess a copy of the recordings. ECF 612 at 1. On November 18, 2021,  
22 this Court granted Defendants' request for a Rule 17(c) subpoena, finding that Defendants  
23 demonstrated that the *Nixon*<sup>1</sup> factors of relevancy, admissibility and specificity weighed in  
24 favor of pretrial production of the material. Movants' motion to quash the subpoena  
25 followed.

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28 <sup>1</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

## Analysis

1  
2 Movants contend that the First Amendment qualified privilege that protects  
3 journalists and media organizations applies to the interview recordings sought by  
4 Defendants and that Defendants' burden to overcome the privilege cannot be established.  
5 Defendants respond that Movants have waived any First Amendment privilege and, if not  
6 waived, that the privilege does not bar production of the materials in this case.

7 As an initial matter, the Court finds that the interview recordings fall within the  
8 qualified journalist's privilege, this conclusion is not disputed between the parties.  
9 Defendants contend, however, that Movants have waived any privilege. Defendants  
10 identify several facts as supporting a finding of an implied waiver: several hours of the  
11 interviews have already been broadcast; Mr. Wright, the podcast narrator, has revealed  
12 much of the remaining content by speaking for Francis; Mr. Wright was exceedingly  
13 credulous of Francis' claims and the podcasts were scheduled to air in the weeks trial was  
14 scheduled to commence to "ramp-up the drama"; the content of the podcasts is biased  
15 towards the government's trial case; and, in light of Francis' cooperation agreement and  
16 ability to record the interviews himself, Mr. Wright could not have reasonably believed the  
17 recordings would remain privileged.

18 Defendants point to *Ayala v. Ayers*, 668 F. Supp. 2d 1248 (S.D. Cal. 2009) in support  
19 of their waiver claim. In *Ayala*, the court found an implied waiver of the journalist's  
20 privilege where a manuscript was provided by the author to a habeas petitioner's counsel  
21 and the author admitted that he was biased in favor of the petitioner. The court found that  
22 it would be unfair and improper to permit invocation of the journalist's privilege with  
23 respect to the same material in response to the respondent's subpoena for production. *Id.*  
24 at 1250. The *Ayala* court identified two other cases in which a waiver of the journalist's  
25 privilege was implied in cases of selective disclosure. In this case, however, there is no  
26 evidence that Movants have disclosed any portion of the interviews to the government or  
27 its agents. While the timing of the podcast could have been designed to gin up interest,  
28 there is no evidence that the release was meant to confer a benefit to one side over the

1 other, or that one litigant has had access to materials that the other hasn't. Thus, the fairness  
2 interests at play in the cases relied upon by Defendants are simply not applicable here.  
3 Accordingly, the Court declines to find an implied waiver of Movant's First Amendment  
4 qualified privilege.

5 The Court next turns to the question of whether Defendants have made a showing  
6 sufficient to breach the qualified privilege. Interpreting *Branzburg v. Hays*, 408 U.S. 665  
7 (1972), the Ninth Circuit has recognized a "partial First Amendment shield" that protects  
8 journalists against compelled disclosure in all judicial proceedings, civil and criminal alike.  
9 *Farr v. Pitchess*, 522 F.2d 434, 467 (9th Cir. 1975). The process of deciding whether the  
10 privilege is overcome requires that "the claimed First Amendment privilege and the  
11 opposing need for disclosure be judicially weighed in light of the surrounding facts and a  
12 balance struck to determine where lies the paramount interest." *Shoen v. Shoen*, 5 F.3d  
13 1289, 1292-93, (9th Cir. 1993) (quoting *Farr*, 522 F.2d at 468) ("*Shoen I*").

14 Although the precise legal standard applicable to the production of non-confidential  
15 material from a news organization for use in a criminal case is a subject of debate between  
16 the parties, the Court finds that the subpoena issued in this case is enforceable even under  
17 the more stringent test advanced by the movants. Movants contend that "[u]nder  
18 controlling Ninth Circuit law, a litigant may obtain information falling within the scope  
19 of the First Amendment qualified privilege "**only** upon a showing that the requested  
20 material is (1) unavailable despite exhaustion of all reasonable alternative sources; (2)  
21 noncumulative; and (3) clearly relevant to an important issue in the case." Mot. to Quash,  
22 ECF 635 at 7, quoting *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995) ("*Shoen II*").<sup>2</sup>

23 Here, Defendants have satisfied all three requirements. The Court will discuss the  
24 third factor first as the relevancy of the material helps provides context for the remaining  
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27 <sup>2</sup> Defendants contend that *Schoen II* is only applicable to civil litigation and that, under *Branzburg*, the  
28 Court should not permit Movants to withhold non-confidential material. Alternatively, Defendants argue  
that the Court should apply the balancing test set forth in *Farr*.

1 analysis. In their opposition, Defendants set forth several portions of the podcast transcript  
2 that are relevant to their case. These statements suggest that Francis may have received  
3 undisclosed benefits from the government in exchange for his cooperation, that he may be  
4 misrepresenting his medical condition to the Court, that he knowingly violated his plea  
5 agreement, and that he withheld evidence from the government. While these statements  
6 alone are relevant, Defendants maintain that the complete recordings are necessary to  
7 ensure that the statements in the podcast are not misleading and as counter evidence should  
8 Francis falsely claim at trial that his published statements were presented out of context.  
9 The Court agrees.

