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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CISO [Signature]
Date 10/28/13

UNITED STATES OF AMERICA) Criminal No. 10-225 (CKK)
)
 v.)
)
 STEPHEN JIN-WOO KIM,)
)
 Defendant.)

DEFENDANT STEPHEN KIM'S RESPONSE TO THE GOVERNMENT'S NOTICE REGARDING MOTIVE

On October 18, 2013, the government filed a "Notice Regarding Motive" stating that, in light of the Court's Order granting certain discovery requests related to motive, the government "has elected not to rely on [its three] motive theories at trial." See Dkt. 175 at 1-2. The notice claims that this concession "eliminates the basis for" the Court's prior Order granting the defendant discovery. Id. at 2. The notice also states, however, that the government still intends to introduce at trial much of the same evidence that it had relied upon to establish two of its three motive theories, namely that the defendant leaked the intelligence report to curry favor with Fox News and that he was a "disgruntled employee." See id. at 2 (stating that, "apart from the defendant's communications with Fox News reporter James Rosen," the government "will not seek to introduce at trial" the motive evidence described in its opposition to defendant's fifth motion to compel). The government seeks, in other words, to avoid producing the discovery ordered by the Court by disclaiming its motive theories, while at the same time reserving its right to introduce some of the very evidence that it would rely upon to establish its theories. The government should not be permitted to evade the Court's prior discovery order simply by announcing its intent to present the same motive evidence to the jury through the backdoor. The

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Court should require the government to comply with its discovery order or suppress all evidence relating to its motive theories.

The motive evidence at issue consists of a series of emails between defendant and Mr. Rosen that are described in detail in the government's opposition to defendant's fifth motion to compel. See Opp. at 11, 14, 16-17, 21-23. As one of its three theories of motive, the government argued that Mr. Kim leaked the intelligence report to Mr. Rosen because he "wanted to resign from his government position and find a new job, including at Fox News as a specialist in Korean and East Asian affairs and national security issues." See Fifth Motion to Compel, Ex. 3. In support of this theory, the government relied on a series of emails allegedly demonstrating that defendant sought Mr. Rosen's assistance in finding a job, and that Mr. Rosen in turn made "specific requests for North Korea information from the defendant." Opp. at 11, 16-17. The government claimed that, in a May 22, 2009, email, Mr. Rosen established certain "criteria" for Mr. Kim to satisfy when providing such information. Id. at 21-23. The government then argued that defendant leaked the intelligence report specifically because it "satisfied multiple criteria identified by Mr. Rosen in his May 22, 2009, email." Id. at 21. Mr. Kim's alleged motive, in other words, was to provide information to Mr. Rosen that he would find valuable in order to promote his job prospects.

To rebut this theory, the defense moved to compel the production of all classified intelligence reports accessed by Mr. Kim between May 1, 2009, and June 11, 2009 (or a list of their titles to allow the defense to identify specific reports). See Fifth Motion to Compel at 6-7. As the defense explained, these reports would be at least helpful to the defense in rebutting the government's evidence, as they would tend to show that if Mr. Kim was trying to curry favor

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with Mr. Rosen or Fox News, he regularly accessed intelligence reports of far more value than the report at issue in this case. Id. at 6.

The government's second motive theory was that the defendant was a "disgruntled government employee" who "believed that his insights regarding North Korea were being ignored or rejected by other government personnel." Fifth Motion to Compel, Ex. 3. In support of this theory, the government relied on a June 14, 2009, email from defendant to Mr. Rosen. See Opp. at 14. To rebut this theory, defendant moved to compel any evidence tending to support or refute the government's theory that Mr. Kim was "disgruntled" because his views were being "ignored or rejected." See Fifth Motion to Compel at 11-12.

In its Memorandum Opinion on defendant's fifth motion to compel, the Court agreed with the defense that "other intelligence reports accessed by the Defendant between May 1 and June 11, 2009, would be useful to the Defendant in rebutting the Government's theory that Mr. Kim leaked the contents of the [REDACTED] report to Mr. Rosen in hopes of securing employment as a specialist in Korean and East Asian affairs and national security issues at Fox News." Opinion on Fifth Motion at 4-5. The Court therefore ordered the government to provide the defense with a list of the titles of all intelligence reports accessed by Mr. Kim between May 1 and June 11, 2009. Id. at 6. With respect to the "disgruntled employee" theory, the Court similarly ordered the government to produce "any classified documents tending to show that the Defendant's superiors at VCI or high-level government employees outside VCI acknowledged the Defendant's contributions regarding North Korea or solicited his input." Id. at 8.

In its "Notice Regarding Motive," the government attempts to excuse itself from complying with the Court's Order by stating "that is has elected not to rely on these motive theories at trial, thereby eliminating the basis for the defendant's classified discovery demands

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related to motive.” Dkt. 175. The notice, however, contains two critical exceptions that swallow the concession the government is purporting to make.

First, the government’s notice is far more limited than it may first appear. The government carefully states that, with the exception of defendant’s communications with Mr. Rosen, it “will not seek to introduce at trial the evidence described in Section II.B. of its Opposition.” Dkt. 175 at 2 (emphasis added). But Section II.B of the government’s Opposition did not contain the government’s primary evidence in support of its “Fox News” motive theory, namely the evidence related to the May 22nd “criteria” email, which is described in Section II.C of the opposition, not II.B. See Opp. at 10-17, 21-23. Moreover, section II.B of the opposition expressly stated that it was a “summary” of the government’s motive evidence and “does not purport to reflect the entirety of the motive evidence already produced to the defendant.” Id. at 10 n.8. The representation contained in the government’s notice therefore fails to provide any meaningful assurance to the defense or the Court that the government will not seek to introduce its primary motive evidence at trial or rely on similar evidence that is not expressly addressed in Section II.B of its opposition.

Second, the government’s notice also expressly states that the government still intends to introduce “the defendant’s communications with Fox News reporter James Rosen,” which were the very documents the government relied on to establish both its “Fox News” and its “disgruntled employee” motive theories.¹ Id. at 2. If the government intends to present the jury with the same emails that it would have used to establish motive, the basis for the Court’s Order is not “eliminated,” as the government asserts. Id. To the contrary, so long as the government

¹ Without explanation, the government asserts that these communications are “independently admissible.” See Dkt. 175 at 2. The government should be required to explain how this is so, so that Mr. Kim may respond.

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intends to introduce the communications described at length in its opposition involving motive, the Court's Order should remain in effect. The government should either comply with the Court's Order, or be precluded from introducing all evidence relating to motive.²

In summary, the Court's Order on defendant's fifth motion to compel requires the government to provide discovery relating to its motive theories. The government has not sought relief from that Order, but rather has filed a "notice" asserting that the basis for the Court's Order has been "eliminated." As this "notice" is insufficient for the reasons set forth above, the Court should not relieve the government of its obligation to comply with the Order by producing all applicable materials by November 8, 2013.

Respectfully submitted,

DATED: October 24, 2013

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² As to its third motive theory involving [REDACTED], the government did not rely on any communications between the defendant and Mr. Rosen in its prior pleadings. See Opp. at 14-16. Based on the government's notice, the defense thus assumes that the government has agreed not to introduce any evidence regarding Mr. Kim's purported views on [REDACTED]

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