

REDACTED

IN CAMERA AND UNDER SEAL

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FILED

UNITED STATES DISTRICT COURT
DENVER, COLORADOIN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

MAY 25 2007

Criminal Case No. 05-cr-00545-EWN

GREGORY C. LANGHAM
CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,
Defendant.**MEMORANDUM AND OPINION ORDER CONCERNING DEFENDANT'S FIFTH
SUBMISSION UNDER SECTION 5 OF THE CLASSIFIED INFORMATION
PROCEDURES ACT AND REQUEST FOR PRODUCTION OF CLASSIFIED
DOCUMENTS SUBMITTED EX PARTE PURSUANT TO SECTION 4 OF THE ACT**

This is a criminal insider trading and securities fraud case. Plaintiff United States of America ("the Government") alleges that Defendant Joseph P. Nacchio violated federal securities laws by selling certain securities while in possession of, and based upon, material non-public information. This matter comes before the court on Defendant's: (1) "Fifth Section 5 CIPA Submission on Behalf of Defendant, and Request for Production of Classified Documents Submitted *Ex Parte* Pursuant to CIPA [Section] 4," filed March 13, 2007; and (2) "Renewed Objection by Joseph P. Nacchio to Exclusion of Classified Testimony as Violative of his Constitutional Right to Mount a Defense," filed April 9, 2007.

Section 5 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 2007), requires that a criminal

REDACTED

defendant who "reasonably expects to disclose or cause the disclosure of classified information in any manner in connection with trial or any pretrial proceeding" must notify the court and the United States Attorney of said expectations. *Id.* §5. The Government has not requested a CIPA section 6(a) hearing on the admissibility and relevance of the information contained in

Defendant's submission, as it has for past submissions. Nevertheless, with this order, the court sets forth its relevance and admissibility determinations in the interest of developing the record in this case. For the same reasons, the court addresses in writing Defendant's motion concerning certain Government submissions to the court made *ex parte*, upon which the court has only ruled orally to date, and Defendant's objection to exclusion of certain classified testimony.

I. GENERAL BACKGROUND

The court has discussed the facts and procedural history of this case at length in its previous orders. Familiarity therewith is thus assumed and the court turns directly to the matter before it. Defendant has long made known his intent to introduce classified information in mounting his defense to the forty-two counts of insider trading against him. In short, Defendant claims that he possessed classified information that suggested Qwest's business prospects were better than non-classified information suggested.

Specifically, Defendant contends that some time before late 1997 or early 1998, Qwest constructed an extensive fiber optic network. Because it was built with glass that was purer than that which was formerly available, Qwest's new network was superior to the existing networks built by Qwest's competitors. Qwest's new network also had significant amounts of bandwidth available for sale, [REDACTED]

[REDACTED]

Defendant suggests that information

conveyed to him in the course of these communications formed a basis for his good-faith beliefs concerning Qwest's prospects for such classified business. The court has already found information pertaining to all but one of the agencies to be irrelevant and inadmissible as proof for any such good-faith defense.

Particularly relevant to the instant matter, [REDACTED] are among the agencies the court has found to be irrelevant. Nonetheless, as will be discussed in further detail, Defendant has tenaciously argued that evidence concerning a February 26, 2001 meeting he attended with Qwest executive James Payne and representatives from [REDACTED] is relevant and admissible. Defendant has repeatedly represented that at the meeting he learned of the [REDACTED]

[REDACTED]

The court has consistently found that this information is neither relevant nor admissible.

II. ANALYSIS

A. DEFENDANT'S FIFTH SECTION 5 CIPA SUBMISSION

Defendant's fifth section 5 CIPA submission consists of three parts: (1) a new proffer concerning [REDACTED], which Defendant argues is relevant and admissible; (2) a renewed request for production of documents submitted *ex parte* by the Government; and (3) an implicit request

for reconsideration of the admissibility of evidence concerning [REDACTED]. The court addresses each part in turn.

1. DEFENDANT'S [REDACTED] PROFFER

In his submission, Defendant makes a new proffer of information concerning his dealings with [REDACTED] that he intends to introduce at trial. The court has already determined that Defendant's evidence concerning [REDACTED] is generally relevant and admissible. By way of review, Defendant has asserted that Qwest entered into two classified contracts with the valued at hundreds of millions of dollars, without a competitive bidding process and that in 2000 and 2001, he participated in discussions with high-ranking [REDACTED] representatives concerning the possibility of awarding additional contracts of a similar nature. Those discussions allegedly led Defendant to believe that [REDACTED] would award Qwest contracts valued at amounts that would more than offset the negative warnings he was receiving about Qwest's financial prospects. The court has held that this evidence goes directly to Defendant's state-of-mind defense because, if credited, it would tend to establish Defendant's reasonable, good-faith belief that Qwest's financial prospects were better than others thought.

