IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Criminal Case No. 05–cr–00545–EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

REDACTED

Defendant.

FIRST MEMORANDUM OPINION AND ORDER PURSUANT TO SECTION 6(a) OF THE CLASSIFIED INFORMATION PROCEDURES ACT

Section 6(a) of the Classified Information Procedures Act ("CIPA"), Pub. L. 96–456, 94 Stat. 2025 (1980), *codified at* 18 U.S.C.A. App. 3 §§ 1–16 (West 2006), requires the court, upon request of the Government, "to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding." It also requires the court to "set forth in writing the basis for its determination" as to each item of classified information. The court conducted a section 6(a) hearing on October 12, 2006. It now files this writing setting forth the bases for its rulings concerning the use, relevance, or admissibility of the classified information in question.

I. BACKGROUND: THE ISSUES IN THE CASE

Any determination concerning relevance or admissibility must rest on the issues framed by the Indictment. The Indictment charges Defendant Joseph P. Nacchio, the former Chief Executive Officer of Qwest Communications International, Inc. ("Qwest"), with violating federal securities laws and regulations by selling securities on the basis of material, non-public information. Specifically, the Government charges:

> No later than December 4, 2000, through and including September 10, 2001, [Defendant] was aware of material, non-public information about Qwest's business, including, but not limited to: (a) that Qwest's publicly stated financial targets, including its targets for 2001, were extremely aggressive and a "huge stretch;" (b) that in order to achieve its publicly stated financial targets for 2001, Qwest would be required to significantly increase its recurring revenue business during the first few months of 2001; (c) that Qwest's past experience or "track record" in growing recurring revenue at a sufficient rate to meet its publicly stated financial targets was poor; (d) that Qwest's recurring revenue business was underperforming from early 2001 and was not growing at a sufficient rate to meet Qwest's publicly stated financial targets; (e) that there were material undisclosed risks relating specifically to Qwest's recurring and non-recurring revenue streams that put achievement of Qwest's 2001 publicly stated financial targets in jeopardy; (f) that the gap between Qwest's publicly stated financial targets and Qwest's recurring revenue was increasing, thus increasing Qwest's reliance on risky and unsustainable one-time transactions; and (g) that there would be insufficient nonrecurring revenue sources to close the gap between Qwest's publicly stated financial targets and its actual performance.

To prove these charges, as the Government now concedes, it must prove, *inter alia*, that Nacchio acted "willfully and with the intent to defraud, manipulate, or deceive." These terms are defined in the case law, and the definitions are reflected in standard jury instructions. To act

"willfully" means to act "voluntarily and purposefully, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law." *United States v. Overholt*, 307 F.3d 1231, 1244-46 (10th Cir. 2002). To act with "intent to defraud" means "to act knowingly and with the intention or the purpose to deceive or to cheat." Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice & Instructions – Criminal § 47.14 (5th ed. 2000) (defining identical term under mail, wire, and bank fraud statutes); *United States v. Dowlin*, 408 F.3d 647, 667 (10th Cir. 2005) (approving securities fraud instruction stating, in part, "even though some individual may have lost money in the transactions . . . , this does not rise to the level of fraud unless the evidence establishes beyond a reasonable doubt that the transaction was designed and intended by the defendant to deceive, or trick, or injure, or damage").

As required by CIPA § 5(a), Defendant has disclosed the classified information which he possesses and proposes to use. This disclosure has necessarily revealed some aspects of his defense to the Indictment. He claims that he did not act willfully or with intent to defraud when he sold the securities described in the Indictment. One of the bases for the claim is generally that, because he was appointed by the President of the United States to serve on the National Security Telecommunications Advisory Committee ("NSTAC") and because, as Qwest's chief executive officer and possessor of a top-secret security clearance, he had access to classified information regarding Qwest's classified relations with government agencies, he reasonably believed that Qwest was going to be awarded lucrative contracts with the federal government. Those contracts were, according to him, awarded swiftly by reallocating already-appropriated

funds from one account to another and did not go through a lengthy appropriations or bidding process. He maintains that these prospective contracts were not — and could not be — reflected (1) in the information, favorable or adverse, possessed by his subordinates at Qwest, (2) in Qwest's revenue projections, (3) in press releases, reports, filings with the Securities and Exchange Commission, or (4) in public financial guidance issued by Qwest. According to Defendant, he discounted the adverse non-public information possessed by his subordinates because he reasonably believed, in good faith, that Qwest would be awarded the then-secret government contracts, a circumstance which, he suggests, would at least offset the effects of the adverse information which he allegedly knew. In short, he claims that, based on all the information available to him, the public information concerning Qwest's financial projections remained accurate.

