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DATE: 10/24/06 *Janice H. [Signature]*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham**

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

OCT 24 2006

**GREGORY C. LANGHAM
CLERK**

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH F. NACCHIO,

Defendant.

REDACTED

**FIRST MEMORANDUM OPINION AND ORDER PURSUANT TO SECTION 6(a) OF
THE CLASSIFIED INFORMATION PROCEDURES ACT**

Section 6(a) of the Classified Information Procedures Act ("CIPA"), Pub. L. 96-456, 94 Stat. 2025 (1980), *codified at* 18 U.S.C.A. App. 3 §§ 1-16 (West 2006), requires the court, upon request of the Government, "to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding." It also requires the court to "set forth in writing the basis for its determination" as to each item of classified information. The court conducted a section 6(a) hearing on October 12, 2006. It now files this writing setting forth the bases for its rulings concerning the use, relevance, or admissibility of the classified information in question.

I. BACKGROUND: THE ISSUES IN THE CASE

Any determination concerning relevance or admissibility must rest on the issues framed by the Indictment. The Indictment charges Defendant Joseph P. Nacchio, the former Chief Executive Officer of Qwest Communications International, Inc. ("Qwest"), with violating federal securities laws and regulations by selling securities on the basis of material, non-public information. Specifically, the Government charges:

No later than December 4, 2000, through and including September 10, 2001, [Defendant] was aware of material, non-public information about Qwest's business, including, but not limited to: (a) that Qwest's publicly stated financial targets, including its targets for 2001, were extremely aggressive and a "huge stretch;" (b) that in order to achieve its publicly stated financial targets for 2001, Qwest would be required to significantly increase its recurring revenue business during the first few months of 2001; (c) that Qwest's past experience or "track record" in growing recurring revenue at a sufficient rate to meet its publicly stated financial targets was poor; (d) that Qwest's recurring revenue business was underperforming from early 2001 and was not growing at a sufficient rate to meet Qwest's publicly stated financial targets; (e) that there were material undisclosed risks relating specifically to Qwest's recurring and non-recurring revenue streams that put achievement of Qwest's 2001 publicly stated financial targets in jeopardy; (f) that the gap between Qwest's publicly stated financial targets and Qwest's recurring revenue was increasing, thus increasing Qwest's reliance on risky and unsustainable one-time transactions; and (g) that there would be insufficient nonrecurring revenue sources to close the gap between Qwest's publicly stated financial targets and its actual performance.

To prove these charges, as the Government now concedes, it must prove, *inter alia*, that Nacchio acted "willfully and with the intent to defraud, manipulate, or deceive." These terms are defined in the case law, and the definitions are reflected in standard jury instructions. To act

"willfully" means to act "voluntarily and purposefully, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law." *United States v. Overholt*, 307 F.3d 1231, 1244-46 (10th Cir. 2002). To act with "intent to defraud" means "to act knowingly and with the intention or the purpose to deceive or to cheat." Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, *Federal Jury Practice & Instructions - Criminal* § 47.14 (5th ed. 2000) (defining identical term under mail, wire, and bank fraud statutes); *United States v. Dowlin*, 408 F.3d 647, 667 (10th Cir. 2005) (approving securities fraud instruction stating, in part, "even though some individual may have lost money in the transactions . . . , this does not rise to the level of fraud unless the evidence establishes beyond a reasonable doubt that the transaction was designed and intended by the defendant to deceive, or trick, or injure, or damage").

As required by CIPA § 5(a), Defendant has disclosed the classified information which he possesses and proposes to use. This disclosure has necessarily revealed some aspects of his defense to the Indictment. He claims that he did not act willfully or with intent to defraud when he sold the securities described in the Indictment. One of the bases for the claim is generally that, because he was appointed by the President of the United States to serve on the National Security Telecommunications Advisory Committee ("NSTAC") and because, as Qwest's chief executive officer and possessor of a top-secret security clearance, he had access to classified information regarding Qwest's classified relations with government agencies, he reasonably believed that Qwest was going to be awarded lucrative contracts with the federal government. Those contracts were, according to him, awarded swiftly by reallocating already-appropriated

funds from one account to another and did not go through a lengthy appropriations or bidding process. He maintains that these prospective contracts were not — and could not be — reflected (1) in the information, favorable or adverse, possessed by his subordinates at Qwest, (2) in Qwest's revenue projections, (3) in press releases, reports, filings with the Securities and Exchange Commission, or (4) in public financial guidance issued by Qwest. According to Defendant, he discounted the adverse non-public information possessed by his subordinates because he reasonably believed, in good faith, that Qwest would be awarded the then-secret government contracts, a circumstance which, he suggests, would at least offset the effects of the adverse information which he allegedly knew. In short, he claims that, based on all the information available to him, the public information concerning Qwest's financial projections remained accurate.

