[redacted] Filed with the Classified Information Security Officer
CISO
Date 12/16/2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Leave to File Granted
Judge CKollar-Kotelly
1/30/14

(U) GOVERNMENT'S REPLY TO ADDENDUM OPPOSITION TO THE GOVERNMENT'S FIRST MOTION FOR A HEARING UNDER SEAL PURSUANT TO CIPA SECTION 6(a) AND NOTICE OF OBJECTIONS CONCERNING USE, RELEVANCE AND ADMISSIBILITY OF CLASSIFIED INFORMATION IDENTIFIED IN DEFENDANT'S FIRST CIPA SECTION 5 NOTICE

(U) On September 18, 2013, the United States submitted its Motion for Hearing Under Seal Pursuant to CIPA Section 6(a) and Notice of Objections Concerning Use, Relevance and Admissibility of Classified Information Identified in the Defendant's First CIPA Section 5 Notice (hereinafter "Section 6(a) Motion"). In that filing, the United States provided a detailed explanation of its objections to specific items of classified information that the defendant claims he would disclose at trial in his second CIPA Section 5 notice. The defendant filed a response to the government's motion on October 7, 2013, in which he declined to respond substantively to the government's objections and instead asserted that he would wait until the Section 6(a) hearing to set forth any defense theory demonstrating the use, relevance and admissibility of the classified information he had noticed. See Defendant Stephen Kim's Response to the Government's First Motion for a Hearing Under Seal Pursuant to CIPA Section 6(a) (hereinafter, "Opposition"). When ordered by the Court to respond to the government's objections in more detail, on December 6, 2013, the defendant filed his Addendum Opposition to the Government's

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First Motion for a Hearing Under Seal Pursuant to CIPA Section 6(a) (hereinafter, "Defense Addendum"). As demonstrated below, the Defense Addendum, in large part, still fails to offer any arguments as to the use, relevance and admissibility of the specific classified information to which the government objected in its motion. Because the defense has twice failed to carry its burden on these issues, the Court should preclude the defendant's public disclosure of the specific classified information objected to in the government's Section 6(a) Motion.

[redacted] What is most remarkable about the Defense Addendum is how little disagreement it identifies between the parties concerning the specific classified information raised in the government's Section 6(a) Motion. It is replete with concessions, near-concessions, or failures to provide any coherent response to the government's objections. As many of these concessions concern the same issues about which defense counsel refused to meet-and-confer last August, the Defense Addendum reveals clearly what the defendant's CIPA Section 5 and 6 stratagems have cost: a substantial waste of government time and resources. A comparison between the Defense Addendum and the government's August, 27, 2013, letter[1] seeking to meet and confer with defense counsel concerning many of the issues finally addressed by the defendant in his Addendum, demonstrates that many of these issues could have been resolved, or at least significantly narrowed, prior to the filing of the government's (very burdensome) CIPA Section 6(a) Motion:

- Redactions to the June 11, 2009 article: The government's Aug. 27 Letter asked whether the defendant would agree that [redacted] portion-marked June 11th article may be redacted from the trial version of that document. See Aug. 27 Letter at 1. The defendant refused to respond to that request at the September 3, 2013, meet-and-confer session. Three months later, in his Addendum, the

[1] See Notice of Filing, ECF Docket No. 153, Exhibit 8 (classified letter, dated August 27, 2013 ("Aug. 27 Letter")); see generally Section 6(a) Motion at 12-14.

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defendant finally "agree[d] that [redacted] is not relevant to Mr. Kim's defense." Defense Addendum at 16.

- References to [redacted] The government's Aug. 27 Letter asked whether the defense would confirm that it did not object to the redaction of certain uncharged classified material from the government's "trial ready" set of documents, including references to [redacted] See Aug. 27 Letter at 1. The defendant refused to respond to that request at the September 3, 2013, meet-and-confer session. Three months later, in his Addendum, the defendant finally confirmed that he "does not object to the redaction" of these references and called the government's objections "resolved." Defense Addendum at 8.

