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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)	Criminal No.: 10-225 (CKK)
)	
v.)	Filed In Camera, and
)	Under Seal with the Classified
STEPHEN JIN-WOO KIM,)	Information Security Officer
also known as Stephen Jin Kim,)	
also known as Stephen Kim,)	
also known as Leo Grace,)	
)	
Defendant.)	

(U) GOVERNMENT'S RESPONSE TO DEFENDANT'S REVISED SECOND CIPA § 5 NOTICE AND THIRD CIPA § 5 NOTICE

(U) I. Introduction

(U) On December 9, 2013, the Court found the defendant's Second CIPA § 5 Notice lacking particularity in many respects and ordered the defendant to revise it consistent with the Court's Memorandum Opinion issued on that date. Memorandum Opinion (Dec. 9, 2013) (hereinafter, "Mem. Op.") at 1. "[B]ecause it frames the discussion for all subsequent CIPA proceedings," this Court ordered that the defendant's "'Section 5(a) notice must be particularized, setting forth specifically the classified information which the defendant reasonably believes to be necessary to his defense.'" Mem. Op. at 3 (quoting United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983)). The Court further admonished the defendant that his CIPA § 5 Notice must notice the classified information he "reasonably expects to disclose," meaning that he "has the present intention, based on the information currently available to him, to present this information at trial, with no expectation of later narrowing the

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information."[1] Mem. Op. at 8. When a defendant "*actually* only reasonably expects to disclose a narrow subset of the noticed information," but notices additional information that he does not actually intend to disclose, he "will be imposing an enormous time and resource burden on both the Government and the Court." Mem. Op. at 8.

(U) On January 13, 2014, the defendant filed his Revised Second CIPA § 5 Notice and his Third CIPA § 5 Notice. In both Notices, the defendant largely ignores the guidance and admonitions provided in the Court's Memorandum Opinion and persists in his shotgun approach to his obligations under CIPA § 5. Rather than providing greater specificity about the classified information that he "reasonably expects to disclose" at trial, the defendant has dramatically expanded the quantity of classified information that he purportedly seeks to disclose at trial. In his Revised Second CIPA § 5 Notice the defendant added 20 subcategories of information (i.e., Items 7(i)-(n), 8(e)-(f), 9(e)-(f), 10(f)-(h), and 15(a)-(e)), and 62 new categories of information (not including subcategories) in his Third CIPA § 5 Notice. **In total, the defendant has so far noticed over 2,000 pages of classified discovery – which represents over half of the total classified discovery produced in this case.**

(U) It strains credulity that the defendant "reasonably expect to disclose" all of this classified information at trial. Indeed, for certain categories of noticed material, there appears to be no conceivable basis for the defendant's proper use of it at trial. For example, the defendant persists in his desire to put the government's classification system on trial despite the Court's prohibition on him doing so. Compare Memorandum Opinion (May 30, 2013) at 9 (citing

[1] (U) Without seeking reconsideration, the defendant objects in his Revised Second CIPA § 5 Notice to this aspect of the Court's Memorandum Opinion. See Revised Second CIPA § 5 Notice at 2-3. The defendant cites no authority for his objection. The Court's construction is well grounded in CIPA and is supported by the numerous cases cited in its Memorandum Opinion setting forth the standard for a CIPA § 5 Notice. See Mem. Op. at 2-6.

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Scarbeck v. United States, 317 F.2d 546 (D.C. Cir. 1962)) and Memorandum Opinion (October 8, 2013) at 6-7 (same), with Revised Second CIPA § 5 Notice, Items 15(a)-(b). The defendant also notices hundreds of pages of his prior work product related to North Korea from years before the unauthorized disclosure charged in this case; that work product has no apparent relevance to any issue in this case, and no basis for admissibility by the defense. See Third CIPA § 5 Notice, Item 9. As for classified information related to potential witnesses, the defendant has noticed such material related to hundreds of individuals, many of whom there can be no conceivable basis for the defendant to call as witnesses at trial. For example, the defendant has noticed materials related to his realtor. See Third CIPA § 5 Notice, Item 53. Making matters worse, contrary to the direction of the Court at the last status hearing, the defendant represents that he anticipates filing further CIPA § 5 Notices that will "address classified information that has not been included in his first two notices." See Revised Second CIPA § 5 Notice at 1; see also Third CIPA § 5 Notice at 10.

(U) The defendant's CIPA § 5 Notices have already imposed an enormous time and resource burden on the Intelligence Community. These Notices will also impose severe burdens on the Court (and the United States) in the CIPA § 6 proceedings, as the Court will be required to review and make determinations with respect to all of the classified information noticed by the defendant. The United States sincerely hopes that "this chore [will not] prove irrelevant when the defendant decides on more careful reflection that he *actually* only reasonably expects to disclose a narrow subset of the noticed information." Mem. Op. at 8 (emphasis in original).

(U) The government's specific objections to the numbered items in the defendant's Revised Second and Third CIPA § 5 Notices follow. As each of these objections were the

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subject of prior litigation concerning the defendant's original Second CIPA § 5 Notice, the government's discussion of them will be brief.

(U) **II. The Defendant's Second Revised and Third CIPA § 5 Notices Are Deficient**

(U) As demonstrated below, the following item numbers of the defendant's Second Revised and Third CIPA § 5 Notices are defective when evaluated in light of the standards set forth in the Court's December 9, 2013, Memorandum Opinion.

