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11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

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14 UNITED STATES OF AMERICA,) Criminal Case Nos. 07CR0329-LAB
) 07CR0330-LAB
15 Plaintiff,)
)
16 v.) **NOTICE OF POSSIBLE VIOLATION OF**
) **PROTECTIVE ORDER**
)
17)
18 BRENT ROGER WILKES, et al.,)
)
)
19 Defendants.) Date: July 23, 2007
) Time: 3:00 p.m.
) Courtroom: 9 (2nd Floor)
20) Judge: Honorable Larry A. Burns

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 Notice of Possible Violation of
24 Protective Order, which is based on the attached Memorandum, including the Declaration of Jason A.
25 Forge, the file and records of this case, and the exhibits and arguments to be presented at the July 23,
26 2007 Status Conference in these matters.
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1 I.

2 **INTRODUCTION**

3 Consistent with this Court’s call for vigilance concerning leaks of information to the press, the
4 government wishes to alert the Court to the following newspaper article: George E. Condon, Jr. and
5 Marcus Stern, *Imprisoned Cunningham outlines depths of corruption to FBI*, S.D. Union Trib., July 18,
6 2007. This story was also featured on the splash page of the Union-Tribune’s website,
7 SignonSanDiego.com, along separate hyperlinks enabling viewers to download copies of the following
8 documents: (1) 11 pages of an FBI FD-302 report (the “U-T Version FD-302”), dated February 7, 2007;
9 and (2) a 76-page sealed search warrant affidavit, dated September 21, 2005 (the “U-T Version Sealed
10 Search Warrant Affidavit”). See Declaration of Jason A. Forge (attached), ¶ 2.

11 II.

12 **IT APPEARS THAT SOMEONE**
13 **VIOLATED THE COURT’S PROTECTIVE ORDER**

14 On February 20, 2007, this Court entered an Order Permitting Disclosure of Search Warrant and
15 Grand Jury Material, and Protective Order that, *inter alia*, limited defense counsel’s use of documents
16 and materials produced in discovery, as follows:

17 2. The Government is authorized to produce to the defendant a copy of any
of the sealed search warrants in this case as necessary to satisfy its discovery obligations.

18 3. All documents and other materials produced by the United States in
19 criminal discovery in this case are for use by defense counsel, and any person engaged
20 or consulted by defense counsel, for any purpose that is reasonably related to the
preparation of this case for trial (including, but not limited to, investigating the facts and
preparing for pre-trial ad post-trial motions) and any appeals of this matter.

21 See Protective Order, dated February 20, 2007.

22 During the March 19, 2007 hearing concerning alleged government leaks of information, the
23 Court announced a broader protective order and emphasized that it applied to all parties:

24 I don’t condone trying the case in the press or forecasting even before defense
25 counsel and the defendants know to the press and the public what’s going to happen.
That shouldn’t have been done. And I think they have a justified concern that given the
26 nature of the information here, that there ought to be some reciprocal restrictions on both
sides.

27 That’s what I’d like to address. I agree with [government counsel]. I can do that
28 on a stand-alone basis. I’m prepared to do that. I think that there’s also some
application of CIPA provisions that would control that. And if there’s another leak,
make the person leaking subject to sanctions in any number of ways.

1 3/19/07 Tr. 33-34.

2 The documents that someone provided to the Union-Tribune fell squarely within the Court's
3 Protective Order. Therefore, it appears that whoever provided these documents to the Union-Tribune,
4 or caused them to be provided, did so in violation of this Court's Protective Order. As set forth below,
5 when viewed in combination with the meticulous records maintained by the government's paralegal in
6 these matters, the actual versions of the documents available on the Union-Tribune's website narrow
7 significantly the range of possible sources.

8 **A. The FD-302**

9 Before producing original version of the FD-302, the government paralegal for this case used
10 a grease pencil to redact certain information from the report. *Id.* at ¶ 3. In or about the week of May
11 21, 2007, she made a single copy of the document, which she provided, along with others, to the
12 commercial copy service that is facilitating the document production in this case. *Id.* She has retained
13 this original in a locked office, and not made any additional copies, nor has she allowed anyone else to
14 do so. *Id.* To this day, the original reflects only one number stamp, beginning at "OTG-REPORTS-
15 0284235." *Id.* According to the commercial copy service, the only individual or entity to receive the
16 original version of the FD-302 was counsel for defendant John Michael. *See* Forge Decl., ¶ 5. On May
17 24, 2007, counsel for defendant Michael signed a receipt for a discovery order that included the original
18 version of the FD-302, provided the commercial copy service with his Federal Express account number
19 for shipping, and signed a check for \$756.01 for the order. *Id.* The commercial copy service produced
20 to counsel for defendant Michael the original version of the FD-302 in both paper and electronic
21 versions. *Id.* Neither version had been altered from the original, and no new number stamps were
22 added. *Id.*