- Substitutions/Redactions to "trial ready" materials: The government's Aug. 27 Letter asked whether the defendant actually objected to each and every proposed substitution and redaction in the "trial ready" materials, and specifically identified the types of classified information that the government would object to use at trial in those materials (e.g., the terms [redacted] See Aug. 27 Letter at 2-3. The defendant refused to respond to that request at the September 3, 2013, meet-and-confer session. In his Addendum, the defendant still does not respond to the whole of the government's objection regarding this classified information but, where he does attempt to meet the government's objection, he concedes that his reasons for noticing the classified document in question "do not necessarily hinge on the use of the specific phrase" to which the United States had objected, i.e., "'[redacted]

- List of classified compartments: The government's Aug. 27 Letter noted that the parties had previously agreed to enter a stipulation that the defendant had access to at least 79 SCI compartments, and asked whether the defense agreed that the proposed stipulation resolved the need for the list of SCI compartments and access privileges identified by the defendant in his first CIPA Section 5 notice. See Aug. 27 Letter at 2. The defendant refused to respond to that request at the September 3, 2013, meet-and-confer session. In his Addendum, the defendant now claims that the "terms of the stipulation have not been finalized, so it is premature for the government to assert that it 'resolves the defendant's need' for the document." Defense Addendum at 15. In the past three months, the defense has made no effort to "finalize" that stipulation, despite the government's request in August.

(U) Because of defense counsel's refusal to engage in productive discussions concerning these same issues, members of the Intelligence Community were forced to assemble and draft detailed declarations setting forth the legal and factual bases for the classified information privilege protecting this information from public disclosure. Further, the government was

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required to draft a 63-page motion seeking to preclude this same material from use at trial, much of which the defendant now concedes, or effectively concedes, is not relevant to any issue in this case. The conduct of the defense in this case stands in stark contrast to the productive negotiations that have occurred prior to the beginning of CIPA Section 6 proceedings in other cases before this Court. See Section 6(a) Motion at 14, n. 5. For all these reasons, the government's Section 6(a) Motion should be granted.

(U) I. Trial Ready Set

[redacted] In his Addendum, the defendant continues to persevere in his incorrect assertion that the United has conceded that every item of classified information in the "trial ready" set – including the classified information underlying the proposed substitutions and redactions to those documents – is admissible if offered by the defense at trial because the United States will use those documents in its case-in-chief at trial. The United States has repeatedly and consistently stated otherwise. See, e.g., Section 6(a) Reply at 6 ("The defendant is wrong in his assumption."). Far from conceding anything, in its Section 6(a) Motion, the United States identified page-by-page the differences between the trial ready set of documents and the versions of those documents produced in classified discovery. The United States then set forth at length and in detail its objections to the use of the classified information underlying the government's proposed substitutions and redactions in the trial ready set, and its claim of privilege over those items of classified information. See Section 6(a) Motion at 36-51; [redacted]

[redacted] The government's position with respect to the classified information underlying the proposed substitutions and redactions to the trial ready set of documents is also clear: during the CIPA Section 6(a) stage, "the Court should decide [whether] the classified information underlying th[e] additional substitutions and redactions [in the trial ready set] is . . . relevant or

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helpful to the defense and should . . . otherwise be admitted at trial by the defense." Section 6(a) Motion at 35-36; see also Section 6(a) Reply at 6 (quoting same). "Accordingly, the defendant must meet his burden at the CIPA Section 6(a) stage of demonstrating the use, relevance and admissibility of the classified information underlying the government's substitutions and redactions in the trial ready set." Section 6(a) Reply at 7.

(U) The government's position is consistent with the law. As this Court has already held, it must decide the permissibility of the government's proposed substitutions and redactions in CIPA only if it has previously "determine[d] at [the CIPA Section 6(a)] hearing that disclosure of the classified information identified by the defendant is warranted . . . ." Memorandum Opinion (Dec. 9, 2013) at 3; see also 18 U.S.C. App. 3 § 6(c) (only calling for the Court to pass on substitutions and redactions after a "determination by the court authorizing the disclosure of specific classified information"). Put another way, no classified information that the United States has substituted or redacted will even reach the 6(c) stage unless the defendant has first successfully argued as to the use, relevance, and admissibility of the underlying classified information at the Section 6(a) stage. The defendant's cavalier approach to the trial ready set also runs afoul of another holding of this Court: that Section 6(a) proceedings focus on the relevance, use and admissibility by the defense of specific classified information, not classified documents. See Memorandum Opinion (Dec. 9, 2013) at 16 ("It is not enough for 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 disclose at trial."); see also United States v. Rezaq, 134 F.3d 1121, 1142 (D.C. Cir. 1998) (Yunis standard "applies to sub-elements of individual documents"); 18 U.S.C. App. 3 § 5 (defendant must notice intention to use "classified information," not documents).

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(U) Ignoring these clear statements of law, the defendant fails to offer any argument in his Addendum demonstrating the use, relevance or admissibility of the specific classified information underlying the government's proposed redactions and substitutions to the trial ready set. The defense merely claims that "the government cannot seriously dispute that the 'core documents' in its case against Mr. Kim are useful and relevant to the defense." Defense Addendum at 4. That conclusory statement does not even begin to satisfy the defendant's burden concerning the use, relevance, and admissibility of the specific classified information in those documents that is in dispute. Accordingly, the Court should find that the defense has waived its opportunity to present that classified information at trial. As a result, the Court should permit for use at trial only the versions of the trial ready set proposed by the United States in its Section 6(a) Motion.

