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10  
 11 UNITED STATES DISTRICT COURT  
 12 SOUTHERN DISTRICT OF CALIFORNIA

13		)	Criminal Case No. 07CR0329-LAB
14	UNITED STATES OF AMERICA,	)	
15	Plaintiff,	)	<b>GOVERNMENT'S RESPONSE AND</b>
16	v.	)	<b>OPPOSITION TO DEFENDANT FOGGO'S</b>
17		)	<b>MOTION TO CHANGE VENUE AND</b>
18	KYLE DUSTIN FOGGO (1),	)	<b>SEVER DEFENDANTS</b>
19	aka "Dusty" Foggo,	)	Date: May 14, 2007
20	BRENT ROGER WILKES (2),	)	Time: 2:00 p.m.
	Defendants.	)	Courtroom: 9 (2nd Floor)
		)	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 Response and Opposition to  
 24 Defendant Foggo's motion seeking to change venue and sever defendants. Said Response and  
 25 Opposition is based upon the files and records of this case, together with the attached statement of facts,  
 26 and memorandum of points and authorities.  
 27  
 28

I

**INTRODUCTION**

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2  
3 Recognizing that venue properly lies in the Southern District of California, Defendant Foggo  
4 nevertheless claims that the “interest of justice” mandates transferring his case to the Eastern District  
5 of Virginia. In forwarding this ill-considered and untenable request, Foggo chooses to base it upon a  
6 number of inaccurate factual predicates, including that: (1) the government admitted that the present  
7 charges facing Foggo have nothing to do with “the separate charges against Mr. Wilkes;” (2) most of  
8 the relevant witnesses and documents are in or near the Eastern District; and (3) this “case has little  
9 connection to the Southern District of California.”<sup>1/</sup> See *Defendant Foggo’s Motion* at 3. Equally  
10 significant, Defendant Foggo chooses to ignore the all too real, deleterious impact of severing two co-  
11 defendants and forcing the government to conduct multiple trials on the same charges on two different  
12 coasts. This impact – when discussed in the light of day and not hidden from the Court’s view –  
13 renders moot virtually every argument Foggo musters in support of transferring venue. Because of the  
14 nationwide endeavor required to present the witnesses, the location of virtually all original documents  
15 and trial exhibits, the location of the underlying events, and the consequence of a severance and multiple  
16 trials, the defendant has failed to carry his burden that a trial in the Southern District of California is  
17 convenient for “all parties and witnesses” and “in the interests of justice.” Accordingly, Foggo’s  
18 motion to transfer venue *as to him* must be denied.

19 II

20 **STATEMENT OF FACTS**

21 **A. Background**

22 Defendant Brent Roger Wilkes is the owner of ADCS, Inc., a defense contractor headquartered  
23 in Poway, California. ADCS’s main corporate office was located at 13970 Stowe Drive, Poway,  
24 California 92064. Wilkes built the Poway office himself, in lavish style, to house his growing empire  
25 of companies, including Group W Advisors, Group W Events, Group W Holdings, Inc., Group W Media

26 \_\_\_\_\_  
27 <sup>1/</sup> The government is not suggesting that Foggo is attempting to mislead intentionally the Court.  
28 It is far more probable that the defendant simply lacks a full appreciation of all the factual circumstances  
comprising the government case.

1 Productions, Inc., Group W Transportation, Inc., Wilkes Corporation, Mailsafe, Inc., The Wilkes  
2 Foundation, Al Dust Properties, LLC, WBR Equities, LLC, Archer Defense Technologies, Inc., Archer  
3 Defense, Liberty Defense Technologies, Inc., Paradigm Knowledge Management, Inc., and Mirror Labs,  
4 Inc. All of these companies were controlled and operated by Wilkes from the Southern District of  
5 California.

6 ADCS received tens of millions of dollars in government contracts as a prime contractor and  
7 subcontractor during fiscal years 1999 through 2005. According to Congressman Cunningham's staff,  
8 ADCS was Cunningham's top constituent interest for many of these years. The staff also indicated that  
9 ensuring that ADCS received significant levels of government contracts was one of Cunningham's top  
10 priorities. Cunningham has admitted that this was so due to the bribes he was paid – and other support  
11 provided – by Brent Wilkes.

12 By 2003, as a result, in part, of competing bribe activity from defense contractor Mitch Wade,  
13 Wilkes no longer enjoyed Congressman Cunningham's sole or even primary attention, and the contracts  
14 going to ADCS began to dry up. By the end of 2003, ADCS was facing a severe financial crisis. The  
15 company's economic situation was so dire that it was having difficulty meeting its financial obligations.  
16 In fact, in December 2003, Wilkes found it necessary to take a loan of approximately \$200,000 from one  
17 of his departing employees in order to make payroll. It was during 2003 and 2004, that Wilkes came  
18 to seek increasing assistance in obtaining government contracts from his best friend, Dusty Foggo.

#### 19 **B. Foggo-Wilkes Relationship**

20 Defendant Kyle Dustin "Dusty" Foggo was born in Honolulu, Hawaii, on November 21, 1954.  
21 Foggo is a life-long friend of Wilkes. They were both members of the Hilltop High School football  
22 team, roommates at San Diego State University, and best men at each other's weddings. Each named  
23 their son after the other. They and their families socialized frequently. Numerous individuals have  
24 reported statements by Wilkes and Foggo that they "love" each other as "brothers" and as each other's  
25 "best friend in the whole wide world."

26 In addition to their close personal ties, Wilkes and Foggo also had significant financial ties.  
27 Wilkes and Foggo frequently discussed Wilkes's desire that Foggo should join ADCS after leaving the  
28 CIA. In both 1995 and 1999, Foggo met with people at ADCS and Wilkes openly referred to Foggo as

1 ADCS's future Chief Operating Officer. At ADCS's Poway headquarters, opened in late 2002, an  
2 executive office three doors down from Wilkes's was left empty for years as it was expressly reserved  
3 for Foggo. In fact, an ADCS internal document (that appears to have been created on May 12, 2004)  
4 refers to a desktop computer in "Dusty's Office." For his part, in the Spring of 2005, Foggo indicated  
5 in a loan application that he had a "big" employment offer from a San Diego company.

6 Equally significant, Foggo also mentioned to a number of his associates that he was considering  
7 running for Duke Cunningham's seat in Congress when Cunningham stood down. As part of this plan,  
8 Foggo indicated that prior to running for office he would return to San Diego to raise funds and make  
9 contacts. Foggo said that he had spoken to Wilkes about those plans. Moreover, at least one ADCS  
10 executive indicated that Wilkes mentioned his plans to have Foggo take over ADCS in the event that  
11 anything happened to Wilkes.<sup>2/</sup>

### 12 **C. The Conspiracy**

13 As Wilkes's financial situation deteriorated due to a dearth in government contracts, Foggo  
14 assumed new duties as the Chief of an Overseas Location of the CIA. From this position, Foggo was  
15 able to help out his friend Wilkes to improperly obtain government contracts that Foggo was in a  
16 position to influence. Most of the activities in which Foggo sought to obtain business for Wilkes lay  
17 outside Wilkes's fields of experience and expertise. Nonetheless, Foggo succeeded in directing funds  
18 to Wilkes (which eventually ended up in San Diego) through both contracts and contractors; and was  
19 close to succeeding on a larger scale than ever before when their scheme unraveled as a result of our  
20 August 2005 search warrants on Wilkes's businesses.

