IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

REDACTED

SECTION 5 CIPA REPLY SUBMISSION
ON BEHALF OF DEFENDANT
(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, and in accordance with the Court's August 25, 2006 Order, submits the following reply to the government's 2nd Response To Defendant's Section 5 CIPA Submission (August 16, 2006) (the "Government Response").

Introduction

The government asks the Court to adopt its version of fact and to dismiss Mr. Nacchio's version outright. In short, the government impermissibly seeks to shift fact finding from the jury

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to the Court. In so doing, the prosecution totally ignores the information it sought and received from James Payne.[1]

Mr. Payne directly contradicts the government and corroborates Mr. Nacchio. He is in a position to corroborate Mr. Nacchio since he shared Mr. Nacchio's classified knowledge, which was not available to the Qwest employees who offered Mr. Nacchio a different valuation of Qwest's financial projections. Putting aside this persistent refusal to acknowledge Mr. Payne's corroboration of Mr. Nacchio, namely that *prospective* classified government contracts for the year 2001 were *not* included in the September 7, 2000 guidance or its later iterations, the government's attempts to use this proceeding to seek fact finding by the Court are impermissible. These efforts badly misperceive the purpose of a Section 6 CIPA hearing. It is for the jury to decide factual disputes, after having an opportunity to observe the witnesses and inspect the relevant documents. This Section 6 hearing is limited to determining whether Mr. Nacchio's proffer is relevant to his defense, with the Federal Rules of Evidence determinative of the question.

On May 15, 2006, Mr. Nacchio submitted his "Section 5 CIPA Submission On Behalf Of Defendant" (the "Section 5 Submission"). Pursuant to the Court's directive, the Section 5 Submission was preliminary in nature, a limited proffer based solely on counsel's interview with Mr. Nacchio. (*Ex Parte* Order Concerning Defendant's *Ex Parte* Submission Filed April 24,

[1] As we have previously explained, James F.X. Payne was Qwest's Senior Vice President and General Manager of the federal group, and the person who accompanied Mr. Nacchio to the classified meetings which are the subject of the Section 5 Submission. He was also the person responsible for projecting the future income of Qwest from government contracts -- both classified and unclassified. He was sought out and interviewed by the government days before the indictment when the government learned from Mr. Nacchio's attorneys of the possible use of classified information in his defense.

2006 at 4 (May 2, 2006). There has been as yet no opportunity to obtain detailed corroborative information from other witnesses or from government documents. Perhaps not realizing this, the government has attacked the Section 5 Submission as too vague to justify a finding of relevance. In fact, one of the purposes of the Section 5 Submission was to demonstrate that in addition to Mr. Nacchio's personal knowledge there is also a large independent body of corroborative classified information that is relevant to Mr. Nacchio's defense. The question is not whether Mr. Nacchio's personal knowledge is, in and of itself, sufficient to provide a CIPA-related defense, for Mr. Nacchio need not testify. Rather, Mr. Nacchio's proffer demonstrates that in addition to his testimony, should he choose to testify, there exist witnesses and corroborating classified evidence which is relevant to the defense and which Mr. Nacchio should now be allowed to pursue. This evidence of prospective government business can be found in the prospective testimony of the other participants -- including Mr. Payne -- in the classified conversations Mr. Nacchio had with senior members of the nation's clandestine intelligence agencies and the National Security Council staff, as well as in classified documents related to those meetings.[2] These communications to Mr. Nacchio are relevant to his state of mind irrespective of his decision to take the stand.

Further corroboration can be found even in the statements of the principal government witnesses, Mohebbi and Szeliga, who each told the government -- and in one case the grand jurors -- that at various times during the relevant period Mr. Nacchio informed them that he knew things that they did not know about Qwest's financial prospects. For example, when

[2] CIPA "applies to classified testimony as well as to classified documents." *United States v. North*, 708 F.Supp. 399, 401 (D.D.C.), *appeal dismissed on other grounds*, 859 F.2d 216 (D.C. Cir. 1988), *cert. denied on other grounds*, 490 U.S. 1004 (1989).

interviewed by the FBI, Robin Szeliga told of remarks by Mr. Nacchio about prospects for government business which were "mind boggling." Ms. Szeliga also recounted a discussion with Mr. Nacchio when she asked why Qwest was buying South American routes and Mr. Nacchio replied that they needed the routes but he could not talk about it. Additionally, Ms. Szeliga told the government that when there was a meeting at the Anschutz ranch someone from the federal government showed up and she was not allowed to talk to him. Still further, she reported a conversation to the government between Mr. Nacchio and Greg Casey (the head of Qwest's wholesale business unit) in which Mr. Casey said that until the other products came up to gobble up bandwidth, the market would lull, to which Mr. Nacchio responded that he understood that, but that he sat on a government panel for technology and there were going to be some big needs and the government would need more and more bandwidth.

The Court will also recall the grand jury testimony of Ashfin Mohebbi, in which he testified that in rejecting his views, Mr. Nacchio told him during the trading period, that he had information not available to Mr. Mohebbi. Thus Mr. Mohebbi testified that Mr. Nacchio said:

> I heard you; I disagree with you. We're not going to change the numbers. The numbers are the numbers. We're going to make the numbers. ... I can tell you what he told me, which is, I heard you; I don't agree with it. *He said a number of other things: You know, you don't know things; you don't know everything that I know; we're not changing the numbers.*

(*See* Reply To The Government's Response To Motion For Dismissal Of Indictment Due To Prosecutorial Misconduct In The Grand Jury at 5-7 and Exhibit A (emphasis added) (June 22, 2006) [Doc. No. 97])[3]

[3] Curiously, Mr. Mohebbi sent an email to other Qwest employees in October 2001 in which he stated, "I want to know what Jim Payne has been doing in the last 2 years."

In addition to our first Section 5 Submission, Mr. Nacchio would now supplement this with an additional factual proffer of events in 2000 and 2001 related to the $2 billion "GovNet" project. At the time of the first submission, the defense did not believe this was classified and, therefore, it was not included. However, in its Response the government took the position that the mere identification of the name of a clandestine intelligence agency may, in and of itself, be classified and cause surrounding evidence to also become classified. (*Id.* at 19-20) Indeed, we were just served this week with the sealed Declaration of Cindy Meyer, a Telecommunications Specialist at the Defense Information Systems Agency ("DISA") of the United States Department of Defense ("DOD"), who stated, ¶ 3 at 2:

> However, this determination of no classified information could change if the information is expanded even slightly. For example, fragments of information, such as the linkage of location with the contract in question would be classified information, while the data separately is not classified.

In light of this statement, we are supplementing our Section 5 Submission with the "GovNet" material, *infra*.[4]

Accordingly, Mr. Nacchio respectfully asks that the Court: make a finding of relevance of the classified facts set forth here and in Mr. Nacchio's Section 5 Submission; deny the government's proposed stipulations and substitutions; deem that Mr. Nacchio and his counsel have the "need to know" which will allow them to interview witnesses and subpoena related

[4] Section 5(a) of CIPA specifically provides that, "[w]henever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information." 18 U.S.C. App. 3 § 5(a).

documents; and, because new information may then be uncovered, allow, if necessary, additional defense submissions, pursuant to § 5(a) of CIPA.[5]

The Role Of CIPA

In *United States v. Poindexter*, 725 F.Supp. 13 (D.D.C. 1989), District Judge Harold H. Greene summarized CIPA's application to a criminal proceeding:

> Under the CIPA procedures ... the defense is required (by section 5) to notify the Court and the prosecutor of its intention to disclose particular classified information at trial. Section 6(a) permits the prosecution thereafter to request an *in camera* hearing for a determination of the use, relevance, and admissibility of this proposed defense evidence. If the Court makes an affirmative finding with respect thereto, the government may move for, and the Court may authorize, the substitution of unclassified facts or a summary of the classified information in the form of an admission by the government. Under section 6(e)(2) if the government prevents a defendant from disclosing classified information at trial, the Court may find against the prosecution on any issue to which the excluded information relates; it may strike or preclude the testimony of particular government witnesses; and it may dismiss the indictment or specific counts thereof.
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> Moreover, the protection of the rights of defendant is paramount under the statutory scheme: if the Attorney General files an affidavit objecting to the disclosure of the classified material, and the Court determines that other remedies,

[5] While we believe we are not obligated to advise the Court and the prosecution of who we wish to interview in preparation of Mr. Nacchio's defense, we are unable to conduct interviews without first obtaining a "need to know" determination from the Court. In that regard, we were unable to interview Mr. Payne concerning the classified material — even though he and we were cleared as to the subject matter. In order to facilitate the process, we provide the names of some of the potential witness we need to interview. We wish to interview Mr. Payne, his predecessor Dean Wandry and possibly other Qwest employees, as well as senior representatives of the clandestine intelligence agencies and National Security Council staff with whom Mr. Nacchio had discussions. Those senior representatives include: Richard Clarke, at the time the National Security Council's National Coordinator for Security, Infrastructure Protection and Counter-terrorism; Lieutenant General Harry D. Raduege, Jr., then the Manager of the National Communications System; and [redacted] It is also our intention to subpoena classified documents related to those discussions.

> including satisfactory unclassified substitutes providing defendant "with substantially the same ability to make his defense as would disclosure of the specific classified information," cannot be fashioned, it must provide relief, including, where appropriate, by a dismissal of the indictment.

Id. at 31-32, *quoting* CIPA § 6 (18 U.S.C.A. App. 3 § 6(c)(1)). *Accord*, *United States v. Lee*, 90 F.Supp.2d 1324, 1325-26 (D.N.M. 2000).

