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10 UNITED STATES DISTRICT COURT  
11 SOUTHERN DISTRICT OF CALIFORNIA  
12

13 UNITED STATES OF AMERICA,	)	Criminal Case No. 07CR0329-LAB
	)	
14 Plaintiff,	)	<b>GOVERNMENT’S SUPPLEMENTAL</b>
	)	<b>RESPONSE AND OPPOSITION TO</b>
15 v.	)	<b>DEFENDANT FOGGO’S MOTION FOR</b>
	)	<b>SEVERANCE AND TRANSFER OF VENUE</b>
16	)	
17 KYLE DUSTIN FOGGO (1),	)	Date: January 2, 2007
aka “Dusty” Foggo,	)	Courtroom: 9 (2nd Floor)
18 BRENT ROGER WILKES (2),	)	Judge: Honorable Larry A. Burns
	)	
19 Defendants.	)	
	)	

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21 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel,  
22 Karen P. Hewitt, United States Attorney, and Sanjay Bhandari, Valerie H. Chu, Jason A. Forge, and  
23 Phillip L.B. Halpern, Assistant U.S. Attorneys, and hereby files its Supplemental Response and  
24 Opposition to Defendant Foggo’s renewed motion seeking to sever defendants and transfer venue. Said  
25 Response and Opposition is based upon the file and records of this case, including the government’s  
26 prior Response and Opposition filed May 7, 2007, which is attached as Exhibit A.

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1 I.

2 **INTRODUCTION**

3 Defendants Foggo and Wilkes are charged with, *inter alia*, participating in a conspiracy  
4 encompassing national and international offense conduct that is properly brought “in any district in  
5 which any act in furtherance of the conspiracy was committed.” *United States v. Al-Talib*, 55 F.3d 923,  
6 928 (4th Cir. 1995). *See also Hyde v. United States*, 225 U.S. 347 (1912) (venue properly found where  
7 conspiracy formed or where any overt act occurred); 18 U.S.C. § 3237(a). As this case is properly  
8 charged in the Southern District of California, Foggo seeks to transfer venue pursuant to Federal Rule  
9 of Criminal Procedure 21(b), which allows a defendant to initiate a motion for a transfer of venue to  
10 another district if convenient for the parties and witnesses and in the interest of justice. Fed. R. Crim.  
11 P. 21(b) (2005).

12 As set forth in great detail in the government’s original Response and Opposition, this case  
13 belongs in the Southern District of California (the “SDCA”). Our position on this is unchanged, and  
14 defendant Wilkes agrees. Nevertheless, at the hearing on December 17, 2007, the Court posed the  
15 hypothetical of severing the case against Foggo and transferring it to the Eastern District of Virginia (the  
16 “EDVA”). The Court then asked the government whether it would respond to such a scenario by  
17 moving to dismiss without prejudice its case against Wilkes in the SDCA and re-indicting Wilkes in the  
18 EDVA. The government has examined and re-examined the *Platt*<sup>1/</sup> factors, and we believe that Foggo  
19 has failed to demonstrate the “substantial inconvenience” necessary to warrant the extraordinary relief  
20 he seeks. As such, the government respectfully declines to encourage such an outcome by agreeing to  
21 dismiss and re-indict its case against Wilkes.

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<sup>1/</sup>*Platt v. Minnesota Mining and Manufacturing Co.*, 376 U.S. 240 (1964).

1 **II.**

2 **ARGUMENT**

3 Wilkes’s objection to Foggo’s request is no small matter. It deprives this Court of discretion to  
4 transfer venue of the government’s case against him.<sup>2/</sup> In doing so, it confirms that Foggo cannot  
5 possibly meet his burden under *Platt*. As this Court has recognized, trying the same case involving the  
6 same witnesses in two different districts located in two different federal circuits on opposite coasts  
7 makes no sense. In fact, even if the Court ignores Wilkes, it would be inappropriate to transfer the case  
8 against Foggo. This was true when Foggo first made this request in April 2007, and it is even more true  
9 today.