23 Comparing the hand redactions on the original to the redactions on the U-T Version FD-302
24 available on the U-T's website to the original yields the unmistakable conclusion that the U-T Version
25 FD-302 is a copy of the first 11 pages of the original, with two differences: (1) the U-T Version FD-302
26 has been reduced in size; and (2) a new framed number-stamp has been added at the center of the bottom
27 of each page, beginning with number 115. *See* Forge Decl., ¶ 6. The precise location of this new
28 number-stamp varies slightly between some pages, implying that there was more human involvement

1 than would be the case if the number had been added electronically or through some other purely
2 automated process. *Id.* Prior to seeing the U-T Version FD-302, no member of the prosecution team
3 (including the case paralegal and other USAO personnel) had ever seen such a version of this document.
4 *Id.* at ¶ 8.

5 **B. Sealed Search Warrant Affidavit**

6 The government has twice produced in discovery copies of the Sealed Search Warrant Affidavit.
7 *See* Forge Decl., ¶ 3. These copies were identical, and they bore one number stamp on each page,
8 beginning with “OTG-SWCIP-0247993.” *Id.* On March 13, 2007, prior counsel for defendant Michael
9 signed a receipt for a document production that included the Sealed Search Warrant Affidavit, which
10 the case paralegal sent that day via overnight delivery. *Id.* On April 4, 2007, the case paralegal
11 produced to present counsel for defendant Michael 1,279 pages of discovery (via Federal Express),
12 which included the Sealed Search Warrant Affidavit. *Id.* On April 19, 2007, present counsel for
13 defendant Michael signed a receipt for a document production that included the Sealed Search Warrant
14 Affidavit, along with a check for \$127.90, both of which were delivered to the U.S. Attorney’s office.
15 *Id.* The government did not produce the Sealed Search Warrant Affidavit to any individual or entity
16 other than prior and present counsel for defendant Michael. *Id.* The Sealed Search Warrant Affidavit
17 remains under seal by the United States District Court for the Eastern District of New York, which this
18 Court’s Protective Order made clear to all parties. *See* Forge Decl., ¶ 4.

19 The U-T Version Sealed Search Warrant Affidavit has been altered in exactly the same way as
20 the U-T Version FD-302 – reduced in size in order to accommodate a new framed number-stamp at the
21 bottom center of each page. *See* Forge Decl., ¶ 7. The new number-stamp on the U-T Version Sealed
22 Search Warrant Affidavit begins with page number 216. *Id.* Prior to seeing the U-T Version Sealed
23 Search Warrant Affidavit, no member of the prosecution team (including the case paralegal and other
24 USAO personnel) had ever seen such a version of this document. *Id.* at ¶ 9.

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III.

CONCLUSION

This is merely a notice. The government has carefully avoided making accusations, and, instead, has exclusively focused on providing the Court with the facts and circumstances concerning the handling of the documents that someone may have leaked or caused to be leaked to the San Diego Union-Tribune.

DATED: July 20, 2007

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/Sanjay Bhandari
SANJAY BHANDARI
Assistant U.S. Attorney

s/Valerie H. Chu
VALERIE H. CHU
Assistant U.S. Attorney

s/ Jason A. Forge
JASON A. FORGE
Assistant U.S. Attorney

s/ Phillip L.B. Halpern
PHILLIP L. B. HALPERN
Assistant U.S. Attorney

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DECLARATION OF JASON A. FORGE

1. I am an Assistant United States Attorney and am currently assigned to the prosecution of United States v. Wilkes, et al., 07cr0329-LAB and 07cr0330-LAB.

2. On July 18, 2007, The San Diego Union Tribune published the following newspaper article: George E. Condon, Jr. and Marcus Stern, *Imprisoned Cunningham outlines depths of corruption to FBI*, S.D. Union Trib., July 18, 2007. This story was also featured on the splash page of the Union-Tribune’s website, SignonSanDiego.com, along with separate hyperlinks enabling viewers to download copies of the following documents: (1) 11 pages of an FBI FD-302 report (the “U-T Version FD-302”), dated February 7, 2007; and (2) a 76-page sealed search warrant affidavit, dated September 21, 2005 (the “U-T Version Sealed Search Warrant Affidavit”) (these and the other documents referenced herein will be made available for the Court’s review and inspection at the July 23, 2007 Status Conference in these matters).

3. On July 18, 2007, I had several conversations with Martha Hernandez, the paralegal at the United States Attorney’s Office assigned to these cases. Through those conversations with Ms. Hernandez, and my personal review of the documents, I learned the following:

a. Before producing in discovery the original version of the FD-302, she used a grease pencil to redact certain information from the report.

b. In or about the week of May 21, 2007, she made a single copy of the document, which she provided, along with others, to the commercial copy service that is facilitating the document production in this case.

c. She has retained this original in a locked office, and not made any additional copies, nor has she allowed anyone else to do so.

d. To this day, the original reflects only one number stamp, beginning at “OTG-REPORTS-0284235.”

e. The government has twice produced in discovery copies of the Sealed Search Warrant Affidavit. These copies were identical, and they bore one number stamp on each page, beginning with “OTG-SWCIP-0247993.”

