

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

REDACTED

JOSEPH P. NACCHIO,

Defendant.

**REPLY TO UNITED STATES' PROPOSED SUBSTITUTIONS PURSUANT TO
SECTION 6(c) OF THE CLASSIFIED INFORMATION PROCEDURES ACT
(FILED IN CAMERA AND UNDER SEAL WITH THE COURT SECURITY OFFICER)**

Defendant Joseph P. Nacchio, by and through undersigned counsel, and pursuant to Section 6(c) of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 6(c), respectfully submits this Reply to the government's December 22, 2006 "Proposed Substitutions Pursuant To Section 6(c) of the Classified Information Procedures Act" (the "Proposed Substitutions").

Introduction

On December 8, 2006, while ruling on the government's initial requests for substitution regarding the Court's findings of use, relevance and admissibility with regard to classified information pertaining to [REDACTED] the Court announced the procedure it intended to adopt to allow Mr. Nacchio "substantially the same ability to make his

defense as would disclosure of the specific classified information." CIPA, § 6(c). The Court stated:

Your witness -- and I know it doesn't have to be Mr. Nacchio -- but somebody will say that they talked to an agency. And you will ask them, do you know the name of that agency? And he will say, yes, I do. And at that point, if it's [REDACTED] that you're asking about, you will advise me that this is a matter that the Court has said the specific agency can't be referred to, and it would be designated as an agency in Department of Defense.

I will tell the jury that because of the Classified Information Act, your witness, whether it's Mr. Nacchio or somebody else, even though he recalls the name of the agency, is not able to relate that name.

The same thing will be done about, for example, the location of [REDACTED] the -- you can establish that the witness knows the information as to where that facility is, and then the jury will be told that the Court has directed because of national security concerns that the specific location not be talked about and that we talk about a location on the West Coast.

Transcript of Sealed Proceedings, 22:7-25 (December 8, 2006) (the "December 8 Transcript").

We do not agree that the proposed substitutions are fully adequate to protect Mr. Nacchio's constitutional right to mount a defense, however, in light of the Court's prior rulings and the procedure described by the Court for admitting substitutions, except for two instances discussed below, the substitutions are acceptable to Mr. Nacchio, but with two caveats. First, the Court's procedure should be followed each and every time that the defense questions a witness about classified matters as to which the Court has ordered substitutions. Second, if the government seeks at any time to challenge the truth of any of its substitutions, whether by direct denial or collaterally by deriding the vagueness of the testimony, at that point the substitution will no longer provide Mr. Nacchio with the unimpeded right to mount a defense and the door should then be open for the actual classified material to be elicited.

With these caveats, and except for two instances which will be discussed below, the government's latest round of proposed substitutions is acceptable.

The Legal Standard

The government correctly states the legal standard covering the "substitution" phase of these proceedings set forth in § 6(c) of CIPA: proposed substitutions may *only* be allowed if the Court finds that the "statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." (Proposed Substitutions at 3) Critically, "the protection of the rights of defendant is paramount under the statutory scheme...." *United States v. Poindexter*, 725 F.Supp. 13, 32 (D.D.C. 1989). No substitutions may, therefore, prevent Mr. Nacchio from informing the jury of the context in which he obtained earlier classified contracts as well as what he was told about prospective classified contracts. Only in this manner will the jury be able to judge whether Mr. Nacchio was reasonable in his expectations, which were based on his past experience with these clandestine agencies and their access to immediate funds outside of normal government budget processes. As the Court of Appeals for the District of Columbia explained, in the specific context of CIPA:

In some cases, a court might legitimately conclude that it is necessary to place a fact in context in order to ensure that the jury is able to give it its full weight. For instance, it might be appropriate in some circumstances to attribute a statement to its source, or to phrase it as a quotation. As the Court said in *Old Chief*, "[a] syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it." [*Old Chief v. United States*,] 519 U.S. [172, 189 (1997)], 117 S.Ct. at 654.

United States v. Rezaq, 134 F.3d 1121, 1142 (D.C. Cir.), *cert. denied*, 525 U.S. 834 (1998).