If there is evidentiary support for a "good faith" instruction, the court is required to give it, in addition to an instruction defining what is meant by "willful." *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984). The pertinent part of the standard "good faith" instruction reads:

The "good faith" of Defendant is a complete defense to the charge of securities fraud contained in the indictment because good faith on the part of the defendant is, simply, inconsistent with "the intent to defraud" alleged in each charge of the indictment.

A person who acts . . . on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct.

A defendant does not act in "good faith" if, even though he honestly holds a certain opinion or belief, that defendant also knowingly makes false or fraudulent pretenses, representations, or promises to others.

The law is written to subject to criminal punishment only those people who knowingly defraud or attempt to defraud

While the term "good faith" has no precise definition, it encompasses, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another.

Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice & Instructions - Criminal § 19.06 (5th ed. 2000).

II. DEFENDANT'S SECTION 5 PROFFER OF CLASSIFIED INFORMATION

A. GENERAL DESCRIPTION

Some time before late 1997 or early 1998, Qwest constructed an extensive fiber optic network. Because it was built using purer glass not previously available when earlier networks were constructed, it was superior to the older networks constructed by Qwest's competitors. It was also more complete than the competitors' networks. Because it was new and had plenty of bandwidth available for sale, Defendant claims that it was particularly attractive to clandestine government agencies. According to Defendant,

Defendant mentions four clandestine agencies which were allegedly involved in classified communications with him and in the award of classified contracts. Some of the communications

occurred because Defendant was a member of NSTAC. In addition, Qwest was approached directly by the agencies. Other Qwest employees who possessed top-security clearances and who had knowledge of classified matters were the successive heads of Qwest's Government Group, Dean Wandry and, thereafter, James Payne. Defendant's section 5 notice suggests that classified information conveyed to him by these subordinates also formed a basis for his good-faith beliefs concerning Qwest's prospects for such classified business.

B. SPECIFIC INFORMATION WHICH DEFENDANT PROPOSES TO USE

As noted, Defendant discusses his and Qwest's contracts and contacts with four clandestine agencies of the United States. As he relates the chronology, Qwest's classified contracts and contacts commenced with an award by one of the agencies and thereafter blossomed into prospects for classified work from the other agencies after Qwest's initial work proved successful. He discusses his and Qwest's classified discussions and contracts with each agency, and each agency has reviewed his section 5 notice and designated parts which it regards as classified. The specific information concerning each agency will be detailed in connection with the court's admissibility determinations set forth hereinafter.

III. BASIS FOR COURT'S DETERMINATION UNDER CIPA § 6(A)

A. THE STANDARD FOR MAKING THE DETERMINATION

At the outset, the court confronts a dispute concerning the standards by which it should make its section 6(a) determination. The Government argues that the court must undertake a three-step process. First, Defendant must show, and the court must find, "that the information would be helpful to his defense." Second, the court "must apply a materiality test" which

involves asking whether "there is a reasonable likelihood that the evidence could affect the judgment of the trier of fact." Third, the court must "take into consideration the fact that the information in question is sensitive national security information in *balancing the parties' competing interests* concerning discovery and use of the information." (Emphasis added.) In support of its argument, the Government cites four decisions from three circuits: *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989); *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998); *United States v. Sarkisian*, 841 F.2d 959 (9th Cir. 1988); and *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (divided, 7-5, *en banc* decision).