If there is evidentiary support for a "good faith" instruction, the court is required to give it, in addition to an instruction defining what is meant by "willful." *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984). The pertinent part of the standard "good faith" instruction reads:

> The "good faith" of Defendant is a complete defense to the charge of securities fraud contained in the Indictment because good faith on the part of the defendant is, simply, inconsistent with "the intent to defraud" alleged in each charge of the Indictment.
>
> A person who acts . . . on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct.

> A defendant does not act in "good faith" if, even though he honestly holds a certain opinion or belief, that defendant also knowingly makes false or fraudulent pretenses, representations, or promises to others.
>
> The law is written to subject to criminal punishment only those people who knowingly defraud or attempt to defraud
>
> While the term "good faith" has no precise definition, it encompasses, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another.

Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice & Instructions – Criminal § 19.06 (5th ed. 2000).

II. DEFENDANT'S SECTION 5 PROFFER OF CLASSIFIED INFORMATION

A. GENERAL DESCRIPTION

Some time before late 1997 or early 1998, Qwest constructed an extensive fiber optic network. Because it was built using purer glass not previously available when earlier networks were constructed, it was superior to the older networks constructed by Qwest's competitors. It was also more complete than the competitors' networks. Because it was new and had plenty of bandwidth available for sale, Defendant claims that it was particularly attractive to clandestine government agencies. According to Defendant,

Defendant mentions four clandestine agencies which were allegedly involved in classified communications with him and in the award of classified contracts. Some of the communications

occurred because Defendant was a member of NSTAC. In addition, Qwest was approached directly by the agencies. Other Qwest employees who possessed top-security clearances and who had knowledge of classified matters were the successive heads of Qwest's Government Group, Dean Wandry and, thereafter, James Payne. Defendant's section 5 notice suggests that classified information conveyed to him by these subordinates also formed a basis for his good-faith beliefs concerning Qwest's prospects for such classified business.

B. Specific Information Which Defendant Proposes to Use

As noted, Defendant discusses his and Qwest's contracts and contacts with four clandestine agencies of the United States. As he relates the chronology, Qwest's classified contracts and contacts commenced with an award by one of the agencies and thereafter blossomed into prospects for classified work from the other agencies after Qwest's initial work proved successful. He discusses his and Qwest's classified discussions and contracts with each agency, and each agency has reviewed his section 5 notice and designated parts which it regards as classified. The specific information concerning each agency will be detailed in connection with the court's admissibility determinations set forth hereinafter.

III. Basis for Court's Determination Under CIPA § 6(a)

A. The Standard for Making the Determination

At the outset, the court confronts a dispute concerning the standards by which it should make its section 6(a) determination. The Government argues that the court must undertake a three-step process. First, Defendant must show, and the court must find, "that the information would be helpful to his defense." Second, the court "must apply a materiality test" which

involves asking whether "there is a reasonable likelihood that the evidence could affect the judgment of the trier of fact." Third, the court must "take into consideration the fact that the information in question is sensitive national security information in *balancing the parties' competing interests* concerning discovery and use of the information." (Emphasis added.) In support of its argument, the Government cites four decisions from three circuits: *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989); *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998); *United States v. Sarkisian*, 841 F.2d 959 (9th Cir. 1988); and *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (divided, 7–5, *en banc* decision).

Defendant advocates a more simple process. According to him, the court must decide relevance and admissibility by applying the same rules of evidence that it would apply in any criminal proceeding, ignoring, for the time being, the fact that the information is classified. He relies on a recent district court decision, *United States v. Libby*, __ F. Supp. 2d __ (D.D.C. Sept. 21, 2006). For reasons stated below, this court is generally persuaded by *Libby*. As the first court presented with this issue succinctly summarized the entire CIPA process:

> Under CIPA, in making its rulings on admissibility, the Court is to disregard the fact that certain material may be classified. The Act "does not alter the existing standards for determining relevance or admissibility." Both documentary and testimonial evidence containing classified matter may be admitted if in conformity with the Federal Rules of Evidence. If specific classified information is admissible, the Court may consider an alternative — the substitution for such classified information of a statement admitting the relevant facts that the specific classified information would prove, or a summary of the specific classified information, consistent with preserving the accused's right to make a full defense; if no alternative suffices, the Court may dismiss the indictment or take other measures. If information the defendant

> intends to disclose at trial is found inadmissible, however, that is the end of the matter as far as CIPA is concerned. The defendant is in no worse position than if a proffer of evidence were rejected upon the trial.