(U) **II. <u>The First Set of "Treat As Classified" Documents</u>**

(U) The defendant also failed to meet the government's arguments regarding the "treat as classified" documents. As an initial matter, the defendant wrongly accuses the United States of making an improper "blanket objection to the disclosure of all 'classified information' contained in defendant's Section 5 notice." Defense Addendum at 6. The United States did not do this. As is evident from its lengthy Section 6(a) Motion, the United States carefully reviewed the materials noticed by defendant in his first Section 5 Notice, and notified the Court of numerous items that were not in dispute under Section 6(a). The United States then made specific objections, breaking down by bullet point the particular items of classified information at issue.[2]

[2] (U) The defendant also claims that the Court cannot rule on the relevance and admissibility of unclassified portions of classified documents at the Section 6 stage. Defense Addendum at 6. To the contrary, as the United States noted, the Court may properly rule on other issues of privilege at the Section 6 stage, particularly where they are closely related to the classified

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For instance, the United States grouped together several sets of similar documents, consisting of investigative questionnaires, employee badge records, and employee phone records. The United States then stated that "[t]hese materials contain the following classified or statutorily-protected information:" and provided a bullet-point list of the specific classified information to which it objected, see Section 6(a) Motion at 52-53, and asserted its privilege over that material, see id. at 53-54. In addition to its privilege argument, the United States made evidentiary arguments, noting that "none of the investigatory materials that the defendant has noticed would be admissible at trial" because they are hearsay, and "neither those materials nor the classified and statutory protected information that they contain would be relevant or helpful to the defense at trial." Section 6(a) Motion at 54. Accordingly, the defendant's assertion that the government has made a "blanket objection to the disclosure of all 'classified information' contained in defendant's Section 5 notice" is specious. As demonstrated below, his arguments concerning the specific classified information objected to in the government's Section 6(a) Motion fare no better.

(U) A. Investigative Questionnaires, Badge Records, and Phone Records for Individuals on the Access List

[redacted] The Defense Addendum largely ignores the government's objections to the specific items of classified information the government's Section 6(a) Motion identifies in the investigative questionnaires.[3] Where defendant has offered no response to the

information privilege. See Section 6(a) Motion at 48-49; see also United States v. Drake, No. RDB 10-181, 2011 WL 2175007, *5-*7 (D. Md. June 2, 2011).

[3] (U) The defendant claims that "it is not clear to the defense whether the government intended to object to the disclosure of the classification markings that appear at the top of the investigative questionnaires themselves." Defense Addendum at 11 n.7. The defendant makes the same claim with respect to classification markings at the top of the badge records and phone records. Id. at

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government's objections, and has failed to set forth any theory concerning use, relevance and admissibility, the Court should find that the defendant has conceded these objections and hold that the defendant is prohibited from using the identified classified information. For instance, the United States objected to the use of references in the investigative questionnaires to a [redacted] See Section 6(a) Motion at 53 and n.36. See also Ex Parte Classified Addendum. The defendant's only response is to question whether that information is really classified. See Defense Addendum at 8. The defendant's opinion about the classification of information has no bearing on the CIPA process, and should be rejected. See, e.g., United States v. Smith, 750 F.2d 1215, 1217 (4th Cir. 1984), vacated on other grounds, 780 F.2d 1102 ("[T]he government . . . may determine what information is classified. A defendant cannot challenge this classification. A court cannot question it."). Otherwise, the defendant does not assert that references to [redacted] are relevant or admissible. To the contrary – three months after the government sought to resolve this issue – the defense "does not object to the redaction" of these references, and "[t]he government's objections . . . are therefore resolved." Defense Addendum at 8. Accordingly, the Court should find that the defendant is not allowed to introduce any references to [redacted] in the investigative questionnaires, or anywhere else they might appear in documents to be used at trial.

[redacted] The United States also objected to references in the investigative questionnaires to types of classified [redacted] specifically [redacted]

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12 n.8; id. at 13 n.9. The United States will consent to the removal at trial of classification markings from these items subject to additional agreed-to conditions, such as the defense not commenting on the lack of classification markings and an appropriate jury instruction. The United States will address the issue of classification markings on other documents on a case-by-case basis.

