

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

PETER J. LIMONE, et al.,	)	
Plaintiffs,	)	
	)	
v.	)	Civ. Action No. 02-10890-NG
	)	
	)	
UNITED STATES OF AMERICA,	)	
et al.,	)	
Defendants.	)	
GERTNER, D.J.:		

ORDER TO SHOW CAUSE  
December 12, 2006

As I indicated in open court, there is a serious problem in the defense of the above entitled cases.

On the one hand, the lawyers representing the government, who sign the pleadings, who are familiar with the plaintiffs' allegations, and who are subject to the discipline of this Court, including the disciplinary provisions of Rule 11 and Rule 26(g) Fed. R. Civ. Pro. - have not had access to the discovery at least in its unredacted form. In a striking admission, they have represented to the Court that they, attorneys and officers of this Court, are somehow not authorized by their client, the Federal Bureau of Investigation, to see the material until the FBI - or its general counsel, apparently - redacts it. Indeed, Ms. Lipscomb went so far as to compare her diminished status to that of someone in a national security case who does not have a security clearance. The analogy was, in a word, absurd.

On the other hand, the lawyers representing the FBI, the FBI's general counsel, who ostensibly reviewed the documents, determined what should or should not be redacted, have not entered an appearance in the case, and according to a recent submission are not even permitted to do so. As such, they are not subject to the discipline of this Court, including the disciplinary provisions of Rule 11 and Rule 26(g). Nor can I have great confidence that are familiar with the plaintiffs' allegations in any great detail. When I demanded that the FBI's general counsel enter an appearance in the instant case, I was told (in United States' Motion for Reconsideration of Court's December 7 2006 Order Requiring Anne M. Gulyassy [Deputy General Counsel of the FBI] to appear) that she was "agency counsel and has no litigating authority in this case."

True, the FBI and all law enforcement agencies should take all lawful steps to protect the identity of informants who have cooperated with the government. But the rule of protection is not absolute. The Roviaro decision contemplates a balance between the public interest in protecting the flow of information against the individual's right to prepare his or her case. The nature of that balance depends upon the particular circumstances of each case, the allegations, the defenses, the significant of the informant's testimony and other relevant factors.

True too, that under Rule 26(g) every disclosure is to be signed by "at least one attorney of record" who is supposed to make a "reasonable inquiry" that "the disclosure is complete and correct as of the time it is made." But here again, what is reasonable obviously depends upon the circumstances.

*These circumstances are unique. This is case is about inter alia informant abuse, about the failure to disclose exculpatory evidence bearing on the innocence of the four plaintiffs, about FBI agents allegedly "hiding the ball," not disclosing critical information that would have exonerated the plaintiff not just from plaintiffs but from other law enforcement personnel, and not doing so for nearly forty years.*

Given those accusations, the position the FBI is taking is chilling. Time and again during the course of the litigation, a question will be posed about a document produced in discovery and government counsel will have no idea how to answer because they have not been privy to all of the information, because they have not participated in the screening decisions - and the answer is delayed. Time and again it appears that the lawyers representing the Government have simply not been given the authority that they need to understand the big picture, trying this case, if you will, with one hand tied behind their back.

This Court is not remotely satisfied. Plaintiffs' have moved for monetary contempt sanctions for the government's failure to properly comply with Rule 26(g), which will be taken

under advisement. In order to make that decision, the Court ORDERS that this matter be brought to the personal attention of the Director of the FBI, to answer the Court's concern that counsel be given the tools they need to fairly and properly defend these charges, namely access, as officers of the Court, to the documents relevant to the case at bar. Counsel IS ORDERED report to this Court no later than Monday, December 18, 2006.

So ordered this 12 day of December, 2006.

/s/ Hon. Nancy Gertner

SO ORDERED.

Date: December 12, 2006

*/s/ Nancy Gertner*  
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NANCY GERTNER, U.S.D.C.