United States v. Wilson, 586 F. Supp. 1011, 1013 (S.D.N.Y. 1983) (footnotes omitted), *aff'd*, 750 F.2d (2d Cir. 1984); *see also United States v. Baptista–Rodriguez*, 17 F.3d 1354, 1363–64 (11th Cir. 1994).

The language of section 6(a) does not even hint at the appropriate standards for making a court's section 6(a) determination, but the House Report, Senate Report, and Conference Report are all crystal clear. The House Report stated:

> It is the Committee's intent that the existing standards of use, relevance, and/or admissibility of information or materials in criminal trials not be affected by [the bill]. The words "make all determinations concerning the use, relevance, or admissibility of the classified information at issue that would otherwise be made during the trial or pre-trial hearing" . . . were carefully chosen to reflect this intent.

H.R. Rep. No. 96–831, pt. 1, at 14–15 (1980).

The Senate Report is even plainer:

> Following the [section 6(a)] hearing, the court must determine whether and the manner in which the information at issue may be used in a trial or pretrial proceeding. This provision is intended to retain current practices. A defendant should not be denied the use of information that he would otherwise use simply because of the procedures of this bill. Thus, on the question of a standard for admissibility of evidence at trial, the committee intends to retain current law *regardless of the sensitivity of the information*. Some senators on the committee believe that a judge should rule any "relevant" evidence admissible. *On the other hand, the Department of Justice has argued that classified information is analogous to information regarding identification of informants*

> *and that the standard for introduction of classified information must be "relevant and material" or "relevant and helpful."*

S. Rep. No. 96–823, at 8 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4301–02 (emphasis added). The emphasized language demonstrates that the Department of Justice had suggested an alternate standard based on case law protecting the identification of informants, *see Roviaro v. United States*, 353 U.S. 53 (1957), that the Senate Judiciary Committee had considered that standard, and that it rejected the Department's proposal. The rejected proposal is exactly the one which the Government would now have the court use in making its section 6(a) determination.

Finally, if unsurprisingly, the Conference Report confirms the agreement reflected in the separate reports of both houses of Congress: "[T]he conferees agree that . . . nothing in the conference substitute is intended to change the existing standards for determining relevance and admissibility." H.R. Conf. Rep. No. 96–1436, at 12 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4310.

With a single exception, discussed below, the cases upon which the Government relies are distinguishable from the one before this court. *Yunis*, *Rezaq*, and *Sarkisian* all presented the question of whether classified information in the hands of the Government could be discovered by the defendant under CIPA § 4, not whether information already possessed by a defendant should be found to be relevant, admissible, and usable under CIPA § 6(a). The cases thus apply and discuss section 4. *See, e.g.*, *Yunis*, 867 F.2d at 621 ("Section 4 of CIPA . . . creates no new rights of or limits on discovery of a specific area of classified information. Rather it contemplates an application of the general law of discovery in criminal cases to the classified

information area with limitations imposed based on the sensitive nature of the classified information."). The cases all involve applications of rule 16 of the Federal Rules of Criminal Procedure and the procedures allowed by CIPA § 4, which differ from those allowed by CIPA § 5.

It would be a mistake to apply rules set forth in these three discovery cases to a case where a defendant already possesses the classified information and the Government asks the court to prevent him from using it at trial. "There is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). In addition, federal statutes and criminal rules carefully delineate and limit the information which the Government must furnish a defendant. This court is here confronted, however, not with a discovery issue, but with an issue which affects Defendant's sixth amendment "right to a speedy and public trial," U.S. CONST. amend. VI, encompassing "an opportunity to be heard in his defense — a right to his day in court — . . . [and] to offer testimony." *In re Oliver*, 333 U.S. 257, 273 (1948). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The rules of evidence and procedure which apply in all criminal cases are "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* This court will not engraft additional barriers onto these rules unless required by CIPA to do so.

The only authority cited by the Government which squarely supports its position is a divided *en banc* decision handed down by the Fourth Circuit, overruling an earlier panel decision of that court. In *United States v. Smith*, 780 F.2d at 1104, the *en banc* majority vacated a district

court's section 6(a) order admitting certain evidence, holding that the district court had applied an incorrect legal standard by failing to follow the three-part test proposed by the Government here. Acknowledging the committee reports already discussed in this opinion, the majority agreed that "ordinary rules of evidence determine admissibility under CIPA." 780 F.2d at 1106. The court reasoned that those "ordinary rules of evidence" include the rule on privilege, Fed. R. Evid. 501, which provides that privileges in federal criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." Without citing prior federal common law creating the privilege, and without denominating the privilege it was recognizing, the majority held that information otherwise admissible might "be excluded under a privilege similar to the informer's privilege recognized by *Roviaro v. United States*, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957). We believe that the district court committed an error of law in not applying such a privilege before ruling the relevant classified information admissible." 780 F.2d at 1107. The majority extensively discussed *Roviaro* and its progeny, deriving directly from *Roviaro* its ruling that "[t]he privilege must . . . give way when the [information protected by the privilege] 'is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.'" *Id.* (citing *Roviaro*, 353 U.S. at 60–61). The majority also used *Roviaro* to support its ruling that "'[t]he trial court is required to balance the public interest in nondisclosure against the defendant's right to prepare a defense.'" *Id.* (citing *Roviaro*, 353 U.S. at 62).

