

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
El Paso Division**

UNITED STATES OF AMERICA	)	
	)	Case No. EP-07-CR-87
v.	)	
	)	The Honorable Kathleen Cardone
LUIS POSADA CARRILES	)	

**GOVERNMENT'S MOTION FOR A PROTECTIVE ORDER**

The United States of America, by and through Michael J. Mullaney, Acting U.S. Attorney, and John W. Van Lonkhuyzen and Rebekah L. Sittner, Trial Attorneys, respectfully moves this Court to issue a protective order, pursuant to Rule 16(d)(1), Federal Rules of Criminal Procedure, regarding the handling of sensitive but unclassified discovery material that has been or will be disclosed by the United States to the defendant. A proposed protective order is attached. This motion follows the Government's unsuccessful attempt to reach agreement with the defendant on a stipulated protective order that could be proposed to the Court for entry in this action. In support of its motion, the Government relies on the following points and authorities:

1. Rule 16(d) of the Federal Rules of Criminal Procedure specifically provides that a Court may "for good cause, deny, restrict or defer discovery or inspection, or grant other appropriate relief." See Fed. R. Crim. P. 16(d)(1). The Supreme Court has emphasized that trial courts can and should utilize protective orders to restrict the dissemination of materials produced in discovery in appropriate cases. See, e.g., Alderman v. United States, 394 U.S. 165, 185 (1969). ("[W]here appropriate, [a trial court should] place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect."); E.I. DuPont De Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917) ("It will

be understood that if, in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made.”). Lower courts have echoed this admonition, and while Rule 16(d) is frequently used to limit discovery, it may also be used to govern the handling of sensitive materials that are produced in discovery. See, e.g., King v. PA Consulting Group, Inc., 485 F.3d 577, 584, 591 (10th Cir. 2007) (finding no abuse of discretion by the district court in a case where, “[b]ecause the evidence included a number of confidential, proprietary documents, discovery was conducted under a Consent Protective Order” under which “[t]he most sensitive documents were designated ‘Attorneys’ Eyes Only,’ prohibiting the parties from viewing them”); Bittaker v. Woodford, 331 F.3d 715, 726 (9th Cir. 2003) (“Courts could not function effectively in cases involving sensitive information - trade secrets, medical files and minors, among many others - if they lacked the power to limit the use parties could make of sensitive information obtained from the opposing party by invoking the court’s authority.”); Covey Oil Co. v. Cont’l Oil Co., 340 F.2d 993, 999 (10th Cir.1965) (upholding a protective order that restricted access to sensitive documents to counsel and independent certified public accountants, prohibited use of the materials for competitive purposes, and required material to be filed under seal), overruled on other grounds as stated in FTC v. Alaska Land Leasing, Inc., 778 F.2d 577, 578 (10th Cir. 1985). Additionally, this Court has recognized the appropriateness of protective orders concerning the handling of discovery in its Standing Discovery Order (D.E. # 141, at 3).

2. To meet its discovery and due process obligations, the Government intends to

disclose to the defendant certain information of a potentially sensitive nature.<sup>1</sup> See Fed. R. Crim. P. 16(a)(1) and 26.2; the Jencks Act, 18 U.S.C. § 3500; Brady v. Maryland, 373 U.S. 83, 87 (1963); and Giglio v. United States, 405 U.S. 150, 154 (1972). This discovery does not contain any classified information; however, the information potentially implicates the privacy, proprietary, law enforcement, and other interests of third parties and foreign governments. The Government has a compelling interest in preventing certain sensitive but unclassified discovery materials from being disclosed to anyone not a party to the court proceedings in this matter; such material may include information relevant to ongoing national security or criminal investigations and prosecutions, both foreign and domestic; information provided to the United States by foreign law enforcement, or vice versa; and materials implicating the privacy, proprietary or economic interests of third parties. The unwarranted disclosure or use of such information could harm the entities that produced and ultimately control these materials, or those otherwise affected by its unwarranted release. Discovery of these materials should be governed by a protective order.