21 During the entire length and breath of defendants' illegal activity, Defendant Brent Wilkes was  
22 located in the Southern District of California.<sup>3/</sup> Moreover, all of their illegal schemes were, at bottom,

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23  
24 <sup>2/</sup> Wilkes also bestowed large and frequent financial benefits on Foggo, including expensive  
25 meals at exclusive restaurants, plane tickets, expensive vacations, and other items. Among these  
26 benefits were a Scotland vacation that included a fully staffed castle for over \$36,000 per week, a  
27 helicopter ride to a famous Scottish golf course for over \$4,000, and a private jet to and from the United  
28 Kingdom for over \$12,000. These benefits (which were concealed on Foggo's government disclosure  
forms) were paid exclusively from accounts in San Diego.

<sup>3/</sup> Wilkes controlled his financial empire from the Southern District of California. Although  
(continued...)

1 designed to obtain government funds for Wilkes in San Diego. Defendant Foggo's location, on the  
2 other hand, was variable. Indeed, during the first couple of years of illegal activity, Foggo was not even  
3 located in the United States. Foggo only returned to Virginia in or about November 2004, when he  
4 returned to the CIA headquarters as its Executive Director ("ExDir") -- then the third highest ranking  
5 official at CIA. From this new location, Defendant Foggo continued to use his influence to improperly  
6 influence the award of government contracts to Defendant Wilkes.

### 7 III

### 8 ARGUMENT

#### 9 A. Legal Standard

##### 10 1. Rule 21(b) is based Upon a Substantial Balance of Inconvenience

11 A criminal prosecution should generally be retained in the original district in which it was filed.  
12 *United States v. Baltimore and O.R.R.*, 538 F. Supp. 200 (D.D.C. 1982). Federal Rule of Criminal  
13 Procedure 21(b), however, allows a defendant to initiate a motion for a transfer of venue to another  
14 district *if convenient for the parties and witnesses and in the interest of justice*. Fed. R. Crim. P. 21(b)  
15 (2005) (emphasis added). The defendant wishing to switch the location of trial bears the burden of  
16 justifying the requested transfer. *See United States v. Spy Factory, Inc.*, 951 F. Supp. 450, 464  
17 (S.D.N.Y. 1997); *United States v. Persico*, 621 F. Supp. 842, 858 (S.D.N.Y. 1985). For a defendant to  
18 succeed on a motion under Rule 21(b), he must demonstrate that prosecution of the case in the district  
19 where the count was properly filed would "result in a substantial balance of inconvenience." *United*  
20 *States v. Hurwitz*, 573 F. Supp. 547, 552 (D.W.Va. 1983); *see also United States v. Cores*, 356 U.S. 405  
21 (1958); *United States v. National City Lines, Inc.*, 334 U.S. 573 (1948); *United States v. Johnson*, 323  
22 U.S. 273 (1944).

23  
24  
25 \_\_\_\_\_  
26 <sup>3</sup>(...continued)

26 some of his illegal activity required him to set up a shell corporation in Virginia, this corporation was  
27 entirely controlled by Wilkes from the Southern District of California. For example, Wilkes supplied  
28 the shell corporation with all computer and accounting services necessary to conduct business.  
Moreover, the head of the shell corporation has admitted that his company was really run by Wilkes who  
made all the significant business decisions.

1 The decision whether to transfer a case is committed to the sound discretion of the district court.  
2 See *United States v. Heaps*, 39 F.3d 479, 482 (4th Cir. 1994) (citing *United States v. Espinoza*, 641 F.2d  
3 153, 162 (4th Cir. 1981)). As such, it will be reversed only if the reviewing court concludes that the trial  
4 court abused this discretion. *Heaps*, 39 F.3d at 482. To warrant a transfer from the district where an  
5 indictment was properly returned, it should appear that a trial there would be *so unduly burdensome that*  
6 *fairness requires the transfer* to another district of proper venue where a trial would be less burdensome;  
7 and, necessarily, any such determination must take into account any *countervailing considerations*  
8 which may militate against removal. *United States v. United States Steel Corp.*, 233 F. Supp. 154, 157  
9 (S.D.N.Y. 1964).

10 The Sixth Amendment to the Constitution provides for the right of trial in the vicinity of the  
11 offense as a safeguard against unfairness and hardship if the accused were prosecuted against his or her  
12 will in a remote place; but *when venue lies in several districts*, the constitutional provisions are not  
13 intended to provide a defendant an absolute right to be tried in his or her home district or any particular  
14 place. *Platt v. Minnesota Mining and Manufacturing Co.*, 376 U.S. 240 (1964). Defendant Foggo is  
15 charged with, *inter alia*, participating in a conspiracy encompassing worldwide offense conduct and,  
16 as is beyond dispute, “a prosecution may be brought in any district in which any act in furtherance of  
17 the conspiracy was committed.” *United States v. Al-Talib*, 55 F.3d 923, 928 (4th Cir. 1995). See also  
18 *Hyde v. United States*, 225 U.S. 347 (1912) (venue properly found where conspiracy formed or where  
19 any overt act occurred); 18 U.S.C. § 3237(a). Accordingly, to prevail, Foggo must convince the court  
20 that severing defendant Foggo (which is admittedly more convenient *for him*) and conducting two trials  
21 with virtually identical issues and witnesses – one in the Southern District of California and one in the  
22 Eastern District of Virginia – would be more convenient for **all of the witnesses and parties** ( including  
23 the government) and otherwise be in the interest of justice.<sup>4/</sup>

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26 <sup>4/</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 (5<sup>th</sup> Cir. 1964); *United States v. Choate*, 276 F.2d 724,  
727 (5<sup>th</sup> 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           2.       Platt Factors: Whether Transferring Venue is in the Interest of Justice?

2           As noted in Defendant Foggo's moving papers, the Supreme Court has set forth the following  
3 ten factors for considering whether a defendant's transfer of venue motion is "in the interest of justice"  
4 as required by Rule 21 (b): (1) location of defendant; (2) location of possible witnesses; (3) location of  
5 events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption  
6 of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel;  
7 (8) relative accessibility of place of trial; (9) docket condition of each district or division involved; and  
8 (10) any other special elements which might affect the transfer. *Platt*, 376 U.S. at 243-44. In applying  
9 this calculus, the court must keep in mind that no one factor is dispositive; rather, a court should strike  
10 a balance to determine which factors are most important in reaching its decision. *See United States v.*  
11 *Maldonado-Rivera*, 922 F.2d 934, 966 (2d Cir. 1990).

12           Although Foggo addresses most of these factors in his moving papers, he fails to either  
13 adequately illuminate the facts surrounding the instant charges, or to present fairly the multiple problems  
14 that spring from severing the defendants. As shall be discussed below, a more thorough and detailed  
15 analysis forcefully reveals that Foggo has not met his burden justifying a severance of defendants and  
16 a transfer of his case to the Eastern District of Virginia.