In his submission to the court, Defendant now proffers the following:

In the 2000-2001 time frame, employees of [REDACTED] discussed with employees of Qwest [REDACTED] desire to upgrade the agency's capabilities in the [REDACTED] United States. Qwest understood the scope of this project to be in the range of [REDACTED]. Based on the nature of these discussions, Qwest personnel — including [Defendant] — were optimistic about receiving this work during that time frame, particularly because one of the sites pinpointed by [REDACTED] was already on the Qwest backbone.

Defendant's current proffer is an appropriate supplementation to the evidence the court has already determined to be relevant and admissible. Indeed, the Government does not object to the admissibility of the proffer now before the court, beyond reserving its right to object to any lack of foundation in presenting the evidence at trial. Accordingly, the court deems Defendant's proffer to be relevant and admissible, provided that Defendant can establish a proper foundation therefor.

2. REQUEST FOR PRODUCTION OF *EX PARTE* MATERIALS

Defendant underscores that on February 5, 2007, pursuant to CIPA section 4, the Government filed with the court *ex parte* certain materials concerning the classified information Defendant intends to introduce. It is beyond contention that CIPA section 4 expressly provides for such filings:

The court, upon a sufficient showing, may authorize the [Government] to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the [Government] to make a request for such authorization in the form of a written statement to be inspected by the court alone.

18 U.S.C.A. App. 3 §4 (West 2007). Defendant maintains that he asked for production of the *ex parte* filing twice in closed hearings and now again asserts he is entitled to production of "all

[REDACTED] which have been submitted to the [c]ourt, *ex parte*." Defendant reasons that [REDACTED] may have relied on the *ex parte* submission in making certain factual proffers in a summary the Government furnished to Defendant.

Before turning to the specifics and merits of Defendant's argument, the court must first turn to a different motion to provide context. During a closed hearing on February 23, 2007, held in keeping with CIPA section 6(a), the court found that certain documents Defendant had identified were relevant and admissible at trial. The court then ordered the Government to furnish Defendant with summaries of the classified information contained in the documents. The summaries were to be contemplated as a substitution for the classified information, as provided for under CIPA section 6(c), which states in relevant part that "[u]pon any determination by the court authorizing the disclosure of specific classified information . . . the [Government] may move that, in lieu of the disclosure of such specific classified information, the court order . . . the substitution of such classified information of a summary of the specific classified information."

Id. §6(c)(1). It is undisputed that on February 28, 2007, the Government produced its proposed summary of the relevant classified information to Defendant. In his submission presently before the court, Defendant relies heavily upon statements contained in the summary and his interpretations thereof.¹

Defendant notes that in the summary, [REDACTED] made factual representations on behalf of [REDACTED] concerning Defendant's participation in the above-mentioned February 2001 meeting. Defendant underscores a number of statements in the summary, including that: (1) the meeting indeed did take place on February 26, 2001; (2) [REDACTED] representatives were present at the

¹It is worth noting that on March 1, 2007, Defendant filed a motion for disclosure of the names of individuals who could verify the information contained in the summary. The court denied that motion in a hearing on March 9, 2007.

meeting; and (3) the meeting was [REDACTED]

[REDACTED]
Defendant particularly emphasizes the statement contained in the summary that

[REDACTED] and [REDACTED] suggestion, contained in

a subsequently filed declaration, that Qwest was [REDACTED]

[REDACTED] After citing these statements, Defendant asserts that [REDACTED] did not attend the

[REDACTED] meeting and speculates that she must have obtained information concerning same

by speaking with individuals at [REDACTED] who possessed personal knowledge about the meeting,

reviewing [REDACTED] documents about the meeting, or "a combination of the two." This is a foregone

conclusion [REDACTED] has never represented that she was present at the meeting. Reiterating

its holding set forth in a hearing on March 9, 2007, the court finds that [REDACTED] was not

directly involved in any of the contracts with Qwest or discussions about contracts with

Defendant. Accordingly, at best, "her information would be . . . second- or third-hand hearsay."

Therefore, any intentions Defendant may have to rely upon [REDACTED] statements in

mounting his defense are badly misplaced.

Finally, Defendant asserts that, based on conversations with an attorney from the

Government, he has reason to believe [REDACTED] may have used the documents submitted to

the [c]ourt, *ex parte*, as a basis for the statements attributed to her." The court is unimpressed

with this thinly veiled fishing expedition. Defendant's patently speculative musings concerning

hearsay statements simply cannot serve to change this court's prior determination that the *ex parte* submission is not discoverable.

3. DEFENDANT'S [REDACTED] PROFFER

Defendant's implicit point in focusing on [REDACTED] statements is not lost on this court. As stated above, Defendant has repeatedly argued that information he allegedly gathered during the February 2001 meeting with [REDACTED] is relevant to his defense. The court has repeatedly found that such information is neither relevant nor admissible. In hopes of creating a complete record, the court sets forth Defendant's several variations on his argument and again finds that none leads to evidence that is relevant or admissible in this case.