[redacted] See Section 6(a) Motion at 53 and n.37; [redacted] In his Addendum, the defendant does not address why the use of these terms is relevant or helpful to the defense. Instead, he attempts to offer a theory of relevance and admissibility of the overall documents in which the terms appear, or of questions in documents containing those terms. In doing so, the defendant ignores that the government's objection is focused on the specific classified words and phrases identifying the types of [redacted] identified in its motion. See Section 6(a) Motion at 52-53. For instance, the defendant provides the example of Question 17 from the investigative questionnaire, see Defense Addendum at 9, which reads "Did you have access to the [redacted] report in which the aforementioned articles were based?" The government objected to the use of the references to the [redacted] contained in this question. While defendant offers a theory of relevance and admissibility as to Question 17, see Defense Addendum at 9-11, he provides no justification for why the phrase [redacted] are themselves relevant. Indeed, the defendant concedes that all of his reasons for using Question 17 "do not necessarily hinge on the use of the specific phrase [redacted] Defense Addendum at 11. Again, the Court should find that the defendant has conceded that he should not be allowed to use the terms [redacted] at trial, and that no further proceedings under Section 6 are necessary to that determination.[4]

[4] (U) The defendant sets forth theories of use, relevance and admissibility as to the non-classified portions of Question 17 and other items from the investigative questionnaires. See Defense Addendum at 8-12. The government hereby preserves its objections to the admission of these items or elicitation of testimony therefrom on relevance, hearsay and any other grounds. But [redacted]

[redacted]

(U//FOUO) With respect to National Security Agency (NSA) employee James [redacted] the United States objected to the investigative questionnaire and badge records of Mr. [redacted] which the defendant noticed and which contain identifying information, as well as the names of two other NSA employees who witnessed him signing the investigative questionnaire and statement and waiver. See Section 6(a) Motion at 53 and n. 39. The defense asserts that it will not seek to use Mr. [redacted] social security number, and that "with respect to the full names of NSA personnel, the defense remains confident that the parties will agree on a solution as part of the CIPA Section 6(c) process." Defense Addendum at 12. This assertion, however, misses the point, because in order to progress to the Section 6(c) stage, there must be a prior "determination by the court authorizing the disclosure of specific classified information." 18 U.S.C. App. 3 § 6(c). Only if the defense carries its burden on use, relevance and admissibility is it necessary for the Court to opine on the propriety of a substitution or redaction. Because the defendant has failed to carry his burden on those issues with respect to Mr. [redacted] identifiers, the government's Section 6(a) Motion should be granted.

(U//FOUO) As for Mr. [redacted] NSA badge records, the defendant asserts that because Mr. [redacted] accessed the intelligence report at issue, "his whereabouts on that date are therefore relevant to the defense." Defense Addendum at 13. Defendant's theory suffers from two important flaws.[5] First, the defendant has not identified anything about the whereabouts of this

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because the theories of use, relevance and admissibility set forth by the defense do not relate to the specific classified information at issue, they need not be resolved by the Court in the Section 6(a) proceedings.

[5] (U) The defense also questions whether the badge records should be classified. Defense Addendum at 12 n.8. Again, the defendant's opinion has no bearing on the classification of a document. See, e.g., Smith, 750 F.2d at 1217.

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particular person that has any probative value in this case. Without something more, the mere whereabouts of a person on the Access List on June 11, 2009, has no probative value to any issue in this case, and would simply mislead and distract the jury. Second, even if Mr. [redacted] whereabouts in particular had some relevance to the case, the only privilege the United States has asserted with respect to his whereabouts is a (statutory) privilege over the references to the precise building locations (NSA entries and exits) used by Mr. [redacted] The defendant has offered no theory as to why the precise building locations of Mr. [redacted] entries or exits into a specific NSA facility would be relevant to any issue in this case.

[redacted] Just as with the badge records, the defendant should not be able to claim that the phone records of an individual are admissible at trial merely because the individual is on the Access List.

(U) B. List of SCI Compartments and Access Privileges

(U) In its Section 6(a) Motion, the United States set forth its belief that the stipulation to which the parties had previously agreed to enter concerning the defendant's access to at least 79 different SCI compartments as of June 2009 would vitiate the defendant's need for the list of those same compartments noticed in his First CIPA Section 5 notice. Section 6(a) Motion at 56-57. That certainly was the government's intent when it agreed to enter that stipulation. See Notice of Filing, ECF Docket No. 80, Exhibit 10 (classified discovery letter, dated June 22, 2012). In his Addendum, however, the defendant reveals for the first time that the information he intends to use from the document in question goes beyond the stipulation. Namely, the