17           i.       Location of the Defendant

18           It is not contested that the location of Defendant Foggo's current residence – taken alone – favors  
19 a trial in Virginia. *See United States v. Nat'l City Lines, Inc.*, 7 F.R.D. 393, 395-96 (S.D. Cal. 1947)  
20 (transferring venue where all defendants requested transfer and where the principal place of business,  
21 location of records, control of corporate subsidiaries, and negotiation of agreements and transactions  
22 forming basis of indictment all occurred in other district). Yet, it is equally clear that the location of  
23 Defendant Wilkes's current residence – taken alone – favors a trial in San Diego. Accordingly,  
24 analyzing the issue from this limited perspective does little to inform the Court as to what the interest  
25 of justice requires. Indeed, unless Wilkes was to *join* Foggo's motion, the "location of defendant" factor  
26 is, at best, a draw. *See United States v. Guastella*, 90 F. Supp. 2d 335 (S.D.N.Y. 2000) (denying  
27 defendant's motion to transfer venue even though four out of six defendants lived closer to the proposed  
28 venue; and finding that defendant's location weighed only "slightly in favor of transfer"). Moreover,

1 once the convenience of the government and witnesses are factored into the equation (as discussed  
2 below), the scale tips heavily towards trial in the Southern District of California.

3 In this context, it must first be stressed that the defendant simply has no right, constitutional or  
4 otherwise, to be tried in his home district. *See Platt*, 376 U.S. at 245-46; *United States v. Espinosa*, 641  
5 F.2d 153, 162 (4th Cir. 1981). Second, “[t]o the extent that there is a ‘policy’ favoring the trial of  
6 defendants where they reside this ‘policy’ is in tension with the more general presumption that ‘a  
7 criminal prosecution should be retained in the original district.’” *See Ferguson*, 432 F. Supp. 2d 559,  
8 567-69 (E.D. Va. 2006) (concluding that matter should remain in original district unless interests of  
9 justice require transfer) (citing *United States v. Spy Factory, Inc.*, 951 F. Supp. 450, 464 (S.D.N.Y.  
10 1997). *See also United States v. Guastella*, 90 F. Supp. 335, 342 (S.D.N.Y. 2000) and *United States*  
11 *v. Posner*, 549 F.Supp. 475, 477 (S.D.N.Y. 1982) (finding general presumption that “criminal  
12 prosecution should be retained in the original district” unless interest of justice required transfer).  
13 Lastly, as shall be discussed in greater detail *infra*, the magnitude of this case, the prospect of multiple  
14 trials, and the potential cost to taxpayers far outweigh an individual defendant’s personal circumstances  
15 in seeking a trial closer to home.

16 Without question, Defendant Foggo advances compelling and sympathetic personal  
17 circumstances for a trial near his home and his family. *See Defendant Foggo’s Motion at 5-7* (arguing  
18 that substantial familial hardships would result from a trial in San Diego). Although such a result is  
19 unfortunate, the brunt of such hardship results not from the location of the trial, but from the mere fact  
20 that the defendant – a former high government official in a position of great public trust – will be placed  
21 on trial in federal court for extremely serious charges that carry substantial penalties. *See United States*  
22 *Steel Corp.*, 233 F. Supp. at 157 (finding that all criminal prosecutions impose burdens and dislocation  
23 from normal occupational and personal activities). In this regard, it is probable that a trial in the Eastern  
24 District of Virginia (which would normally attract more attention from the major news outlets) might  
25 cause more, rather than less, strain to his family relations.<sup>5/</sup>

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27 <sup>5/</sup> Indeed, the government was informed that Foggo even contemplated sending his family away  
28 to spare them the attendant problems inherent with being tried on these charges before a likely national  
audience.

1 Defendant Foggo also argues that a transfer is warranted based, in part, on the fact that his wife  
2 will not be in a position to accompany and provide support to him “during the expected pretrial hearings,  
3 and particularly, during a one-month trial.” In support of this argument, defendant paints a picture of  
4 a warm, loving, and supportive married life, which would be hampered by his absence for a matter of  
5 weeks. First off, the rosy picture defendant paints of his married life is not necessarily an entirely  
6 accurate depiction.<sup>6/</sup> Secondly, it is hard for defendant to maintain, given the extensive travel inherent  
7 in his career, that his family is not somewhat accustomed to having him occasionally absent for a matter  
8 of several weeks at time.

9 Most importantly, Defendant Foggo has failed to even suggest how a trial in the Eastern District  
10 of Virginia would, on balance, not result in equal hardship to the far more numerous family members  
11 of the government prosecution team who will suffer the same hardships when forced to live in the  
12 Eastern District of Virginia to conduct a second trial on these charges. Simply stated, Defendant Foggo,  
13 despite recognizing that a transfer means severance and multiple trials, has failed to establish that a trial  
14 in Virginia *for him only* (and in San Diego for Defendant Wilkes) is convenient for *all* parties and in the  
15 interests of justice. *See United States v. Aronoff*, 463 F. Supp. 454, 458 (S.D.N.Y. 1978) (finding that  
16 the prospect of separate trials “is of no small consequence [and accordingly] the Court must weigh all  
17 of the relevant factors with great care”). In other words, the expense and hardship resulting from  
18 multiple trials on both coasts do not support a transfer under Rule 21(b), which must be predicated upon  
19 the “convenience of the parties” – **not just the convenience of one defendant** – and “the interests of  
20 justice.”

21 ii. Location of Possible Witnesses

22 In discussing the second *Platt* factor, defendant starts off on solid footing by observing correctly  
23 – at least according to several district court decisions – that the location of witnesses is “one of the more  
24 significant factors” in the decision to transfer venue under Rule 21(b). *See United States v. Daewoo*  
25 *Indus. Co., Ltd.*, 591 F. Supp. 157, 160 (D. Or. 1984); *Ferguson*, 432 F. Supp. 2d at 564 (quoting  
26 favorably the language in *Daewoo Indus. Co., Ltd.*); *United States v. Alter*, 81 F.R.D. 524 (S.D.N.Y.

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27  
28 <sup>6/</sup> The government is prepared to supply the court with evidence on this point if the Court feels  
it is necessary and the defense wishes to contest this assertion.

1 1979). Unfortunately, the defendant then missteps by claiming that “[t]here can be no question that this  
 2 factor weighs in favor of transferring this case to the Eastern District of Virginia.” *See Defendant*  
 3 *Foggo’s Motion* at 7. To the contrary, it is virtually guaranteed that a severance of defendant Foggo and  
 4 the resulting multiple trials would, in fact, result in extreme prejudice to the very government personnel  
 5 that Foggo somewhat disingenuously claims would be benefitted by a separate trial in the Eastern  
 6 District of Virginia. *See Jones v. Gasch*, 404 F.2d 1231, 1241 (D.C. Cir. 1967) (court should weight  
 7 convenience of the government and its witnesses along with convenience of defendant and his  
 8 witnesses).

9 In performing this portion of the analysis, the Court should consider the location of “substantive  
 10 witnesses who have personal knowledge of the facts of the case” – as opposed to character witnesses  
 11 who typically will coincide with the location of the defendant (discussed immediately above).<sup>7/</sup> *Id.* at  
 12 1241. To his credit, defendant – for the most part – attempted to address the criteria, which other courts  
 13 have generally considered:

- 14 (1) The name and address of each witness that is unable or unwilling to come to the district  
 in which the case was indicted for trial;
- 15 (2) The reason why it is inconvenient for each witness to come to this district;
- 16 (3) A summary of the expected testimony of each allegedly inconvenienced witness; and
- (4) Identifying the materiality of the matters about which the witness will testify.

17 *See Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 756-57 & n.2 (3d Cir. 1973); *Lindberg v. United States*,  
 18 363 F.2d 438, 438 (9th Cir. 1966); *Spy Factory*, 951 F. Supp. at 456 (dismissing “naked allegations”  
 19 in favor of specific examples of witness testimony and their inability to testify due to the venue for the  
 20 trial); *United States v. Guastella*, 90 F. Supp. 2d 335, 338-39 (S.D.N.Y. 2000) (holding that the  
 21 defendant failed to carry his burden on a motion to transfer venue by not indicating why his witnesses  
 22 were unable to testify at the present trial location).