The government concedes that CIPA § 6 requires that any substitution provide Mr. Nacchio with substantially the same ability to make his defense. (Government Response at 3-4)

Additionally, in *Poindexter*, Judge Greene further explained:

> [S]ection 5 of CIPA does not require a defendant to specify whether he will testify or what he will testify about. The statute requires merely a general disclosure as to what classified information the defense expects to use at the trial, regardless of the witness or the document through which that information is to be revealed. In other words, defendant need *not* reveal what he will testify about or whether he will testify at all. ... All he is required to do under CIPA is to identify the classified information on which his side intends to rely in the course of its overall presentation, not who will disclose it as part of any particular testimony.

Id. At 33; *accord*, *Lee*, 90 F.Supp.2d at 1327 (citing *Poindexter*); *see also United States v. Wilson*, 571 F.Supp. 1422, 1427 (S.D.N.Y. 1983) ("The notice rules ... require only that a 'brief description of the classified information' be provided.").

The description of the relevant classified information known to Mr. Nacchio, as set forth here and in his initial Section 5 Submission, we submit, should constitute sufficient notice under CIPA Section 5.

The Body Of Classified Materials Is Properly Admissible

The issue is whether the classified information in our submission and the body of related independent classified testimonial and documentary materials which we seek to obtain should, under the Federal Rules of Evidence, be admissible at the trial:

> CIPA does not create new law governing the admissibility of evidence. [*United States v. Collins*, 720 F.2d 1195, 1199 (11th Cir. 1993)] It simply ensures that questions of admissibility will be resolved under controlled circumstances calculated to protect against premature and unnecessary disclosure of classified information. Thus, the district court *may not* take into account the fact that evidence is classified when determining its "use, relevance, or admissibility." [*United States v. Juan*, 776 F.2d 256, 258 (11th Cir. 1995)]; *Collins*, 720 F.2d at 1199. The relevance of classified information in a given case is governed solely by the well-established standards set forth in the Federal Rules of Evidence. [*United States v. Anderson*, 872 F.2d 1508, 1514, *cert. denied*, 493 U.S. 1004 (1989)]; *see* Fed.R.Evid. 401-03.

United States v. Baptista-Rodriguez, 17 F.3d 1354, 1363-64 (11th Cir. 1994) (emphasis added).

The government suggests that Mr. Nacchio must surmount a higher burden than the Rules of Evidence, that in addition to relevance under Fed.R.Evid. 401, he "must show that the information would be helpful to his defense" and that "where the Defendant seeks to discover or use classified information the Court must apply a materiality test as well as a relevance test." Government Response at 3. This is a misreading of the law. Earlier this month, United States District Judge Reggie B. Walton published a decision in *United States v. Libby*, -- F.Supp.2d -- , 2006 WL 2692740 (D.D.C. September 21, 2006).[6] The District Court there rejected the identical argument which the government asserts here. The Court definitively ruled that only "the Federal Rules of Evidence and the restrictions they impose control whether information subject to CIPA proceedings is admissible during a trial." 2006 WL 2692740, *1. The Court found that the cases relied upon by the government "ignore the clear language of the statute and the unambiguous mandate from Congress that the standard evidentiary rules applicable in federal courts apply with equal force in Section 6(a) hearings." *Id.*, *5. We submit that the law is clear that it is the Rules

[6] For the Court's ease of convenience, a copy of this opinion is attached as Exhibit 2.

of Evidence as applied in an ordinary trial setting that govern the admissibility of both classified and unclassified information at trial. *Id.*, *6.

As elucidated during the sealed portion of the August 25, 2006 hearing, Mr. Nacchio's state of mind is an essential element of the charged offense, that is, an intent to defraud the buyers when he sold his shares of Qwest stock. (Sealed Transcript of Proceedings, 38:18 - 39:2 (August 25, 2006)) *See United States v. O'Hagan*, 521 U.S. 641 (1997); *Elbel v. United States*, 364 F.3d 127 (10th Cir. 1966), *cert. denied*, 385 U.S. 1014 (1967). Thus the government must not only prove that the "warnings" given to Mr. Nacchio were, in fact, material, but also that they motivated Mr. Nacchio to sell with the intent to defraud his buyers. Mr. Nacchio's reasonable belief concerning significant additional 2001 revenue from classified government work, which was not included in Qwest's public guidance and which motivated him to discount contrary views of others is, therefore, both relevant and highly probative of this scienter element, and clearly admissible under Federal Rule of Evidence 401. Also squarely at issue in this case is the defense of good faith, which the Court itself acknowledged during the August 25, 2006 hearing. (Sealed Transcript of Proceedings, 38:6-9 (August 25, 2006)) *See Steiger v. United States*, 373 F.2d. 133, 136 (10th Cir. 1967). These additional business opportunities go to the heart of that defense, as well.

The Government Improperly Seeks To Use Section 6 Of CIPA To Impose Its Version Of The Facts On The Defense And Prevent The Jury From Deciding Disputed Facts

The government acknowledges that "[i]t is not the purpose of this pleading to controvert the alleged 'facts' in the § 5 Filing," but then immediately asserts that "they are, in almost every case, simply wrong." (Government Response at 2). In reality, a side by side comparison between

Mr. Nacchio's Section 5 Submission and the substitutions the government has proposed reveals that the government seeks nothing less than to replace Mr. Nacchio's proffer with their own version of events. Resolving disputes of fact is not permissible in a CIPA § 6 hearing. Disputes of fact must be resolved by the jury. For the purposes of a § 6 hearing, it matters not whether the government contests Mr. Nacchio's assertions. It only matters whether those asserted facts are relevant to his defense. The rest is for the trial.

Moreover, the government's version of the "facts" continues to ignore information given to it by Mr. Payne when he was interviewed on November 14, 2005, just four days after Mr. Nacchio's counsel advised the Department of Justice that Mr. Payne could corroborate that Mr. Nacchio had a reasonable basis to believe that the guidance was correct. It will be recalled that just a few weeks before the indictment the defense offered to toll the statute of limitations and to make a proffer to the government in regard to the classified information which bore on Mr. Nacchio's state of mind. (*See* Exhibit 3, letters from Mr. Nacchio's counsel to Alice Fisher, Esq. dated November 2 and 17, 2005)

Instead, the government sought to seal off this defense by interviewing a number of witnesses, including Mr. Payne, having people say that all the "prospective" government work -- classified and unclassified -- was already in the guidance. And so, on November 14, 2005, just a month before the indictment, the government reached out to Mr. Payne for that purpose. Nonetheless, on that date, Mr. Payne told the government that prospective classified contracts were *not* included in the annual budgets and that he only identified classified contracts for inclusion in quarterly budgets if they had actually been awarded or were about to be awarded. (*See* Exhibit 1, the Form 302 from Mr. Payne's interview) In spite of that statement, which

appears two times in the Payne 302, in a volunteered filing on January 17, 2006, the government three times represented to the Court that all "prospective" government work for 2001 was included in the September 7, 2000 guidance. And they have repeated that at least four times in the present filing. (*See* Government Response at 9-10)

As we have already stated in papers filed with the Court, the government has been placed on notice of this information no less than five times: four times before the indictment, by letter dated November 2, 2005, when orally informed by Mr. Nacchio's attorneys on November 10, 2005, by Mr. Payne himself when he was interviewed on November 14, 2005 (memorialized in a FBI Form 302 memo) (*see* Exhibit 1), and in a follow-up letter from counsel to the Department of Justice on November 17, 2005; and after the indictment, in our May 1, 2006 Omnibus Discovery Motion at 9-16 and Exhibits C-G. [Doc. No. 65])

Despite this the government persists in proclaiming that Mr. Nacchio's account is "erroneous" and "untrue." (Government Response at 17, 18) The government continues to insist that its version of the facts -- that all *prospective* classified contracts for the entirety of 2001 were included in the September 7, 2000 guidance -- be adopted by the Court and therefore, the government argues, there is no right to use classified information at trial because Mr. Nacchio's assertions are false. (*See* Government Response at 8-12, 13, 17 (reiterating the position asserted in its January 17, 2006 "Memorandum Brief Regarding CIPA" [Doc. 20-1]))[7]

The government's reliance on Exhibits I and J of its Response is misplaced. Exhibit I is simply a report of actual revenue booked by Qwest in 2001 and 2002 from classified government

[7] Surprisingly, however, at one point the government confirmed Mr. Nacchio's and Payne's assertion, conceding that Qwest only "include[d] in its forecasts all such classified business *that had reached a sufficient level of certainty to be tracked* . . ." (Government Response at 13)

contracts in hand at the time. The ultimate amount of revenue booked in 2001 and 2002 has nothing to do with Mr. Nacchio's expectations in 2000 through May 2001 concerning revenue for the year 2001. For purposes of the defense of this case, which is based on Mr. Nacchio's state of mind and good faith, what is relevant is Mr. Nacchio's reasonable anticipations during the time he was trading as to the ability of Qwest to achieve the public guidance for the year 2001.

The government persists in ignoring what it was told during its interview of Mr. Payne about Exhibit J, an "initiative sheet" dated "as of April 13, 2001," which the government submits as "proof" that "all information concerning federal contracts and prospective federal business, classified or unclassified, that would or *might* produce revenue was included in Qwest's forecasts and reports, both internally and externally." (Government CIPA Memorandum at 4 (emphasis added) [Doc. 20-1]) When the government interviewed Mr. Payne on November 14, 2005, Mr. Payne told them that he knew nothing about these initiative sheets:

> Payne was asked about initiative sheets and he said he had not seen them, nor was he familiar with them. It was explained to him that deals were classified by and reported in initiative categories A, B or C depending on their likelihood of closing. He said it made sense, but that he was not familiar with it.