Indeed, on October 12, 2006, this Court noted:

----- On the other hand, independent of CIPA, the Court might readily say, it's admissible. Why not -- as some of the cases recognize, and the Supreme Court's

decision in *Old Chief* recognizes, there is a value in telling a coherent, logical, sensible story.

Transcript of Sealed Proceedings, 11:17-21 (October 12, 2006) (the "October 12 Transcript").

The correctness of this position was recently underscored by Judge Walton's latest decision in *United States v. Libby*, -- F.Supp.2d --, 2006 WL 3262446 (November 13, 2006). Judge Walton rejected the government's proposed substitutions under § 6(c) of CIPA as inadequate, noting that, "Congress made clear that this provision 'rests on the presumption that the defendant should not stand in a worse position, because of the fact that classified information is involved, than he would without this act.' " *Id.*, *2. The Court concluded that:

Therefore, the standard Congress codified must be construed in a manner that is consistent with the protections provided in the Sixth Amendment. Thus, examining a criminal defendant's right to present a defense generally will help place into context whether a proposed substitution affords him "substantially the same ability to make his defense." 18 U.S.C.A. App. § 6(c). If the substitution infringes on the defendant's Sixth Amendment rights, the substitution is insufficient.

It is a fundamental guarantee of the Sixth Amendment to the Constitution that a criminal defendant has the right to present a defense to the charges he is facing. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (citing *Washington v. Texas*, 388 U.S. 14, 19 (1967)). This fundamental right includes "the right to present the defendant's version of the facts ... to the jury so it may decide where the truth lies." *Washington*, 388 U.S. at 19.

2006 WL 3262446, * 4.

In so ruling, Judge Walton relied heavily on *United States v. Fernandez*, 913 F.2d 148 (4th Cir. 1990). See, e.g., 2006 WL 3262446, * 1, *2, *5, *6. *Fernandez* is particularly notable because it was decided under the Fourth Circuit's more stringent "helpful to the defense" standard, 913 F.2d at 154, a standard which has been rejected by both Judge Walton and this Court. Nevertheless, even under that stricter standard, the *Fernandez* Court upheld the refusal of

the District Court to allow overly restrictive § 6(c) CIPA substitutions. Indeed, the Fourth Circuit found impermissible that:

Here, the government is simultaneously prosecuting the defendant and attempting to restrict his ability to use information that he feels is necessary to defend himself against the prosecution. Although CIPA contemplates that the use of classified information be streamlined, courts must not be remiss in protecting a defendant's right to a full and meaningful presentation of his claim to innocence.

913 F.2d at 154.

Further, in upholding the District Court's § 5 finding of relevance, the Fourth Circuit stated that, "Whether a jury would believe Fernandez is, of course, uncertain, but to rule this evidence irrelevant under § 6(a) of CIPA would be to vitiate much of the force of the defense."

Id. at 156. The government's proposed substitutions were correctly rejected, because:

The charge that Fernandez misrepresented the purpose of the airstrip project essentially calls into question his version of the truth about what he did as CIA station chief in Costa Rica. To address this charge requires Fernandez to paint a concrete and detailed picture of his working environment as he saw it. We agree with Fernandez's contention that the substitutions would preclude the defense from "present[ing] a coherent case of its own, since it would be shackled to a script written by the prosecution. ... The substitutions would have required the jury to judge Fernandez's role in the airstrip project, and thus the truth of his statements about it, in a contextual vacuum. They would not have provided Fernandez with "substantially the same ability to make his defense...."

913 F.2d at 158.

It is for the reasons enunciated in *Poindexter*, *Libby* and *Fernandez*, that Mr. Nacchio makes his second above-stated caveat. If at any time the government seeks to challenge the truth of any of its substitutions, at that point the substitution will no longer provide Mr. Nacchio with the unimpeded right to mount a defense and he should be allowed to elicit the actual classified material.

