

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA) Criminal No.: 10-225 (CKK)
)
 v.)
)
 STEPHEN JIN-WOO KIM,)
 also known as Stephen Jin Kim,)
 also known as Stephen Kim,)
 also known as Leo Grace,)
)
 Defendant.)

**GOVERNMENT’S REPLY TO DEFENDANT’S RESPONSE TO
GOVERNMENT’S EX PARTE, IN CAMERA, UNDER SEAL MOTION FOR
PROTECTIVE ORDER PURSUANT TO CIPA § 4 AND FED. R. CRIM. P. 16(d)(1)**

On September 7, 2012, the United States filed a pleading captioned “Government’s Ex Parte, In Camera, Under Seal Motion and Memorandum of Law for a Protective Order Pursuant to CIPA § 4 and Fed. R. Crim. P. 16(d)(1)” [ECF Docket No. 81] (“CIPA § 4 Motion”).

Pursuant to the Court’s CIPA Protective Order [ECF Docket No. 10], ¶ 18, the United States gave notice that same day on the public docket that the government’s CIPA § 4 Motion had been filed with the Court, through the Classified Information Security Officer.

On September 17, 2012, the defendant filed a response to the government’s CIPA § 4 Motion, opposing the government’s “motion to proceed ex parte, and alternatively, ask[ing] the Court to defer judgment on the government’s motion until after the defense files its own ex parte memorandum on materiality.” See Defendant’s Response to the Government’s Ex Parte, In Camera, Under Seal Motion for a Protective Order Pursuant to CIPA § 4 and Fed. R. Crim. P. 16(d)(1) [ECF Docket No. 83] (“Defendant’s Response”), at 3. For the reasons that follow, the defendant’s objection to the ex parte nature of the government’s CIPA § 4 Motion is meritless. Nevertheless, should the Court permit an ex parte submission from the defense to aid in its

resolution of the government's CIPA § 4 Motion, the United States requests that the Court's consideration of any such submission be done in a manner that preserves the government's right to interlocutory appeal under CIPA § 7.

First, the defendant ignores the great weight of authority, including D.C. Circuit case law, upholding the ex parte nature of motions under CIPA § 4 and Fed. R. Crim. P. 16(d)(1). Indeed, in United States v. Mejia, 448 F.3d 436 (D.C. Cir. 2006), the D.C. Circuit did not simply affirm the district court's decision to conduct CIPA § 4 proceedings ex parte. In Mejia, the D.C. Circuit found “**no support** for the defendants' claim of the right to participation or access” in those proceedings. Id. at 458 (emphasis added). This is unsurprising, as both CIPA § 4 and Fed. R. Crim. P. 16(d)(1) both authorize ex parte proceedings. The legislative history of CIPA explains that because “the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules.” United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988), quoting H.R. Rep. 96-831, pt. 1, at 27 n. 22 (1980). Numerous other federal courts of appeals have likewise held that CIPA § 4 proceedings are appropriately conducted ex parte. See, e.g., United States v. Abu-Jihaad, 630 F.3d 102, 142-43 (2d Cir. 2010); United States v. Campa, 529 F.3d 980, 995 (11th Cir. 2008); United States v. O'Hara, 301 F.3d 563, 568 (7th Cir. 2002); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998); United States v. Innamorati, 996 F.2d 456, 487 (1st Cir. 1993); United States v. Porter, 701 F.2d 1158, 1162 (6th Cir. 1983). See also United States v. Abu Ali, 528 F.3d 210, 257-58 (4th Cir. 2008) (affirming, under CIPA, district court's decision to deny defense counsel access to government's classified ex parte opposition to defendant's post-trial motion to compel).

Second, the defendant mistakenly places heavy reliance on Judge Walton's initial CIPA § 4 decision in United States v. Libby, 429 F.Supp.2d 18 (D.D.C. 2006), amended by 429 F.Supp.2d 46 (D.D.C. 2006). See Defendant's Response at 2, 4-6, 8-9. Judge Walton initially held that the materiality of classified documents was not a proper subject for ex parte filings under CIPA § 4 and that the United States would be required to justify its use of any ex parte submissions under CIPA § 4 in accordance with the multi-part test set forth in the defendant's Response. Libby, 429 F.Supp.2d 18; Defendant's Response at 5. Less than one month later, on the government's motion for clarification or, in the alternative, reconsideration, Judge Walton acknowledged that he had made a "clear error of law" and "erroneously read into the text of [CIPA § 4] requirements that are simply not there," and therefore issued an amended decision. Libby, 429 F.Supp.2d at 47. Strikingly, the defendant makes no mention of this critical development in a case on which he places such great reliance. In any event, Judge Walton stated in his amended decision that, even in cases involving defense counsel with security clearances, materiality would have to be addressed in ex parte proceedings under CIPA § 4, where the United States provided sufficient explanation as to "why the ex parte filing is necessary and appropriate." Libby, 429 F.Supp.2d at 48.¹

Therefore, consistent with the statute and the case law, the Court should adjudicate the government's CIPA § 4 Motion on an ex parte basis. To the extent further explanation is

¹ Judge Walton's amended decision in Libby also undermines the defendant's suggestion that the government's CIPA § 4 filing has come too late in this case. See Defendant's Response at 2. As Judge Walton correctly observed, "[t]he text of the statute does not limit when in the discovery process Section 4 can be invoked and the Court appreciates that the government may seek to utilize Section 4 at any point throughout the litigation." Libby, 429 F.Supp.2d at 47 (citation omitted).

National Security Section
United States Attorney's Office
555 4th Street, N.W., Room 11-447
Washington, D.C. 20530
Phone: (202) 252-7806
Jonathan.M.Malis@usdoj.gov

/s/

DEBORAH CURTIS
Trial Attorney
CA Bar Number 172208
Counterespionage Section
U.S. Department of Justice
600 E Street, N.W.
Washington, D.C. 20530
Phone: (202) 233-2113
Deborah.Curtis@usdoj.gov

CERTIFICATE OF SERVICE

On this 21st day of September, 2012, a copy of the foregoing was served on counsel of record for the defendant via the Court's Electronic Filing System.

/s/

JONATHAN M. MALIS
Assistant United States Attorney