10         Given Francis' central role as a cooperating witness in this case, the Court finds that  
11 the evidence sought by Defendants is clearly relevant to an important issue in this case.  
12 Although the defendants charged in this case have not been expressly named by Francis in  
13 the podcast, the government has alleged a vast conspiracy involving Francis, these  
14 defendants and co-conspirators not charged in the Indictment. *See, e.g., Gov't Mot. in*  
15 *Limine 23*, ECF 528, at 49. This conspiracy is the topic of the podcast, and Francis has  
16 made statements, personally and vis-à-vis the narrator, which appear to call into question  
17 his credibility, motive and bias. The Sixth Amendment's confrontation clause guarantees  
18 Defendants the right to cross-examination of witnesses, which includes testing the witness'  
19 perceptions and memory as well as impeaching and discrediting the witness. *Davis v.*  
20 *Alaska*, 415 U.S. 308, 316 (1974). Francis' believability as a witness will be a crucial  
21 determination for the jury as he is the orchestrator and alleged briber of each of the  
22 defendants and was closely connected with all of the activities charged in the indictment.  
23 While the Court acknowledges that impeachment evidence may not always be sufficient to  
24 overcome the reporter's privilege, in this case Francis' critical role in the prosecution  
25 requires that Defendants be able to effectively cross-examine him in order to ensure a fair  
26 trial. Therefore, the Court concludes that the requested materials are clearly relevant to an  
27 important issue in the case.  
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1 With respect to the requirement of unavailability from other sources, the Court notes  
2 that Defendants brought a motion to compel production of the requested material and were  
3 informed that neither the United States nor Francis possess a copy of the recordings. ECF  
4 612 at 1. Movants contend that Francis himself is an alternative source of the information  
5 revealed during the podcasts, however, unlike the civil litigation context of the authorities  
6 cited by Movants, in this case Francis is not available to the defendants for a deposition.  
7 Furthermore, as Defendants point out, “recorded verbatim statements are, “[b]y their  
8 nature, ...not obtainable from any other source.”” Def.’s Resp., ECF 640 at 20, quoting  
9 *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980). The Court finds this  
10 concept especially important in this case, given that some of Francis’ published statements  
11 during the podcasts do appear to call into question his veracity. After reviewing the  
12 transcripts of the podcasts, the Court has no confidence that statements made by Francis to  
13 the reporter would be capable of being fully preserved by questioning Francis a second  
14 time—particularly when that second time would involve an entirely different motivation  
15 for Francis, his trial testimony pursuant to a plea agreement as a cooperating government  
16 witness. Thus, the Court is persuaded that Defendants have demonstrated that the  
17 requested material is unavailable from reasonable alternative sources.

18 Finally, the Court is persuaded that the requested material is not cumulative.  
19 Movants contend that the interview recordings are cumulative because they will merely  
20 repeat Francis’s testimony. However, Francis’ trial testimony, the testimony of the  
21 government’s “star” witness as Francis proclaims himself in the podcast, will not likely  
22 cover the facts that he willfully disregarded what he perceives to be the terms of plea  
23 agreement, withheld evidence from the government, and potentially lied to the Court and  
24 received benefits for his testimony. The podcast recordings are the exclusive evidence of  
25 these statements. The importance of Francis’ recorded statements is that they tend to  
26 establish bias and cast doubt on his credibility with respect to what is anticipated to be his  
27 trial testimony. In this regard, the material is unique.  
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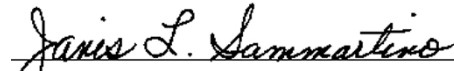
1 In addition to these factors, the Court has considered the Movants' interests in  
2 protecting the materials at issue, including the threat to the vitality of the newsgathering  
3 process resulting from court-compelled disclosure,<sup>3</sup> however the Court is persuaded that  
4 Defendant's Fifth Amendment due process and Sixth Amendment confrontation rights are  
5 paramount. Accordingly, the Court finds that Movants' privilege in this matter must give  
6 way to the needs of the defendants.

7 **Conclusion**

8 For the reasons set forth above, the Court finds that Defendants have demonstrated  
9 that the subpoenaed material is unavailable despite exhaustion of all reasonable alternative  
10 sources, noncumulative, and clearly relevant to an important issue in the case.  
11 Accordingly, Movants' Motion to Quash Defendant's Subpoena is **Denied**. Movants shall  
12 comply with the subpoena within one week of the date this Order is entered.

13 IT IS SO ORDERED.

14 Dated: December 21, 2021

15   
16 Hon. Janis L. Sammartino  
17 United States District Judge  
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25 <sup>3</sup> In *Shoen II* the Court recognized several interests in the determination of whether the journalist's  
26 privilege applies in the absence of confidentiality: "[t]he threat of administrative and judicial intrusion  
27 into the newsgathering and editorial process; the disadvantage of a journalist appearing to be an  
28 investigative arm of the judicial system or a research tool of government or of a private party; the  
disincentive to compile and preserve non-broadcast material; and the burden on journalists' time and  
resources in responding to subpoenas." 48 F.3d 412 at 416, quoting *Shoen I*, 5 F.3d 1289 (9th Cir. 1993)  
(*"Shoen I"*).