(*See* Exhibit 1 at 4)

More importantly, what Mr. Payne did know and what he told the government on November 14, was that he and Mr. Nacchio were aware of *prospective* classified contracts: "Nacchio would know about potential projects that were in the funnel" (Exhibit 1 at 2); "Nacchio was aware of the speculative government transactions, particularly the large ones" (*id.* at 3); and that these prospects were not included in the budgets that he prepared. Mr. Payne also told the government that he never shared that information with Qwest's budgeting personnel; he only

reported classified contracts to the company when they actually were awarded or were about to be awarded. Therefore, contrary to the government's assertion, these initiative sheets could not have included prospective classified work.[8] None of the information contained in Exhibit J, dated April 2001, was necessarily relevant to the projections made in September 2000 and confirmed thereafter.

Among the other things Mr. Payne told the government that day were:

- As "Senior Vice President and General Manager of the federal group" he was "very cautious about what he included in his reporting. He only included those deals that were ready for closure. Payne was guided by the booking guidelines that were very rigid. It was an audited process. He included all real revenue possible on a *quarterly* basis." (Exhibit 1 at 1, 4 (emphasis added))

- "The government process was long-term and Qwest focused on the short term. No one ever asked how things were going to look six months from now. He [Payne] informed them how he expected to make his numbers *and only included the government contracts that were pertinent to the time frame they were looking at, quarter-by-quarter.* There was always a strong possibility that circumstances could change. For instance, 80% of government contracts could be sole source contracts. *He only included those contracts that he had "won."* He would not have included those numbers he had not "won" and he would not set expectations that he would not be able to meet." (*Id.* at 3 (emphasis added))

- Finally, far from telling the government that prospective classified government projects, such as "Ferrari," would be "included on various schedules and forecasts, using... coded information" (Government CIPA Memorandum at 5-6 [Doc. 20-1]), Payne told the government unequivocally that project Ferrari was not included in his sales forecast, because the contract had not been signed, and that "[i]*t would have been foolish, improper, and fraudulent to have included [Ferrari] in his revenue forecast.*" (*Id.* at 4) (emphasis added))

Thus, Mr. Payne's statements not only refute the government's factual assertion that all prospective classified government work "that might produce revenue" was "included in Qwest's

[8] It must be remembered that the guidance was put out to the public on September 7, 2000 for the year ending December 31, 2001.

forecasts and reports," but support Mr. Nacchio's assertion that he had in mind prospective classified contracts when he weighed the "warnings" he received from persons who lacked any knowledge about these prospective revenues. We have already noted that the two main government witnesses confirmed that assertion by the contemporaneous statements which Mr. Nacchio made to them.

In the final analysis, for purposes of a CIPA determination of relevance and use, the government has offered nothing more than its preferred explanation as to the meaning of Exhibit J, with that explanation discredited by Mr. Payne's statements to the government on November 14, 2005.[9] But that dispute is not for CIPA resolution. Certainly, the government can offer its version of the facts at trial, Mr. Payne can testify to the contrary, and the jury can decide whom to believe. But the government may not ask the Court, under the guise of a Section 6 CIPA hearing, to adopt its version of the facts -- a demonstrably incorrect version, at that -- and to reject the facts set forth here, in our Section 5 Submission and in Mr. Payne's corroborating statement, and to cut off access by the defense to such further corroboration.

The government attempts to distract us from the issues by adducing "proof" that the actual revenue which Qwest ended up booking from classified contracts in 2001 was less than Mr. Nacchio hoped to receive. (*See, e.g.*, Government Response at 11, 17) All that matters for purposes of the trial is what Mr. Nacchio reasonably thought would happen during the period he was selling stock. *See, e.g., Steiger*, 373 F.2d at 136 (retrospective view of what actually

[9] Indeed, the government does not, and cannot, explain how Exhibit J -- a document dated April 2001 -- includes what it claims were, at that time, mere prospects for classified contracts that were not likely to close, yet those same prospects were nevertheless included in the 2001 guidance, which was created on September 7, 2000, *more than six months earlier*.

happened does not defeat a good faith defense).[10] In any event, we intend to offer proof that Mr. Nacchio's expectations were frustrated in part, because he refused to accede to improper government requests, although he did not anticipate that retaliation.

In this regard, and apparently out of confusion, the government has merged two separate incidents into one. It rejects as "irrelevant" Mr. Nacchio's refusal to accede [redacted] (*see* Mr. Nacchio's Section 5 Submission at 9 n.5) because "his disagreement with [redacted] arose after September 11, 2001." (Government Response at 18-19). At the same time, the government, itself, quotes Mr. Nacchio as having said the event took place "in late 2000 or early 2001." (*Id.* at 18) The truth is that Mr. Nacchio [redacted]

[10] It is for this reason that Exhibit I to the Government Response is irrelevant: it only shows what actually ended up being booked by the end of 2001, *not* what Mr. Nacchio believed, during the trading period which ended in May, constituted viable prospects for the end of the year.

[redacted] Mr. Nacchio made no mention of the [redacted] in his Section 5 Submission. Furthermore, Mr. Nacchio did not learn until many months later -- probably after May 29, 2001 - that his refusal [redacted] cost Qwest not only the contract at issue but [redacted] good will towards Qwest in future classified work.

The government distorts factual issues in a number of places. For example, it contends that "[t]here is no statement in the § 5 Filing of how much revenue was anticipated from any specific contract...." (Government Response at 12) We have already shown that CIPA does not require this type of specificity; we hope to develop such greater detail as we interview other witnesses and gain access to documents. For now, it is sufficient that Mr. Nacchio reasonably believed at the time "that there was at least $500,000,000 of imminently prospective government work which was unknown to those critiquing the guidance." (Section 5 Submission at 7)

The government misrepresents Mr. Nacchio's position as being that Qwest "morphed into a dependency on federal contracts" and labels "the whole issue of government contracts [as] simply a sideshow." (Government Response at 13, 18) Mr. Nacchio does not claim that Qwest was dependent on government contracts, but simply that he thought Qwest had an excellent chance to obtain hundreds upon hundreds of millions of potential revenue dollars which were not part of the numbers already in the public guidance.

The Identity Of The Clandestine Agencies, The Names Of The Senior People With Whom Mr. Nacchio Spoke, And The History Of Qwest's Dealings With Those Agencies And Those Individuals Are Necessary To Provide The Essential Context For The Reasonableness Of Mr. Nacchio's State Of Mind

The government demands that Mr. Nacchio's Section 5 Submission be redacted to remove the names of the clandestine intelligence agencies, the identities of the individuals with whom Mr. Nacchio conversed, and to eliminate the history of Mr. Nacchio's dealings with those agencies and individuals. To do so, however, would strip the critical context from these events, context that is essential to understanding why Mr. Nacchio's expectations for future classified contracts were reasonable.

The government asserts that:

> The names of agencies involved in intelligence gathering, the names of individuals employed by those agencies in an intelligence capacity, and the operational details of intelligence gathering activities, including their location, their purpose and technologies or methods used are classic examples of highly classified information.

(Government Response at 5)

This may be the case but, in and of itself, not a reason to gut the Section 5 Submission. As has been shown, the protection of a defendant's rights is paramount under the statutory scheme. The jury is entitled to be informed of the context in which Mr. Nacchio obtained earlier classified contracts as well as what he was told about prospective classified contracts, all in order to be able to judge whether Mr. Nacchio was reasonable in his expectations, which were based on his past experience with the agencies and their access to immediate funds outside of normal government budget processes. Stripping the names of agencies and individuals and the history of past dealings (as set forth in the Section 5 Submission) removes all critical context.

Indeed, in a case cited by the government at 3 of its Response, the Court of Appeals for the District of Columbia explained:

> 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).

The government is, therefore, incorrect in suggesting that "[i]t is immaterial whether Qwest's contracts were with [redacted] or the State of Florida and it is immaterial whether the operations for which the contracts were put in place are centered in Afghanistan or the Congo." (Government Response at 8) If the jury was simply told that Mr. Nacchio met a "government employee," who said that Qwest would be receiving a contract worth tens or hundreds of millions, without the need for public bidding or the normal budgeting process, they might react one way. If, however, they were told the truth, that during a time when the nation had already been subject to terrorist attacks (*e.g.*, the African embassy bombings and the bombing of the U.S.S. Cole) and continuous cyber-attacks against the Department of Defense and the White House, the director of the [redacted] – who had previously awarded Qwest a classified "no-bid," *immediately funded*, contract to establish secure trans-Pacific fiber optic communications with an [redacted] -- tells Mr. Nacchio that the agency wanted to establish a similar fiber optic link to Eastern Europe, on

the same terms, the jury might react in a totally different manner.[11] The government's proposed substitutions emasculate what really happened, and Mr. Nacchio has a constitutional right to have the jury know the true facts which underlay his belief that the guidance was correct.

The context also includes the overarching fact that Mr. Nacchio's dealings with each agency were not isolated, but interrelated with each other. [redacted] personnel would sit in on meetings at [redacted] or DISA [redacted] Our nation's entire national security apparatus was fighting the pre-September 11 stages of today's global war on terror, and the various agencies often coordinated their efforts. This is why, for example, the substitutions offered by [redacted] are wholly inadequate. Our Section 5 Submission at 5 -- which the government wishes to neuter (*see* Declaration of [redacted] Officer (August 17, 2006), ¶¶ 10-14) -- [redacted]

Sometime in 2000 or 2001, [redacted] Mr. Payne later told Mr. Nacchio this was because [redacted] Without these details, which [redacted] wishes to strike, the evidence would lose its meaning.

[11] Evidence will be developed, as we showed in our initial submission, that these agencies not only had the capacity to, but actually did, award contracts without bidding and without need to seek appropriations. (*See* Section 5 Submission at 5)

[12] Indeed, during this period of time Mr. Nacchio's relationship [redacted]

The proposed substitutions would not protect Mr. Nacchio's rights, nor would they provide him "with substantially the same ability to make his defense as would disclosure of the specific classified information." CIPA, § 6. We respectfully submit that they should be denied.