This court is not persuaded by the *Smith* majority's reasoning. Its recognition of a "privilege similar to" the *Roviaro* privilege flies in the face of clear and express rejection of such

a privilege by Congress. As the *Smith* dissenters note, Assistant Attorney General Philip B. Heymann complained in testimony before the House committee that the House bill did not include the *Roviaro* standard and "testified at length on the reasons this omission should be rectified." 780 F.2d at 1111–12 (dissenting opinion). *See* Graymail Legislation: Hearing on H.R. 4736 and H.R. 4745 Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence, 96th Cong. 8–11 (1979) (statement of Philip B. Heymann, Assistant Attorney General). The assistant attorney general tried again in the Senate committee. *See* Graymail, S. 1482: Hearing on S. 1482 Before the Subcomm. on Criminal Justice of the Comm. of the Judiciary, 96th Cong. 18 (1980) (statement of Philip B. Heymann, Assistant Attorney General). This argument failed again to induce any change in the language of the bill. The court can think of no rule of statutory interpretation which would permit the Government to inject by judicial decision an interpretation which was considered and rejected by the Congress.

Setting aside the explicit congressional rejection of the Government's position, the court believes it unsound to create and apply an evidentiary "privilege similar to" the *Roviaro* privilege in cases involving classified information, for two reasons. First, *Roviaro* applies where a defendant, in pre-trial discovery, seeks disclosure of the identity and/or location of a Government informer. Where defendant knows the informer's identity and location, and proposes to call him as a witness, the privilege does not apply. *See Roviaro*, 353 U.S. at 60 n.8 (dictum); *United States v. Godkins*, 527 F.2d 1321, 1326 (5th Cir. 1976). *Roviaro* is not analogous to the situation before this court, where Defendant already possesses the information at issue.

Second, the analogy to *Roviaro* is also unsound because courts, while fully capable of doing the balancing required by *Roviaro*, are ill-equipped by training, education, or experience to accomplish the balancing which the *Smith* majority apparently requires in a case involving classified information. In the balancing process described by *Roviaro*, a court's decision on disclosure of such information must depend on the "particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro*, 353 U.S. at 62. The Government can, and regularly does, provide the court with specific information on the basis of which the court itself can independently evaluate the significance of the informer's testimony, the danger to the informer posed by disclosing his identity, and the likelihood that disclosure in a particular case will damage an ongoing investigation or other interest advanced by the Government. Evaluation of this information by the court does not require specialized experience or training.

The balancing apparently required by *Smith*, in contrast, requires a court to consider and evaluate the significance of "information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security." CIPA § 1 (defining "classified information"). In practice, classification has been by executive order, regulation, or other action of the Executive Branch, for reasons relating to the "national defense and foreign relations of the United States." *See* CIPA § 2 (defining "national security"). These issues are properly committed to the Executive Branch, because courts and legislators lack the training and experience to make such classification decisions, and they are not responsible for the national

defense and foreign relations of the United States. For similar reasons, courts lack the expertise and background to consider the full gamut of data or background which is necessary to appreciate and evaluate the significance of the information at issue or the damage which would be done were the information to be disclosed — and the Government is properly reluctant to disclose the full array of data which would be necessary for a balancing process which means anything. "What may appear to the court to be innocuous may be dangerously revealing to those more informed." *United States v. Juan*, 776 F.2d 256, 258–59 (11th Cir. 1985) (warning that, even where court is evaluating a summary under section 6[c] of CIPA, the Executive Branch retains the ultimate decision whether a summary adequately protects classified information).

The Government's submissions in this case illustrate the problems presented by the balancing process apparently envisioned by the *Smith* majority. While the Government advocates balancing in a section 6(a) proceeding, it does not provide information from which the court can really do it. The affidavits of agency officials mostly tell the court what information in Defendant's submission is classified, and they aver, in conclusory terms, that disclosure would do "serious damage" or "exceptionally grave damage" to national security. One agency states that disclosure would create "diplomatic tensions" which would adversely affect the nation's foreign relations. The agencies do not fully inform the court why evidence has been so classified, why its disclosure would harm the national security, or the extent of that harm. In short, they do not provide the information which would enable the court do any real balancing and instead invite the court to allow the Executive Branch to place its thumb on the scales.