3. The Government has submitted a proposed protective order for the Court's consideration, which seeks to limit inappropriate or damaging public disclosure of such sensitive information, while neither precluding discovery nor limiting defense counsel's legitimate ability to prepare for trial. Entry of the proposed protective order will make it possible to complete discovery in a timely and efficient manner and eliminate the need for the Court to deal with

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<sup>1</sup> The categories of materials that the Government seeks to protect by such a protective order include, but may not be limited to: (1) reporters' tapes and transcripts, or related materials, that have not themselves been published; (2) information produced by or for a foreign government; (3) medical or psychological records or reports; and (4) Giglio material from agent's personnel files (though the Government is not aware of any at this time).

multiple individual requests for protective orders by the Government for each individual item of sensitive discovery produced in connection with this matter.

4. First, the Government has proposed a two-tiered designation system for unclassified discovery materials. Under the Government's proposed protective order, the Government will segregate the discovery materials it produces to the defendant and his counsel of record into two categories: (1) general discovery materials and (2) particularly sensitive discovery materials. Second, material designated as particularly sensitive shall not be disseminated by the defendant or his counsel of record to any individuals, organizations or other entities - including the press - other than to members of the defense team and experts retained to assist in the preparation of the defense. Procedures are established to provide for disclosure to actual or potential witnesses. The text of the proposed order also contains language that prohibits defense counsel from disseminating copies of particularly sensitive discovery material to third parties who refuse to agree to not share the contents of discovery with the media, or to not pass copies to anyone else.<sup>2</sup> Additionally, any papers to be filed with the Court by either party which quote, summarize, excerpt, refer to, or otherwise disclose the contents of particularly sensitive discovery materials, or any information therein, shall be filed under seal. Any papers to be filed with the Court in response to papers filed in conformity with the above restriction must also be filed under seal.

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<sup>2</sup> Specifically, defense counsel has stated that he would not agree to a protective order as to reporters' tapes and transcripts, or related materials, that have not themselves been published, apparently taking the absence of a First Amendment privilege to be the absence of a privacy or commercial right to a recording. However, defense counsel has stated orally he could agree to a protective order as to medical or psychological records or reports.

5. The protective order sought by the Government in this case would not restrict the defendant's rights to discovery under Rule 16 or the Jencks Act, nor under the doctrines announced by Brady or Giglio. Rather, the order is narrowly drawn and merely would restrict any further dissemination of sensitive materials beyond the defendant and defense team. It specifically prohibits dissemination to the press and non-essential third parties, yet allows the defendant to disclose such material to those persons appropriately assisting in case preparation, including outside experts. Thus the Government's proposed order strikes a balance – in allowing the defendant the freedom to use discovery material with third parties where necessary and appropriate, while at the same time requiring the recipient of any such discovery material to agree to two important but non-intrusive conditions: (1) to not share the contents of the discovery with the media, and (2) to not disseminate copies of the material to anyone else without the permission of the Court. Because the Government's proposed protective order in no way limits the scope of the information the defendant will receive, but only the handling of that information, while at the same time protects third parties' interests, the defendant cannot be prejudiced by it. Therefore, to protect sensitive discovery information, the United States respectfully asks this Court to restrict the disclosure of sensitive but unclassified materials that the United States discloses, pursuant to an appropriate protective order such as the one proposed herein.

WHEREFORE, the United States respectfully moves that the Court issue the attached Protective Order.

Respectfully submitted,

MICHAEL J. MULLANEY  
ACTING UNITED STATES ATTORNEY

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Certificate of Service

I hereby certify that on the 5<sup>th</sup> day of June, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: None.