Because Of The Position Taken By The Government In Its Response Mr. Nacchio Now Supplements His Section 5 Submission

The Government Response at 2 seeks "an order that Defendant will be limited in his proof to the specific facts proffered in the § 5 Filing...." The government further asserts that "the Defendant is bound by the specific facts in his § 5 Filing and cannot elaborate on or embellish these facts at trial...." (Government Response at 20) The government is, therefore, incorrectly asserting that no classified detail, no matter how small, can be introduced at trial unless first made the subject of a Section 5 submission.

When we made our initial Section 5 Submission, we limited the submission to those matters relevant to Mr. Nacchio's defense which were known by him to be classified, even though there was equally relevant information known to Mr. Nacchio, but which Mr. Nacchio did not believe was classified. However, because of the position now taken by the government in its Response -- that even the mere mention of a clandestine agency by name is classified and, therefore, all of the information relating to that agency is also classified -- we are now compelled to supplement our submission pursuant to § 5(a) of CIPA, lest the government seek to bar its use at trial for failure to have been included in any of Mr. Nacchio's § 5 submissions. The supplement is as follows:

During 2000 and early 2001, Mr. Nacchio met with representatives of clandestine government agencies, with members of the President's National Security Council staff, and with senior members of the Administration. These meetings had as their central theme the

government's vulnerability because of its internet dependency and the need to protect itself against denial of service attacks and even more insidious forms of cyber-warfare being launched against critical government infrastructure. In these meetings Mr. Nacchio advocated taking advantage of the transformation in electronic transmission to fiber optics by companies such as Qwest, and utilizing a private government "intranet" for critical government services. Among the people with whom Mr. Nacchio met personally during this period were: President Bush; Vice President Cheney; then-National Security Advisor Condoleeza Rice; Richard Clarke, the National Security Council's National Coordinator for Security, Infrastructure Protection and Counter-terrorism; Lieutenant General Harry D. Raduege, Jr., the Manager of the National Communications System; and General Ralph E. Eberhart, Commander in Chief of the United States Space Command.

With respect to the vulnerability at the Department of Defense, General Raduege assured Mr. Nacchio that he would be looking into this fiber optic capability, and at one point told Mr. Nacchio that [redacted] During this same time frame, cyberwarfare was a principal topic of discussion between Mr. Nacchio and the National Security Council staff, primarily represented by Richard Clarke. [redacted]

In the course of these discussions, Mr. Clarke became a big proponent of a *$2 billion* project for a private government intranet dubbed "GovNet," which was to be paid for by shifting funds from already approved and budgeted appropriations. In other words, contracts for GovNet

were to be fast tracked and not subject to the normal years of budgeting typical of government contracts. Mr. Nacchio believed the GovNet initiative would complement the prior contracts that Qwest had with [redacted] and DISA/DOD (QVPN 2), and other intelligence agencies.[13]

Mr. Nacchio had, therefore, a reasonable basis to believe that a significant portion of the $2 billion would be spent at Qwest during 2001. Indeed, at a March 2001 meeting in the White House with National Security Advisor Condoleeza Rice and National Coordinator for Security Richard Clarke, Mr. Nacchio told them that GovNet could be built in only six months, an assessment with which Mr. Clarke agreed.[14]

These meetings were also relevant to Mr. Nacchio's evaluation of Qwest prospects for 2001.

Conclusion

For the foregoing reasons, Mr. Nacchio respectfully requests that: the Court find that the classified information known to him is relevant to his defense; the government's proposed substitutions and stipulations be denied; Mr. Nacchio and his attorneys be deemed to have the "need to know" which will allow them to interview witnesses and subpoena documents, which can aid in fleshing out the conversations, aid in establishing the dates of meetings (now, in some instances, six years ago), and aid in corroborating the defense of good faith in the prosecution of Mr. Nacchio for fraud; and because new information may then be uncovered allow, if necessary, additional defense submissions, pursuant to § 5(a) of CIPA.

[13] [redacted] QVPN 2 was the global communications network that Qwest created for DISA/DOD.

[14] In July 2001 the government issued a public Request For Proposal for GovNet, signaling that the project would now be built according to normal government bidding procedures. Ultimately, after the events of September 11, 2001, the GovNet project was further delayed.

Respectfully submitted this 29th day of September, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2006, a true and correct copy of the foregoing **SECTION 5 CIPA REPLY SUBMISSION ON BEHALF OF DEFENDANT (with Exhibits 1-3)** 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
Edward S. Nathan

EXHIBIT 1 TO MR. NACCHIO'S
REPLY TO SEC. 5 SUBMISSION

FBI FORM "302" REGARDING NOVEMBER 14, 2005
INTERVIEW OF JAMES F.X. PAYNE

(PREVIOUSLY FILED AS EXHIBIT E TO
MR. NACCHIO'S OMNIBUS DISCOVERY MOTION
(MAY 1, 2006) [DOC. NO. 65])

Memorandum of Interview

Person Interviewed:	James F.X. Payne
Place of Interview:	Law offices of Barton, Baker, McMahon, Hildebrant & Tolle, LLP 1320 Old Chain Bridge Road McLean, VA 22101
Date of Interview:	November 14, 2005
Interviewed by:	Michael Koenig, DOJ Trial Attorney Susan Montoya, FBI - Special Agent JoJan Henderson, US Postal Inspector (SA Montoya and PI Henderson by teleconference)
Also Present:	Rand Allen, Attorney Jeff Hildebrant, Attorney Bill Barton, Attorney

James Payne was interviewed concerning his involvement with classified government projects while employed at Qwest Communications. Michael Koenig identified himself and the agents, who participated in this interview by teleconference, to Payne, who gave the following information voluntarily.

Full name: James F.X. Payne
Date of Birth: June 27, 1951
Address: 2925 Glover Driveway NW, Washington DC 20016
Mobile telephone: 202-421-4550
Office telephone: 240-379-3666

Payne graduated from Georgetown University in 1973 and got a graduate degree in business from George Washington in 1980. He was employed as a publishing field writer and worked in marketing. In 1980, he was hired by GTE which later became Sprint. He left Sprint in August 1999 and went to work for Qwest. He left Qwest in May 2005. He is now working as the president of federal telecommunications for Bechtel.

At Qwest, he was the Senior Vice President and General Manager of the federal group. He managed profit and loss (P&L) and the sales and postings for all federal business. He worked in Arlington, VA. His group started with thirty employees and grew to 500 employees. At the time of the merger with US West, he inherited an additional 80 people. He arrived after the announcement of the merger.

He reported to different individuals while at Qwest. As people shifted around, he reported to Shaun Gilmore, then Tom Hall. He later reported to Shaun Gilmore again and later Joel Arnold. In the 2001 time frame, he reported to either Hall or Arnold. When Hall left, he reported directly to Arnold. His title did not change, but he was promoted at that time.

When dealing with government transactions, they were required to use code names given by the government. "Ferrari" was an example of that and was a potential contract. Payne, Gilmore and Joseph Nacchio had security clearances. It was the government's choice as to who would have what clearances

In the time frame between 3rd Quarter 2000 and 3rd Quarter 2001, Payne had direct contact with Nacchio on any classified projects both in person and on the telephone.

There were classified projects or contracts included in Qwest's financial results and forecasts. The revenue from the contracts were included in their financial results. Payne did not know what was in the formal forecasts. He had an opportunity list that included projects that were in the sales funnel. He had no idea what was included in the guidance to Wall Street.

He was involved intensely in the budget process in the early fall, or August, of every year. He would be setting his own quota. He would look at the backlog of orders and they would negotiate a growth rate. His growth rates were higher than that of the commercial side. The revenue expected from classified sales were included in roll-ups that went to the senior executives. There was no reason not to include them.

Potential revenue sources that could expected to produce revenue was included in his forecasts if they could establish a current run rate, get the order out of backlog and forecast for the next year.

No one ever asked him to demonstrate what was in the funnel. No one ever looked at the profile of opportunities in his funnel. They did not assume they would win all opportunities. Nacchio would know about potential projects that were in the funnel.

To get to a budget number, they used a "waterfall chart." He would take the existing government contracts, the run rates and current backlog. He added in a "stretch." Nacchio had run the government department at AT&T. Some projects were large enough that they would require Nacchio's involvement for approval. Payne said he never conversed with Nacchio in any specificity concerning these projects.

When Payne arrived at Qwest, there was no discipline applied to the sales funnels or customer account plans. There was no structure and it was very informal. When interfacing with the commercial side of the business, there was no discipline until 2003. Payne said he always looked for a more disciplined approach. He and Cliff Holtz were key parts of the newly developed, more disciplined sales approach.

It was always a fire drill. Payne wanted to put things into a regular format. Senior management would come to him and ask him what his number would be for 2001 in November 2000. Once the number was set for the next year, he provided quarterly and monthly numbers.

The government contract process was long-term and Qwest was focused on the short time. No one ever asked how things were going to look six months from now. He informed them how he expected to make his numbers and only included the government contracts that were pertinent to the time frame they were looking at, quarter-by-quarter.

In and around 2nd Quarter 2001, when he did his roll up, he would include those numbers he expected to be happening that quarter. There was always a strong possibility that circumstances could change. For instance, 80% of government contracts could be sole source contracts. He only included those contracts that he had "won." He would not have included those numbers he had not "won" and he would not set expectations that he would not be able to meet. For instance, "Ferrari" was a project that was always floating around from month-to-month. He would not have relied on it to make the numbers. In the first two quarters of 2001, he had no recollection of the amount of revenue generated from classified contracts. All federal contracts, including classified contracts, that were consummated were included in his revenue. There was no separate list of transactions that only Payne and Nacchio knew about.

Another unique government factor was the end-of-the-year funds. At the end of the year, they would determine they had underspent their budget and needed to spend money.

