

FILED WITH  
COURT SECURITY OFFICER  
9/29/06 *Scampbell*  
DATE

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**REDACTED**

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SECTION 5 CIPA REPLY SUBMISSION  
ON BEHALF OF DEFENDANT  
(FILED IN CAMERA AND UNDER SEAL WITH THE COURT SECURITY OFFICER)

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Defendant Joseph P. Nacchio, by and through undersigned counsel, pursuant to Section 5 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 5, and in accordance with the Court's August 25, 2006 Order, submits the following reply to the government's 2nd Response To Defendant's Section 5 CIPA Submission (August 16, 2006) (the "Government Response").

Introduction

The government asks the Court to adopt its version of fact and to dismiss Mr. Nacchio's version outright. In short, the government impermissibly seeks to shift fact finding from the jury

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**REDACTED**

to the Court. In so doing, the prosecution totally ignores the information it sought and received from James Payne.<sup>1</sup>

Mr. Payne directly contradicts the government and corroborates Mr. Nacchio. He is in a position to corroborate Mr. Nacchio since he shared Mr. Nacchio's classified knowledge, which was not available to the Qwest employees who offered Mr. Nacchio a different valuation of Qwest's financial projections. Putting aside this persistent refusal to acknowledge Mr. Payne's corroboration of Mr. Nacchio, namely that *prospective* classified government contracts for the year 2001 were *not* included in the September 7, 2000 guidance or its later iterations, the government's attempts to use this proceeding to seek fact finding by the Court are impermissible. These efforts badly misperceive the purpose of a Section 6 CIPA hearing. It is for the jury to decide factual disputes, after having an opportunity to observe the witnesses and inspect the relevant documents. This Section 6 hearing is limited to determining whether Mr. Nacchio's proffer is relevant to his defense, with the Federal Rules of Evidence determinative of the question.

On May 15, 2006, Mr. Nacchio submitted his "Section 5 CIPA Submission On Behalf Of Defendant" (the "Section 5 Submission"). Pursuant to the Court's directive, the Section 5 Submission was preliminary in nature, a limited proffer based solely on counsel's interview with Mr. Nacchio. (*Ex Parte* Order Concerning Defendant's *Ex Parte* Submission Filed April 24,

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<sup>1</sup> As we have previously explained, James F.X. Payne was Qwest's Senior Vice President and General Manager of the federal group, and the person who accompanied Mr. Nacchio to the classified meetings which are the subject of the Section 5 Submission. He was also the person responsible for projecting the future income of Qwest from government contracts — both classified and unclassified. He was sought out and interviewed by the government days before the indictment when the government learned from Mr. Nacchio's attorneys of the possible use of classified information in his defense.

2006 at 4 (May 2, 2006). There has been as yet no opportunity to obtain detailed corroborative information from other witnesses or from government documents. Perhaps not realizing this, the government has attacked the Section 5 Submission as too vague to justify a finding of relevance. In fact, one of the purposes of the Section 5 Submission was to demonstrate that in addition to Mr. Nacchio's personal knowledge there is also a large independent body of corroborative classified information that is relevant to Mr. Nacchio's defense. The question is not whether Mr. Nacchio's personal knowledge is, in and of itself, sufficient to provide a CIPA-related defense, for Mr. Nacchio need not testify. Rather, Mr. Nacchio's proffer demonstrates that in addition to his testimony, should he choose to testify, there exist witnesses and corroborating classified evidence which is relevant to the defense and which Mr. Nacchio should now be allowed to pursue. This evidence of prospective government business can be found in the prospective

testimony of the other participants -- including Mr. Payne -- in the classified conversations Mr. Nacchio had with senior members of the nation's clandestine intelligence agencies and the National Security Council staff, as well as in classified documents related to those meetings.<sup>2</sup> These communications to Mr. Nacchio are relevant to his state of mind irrespective of his decision to take the stand.

Further corroboration can be found even in the statements of the principal government witnesses, Mohebbi and Szeliga, who each told the government -- and in one case the grand jurors -- that at various times during the relevant period Mr. Nacchio informed them that he knew things that they did not know about Qwest's financial prospects. For example, when

<sup>2</sup> CIPA "applies to classified testimony as well as to classified documents." *United States v. North*, 708 F.Supp. 399, 401 (D.D.C.), appeal dismissed on other grounds, 859 F.2d 216 (D.C. Cir. 1988), cert. denied on other grounds, 490 U.S. 1004 (1989).

interviewed by the FBI, Robin Szeliga told of remarks by Mr. Nacchio about prospects for government business which were "mind boggling." Ms. Szeliga also recounted a discussion with Mr. Nacchio when she asked why Qwest was buying South American routes and Mr. Nacchio replied that they needed the routes but he could not talk about it. Additionally, Ms. Szeliga told the government that when there was a meeting at the Anschutz ranch someone from the federal government showed up and she was not allowed to talk to him. Still further, she reported a conversation to the government between Mr. Nacchio and Greg Casey (the head of Qwest's wholesale business unit) in which Mr. Casey said that until the other products came up to gobble up bandwidth, the market would lull, to which Mr. Nacchio responded that he understood that, but that he sat on a government panel for technology and there were going to be some big needs and the government would need more and more bandwidth.

