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9 Attorneys for Defendant Kyle Dustin Foggo

10 UNITED STATES DISTRICT COURT  
11 SOUTHERN DISTRICT OF DISTRICT OF CALIFORNIA

12  
13 UNITED STATES OF AMERICA,

14 Plaintiffs,

15 v.

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

18 BRENT ROGER WILKES (2),

19 Defendants.  
20

Criminal No. 07cr0329-LAB

**DEFENDANT KYLE DUSTIN FOGGO'S  
MOTION TO COMPEL  
INVESTIGATION INTO  
ACKNOWLEDGED 6(e) VIOLATIONS**

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

21 PLEASE TAKE NOTICE that on May 14, 2007 at 2:00 p.m., or as soon thereafter as counsel  
22 may be heard, in Courtroom 9 before the Honorable Larry A. Burns of this Court, located at 940 Front  
23 Street, San Diego, California 92101, Defendant Kyle Dustin Foggo will bring for hearing his motion to  
24 compel an investigation into acknowledged violations of Fed. R. Crim. P. 6(e).  
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1 **I. INTRODUCTION**

2 At recent hearings before this Court, the government acknowledged “reprehensible and  
3 inexcusable” violations of its grand jury secrecy obligations under Fed. R. Crim. P. 6(e). The required  
4 result of these egregious, admitted violations is an investigation by an entity unconnected to the  
5 conduct at issue and independent from the United States Attorney’s Office for the Southern District of  
6 California. The investigation must be followed by an *in camera* report and subsequent proceedings  
7 and disclosures to defense counsel as deemed appropriate by the Court.

9 **II. THE GOVERNMENT ADMITS IT HAS VIOLATED GRAND JURY SECRECY  
10 OBLIGATIONS**

11 Grand jury secrecy impose an obligation of secrecy on those provided knowledge of a matter  
12 occurring before the grand jury under Fed. R. Crim. P. 6(e)(2)(B).<sup>1</sup> As explained in the Department of  
13 Justice Grand Jury Manual:

14 Grand jury secrecy is vital to the investigative function of the grand jury. It serves several  
15 distinct interests, primarily: (1) to encourage witnesses to come forward and testify freely and  
16 honestly; (2) minimize the risks that prospective defendants will flee or use corrupt means to  
17 thwart investigations; (3) to safeguard the grand jurors themselves and the proceedings from  
18 extraneous pressures and influences; and (4) to protect accused persons who are ultimately  
19 exonerated from unfavorable publicity.

20 *See* DOJ Grand Jury Manual, at § II(A)(1) (Purpose of Rule 6(e), *available at*  
21 <http://www.usdoj.gov/atr/public/guidelines/206584.htm#IIA1>, last visited April 21, 2007; *see also*  
22 *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1411 (9th Cir. 1993) (explaining importance of grand jury  
23 secrecy, including *inter alia*, to “insure the grand jury of unfettered freedom in its deliberations”);  
24 *United States v. Eisenberg*, 711 F.2d 959, 961 (11th Cir. 1983) (grand jury secrecy obligations intended

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25 <sup>1</sup> Fed. R. Crim. P. 6(e)(2)(B) prohibits the following persons from disclosing a matter before the  
26 grand jury: (i) a grand juror; (ii) an interpreter; (iii) a court reporter; (iv) an operator of a recording  
27 device; (v) a person who transcribes recorded testimony; (vi) an attorney for the government; or (vii) a  
28 person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii). Fed. R. Crim. P. 6(e)(3)(A)(iii)  
allows for disclosure to “any government personnel . . . that an attorney for the government considers  
necessary to assist in performing that attorney’s duty to enforce federal criminal law.” Fed. R. Crim. P.  
6(e)(3)(A)(iii) allows for disclosure to “any government personnel . . . that an attorney for the  
government considers necessary to assist in performing that attorney’s duty to enforce federal criminal  
law.”