23 Examining these criteria, it is immediately and obviously apparent that the defense does not even  
 24 suggest that any of the fifteen or so witnesses he lists in his declaration are *unable or unwilling* to come  
 25 to San Diego. Further, Defendant Foggo’s lengthy and detailed break-down of the locations of these  
 26 fifteen plus witnesses entirely misses the mark. Assuming that these witnesses possess relevant

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27 <sup>7/</sup> In any event, it is possible – given the extensive volume of “bad-character” evidence the  
 28 government has amassed – that defendant’s suggestion that he will, in fact, call character witnesses is  
 normal attorney posturing.

1 testimony (a fact conceded at least as to some of these witnesses), defendant suggests that traveling to  
2 San Diego represents a greater burden than traveling to Virginia. Assuming this to be true – at least as  
3 to the witnesses articulated in defense counsel’s declaration – defendant, once again, simply ignores the  
4 fact that the witnesses will in all likelihood not be relieved of their obligation to travel to San Diego.  
5 Rather, they will simply have to make two trips: one to the Eastern District of Virginia for Foggo’s trial  
6 and one to the Southern District of California for Wilkes’s trial.<sup>8/</sup>

7 Finally, defendant tries to bolster his argument by “cherry picking” four potential government  
8 witnesses that reside in or near the Washington, D.C. area. An admittedly preliminary examination of  
9 the potential government trial witnesses reveals that they are fairly equally split between the two coasts.  
10 More importantly, however, if the government witnesses are excluded, San Diego proves to be the more  
11 convenient location for twice as many potential trial witnesses.<sup>9/</sup> Among these witnesses are the  
12 numerous investigative agents who played a significant role in investigating the instant case.<sup>10/</sup>

13 Given this background, it is clear that the location of the substantive witnesses does not weigh  
14 in favor of transferring Foggo’s case to Virginia. The prospect of having all of the government  
15 witnesses (and a significant portion of the defense witnesses) travel and testify more than once is not

16 \_\_\_\_\_  
17 <sup>8/</sup> Defendant suggests that in trying this case the government will have to obtain the testimony  
18 of witnesses who are currently located in diverse overseas locations such as Africa and Eastern Europe.  
19 Defendant may be correct in arguing that it is marginally easier to travel from these foreign locations  
20 to a federal court on the Eastern Seaboard. *See Defendant Foggo’s Motion* at 9 (“the burden in terms  
of time and expense in traveling to Virginia is considerably less than the burden of traveling to San  
Diego). However, defendant simply ignores the fact that it is vastly more burdensome to cause these  
officials to travel from their far locals to attend trials on both coasts held at different times.

21 <sup>9/</sup> Although the defendant’s breakdown includes a reference to witnesses who have testified  
22 before the grand jury, the government feels constrained to merely note that its own breakdown would  
be in line with its proposed trial witnesses. If the Court feels this matter needs further documentation  
the government would be happy upon order of the Court to provide the exact numbers at side bar, in a  
sealed declaration, or in open court.

23  
24 <sup>10/</sup> In response to the size and complexity of this case, the government has assembled a task force  
25 comprised of federal agents, analysts, and technicians from several agencies, including the CIA, FBI,  
26 IRS, and DCIS. Most of these agents and supporting government employees are permanently stationed  
in the Southern District of California. Like moving the documents in this case (discussed below), it  
would be a huge undertaking to relocate permanent federal agents and other employees – not to mention  
AUSAs who have numerous other responsibilities and cases – who are responsible for the investigation  
27 and prosecution of this case. In addition, to the extent that these agents and attorneys are also  
28 responsible for the prosecution of the related case, *United States v. Wilkes and Michael*, Criminal Case  
No. 07cr0330-LAB, changing venue could hamper the government’s ability to bring both matters timely  
to trial.

1 convenient to anyone (*other than* Foggo) and is clearly not in the interest of justice.

2 iii. Location of Events Likely to Be in Issue

3 Defendant Foggo next argues that transfer is appropriate because it is clear that the majority of  
4 the events and transactions at issue occurred in another jurisdiction. *See Defendant Foggo's Motion* at  
5 11.<sup>11/</sup> Based upon a completely inaccurate and misleading characterization of the events underlying the  
6 instant indictment, he argues to the Court that this case's "natural center of gravity" lies in the Eastern  
7 District of Virginia and that "the interest of justice demand" that he be tried in that district. As shall be  
8 discussed below, such faulty logic would similarly suggest that the effects of gravity caused the apple  
9 to fall from Newton's head up towards the tree branch.

10 The defendant begins to distort the record by claiming that the government admitted in court that  
11 the "charges against Mr. Foggo in this case relate neither to the charges against Mr. Cunningham nor  
12 to the separate charges against Mr. Wilkes." *See Defendant Foggo's Motion* at 2. This is patently  
13 untrue as the transcript of the hearing indicates. By selectively quoting only a portion of the transcript  
14 (regarding the likelihood of the Court granting a severance of the charges if we had indicted Foggo in  
15 the Wilkes-Michael Indictment), Foggo omits the fact that the government explicitly informed the Court  
16 that the Foggo-Wilkes case (07cr0329-LAB) was, in fact, related to the Wilkes-Michael case (07cr0330-  
17 LAB). For example, government counsel stated:

18 [B]oth of these cases stem from the same investigation. And in doing so, there is a vast  
19 overlap, especially in the amount of discovery, but as well in the witnesses that the court  
will deal with as well as the factual setting here.

20 *See Transcript of February 21, 2007 Hearing* at 16. Similarly, the government also informed the court  
21 that it would "have to deal with some . . . similar legal issues." *Id.* at 17.

22 Defendant's gravitational argument continues to lose its attraction by virtue of his misplaced  
23 assertion that the overt acts listed in the Indictment indicate that the "charges against him could have  
24 and should have been brought in the Eastern District of Virginia." In support of this assertion, Foggo

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26 <sup>11/</sup> Defendant cites *United States v. Ferguson*, 432 F. Supp. 559, 565 (E.D. Va. 2006) for the  
27 proposition that a transfer is appropriate when the majority of events and transactions occur in another  
28 district. Although the government does not quarrel with this general proposition, it should be noted that  
even though a transfer may be appropriate based upon this factor, *Ferguson* does not hold that it should  
be granted if other *Platt* factors suggest that the interests of justice would require the prosecution to be  
maintained in the original jurisdiction.

1 correctly alleged that of the 44 listed overt acts he believes that “22 of those acts occurred, at least in  
2 part, in or near the Eastern District of Virginia.” However, he then mistakenly concludes that 26 of the  
3 acts “have no connection to California.” *See Defendant Foggo’s Motion* at 12.

4 A review of the 44 overt acts reveal that all but 13 have a connection to San Diego. Defendant  
5 Foggo misapprehends the nature of these overt acts most likely because he has not yet reviewed – or had  
6 not been able to place in context – all of the evidence produced in discovery in connection with the case.  
7 For example, Foggo claims that overt acts involving emails sent between himself and Wilkes  
8 Subordinate X do not have a “connection” to San Diego (*see e.g.*, overt acts 12 and 29). Although such  
9 emails on their face appear to be between Foggo in an overseas location and Wilkes Subordinate X in  
10 or near Virginia, they are in reality emails that pass through the ADCS server in San Diego, California.  
11 In this regard, it should be noted that this is not a mere technical observation; but, in fact, illustrates  
12 how Wilkes Subordinate X is simply operating a shell company that is being controlled and operated  
13 by Defendant Wilkes from San Diego. This tactic reinforces the conclusion that the real nexus for the  
14 conspiracy is San Diego with Wilkes Subordinate X serving as just that: a subordinate who runs a shell  
15 company to disguise the illicit nature of the Wilkes-Foggo relationship.