[REDACTED]

With the caveats set forth above, Mr. Nacchio does not object to the government's latest proposed substitutions regarding [REDACTED]. By way of example only, with regard to proposed substitution Nos. 3 and 5, it is the defense's understanding that in accordance with the Court's prior rulings the examination regarding [REDACTED] would include the following:

Q. Was Qwest was contacted by a representative of a clandestine government agency?

A. Yes.

Q. Do you know the name of that agency?

A. Yes.

At that point the Court would be advised that the next question will be "what was the name of that agency," but the Court had Ordered a substitution for the name of that agency. The Court would then advise the jury that even though the witness recalls the name of the agency he is being directed not to answer for reasons of national security, and to instead answer by using a substituted name: "agency of the Department of Defense" The examination would then continue:

Q. Do you know the name of the representative who contacted you?

A. Yes.

At that point the Court would be advised that the next question will be "what was the name of that representative," but the Court had Ordered a substitution for the name of that representative. The Court would then advise the jury that even though the witness recalls the

name of the representative he is being directed not to answer for reasons of national security, and to instead answer by using the substituted name: "Jack Thompson."

A similar procedure would be used for all of the other substitutions.

[REDACTED]

With the caveats set forth above, Mr. Nacchio does not object to the government's admissions and proposed substitutions regarding [REDACTED]

[REDACTED]

With regard to this agency, Mr. Nacchio objects to proposed substitution No. 13 because it would *eliminate* the fact that Qwest received classified contracts from [REDACTED] and this is not acceptable.

The government states:

[REDACTED]

Proposed Substitutions, ¶ 13 at 8-9.¹

¹ The government "admits that [REDACTED] Proposed Substitutions, ¶ 17 at 10 (emphasis added). We presume this is a typographical error; as Mr. Nacchio's proffer was that the contract was awarded on September 15, 2000.

By substituting the fact that the work Qwest began in 2000 and additional work Qwest was hoping to receive in 2001 would further very important national security objectives for a clandestine government agency, the government's proposed substitution has stripped away the critical context which informed Mr. Nacchio's state of mind at the time. Mr. Nacchio's Sixth Amendment rights would be defeated if the jury were allowed to infer that this work was just an ordinary [REDACTED] project for [REDACTED] since the jury would then be deprived of the *most critical* facts known to Mr. Nacchio when determining the reasonableness of his belief that Qwest would be receiving 2001 revenue stemming from this project -- namely, that for reasons of national security [REDACTED] was already in the process of using Qwest to [REDACTED]

[REDACTED] and that it wanted to use Qwest for a similar project [REDACTED]

Without this context, the jury will be unable to weigh Mr. Nacchio's belief in the likelihood of receiving this new work because [REDACTED] needs and its method of awarding projects would be completely obliterated.

Despite this, we do not insist that [REDACTED] be specifically identified but instead, similar to [REDACTED] could be referred to as [REDACTED]

With regard to proposed substitution No. 16, we have no objection to substituting the name of [REDACTED]. However, substituting "senior technology officer" for his title of [REDACTED] diminishes the high position he held and the extent and reason Mr. Nacchio could rely on his representations. A possible substitution would be: "one of the highest ranking officers in the agency."

As to the government's remaining proposed [REDACTED] substitutions, with the caveats set forth above, Mr. Nacchio does not object.

The Government's Outstanding CIPA Obligations

On December 8, 2006, the Court stated, "I think that the Government should probably take seriously the suggestion that some of these materials in the Rule 17(c) subpoenas might be construed as *Brady* materials." December 8 Transcript, 66:25 - 67:2. On December 12, 2006, we transmitted just such a request to the government. No response has been received. Additionally, on December 13, 2006, Mr. Nacchio filed his "Motion For Order Requiring The Government To Immediately Produce, And Make Continuing Production Of, Rebuttal Information To Defendant, Pursuant To Section 6(f) Of The Classified Information Procedures Act (December 13, 2006) [Doc. No. 201]. No response has been filed.

We respectfully request that the Court direct the government to provide responses no later than January 22, 2006.

Respectfully submitted this 4th day of January, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2007, a true and correct copy of the foregoing **REPLY TO UNITED STATES' PROPOSED SUBSTITUTIONS PURSUANT TO SECTION 6(c) OF THE CLASSIFIED INFORMATION PROCEDURES ACT** was filed and served by hand delivering same, in Washington, D.C., to the Court Security Officer appointed by the Court in this within matter.

s/Edward S. Nathan
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