Defendant advocates a more simple process. According to him, the court must decide relevance and admissibility by applying the same rules of evidence that it would apply in any criminal proceeding, ignoring, for the time being, the fact that the information is classified. He relies on a recent district court decision, *United States v. Libby*, __ F. Supp. 2d __ (D.D.C. Sept. 21, 2006). For reasons stated below, this court is generally persuaded by *Libby*. As the first court presented with this issue succinctly summarized the entire CIPA process:

Under CIPA, in making its rulings on admissibility, the Court is to disregard the fact that certain material may be classified. The Act "does not alter the existing standards for determining relevance or admissibility." Both documentary and testimonial evidence containing classified matter may be admitted if in conformity with the Federal Rules of Evidence. If specific classified information is admissible, the Court may consider an alternative — the substitution for such classified information of a statement admitting the relevant facts that the specific classified information would prove, or a summary of the specific classified information, consistent with preserving the accused's right to make a full defense; if no alternative suffices, the Court may dismiss the indictment or take other measures. If information the defendant

intends to disclose at trial is found inadmissible, however, that is the end of the matter as far as CIPA is concerned. The defendant is in no worse position than if a proffer of evidence were rejected upon the trial.

United States v. Wilson, 586 F. Supp. 1011, 1013 (S.D.N.Y. 1983) (footnotes omitted), *aff'd*, 750 F.2d (2d Cir. 1984); *see also United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363-64 (11th Cir. 1994).

The language of section 6(a) does not even hint at the appropriate standards for making a court's section 6(a) determination, but the House Report, Senate Report, and Conference Report are all crystal clear. The House Report stated:

It is the Committee's intent that the existing standards of use, relevance, and/or admissibility of information or materials in criminal trials not be affected by [the bill]. The words "make all determinations concerning the use, relevance, or admissibility of the classified information at issue that would otherwise be made during the trial or pre-trial hearing" . . . were carefully chosen to reflect this intent.

H.R. Rep. No. 96-831, pt. 1, at 14-15 (1980).

The Senate Report is even plainer:

Following the [section 6(a)] hearing, the court must determine whether and the manner in which the information at issue may be used in a trial or pretrial proceeding. This provision is intended to retain current practices. A defendant should not be denied the use of information that he would otherwise use simply because of the procedures of this bill. Thus, on the question of a standard for admissibility of evidence at trial, the committee intends to retain current law *regardless of the sensitivity of the information*. Some senators on the committee believe that a judge should rule any "relevant" evidence admissible. *On the other hand, the Department of Justice has argued that classified information is analogous to information regarding identification of informants*

and that the standard for introduction of classified information must be "relevant and material" or "relevant and helpful."

S. Rep. No. 96-823, at 8 (1980), as reprinted in 1980 U.S.C.C.A.N. 4294, 4301-02 (emphasis added). The emphasized language demonstrates that the Department of Justice had suggested an alternate standard based on case law protecting the identification of informants, see *Roviaro v. United States*, 353 U.S. 53 (1957), that the Senate Judiciary Committee had considered that standard, and that it rejected the Department's proposal. The rejected proposal is exactly the one which the Government would now have the court use in making its section 6(a) determination.

Finally, if unsurprisingly, the Conference Report confirms the agreement reflected in the separate reports of both houses of Congress: "[T]he conferees agree that . . . nothing in the conference substitute is intended to change the existing standards for determining relevance and admissibility." H.R. Conf. Rep. No. 96-1436, at 12 (1980), as reprinted in 1980 U.S.C.C.A.N. 4294, 4310.

With a single exception, discussed below, the cases upon which the Government relies are distinguishable from the one before this court. *Yunis, Rezaq*, and *Sarkisian* all presented the question of whether classified information in the hands of the Government could be discovered by the defendant under CIPA § 4, not whether information already possessed by a defendant should be found to be relevant, admissible, and usable under CIPA § 6(a). The cases thus apply and discuss section 4. See, e.g., *Yunis*, 867 F.2d at 621 ("Section 4 of CIPA . . . creates no new rights of or limits on discovery of a specific area of classified information. Rather it contemplates an application of the general law of discovery in criminal cases to the classified

information area with limitations imposed based on the sensitive nature of the classified information.”). The cases all involve applications of rule 16 of the Federal Rules of Criminal Procedure and the procedures allowed by CIPA § 4, which differ from those allowed by CIPA § 5.

It would be a mistake to apply rules set forth in these three discovery cases to a case where a defendant already possesses the classified information and the Government asks the court to prevent him from using it at trial. “There is no general constitutional right to discovery in a criminal case.” *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). In addition, federal statutes and criminal rules carefully delineate and limit the information which the Government must furnish a defendant. This court is here confronted, however, not with a discovery issue, but with an issue which affects Defendant’s sixth amendment “right to a speedy and public trial,” U.S. CONST. amend. VI, encompassing “an opportunity to be heard in his defense — a right to his day in court — . . . [and] to offer testimony.” *In re Oliver*, 333 U.S. 257, 273 (1948). “Few rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The rules of evidence and procedure which apply in all criminal cases are “designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Id.* This court will not engraft additional barriers onto these rules unless required by CIPA to do so.

