

1 Mark J. MacDougall, *pro hac vice*
2 W. Randolph Teslik, P.C., *pro hac vice*
3 Andrew J. Dober, Bar No. 229657
4 AKIN GUMP STRAUSS HAUER & FELD LLP
5 1333 New Hampshire Avenue, NW
6 Washington, DC 20036
7 (202) 887-4000

8 Attorneys for Defendant Kyle Dustin Foggo

9 UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 KYLE DUSTIN FOGGO (1),
15 aka "Dusty" Foggo,

16 BRENT ROGER WILKES (2),

17 Defendants.

Case No. 07-cr-0329-LAB

**DEFENDANT'S NOTICE OF MOTION
AND MOTION TO MODIFY THE
PROTECTIVE ORDER ENTERED
PURSUANT TO THE CLASSIFIED
INFORMATION PROCEDURES ACT**

Date: TBD
Time: TBD
Place: Courtroom 9 (Second Floor)
Judge: Hon. Larry Alan Burns

18 **TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

19 Defendant Kyle Dustin Foggo hereby moves this Court to modify the Protective Order
20 issued March 5, 2007. Defendants did not consent to the government's motion and assert that
21 certain provisions of the Protective Order (*i.e.*, the prohibition on discussing classified
22 information over the telephone) should apply to the prosecution as well as the defense.
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1 **I. INTRODUCTION**

2 Defendant Kyle Dustin Foggo respectfully petitions this court to modify its March 5,
3 2007 protective order, pursuant to the provisions of the Classified Information Procedures Act
4 (CIPA). Contrary to the representation made by the United States in its draft protective order
5 submitted to the court via email, and as Exhibit B to the motion, Defendant Foggo did not join
6 the government’s motion for a protective order and section 3 scheduling conference under
7 CIPA.¹ To be sure, Mr. Foggo does not object to the entry of a protective order in this case. The
8 primary dispute between the government and counsel for Mr. Foggo is whether certain parts of
9 the protective order should apply to both the prosecution and the defense. The prosecution flatly
10 refuses to be bound by any part of the very protective order they drafted.

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12 National security concerns, as well as equitable considerations, weigh in favor of
13 applying certain provisions of the protective order to the prosecution. Current events leave no
14 doubt that members of the executive branch are capable of disclosing highly classified
15 information to the public, and the press in particular. The events and publicity leading up to the
16 indictment in this case demonstrate the ability of “unnamed government officials” to leak
17 classified information, grand jury proceedings and other sensitive internal government
18 information. It is preposterous for the government to assert because “it is [the executive] branch
19 of the government that makes the decisions regarding the designation and handling of classified
20 information.”

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23 ¹ The government’s “motion” accurately represented that there was a limited dispute over
24 the scope and terms of the protective order. *See* Gov. Mot. at 9-11. The government’s proposed
25 “protective order,” submitted to the court via email and pursuant to section 2(h) of the Electronic
26 Case Filing Administrative Policies and Procedures Manual of the United States District Court
for the Southern District of California, however, incorrectly stated that the parties had filed a
“joint motion” for entry of a protective order.

1 information” that it is somehow exempt from judicial oversight. *See* Gov. Mot. at 10. It is
2 equally absurd to suggest that the executive branch’s use of classified information to preserve
3 “our national security” renders them unaccountable to this Court. The government lawyers, like
4 defense counsel, are officers and servants of the Court and it is before the judicial branch that
5 crimes relating to the inappropriate disclosure of classified information are tried.

