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 OPPOSITION TO MOTION TO STRIKE

On September 18, 2013, the United States filed a Motion for a Hearing Under Section 6(a) of the Classified Information Procedures Act, 18 U.S.C. App. 3 ("CIPA"). In its Motion, the United States set forth in detail its objections to the introduction at trial of certain classified information identified by the defendant in his First CIPA Section 5 Notice. In support of its Motion, the United States also filed with the Court an Ex Parte, In Camera, Under Seal Classified Addendum ("Classified Addendum") for the limited purpose of establishing the classified information privilege for a narrow subset of classified information noticed by the defendant. On October 11, 2013, the defendant moved to strike the government's Classified Addendum from the record ("Motion to Strike") [Docket No. 170]. For the reasons stated in the Classified Addendum, and the reasons stated below, the defendant's Motion to Strike should be denied.

I. Privilege Determinations Are Appropriately Based on Ex Parte Submissions

The defendant's assertion that the government's Classified Addendum amounts to an "ex parte proceeding[]" which is only "permitted in the rarest of circumstances" is a gross

overstatement. Motion to Strike at 4. The United States submitted the Classified Addendum for the limited purpose of establishing the classified information privilege for a narrow subset of classified information noticed by the defendant, where the basis for the privilege is grounded in other classified information that has not been disclosed to the defense. Contrary to the defendant's assertions, use of an ex parte submission to establish a privilege claim is not "rare" or "disfavored," but is instead the preferred method of establishing a privilege. This is so, precisely because that method protects the proponent of a privilege from having to divulge even more privileged information in order to support the assertion of the privilege. See, e.g., Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (where privilege is at issue, court may conduct ex parte, in camera review "for the limited purpose of determining whether asserted privilege is genuinely applicable."); United States v. Abu Ali, 528 F.3d 210, 245 (4th Cir. 2008); In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002, 318 F.3d 379, 386 (2d Cir. 2003) (describing presentation of documents for in camera review as a "practice both long-standing and routine in cases involving claims of privilege," and citing illustrative cases); In re Eisenberg, 654 F.2d 1107, 1112 n. 7 (5th Cir. 1981) ("It is settled that in camera proceedings are an appropriate means to resolve disputed issues of privilege.").[1] The United States seeks to

[1] It is also commonplace for courts to consider narrow ex parte, in camera filings in the highly analogous context of the state secrets privilege. "The standard practice when evaluating a claim that the state secrets privilege applies is to conduct in camera and ex parte review of documents." Doe v. Tenet, 329 F.3d 1135, 1152 (9th Cir. 2003). See also In re Sealed Case, 494 F.3d 139, 145 (D.C. Cir. 2007); Halkin v. Helms, 690 F.2d 977, 995-98 (D.C. Cir. 1982); Mohamed v. Jeppesen Dataplan Inc., 614 F.3d 1070, 1086 (9th Cir. 2010); Crater Corp. v. Lucent Technologies Inc., 423 F.3d 1260, 1266 n.3 (Fed. Cir. 2005); Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998); Black v. United States, 62 F.3d 1115, 1119 (8th Cir. 1995). Opposing parties "have no right to use material that is alleged by the government to contain state secrets in order to participate in the district court's review of the bona fides of the government's allegation" that the state secrets privilege applies. Doe v. CIA, 576 F.3d 95, 97 (2d Cir. 2009).

avoid divulging privileged information to the defendant, to which he is not otherwise entitled, by establishing the bona fides of its classified information privilege ex parte.

Further, the defendant will not be prejudiced by this Court's ex parte consideration of the Classified Addendum because the defendant has no role in determining whether a given piece of information is classified. As Section 1 of CIPA recognizes, classification is an executive decision, one that the defendant is in no position to second guess. 18 U.S.C. App. 3, § 1 (defining "classified information" under CIPA as "any information . . . 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."). Courts have refused to allow defendants to challenge classification determinations in the CIPA context. In United States v. El-Mezain, 664 F.3d 467, 520-21, 523 (5th Cir. 2011), for example, the Fifth Circuit rejected the defendant's invitation to "second guess in the first instance the Government's determination of what is properly considered classified information." See also United States v. Smith, 750 F.2d 1215, 1217 (4th Cir. 1984), vacated on other grounds, 780 F.2d 1102 (4th Cir. 1985) ("[T]he government . . . may determine what information is classified . . . . A defendant cannot challenge this classification."); United States v. Collins, 720 F.2d 1195, 1198 n.2 (11th Cir. 1989) ("It is an Executive function to classify information, not a judicial one."). Similarly, in the FOIA context, the D.C. Circuit has instructed that the "predictive judgment by the government's intelligence sources" should not be "second-guess[ed]," and as a result, it has "'consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review.'" Larson v. Dept. of State, 565 F.3d 857, 865 (D.C. Cir. 2009) (quoting Center for Nat'l Sec. Studies v. Dept. of Justice, 331 F.3d 918, 927, 928 (D.C. Cir. 2003)). Denying the defendant's Motion to Strike thus will cause him no

harm as he has no role in assessing the adequacy of the government's assertion of the classified information privilege in the first place.