In contrast to the *Roviaro* balancing suggested by the *Smith* majority, CIPA itself outlines an elaborate choreographed procedure designed to insure both that the Government can protect classified information and that an accused can present a defense. Assuming that a defendant has obtained classified information by discovery or otherwise, the initial step outlined by CIPA is the section 6(a) hearing to determine the use, relevance, and admissibility of information which the Executive Branch has designated as "classified." In contrast to what is required at later steps, the Government is not required during the section 6(a) hearing to tell the court or defendant the basis for classification or to identify the damage to the national security which would ensue if the information were disclosed. By identifying the classified information in its response to Defendant's notice that he intends to use such information, the Government here has complied with the court's view of what section 6(a) requires, even though its submission is insufficient to do the balancing which would be required by *Smith*.

If, and only if, the court determines under section 6(a) that classified information is admissible, the Government can invoke the second step of the CIPA procedure. Under section 6(c) the Government may move that the court order the substitution of a "statement admitting the relevant facts" or "a summary of the specific classified information." CIPA § 6(c). The court must grant the Government's motion if, after a mandated hearing, "it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure to the specific classified information." *Id.* It is significant, for purposes of discussing the proper standard under section 6(a), that section 6(c) permits the United States to "submit to the court an affidavit of the Attorney General certifying that disclosure of classified

information would cause *identifiable damage* to the national security of the United States and explaining the *basis for the classification* of such information." *Id.* (emphasis added). As one court has observed:

> It appears to us that, if Congress had intended the district court to balance national security against relevancy in the 6(a) hearing, provision would have been made for transmission of information necessary for balancing during the 6(a) hearing and not after relevancy and admissibility have been determined.

United States v. Smith, 750 F.2d 1215, 1218 (4th Cir. 1984) (panel opinion), *overruled*, 780 F.2d 1102 (4th Cir. 1985) (*en banc*).

Even if the court deems an admission or summary proposed under section 6(c) to be inadequate, the Government may, after exhausting its interlocutory appellate rights, invoke a final step of the CIPA procedure. By filing an affidavit of the Attorney General objecting to disclosure, the Government may obtain an order prohibiting defendant from disclosing the classified information. CIPA § 6(e). The Government's invocation of this step, however, comes at some cost, since the court may dismiss the indictment or impose less drastic remedies if "the interests of justice" so require. *Id.* Significantly, even at this last step, Congress has warned courts against balancing:

> It should be emphasized, however, that the court should not balance the national security interests of the government against the rights of the defendant to obtain the information. The sanctions against the government are designed to make the defendant whole again.

S. Rep. 96-823 at 9, *as reprinted in* U.S.C.C.A.N. at 4303. If Congress did not intend such balancing at the final step of the CIPA procedure, it is difficult to see why the court should

balance at this earlier section 6(a) stage. Accordingly, the court will decide in this opinion whether the classified evidence is relevant and admissible by applying the Federal Rules of Evidence.

B. THE DETERMINATION OF USE, RELEVANCE, AND ADMISSIBILITY

1. APPROPRIATENESS OF SUMMARIES, SUBSTITUTIONS, AND REDACTIONS

The Government argues that all or most of the classified information at issue is irrelevant under rule 401 of the Federal Rules of Evidence. The bulk of its submission, however, focuses on the details of the information, arguing, for example, that a certain specific detail is irrelevant and proposing summaries of the information which, it contends, would allow Defendant to make his defense. Defendant responds by saying that all of the details are relevant to his defense. He argues that his overall credibility has been placed in issue by the Indictment or will be placed in issue by the Government during trial. He posits that the classified information on which he relies, together with the reasonable inferences which he drew in good faith from the information, are likely to be disputed by the Government and that the very detail of the information tends to supply its own veracity and to bolster his good faith and reasonableness in relying on the information — important aspects of his defense which would be lost if he were able to advance only a general, vague, or truncated version of events.

To the extent that the Government is arguing for supplanting the classified facts with a substitution or summary, it is improperly seeking to conflate the section 6(a) hearing and the section 6(c) hearing. CIPA is clear (1) that the two proceedings are to be sequential, not simultaneous, CIPA § 6(c) ("Upon any determination by the court authorizing the disclosure of

specific classified information . . . , the United States may move that . . . the court order" a "summary" or "substitution."), and (2) that (as already explained above) the Government may submit additional information in connection with the section 6(c) hearing. Case law confirms that the two hearings are separate and sequential. *Smith*, 750 F.2d at 1217 (panel opinion, overruled on other grounds); *Wilson*, 586 F. Supp. at 1013. The Government may review, revise (if it thinks revision appropriate), and resubmit its material as part of a proposal for a substitution, summary, or admission under section 6(c).