6 **II. BACKGROUND AND OVERVIEW OF DEFENDANT’S PROPOSED ORDER**

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8 On March 1, 2007, the government filed a motion requesting that this Court: (1) hold a
9 pretrial conference pursuant to section 2 of the Classified Information Procedures Act (“CIPA”),
10 18 U.S.C. App. 3 § 1-16, to discuss issues regarding the handling, discovery and disclosure of
11 classified information and (2) enter a protective order under section 3 of CIPA to protect against
12 the unauthorized disclosure of classified information. *See* Government’s Motion Seeking
13 Pretrial Conference and Protective Order Pursuant to the Classified Information Procedures Act
14 (March 1 2007) (Docket entry 17) (“Gov. Mot.”). At the time of the filing, and pursuant to the
15 Court’s electronic filing guidelines, the government submitted a proposed order via email. The
16 proposed order incorrectly referred to the government’s motion as a “joint motion” by the
17 government and the defendants. Moreover, the same proposed order, with the “joint motion”
18 language, was filed with the Court as Exhibit B to the government’s motion. Defense counsel
19 did not consent to the filing of a joint motion or the entry of the protective order sought by the
20 government because certain provisions of any protective order, aimed at safeguarding classified
21 information, should apply to all parties. Defense counsel raised these concerns with the
22 government prior to the filing of the government’s motion, but the government declined to
23 modify the order. Defense counsel’s proposed protective order, attached to this filing as Exhibit
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1 A, is virtually identical to the government’s motion except insofar as it applies bilateral, as
 2 opposed to unilateral, conditions on the parties. *See* Proposed Protective Order (attached hereto
 3 as Exhibit A).

4 Defendant’s proposed protective order maintains the same stringent limitations on
 5 discussion, preparation and dissemination of classified information as the government’s
 6 proposed order, but makes certain provisions of the protective order equally applicable to the
 7 government (*i.e.*, no discussion of classified information over unsecured telephone lines), as set
 8 forth in the chart below.
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10 In summary, defendant Foggo’s proposed protective order would require that (1) both
 11 parties submit pleadings with potentially classified information to the Court Security Officer;
 12 (2) all materials containing classified information or potentially classified information be
 13 prepared in a secure area; (3) discussions of classified information not occur over unsecured
 14 telephone lines; and (4) defense counsel receive notice of any change in classification status.
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Section	Text of Current Protective Order	Text of Defendant’s Proposed Protective Order
9	Filing of Papers by Defendants: ... Any pleading or other document filed by the defendants which defense counsel knows or has reason to believe is classified, or is unsure of whether the document contains classified information, shall be filed under seal with the Court Security Officer or his designee.” ... All portions of all papers filed by the defendants that do not contain classified information shall be unsealed by the Court Security Officer and placed in the public record. The Court Security Office shall deliver under seal to the Court and counsel for the United States any pleading or document to be filed by the defendants that contains classified information....	Filing of Papers by Either Party: ... Any pleading or other document filed by either party which either party knows or has reason to believe is classified, or is unsure of whether the document contains classified information, shall be filed under seal with the Court Security Officer or his designee.” ... All portions of all papers filed by either party that do not contain classified information shall be unsealed by the Court Security Officer and placed in the public record. The Court Security Officer shall deliver under seal to the Court and counsel for opposing party any pleading or document to be filed that contains classified information ...
10	Filing of papers by the United States: Those portions of pleadings or documents filed by the United States that contain classified information shall be filed under seal with the Court through the Court Security Officer. Such pleadings and	Deleted, as section 9 would apply to both parties.

Section	Text of Current Protective Order	Text of Defendant's Proposed Protective Order
	documents shall be marked, "Filed Under Seal with the Court Security Officer." The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing.	
13(c)	All notes and documents prepared by the defense (including, without limitation, pleadings or other documents intended for filing with the Court) that do or may contain classified information must be prepared in a secure area on word processing equipment approved by the Court Security Officer. All such documents and any associated materials (such as notes, drafts, copies, typewriter ribbons, magnetic recordings, exhibits) containing classified information shall be maintained in the secure area unless and until the Court Security Officer determines that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to counsel for the United States;	[Now § 12(c)]: Same as current order, with the following sentence added at the end of the section: " All notes and documents prepared by the prosecution team (including, without limitation, pleadings or other documents intended for filing with the Court) that do or may contain classified information must be prepared in a secure area on word processing equipment approved either by the Court Security Officer or the government executive branch agency with original classification authority for the information potentially at risk.
13(e)	The defense shall discuss classified information only with other cleared persons and only in the secure area or in an area authorized by the Court Security Officer.	[Now § 12(e)]: Neither the defense nor the prosecution shall discuss classified information except with other cleared persons and only in a secure area or in an area authorized by the Court Security Officer.
13(g)	The defense shall not discuss classified information over any standard commercial telephone instrument or office intercommunication systems, including but not limited to the Internet, or in the presence of any person who has not been granted access by the Court to classified information.	[Now § 12(g)]: Neither the defense nor the prosecution shall discuss classified information over any standard commercial telephone instrument or office intercommunication systems, including but not limited to the Internet, or in the presence of any person who has not been granted access by the Court to classified information.
13(h)	Any documents written by the defense that do or may contain classified information shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have received an appropriate approval for access to the classified information.	[Now § 12(h)]: Any documents written by the defense or the prosecution that do or may contain classified information shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have received an appropriate approval for access to the classified information.
13(i)	If counsel for the government advises defense counsel that certain classified information or documents may not be disclosed to the defendants, then defense counsel shall not disclose such information or documents to the defendants without prior concurrence of counsel for the government or, absent such concurrence, approval of the Court. Counsel for the government shall be given an opportunity to be heard in response to any defense request for the disclosure to the defendants of such classified information.	[Now § 12(i)]: If counsel for the government desires to disclose certain classified information to defense counsel, and to prohibit defense counsel from disclosing such information to the defendants, counsel for the government shall obtain prior approval of the court. Counsel for the defense shall be given an opportunity to be heard in response to any prosecution request to limit the disclosure of classified information to defense counsel.