16 Similarly, Foggo claims that overt acts involving financial transactions outside of California do  
17 not have a “connection” to San Diego (*see e.g.*, overt acts 15, 20, 21, 22, 27, 35, 36, 37 and 38). Once  
18 again on its face financial transactions occurring in different states or different countries may not appear  
19 to have a connection to San Diego. However, a review of these acts reveal that they all are all intimately  
20 connected to San Diego.

21 For example, overt act 27 involves Wilkes Subordinate X treating Defendant Foggo to a meal  
22 at an overseas location. An analysis of this transaction reveals that Subordinate X (although paying for  
23 the meal with a personal credit card that was sent to an out-of-state location) submitted a reimbursement  
24 form reflecting this meal to Archer Defense Technologies, Inc., a San Diego based corporation owned  
25 and controlled by Defendant Wilkes. Subsequently, this “business expense” was approved by Wilkes’s  
26 San Diego-based financial department and a check (which included the reimbursement for his meal with  
27 Foggo) was issued from Archer Defense’s San Diego bank account. So – although on its face this  
28 transaction might appear to be wholly unconnected to Defendant Wilkes and San Diego – not only is

1 there a connection to San Diego, but that connection highlights the central role played by Defendant  
2 Wilkes in the Southern District of California.

3 Finally, Foggo attempts to suggest that a wire transfer from the Virginia area to Group W  
4 Advisors does not have a “connection” to San Diego (*see e.g.*, overt acts 17). To the extent that  
5 defendant’s assertion does not represent a simple mistake, it fails to recognize that Group W Advisors  
6 is one of Wilkes’s San Diego-based companies. As such, the money not only has a connection to San  
7 Diego, it is destined for deposit in San Diego. As such, it represents yet another example of how the  
8 conspiracy was directed for the benefit of Wilkes and his various companies, which are all  
9 headquartered in the San Diego area.<sup>12/</sup>

10 Foggo’s position on the cases’s natural center of gravity falls further into a black hole when he  
11 forwards in its support the curious argument that four out of seven wire fraud counts and all three of the  
12 money laundering counts originate outside of California. While these statements are true enough as  
13 factual matters, defendant omits to mention that these same counts all contain transmissions to the  
14 Southern District of California. Moreover, as is apparent from the face of six out of the seven wire fraud  
15 counts they are directly related to obtaining business and/or payments of money that directly benefits  
16 and/or flows to Defendant Wilkes in San Diego. Indeed, when not examined through a mirror darkly,  
17 it becomes clear that the impetus for all these wires was Wilkes’s desire to obtain – and Foggo’s  
18 agreement to assist in providing – profits that flowed to bank accounts in San Diego, California. So,  
19 contrary to defendant Foggo’s suggestion, the substantive counts in the Indictment strongly support  
20 maintaining jurisdiction in San Diego.

21 A review of the three money laundering counts also reveal that the true center of the case is in  
22 San Diego. All three of these counts demonstrate that Shell Company No. 1 was set up in Virginia  
23 merely as a matter of convenience (as Wilkes’s Subordinate X was coincidentally located there as a

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24 <sup>12/</sup> It should be noted that the mere location of Wilkes’s business transactions does not  
25 necessarily mandate a finding that venue must lie in the same district. *Guastella*, 90 F. Supp. 2d at 339  
26 (holding that “the location of the events at issue favor[ed] neither side,” despite the fact that the  
27 defendants initiated and primarily conducted their investment fraud scheme in the charging district  
28 “because the criminal activity that was alleged to have occurred in this case was national . . . in scope”);  
*see also Spy Factory*, 951 F. Supp. at 457 ( holding that “[b]ecause the criminal activity that was alleged  
to have occurred in this case was concededly national in scope, the location of the events at issue favors  
neither side.”).

1 result of lobbying activity that is relevant only to the Wilkes-Michael case) and that the money  
2 generated through the honest services fraud scheme flowed, for the most part, directly to San Diego.  
3 Once again, this fact is completely unsurprising as this case from its inception was a scheme hatched  
4 by Wilkes and Foggo to enrich Wilkes in San Diego at the expense of the government.

5 Finally, it must be noted that a review of the entire scheme (not limited to the overt acts and  
6 substantive counts in the indictment) also strongly supports the conclusion that the origin and epicenter  
7 of the present conspiracy and honest services fraud is centered in this district, not the Eastern District  
8 of Virginia. Put more prosaically, Foggo's gravitational center cannot hold.

9 Indeed, as roughly sketched out in the statement of facts, this case is first and foremost a  
10 conspiracy to defraud the United States by improperly obtaining government funds through Wilkes's  
11 corporate structure for his personal enrichment. Regardless of implications to the contrary, it was not  
12 necessary for Foggo to be anywhere near Virginia to carry out his role in the conspiracy. Indeed for the  
13 first couple years of the conspiracy, Foggo was not even stationed in this country. From his overseas  
14 location, Foggo improperly assisted Wilkes in his esurient efforts to obtain additional government funds  
15 – funds which were eventually destined for San Diego, and which may or may not have passed through  
16 Virginia. In these circumstances, it is clear that the locus of the crime was not Virginia, but San  
17 Diego.<sup>13/</sup>

18 Given the connection of almost all the overt acts and substantive counts to San Diego, the  
19 government contends that the Court should deny defendant's motion for severance and a transfer of  
20 venue. This is especially true where the heart of the conspiracy remains in San Diego and the relevant  
21 events related to the conspiracy took place in myriad of locations around the country and the world, but  
22 most of all in San Diego.

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27 <sup>13/</sup> Although it could be argued that the locus lay equally in Foggo's overseas location, Foggo's  
28 transfer to Virginia in or about November 2004 did nothing to dampen his enthusiasm for improperly  
benefitting his codefendant at taxpayers' expense. The continuation of defendant's crime during his  
various changing positions and locations at the CIA merely reflect that the one constant in the equation  
is the money that continues to flow to Defendant Wilkes in the Southern District of California.

iv. Location of Documents and Records Likely to Be Involved

1                   iv.     Location of Documents and Records Likely to Be Involved  
2           Aside from largely irrelevant musing regarding classified work unrelated to the instant case,<sup>14/</sup>  
3 Foggo argues that this factor clearly weighs in favor of transfer because he believes that “many of the  
4 documents relevant to Mr. Foggo’s defense remain at CIA Headquarters or the “overseas location.”  
5 Once again, Mr. Foggo is simply wrong. The government, in fact, has already assembled approximately  
6 10,000 classified documents (comprising roughly 30,000 pages) in San Diego that were obtained from  
7 various CIA facilities located both in this country and abroad.