10 First, transferring this case would waste over 10 months of litigation in this district. This Court  
11 has decided several substantive motions, and it has issued several orders. All of this progress would be  
12 lost in the event of a transfer to a new court.

13 Second, at a cost of tens of thousands of dollars, the government has recently completed  
14 construction of a Sensitive Compartmented Information Facility (“SCIF”) within the courthouse in San  
15 Diego. This case was the principal impetus for the SCIF’s construction, and it is the answer to defense  
16 counsels’ oft-raised complaints about access to a SCIF. Not only would a transfer waste this investment,  
17 but it would start anew defense counsels’ search for a SCIF.

18 And third, Foggo himself has created and compounded the inconvenience to his self-chosen  
19 defense team. Regarding this defense team, to the government’s knowledge, Foggo did not have a  
20 preexisting relationship with any of these lawyers, and only one is admitted to practice law in California.  
21 Nor did Foggo ever ask this Court to appoint counsel to represent him – as this Court did for Wilkes.  
22 Foggo simply chose to enlist a team of lawyers located on the east coast in order to defend a case  
23 brought on the west coast. And a team of lawyers located on the east coast chose to defend a case  
24 brought on the west coast. Moreover, this defense team is from a firm that has *three* west coast offices.

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26 <sup>2/</sup>Rule 21(b) provides for transfer only “upon motion of the defendant” and does not authorize  
27 transfer, in a multi-defendant case, of defendants who do not move or who object to transfer. *See e.g.*,  
28 *Yeloushan v. United States*, 339 F.2d 533, 536-37 (5th Cir. 1964); *United States v. Choate*, 276 F.2d  
724, 727 (5th Cir. 1960); *United States v. Clark*, 360 F. Supp. 936 (S.D.N.Y 1973); *United States v.*  
*Jessup*, 38 F.R.D. 42, 49-50 (M.D. Tenn. 1965); *United States v. Parr*, 17 F.R.D. 512, 518-19 (S.D. Tex.  
1955).

1 Yet, despite the fact that Foggo has tripled the size of his defense team – from three lawyers on his  
2 original motion to nine lawyers on his renewed motion – he has not enlisted the services of a single  
3 lawyer from any of his team’s three west coast offices. The fact that Foggo’s legal team could afford  
4 to triple its size in eight months’ time, and to do so to the exclusion of all the attorneys in their three  
5 west coast offices, belies any claim of financial hardship this team may claim. Any complications that  
6 result from these choices are of Foggo’s own making and should not weigh in favor of transfer.

7 In stark contrast, all of the prosecutors and the offices of three of the four investigative agencies  
8 involved in this case are located in San Diego. This is the prosecution team that commenced this  
9 investigation, and Wilkes, the original target of the investigation, was and remains a San Diego resident.  
10 The lawyers that this Court appointed to represent Wilkes are located in San Diego. In fact, Foggo  
11 himself is no stranger to San Diego – he grew up here, completed all of his schooling here, and he had  
12 plans to return to San Diego when he was indicted. Thus, all of the parties to this case have connections  
13 to San Diego. The only counsel who would be inconvenienced by a trial in San Diego are the only  
14 counsel who chose to participate in a case pending across the country from where they reside, in a  
15 district in which all but one of them are not ordinarily permitted to practice. And because neither Wilkes  
16 nor Foggo is paying for his own defense, nearly all of the expenses of this litigation will be borne by  
17 one “party”: the taxpayers. Those expenses would be much greater if the entire prosecution team  
18 (including the agents) were forced to relocate to the east coast to litigate and try this case.<sup>3/</sup>

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28 <sup>3/</sup>See Fed. R. Crim. P. 2 (rules should be interpreted to, *inter alia*, “secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.”).

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**III.**

**CONCLUSION**

Based on the foregoing arguments, including those set forth in the attached May 2007 Response and Opposition, the government respectfully requests that the Court deny defendant Foggo's renewed motion to transfer venue.

DATED: December 31, 2007

Respectfully submitted,

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