UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S REPLY IN SUPPORT OF HIS MOTION TO STRIKE THE GOVERNMENT'S *EX PARTE, IN CAMERA*, UNDER SEAL CLASSIFIED ADDENDUM TO ITS FIRST CIPA SECTION 6(a) MOTION

In its opposition to defendant's motion to strike the government's ex parte addendum, the government concedes the primary argument relied upon in defendant's motion: CIPA, by its plain terms, does not authorize the filing of ex parte pleadings at the CIPA Section 6(a) stage. See Opp. at 4. Although the government cites a number of cases addressing ex parte pleadings in other contexts (e.g., FOIA, cases involving attorney work product, etc.), see Opp. at 2-3, the government fails to cite a single case in which a court has permitted the government to file an ex parte pleading when considering the use, relevance, and admissibility of evidence in a criminal case under CIPA Section 6(a). The absence of any case law supporting the government's position is not a coincidence, as CIPA makes quite clear that the government is not permitted to rely on secret evidence and secret arguments when challenging the defendant's right to use classified information that has been properly noticed under CIPA Section 5.

CIPA specifically authorizes the government to submit ex parte pleadings in two circumstances: when seeking to withhold otherwise discoverable information under Section 4, and when proposing substitutions for otherwise admissible evidence under Section 6(c). See

Motion at 2-3. The lack of any comparable provision in CIPA Section 6(a) is fatal to the government's attempt to submit an ex parte addendum to its first Section 6(a) motion.

The government concedes that "CIPA does not make specific provision for the Court's consideration of ex parte materials at the Section 6(a) stage," but then argues that "it does not prohibit such consideration either." Opp. at 4. This argument violates basic tenets of statutory interpretation. "[W]here 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). The fact that Congress specifically authorized ex parte submissions under CIPA Sections 4 and 6(c), but not under Section 6(a), demonstrates that Congress did not intend to permit ex parte pleadings at the 6(a) stage.

The government's argument that ex parte submissions are permissible because "[n]othing 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," Opp. at 4, is similarly unavailing. If the "longstanding, common law practice" of permitting ex parte filings were a sufficient basis to allow the government to proceed ex parte any time that it wishes to assert a privilege during CIPA proceedings, the specific provisions authorizing ex parte submissions under Sections 4 and 6(c) would be unnecessary, as the government would be permitted to proceed ex parte regardless of whether the statute authorized it to do so. Yet such an interpretation also flies in the face of a "basic interpretive canon," namely that "a statute should be construed to give effect to all its provisions, so that no part will be inoperative or superfluous,

void or insignificant."[1] Corley v. United States, 556 U.S. 303, 304 (2009) (internal quotations omitted).

Aside from its "common law" argument, the government also claims that it must be permitted to proceed ex parte to protect its classified information privilege at the Section 6(a) stage, and that failing to do so "would lead to the undermining of the classified information privilege itself." Opp. at 4-6. But this argument overlooks the fact that the procedures mandated by CIPA (which do not include ex parte CIPA 6(a) filings) are more than adequate to "protect a government privilege in classified information." United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989); United States v. Mejia, 448 F.3d 436, 455 (D.C. Cir. 2006). Those procedures allow the government (1) to seek to withhold otherwise discoverable information from the defendant during discovery through a non-adversarial, ex parte process (as the government has repeatedly done in this case); (2) to contest the use, relevance, and admissibility of defendant's evidence months before trial; (3) to propose the use of substitutes for otherwise admissible evidence; and (4) ultimately to preclude the defendant from introducing classified evidence as

[1] In support of its "common law" argument, the government relies on United States v. Sedaghaty, 728 F.3d 885 (9th Cir. 2013), and United States v. Aref, 533 F.3d 72 (2d Cir. 2008). Neither of those cases involved proceedings under CIPA Section 6(a). Sedaghaty addressed six notices filed by the government under CIPA Section 4 (which expressly authorizes ex parte proceedings), and three conferences during trial to clarify the Court's earlier Section 4 rulings. See 728 F.3d at 908. Aref involved protective orders sought by the government under CIPA Section 4, as well as the government's response to defendant's motion "to discover evidence resulting from any warrantless surveillance and to suppress any illegally obtained evidence or to dismiss the indictment." 533 F.3d at 76. Sedaghaty and Aref thus lend no support to the government's argument that it should be permitted to proceed ex parte even in the absence of specific authorization under CIPA.

part of his defense if disclosure would jeopardize national security (albeit on pain of sanction). See 18 U.S.C. App. III §§ 4, 6(a), 6(c), 6(e). In light of all of these procedures, which are far more onerous on the defense than the government, there is simply no need to add an additional requirement that the government is also permitted to present secret evidence during the Section 6(a) process.

The government offers no cogent explanation for its request. The government's concerns that the defendant will somehow use the Section 6(a) process to "challenge classification determinations" or "press for [discovery]," see Opp. at 3-5, are misplaced, as the only issues properly before the Court during Section 6(a) proceedings are the use, relevance, and admissibility of classified information already in the defense's possession (and properly noticed under Section 5). The government's complaint that "the proper mode for establishing the privilege … should not change depending on the stage of the proceedings," Opp. at 5, is similarly misplaced, as the basis for the government's privilege is properly raised at this stage of the proceedings under Section 6(c) (which expressly authorizes ex parte submissions), not Section 6(a). See 18 U.S.C. App. III § 6(c)(2) (permitting the government to file an ex parte affidavit "explaining the basis for the classification of" the information once proceedings under Section 6(a) have concluded).

The Court should thus decline the government's invitation to create an ex parte process that is not authorized by CIPA, and that would undermine the basic fairness of the Section 6(a) process. The procedures mandated by CIPA adequately protect the government's interest in preventing the unnecessary disclosure of classified information. The government provides no compelling reason why it should be permitted to present secret evidence during what is supposed to be an adversarial Section 6(a) process.

Dated: October 25, 2013

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 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