

from discovery pursuant to CIPA section four, which authorizes the government to seek the Court's permission to file such requests ex parte. See 18 U.S.C. App. 3 § 4 (“The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone.”).

The present motion involves a separate section of CIPA, section 6(a), which addresses the relevance and admissibility of evidence for trial purposes and does not authorize the government to proceed ex parte. To the contrary, section 6(a) permits the government to move for a hearing as to the use, relevance, and admissibility of classified information noticed by the defendant under CIPA section five, and provides that any such hearing will be held in camera (but not ex parte) “if the Attorney General certifies to the court ... that a public proceeding may result in the disclosure of classified information.” 18 U.S.C. App. 3 § 6(a). Section 6(b) clarifies that proceedings under section 6(a) are not to be conducted ex parte, as it requires the government to provide the defense with notice of the specific classified information that will be at issue during section 6(a) proceedings. See 18 U.S.C. App. 3 § 6(b). Indeed, CIPA section 6(c) makes clear that the government is not authorized to file ex parte pleadings until section 6(a) hearings have concluded and the Court proceeds to consider the use of any proposed substitutes for classified information under section 6(c). Specifically, section 6(c) authorizes the government to file an affidavit describing any damage that would result from disclosure of the classified information at issue and expressly provides that, “[i]f so requested by the United States, the court shall examine such affidavit in camera and ex parte.” 18 U.S.C. App. 3 § 6(c)(2).

The fact that CIPA expressly authorizes the government to file ex parte pleadings during discovery (CIPA section four) and when proposing the use of substitutes (section 6(c))

demonstrates quite clearly that ex parte pleadings are not permitted under CIPA section 6(a), which contains no similar provision. It is well-established that, “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Russello v. United States, 464 U.S. 16, 23 (1983). In this case, Congress chose to allow the government to seek leave to file ex parte pleadings under CIPA sections four and 6(c), but not under section 6(a). To allow the government to file an ex parte pleading at the section 6(a) stage when the Court is considering the relevance and admissibility of evidence that the defendant intends to use at trial is thus inconsistent with the text and structure of CIPA.

II. The Filing of an Ex Parte Pleading at the CIPA Section 6(a) Stage Is Precluded by the D.C. Circuit’s Decision in Mejia

The conclusion that ex parte pleadings are not permitted at the CIPA section 6(a) stage is further bolstered by the D.C. Circuit’s decision in United States v. Mejia, 448 F.3d 436 (D.C. Cir. 2006). In Mejia, the defendant challenged the government’s use of ex parte proceedings during classified discovery under CIPA section four, arguing that decisions regarding the discoverability of classified information should “be made with the participation of defendants and their counsel.” Id. at 457. In rejecting the defendant’s claims, the D.C. Circuit explained that “[w]hile CIPA §§ 5 and 6 establish procedures for participation by defendants in certain in camera hearings, those sections apply to the disclosure of classified information in trial or pretrial proceedings.” Id. (citing 18 U.S.C. App. 3, §§ 5(a), 6(a)). The Court, in other words, distinguished section 6(a)’s provisions (which provide for participation by defendants) from those of CIPA section four, which permit (but do not require) ex parte proceedings. See id.

Mejia thus confirms the interpretation of CIPA sections four and 6(a) provided above. While CIPA section four expressly permits the government to proceed ex parte, section 6(a) does

just the opposite, “establish[ing] procedures for participation by defendants.” 448 F.3d at 457. The government does not enjoy blanket authority to proceed ex parte under CIPA; the Act itself is quite specific regarding the procedural stages at which ex parte pleadings are warranted, and Section 6(a) clearly is not one of the stages when an ex parte pleading is necessary or appropriate.

Moreover, ex parte proceedings are generally disfavored in this Circuit, and are permitted only in the rarest of circumstances. See United States v. Libby, 429 F. Supp. 2d 18, 21 (D.D.C. 2006), as amended by, 429 F. Supp. 2d 46 (D.D.C. 2006). In light of the text and structure of CIPA and the general presumption against ex parte proceedings, Defendant’s motion to strike the government’s ex parte addendum should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2013, I caused a true and correct copy of the foregoing to be served via the Court's ECF filing system to all counsel of record in this matter.

/s/ Abbe David Lowell