1 to protect the accused from "adverse pretrial publicity"); *Illinois v. Abbott & Associates, Inc., et. al.*,  
2 460 U.S. 557, 567 (1983) ("The General Rule of Secrecy codifies a longstanding rule of common law  
3 which we have recognized as "an integral part of our criminal justice system." (citations omitted))

4 There is no question that the government has violated its Rule 6(e) obligations. Members of  
5 the press were informed that indictments against Mr. Foggo and Mr. Wilkes were imminent two weeks  
6 before the indictments were announced and while grand jury deliberations were ongoing. *See Charges*  
7 *Near in Calif. Bribery Case*, Assoc. Press, Feb. 1, 2007 (quoting two unnamed government officials  
8 regarding imminent indictments), attached hereto as Exhibit A. Shortly before the article was  
9 published, counsel for both defendants received telephone calls from one or more journalists, who  
10 described in detail the contents of the two indictments. *See Transcript of Proceedings*, March 19, 2007,  
11 at 18-21, 41-42, attached hereto as Exhibit B. The media was also informed of the indictments the  
12 night before they were issued, leading a reporter to telephone Mr. Foggo's counsel the evening before  
13 the indictments were announced. News crews began arriving at Mr. Foggo's residence as early as 6:00  
14 a.m. on February 13, 2007, over eight hours before the government announced the indictments.

15 In most cases involving grand jury secrecy violations, there is a factual dispute over whether  
16 such a violation occurred, necessitating a preliminary evidentiary hearing before the Court. Here,  
17 however, the government acknowledged its own egregious behavior:

- 18 • The government: "Your honor, I want to make it clear to the court ... the leaks of the  
19 information to the press were absolutely reprehensible and completely inexcusable." Exh.  
20 B at 23. "
- 21 • The government: "I agree that someone or some people did not follow their 6(e)  
22 obligations in this case. They reprehensibly violated those obligations." Exh. B at 27.

23 Thus, there is no question that a violation occurred. As explained below, this all but mandates an  
24 immediate, court-supervised investigation into the government's conduct.

### 25 **III. AN INVESTIGATION MUST BE UNDERTAKEN INTO THE SOURCE OF THE** 26 **GRAND JURY VIOLATIONS**

27 There is no question that violations of Rule 6(e) have occurred, and that someone within the  
28 government is responsible for those violations. Both the Government and this Court have

1 acknowledged as much. But, upon questioning from the Court, the government declined to state  
2 whether they are investigating the misconduct:

- 3 • The Court: “Are you doing an investigation to find out who did this?”
- 4 • The government: “I’m not in a position to disclose that in open court, but I will state that  
5 nothing would please me more than to determine who is responsible for that and get them in  
6 front of this court to be held accountable for having done that.” Exh. B. at 24.

7 As demonstrated by a review of the limited case law regarding grand jury secrecy violations, a  
8 thorough investigation must be conducted and provided to the Court, *in camera*, for determination of  
9 the appropriate remedies. See, e.g. *In re Grand Jury Proceedings (Ballas)*, 62 F.3d 1175, 1179 (9th  
10 Cir. 1995) (“It is the duty of the district court, not the tax court or these taxpayers, to preserve the  
11 secrecy of grand jury proceedings and to devise sanctions for violations of 6(e).”); *Bank of Nova Scotia*  
12 *v. United States*, 487 U.S. 250, 263 (1988) (describing remedies for 6(e) violations). The government  
13 may not equivocate as to whether an investigation into the source of the leaks is taking place, as the  
14 Court shares its duty to “preserve the integrity of Rule 6” and must ensure that the guilty party is held  
15 accountable by ordering an investigation into the source of the pre-indictment leaks to the media. *Finn*  
16 *v. Schiller*, 72 F.3d 1182, 1189 (4th Cir. 1996) (stating that it is the district court’s *duty* to investigate  
17 violations of Rule 6 and impose contempt sanctions on the guilty party) (emphasis added); *United*  
18 *States v. Kearney*, 436 F. Supp. 1108, 1119 (S.D.N.Y. 1977) (ordering an independent investigation into  
19 the identity of a Justice Department official who leaked grand jury testimony to the press).

20 *Ballas* involved an acknowledged, pre-indictment disclosure of grand jury information in a tax  
21 shelter investigation. 62 F.3d at 1178. The Ninth Circuit held that the requested investigation was  
22 moot, but only because the government had informed the District Court that an investigation into a  
23 Rule 6(e) violation had been undertaken by the Office of Professional Responsibility for the  
24 Department of Justice and a report would be filed with the District Court. *Id.* (“We agree with the  
25 government that the request for an independent inquiry is moot in light of the government’s  
26 representation to the district court (and this court) that the Office of Professional Responsibility of the  
27 Department of Justice is conducting an investigation into the disclosure and that the resulting report  
28

1 will be filed with the district court *in camera* and under seal.”). Here, no such representation has been  
2 made nor is this case any longer at the pre-indictment stage.