Payne said there were opportunities he referred to as "bluebirds." They were a "call to arms." Payne himself could not commit the company so he would bring them to the CEO to talk about it. There was always the possibility that the customer might, for some reason, expand by 20 times their capacity. They might ask Qwest how they would handle that. The government might come to Qwest saying they have choices with others and was Qwest comfortable if they shifted to them. These were speculative revenue opportunities that were conditioned upon things Payne had no control of They would not have forecasted those upward.

Nacchio was aware of the speculative government transactions, particularly the larger ones. Payne said he also made it clear to Nacchio how speculative the transactions were. There was an atmosphere of pressure at Qwest. Nacchio made it clear that if he could do anything to help to close a transaction, Payne should let him know. Nacchio helped close deals. Concerning the capacity issue, it was being debated at appropriations and Qwest was to stand ready, if the government decided they could be their agent.

Payne said he briefed Nacchio, but did not get his perspective on any of the transactions. He did not know what Nacchio did with the information or who he shared it with. All big transactions were brought forward to Nacchio. Payne said he did not get the sense that his unit had to close deals for Qwest to make its numbers. However, there was constant pressure to make the numbers.

Payne was asked about initiative sheets and he said he had not seen them, nor was he familiar with them. It was explained to him that deals were classified by and reported in initiative categories A,B or C depending on their likelihood of closing. He said it made sense, but that he was not familiar with it.

Steave Treanor was Payne's financial person. Treanor reported to Doug Hutchins, who reported to Grant Graham. Payne did not meet Graham but believed he spoke with him on the phone. He met with Hutchins a couple of times.

When working on the budget, Payne would get a number and would generate documents describing how he was going to make the numbers. Classified contracts were included. Payne was very cautious about what he included in his reporting. He only included those deals that were ready for closure. Payne was guided by the booking guidelines that were very rigid. It was an audited process. He included all real revenue possible on a quarterly basis.

Payne said he never included "Ferrari" in his forecasts. The contract was never signed and there was no request for proposal (RFP). He was under pressure to be accurate. For "Ferrari" to have happened it would have had to be sole-sourced. There were political gyrations involved. They ended up winning the contract, several years later. He would not have relied on it in his forecasts. It would have been foolish, improper, and fraudulent to have included it in his revenue forecast. It would have also violated the booking guidelines.

Payne said he did own Qwest stock and sold 5,900 shares in July 2004.

Payne was asked if he had any recent contact with Nacchio or his attorney. He was told he did not have to answer the question. Payne stated that he would prefer not to answer the question unless it was explained to him why it was pertinent. The government declined to do so.

Payne was shown a document titled "Revenue Forecast 2001" bearing his name as SVP for the Federal Government Channel, Bates-numbered QDSECSP2982416-34 (without pages QDSECSP2982418,20 and 23). He was not familiar with the documents. His budget was not broken down into quarters as shown on the document.

When asked about dealings with NSTAC, Payne recalled a briefing package. He described a meeting in the situation room of the White House with Condeleeza Rice and Richard Clark in March 2001. Clark put a question forward to the ex-CEO of GTE, who had been the previous chairman of NSTAC. He asked if they could create an infrastructure for the government that was not connected to the public switch network. The response was that he could not do it. Nacchio responded, that not only was it possible, but he had already done it. He went on to describe how he would do it and there was debate on the subject. Others argued it would be prohibitively and outrageously expensive. There were about 15 to 20 people present at this meeting.

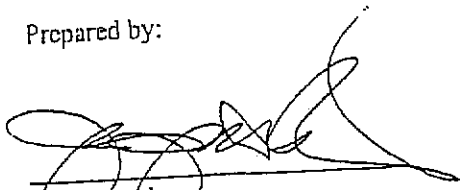
It was not until later, in a meeting in November 2001, the committee discussed the potential of

expanding the current infrastructure. The RFP draft came out at about this time and described how it was to be done.

Payne said any revenue from any contracts with government agencies were included and documented in his financial results. Any real revenue or real revenue opportunity was reported up and made part of his quarterly forecasts. This included classified contracts. None were left out. If there were projects that were not in his reports, it was because they could not have been reasonably relied on for revenue for Qwest.

Documents referenced in this report are attached and incorporated herein.

Prepared by:



JoJan Henderson
US Postal Inspector

EXHIBIT 2 TO MR. NACCHIO'S REPLY TO SEC. 5 SUBMISSION

United States v. Libby, -- F.Supp.2d --, 2006 WL 2692740 (D.D.C. September 21, 2006)

--- F.Supp.2d ----
--- F.Supp.2d ----, 2006 WL 2692740 (D.D.C.)
(Cite as: --- F.Supp.2d ----)

H

Briefs and Other Related Documents

Only the Westlaw citation is currently available.

United States District Court,District of Columbia.

UNITED STATES of America,

v.

I. Lewis LIBBY, Defendant.

Criminal No. 05-394(RBW).

Sept. 21, 2006.

Patrick Fitzgerald, Office of the United States Attorney, Debra R. Bonamici, Office of the Special Counsel, Chicago, IL, Kathleen Kedian, Peter Robert Zeidenberg, U.S. Department of Justice, Washington, DC, for Plaintiff.

MEMORANDUM OPINION AND ORDER

REGGIE B. WALTON, District Judge.

*1 On September 27, 2006, this Court will commence hearings pursuant to Section 6(a) of the Classified Information Procedures Act ("CIPA"), 18 U.S.C.App. III, § 6(a) (2000), to address the "use, relevance, and admissibility" at trial of certain classified documents, information, and testimony.[FN1] After reviewing the papers submitted by the parties, it is apparent that they not only disagree on the evidentiary value of the information at issue, but also have divergent views on the standard the Court should employ in determining whether use of the information should be precluded during the trial.[FN2] Thus, before these hearings commence, the Court must address the standard it will employ during those hearings in addressing the admissibility question. As discussed in greater detail below, it is the Court's conclusion that the Federal Rules of Evidence and the restrictions they impose control whether information subject to CIPA proceedings is admissible during a trial.

FN1. In connection with these hearings, the following papers have been submitted to the Court: (1) the Defendant's Consolidated CIPA § 5 Notice ("Def.'s Notice"); (2) the defendant's Memorandum Concerning Use, Relevance, and Admissibility of Classified Documents and Information Listed in Defendant's Consolidated CIPA § 5 Notice ("Def.'s Mem."); (3) the Government's CIPA § 6(b) Notice ("Gov't's Notice"); (4) the Government's Memorandum in Opposition to Defendant's Arguments Regarding the Use, Relevance, and Admissibility of Classified Documents ("Gov't's Opp'n"); and (5) the defendant's Reply Memorandum Concerning Use, Relevance, and Admissibility of Classified Documents and Information Listed in Defendant's Consolidated CIPA § 5 Notice ("Def.'s Reply").

FN2. The Court uses the term "information" throughout this opinion to encompass all categories of classified evidence, including documents and testimony, that the defendant seeks to introduce as evidence during the trial and which is identified in his Section 5 notice.

I. The CIPA

The CIPA establishes the procedures for pretrial determinations of the disclosure and the admissibility at trial of classified information in federal criminal proceedings.[FN3] *See United States v. Fernandez*, 913 F.2d 148, 151 (4th Cir.1999). The statute was designed to reconcile, on the one hand, a criminal defendant's right to obtain prior to trial classified information and introduce such material at trial, with, on the other hand, the government's duty to protect from disclosure sensitive information that could compromise national security. *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C.Cir.1998). As such, the CIPA creates pretrial, trial, and appellate procedures for federal criminal cases where there is a possibility that classified information will be disclosed through a defendant's defense. These pretrial procedures cover the manner in which pretrial conferences are to be conducted, the issuance of protective orders, and the regulation of the discovery of classified information sought by criminal defendants. 18 U.S.C.App. III, § § 2-4. In addition, the CIPA sets forth a structure for determining the admissibility of classified information at trial, which involves a four step process. 18 U.S.C App. III, § § 5-6.

FN3. It is clear to the Court, and the defendant does not contend otherwise, that the government's assertion that the

documents identified in the defendant's Section 5 notice are classified is justified. Accordingly, it is proper to employ the CIPA procedures.

First, Section 5(a) of the CIPA requires a defendant to file a notice describing the classified information he "reasonably expects to disclose or cause the disclosures of" at trial. 18 U.S.C.App. III, § 5(a) ("Section 5 notice"). If the defendant fails to comply with this requirement, the Court, in its discretion, may preclude the use of any classified information not part of the defendant's Section 5 notice. *Id.* at § 5(b). Second, at the government's request, the Court must hold a pretrial hearing to address the "use, relevance, or admissibility" of the classified information identified in the defendant's Section 5 notice. *Id.* at § 6(a).[FN4] Following this hearing, the Court is required to "set forth in writing the basis for its determination" as to each piece of classified information that was at issue during the hearing. *Id.* Third, if the Court determines that certain classified information can be used during trial, the government may move (1) to replace the classified portions of the information at issue with a statement admitting the relevant facts that the information would tend to prove, or (2) to substitute a summary of the information. *Id.* at § 6(c)(1)(A)-(B). "The court shall grant such a motion ... if it 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." *Id.* at § 6(c)(1). And finally, if the Court denies the government's proposed admission or substitution, the government has two options. The government can file an "affidavit of the Attorney General objecting to [the] disclosure of the classified information at issue," which will then require the dismissal of the indictment except in cases where "the [C]ourt determines that the interests of justice would not be served by dismissal of the indictment." *Id.* at § 6(e). Alternatively, the government can file an immediate interlocutory appeal. *Id.* at § 7.

FN4. This hearing is preceded by the government's notice to both the Court and the defense of which documents in the defendant's Section 5 notice are classified and at issue. 18 U.S.C.App. III, § 6(b) ("Section 6(b) notice").

