

FILED WITH COURT SECURITY OFFICER
IN CAMERA AND UNDER SEAL

REDACTED

DATE: 3/13/07 *gmunther*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

MAR 13 2007

GREGORY C. LANGHAM
CLERK

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**FIFTH SECTION 5 CIPA SUBMISSION ON BEHALF OF DEFENDANT,
AND REQUEST FOR PRODUCTION OF CLASSIFIED DOCUMENTS
SUBMITTED EX PARTE PURSUANT TO CIPA § 4**

(FILED IN CAMERA AND UNDER SEAL WITH THE COURT SECURITY OFFICER)

Defendant Joseph P. Nacchio, by and through undersigned counsel, pursuant to Section 5 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 5, respectfully submits this CIPA Memorandum.

A. [REDACTED]

Pursuant to Mr. Nacchio's obligation under CIPA § 5 to apprise the government and the Court of newly discovered classified information he intends to introduce at trial, he states 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

REDACTED

States. Qwest understood the scope of this project to be in the range of \$50-100 million. Based on the nature of these discussions, Qwest personnel -- including Mr. Nacchio -- 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.

B. [REDACTED]

After receiving notice that the government had made an *ex parte* CIPA § 4 submission to the Court, without being advised of the reason for the *ex parte* submission, we asked during an ensuing Status Conference that the government be directed to provide us with the documents in question. The Court denied our request. Subsequently, on February 23, 2007, the Court directed the government to provide us with a summary of certain government interviews with attorneys for clandestine agencies, but not with any of the underlying documents which had been submitted *ex parte*.

Following receipt of the summary, we filed a "Motion For Disclosure Of Names Of Witnesses Who Can Verify The Information Provided In The Summary Report Produced By The Government On 2/28/07." That motion was denied during the March 9, 2007 closed CIPA hearing. Counsel for Mr. Nacchio then made an oral request for the production of classified [REDACTED]-related materials which the government has submitted to the Court, *ex parte*, pursuant to CIPA § 4. The Court denied that request.

In order to establish a clear record, Mr. Nacchio now formally renews that request and states as good cause shown the following:

1. By classified letter dated February 28, 2007, acting "pursuant to the Court's order of February 23, 2007," the government produced to Mr. Nacchio "a classified summary of two memoranda of interview drafted by the Federal Bureau of Investigation."

2. The summary reflects that [REDACTED] an attorney with [REDACTED] met months ago with Mr. Leone, at which time she made certain factual proffers on behalf of [REDACTED]

3. The second paragraph of page two of the summary, as well as the first paragraph of page three of the summary, proffer certain facts concerning the February 26, 2001 meeting at which [REDACTED] met with Mr. Nacchio.¹

These are:

2. The meeting did, in fact, take place

b. Individuals from [REDACTED] were present on behalf of [REDACTED]

c. The meeting was

d.

4. We have previously proffered that Messrs. Nacchio and Payne left that meeting feeling optimistic about the award to Qwest of [REDACTED] contracts which would have yielded significant revenue in 2001. We have also previously proffered that when Mr. Nacchio was asked by [REDACTED] at that meeting [REDACTED]

¹ James F.X. Payne was also present at this meeting.

[REDACTED] and that Qwest did not receive any of the 2001 business which Mr. Nacchio left the February 26, 2001 meeting feeling optimistic about.² The summary states, [REDACTED]

[REDACTED] subsequently represented that this assertion was incorrect, stating, remarkably, that Qwest didn't receive classified work from [REDACTED] because the [REDACTED]

[REDACTED] "Declaration of [REDACTED] Associate General Counsel, Litigation, [REDACTED] Office of General Counsel," ¶ 5 (March 8, 2007).

5. [REDACTED] did not represent that she, personally, attended the [REDACTED] meeting. Necessarily, therefore, she harvested the facts proffered to Mr. Leone either from speaking with individuals [REDACTED] with personal knowledge pertaining to that meeting, as a result of reviewing [REDACTED] documents pertaining to that meeting, or a combination of the two.

6. Indeed, from conversations with a government attorney, we have reason to believe that [REDACTED] may have used the documents submitted to the Court, *ex parte*, as a basis for the statements attributed to her in the 302.

7. Respectfully, we believe that based on this record we should be allowed to view any [REDACTED] documents which were submitted by the government to the Court, *ex parte*, because they bear directly on Mr. Nacchio's good faith basis in believing that Qwest would receive work [REDACTED]

² The government repeatedly denied to the Court that this request was ever made [REDACTED] even though it readily seems that it was well aware of [REDACTED] proffer and had also interviewed Mr. Payne in July 2006, at which time he advised the government of not [REDACTED] but the [REDACTED] thereafter, accompanied by [REDACTED]

D. CONCLUSION

For the foregoing reasons, Mr. Nacchio respectfully requests that the Court: find that the information identified herein is relevant, admissible and may be used at trial in this matter, and direct the government to provide Mr. Nacchio with copies of all [REDACTED] documents which have been submitted to the Court, *ex parte*, pursuant to CIPA § 4.

Respectfully submitted this 13th day of March, 2007.

s/Herbert J. Stern
Herbert J. Stern
Jeffrey Spelser
Edward S. Nathan
Alain Leibman
Mark W. Ruffolo
Stern & Kilcullen
75 Livingston Avenue
Roseland, New Jersey 07068
(973) 535-1900
(973) 535-9664 (facsimile)

s/John M. Richilano
John M. Richilano
Marci A. Gilligan
Richilano & Gilligan, P.C.
633 17th Street, Suite 1700
Denver, CO 80202
(303) 893-8000
(303) 893-8055 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2007, a true and correct copy of the foregoing **FIFTH SECTION 5 CIPA SUBMISSION ON BEHALF OF DEFENDANT AND REQUEST FOR PRODUCTION OF CLASSIFIED DOCUMENTS SUBMITTED EX PARTE PURSUANT TO CIPA § 4**, was filed and served by hand delivering same, in Denver, Colorado, to the Deputy Court Security Officer appointed by the Court in this within matters.

s/Edward S. Nathan
Edward S. Nathan