Section	Text of Current Protective Order	Text of Defendant's Proposed Protective Order
12(j)	Not included	If the original classification authority alters the status of any classified information or documents (<i>i.e.</i> declassifies entirely or changes from top secret to secret), that relate, in whole or in part, to the investigation or prosecution of this case, counsel for the government shall promptly notify defense counsel of any such change.

III. CERTAIN PROVISIONS OF THE PROTECTIVE ORDER SHOULD APPLY TO ALL PARTIES

A. Government Officials Are Fully Capable of Disclosing Confidential and Classified Information to Outside Parties

History is filled with examples of prominent government officials leaking sensitive, often times classified, information to outside parties. The investigation leading up to the indictment was replete with leaks of sensitive information. On February 1, 2007, two weeks before the indictments against Mr. Foggo and Mr. Wilkes were announced, the Associated Press published an article quoting two unnamed "government officials" saying that charges of honest services fraud and conspiracy against Mr. Foggo and Mr. Wilkes were going to be presented to the grand jury within weeks. *See Charges Near in Calif. Bribery Case*, Associated Press, Feb. 1, 2007, available at <http://www.citizensforethics.org/press/pressclip.php?view=5053> (Exhibit B). The officials spoke on the condition of anonymity because they knew that "grand jury proceedings are secret." *Id.* Rule 6(e) imposes strict secrecy requirements on grand jury deliberations. On February 6, 2007, the Associated Press published an article about the so-called "CIA water contract" purporting to provide detailed, classified information about the contract. *See AP Enterprise: Iraq Water Deal Illuminates Murky World of Secret Contracting*, Associated Press, Feb. 6, 2007, available at <http://www.signonsandiego.com/news/nation/20070206-1100-cia-corruptionprobe.html> (Exhibit C). According to the article, "[t]hose officials and others spoke on

1 condition that they not be identified because the charges have not been finalized and because
2 CIA contracting is classified.” *Id.*² On January 9, 2007, the Wall Street Journal published an
3 article detailing purported tensions between the CIA and the US Attorney’s Office over access to
4 classified documents in this investigation. *See CIA Digs in Its Heels: Wrangling Stalls U.S.*
5 *Probe*, Wall St. J., Jan. 9, 2007 at A4 (Exhibit D). The article cited to “those familiar with” or
6 “close to” the investigation on numerous occasions, an obvious reference to government officials
7 as the article was focused on an alleged intra-agency conflict to which only a handful of
8 government officials would have been privy. On May 8, 2006, Newsweek ran an article filled
9 with reported tales of squabbles within the intelligence community and other highly sensitive
10 information, if true. *See Changing the Guard: CIA: As Hayden Named, Agency’s No. 3 Leaves*,
11 Newsweek Web Exclusive, May 8, 2006, available at
12 <http://www.msnbc.msn.com/id/12689791/site/newsweek/> (Exhibit E).

14 **B. The Government’s Argument Against Exemption From The Protective Order Are**
15 **Misplaced**

16 It will be understood that if, in the opinion of the trial judge, it is or should become
17 necessary to reveal the secrets to others, it will rest in the judge’s discretion to determine
18 whether, to whom, and under what precautions, the revelations should be made.