*2 Here, the defendant has filed his final Section 5 notice. In response, the government has moved for a hearing pursuant to Section 6(a) and it has filed its Section 6(b) notice identifying those items of classified information that are at issue. Accordingly, the Court, in the upcoming hearings, must now make pretrial "determinations concerning the use, relevance, or admissibility of [the] classified information" identified by the government. 18 U.S .C.App. III, § 6(a). Only after these determinations are made does the Court need to address the question of redactions and substitutions.

II. Section 6(a) of the CIPA

As noted above, the parties disagree sharply on the standard the Court should employ in the Section 6(a) proceeding. The defendant argues that the Court must simply apply the Federal Rules of Evidence, Def.'s Mem. at 5-6, while the government contends that the Court should engage in a three-step inquiry, Gov't's Opp'n at 5-15. Specifically, the government opines that when it asserts a classified information privilege,[FN5] a classified document (or testimony based on a classified document) should be precluded from use at trial unless the Court determines (1) that the document is relevant; (2) that the document is "helpful to the defense," and (3) that the defendant's interest in disclosure of the document outweighs the government's need to protect the classified information. *Id.* The Court cannot accept the government's position for the following reasons.

FN5. The papers submitted by government refer to this privilege as both the classified information privilege and the national security privilege. *See, e.g.*, Gov't's Opp'n at 12-14.

"The CIPA's fundamental purpose is to protect and restrict the discovery of classified information in a way that does not impair the defendant's right to a fair trial. It is essentially a *procedural* tool that requires a court to rule on the relevance of classified information before it may be introduced." *United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir.2005) (emphasis added) (internal quotation marks, brackets, and citations omitted); *see also Fernandez*, 913 F.2d at 154; *United States v. Smith*, 780 F.2d 1102, 1106 (4th Cir.1985) (en banc). When the CIPA was enacted, Congress made clear that the statute did not alter the rules governing the admissibility of evidence during a trial. Senate Rep. No. 96-823, 96th Cong., 2d Sess. (1980), p. 8; House Conf. R. No. 96-1436, 96th Cong.2d. Sess., (1980), p. 12 ("As noted in the reports to accompany[,] ... [n]othing in the

conference substitute is intended to change the existing standards for determining relevance and admissibility."); *see* Smith, 780 F.2d at 1106; *United States v. Johnson*, 139 F.3d 1359, 1365 (11th Cir.1998) ("CIPA has no substantive impact on the admissibility or relevance of probative evidence."); *United States v. Wilson*, 732 F.2d 404, 412 (5th Cir.1984) ("CIPA does not undertake to create new law governing admissibility.") (internal quotation marks and citation omitted). However, "[w]hile [the] CIPA creates no new rule of evidence regarding admissibility, the procedures it mandates protect a government privilege in classified information." *Yunis v. United States*, 867 F.2d 617, 623 (D.C.Cir.1989).

*3 Under Section 6(a), the Court is charged with making a pretrial "determination concerning the use, relevance, or admissibility" of the classified information identified in the defendant's Section 5 notice. 18 U.S.C.App. III, § 6(a). It is an unremarkable proposition of statutory interpretation that it is a court's "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citation omitted). Thus, during a Section 6(a) proceeding, the Court must make determinations not only as to the relevance of classified information, but also as to its use and admissibility at trial. 18 U.S.C.App. III, § 6(a). The fact that these are separate inquiries cannot be surprising since, for example, it is well settled that not all relevant evidence is admissible during a trial. *See* Fed.R.Evid. 403 ("[A]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."); Fed.R.Evid. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court.").

Applying the framework enunciated in Section 6(a), the Court must first determine whether the information identified by the defendant is relevant. Specifically, the Court must assess whether the information "[has] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401 (defining "relevant evidence"). Following the relevance determination, the Court must then examine whether the information is admissible at trial, and if so, whether its use should be limited.[FN6] This inquiry is also governed by the Federal Rules of Evidence, which imposes restrictions on the use of relevant evidence. *See, e.g.*, Fed.R.Evid. 403, 404(b), 501.

FN6. For example, courts often admit evidence of other crimes, but limit their use to show, inter alia, motive, identity, or a common scheme or plan. *See, e.g.*, Fed.R.Evid. 404(b); Instructions 2 .51(A), 2.51(B), Criminal Jury Instructions, Young Lawyers Section, The Bar Association of the District of Columbia (2005).

Here, the government not only challenges the relevance of the information proffered by the defendant, but also asserts that its introduction should be excluded at trial because the government has a classified information privilege. Gov't's Opp'n at 7. The government contends that when such a privilege is raised, the Court's inquiry must go beyond examining the relevance of the information. Specifically, the government argues that after a national security privilege has been invoked, the Court must look further than relevance and determine whether introduction of the information would be at least "helpful to the defense." *Id.* at 8 (citing *Yunis*, 867 F.2d at 622). If this hurdle is satisfied, the government posits that the Court must then balance the need to protect the government's information against the defendant's interests in disclosure. *Id.* (citing *Smith*, 780 F.2d at 1110). According to the government, this further inquiry is used to determine the "use" and "admissibility" at trial of the information in question. *Id.* at 14. While recognizing that the District of Columbia Circuit has not mandated such a balancing test, the government notes that other courts have. *Id.* at 9 n. 5.

*4 Before addressing the legal arguments raised by the government in support of its three-step inquiry, which in practice sets a standard higher than mere relevance and admissibility assessments, it is important to discuss briefly the history of the CIPA. During the congressional hearings which preceded the enactment of the CIPA, the Department of Justice ("DOJ") requested that the CIPA include a heightened standard for the admissibility of classified information. Specifically, the DOJ sought language that would make evidence admissible only if it was "relevant and material." Graymail S. 182, Hearing Before Subcommittee on Criminal Justice of Senate Judiciary Committee, 96th Cong., 2d Sess. (1980), pp. 3, 18. Under this standard, the Court would be required to balance the probative worth of the evidence against the potential harms to national security. *Id.* at pp. 9, 22. This standard was rejected

by Congress, which stated unambiguously that "nothing in the [CIPA] is intended to change the existing standards for determining relevance and admissibility." Smith, 780 F.2d at 1106 (citing House Conference Report No. 96-1436, 96th Cong., (1980), p. 12.).

Here, the government is advocating a standard similar to the one rejected by Congress. Not only does the government's argument lack support in the legislative history, but with one exception, *see* Smith, 780 F.2d at 1106-1110, its position is not supported by the existing case law. While there can be no question that the government has a legitimate privilege in protecting documents and information concerning national security, *see, e.g.*, C. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); Totten v. United States, 92 U.S. 105, 106-07 (1875), the extent of that protection in the context of a criminal prosecution is embodied in the procedures set forth in the CIPA, Yunis, 867 F.2d at 623 ("the procedures [the CIPA] mandates protect [the] government['s] privilege in classified information."); see United States v. Mejia, 448 F.3d 436, 455 (D.C.Cir.2006) (quoting Yunis, 867 F.2d at 623). And the cases in this Circuit that have applied the CIPA have recognized only that it allows for the Court to balance the assertion of a classified information privilege against a criminal defendant's interests during the discovery process. *See* Mejia, 448 F.3d at 455; Yunis, 867 F.2d at 623.

In *Yunis*, and later in *Mejia* which reaffirmed *Yunis*, the District of Columbia Circuit addressed the question of what standard to employ in a CIPA proceeding when the Court is asked to determine whether classified information should be produced in discovery. Recognizing that the government has a substantial interest in protecting classified information, the *Yunis* Court reasoned that something more than simple "materiality" must be shown. Yunis, 867 F.2d at 622. Thus, the Court required a further inquiry, one consistent with what the Supreme Court found necessary in Roviario v. United States, 353 U.S. 53 (1957). *Id.* In *Rovario*, the Supreme Court was presented with the question of whether an informant's identity had to be disclosed during discovery. Roviaro, 353 U.S. at 59. The Supreme Court held that while a common law "informant's privilege" exists, the privilege must give way when disclosure of the information "is relevant and helpful to the defense of an accused." Yunis, 867 F.2d at 622 (citing Roviaro, 353 U.S. at 60-61) (internal quotation marks omitted). Finding the disclosure of classified information analogous to the disclosure of an informant's identity, the Circuit Court in *Yunis* required an identical inquiry for determining whether classified information should be produced during discovery. *Id.* at 622-23. Thus, the Circuit Court concluded that something *more* than "a mere showing of theoretical relevance" was required for the Court to order the production of classified documents. *Id.* at 623; Mejia, 448 F.3d at 455. And this Court employed this test when presented with motions to compel the production of classified documents at an earlier stage of this litigation. *See* United States v. Libby, 429 F.Supp.2d 1, 7 (D .D.C.2006); *see also* United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir.1988) (applying a balancing test to a CIPA § 4 proceeding); United States v. Pringle, 751 F.2d 419, 427 (1st Cir.1984) (same).

*5 The government now asks this Court to import this test, used at the discovery stage, into the CIPA "use, relevance, and admissibility" decision. Gov't's Opp'n at 5-15. As support for this applicability leap, the government relies on cases from the Fourth Circuit, including one from a splintered en banc court. *Id.* (citing Smith, 780 F.2d at 1107-11). These cases, however, ignore the clear language of the statute and the unambiguous mandate from Congress that the standard evidentiary rules applicable in federal courts apply with equal force in Section 6(a) hearings.