On May 15, 2006, in his first CIPA section 5 submission to the court, Defendant proffered he participated in a "classified overture" that did not lead to a contract. Defendant stated that sometime in late 2000 or early 2001, he and Mr. Payne traveled to [REDACTED] headquarters for a meeting, at which he [REDACTED]. As this court stated in its October 24, 2006 Memorandum Opinion, Defendant did not articulate the basis for his expectation or provide any other information from which one might conclude the expectation was anything more than wishful thinking. Defendant proffered that when he and Mr. Payne arrived to meet [REDACTED] personnel and a representative of [REDACTED] no contract was discussed.

Instead:

[REDACTED]

Based on representations in a hearing on December 8, 2006, it appears Defendant meant to repeat this proffer in his third CIPA Section 5 submission, filed October 31, 2006, but inadvertently omitted it.

The Government asserts that on February 12, 2007, it produced to Defendant a memorandum of an interview with Mr. Payne. The memorandum, which the Government filed as an attachment to its response to Defendant's fourth CIPA section 5 submission, reflects Mr. Payne's statements [REDACTED]

[REDACTED] On February 20, 2007, Defendant filed his fourth CIPA section 5 proffer, in which he stated:

Mr. Payne confirmed to the [G]overnment what [the Defense had] previously proffered: [REDACTED]

In his submission presently before the court, Defendant proffers that he [REDACTED]

[REDACTED] Defendant's position that [REDACTED]
Qwest lost the contract [REDACTED]
has not changed.

The court finds now, as it has before, that the evidentiary problems with this information render it inadmissible and irrelevant in whatever form it may take. For the sake of simplicity, the court will refer to the action allegedly requested as [REDACTED] Defendant's statement that Mr. Payne told him [REDACTED]

caused Qwest to *lose* contracts is inadmissible hearsay. Fed. R. Evid. 801, 802. *Losing* contracts simply does not support a good-faith belief that unfavorable information about Qwest's financial future would be neutralized by the award of contracts by clandestine agencies. Accordingly, Defendant cannot defeat the hearsay character of the information by establishing that it goes to

his state of mind. Moreover, the information is irrelevant. First, it is irrelevant under Federal Rule of Evidence 401, because it is too vague, conclusory, and general either to support a good-faith inference that [REDACTED] was contemplating a contract with Qwest during the relevant time period or to establish that [REDACTED] did not award Qwest the contract because of Defendant's [REDACTED]

Even if the information were sufficiently specific, the claim that [REDACTED] withheld the contract because of Defendant's refusal is irrelevant to his case. As this court stated in its

October 24, 2006 Memorandum Opinion:

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," [as required under Rule 401]. 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.

The court did not change its position when Defendant changed his proffer and does not so now. (See Feb. 23, 2007 Hr'g Tr. at 19-24; Mar. 1, 2007 Hr'g Tr. at 19.) Simply stated, the

reasons why the contract was not awarded do not bear on what is at issue in the case —

Defendant's good-faith belief that Qwest's financial position was more secure than represented in other information. The hearsay nature of the information, the lack of probity, and the dangers of unfair prejudice, confusing the issues, and wasting of time all underlie the court's unwavering position. The information concerning [REDACTED] and concerning statements allegedly made during the February 2001 meeting is and shall remain irrelevant and inadmissible under Rules 401 and 403.

B. DEFENDANT'S OBJECTION TO EXCLUSION OF TESTIMONY

Defendant has also filed an objection to the court's exclusion of his testimony concerning the [REDACTED]. Defendant reasons that the court's determination that such evidence is irrelevant, more prejudicial than probative, and inadmissible hearsay has "deprived [him] of the ability to explain why — after he came out of the February meeting with a reasonable, good faith, [sic] expectation that Qwest would be receiving significant contracts from [REDACTED] in 2001 . . . — Qwest was denied significant work." Defendant asserts that this deprivation is tantamount to a violation of his constitutional rights because it has resulted in his inability to mount a full CIPA defense. The court is not convinced. Defendant's plaintive posturing cannot defeat the court's oft-repeated substantive finding that the evidence concerning the [REDACTED] is neither admissible nor relevant in this case. As the Government has argued, "Defendant has no constitutional right to present irrelevant testimony to the jury." The court agrees.

III. CONCLUSION

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

ORDERED as follows:

1. Defendant's [REDACTED] proffer is relevant and admissible at trial; provided that Defendant can adequately establish a foundation therefor.
2. Defendant's request for production of classified documents is denied.
3. Defendant's [REDACTED] proffer is irrelevant and inadmissible.
4. Defendant's objection is overruled.

Dated this 25th day of May, 2007

BY THE COURT:

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