(U) First, in his Revised Second CIPA § 5 Notice, the defendant persists in identifying items that do not provide "with specificity the identifiable classified information he reasonably expects at this point to elicit or cause to be elicited through trial testimony," and which instead pose open-ended inquiries that are nothing more than discovery requests disguised as a CIPA § 5 Notice. The United States objects to Items 7(c), 7(d), 7(e), 7(f), 8(c), 8(d), 8(e), 8(f), 9(c), 9(d), 9(e), 9(f), 10(d), 10(e), 10(f), 10(g), 10(h), 15, and 16 in the defendant's Revised Second CIPA § 5 Notice on this basis. Indeed, for each of these requests, the defense does not identify any substantive classified information that he will seek to elicit at trial. Rather, he only identifies the inquiries that he may direct to a trial witness with respect to the noticed item. As the United States explained in its objections to the defendant's original Second CIPA § 5 Notice, such an approach is improper under CIPA. Gov't Objections to Adequacy of the Second CIPA § 5 Notice at 7-8, 10-11; see also Mem. Op. at 10-11, 13-15, 21-23. It is not the government's obligation to investigate the defense case and identify any classified information that the defendant may seek to disclose at trial in response to his open-ended inquiries. As the Eleventh Circuit held in Collins, 720 F.2d at 1199, CIPA does not countenance such an attempt to "suddenly shift[] the burden . . . to the government to anticipate and state what it fears from 'greymail.'"

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(U) Second, with respect to Items 15 and 16 in his Revised Second CIPA § 5 Notice, the defendant fails to identify, as directed by the Court, the "specific examples of documents or information" about which the defendant will seek classified information related to each item. See Mem. Op. at 20. The defendant's assertion in Item 15 that he will seek classification decision information concerning "any emails, documents, investigative reports (such as FBI 302s), and memoranda provided to the defense in discovery," is plainly at odds with the Court's directive. Identifying every document produced to the defense in classified discovery in Item 15 is no better than identifying none at all. Similarly, with respect to Item 16, the defendant identifies only "an example . . . for illustrative purposes" of a communication with the media about which he may seek classified information at trial. The defendant was obliged to provide an exhaustive list of the documents or information that he believes would be encompassed within Item 16. See Mem. Op. at 20. Thus, neither of the approaches taken by the defendant regarding Items 15 and 16 -- i.e., identifying every document produced in discovery as he does in revised Item 15, or identifying only a lone example of such a document as he does in revised Item 16 -- satisfies the defendant's specificity obligations as required by the Court's Memorandum Opinion.

(U) Third, in Items 5, 6, 9, 10, 11, 12, 13, 14, 15, and 22 of his Third CIPA § 5 Notice, the defendant lists many lengthy documents, including emails and the defendant's prior work product, that contain a variety of classified information on multiple topics without specifying the particular information in those documents that the defendant reasonably expects to disclose publicly at trial. As the Court held in its Memorandum Opinion, "[i]t is not enough for the Defendant to identify the specific classified documents that he expects to disclose at trial. Rather, Defendant must specify the specific classified information he reasonably expects to

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disclose at trial." Mem. Op. at 16. In order for the United States to evaluate meaningfully whether the defendant seeks to elicit information that is classified and objectionable, the government needs to know what information from these documents the defendant seeks to adduce at trial, rather than having to sift through the entire document and object to every single item of classified information.[2]

[redacted] Finally, Items 7(j), 7(m), 7(n), 15, and 16 in the defendant's Revised Second CIPA § 5 Notice and Items 19 and 20 in the defendant's Third CIPA § 5 Notice all contain either vague terms or indefinite categories of classified information and/or non-exhaustive lists that the broad categories of unspecified classified information may encompass. On its face, such notice fails. See Mem. Op. at 10-11, 13, 19-21. For example, Items 7(j) and 7(m) use the terms "relate" and "relating," which are inherently "nebulous." See Mem. Op. at 18. Item 7(n), on the other hand, seeks a "general description" of five general areas related to [redacted] but makes no effort to describe what that potentially classified information is. Thus, it fares no better than the items which the Court has previously rejected as providing "'notice of nothing more than the general areas of activity to be revealed in the defense.'" See id. at 19 (quoting Collins, 720 F.2d at 1199). Similarly, Item 20 of the defendant's Third CIPA § 5 Notice states that the defendant intends to disclose:

> 20. Testimony concerning [redacted]

[2] [redacted] For example, Item 11 is an email from Theodore McCarthy to the defendant, dated June 10, 2009, about North Korean [redacted] attaching both a [redacted] and McCarthy's Powerpoint presentation for a [redacted] concerning that same subject matter. Item 11 consists of 45 Bates-numbered pages.

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[redacted] See CLASS_000372A.

Consistent with the Court's Memorandum Opinion, the defendant must provide further clarity concerning the particular [redacted] to which he is referring. See Mem. Op. at 19-20. Further, the defendant's use of the term "particularly" is no better than the non-exhaustive list language the defendant employed in his original Second CIPA § 5 Notice. The use of such "non-exhaustive language in these items constituted inadequate notice." See id. at 10.

(U) **III. Conclusion**

(U) The United States believes that the law requires greater specificity and particularity than the defendant has provided in his CIPA § 5 Notices and that the defendant's failure to do so has come at a cost. The cost will only increase as the Court is called upon to make specific written rulings in the CIPA § 6(a) proceedings. Nevertheless, the United States appreciates that the Court has set a rigorous schedule to prepare this long-pending case for trial, with trial set to begin on April 28, 2014. Therefore, for all Items to which the United States has not stated an objection herein, the government will file its next CIPA § 6(a) Motion according to the schedule already set by the Court. Depending on the timing of the Court's ruling on these objections, the United States will either address the objected-to Items in its next CIPA § 6(a) Motion or seek leave to file a supplement to that Motion to address these Items as quickly as possible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 24th day of January, 2014, I caused a true and correct copy of the foregoing filing to be served on counsel of record through the Classified Information Security Officer.

G. Michael Harvey
Assistant United States Attorney

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