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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF DISTRICT OF CALIFORNIA
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11
12 UNITED STATES OF AMERICA,

13 Plaintiffs,

14 v.

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

17 BRENT ROGER WILKES (2),

18 Defendants.
19

Criminal No. 07cr0329-LAB

**DEFENDANT KYLE DUSTIN FOGGO'S
MOTION FOR ENTRY OF
PROTECTIVE ORDERS REGARDING
ATTORNEY-CLIENT
COMMUNICATIONS, *TOUHY*
DISCLOSURES, AND TREATMENT OF
CLASSIFIED INFORMATION**

Date: May 14, 2007
Time: 2:00 p.m.
Ctrm: 9 (Second Floor)
Judge: Larry Alan Burns

20 PLEASE TAKE NOTICE that on May 14, 2007 at 2:00 p.m., or as soon thereafter as counsel
21 may be heard, in Courtroom 9 before the Honorable Larry A. Burns of this Court, located at 940 Front
22 Street, San Diego, California 92101, Defendant Kyle Dustin Foggo will bring for hearing his Motion
23 for Entry of Protective Orders Regarding Attorney-Client Communications, *Touhy* Disclosures, and the
24 Treatment of Classified Information.
25

26 **I. INTRODUCTION**

27 Defendant Foggo seeks entry of three, discrete protective orders, the substance and necessity of
28 which has been discussed at previous hearings:

- 1 1. Protective Order Regarding Communications Between Defendant Foggo and Defense
2 Counsel, attached hereto as Exhibit A.
- 3 2. Protective Order Regarding *Touhy* Disclosures, attached hereto as Exhibit B.
- 4 3. Protective Order Regarding Treatment of Classified Information, attached hereto as
5 Exhibit C.

6 Defense counsel provided copies of the proposed orders to the government on Friday, April 20,
7 2007. The government is considering the proposed orders. Defense counsel will promptly notify the
8 Court should defendant Foggo and the government reach agreement on any of the above-referenced
9 orders prior to the May 14 hearing.

10 **II. THE PROTECTIVE ORDER REGARDING COMMUNICATIONS BETWEEN**
DEFENDANT FOGGO AND DEFENSE COUNSEL

11 Mr. Foggo does not presently have a security clearance and, indeed, cannot obtain one because
12 he is under indictment, yet Mr. Foggo's counsel is in the process of obtaining Top Secret – SCI
13 clearances. Thus, Mr. Foggo's counsel can theoretically be subject to liability for disclosing classified
14 information to an individual lacking a security clearance—namely by having attorney-client
15 conversations with Mr. Foggo. Moreover, Mr. Foggo is under restrictions by virtue of his contract with
16 the Central Intelligence Agency (“CIA”) and it is defense counsel's understanding that there is no
17 carve-out for disclosures made in an attorney-client setting.

18 The first protective order aims to remedy the situation by permitting defense counsel and Mr.
19 Foggo to freely and fully discuss matters which Mr. Foggo or defense counsel deem relevant to the
20 formulation or presentation of the defense in this case, provided that:

- 21 1. No information shall be disclosed by Mr. Foggo to defense counsel that is not within the
22 security clearances obtained by defense counsel; and
- 23 2. Mr. Foggo and his counsel continue to comply with the Court's March 5, 2007
24 protective order.

25 *See* Exh. A.

26 **III. PROTECTIVE ORDER REGARDING *TOUHY* DISCLOSURES**

27 Mr. Foggo spent twenty-three years in the CIA and the conduct at issue pertains to actions
28 taken while working for the CIA. As a result, the vast majority of potential defense witnesses—factual
and character—are current or former CIA officers. Three former CIA officers executed declarations in

1 support of Mr. Foggo's Motion for Severance and Transfer of Venue to the Eastern District of Virginia
2 and another fifteen current CIA officers were referenced in a declaration executed by Mr. Foggo's
3 counsel.

4 The CIA invoked the *Touhy* regulations when Mr. Foggo's counsel asked to talk with current or
5 former CIA officials. See Letter from CIA General Counsel's Office to M. MacDougall, Jan. 11, 2007,
6 attached hereto as Exhibit D. Pursuant to the CIA's *Touhy* regulations, the CIA requests a "reasonably
7 detailed description of the information sought" from any current or former CIA officials. See Exh. D,
8 at 2; 32 C.F.R. § 1905. The information requested, if shared with government personnel involved in
9 the investigation or prosecution of the case against Mr. Foggo, would provide the government with a
10 roadmap to defense counsel's trial preparation as defense counsel would be forced to disclose the
11 identity of virtually every potential witness interviewed and the subject matter of the interviews.

12 The proposed protective order remedies the situation by prohibiting CIA personnel involved in
13 reviewing any *Touhy* disclosure made by Mr. Foggo from sharing the disclosures, including the
14 identity of the individual defense counsel wishes to interview, with any government official involved
15 in the investigation or prosecution of the case against Mr. Foggo. The protective order would also
16 require the government to furnish the court and defense counsel with the names of CIA personnel
17 responsible for reviewing the *Touhy* disclosures. See Exh. B.

18 **IV. PROTECTIVE ORDER REGARDING CLASSIFIED INFORMATION**

19 The third proposed protective order, attached hereto as Exhibit C, would apply bi-lateral
20 restrictions on the use and disclosure of classified information. The rationale for such an order was
21 articulated in Defendant's Motion to Reconsider Scope of the CIPA Protective Order, filed March 15,
22 2007, and at the March 17, 2007 hearing. The Order has been carefully drafted to address concerns
23 raised by the government at the hearing. Specifically, the proposed order would allow the government
24 to possess, create, or maintain classified information at any area approved for the possession, storage
25 or maintenance of classified information under existing federal regulations. See Exh. C at ¶ 3(b).
26 Defense counsel's access to classified information would be restricted to a "secure area" authorized by
27 the Court Security Officer. *Id.* The same restrictions would apply to the preparation of notes and
28

1 pleadings containing classified information and the discussion of classified information. *Id.* at ¶ 3(c),
2 3(e).

3 The proposed order would charge counsel for the respective parties with providing potential
4 witnesses and other parties with copies of the order as well as bringing violations of the order to the
5 attention of the court. *Id.* at ¶ 4.

6 **V. CONCLUSION**

7 For the foregoing reasons, Mr. Foggo respectfully moves the court for entry of the protective
8 orders.

9 Dated: April 23, 2007

10 Respectfully submitted,

11 */s/ Andrew J. Dober*

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2007, a copy of Motion for Entry of Protective Orders Regarding Attorney-Client Communications; *Touhy* Disclosures; and Treatment of Classified Information was filed electronically, causing notice to be emailed to the following parties:

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/s/ Andrew J. Dober

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