The only authority cited by the Government which squarely supports its position is a divided *en banc* decision handed down by the Fourth Circuit, overruling an earlier panel decision of that court. In *United States v. Smith*, 780 F.2d at 1104, the *en banc* majority vacated a district

court's section 6(a) order admitting certain evidence, holding that the district court had applied an incorrect legal standard by failing to follow the three-part test proposed by the Government here. Acknowledging the committee reports already discussed in this opinion, the majority agreed that "ordinary rules of evidence determine admissibility under CIPA." 780 F.2d at 1106. The court reasoned that those "ordinary rules of evidence" include the rule on privilege, Fed. R. Evid. 501, which provides that privileges in federal criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." Without citing prior federal common law creating the privilege, and without denominating the privilege it was recognizing, the majority held that information otherwise admissible might "be excluded under a privilege similar to the informer's privilege recognized by *Roviaro v. United States*, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957). We believe that the district court committed an error of law in not applying such a privilege before ruling the relevant classified information admissible." 780 F.2d at 1107. The majority extensively discussed *Roviaro* and its progeny, deriving directly from *Roviaro* its ruling that "[t]he privilege must . . . give way when the [information protected by the privilege] 'is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.'" *Id.* (citing *Roviaro*, 353 U.S. at 60-61). The majority also used *Roviaro* to support its ruling that "[t]he trial court is required to balance the public interest in nondisclosure against the defendant's right to prepare a defense." *Id.* (citing *Roviaro*, 353 U.S. at 62).

This court is not persuaded by the *Smith* majority's reasoning. Its recognition of a "privilege similar to" the *Roviaro* privilege flies in the face of clear and express rejection of such

a privilege by Congress. As the *Smith* dissenters note, Assistant Attorney General Philip B. Heymann complained in testimony before the House committee that the House bill did not include the *Roviaro* standard and "testified at length on the reasons this omission should be rectified." 780 F.2d at 1111-12 (dissenting opinion). See *Graymail Legislation: Hearing on H.R. 4736 and H.R. 4745 Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence, 96th Cong. 8-11 (1979)* (statement of Philip B. Heymann, Assistant Attorney General). The assistant attorney general tried again in the Senate committee. See *Graymail, S. 1482: Hearing on S. 1482 Before the Subcomm. on Criminal Justice of the Comm. of the Judiciary, 96th Cong. 18 (1980)* (statement of Philip B. Heymann, Assistant Attorney General). This argument failed again to induce any change in the language of the bill. The court can think of no rule of statutory interpretation which would permit the Government to inject by judicial decision an interpretation which was considered and rejected by the Congress.

Setting aside the explicit congressional rejection of the Government's position, the court believes it unsound to create and apply an evidentiary "privilege similar to" the *Roviaro* privilege in cases involving classified information, for two reasons. First, *Roviaro* applies where a defendant, in pre-trial discovery, seeks disclosure of the identity and/or location of a Government informer. Where defendant knows the informer's identity and location, and proposes to call him as a witness, the privilege does not apply. See *Roviaro*, 353 U.S. at 60 n.8 (dictum); *United States v. Godkins*, 527 F.2d 1321, 1326 (5th Cir. 1976). *Roviaro* is not analogous to the situation before this court, where Defendant already possesses the information at issue.

Second, the analogy to *Roviaro* is also unsound because courts, while fully capable of doing the balancing required by *Roviaro*, are ill-equipped by training, education, or experience to accomplish the balancing which the *Smith* majority apparently requires in a case involving classified information. In the balancing process described by *Roviaro*, a court's decision on disclosure of such information must depend on the "particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro*, 353 U.S. at 62. The Government can, and regularly does, provide the court with specific information on the basis of which the court itself can independently evaluate the significance of the informer's testimony, the danger to the informer posed by disclosing his identity, and the likelihood that disclosure in a particular case will damage an ongoing investigation or other interest advanced by the Government. Evaluation of this information by the court does not require specialized experience or training.