19 *E.I. DuPont De Nemours Powder Co. v. Masland*, 244 U.S. 100, 103 (1917) (Holmes, J.). Under
20 the Constitution, the “judicial power of the United States must be reposed in an independent
21 Judiciary.” *Id.*, quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50,
22 60 (1982). “The judiciary is concerned with national security no less than the other branches.”
23 *United States v. Smith*, 706 F. Supp. 593, 595 (M.D. Tenn. 1989), *overturned on other grounds*,

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25 ² Defendant Foggo takes no position on the accuracy of any individual statement
26 contained in the article or any other article referenced in this pleading.

1 899 F.2d 564 (6th Cir. 1990). “The independence of the Judiciary must be jealously guarded at
2 all times against efforts by prosecutors to erode its authority.” *United States v. Smith*, 899 F.2d
3 564, 569 (6th Cir. 1990). “A criminal defendant’s right to a fair trial should not be compromised
4 by extrajudicial comments by any lawyer, party, or witness made for public dissemination.”
5 *United States v. Scrushy*, 2004 U.S. DIST. LEXIS 6711, *14 (N.D. Ala. 2004). “A defendant on
6 trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide
7 arena.” *Id.*, quoting *Estes v. Texas*, 381 U.S. 532 (1965).

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9 The government’s motion is replete with references to the importance of safeguarding
10 classified information to protect the national security. Yet, despite the highly classified nature of
11 the information in this case, the government is not willing to abide by the terms of its own
12 protective order. *See* Gov. Mot. at 9-11. Most information related to the CIA is classified at one
13 level or another. Mr. Foggo operated in that environment for 23 years. Virtually everything
14 related to this case—including all communications between Mr. Foggo and defense counsel and
15 all communications between counsel for the government and the CIA and other investigative
16 agencies—will involve classified information. Indeed, until recently, the very fact that Mr.
17 Foggo served overseas for the CIA was classified. The location(s) of Mr. Foggo’s overseas
18 service remain classified, as do the nature and substance of relevant contracts and witnesses.³
19 Under the terms of the current protective order, virtually all communications between defense
20 counsel and Mr. Foggo will have to take place in a “secure area” and defense counsel will be
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24 ³ Defendant does not address the viability of the government’s desire to try this case
25 using fictional places and made up names at this time. Nor does it consider the chilling effect on
26 Mr. Foggo’s right to a fair trial that would be imposed by depriving the jury of the actual facts
behind Mr. Foggo’s 23 years of service to his country.

1 prohibited from having any telephone discussions with Mr. Foggo unless arrangements are made
2 for a secure phone line. The government has deemed these extraordinary restrictions necessary
3 because “[t]he disclosure of the classified information in this case could reasonably be expected
4 to cause serious damage to the national security of the United States.” *See* Gov. Mot. at 5. The
5 government, on the other hand, would not be similarly restricted in its communications with its
6 witnesses and agents, despite the equal harm of disclosure of information in this context.

7
8 Given the primacy of national security concerns, counsel for the government should be
9 forced to play by the same rules it seeks to impose on the defense. Instead, they claim that the
10 possession of Top Secret – SCI clearances somehow alleviates national security concerns and
11 virtually exempts them from regulation by this Court. *See* Gov. Mot. at 9. This is irrelevant to
12 basic, threshold issues such as whether the prosecution should be permitted to discuss classified
13 information over the telephone or whether discussions concerning classified information should
14 be confined to secure areas. Moreover, defense counsel is in the process of obtaining Top Secret
15 – SCI clearances. Under the government’s flawed logic—that the level of security clearance
16 determines the necessity of being bound by a protective order—the protective order should be
17 lifted in its entirety upon defense counsel’s receipt of Top Secret security clearances. This is
18 obviously not a position the government will adopt.

19
20 The government also contends it should be excused from the restrictions placed on
21 defense counsel because it has multiple secure areas approved for the maintenance and review of
22 classified information. *See* Gov. Mot. at 9. Once again, this is irrelevant. Defendant’s proposed
23 protective order would not alter the status of the government’s designated secure areas, but
24 would merely require that the government lawyers confine discussion and maintenance of
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1 classified information, much of which may well pertain to the defendant, to secure areas (and
2 secure phone lines), as is required of the defense under the current protective order.