3 In *Eisenberg*, the Eleventh Circuit held that the *prima facie* showing of a 6(e) violation required  
4 the District Court to consider the appropriate means of relief for targets of an ongoing, un-indicted  
5 grand jury investigation, and specifically noted that an indicted individual would have a greater interest  
6 in obtaining the results of that investigation:

7 Once the court determines that Rule 6(e) has been violated, the court may properly inform the  
8 targets' counsel of the names of the violators. Targets' counsel may then play a proper role in  
9 hearings involving imposition of contempt sanctions on government employees ... If an  
10 indictment is issued against their clients, counsel may obtain the record of the investigation of  
11 the Rule 6(e) violations. At that time, the indicted individuals can decide whether to move for  
12 dismissal of the indictment on grounds of improper government conduct and prejudicial  
13 publicity in violation of Rule 6(e).

14 711 F.2d at 965.

15 At this time, Mr. Foggo respectfully asks only that this Court order a thorough, expedient  
16 investigation into the source of the violations and reserves the right to seek further relief once the  
17 Court is furnished with the report.<sup>2</sup> While defense counsel does not pre-judge the investigation in any  
18 way, a few preliminary points are worthy of mention. First, the identity of the reporter and the  
19 approximate date of the disclosures are known, as can be judged from the date of the articles. Second,  
20 the reporter claimed to have been shown copies of the indictments, meaning an in-person meeting took  
21 place. Of course, in-person meetings do not randomly happen. They are preceded by phone calls  
22 and/or emails setting the time and place of the meeting. Third, the government should know each and  
23 every individual affiliated with the investigation who was provided a hard copy of the indictment and

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24 <sup>2</sup> In *Ballas*, the Ninth Circuit held that the district court was not obligated to release the  
25 investigative report to taxpayers who were not targets of the grand jury investigation, but were  
26 nonetheless harmed by Rule 6(e) violations. 62 F.3d at 1189 However, the district court retained the  
27 discretion to release the report to the taxpayers if it were necessary to protect their interests in tax  
28 court. *Id.* Here, Mr. Foggo not only was a target of the grand jury investigation, but he faces criminal  
prosecution in federal court rather than civil penalties in tax court. Hence, Mr. Foggo has a far greater  
interest in the investigative report. Moreover, as pointed out by counsel for Mr. Wilkes at the March  
19, 2007 hearing, information regarding the disclosures is potentially *Brady* and/or *Giglio* material and  
is demonstrative evidence of bias against the defendants.

1 had knowledge about the timing of the indictments. Fourth, the investigation cannot be confined to  
2 current government employees, but must extend to any former government employees that had access  
3 to grand jury information. For example, the United States Attorney at the time the leaks occurred is no  
4 longer employed by the government and, according to press reports, the Special Agent-In Charge of the  
5 FBI's San Diego field office is leaving the government for employment in the private sector on April  
6 30, 2007. Both of these individuals were undoubtedly in possession of grand jury information.<sup>3</sup> Fifth,  
7 and finally, the inspector general's office of the CIA was intimately involved in the grand jury  
8 investigation and must also be questioned.  
9

10  
11 **CONCLUSION**

12 For the foregoing reasons, Mr. Foggo respectfully moves the Court to order an investigation  
13 into the identity of the party or parties responsible for acknowledged violations of Fed. R. Crim. P.  
14 6(e).

15 Dated: April 23, 2007

16 Respectfully submitted,

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18 */s/ Andrew J. Dober*

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27 <sup>3</sup> Defense counsel does not imply or suggest that either of these individuals were involved in  
28 the grand jury violations. Defense counsel does not know who was responsible for the violations nor  
does defense counsel know what other individuals in possession of grand jury information have since  
departed the government.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of April, 2007, that a copy of Defendant Kyle Dustin Foggo's Motion to Compel Investigation was filed electronically, causing notice to be emailed to the following parties:

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*/s/ Andrew J. Dober*  
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Andrew J. Dober

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