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defendant apparently both wants to disclose publicly the specific compartments to which he had access on June 11, 2009, as well as the names of the specific compartments to which other State Department employees had access. Defense Addendum at 12. The United States objects to the admission of this irrelevant, classified information.[6] At the outset, the compartments to which other State Department employees had access are not relevant and helpful to the defense, and are more likely than not to confuse and mislead the jury, and to waste time in presentation. The defense offers no argument to the contrary in his Addendum. See id. Similarly, the defendant offers no argument as to the relevance of the specific compartments to which he had access on June 11, 2009 (as opposed to the number and/or volume of those compartments). See id. The defendant claims that because the United States agreed to the admissibility of the aforementioned proposed stipulation, it has conceded the relevancy of the list of the specific 79 SCI compartments. This argument is specious. The United States has never conceded the relevance of the specific compartments, and the defense still has offered no basis for their relevance or admission at trial.

[redacted] C. Email Regarding the June 11, 2009 Fox News Article Sent by [redacted]

[redacted] In noticing the June 11, 2009, email sent by [redacted] the defendant did not specify whether he was noticing a version that contained [redacted] or one that did not. As it has with other [redacted] the United States objected on the grounds that [redacted] is covered by the classified information privilege and is not

[6] (U) In its Section 6(a) Motion, the United States reserved its right to object where, as here, the defendant raises his intention to use different classified information than was previously apparent. See Section 6(a) Motion at 34.

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relevant or helpful to the defense. See Section 6(a) Motion at 58-59. The United States specifically stated that if the defense agreed to use the version of the email that did not include [redacted] and contained a redaction [redacted] June 11, 2009 article, then the Court's decision on any objection to the use of this email could await trial, since the classified CIPA issues would be resolved. Section 6(a) Motion at 59. The defense did not respond to this statement in its Opposition. In its Addendum, the defense finally states that it seeks to use the version of the email that does not contain [redacted] and in any event offers no justification for why [redacted] would be relevant or admissible at trial. See Defense Addendum at 16.

[redacted] The defense also states that it "agrees that [redacted] June 11, 2009 Fox News article is not relevant to Mr. Kim's defense," despite having noticed the email in its entirety, which included this specific classified information. See Defense Addendum at 16. The defendant goes on, however, to assert that more information should be redacted from the Fox News article than has been redacted in the trial ready set. Id. If the defense objects to the information on relevance or other grounds, it may lodge such an objection and seek relief outside of the CIPA process.

(U/FOUO) D. The FBI 302 and Agent Notes from September 20, 2010, Interview of Mi Young [redacted]

(U//FOUO) In its Section 6(a) Motion, the United States asserted objections over the public disclosure of NSA employee Mi Young [redacted] last name and telephone number, and the last name of another NSA employee, all of which appear in Ms. [redacted] FBI 302 and associated agents' notes. Section 6(a) Motion at 60-61. This information is subject to a NSA statutory privilege. See id.; see also [redacted] ¶ 12c. The United States stated that if the defendant

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agreed to refer to Ms. [redacted] and Special Agent Storme [redacted] by their first names and last initials, as well as to forgo disclosure of Ms. [redacted] NSA telephone number, then the Court's ruling on any other objection to the use of these materials could await trial. Section 6(a) Motion at 60-61. Absent such an agreement, the United States objected to the use of this privileged information as hearsay that is not relevant and helpful to the defense. Id. at 61.

(U//FOUO) Without asserting any basis for the relevance or admissibility of this information, and without contesting the valid statutory privilege that the NSA holds in this information, the defendant claims in his Addendum that "these types of substitutions are more properly addressed under Section 6(c)." Defense Addendum at 16. The defense goes on to claim that it "does not foresee any issues with the government's proposal as to these two individuals" and "is confident that the parties will reach agreement on the treatment of the full names and identifying information of NSA personnel as part of the Section 6(c) process." Id. at 17. Again, this claim overlooks that if the defendant has not met his burden at the CIPA Section 6(a) stage of demonstrating the use, relevance and admissibility of the information at issue, it need not be addressed at the 6(c) stage. Accordingly, because the defendant has failed to meet its burden with respect to this information, the government's Section 6(a) Motion seeking to preclude the public disclosure of this information should be granted.

(U) III. Conclusion

(U) For all of the foregoing reasons, the United States respectfully requests that where the defendant has not addressed the specific information contained in the government's objections, and has not offered even a general theory for its relevance and admissibility, the Court deem that the defendant has conceded the objections and that no further argument is needed to sustain the government's objections. For the objections that the defendant has addressed by offering some

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showing of the relevance and admissibility for the specific items of classified information at issue, the United States respectfully requests that upon a hearing in this matter, the Court sustain its objections to the admission of the classified information at issue in the government's Section 6(a) Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 16th day of December, 2013, 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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