

**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.)	

JOINT NOTICE

Defendant Stephen Kim and the United States of America (collectively, the “parties”), through their undersigned counsel, submit this Joint Notice pursuant to the Court’s August 23, 2013, Order.

I. Background

During an on-the-record conference call with the Court on August 23, 2013, the parties discussed the potential need for a closed hearing on September 27, 2013, to address any remaining classified discovery issues. With respect to the issues to be addressed at the September 27, 2013, hearing, the parties state as follows:

II. Defendant’s Notice of Outstanding Discovery Issues

In the defense’s view, a closed hearing remains necessary to address several outstanding discovery issues.

First, the hearing should address the defendant’s discovery requests relating to information known to the defendant at time of the alleged disclosure. As the Court is aware, by letter dated June 14, 2013, the defense requested the production of certain information known to the defendant at the time of the alleged disclosure. The defense’s requests were based on the Court’s prior rulings on Mr. Kim’s third motion to compel discovery.

In response, the government requested a “proffer” from the defense regarding what Mr. Kim knew at the time of the disclosure. At a status conference held on July 9, 2013, the Court agreed with the defense that the government’s demand for a “proffer” was unreasonable and informed the government that it would have to propose some alternative means of resolving the defense’s request. The Court ordered the parties to meet and confer on this issue. If the parties were unable to reach an agreement, the Court ordered the parties to “promptly notify the Court to arrange a closed hearing *in lieu of motion practice* on this issue.” Dkt. 119 (emphasis added).

Although the parties did meet and confer on this issue, the government failed to propose any means (other than a “proffer”) of resolving the defendant’s requests. Instead, rather than doing as the Court ordered, the government finally responded to the defense’s request *yesterday* (more than three months after the original request), stating, “We believe these requests call for the production of classified material to which the defense is not entitled.” Ex. A. After deliberating for over three months, in other words, the government abandoned its “proffer” request, did not offer a new proposal, and simply refused to produce a single document.

This morning, the government notified the defense that it “assumes the defense will want to move to compel on some or all of” the relevant requests. Ex. B. The government thus asserts that “the only issue to be raised on Friday was the scheduling of your anticipated motion to compel.” *Id.*

The government’s response ignores the Court’s prior order (as well as the agreement by the parties) that the “proffer” issue would be resolved either during the meet-and-confer process or in “a closed hearing in lieu of motion practice on this issue.” Dkt. 119. Consistent with the last status hearing and the Court’s Order, the defense therefore requests the closed hearing

envisioned for Friday, September 27, 2013, to address the defendant's discovery requests relating to information known to the defendant at time of the alleged disclosure.

Second, a closed hearing would also permit the parties to address a number of other outstanding issues. The Court is currently considering the defendant's challenge to the government's email search protocol, as well as the defendant's motion for reconsideration. A closed hearing would permit the parties to respond to any questions that the Court may have on those issues.

Third, the closed hearing should address what the defense believes is the government's improper reliance on *ex parte* submissions during CIPA § 6 proceedings, which are not authorized by the Act.

III. The Government's Notice of Outstanding Discovery Issues

The United States does not agree with the defense's characterization of the July 9, 2013, status conference. The Court did not place the burden on the Government to resolve the impasse between the parties concerning the discovery requests relating to information known to the defendant at the time of the unauthorized disclosure. Rather, the Court encouraged both parties to meet and confer relating to that issue to determine whether it could be resolved. See Dkt. 119. Further, the Court indicated during the status conference that the defense's position – i.e., that it need not provide any further information prior to the production of the classified material it sought – was also questionable. See July 9, 2013, Hearing Transcript at 16, 18, 46.

Additionally, the United States does not agree with the defense's characterization of the parties' meet-and-confer session following the July 9, 2013, status conference. At the meet-and-confer session, the United States did not "fail[] to propose any means (other than a 'proffer') of resolving the defendant's requests" (defense's characterization above). In fact, to address the

concern raised by the Court at the July 9, 2013, status conference that any proffer offered by the defendant may be used against him at trial, the United States offered to accept an attorney proffer from the defense and with the explicit understanding that any such proffer would not be used against the defendant at trial. Despite those assurances, the defense has failed to provide any proffer. As an alternative, the United States also offered at the meet-and-confer session (i) to review the defendant's classified electronic media and auditable databases (that the defendant was known to have used) to identify the intelligence reports that the defendant was seeking to demonstrate contained classified information known to him at the time of the unauthorized disclosure, and then (ii) to review any such reports to determine if there was any overlap between the information in them and the other classified discovery that the defendant was seeking. At the conclusion of the meet-and-confer session, counsel for the defendant stated that the defense would respond to the government's proposal following the meet-and-confer session. The defense has failed to do so.

Attempts at resolving the impasse having effectively failed, and seeking to move these matters forward, the United States further advises the Court that it has now completed a time-consuming review of the defendant's classified electronic media and auditable databases as it proposed to the defense at the meet-and-confer session. Based on that review, on September 23, 2013, the United States sent its written response to the five outstanding discovery requests remaining from the defendant's June 14, 2013, discovery letter, i.e., discovery requests 2, 3, 4a, 4b, and 5. See Notice of Filing, Docket # 118, Exhibit 14. In its letter, the United States advised the defense that those discovery requests called for the production of classified material to which the defense is not entitled. Those discovery requests are now ripe for adjudication if the defendant chooses to file a motion to compel. The United States believes that the Court will

benefit from full briefing on these matters prior to any sealed hearing so that the Court has an appreciation of the scope of the defendant's requests and the classified information equities that are implicated by them. The United States requests that the Court set a briefing schedule at Friday's status conference for any additional motion to compel that the defendant may choose to file. Following briefing, the Court can set a date for a sealed hearing, if the Court believes one is necessary.

As for the other issues that the defense seeks to raise concerning the defendant's fully-briefed challenge to the government's email search protocol and the defendant's motion for reconsideration, the Court has not indicated that it wishes to hear oral argument on them. The United States stands ready to address whatever questions the Court may have concerning those motions, but respectfully requests clarification prior to the status hearing on Friday as to whether it will hear argument on those motions. As for the defense's question concerning the government's first CIPA § 6 Motion, the United States respectfully requests that any hearing on the motion await full briefing.

Dated: September 25, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2013, I caused a true and correct copy of the foregoing be served via the Court's ECF filing system to all counsel of record in this matter.

/s/ _____
Abbe David Lowell