The balancing apparently required by *Smith*, in contrast, requires a court to consider and evaluate the significance of "information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security," CIPA § 1 (defining "classified information"). In practice, classification has been by executive order, regulation, or other action of the Executive Branch, for reasons relating to the "national defense and foreign relations of the United States." See CIPA § 2 (defining "national security"). These issues are properly committed to the Executive Branch, because courts and legislators lack the training and experience to make such classification decisions, and they are not responsible for the national

defense and foreign relations of the United States. For similar reasons, courts lack the expertise and background to consider the full gamut of data or background which is necessary to appreciate and evaluate the significance of the information at issue or the damage which would be done were the information to be disclosed — and the Government is properly reluctant to disclose the full array of data which would be necessary for a balancing process which means anything. “What may appear to the court to be innocuous may be dangerously revealing to those more informed.” *United States v. Juan*, 776 F.2d 256, 258–59 (11th Cir. 1985) (warning that, even where court is evaluating a summary under section 6(c) of CIPA, the Executive Branch retains the ultimate decision whether a summary adequately protects classified information).

The Government’s submissions in this case illustrate the problems presented by the balancing process apparently envisioned by the *Smith* majority. While the Government advocates balancing in a section 6(a) proceeding, it does not provide information from which the court can really do it. The affidavits of agency officials mostly tell the court what information in Defendant’s submission is classified, and they aver, in conclusory terms, that disclosure would do “serious damage” or “exceptionally grave damage” to national security. One agency states that disclosure would create “diplomatic tensions” which would adversely affect the nation’s foreign relations. The agencies do not fully inform the court why evidence has been so classified, why its disclosure would harm the national security, or the extent of that harm. In short, they do not provide the information which would enable the court do any real balancing and instead invite the court to allow the Executive Branch to place its thumb on the scales.

In contrast to the *Roviano* balancing suggested by the *Smith* majority, CIPA itself outlines an elaborate choreographed procedure designed to insure both that the Government can protect classified information and that an accused can present a defense. Assuming that a defendant has obtained classified information by discovery or otherwise, the initial step outlined by CIPA is the section 6(a) hearing to determine the use, relevance, and admissibility of information which the Executive Branch has designated as "classified." In contrast to what is required at later steps, the Government is not required during the section 6(a) hearing to tell the court or defendant the basis for classification or to identify the damage to the national security which would ensue if the information were disclosed. By identifying the classified information in its response to Defendant's notice that he intends to use such information, the Government here has complied with the court's view of what section 6(a) requires, even though its submission is insufficient to do the balancing which would be required by *Smith*.

If, and only if, the court determines under section 6(a) that classified information is admissible, the Government can invoke the second step of the CIPA procedure. Under section 6(c) the Government may move that the court order the substitution of a "statement admitting the relevant facts" or "a summary of the specific classified information." CIPA § 6(c). The court must grant the Government's motion if, after a mandated hearing, "it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure to the specific classified information." *Id.* It is significant, for purposes of discussing the proper standard under section 6(a), that section 6(c) permits the United States to "submit to the court an affidavit of the Attorney General certifying that disclosure of classified

information would cause *identifiable damage* to the national security of the United States and explaining the *basis for the classification* of such information." *Id.* (emphasis added). As one court has observed:

It appears to us that, if Congress had intended the district court to balance national security against relevancy in the 6(a) hearing, provision would have been made for transmission of information necessary for balancing ~~during the 6(a) hearing and not after~~ relevancy and admissibility have been determined.

United States v. Smith, 750 F.2d 1215, 1218 (4th Cir. 1984) (panel opinion), *overruled*, 780 F.2d 1102 (4th Cir. 1985) (*en banc*).

Even if the court deems an admission or summary proposed under section 6(c) to be inadequate, the Government may, after exhausting its interlocutory appellate rights, invoke a final step of the CIPA procedure. By filing an affidavit of the Attorney General objecting to disclosure, the Government may obtain an order prohibiting defendant from disclosing the classified information. CIPA § 6(e). The Government's invocation of this step, however, comes at some cost, since the court may dismiss the indictment or impose less drastic remedies if "the interests of justice" so require. *Id.* Significantly, even at this last step, Congress has warned courts against balancing:

It should be emphasized, however, that the court should not balance the national security interests of the government against the rights of the defendant to obtain the information. The sanctions against the government are designed to make the defendant whole again.

S. Rep. 96-823 at 9, as reprinted in U.S.C.C.A.N. at 4303. If Congress did not intend such balancing at the final step of the CIPA procedure, it is difficult to see why the court should