8           In support of his faulty argument, Foggo presents the declaration of retired FBI Agent Edward  
9 M. Shubert. Mr. Shubert states that based upon his extensive experience, he believes that “the proper  
10 assembly, transportation, delivery and protection of a large volume of classified material from the  
11 Washington, DC area to San Diego, California would be a costly undertaking that would consume  
12 extensive resources in order to ensure adequate security.” *See Shubert declaration* at 2. This argument  
13 is just plain wrong. As noted above, the material – with only limited exceptions – has already been  
14 transferred. Mr. Shubert’s opinion thus mandates against severance and favors trial in San Diego. As  
15 the vast majority of the material is already in San Diego, transferring Foggo’s case to Virginia would,  
16 in fact, trigger this alleged extra cost and effort.<sup>15/</sup>

17           Defendant’s attempt to fix the Court’s attention on the classified documents is understandable  
18 as there are hundreds of thousands of non-classified documents either seized in the Southern District  
19 of California or returned to a grand jury sitting in this district.<sup>16/</sup> Therefore an examination of the

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21           <sup>14/</sup> For example, Defendant asserts that “over 80% of [his] time at the unidentified overseas  
22 location, following the attacks of September 11, 2001, was spent working on compartmentalized  
23 operations classified as the ‘top secret’ level.” *See Defendant’s Motion* at 13. Assuming the above to  
24 be true, the classified material is not admissible or even discoverable unless it is relevant to the present  
25 case, which basically involves one single contract administered from that location and awarded to a  
26 Wilkes shell company.

27           <sup>15/</sup> Shubert also observes that the transportation of this classified information would “increase  
28 the risk of compromise or surreptitious access to the classified information contained therein.” It is hard  
29 to argue with the fact that a transfer of information increases the risk of it being improperly  
30 disseminated. However, as noted above, the information for the most part has already been transferred;  
31 so, to the extent that Shubert has a valid point, it again weighs against transfer of Foggo’s case.

32           <sup>16/</sup> Most of the documents comprising discovery in this case were seized pursuant to search  
33 warrants. As the Court well knows, upon seizing documents pursuant to search warrant, the government

(continued...)

1 location of all the relevant documents and records again weighs in favor of denying defendant's motion  
2 to transfer. Finally, it must again be stressed that if defendant's motion is granted this would require  
3 that the hard copy records be shifted from coast-to-coast as the trial and discovery schedules were set  
4 by the two different jurisdictions. Certainly, the interests of justice would not require such a bizarre  
5 result – especially, as defendant cautions, when dealing with classified materials.

6 v. Disruption of Defendant's Business

7 Defendant Foggo fails to address this factor as a trial in San Diego will presumably not result  
8 in any disruption to his business. As such, he has failed to establish that this factor favors trying him  
9 separately in the Eastern District of Virginia

10 vi. Expense to the Parties

11 Without question, severing Defendant Foggo and transferring his case to the Eastern District of  
12 Virginia would result in his facing a less substantial financial burden. Moreover, the government does  
13 not contest the fact that travel and lodging expenses are obvious, albeit not controlling, considerations  
14 in determining the balance of inconvenience to the parties. *See United States v. Haley*, 504 F. Supp.  
15 1124, 1128-29 (E.D.Pa.1981). However, the pertinent inquiry under this factor is again not confined to  
16 the expenses to Foggo, but to the expenses to all the parties. *See e.g., Platt*, 376 U.S. at 243-44; *United*  
17 *States v. Projansky*, 465 F.2d 123, 139 (2<sup>nd</sup> Cir. 1972).

18 When examined in this light, the expenses that will be sustained by Defendant Foggo pale in  
19 comparison with those associated with having to try the same case twice at opposite ends of the country.  
20 Defendant Foggo, after his co-defendant is tried in San Diego, would have federal taxpayers pay the  
21 expense of conducting a duplicate trial in Virginia, including flying all witnesses from diverse locations  
22 around the globe to attend a second proceeding and relocating virtually the entire prosecution team. By  
23 virtue of Defendant Foggo's logic, this enormous expense is justified almost solely to save *his* travel

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25 <sup>16/</sup>(...continued)

26 must take custody of the documents, maintain their integrity, make them available for inspection, and  
27 organize them for an orderly presentation at trial. In the present case, the government either seized the  
28 documents in San Diego or brought the records to this district from other locations, notably Virginia and  
Washington, D.C. As these documents were brought to this district for *bone fide* purposes, this factor  
weighs in favor of denying the transfer. *See United States v. Maldonado-Rivera*, 922 F.2d 934 (2d Cir.  
1990) (denying request to transfer as documents brought from defendant's home district to the original  
venue).

1 and lodging expenses in attending trial in San Diego. This logic, however, is neither more convenient  
2 for all the parties, nor serves the interest of justice for federal taxpayers.<sup>17/</sup>

3 Defendant attempts to escape this common sense conclusion by asserting that he “simply cannot  
4 bear the costs of travel and lodging related to multiple trips to attend pretrial hearings and a one-month  
5 trial held in the Southern District of California.” See *Defendant Foggo’s Motion* at 14. Although the  
6 government concedes that the cost related to a trial in this district (which will hopefully be less than one  
7 month) may impose a substantial financial hardship for Foggo, it will not be unbearable.<sup>18/</sup> Not only does  
8 Foggo benefit from a government pension that most likely exceeds \$75,000 per year, but he has a  
9 number of friends (including Mr. Wilkes and his assorted family members) in the San Diego area who  
10 could most likely assist with obtaining suitable transportation and lodging – for example, one of Mr.  
11 Foggo’s sureties is believed to have a house in the San Diego area that is not currently occupied.

12 The expense of *all parties* again favors trying Foggo and Wilkes together in a joint trial in the  
13 Southern District of California.

14 vii. Location of Counsel

15 Defendant Foggo correctly asserts that the location of his counsel of choice is not something to  
16 be “cavalierly dismissed.” *Aronoff*, 463 F. Supp at 459. However, he neglects to mention that he  
17 selected this counsel knowing full well that the investigation was being conducted in San Diego and that  
18 a grand jury in the Southern District of California was contemplating bringing charges in this district.  
19 Nor does he mention that the Court is entitled to examine the location of all counsel, which includes  
20 Defendant Wilkes’s defense team, and the government prosecution team, both of which presumably find  
21 it more convenient and cost efficient to conduct the trial closer to their homes.

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23 <sup>17/</sup> To the extent that some district courts have suggested that the government “has, for all  
24 practical purposes unlimited financial resources [as it can] mint money,” see *United States v. Coffee*,  
25 113 F.Supp 2d 751, 757 (E.D. Pa. 2000), the government respectfully disagrees. It would appear that  
the *Coffee* court had not analyzed the latest Department of Justice budgets, which do not even allow for  
funding all AUSA positions and require constant monitoring of travel and other case related travel costs.

26 <sup>18/</sup> Defendant cites *United States v. Ferguson*, 432 F. Supp. 2d at 567 to support his contention  
27 that if the defendant cannot bear the expense of trial in San Diego that should control the Court’s  
28 inquiry. *Ferguson* based this conclusion on *Baltimore & Ohio R.R.*, 538 F. Supp 200 (D.C.D.C. 1982).  
A review of *Baltimore & Ohio R.R.* reveal that the district court in that decision merely observed that  
“the size of the expense concern[ed] the Court less than whether the defendants [could] bear the  
expense.” 538 F. Supp. at 205.

1 Finally, he fails to mention that his defense counsel has committed to doing this case in this  
2 district and has requested to be admitted *pro hoc vice*. Therefore, he will not be denied his counsel of  
3 choice. Defense counsel has suggested no case – and the government has unearthed none – granting a  
4 transfer in this circumstance. Accordingly, the balancing of equities clearly weighs in favor of a trial  
5 in San Diego.

