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2 W. Randolph Teslik, *pro hac vice*  
3 Paul W. Butler, *pro hac vice*  
4 Thomas C. Goldstein, *pro hac vice*  
5 Troy D. Cahill, *pro hac vice*  
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14 Attorneys for Defendant Kyle Dustin Foggo

15 UNITED STATES DISTRICT COURT  
16 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

17 UNITED STATES OF AMERICA,

18 Plaintiff,

19 vs.

20 KYLE DUSTIN FOGGO (1),  
21 aka "Dusty" Foggo, and

22 BRENT ROGER WILKES (2),

23 Defendants.

Criminal No. 07cr0329-LAB

**DEFENDANT KYLE DUSTIN FOGGO'S  
RENEWED MOTION FOR  
SEVERANCE AND TRANSFER OF  
VENUE TO THE UNITED STATES  
DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA**

Date: December 17, 2007

Time: 2:00pm

Courtroom: 9 (Second Floor)

Judge: Hon. Larry Alan Burns

24 PLEASE TAKE NOTICE that on December 17, 2007 at 2:00 pm, or as soon thereafter as  
25 counsel may be heard, in Courtroom 9 before the Honorable Larry A. Burns of this Court,  
26 located at 940 Front Street, San Diego, CA 92101, Defendant Kyle Dustin Foggo will bring for  
27 hearing his Renewed Motion for Severance and Transfer of Venue to the United States District  
28 Court for the Eastern District of Virginia pursuant to Fed. R. Crim. P. 21, the November 19,  
2007 hearing, and the entire record of this case.

This motion is based on the attached Memorandum of Points and Authorities, defendant

1 Foggo's original Motion for Severance and Transfer of Venue to the United States District Court  
2 for the Eastern District of Virginia, filed April 14, 2007, declarations/affidavits, oral argument of  
3 counsel at hearing, and all other matters of which the Court may properly take judicial notice.  
4

5 Dated: December 11, 2007

6 Respectfully submitted,

7 *Mark J. MacDougall*

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17 UNITED STATES OF AMERICA,

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23 Defendants.

Criminal No. 07cr0329-LAB

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT KYLE DUSTIN FOGGO'S  
RENEWED MOTION FOR  
SEVERANCE AND TRANSFER OF  
VENUE TO THE UNITED STATES  
DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA**

24 **I. INTRODUCTION**

25 Defendant Kyle Dustin Foggo, pursuant to Rule 21 of the Federal Rules of Criminal  
26 Procedure, previously moved for severance and transfer of venue to the United States District  
27 Court for the Eastern District of Virginia on the grounds that the natural center of gravity of the  
28 events alleged in the indictment lies in Virginia and Mr. Foggo, the CIA, and the vast majority of  
potential witnesses and documents reside in the Washington, D.C. area. This Court denied Mr.

1 Foggo's motion without prejudice on May 14, 2007, primarily because of Mr. Wilkes' desire to  
2 be tried in San Diego. Mr. Wilkes has, however, recently been convicted in a highly publicized  
3 trial in the Southern District of California and is scheduled to be sentenced in the near future.  
4 *See United States v. Wilkes*, 07-cr-330-LAB. If Mr. Wilkes is remanded into the custody of the  
5 Bureau of Prisons after sentencing, his future place of residence is uncertain and within the  
6 discretion of the federal government. Therefore, defendant Foggo respectfully renews his  
7 motion for severance and transfer of this case to the Eastern District of Virginia pursuant to Rule  
8 21 of the Federal Rules of Criminal Procedure.  
9

## 10 **II. ARGUMENT**

11 On April 27, 2007 defendant Kyle Dustin Foggo filed a Motion for Severance and  
12 Transfer of Venue to the United States District Court for the Eastern District of Virginia. *See*  
13 Defendant Kyle Dustin Foggo's Motion for Severance and Transfer of Venue to the Eastern  
14 District of Virginia ("Def. Mot.") (Docket No. 57) (attached hereto as Exhibit A). Defendant  
15 Foggo's Motion for Severance and Transfer of Venue was accompanied by extensive factual  
16 submissions supporting his contention that the elements needed to sustain a change of venue  
17 under *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 243-44 (1964), are present in this  
18 case. Def. Mot. at Exhs. 1-10.<sup>1</sup> The government opposed the motion on May 7, 2007. *See*  
19 Government's Response And Opposition To Defendant Foggo's Motion To Change Venue And  
20 Sever Defendants ("Gov. Opp.") (Docket No. 59). Defendant Foggo filed his reply on May 11,  
21 2007. *See* Defendant Kyle Dustin Foggo's Reply in Support of Motion for Severance and  
22 Transfer of Venue ("Def. Reply") (Docket No. 59) (attached hereto as Exhibit B). This Court  
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25 <sup>1</sup> Due to the voluminous number of exhibits accompanying defendant Foggo's original  
26 motion for severance and transfer of venue and reply in support thereof, the exhibits  
27 accompanying Mr. Foggo's original motion are not being physically re-filed with this renewed  
28 motion. The exhibits are available at Docket Nos. 57 and 59.