Because the Government has conflated section 6(a) and (c), Defendant has followed suit. He claims that the facts set forth in his section 5 notice of classified information that he proposes to use are disputed by the Government. He then argues that the proposed substitutions and summaries are defective for two related reasons. First, they are shaded to reflect the Government's version of disputed facts, not his. Second, he argues, as noted earlier, that the details of his story are important to the fact-finder's evaluation of whether it is true and whether it could be the basis for the inferences which he allegedly drew in good faith.

The court will assume, for purposes of this section 6(a) proceeding and order, that the facts set forth in Defendant's section 5 notice are disputed by the Government. It will so assume for two reasons. First, the Government's position concerning the extent to which the facts are disputed has been confusing and contradictory. While Government counsel suggested during the section 6(a) hearing that a number of facts are not disputed, that suggestion contradicts the unequivocal declaration in the Government's written response to Defendant's section 5 notice:

> It is not the purpose of this pleading to controvert the alleged "facts" in the § 5 Filing, even though they are, in almost every case, simply wrong. However, the Government does not want the Court to mistakenly assume that Defendant's facts are even remotely close to the actual events.

Thus warned, the court will avoid mistaken assumptions. Second, in any event, the preferred time for offering "a statement admitting relevant facts" as a substitution for classified information is in connection with the section 6(c) motion and hearing. CIPA § 6(c)(1)(A). It appears to the court that there is nothing in section 6(c) which would preclude the Government from proposing a combination "statement admitting relevant facts"/"summary." It further appears to the court that such a proposal might blunt a few of the objections which Defendant currently asserts.

2. THE RELEVANT TIME PERIOD

Although neither party discusses this issue, it is an important aspect of admissibility in any case. The Indictment claims that, "[b]eginning as early as August 2000" Defendant was warned by subordinates about adverse non-public information affecting Qwest's ability to achieve its publically-stated financial targets. In a bill of particulars ordered by the court, the Government explains that the targets to which it refers are those established on September 7, 2000. Those targets remained in effect until they were revised downward on September 10, 2001. The court notes that the forty-two charges in the Indictment are based on trades which commenced January 2, 2001 and ended May 29, 2001. Because the primary issue raised here is Defendant's state of mind as he made these trades, it is arguable that these dates frame the relevant time period. Because the Government alleges that warnings to Defendant commenced in

August 2000, and because the financial targets were set on September 7, 2000 and lasted through September 10, 2001, it also might be argued that these are the pertinent beginning and ending dates. Any information which could form a basis for a finding that an award of a generally-unknown, classified contract was reasonably likely to occur during this time period should be relevant. Conversely, without a foundation that Defendant had information upon which to base a reasonable and good-faith belief that such a contract was reasonably likely during this latter time period, there would be no basis to conclude that classified contracts would affect the public financial guidance. Hence, for present purposes, the court will mean August 2000 through September 10, 2001 when it refers to "the relevant time period."

Setting aside and reserving issues concerning admissions and summaries, and assuming for present purposes that Defendant's version of the classified facts is disputed by the Government, the court finds that, with three exceptions, the classified information at issue is relevant, admissible, and can be used at trial, subject to further proceedings under CIPA.

3. INADMISSIBLE CLASSIFIED INFORMATION

The court determines the following three items of classified information to be inadmissible:

(1) ALL INFORMATION RELATING TO THE .

The court questions whether the notice of intent to use classified information involving the even suffices as a "brief description of the classified information," as required by CIPA § 5(a). Assuming, *arguendo*, that it does suffice, no foundation has been laid to establish its relevancy, and it is thus too vague and indefinite to be relevant under rule 401. Defendant alleges that

"from mid-1999 throughout 2000" he "was aware of still additional prospective classified business opportunities involving other clandestine agencies such as the

He does not say how he was aware of the opportunities, nor does he provide the name of any employee with whom he (or anyone else) spoke or the date of any such conversation. He does not allude to any specific proposal, a date on which he heard of the proposal, the subject matter of the proposal, or any timetable for implementing the proposal. In short, he provides no foundational information from which any reasonable juror could conclude that the was even vaguely thinking about awarding Qwest any sort of contract during the relevant time period, that such a contract could affect the materiality of other adverse undisclosed information, or that the prospect of an contract could have affected his expectations, beliefs, or state of mind with respect to the accuracy of Qwest's publically disclosed information during the relevant time period. Instead, he shifts into a discussion of a "business opportunity" involving If there is a shred of relevance in this submission, its probative value is clearly outweighed by the danger that it will waste time, mislead the jury, and confuse the issues. *See* Fed. R. Evid. 403.