/s/ Rebekah Sittner

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Rebekah Sittner  
Trial Attorney

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WESTERN DISTRICT OF TEXAS  
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	)	The Honorable Kathleen Cardone
LUIS POSADA CARRILES,	)	
a/k/a "Ramon Medina,"	)	
a/k/a "Lobo,"	)	
a/k/a "Solo,"	)	

**PROTECTIVE ORDER FOR UNCLASSIFIED BUT SENSITIVE MATERIALS**

UPON the application of the United States;

IT IS HEREBY ORDERED, pursuant to Rules 16(d) and 57 of the Federal Rules of Criminal Procedure and this Court’s Standing Discovery Order, that the government shall segregate the discovery materials it produces to the defendant and his counsel of record<sup>1</sup> into two categories: (1) general discovery materials and (2) particularly sensitive discovery materials. The category to which particular discovery materials belong shall be clearly identified by the government;

IT IS FURTHER ORDERED that “particularly sensitive discovery materials” shall not be further disseminated<sup>2</sup> by the defendant or his counsel of record to any individuals, organizations or other entities, other than (i) members of the defense team (co-counsel, paralegals, investigators, translators, litigation support personnel, the defendant and secretarial

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<sup>1</sup> “Counsel of record” means Arturo V. Hernandez, Esq., Filipe D.J. Millan, Esq., and Rhonda A. Anderson, Esq.

<sup>2</sup> “Disseminated” means to provide or disclose a particular piece of discovery, quotations from it, or any information contained in it, or a copy thereof, or to allow the copying of a particular piece of discovery or any information contained therein.

staff, involved in the representation of the defendant in this case), and (ii) experts retained to assist in the preparation of the defense. Notice of proposed dissemination to defense experts shall be provided directly to the Court *ex parte* and under seal and no dissemination to such experts shall be made until approved by the Court. Each of the individuals to whom particularly sensitive discovery material has already been disseminated, or will be disseminated pursuant to the above provision, shall be provided a copy of this Order and must agree to be bound by the terms of this Order and must agree that copies of the material they receive will not be disseminated to any other person or entity without permission of this Court. It is expressly understood and agreed that the undersigned counsel of record for the defendant, as well as co-counsel, any defense investigator and any other member of the defense team, may not show or disclose any such particularly sensitive discovery materials to witnesses or potential witnesses (unless such witness or prospective witness was an author or recipient of the specific item of particularly sensitive discovery materials prior to its production in discovery, or the item reports an interview of the prospective witness). The defendant may seek relief from these provisions as to a particular item or items of particularly sensitive discovery material by providing notice to the Court of intent to show particular, identified item(s) to a particular identified witness(es), and the purpose in doing so. The Notice shall be filed under seal. No disclosure of the items to the witness(es) shall be made until the Court so permits.

IT IS FURTHER ORDERED that all such particularly sensitive discovery materials are to be provided to the defense, and used by the defense, solely for the purpose of allowing the defendant to prepare his defense, and that none of the discovery materials produced by the government to the defense shall be disseminated to the media;

IT IS FURTHER ORDERED that the defense team will store all such discovery materials in a secure place and will use reasonable care to ensure that the discovery materials are not disclosed, whether inadvertently or intentionally, to third persons, including the media, in violation of this Order;

IT IS FURTHER ORDERED that any papers to be filed with the Court by either party which include particularly sensitive discovery materials or quote, summarize, refer to, or otherwise disclose the contents of particularly sensitive discovery materials, or any information therein, shall be filed under seal;

IT IS FURTHER ORDERED that any papers to be filed with the Court in response to papers filed in conformity with the preceding paragraph also be filed under seal;

IT IS FURTHER ORDERED that defense counsel may utilize particularly sensitive discovery materials during any questioning of witnesses at trial or other proceedings only after a determination by the Court that the information proposed to be disclosed constitutes admissible evidence;

IT IS FURTHER ORDERED that upon completion of the case, the defendant and counsel of record, members of the defense team, and anyone else who received particularly sensitive discovery materials pursuant to this Order shall return all such materials in their possession, as well as all copies made thereof, to the government;

IT IS FURTHER ORDERED that nothing in this order shall preclude the government from seeking a further protective order pursuant to Rules 16(d) and 57 of the Federal Rules of Criminal Procedure and this Court's Standing Discovery Order as to particular items of discovery materials;

FINALLY, IT IS ORDERED that any violation of the terms of this Order may result in the imposition of contempt sanctions against the violator.

**SO ORDERED**

Dated this \_\_\_\_ day of June, 2009.

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The Honorable Kathleen Cardone  
United States District Judge