3 **IV. ATTORNEY'S EYES ONLY DESIGNATIONS SHOULD REQUIRE PRIOR**
4 **COURT APPROVAL**

5 The second item of disagreement with the government over the proposed protective order
6 is a provision regarding the ability of defense counsel to disclose classified information to the
7 defendant. *See* Gov. Proposed Protective Order at § 13(i). Free and open communication
8 between an attorney and client is a bedrock principle of our judicial and legal system. The
9 government's proposed protective order turns that system on its head, by requiring defense
10 counsel to obtain court permission anytime they may need to disclose classified information to
11 their client, after the government has designated it as "attorneys' eyes only." The primary
12 rationale for this approach is convenience for the government. *See* Gov. Mot. at 11. This is
13 unacceptable. Government convenience has never been recognized to outweigh the right of an
14 attorney and the criminally accused to communicate openly and freely, especially where a
15 defendant's liberty is at stake. Section 13(i) of the current protective order should be altered to
16 place the burden on the government to obtain court approval prior to designating a document
17 "attorneys eyes only." The proposed change does not jeopardize the disclosure of classified
18 information. Rather, it strikes a balance between expediency and the rights of the accused.
19

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21 **V. DEFENSE COUNSEL MUST BE ADVISED OF CHANGES IN**
22 **CLASSIFICATION STATUS**

23 The third area in which the proposed protective order is lacking is that it provides no
24 avenue for defense counsel or Mr. Foggo to learn what has been and has not been declassified for
25 this case. Likewise, the proposed protective order does not offer any provision that would allow
26 Mr. Foggo and counsel to learn when a document's classification status has changed. Given the

1 different levels of security clearance in this case, it would be extremely difficult and confusing
2 for Mr. Foggo to know what information he can and cannot share with defense counsel, whether
3 over the telephone or in person, without knowing the specific classification status of relevant
4 information. For example, the fact that Mr. Foggo served overseas for the CIA was classified
5 information until shortly before the indictment. The government apparently declassified that
6 information for purposes of the indictment, but the specific locations where Mr. Foggo served
7 have apparently not been declassified. Defense counsel believes that most contracts at issue in
8 this case were designated secret or top secret but we do not know their current status. Such
9 situations will arise countless times throughout the course of the litigation, and therefore defense
10 counsel believes that it is appropriate that the protective order require the government to advise
11 defense counsel when (a) documents or information pertaining to the litigation is declassified or
12 (b) the classification status of documents or information pertaining to the litigation (*i.e.*, changes
13 from top secret to secret) is changed.
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CONCLUSION

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2 For the foregoing reasons, Mr. Foggo respectfully moves the Court to grant this motion
3 and modify the current protective order to (a) apply to the government as well as the defense;
4 (b) require judicial approval prior to designating a classified document “attorney’s eyes only”;
5 and (c) require the original classification authority (the CIA in most cases) to notify defense
6 counsel upon altering the classification status of information or documents related, in whole or in
7 part, to the issues in this litigation.
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10 Dated: March 15, 2007
11

12 By: /s/ Andrew J. Dober
13 Mark J. MacDougall, *pro hac vice*
14 W. Randolph Teslik, P.C., *pro hac vice*
15 Andrew J. Dober, Bar No. 229657
16 AKIN GUMP STRAUSS HAUER & FELD, LLP
17 1333 New Hampshire Avenue, NW
18 Washington, DC 20036

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26 Attorneys for Defendant Kyle Dustin Foggo
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CERTIFICATE OF SERVICE

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I hereby certify that on this 15th day of March, 2007, that a copy of Defendant' Motion to Reconsider Entry of Protective Order Pursuant to Classified Information Procedures Act was filed electronically, causing notice to be emailed to the following parties:

Phillip Halpern
US Attorney's Office
Federal Office Building
880 Front Street, Room 6293
San Diego, CA 92101-8893

Mark J. Geragos
Geragos and Geragos, PLC
350 South Grand Avenue
39th Floor
Los Angeles, CA 90071

/s/ Andrew Dober
Andrew Dober