He does not articulate the basis for his expectation or provide any other information from which anyone could draw a conclusion that the expectation was anything more than wishful thinking. He does not supply any information about the

contract. When he and Payne arrived to meet no contract was discussed. Instead:

There are several evidentiary problems with this information. First, Defendant's statement that Payne told him caused Qwest to *lose* contracts is hearsay. Fed. R. Evid. 801, 802. Defendant cannot avoid its hearsay character by claiming that it goes to his state of mind, because *losing* contracts provides no support for a good faith belief that unfavorable, undisclosed information about Qwest's future would be neutralized by the award of contracts by clandestine agencies. Second, the information is irrelevant, for several reasons. Like the other information about the information about this overture is too vague, conclusory, and general to form the basis for any good-faith inference that was contemplating any contract with Qwest during the relevant time period. Even if Defendant could clear this hurdle, the further claim that withheld the contract because Defendant remains irrelevant to any issue in *this* litigation. While the prospect of undisclosed, classified contracts to be awarded during the relevant time period arguably goes to Defendant's good-faith belief that Qwest's financial prospects remained good, the additional facts that the contracts did not materialize, that an agency decided against an award, that the contract was awarded to another entity, or that an

agency made its decision on reasons which some persons might question, do not make any "fact . . . of consequence" in this litigation "more or less probable." Although, as Defendant implies, the reasons Qwest lost the contract might nevertheless demonstrate that the prospects were not pie-in-the-sky speculations (and thus supply a real and reasonable basis for his good-faith belief), the court is confident that they should be still excluded under rule 403 because they (together with the rebuttal which can be anticipated) would introduce collateral matters, confuse the issues, and result in considerable waste of time.

(2) ALL INFORMATION RELATING TO The notice relating to presents a closer question, because in this instance Defendant does identify the subject matter of a specific contract. He states that there was an opportunity for a Qwest contract

He goes on to state that similar capabilities were being considered He implies that Payne has direct knowledge of these matters.

While this information is plainly more specific than the information, it still lacks sufficient foundation for admissibility on the ultimate issues concerning Defendant's state of mind during the relevant time period. He does not relate whether he and Payne were talking to an authoritative employee or to someone who was talking without authority to do anything. Although he generalizes that the opportunity arose in mid-1999 or 2000, he supplies nothing from which a fact-finder might infer the probability of a contract award during the relevant time period. Thus, the notice still supplies no foundation from which relevance could be inferred. *See* Fed. R. Evid. 401, 403.

(3) CERTAIN INFORMATION RELATING TO CONTRACTS WITH THE

While the classified information from the provides the most persuasive basis for Defendant's state-of-mind defense, there is one item which the court finds to be inadmissible. Defendant asserts that, sometime in 1999, the asked Qwest to expand its domestic fiber optic system

The information that the maintained a

are irrelevant because they simply do not permit any reasonable inference to be drawn concerning those issues which go to Defendant's state of mind. Further, in contrast to the balance of the information which the court regards as admissible for reasons set forth below, the court is not persuaded that this detail is necessary to tell a complete story or to supply a stronger influence concerning Defendant's good faith. The story is sufficiently complete and cogent if the jury is aware that contracted with Qwest to hard wire an and it is not rendered more persuasive by a rendition of the use to which the put that facility.

4. ADMISSIBLE CLASSIFIED INFORMATION

The court rules, for purposes of this section 6(a) proceeding, that the balance of the classified information in Defendant's section 5 notice is relevant and admissible. As it relates to the , Defendant claims that the first classified contract which Qwest received after completing its initial fiber optic network was an contract to build a major fiber optic

backbone throughout the country which connected to an control system in the where there was a hub for classified government communications. In late 1997 or early 1998, after personnel had heard Defendant speak about the capabilities of Qwest's then-new fiber optic system, thereafter awarded this contract for . The did this without going through a competitive bidding process, by tapping into already-appropriated funds. It was after the success of this initial fiber optic network that in 1999 requested Qwest to lay the fiber optic line to discussed above. Defendant asserts that this contract was awarded, without going through a bidding process, on the basis of a single telephone call. He also states that the contract involved worth of revenue.