6 viii. Relative Accessibility of Place of Trial

7 Defendant Foggo fails to address this factor as a trial in San Diego is presumably equally  
8 accessible. As such, he has failed to establish that this factor weighs for or against transferring the trial  
9 against Foggo alone to Virginia.

10 ix. Docket Condition of Each District or Division Involved

11 Defendant Foggo asserts that “an analysis of the docket condition of each federal district . . .  
12 favor transfer to the Eastern District of Virginia.” *See Defendant Foggo’s Motion* at 16. The  
13 government disagrees. Based upon the defense’s own exhibit it would appear that the dockets are  
14 exceedingly similar with each district having a number of factors militating for and against transfer.

15 At the outset, it should be noted that when analyzing a Rule 21(b) motion, “[c]ourts must be  
16 mindful of ... the actual expense and waste of court time in our severely burdened and overtaxed federal  
17 judicial system.” *United States v. Zylstra*, 713 F.2d 1332, 1336 (7th Cir. 1983). *See also United States*  
18 *v. Bloom*, 78 F.R.D. 591, 609-10 (E.D. Pa. 1977) (considering judicial economy in denying a motion  
19 for transfer). Although the advent of the Speedy Trial Act may have somewhat diminished the relevance  
20 of this factor, *see e.g., United States v. Hurwitz*, 573 F. Supp 547, 554 (S.D. W. Va. 1983), some courts  
21 still consider this criteria when deciding the merits of a motion to transfer venue. *See e.g. United States*  
22 *v. Smallwood*, 293 F. Supp. 2d 631, 640-41 (E.D. Va. 2003); *United States v. Lindh*, 212 F. Supp. 2d  
23 541, 551 (E.D. Va. 2002).<sup>19/</sup>

24 In analyzing the competing dockets, defendant is forced to admit that the most recent statistics  
25 reveal that the average number of filings in the two districts are virtually identical, *i.e.*, 527 cases per  
26 district judge in San Diego v. 513 cases per district judge in Virginia. On the other hand, the average

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28 <sup>19/</sup> As noted by defendant, the Ninth Circuit has not had occasion to address the impact of the  
Speedy Trial Act to this factor.

1 medium time to jury trial for a criminal case in San Diego is substantially shorter than in Virginia (3.9  
2 months v. 5.4 months). This result is likely explained by the fact that the average weighed filing is also  
3 lower in San Diego (421 v. 474).<sup>20/</sup> Based upon these figures, it certainly appears that a criminal case  
4 placed on our docket will get to trial sooner than one based in Virginia. Accordingly, it would appear  
5 that the docket conditions would weigh *against* transfer.

6 However, although again omitted from Foggo's analysis, a concern for the Court's docket  
7 unquestionably weighs in favor of keeping his case in this district. This conclusion is inescapable as  
8 a severance of Foggo from the Indictment will essentially double the amount of work required by the  
9 Courts. Among other undesirable results, a district court in the Eastern District of Virginia will have  
10 to get up to speed on the facts and law of this case, which even in its incipient stages has already  
11 engendered briefing and hearings on complex topics such as CIPA. This is clearly an undesirable result  
12 "in our severely burdened and overtaxed federal judicial system." *United States v. Zylstra*, 713 F.2d at  
13 1336. No amount of careful "massaging" of court statistics can change this conclusion.

14 x. Any Other Special Elements Which Might Affect the Transfer

15 Defendant Foggo notes two special considerations that he claims weigh in favor of transfer. The  
16 first is the transportation of classified information. The second is "inaccurate press coverage" allegedly  
17 due to government leaks coupled with "public confusion" arising out of Wilkes's involvement in  
18 multiple criminal schemes. However, neither of these considerations favor, or would in any way be  
19 rectified by, a severance and transfer of Foggo's case to Virginia. In this regard, the absence of any  
20 special elements on his side actually weigh against a transfer to the Eastern District of Virginia.

21 As noted previously, Foggo's first special consideration is unavailing as the material – with  
22 limited exceptions has already been transferred. Accordingly, this factor would actually weigh against  
23 transfer. Foggo's second special consideration is equally lacking in weight. To the extent that Foggo  
24 really believes that pre-trial publicity has created a "very real risk of prejudicing the jury pool against  
25 Mr. Foggo," he is welcome to file the appropriate motion under Rule 21(a). *See Defendant Foggo's*  
26 *Motion* at 18. It is clear, however, that Mr. Foggo tosses this consideration improperly into a Rule 21(b)

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28 <sup>20/</sup> Criminal defendants each receive a weight with more time-consuming cases being assessed  
higher weights and cases demanding relatively less time lower weights.

1 analysis as it would have absolutely no chance of success if brought properly under Rule 21(a).

2 Rule 21(a) provides that a change of venue is appropriate if “so great a prejudice against  
3 defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial  
4 there.” Fed. R. Crim. P. 21(a). To justify transfer based upon pre-trial publicity, Foggo must shoulder  
5 the heavy burden of establishing that the publicity in essence displaced the judicial process, thereby  
6 denying his constitutional right to a fair trial. *See United States v. McVeigh*, 153, 1166, 1181 (10<sup>th</sup> Cir.  
7 1988) (citing *Sheppard v. Maxwell*, 384 U.S. 333, 242-45 (1966)). Such a presumption generally has  
8 been applied “only in cases ‘wherein the press saturated the community with sensationalized accounts  
9 of the crime and court proceedings, and was permitted to overrun the courtroom, transforming the trial  
10 into an event akin to a three-ring circus.’” *United States v. O’Keefe*, 722 F.2d 1175, 1180 (5<sup>th</sup> Cir. 1983  
11 (quoting *United States v. Capo*, 595 F.2d 1086, 190-91 (5<sup>th</sup> Cir. 1979)).

12 Foggo chooses to couch his motion under Rule 21(b) in recognition that there is nothing about  
13 his case, or the media coverage about his case, that requires this Court to take such an extraordinary  
14 action. “Although a defendant is entitled to an impartial jury, he is not entitled to a jury completely  
15 ignorant of the facts.” *United States v. Sherwood*, 98 F.3d 402, 410 (9th Cir. 1996) (rejecting change  
16 of venue motion in notorious kidnaping case of daughter of casino mogul Steven Wynn). Defendant  
17 Foggo would bear the “heavy burden of showing that pretrial prejudice is so great that it is impossible  
18 for the Court to seat a fair and impartial jury.” *United States v. W.R. Grace*, 408 F.Supp.2d 998, 1001  
19 (D. Mont. 2005); *see also Hale v. Gibson*, 227 F.3d 1298, 1332 (10th Cir. 2000) (defendant bears the  
20 burden of establishing that prejudice should be presumed).<sup>21/</sup>

21 In short, Defendant Foggo is unable to demonstrate “presumed prejudice,” meaning that the  
22 pretrial publicity “is so pervasive and inflammatory that the jurors cannot be believed when they assert  
23 that they can be impartial.” *United States v. Croft*, 124 F.3d 1109, 1115 (9th Cir. 1997); *see also*  
24 *Randolph v. People of the State of California*, 380 F.3d 1133, 1142 (9th Cir. 2004); *United States v.*  
25 *Rewald*, 889 F.2d 836, 863 (9th Cir. 1989) (“presumed prejudice” applies only when “the pretrial  
26 publicity was so extensive or the examination of the entire [jury] panel revealed such prejudice that a  
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28 <sup>21/</sup>A district court has broad discretion in ruling on a motion for change of venue, and can be  
reversed only for an abuse of discretion. *See Sherwood*, 98 F.3d at 402.