1 held a hearing on May 14, 2007 and denied Mr. Foggo's motion without prejudice. *See*  
2 5/14/2007 Hrg. Tr. at 21-42 (Docket No. 72).

3 **A. THE RECENT CONVICTION OF MR. WILKES WEIGHS IN FAVOR**  
4 **OF TRANSFER OF VENUE**

5 It is well within the Court's discretion to permit a renewed motion, especially where new  
6 facts have arisen since a previous hearing. *See Continental Oil Co. v. Osage Oil & Refining Co.*,  
7 69 F.2d 19, 25 (10th Cir. 1934). The Court's determination of whether to allow for renewed  
8 motion depends largely on case specific circumstances. *In re Walton Hotel Co.*, 116 F.2d 110,  
9 112 (7th Cir. 1940); *see also Curtin v. Koskey*, 231 Cal. App. 3d 873, 282 Cal. Rptr. 706 (Cal.  
10 1st Dist. App. 1991) (trial court has discretion to entertain renewal of motion).

11 Of course, the factual landscape has been dramatically altered since the May hearing at  
12 which the Court denied Mr. Foggo's motion without prejudice. Mr. Wilkes was recently found  
13 guilty in a separate federal case and is scheduled to be sentenced on January 29, 2008. If Mr.  
14 Wilkes is remanded into custody upon sentencing, as this Court has indicated is likely, he would  
15 no longer reside in San Diego and, instead, will be in custody at a location to be determined by  
16 the Bureau of Prisons. Any interest on the part of Mr. Wilkes in conducting a trial in the  
17 Southern District of California would be essentially eliminated.

18 **B. TRANSFER OF VENUE TO THE EASTERN DISTRICT OF**  
19 **VIRGINIA WOULD BE IN THE INTERESTS OF JUSTICE**

20 As set forth in defendant Foggo's original motion in support of transfer of venue,  
21 attached as Exhibit A to this renewed motion, the primary concern of Rule 21(b) is to "minimize  
22 the inconvenience to the defense." Def. Br. at 4, citing 2 Charles Alan Wright et al., Federal  
23 Practice and Procedure § 343 (1982). Motions brought pursuant to Rule 21(b) are analyzed  
24 under the factors set forth by the Supreme Court in *Platt v. Minnesota Mining & Mfg. Co.*, 376  
25 U.S. 240, 243-44 (1964). Those factors are: (1) location of the defendant; (2) location of  
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1 possible witnesses; (3) location of events likely to be in issue; (4) location of documents and  
2 records likely to be involved; (5) disruption of defendant's business unless the case is  
3 transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place  
4 of trial; (9) docket condition of each district or division involved; and (10) any other special  
5 elements which might affect the transfer. *Id.*

6 Defendant Foggo's Motion for Severance and Transfer of Venue was accompanied by  
7 extensive factual submissions supporting his contention that the elements needed to sustain a  
8 change of venue under *Platt* are present in this case. See Def. Br. at 5-17 (Exh. A). The same  
9 facts set forth in Mr. Foggo's original motion exist today: Mr. Foggo and his family reside in  
10 Virginia (Def. Motion at 5-7); virtually all potential witnesses reside in the Washington, D.C.  
11 area or overseas locations more convenient to the Eastern District of Virginia (Def. Mot. at 7-  
12 11); most of the significant acts alleged in the superseding indictment occurred in the Eastern  
13 District of Virginia (Def. Mot at 11-12); the classified documents and records to be relied upon  
14 by Mr. Foggo are located at the CIA Headquarters (Def. Mot. 12-14); Mr. Foggo will be unable  
15 to bear the expenses associated with trying his case in the Southern District of California (Def.  
16 Mot. at 14-16); Mr. Foggo's counsel is located near the Eastern District of Virginia (Def. Mot. at  
17 16); docket conditions are roughly equal (Def. Mot. at 16-17);<sup>2</sup> and special considerations weigh  
18 in favor of transfer (Def. Mot. 17-18).

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21 Three additional points should be considered. First, the government's opposition  
22 originally asserted that approximately one-half of its potential trial witnesses reside in or near the  
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26 <sup>2</sup> According to news reports, however, federal case filings in the Southern District of California  
27 have increased significantly in the months following Ms. Lam's departure. See Greg Moran,  
28 *Case Filings Up Since Lam Stepped Down*, San Diego Union Tribune, Oct. 3, 2007, available at  
[www.signonsandiego.com/uniontrib/20071003/news\\_1n3stats.html](http://www.signonsandiego.com/uniontrib/20071003/news_1n3stats.html) (last visited Dec. 4, 2007).