It is against this background of contracts and awards that Defendant talks about two meetings, one in September 2000 and one in February 2001, with Defendant supplies information concerning the location of these meetings. According to him, there was discussion about an entirely new fiber optic network to Europe and the Middle East, similar to the successful system. At the February meeting, is alleged to have noted that had already awarded more than $1 billion in classified work to Qwest and "indicated" that he would need to spend multiples of that amount, including the new facilities in Eastern Europe and the Middle East.

This information goes directly to Defendant's state-of-mind defense. According to him, he realistically believed that, during the relevant time period, Qwest would be awarded hundreds of millions of dollars worth of classified contracts by the and that those awards would more than offset the negative warnings he was receiving about Qwest's financial prospects during the

period. He submits that his expectations were reasonable, realistic, and credible because he knew of previous classified contracts awarded to Qwest without competitive bidding and funded by reallocation of already-appropriated funds. When he was speaking to the head of the during the relevant time period about construction of additional fiber optic networks, he could take those conversations seriously, discount the warnings of his subordinates at Qwest, and believe in good faith that Qwest's financial predictions remained accurate.

Having decided that the substance of this classified information is highly relevant and critical to the theory of defense, the court will not at this juncture parse the details of that information, rule chunks of it to be inadmissible, and order that Defendant must present only a disjointed, sanitized, and truncated version of events. Because the court is presuming at this point that Defendant's story is wholly or substantially disputed, all of those details are important. Detail in a story is more persuasive than generalized, vague rendition of events. Unless the details of a story are demonstrated to be untrue or unless the details are inherently fantastic, detail in a story tends to corroborate the story as a whole and to make it more credible. This proposition is readily illustrated by the manner in which the Government itself commonly builds a case where the critical incriminating facts rest on the credibility of an informer who may be an accomplice, who may have made a favorable bargain with his prosecutors, or who may have other substantial motives to fabricate incriminating facts concerning a defendant. It is the Government's usual practice to corroborate the story by producing documentation, surveillance, or other credible testimony from which the jury can see that the informer is accurately relating the details. Rarely, if ever, does this independent corroboration itself prove the incriminating

fact; the corroboration may be as innocent as a hotel receipt proving that the informer and defendant both stayed in the same room at the same time. Yet from the innocent details themselves, the Government asks the jury to infer the final incriminating detail. Defendant seeks something similar here. He seeks to bolster his story by supplying details which, if credited, would tend to establish his reasonable, good-faith, and realistic belief that Qwest's financial prospects were better than others thought.

5. INFORMATION AS TO WHICH RULING IS RESERVED UNTIL TRIAL

One final category of information must be discussed. The Defense Information Systems Agency ("DISA") has reviewed Defendant's section 5 notice and stated that none of the information needs to be treated as classified. DISA warns, however, that its determination could change "if the information is expanded even slightly." DISA further warns that it is "sensitive information" and that "[w]ide public disclosure . . . could allow adversaries to infer classified information." Thus, the Government takes the position that, although this information is not classified and need not receive the top secret treatment accorded such information, it should be held by the court under ordinary seal.

The Government supplies no authority for its request, nor has any interested party briefed the issue. At the very least, the Government's request is awkward and presumptively without merit because the Government is asking the court to make determinations concerning admissibility of information which, if not classified, will be used during a presumptively public trial. At this point, the court will simply find that the information is not classified information. CIPA does not apply, and the court is thus not required to make any pre-trial determination

concerning the use, relevance, or admissibility of this information. Accordingly, the court reserves ruling on this information until trial, when such determinations are usually made absent the requirements of CIPA.

IV. CONCLUSION

Upon the findings and conclusions set forth in this memorandum opinion, it is

ORDERED as follows:

1. Pursuant to CIPA § 6(a), the court determines each category of classified information to be admissible or inadmissible in accordance with the rulings made in this memorandum opinion.

2. The clerk will file the first page of this memorandum opinion and order, together with part "IV. CONCLUSION," in the court's electronic public records. The clerk will, by secure facilities, transmit the entire memorandum opinion and order to the court security officer appointed by the court pursuant to the requirements established by the Chief Justice of the United States regarding CIPA. The court security officer will file-stamp the document, and it will be the original record in the case. The court security officer will also appropriately distribute the entire opinion to the parties and to the involved agencies.

3. The involved agencies shall each promptly designate the parts of the memorandum opinion which are classified information and transmit that designation to the court security officer. The designation may be made by appropriate markings on the memorandum opinion. The court security officer will forthwith transmit it to the court.

4. Upon receipt of all agency designations, the court will elide all classified information, and the clerk will then file the balance of the memorandum opinion and order in the court's electronic record.

Dated this 24th day of October, 2006

BY THE COURT:

s/ Edward W. Nottingham
EDWARD W. NOTTINGHAM
United States District Judge