1 f. On March 13, 2007, prior counsel for defendant Michael signed a receipt for a
2 document production that included the Sealed Search Warrant Affidavit, which the case paralegal sent
3 that day via overnight delivery.

4 g. On April 4, 2007, she produced to present counsel for defendant Michael 1,279
5 pages of discovery (via Federal Express), which included the Sealed Search Warrant Affidavit.

6 h. On April 19, 2007, present counsel for defendant Michael signed a receipt for a
7 document production that included the Sealed Search Warrant Affidavit, along with a check for \$127.90,
8 both of which were delivered to the U.S. Attorney's office.

9 i. The government did not produce the Sealed Search Warrant Affidavit to any
10 individual or entity other than the prior and present counsel for defendant Michael.

11 4. The Sealed Search Warrant Affidavit remains under seal by the United States District
12 Court for the Eastern District of New York, which this Court's Protective Order made clear to all parties.

13 5. On July 18, 2007, I had several conversations with Susan F. Schneider, an employee of
14 Copy Connection Litigation Service, the commercial copy service the USAO has used to facilitate its
15 document production in these cases. Through those conversations with Ms. Schneider and my personal
16 review of documents, I learned the following:

17 a. The only individual or entity to receive the original version of the FD-302 was
18 present counsel for defendant John Michael.

19 b. On May 24, 2007, counsel for defendant Michael signed a receipt for a discovery
20 order that included the original version of the FD-302, provided the commercial copy service with his
21 Federal Express account number for shipping, and signed a check for \$756.01 for the order.

22 c. Copy Connection produced to counsel for defendant Michael the original version
23 of the FD-302 in both paper and electronic versions. Neither version had been altered from the original,
24 and no new number stamps were added.

25 6. Comparing the hand redactions on the original to the redactions on the U-T Version FD-
26 302 available on the U-T's website to the original yields the unmistakable conclusion that the U-T
27 Version FD-302 is a copy of the first 11 pages of the original, with two differences: (1) the U-T Version
28 FD-302 has been reduced in size; and (2) a new framed number-stamp has been added at the center of

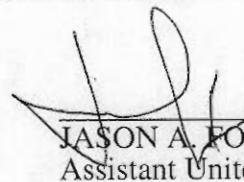
1 the bottom of each page, beginning with number 115. The precise location of this new number-stamp
2 varies slightly between some pages, implying that there was more human involvement than would be
3 the case if the number had been added electronically or through some other purely automated process.

4 7. Comparing the U-T Version Sealed Search Warrant Affidavit available on the U-T's
5 website to the original version yields the unmistakable conclusion that the U-T Version Sealed Search
6 Warrant Affidavit is a copy of the original, with two differences: the U-T Version FD-302 has been
7 reduced in size in order to accommodate a new framed number-stamp located at the center of the bottom
8 of each page, beginning with number 216. The precise location of this new number-stamp varies slightly
9 between some pages, implying that there was more human involvement than would be the case if the
10 number had been added electronically or through some other purely automated process.

11 8. I have spoken with each member of the prosecution team for these cases (including the
12 case paralegal and other USAO personnel), and each of them confirmed that, prior to seeing the U-T
13 Version FD-302 on July 18 or 19, 2007, they had never seen such a version of this document.

14 9. I have spoken with each member of the prosecution team for these cases (including the
15 case paralegal and other USAO personnel), and each of them confirmed that, prior to seeing the U-T
16 Version Sealed Search Warrant Affidavit on July 18 or 19, 2007, they had never seen such a version of
17 this document.

18
19 I declare under penalty of perjury that the foregoing is true and correct and that this declaration
20 is executed in San Diego, California this 20th day of July, 2007.

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22 
23 JASON A. FORGE
Assistant United States Attorney

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

 Plaintiff,

 v.

BRENT ROGER WILKES, et al.,

 Defendants.

) Criminal Case Nos. 07CR0329-LAB
) 07CR0330-LAB

) CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Jason A. Forge, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of the government's **NOTICE OF POSSIBLE VIOLATION OF PROTECTIVE ORDER** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

1. Mark J Geragos
geragos@geragos.com,fileclerk@geragos.com
2. Mark J. MacDougall (Counsel for Defendant Foggo)
mmacdougall@akingump.com,dargento@akingump.com
3. Raymond R. Granger
rgranger@rgranger.com,rgrangeresq@aol.com

I declare under penalty of perjury that the foregoing is true and correct.
Executed on July 20, 2007.

s/ Jason A. Forge
JASON A. FORGE