1 San Diego area. Gov. Opp. Br. at 11.<sup>3</sup> Defendant Foggo is now in possession of over one-  
2 hundred (100) reports summarizing government interviews of potential witnesses in this case,  
3 nearly all of which are classified. See Declaration of Andrew J. Dober at ¶ 3 (“Dober decl. at  
4 ¶ \_\_\_). Whatever the basis for the government’s representation regarding the location of  
5 witnesses, made in its May 7, 2007 filing, there is simply no credible basis for that assertion  
6 now. Less than ten percent (10%) of the interviewees lived on the West Coast. *Id.* at ¶ 4. The  
7 vast majority of individuals interviewed reside in the Washington D.C. area or are CIA officials  
8 currently stationed overseas. *Id.* Moreover, thirteen (13) current CIA officials have agreed to  
9 voluntary pre-trial interviews with counsel for Mr. Foggo and are potential defense witnesses at  
10 trial. *Id.* at ¶ 5. Most of these individuals reside in the Washington, D.C. area and those that do  
11 not are currently stationed overseas, at locations in closer proximity to Washington D.C. than to  
12 San Diego. *Id.* at ¶ 5.

14 It should also be noted that the government called a single San Diego based investigative  
15 agent in its recent case against Mr. Wilkes and the agent’s testimony was limited to “facts  
16 regarding the location from which certain evidence was seized.” See Government’s Response  
17 And Opposition To Issuance Of Subpoenas To Employees Of The United States Attorney’s  
18 Office For The Southern District Of California And Request For Clarification Of Procedures To  
19 Be Followed At Hearing Scheduled For December 11, 2007, at 11, *United States v. Wilkes*  
20 (S.D.C.A. Nov. 30, 2007) (No. 07-cr-330-LAB). Even if the government were to adopt a  
21 different tactic at the trial of Mr. Foggo, discovery provided by the government to date reveals  
22 that the bulk of the investigation was conducted by members of the CIA Office of Inspector  
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26 <sup>3</sup> The government did not submit a list of potential witnesses at the time.  
27

1 General (CIA-OIG), all of whom are located at CIA Headquarters in Langley, Virginia. *See*  
2 Dober decl. at ¶ 4.

3 Second, as this Court is aware, the logistical difficulties imposed on defendant Foggo and  
4 his counsel because of the highly classified nature of the evidence in this case are extreme. To  
5 date, the government has not constructed a SCIF for use by defense counsel in San Diego and  
6 CIPA proceedings have not yet commenced.<sup>4</sup> The Eastern District of Virginia is well suited to  
7 adjudicate disputes involving classified information. *See* Def. Reply at 10-11 (Exh. B). Many  
8 significant CIPA cases have gone to trial there, perhaps more so than in any other district and the  
9 court has multiple, permanent SCIFs. *Id.*

10  
11 Third, as this Court is also aware, the testimony and publicity surrounding the trial of Mr.  
12 Wilkes—which the government has trumpeted as one of the largest cases of congressional  
13 corruption in this country’s history—was extreme. The government introduced salacious  
14 testimony about alleged acts of prostitution involving Mr. Cunningham and Mr. Wilkes during  
15 its case-in-chief. Indeed, the prosecution went so far as to call multiple prostitutes to testify in its  
16 case. This extreme and salacious publicity, unrelated to the charges against Mr. Foggo, will  
17 undoubtedly prejudice the jury pool against Mr. Foggo before trial and further argues in favor of  
18 both a severance from Mr. Wilkes and transfer of venue .

19  
20 **III. CONCLUSION**

21 For the reasons set forth in this motion, and defendant Foggo’s original motion, the  
22 Court should grant Defendant Kyle Dustin Foggo’s Renewed Motion for Severance and Transfer  
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24 <sup>4</sup> Counsel for Mr. Wilkes is using a SCIF in Los Angeles while counsel for Mr. Foggo has  
25 periodic, but limited access to a shared SCIF in Washington, D.C.. The CIA has refused to make  
26 any of its SCIF space available to defense counsel for use in preparing for trial or even for  
27 conducting voluntary pre-trial interviews of its own employees. The agency has, however,  
28 permitted FBI agents and justice department attorneys to conduct numerous witness interviews  
on their premises.

1 of Venue to the Eastern District of Virginia.

2  
3 Dated: December 11, 2007

4 Respectfully submitted,

5 *Mark J. MacDougall*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of December, 2007, that copies of Defendant Kyle Dustin Foggo's Renewed Motion For Severance and Transfer of Venue to the United States District Court for the Eastern District of Virginia and Memorandum of Points and Authorities in support thereof were filed electronically, causing notice to be emailed to the following parties:

Phillip Halpern  
Jason Forge  
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Andrew J. Dober  
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