In *Smith*, the Fourth Circuit, sitting en banc, recognized that "the legislative history is clear that Congress did not intend to alter the existing law governing the admissibility of evidence" in Section 6 proceedings. Smith, 780 F.2d at 1106 (noting further that "[t]he circuits that have considered the matter agree with the legislative history cited that ordinary rules of evidence determine the admissibility under [the] CIPA"). Despite acknowledging this clear mandate from Congress, a seven to five majority of the Fourth Circuit concluded that there existed, under Federal Rule of Evidence 501, a common law privilege for classified information, and that a court must "balance the public interest in nondisclosure against the defendant's right to prepare a defense" before the evidence may be admitted at trial. *Id.* at 1107. The Fourth Circuit's reasoning was based entirely on the Supreme Court's decision in *Roviaro* and its progeny. *Id.* (citations omitted). While noting that "[t]he privilege must give way to the 'fundamental requirements of fairness,' " the Fourth Circuit reasoned that "[t]he defendant must come forward with something more than speculation as to the usefulness of such disclosures." *Id.* at 1107-08 (citations omitted). Thus, the Fourth Circuit held that

"[a] district court may order disclosure only when the information is at least essential to [the] defense, necessary to the defense, and neither merely cumulative nor corroborative," and the defendant's interest in disclosure outweighs the government's classified information privilege. *Id.* at 1109-10 (internal citations and quotation marks omitted); *see also United States v. Zettl*, 835 F.2d 1059 (4th Cir.1987) (applying *Smith*). It is *Smith's* balancing mandate which this Court cannot accept.

As recognized by the dissenting judges in *Smith*, the majority adopted an admissibility standard that was explicitly rejected by Congress when considering the enactment of the CIPA. *Smith*, 780 F.2d at 1111 (Butzner, J. dissenting) (noting that Congress explicitly refused to incorporate language into the CIPA adopting the *Roviaro* balancing test for the admissibility of classified information). Moreover, the majority's reliance on *Roviaro* and its progeny was misplaced, as those cases stand solely for the proposition that a balancing must be employed *before the discovery* of classified information may be required. *Id.* at 1112. In addition, *Roviaro*, was not intended to "exclude the introduction of relevant evidence known to the defendant." *Id.* (citing *Rovario*, 353 U.S. at 60 n. 8; *United States v. Godkins*, 527 F.2d 1321, 1325-27 (5th Cir.1976)). Thus, by employing "*Roviaro* to exclude relevant evidence known to the defendant, instead of confining its principles to discovery requests, [the Fourth Circuit] significantly alter[ed] the existing standard for determining the admissibility of evidence in contravention of express congressional intent." *Id.* Similarly, the reasoning of the *Smith* majority is flawed because it fails to recognize that there is an important difference between the discovery of information and its ultimate use during trial. While,"[t]here is no general constitutional right to discovery in a criminal case," *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (citation omitted), the Constitution mandates that a defendant be accorded the opportunity to present a defense, *see, e.g., Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."). Indeed, the Fourth Circuit failed to recognize that the CIPA itself has separate provisions that govern discovery and admissibility. *Compare* 18 U.S.C.App. III, § § 3, 4, *with id.* at § 6.[FN7]

FN7. While this Court's opinion appears to be the first published opinion that takes exception with the Fourth Circuit's admissibility standard adopted in *Smith*, commentators have suggested that the Fourth Circuit's opinion is contrary to the Congress' intent and the applicable evidentiary standards. *See* Richard Salgado, Comment, *Government Secrets, Fair Trials, and the Classified Information Procedures Act*, 98 YALE L.J. 427 (1988) ("[a]ssuming Congress understood the current state of evidence law, the *Smith* and Zettl court probably violated the intent of Congress when they allowed trial courts to balance the defendant's need for disclosure against the interests of national security in section 6(a) relevancy hearings"); *see also* Charles Wright & Kenneth Graham, Federal Practice and Procedure § 5672 (3d ed.1998) (observing that the Fourth Circuit in *Smith* adopted "a more strict rule of admissibility" for Section 6(a) proceedings, despite Congress' rejection of such a standard).

*6 Based on the foregoing, there is simply no basis for importing the *Roviaro* standard into the CIPA's use, relevance and admissibility determination, especially against the backdrop of Congress' clear declaration that the standard rules of evidence should apply. In fact, the Fourth Circuit appears to be moving away from the en banc court's ruling in *Smith*. Most recently, the Fourth Circuit in *United States v. Moussaoui*, observed, albeit in the discovery context, that even when the balancing test is applied to assess whether documents should be produced to the defendant, "the 'balancing' [it] must conduct is primarily, if not solely, an examination of whether the district court correctly determined that the information the Government seeks to withhold is material to the defense." *Moussaoui*, 382 F.3d 453, 476 (4th Cir.2004) (discussing the required balancing at the discovery phase). Thus, while the Fourth Circuit in *Moussaoui* was presented with a discovery dispute as opposed to a question of admissibility under the CIPA, since the Fourth Circuit in *Smith* required courts in that Circuit to conduct the identical balancing test when determining whether classified information would be admissible under the CIPA, the Fourth Circuit's apparent minimization of that test in the discovery context likely applies with equal force to admissibility determinations.

And just as this Court believes it was improper for the Fourth Circuit to employ the *Roviaro* standard at the admissibility phase, it would be improper for this Court to employ the District of Columbia Circuit's discovery stage pronouncements from *Yunis* and

Mejia during the Section 6(a) proceedings the Court will conduct. While there is no doubt a governmental interest in protecting national security and classified information under the CIPA, the Court's balancing of the government's interests against the defendant's interest was properly employed during the discovery process, not now, when examining whether the disclosed information must be excluded at trial. This is not to say, however, that the government's interests in protecting classified information are diminished at the admissibility stage. Indeed, the CIPA continues to provide the government substantial safeguards to protect classified information at this stage in the proceeding. Thus, if this Court concludes that identified documents are relevant and otherwise admissible at trial, the government can seek to substitute or redact those documents to protect the classified information from disclosure. 18 U.S.C.App. § 6(c). If the government is still not satisfied that the classified information is adequately protected at the conclusion of these hearings, the government has the power to preclude entirely the introduction at trial of the classified information. 18 U.S.C.App., § 6(c)(2). While invocation of this option may require dismissal of this case, now, just as during the discovery process, "[t]he burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." *Moussaoui*, 382 F.3d at 475 (quoting *Jencks v. United States*, 353 U.S. 657, 672 (1957)) (internal quotation marks and emphasis omitted). Thus, the government is not without recourse to protect national security interests if the Court concludes that the defendant must be permitted to reveal classified information as part of his defense.

*7 It is the hallmark of the criminal justice system in this country that every defendant has "a right to his day in court," to "examine the witnesses against him, to offer testimony [and other admissible evidence], and to be represented by counsel." *In re Oliver*, 333 U.S. 257, 273 (1948) (footnote omitted). In fact, the Supreme Court has observed that "[f]ew rights are more fundamental than that of an accused to present ... [a] defense." *Chambers*, 410 U.S. at 302.

And it is the duty of this Court to ensure that the defendant receives his constitutionally protected right to a fair trial. *See, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (noting that a district court has a duty to ensure that a criminal defendant has a fair trial). Adopting the balancing test advanced by the government is not only contrary to Congress' clear mandate and the proper application of the relevant case law in this Circuit, but could infringe on the defendant's constitutional right to put on a defense by preventing him from introducing relevant and otherwise admissible evidence at his trial because the government's interest in nondisclosure was considered of greater significance. This is a balance that is simply not appropriate under either the CIPA or the Constitution. As the Supreme Court recognized almost fifty years ago,

> the Government can invoke its evidentiary privileges only at the price of letting the defendant go free....[S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.

Jencks, 353 U.S. at 670-71 (internal quotation marks and citation omitted). Accordingly, this Court is compelled to employ the standard rules of evidence in assessing admissibility of the classified information throughout the Section 6(a) proceedings it will conduct. To conclude otherwise would be contrary to Congress' clear mandate and potentially compromise the defendant's right to a fair trial.[FN8]

FN8. It is also important to briefly discuss Federal Rule of Evidence 403, as the parties have diverging views on its application. There is no question that Rule 403, as a standard rule of evidence, impacts the admissibility of the classified information referenced in the defendant's CIPA § 5 notice. Rule 403 provides that relevant evidence can be excluded at trial "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403. According to the notes accompanying Rule 403, "'[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.*, notes. Thus, the import of Rule 403 is that evidence will be excluded if its viewing by the fact finder will improperly impact its decision. Accordingly, the fact that evidence may be classified and thus impact important

national security interests is not, by itself, sufficient to exclude the evidence. Rather, there must be some indication that the evidence will improperly impact the jury's decision making process. Thus, for example, if the evidence is of a nature as to divert the jury's attention to unimportant peripheral issues, it might be proper to exclude it. *United States v. Miller*, 874 F.2d 1255, 1277 (9th Cir.1989). And this may not necessarily be the case merely because the evidence is classified.

D.D.C.,2006.

U.S. v. Libby
--- F.Supp.2d ----, 2006 WL 2692740 (D.D.C.)

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- 2005 WL 2847161 (Trial Pleading) Indictment (Oct. 28, 2005) Original Image of this Document (PDF)

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EXHIBIT 3 TO MR. NACCHIO'S
REPLY TO SEC. 5 SUMBISSION

(1) Letter to Alice Fisher, Esq. from Alfred C. DeCotiis, Esq.
(November 2, 2005)

(Previously Filed As Exhibit C To
Mr. Nacchio's Omnibus Discovery Motion
(May 1, 2006) [Doc. No. 65]

(2) Letter to Alice Fisher, Esq. from Herbert J. Stern, Esq.
(November 17, 2005)

(Previously Filed As Exhibit D To
Mr. Nacchio's Omnibus Discovery Motion
(May 1, 2006) [Doc. No. 65]

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November 2, 2005

VIA OVERNIGHT MAIL
Alice Fisher
Assistant Attorney General
Criminal Division
US Department of Justice
950 Pennsylvania Avenue, Room #2107
Washington, DC 20530

Dear Mrs. Fisher:

This firm and Stillman & Friedman, P.C., represent Joseph P. Nacchio, the former Chief Executive Officer of Qwest Communications International Inc. Since the summer of 2002, the United States Attorney's Office for the District of Colorado has been conducting an investigation of Qwest, and the United States Attorney has recently advised us that Mr. Nacchio is a target. We write to request a meeting with you prior to the Department of Justice commencing a prosecution.

