IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. (01) MORDECHAI YOSEF ORIAN, aka "MOTTY," (02) PRANEE TUBCHUMPOL, aka "SOM," (05) RATAWAN CHUNHARUTAI, (06) PODJANEE SINCHAI, and (08) JOSEPH KNOLLER, Defendants.	CRIMINAL NO. 10-00576 SOM ORDER GRANTING THE UNITED STATES' RENEWED MOTION FOR CONTINUANCE AND MOTION FOR ORDER REGARDING PROTECTION OF DEFENDANT ORIAN'S ASSERTED ATTORNEY-CLIENT PRIVILEGE; EXHIBIT A (RULE 502(d) PROTECTIVE ORDER)

ORDER GRANTING THE UNITED STATES' RENEWED MOTION FOR CONTINUANCE AND MOTION FOR ORDER REGARDING PROTECTION OF DEFENDANT ORIAN'S ASSERTED ATTORNEY-CLIENT PRIVILEGE

Before the Court, pursuant to a designation from Chief United States District Judge Susan Oki Mollway, is Plaintiff the United States of America's (the "United States") Renewed Motion for Continuance and Motion for Order Regarding Protection of Defendant Orian's Asserted Attorney-Client Privilege, filed on December 1, 2011 ("Renewed Motion"). See ECF No. 333. The United States requests, pursuant to 18 U.S.C. §§ 3161(h)(7)(A) and (B)(ii), a continuance of the February 8, 2012 trial date for

six months (August 8, 2012). See id. The United States also requests that the Court issue a protective order regarding discovery obtained from computer hard drives seized from Defendant Orian's offices which would permit the government to provide Defendants Tubchumpol and Knoller discovery from the hard drives without segregating out the documents containing Defendant Orian's attorney-client communications. See ECF No. 333 Ex. B (Proposed Protective Order). Defendant Orian filed his Opposition to the United States' Renewed Motion on December 8, 2011 and an Errata to his Opposition on December 9, 2011. See ECF Nos. 340, 341. Defendant Tubchumpol filed a Joinder to Defendant Orian's Opposition on December 13, 2011. See ECF No. 343. The United States' Renewed Motion states that Defendant Knoller joins in its Renewed Motion and that Defendants Orian and Tubchumpol are opposed.[1] See ECF No. 333, at 6. The United States filed its Reply to Defendant Orian's Opposition on December 13, 2011. See ECF No. 342.

This matter came on for hearing before the Court on December 2, 2011 at 9:00 a.m. Florence T. Nakakuni, Esq., Robert J. Moossey, Esq., and Daniel H. Weiss, Esq. appeared on behalf of the United States. William J. Kopeny, Esq. appeared on behalf of Defendant Orian, William A. Harrison, Esq. appeared on behalf of

[1] The United States further states that Defendants Chunharutai and Sinchai have not been arraigned, are not represented by counsel in this matter, and have not been contacted regarding this continuance. See ECF No. 333, at 6.

Defendant Tubchumpol, and Dana M. Cole, Esq. appeared on behalf of Defendant Knoller via telephone. Based on the following, and after careful consideration of the Renewed Motion, the supporting and opposing memoranda and declarations attached thereto, and the record established in this action, the Court HEREBY GRANTS the United States' Renewed Motion, CONTINUES the trial date until August 28, 2012, and ISSUES the Rule 502(d) Protective Order attached hereto as Exhibit A.

BACKGROUND

On October 25, 2011, the United States filed its initial Motion for Continuance ("Initial Motion"), which requested a nine-month continuance of the February 7, 2012 trial date.[2] See ECF No. 303. The United States cited two primary reasons as to why this continuance was necessary: (1) the voluminous discovery it had to sift through, including 77 computer hard drives seized from Defendant Orian's Los Angeles office; and (2) the assignment of new trial counsel in August and October 2011. See id.