Importantly, the Classified Addendum makes no arguments in the area where the defendant does have a role, i.e., in bearing his burden of demonstrating the use, relevance, and admissibility of the classified information that he seeks to use at trial. The United States identified in its CIPA Section 6(a) Motion the classified information that is at issue in the Classified Addendum. See CIPA Section 6(a) Motion at 40-43, 53-54. The defendant therefore may make whatever arguments he wishes concerning the use, relevance, and admissibility of that classified information.[2] Thus, this Court's ex parte consideration of the Classified Addendum will not prejudice the defendant or convert the CIPA Section 6(a) hearing into an ex parte proceeding as the defendant contends.

II. The Defendant Misreads CIPA

Nothing in CIPA purports to abrogate the longstanding, common law practice of using ex parte and in camera filings to assist the trial court in making privilege determinations. While, as the defendant notes, CIPA does not make specific provision for the Court's consideration of ex parte materials at the Section 6(a) stage, it does not prohibit such consideration either. Since ex parte, in camera filings can be considered by a court in ruling on the classified information privilege, United States v. Yunis, 867 F.2d 617, 623-24 (D.C. Cir. 1989), and since the classified information privilege can be invoked at the CIPA Section 6(a) stage, United States v. Zettl, 835 F.2d 1059, 1063, 1066-67 (4th Cir. 1987), it follows that such declarations may be considered by a court at the CIPA Section 6(a) stage to establish a claim of privilege. Construing CIPA

[2] In this sense, the Classified Addendum is far more limited in scope than a motion under CIPA Section 4, which a court can consider ex parte in its entirety (as this Court has repeatedly and appropriately said).

otherwise would run counter to the statute's purpose of providing for flexible solutions for protecting classified information during criminal litigation. As the Ninth Circuit recently held, "CIPA does not limit the court's discretion to hold an ex parte conference if it is required by some overriding necessity such as the necessity to protect sensitive information related to national security . . . ." United States v. Sedaghaty, 728 F.3d 885, 908 (9th Cir. 2013); see also United States v. Aref, 533 F.3d 72, 76 (2d Cir. 2008) (in a CIPA case, upholding district court's consideration of ex parte, in camera memorandum in opposition to defendant's motion to suppress and attached declarations, where necessary to protect classified information).[3]

Further, the proper mode for establishing the privilege – by ex parte and in camera submissions – should not change depending on the stage of the proceedings. The defendant's assertion that the Court can consider ex parte submissions only in proceedings under CIPA Sections 4 and 6(c), but not under CIPA Section 6(a), would impose a regime in which the privilege is not applied uniformly throughout the litigation. It would also encourage ex parte CIPA Section 4 litigation and disincentivize the government's overproduction of classified information in classified discovery for fear that it would not be protected at the CIPA Section 6(a) stage. Indeed, it would lead to the undermining of the classified information privilege itself. In a case where the United States has successfully withheld classified information pursuant to ex parte CIPA Section 4 proceedings, the defendant could nevertheless press for the same classified information in his CIPA Section 5 notice. To defend against that notice, the United States would be required, under the defendant's interpretation of CIPA, to disclose at the Section 6(a) stage

[3] The defendant's reliance on United States v. Mejia, 448 F.3d 436 (D.C. Cir. 2006), is misplaced. That case merely observes that CIPA Section 4 explicitly provides for some ex parte proceedings, while Section 6 has provisions that allow "for participation by defendants in certain in camera hearings . . . ." Id. at 457. But neither CIPA nor Mejia state that a court cannot consider the government's classified information privilege ex parte as the need arises, including at the CIPA Section 6(a) stage.

the classified basis for the privilege that was withheld from the defense at the Section 4 stage. Such a requirement would defeat the purpose of the privilege. For all these reasons, the defendant's interpretation of CIPA runs afoul of the "common mandate of statutory construction to avoid absurd results," and should be rejected. Rowland v. California Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 200-01 (1993).

Accordingly, the defendant's Motion to Strike should be denied.

Respectfully submitted,

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Certificate of Service

On this 23rd day of October, 2013, a copy of the foregoing was served on counsel of record for the defendant via the Court's Electronic Filing System.

_____/s/_____
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