The Government has advised us that it is considering charging Mr. Nacchio with "insider trading." For an understanding of the contemplated charge, Government counsel have referred us to the publicly-filed Information and Plea Agreement involving Qwest's

former chief financial officer. Based on those documents, it appears that the gist of the allegations against Mr. Nacchio would be that during the time he sold Qwest securities in the first half of 2001, he "knew" that the company supposedly was not going to meet revenue targets and expectations for 1Q and 2Q 2001; and that Qwest ultimately met its publicly announced earnings expectations only through certain "non-recurring" revenue sources (such as indefeasible rights of use contracts, know as "IRUs"), which at the time were not -- but supposedly should have been -- separately disclosed to the marketplace.

We believe that such a charge against Mr. Nacchio would be unprecedented and unjust. We briefly highlight below the grounds on which we request a personal meeting with you.

National Security and Classified Information Considerations

As a threshold matter, the Government's theory -- which depends on Mr. Nacchio's state of mind relating to revenue sources and targets -- implicates classified information and, thus, national security concerns. Mr. Nacchio received a top secret security clearance as Qwest's CEO in 1998, and maintained it through the period relevant to the investigation. No other member of the company's senior management team was cleared for secure information. We are unable, without our own clearance, to debrief our client with respect to the underlying facts. However, although Mr. Nacchio has been unable to discuss the underlying facts, we have reason to believe that the classified matters to which Mr. Nacchio was privy support his good faith belief that Qwest's revenue prospects, the nature of Qwest's revenue sources, and the market for IRUs were

entirely consistent with his and the company's public statements. As we have noted in our talks with the United States Attorney, a trial involving these facts would require invocation of the procedures under the Classified Information Procedures Act. This information -- critical to the government's burden to prove fraudulent intent beyond a reasonable doubt -- should be part of our discussions with the Department. We have begun the process of seeking clearance to debrief our client, and submit that no prosecutorial decisions should be made until we are able to advocate fully and effectively about these factors.

Considerations and Issues Against Prosecution

Beyond the significant classified information issue, prosecuting Mr. Nacchio would be inappropriate for many reasons. For example, this case is not like other "high-profile" prosecutions of corporate officers. Unlike Enron or WorldCom, for example, the contemplated prosecution of Mr. Nacchio has nothing to do with fictitious revenue, accounting manipulation, transaction improprieties or similar instances of clearly wrongful conduct. Rather, the contemplated prosecution hinges on an unusual (and we believe unwarranted) characterization of what constitutes material non-public information.

This prosecution would also be an unusual insider trading case for another reason. Mr. Nacchio traded Qwest stock regularly and transparently for years based on common sense economic reasons, doing so within company-defined windows and pursuant to trading plans coming within an SEC regulation. These circumstances will refute a charge

of trading improperly on inside information. There are none of the hallmarks of criminality -- such as secrecy, evasion and the like -- that almost always exist in insider trading transactions.

The Government's theory -- as we can address with you in detail at a meeting -- has many defects. We just cite a few examples: The theory is premised on internal predictions, forecasts and opinions about whether future targets could be met, which involve forward-looking, "soft" information that in the absence of bad faith does not support securities fraud. Similarly, the theory's differentiation as a disclosure requirement of some of Qwest's revenue as "non-recurring" is amorphous and, indeed, unfounded, particularly since no regulation or other authority requires this distinction for disclosure purposes. The notion that "non-recurring" revenue was used improperly as a "gap-filler" also is without merit, because there is nothing wrong with a company meeting its financial goals with all of its products and services (and Qwest having had a history of selling "non-recurring" IRUs for years). Finally, the prosecution eventually turns on complicated accounting and financial-reporting issues, such as a "materiality" determination, which cannot be sustained on accounting grounds and cannot be linked factually to Mr. Nacchio.

Ultimately, this prosecution would also depend on state of mind, and the Government will not be able to show the requisite willfulness for criminal intent. For example, with respect to the disclosure issues at the heart of the Government's theory, the evidence will show that Qwest had in place an elaborate, multi-person, systematic

process to prepare, review and finalize Qwest's disclosures; this process involved many Qwest personnel preparing and reviewing Mr. Nacchio's public statements. In particular, Qwest's Audit Committee, as well as its outside auditors, were involved in the decisions concerning Qwest's disclosures that will be in issue. It is also pertinent that by at least August 2001 (if not earlier) Qwest did disclose the matters underlying the Government's theory; thus the theory must be that disclosure was not given soon enough, by only a matter of months -- which is a very weak basis for a prosecution.

Finally, there are overarching policy considerations against this prosecution. As noted, the supposed non-public information underlying the contemplated charge -- forward-looking predictions and opinions, and the asserted "non-recurring" nature of certain revenue -- cannot fairly be deemed "material" for enforcing the securities laws criminally. Indeed, forward-looking information can be immaterial as a matter of law, and no regulation requires a public company to differentiate revenue between "recurring" and "non-recurring" as the Government's theory would assert. Corporate executives like Mr. Nacchio should not be subjected to risk of a criminal insider trading prosecution for trading shares of their company's stock (which obviously is not an infrequent occurrence) on an amorphous, unpredictable and a post facto rationale for what information might be "material." There is a basic lack of notice inherent in the Government's theory. Even aside from Due Process implications, a prosecution on this scenario is fundamentally unjust.

These are among the numerous reasons that a prosecution is unwarranted. We

LAW OFFICES
DeCOTIIS, FITZPATRICK,
COLE & WISLER, LLP

therefore respectfully request the opportunity to meet with you prior to a prosecutorial decision being made. Thank you for your consideration.

Very truly yours,

Alfred C. DeCotiis

ACD/jd

cc: William J. Leone
Michael Koenig
Paul Pelletier
Charles Stillman
Michael Grudberg
Scott Himes
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MARC E BERSON
RICHARD EDWARD HAMILTON
OF COUNSEL

November 17, 2005

VIA TELECOPIER & FEDERAL EXPRESS

Alice Fisher, Asst. Attorney General
Criminal Division
US Department of Justice
950 Pennsylvania Avenue, Room 2107
Washington, D.C. 20530

Re: Joseph P. Nacchio

Dear Ms. Fisher:

Please allow me to introduce myself. I have just this week been retained by Joseph P. Nacchio to replace Charles Stillman as his counsel in respect to the matters that you were good enough to afford a meeting upon with Charles Stillman, Esq. and Alfred C. DeCotiis, Esq. on November 10, 2005. Mr. DeCotiis remains as co-counsel to Mr. Nacchio, and he has advised me that at this meeting he made the point that the essence of the contemplated prosecution of Mr. Nacchio turned upon the issue of his knowledge and state of mind concerning the recurring and non-recurring income of Qwest during certain relevant periods. My preliminary evaluation of this matter certainly confirms the accuracies of that observation. I am also advised that during this presentation, Mr. DeCotiis and Mr. Stillman made the point that Mr. Nacchio's evaluation of Qwest's income was based on classified information, which was an integral part of his financial projections. In my preliminary interview with Mr. Nacchio, this was confirmed to me. Unfortunately, I am unable to interview my client in these areas because he has refused to reveal or to discuss with me aspects, including the financial aspects, of contracts which are classified and which were part of the his financial evaluation.

I have also been made aware of the fact that during the conference in Washington, you and your colleagues were furnished with the name of a Mr. Jim Payne who would be in a position to confirm that there were such classified contracts and that, financially, they were substantial and would have been used by Mr. Nacchio in evaluating the projected income of Qwest. I believe that representatives of the United States have since interviewed Mr. Payne and I believe, also, that he has confirmed the existence of such contracts. My point is that the presentation, which was made to you, was not only done in good faith but was in fact accurate.

I should also note that I have been advised that while Mr. Payne has access to some of the classified contracts between Qwest and the United States, and projections concerning others to be awarded in the future, his access is far more limited than Mr. Nacchio's. I wish that I could provide the details of this information, but I am unfortunately disabled by the fact that I cannot even interrogate my client on this area, not even for the purpose of defending him and attempting to persuade the Department that he should not be indicted.

I respectfully suggest that this present request is not the typical case where counsel seeks classified information from Departments of the Government under the claim that such is necessary to defend a client. My client already has the information. This is the unique circumstance where my client is being prevented from conferring with his lawyer because he refuses to violate duties imposed upon him by the National Security without appropriate permission from the Government.

Under these circumstances, I respectfully suggest that not only is there no legitimate Government interest in refusing to grant clearance to Mr. Nacchio's counsel, but that there is a very legitimate Government interest in doing so. Putting aside the obvious Government interest in permitting Mr. Nacchio access to counsel under the Sixth Amendment, it is in my judgment that it is very much in the Government's interest to learn what Mr. Nacchio has to say in these areas so that it can properly evaluate the proper action to be taken in this matter given all of the interests at stake.

The short of it is, that if the Government were to proceed without the benefit of this information, it will lose an opportunity to examine, in a private setting, what both its own best interest require and what the interest of justice requires. Some years ago I obtained secret security clearance when I was asked by Judge Walsh to handle the Kastigar pretrial motions in the Iran Contra matter. I am a former United States Attorney and also United States District Judge so I do not believe it would be inappropriate nor cause undue delay to grant me security clearance for the above purposes.

Respectfully,

Herbert J. Stern

HJS/dp
cc: William J. Leone, Acting United States Attorney
(via Fax and Federal Express)
Michael Koenig, Esq. (via Fax and Federal Express)
Paul Pelletier, Acting Chief-Fraud Section
(via Fax and Federal Express)