On November 3, 2011, the undersigned Magistrate Judge issued an Order Denying the United States' Motion for Continuance. See ECF No. 314. Although the Court recognized the large amount of discovery at issue, it was particularly concerned

[2] At the time of the Initial Motion, trial was set for February 7, 2012. After the Court ruled on the Initial Motion, the trial date was continued for one day to February 8, 2012. See ECF No. 320.

with the lack of specificity the United States provided at the time of its Initial Motion regarding how much longer the discovery process would take. See id. at 8-9. At that time, the United States had only imaged 29 of the 77 hard drives and readily admitted that its nine-month continuance request depended upon the volume of the information contained on the hard drives. See id. at 9. As a result, the Court stated that it "simply cannot accept what appears to be a guesstimate by the United States as to how much information is discoverable and how long it will take the FBI to sort through it." Id.

In between the filing of the Initial Motion and the Renewed Motion, the United States was able to complete the imaging process for all 72 hard drives.[3] See ECF No. 333, at 6. The contents of all of the hard drives were made available to Defendant Orian on November 21, 2011. See id. at 2. The government has since determined that approximately 18 terabytes of data are contained on the hard drives. See id. at 6. To date, the United States has processed 14 of the 66 imaged drives. See id. Unlike in its Initial Motion, the United States attached the Declaration of Special Agent Edwin Nam to its Renewed Motion

[3] Although the United States' Initial Motion states that there were 77 hard drives seized, its Renewed Motion says that there are 72 drives. Six of these 72 drives were damaged and unreadable, leaving 66 drives for processing. See ECF No. 333, at 6.

to support its statements regarding the amount of data contained on the hard drives.

On October 6, 2011, Defendant Orian provided the United States with a list of 72 attorneys with whom he might have had communications protected by the attorney-client privilege. See id. at 7. Based on the privilege screening done to date, the government estimates that the drives contain approximately 20 million potentially privileged files ("PP" files). See id. According to the United States' review thus far, the government estimates that it can examine approximately 300 PP files per day to determine whether they are in fact privileged, or whether they are clean and subject to discovery. See id. at 9. At this rate, the government represents that it would take a staff of 100 people 3.87 years to complete the privilege review. See id.

However, assuming the Court grants the United States' proposed protective order, the government needs a six-month continuance to complete the processing of the data, copy the files for production to defendants, and review the contents of the drives in a manner to protect Defendant Orian's attorney-client privilege. See id. at 11. Specifically, the government estimates that it will complete processing the drives by January 2012, turn over the files to Defendants Tubchumpol and Knollezr by the third week of February, and will need an additional five months to review the files. See id.

ANALYSIS

A. Continuance of Trial Date

Under the Speedy Trial Act, 18 U.S.C. § 3161 et seq., a criminal defendant's trial must begin within 70 days of the date the indictment was filed or the defendant's initial appearance, whichever is later. 18 U.S.C. § 3161(c)(1). The statute, however, provides that certain periods of time are excluded from the 70-day calculation. 18 U.S.C. § 3161(h). Among the time periods excluded is:

> Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(7)(A). The district court must set forth in the record, either orally or in writing, its reasons for finding that the ends of justice served by a continuance outweigh the interests in a speedy trial. Id.

Section 3161(h)(7)(B) contains the factors a judge must consider in determining whether to grant a continuance. Here, the United States contends that a continuance is necessary because "the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial

itself within the time limits." 18 U.S.C. § 3161(h)(7)(B)(ii). The Speedy Trial Act also mandates, however, that no continuance shall be granted because of "lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government." 18 U.S.C. § 3161(h)(7)(C).

Upon review of the additional facts presented by the United States in its Renewed Motion, the Court finds that the government has demonstrated that this case is so complex, due to the nature of the prosecution and the volume of the discovery at issue, that it is unreasonable to expect adequate preparation for trial by the presently set date of February 8, 2012. See 18 U.S.C. § 3161(h)(7)(B)(ii). In particular, the United States was able to complete the imaging process for all 72 computer hard drives and is now able to state with precision, via an FBI agent's declaration, exactly how much data it needs to sift through and how long it will take to do so. The Court further notes that 18 terabytes of data is a great deal of information, and it will be difficult for all parties, not just the government, to meaningfully review this amount of discovery before the current trial date.