1 court could not believe the answers of the jurors and would be compelled to find bias or preformed  
2 opinion as a matter of law”) (internal quotation marks and citation omitted). When evaluating a claim  
3 of “presumed prejudice,” the Ninth Circuit requires a court to evaluate three factors. First, “whether  
4 there was a barrage of inflammatory publicity immediately prior to trial amounting to a huge . . . wave  
5 of public passion.” *Id.* (internal quotation marks and citation omitted). Second, “whether the media  
6 accounts were primarily factual or editorial in nature.” *Id.* And third, “whether the media accounts  
7 contained inflammatory prejudicial information that was not admissible at trial.” *Id.* When evaluating  
8 a claim of “presumed prejudice,” the Court also should examine the nature of the crime, i.e., whether  
9 it features a “lurid subject matter.” *Columbia Broadcasting Systems, Inc. v. United States District*  
10 *Court*, 729 F.2d 1174, 1181 (9th Cir. 1984) (holding that John DeLorean cocaine trafficking case did  
11 not involve a lurid subject matter).

12 As the Ninth Circuit has made clear repeatedly, “the presumed prejudice principle is rarely  
13 applicable, and is reserved for an ‘extreme situation.’” *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir.  
14 1988) (affirming the denial of change of venue motion in capital murder trial of Robert Alton Harris,  
15 who brutally murdered two youths in San Diego). *See also United States v. Sherwood*, 98 F.3d 402, 410  
16 (9th Cir. 1996) (“Prejudice is rarely presumed because saturation defines conditions found only in  
17 extreme situations.”) (internal quotation marks and citation omitted); *Jeffries v. Blodgett*, 5 F.3d 1180,  
18 1189 (9th Cir. 1993) (“Courts rarely find presumed prejudice because ‘saturation’ defines conditions  
19 found only in extreme situations.”).

20 The Ninth Circuit has rejected change of venue motions in cases with far more press coverage  
21 than this one. *See, e.g., United States v. Dischner*, 974 F.2d 1502, 1523 (9th Cir. 1992) (rejecting  
22 change of venue motion in corruption case despite 18,000 newspaper column inches, 70 opinion pieces  
23 and editorials, and 177 television news stories devoted to investigation), *overruled on other grounds*,  
24 *United States v. Morales*, 108 F.3d 1031, 1035 (9th Cir. 1997); *Croft*, 124 F.3d at 1115 (rejecting change  
25 of venue motion in conspiracy to murder federal prosecutor case despite “huge numbers” of stories that  
26 had appeared in the local media); *Rewald*, 889 F.2d at 863 (rejecting change of venue motion despite  
27 295 newspaper and magazine articles); *Gallego v. McDaniel*, 124 F.3d 1065, 1071 (9th Cir. 1997)  
28 (“[W]hile there was a considerable amount of media attention devoted to Gallego's trial, Gallego has

1 failed to show that the media publicity in his case was so prejudicial and inflammatory as to have  
2 constituted legal saturation.”); *see also* *W.R. Grace*, 408 F.Supp.2d at 1001 (rejecting change of venue  
3 motion despite 1,900 newspaper articles, two documentary films, two books, telephonic surveys, and  
4 other extensive media coverage).

5 Moreover, none of the few articles cited by Foggo appeared “immediately before trial.” There  
6 is no trial date in this case, and trial likely will not commence for many months. As the Ninth Circuit  
7 has held repeatedly, articles that appear months before a trial begins do not equal “presumed prejudice,”  
8 as a “length of time helps mitigate any bias the media coverage might have created.” *Randolph*, 380  
9 F.3d at 1142. *See, e.g., Patton v. Yount*, 467 U.S. 1025, 1033-34 (1984) (rejecting change of venue  
10 motion because “[t]he voir dire testimony revealed that this lapse in time had a profound effect on the  
11 community and, more important, on the jury, in softening or effacing” any pretrial publicity.”);  
12 *Ainsworth v. Calderon*, 138 F.3d 787, 795 (9th Cir. 1998) (denying change of venue motion in brutal  
13 murder and kidnaping case because “most of the media reports were published between the time of [the  
14 victim’s] and the co-defendant’s confession,” which was more than six months before jury selection);  
15 *Blodgett*, 5 F.3d at 1189 (rejecting change of venue motion because “although there was a substantial  
16 amount of publicity, the bulk of it occurred six months before jury selection in the case.”); *Dischner*,  
17 974 F.2d at 1524 (fact that media coverage occurred long before trial “tend[ed] to dissipate the  
18 prejudicial impact of media coverage”); *Harris*, 885 F.2d at 1362 (“The number of news reports  
19 regarding the Harris case had dissipated considerably by the time of jury selection four months  
20 earlier.”); *Rewald*, 889 F.2d at 864 (“The majority of publicity Rewald complained about in his original  
21 motion for a change in venue was not broadcast or published in close proximity to the trial.”).

22 Finally, it should be noted that defendant’s requested venue shift would not necessarily even  
23 improve matters. As referred to previously, a trial right outside our nation’s capitol is almost guaranteed  
24 to attract more media attention than a trial in San Diego. This would appear to be especially true when  
25 the trial involves government officials, much less the highest ranking CIA official ever charged in a  
26 criminal case. Accordingly, the special considerations enumerated by Defendant Foggo do not weigh  
27 in favor of a severance and transfer of his case to the Eastern District of Virginia.  
28

1 **B. Scorecard**

2 By the government's count, Defendant Foggo ends up batting 0 for 10 on the *Platt* factors when  
3 they are systematically and fairly analyzed. Although he may prevail on 1 or 2 of the factors (*e.g.*  
4 location of the defendant) when examined solely from his perspective, he still falls well below the  
5 "Mendoza line." More important, such a myopic calculus fails to take into account the controlling  
6 admonition to consider *all* the parties and witnesses when deciding whether a transfer would be "in the  
7 interest of justice."

8 **IV**

9 **CONCLUSION**

10 For the above reasons, the government respectfully requests that this Court deny defendant's  
11 motion to sever and transfer venue of his case to the Eastern District of Virginia.

12  
13 DATED: May 7, 2007.

Respectfully submitted,

14 KAREN P. HEWITT  
United States Attorney

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PHILLIP L. B. HALPERN  
24 Assistant U.S. Attorney

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CERTIFICATE OF SERVICE
v.	)	
	)	
KYLE DUSTIN FOGGO (1),	)	
aka "Dusty" Foggo, and	)	
BRENT ROGER WILKES (2),	)	
	)	
Defendants.	)	
_____	)	

IT IS HEREBY CERTIFIED THAT:

I, Phillip L.B. Halpern, 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 RESPONSE AND OPPOSITION TO DEFENDANTS MOTION FOR SEVERANCE AND TRANSFER TO THE EASTERN DISTRICT OF VIRGINIA 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 Geragos (Counsel for Defendant Wilkes)  
Geragos & Geragos, PLC  
350 S. Grand Avenue, 39<sup>th</sup> Floor  
Los Angeles, CA 90071-3480
2. Mark J. MacDougall (Counsel for Defendant Foggo)  
Akin Gump Strauss Hauer & Feld LLP  
1333 New Hampshire Avenue, N.W.  
Washington, DC 20036-1564

I hereby certify that I shall cause to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

NONE

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 7, 2007.

/s/ Phillip L.B. Halpern  
PHILLIP L.B. HALPERN