Moreover, the interests of Defendants Orian and Tubchumpol in commencing trial as scheduled rather than six months later is relatively small. Notably, none of the defendants is in pretrial custody and all have favorable bail

terms. Additionally, Defendant Knoller's attorney is scheduled to begin a three-week jury trial on January 24, 2012 in California and joins in the government's request for a six-month continuance. See ECF No. 303 Ex. A. Finally, the Court submits that the United States' need for such a lengthy continuance is in substantial part due to Defendant Orian's submission of 72 attorney names to the government in order to protect his attorney-client privilege. Indeed, despite having the files in his possession since November 21, 2011, Defendant Orian has not assisted in expediting the discovery process by either waiving the attorney-client privilege or identifying which documents he believes contain privileged materials. For these reasons, the Court concludes that the ends of justice served by a six-month continuance outweigh the interests of Defendants Orian and Tubchumpol going forward with the presently set trial date.

B. Protective Order

Rule 502(d) of the Federal Rules of Evidence provides, "A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court - in which event the disclosure is not also a waiver in any other Federal or State proceeding." Fed. R. Evid. 502(d). Rule 502(d) was added to the Federal Rules of Evidence in September 2008 in response to the "widespread complaint that litigation costs necessary to protect against waiver of attorney-

client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information," a concern that is "especially troubling in cases involving electronic discovery." Fed. R. Evid. 502 advisory committee's note.

Under this rule, a protective order may provide for return of documents without waiver irrespective of the care taken by the disclosing party. Id. As such, "the rule contemplates enforcement of 'claw-back' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege." Id. (citing Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003)). Further, a confidentiality order is enforceable whether or not the parties consent to it. Id. ("Party agreement should not be a condition of enforceability of a federal court's order."); ("This subdivision is designed to enable the court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege . . . ").

Upon review of the United States' Renewed Motion, the Court finds that good cause exists, pursuant to Rule 16(d)(1) of

the Federal Rules of Criminal Procedure,[4] to enter a protective order which permits the government to conduct a limited review of the PP files from Defendant Orian's hard drives and contains a clawback-type of provision regarding Defendants Tubchumpol and Knoller's discovery of attorney-client privileged documents. Discovery in this case will include production of an extensive amount of electronically stored information from Defendant Orian's 72 hard drives, and the risk of inadvertent disclosure of privileged documents appears high. In this complex litigation, the significant amount of time and money that would be expended by the United States' attorneys is simply unnecessary when the Court has a mechanism in Rule 502(d) that allows it to ensure that privilege will not be waived. Therefore, the Court will issue a Rule 502(d) protective order in the form of Exhibit A hereto.

CONCLUSION

In accordance with the foregoing, the Court HEREBY GRANTS the United States' Renewed Motion for Continuance and Motion for Order Regarding Protection of Defendant Orian's Asserted Attorney-Client Privilege, filed on December 1, 2011. The Court FINDS that the ends of justice served by such an action

[4] Rule 16(d)(1) provides in relevant part, "At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." Fed. R. Crim. P. 16(d)(1).

outweigh the best interest of the public and the Defendants in a speedy trial and CONTINUES jury selection and trial from February 8, 2012 until August 28, 2012. The Court ORDERS that the period from February 8, 2012 to and including August 28, 2012 be excluded from the Speedy Trial Act pursuant to 18 U.S.C. §§ 3161(h)(7)(A) and (B)(ii) as to all Defendants, as a failure to grant the continuance would unreasonably deny counsel for all parties time necessary for effective preparation, taking into account the exercise of due diligence. In conjunction with the continuance, the Court finds good cause exists and ISSUES the Rule 502(d) Protective Order attached to this Order as Exhibit A.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, DECEMBER 20, 2011

Richard L. Puglisi
United States Magistrate Judge

UNITED STATES V. ORIAN, ET AL.; CR NO. 10-00576 SOM; ORDER GRANTING THE UNITED STATES' RENEWED MOTION FOR CONTINUANCE AND MOTION FOR ORDER REGARDING PROTECTION OF DEFENDANT ORIAN'S ASSERTED ATTORNEY-CLIENT PRIVILEGE