The Court will also recall the grand jury testimony of Ashfin Mohebbi, in which he testified that in rejecting his views, Mr. Nacchio told him during the trading period, that he had information not available to Mr. Mohebbi. Thus Mr. Mohebbi testified that Mr. Nacchio said:

I heard you; I disagree with you. We're not going to change the numbers. The numbers are the numbers. We're going to make the numbers. ... I can tell you what he told me, which is, I heard you; I don't agree with it. *He said a number of other things: You know, you don't know things; you don't know everything that I know; we're not changing the numbers.*

(See Reply To The Government's Response To Motion For Dismissal Of Indictment Due To Prosecutorial Misconduct In The Grand Jury at 5-7 and Exhibit A (emphasis added) (June 22, 2006) [Doc. No. 97])<sup>3</sup>

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<sup>3</sup> Curiously, Mr. Mohebbi sent an email to other Qwest employees in October 2001 in which he stated, "I want to know what Jim Payne has been doing in the last 2 years."

In addition to our first Section 5 Submission, Mr. Nacchio would now supplement this with an additional factual proffer of events in 2000 and 2001 related to the \$2 billion "GovNet" project. At the time of the first submission, the defense did not believe this was classified and, therefore, it was not included. However, in its Response the government took the position that the mere identification of the name of a clandestine intelligence agency may, in and of itself, be classified and cause surrounding evidence to also become classified. (*Id.* at 19-20) Indeed, we were just served this week with the sealed Declaration of Cindy Meyer, a Telecommunications Specialist at the Defense Information Systems Agency ("DISA") of the United States Department of Defense ("DOD"), who stated, ¶ 3 at 2:

~~However, this determination of no classified information could change if the information is expanded even slightly. For example, fragments of information, such as the linkage of location with the contract in question would be classified information, while the data separately is not classified.~~

In light of this statement, we are supplementing our Section 5 Submission with the "GovNet" material, *infra*.<sup>4</sup>

Accordingly, Mr. Nacchio respectfully asks that the Court: make a finding of relevance of the classified facts set forth here and in Mr. Nacchio's Section 5 Submission; deny the government's proposed stipulations and substitutions; deem that Mr. Nacchio and his counsel have the "need to know" which will allow them to interview witnesses and subpoena related

<sup>4</sup> Section 5(a) of CIPA specifically provides that, "[w]henver a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information." 18 U.S.C. App. 3 § 5(a)

documents; and, because new information may then be uncovered, allow, if necessary, additional defense submissions, pursuant to § 5(a) of CIPA.<sup>5</sup>

### The Role Of CIPA

In *United States v. Poindexter*, 725 F.Supp. 13 (D.D.C. 1989), District Judge Harold H. Greene summarized CIPA's application to a criminal proceeding:

Under the CIPA procedures ... the defense is required (by section 5) to notify the Court and the prosecutor of its intention to disclose particular classified information at trial. Section 6(a) permits the prosecution thereafter to request an *in camera* hearing for a determination of the use, relevance, and admissibility of this proposed defense evidence. If the Court makes an affirmative finding with respect thereto, the government may move for, and the Court may authorize, the substitution of unclassified facts or a summary of the classified information in the form of an admission by the government. Under section 6(e)(2) if the government prevents a defendant from disclosing classified information at trial, the Court may ~~find against the prosecution on any issue to which the excluded information~~ relates; it may strike or preclude the testimony of particular government witnesses; and it may dismiss the indictment or specific counts thereof.

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Moreover, the protection of the rights of defendant is paramount under the statutory scheme: if the Attorney General files an affidavit objecting to the disclosure of the classified material, and the Court determines that other remedies,

<sup>5</sup> While we believe we are not obligated to advise the Court and the prosecution of who we wish to interview in preparation of Mr. Nacchio's defense, we are unable to conduct interviews without first obtaining a "need to know" determination from the Court. In that regard, we were unable to interview Mr. Payne concerning the classified material—even though he and we were cleared as to the subject matter. In order to facilitate the process, we provide the names of some of the potential witness we need to interview. We wish to interview Mr. Payne, his predecessor Dean Wandry and possibly other Qwest employees, as well as senior representatives of the clandestine intelligence agencies and National Security Council staff with whom Mr. Nacchio had discussions. Those senior representatives include: Richard Clarke, at the time the National Security Council's National Coordinator for Security, Infrastructure Protection and Counterterrorism; Lieutenant General Harry D. Raduege, Jr., then the Manager of the National Communications System; and

It is also our intention to subpoena

classified documents related to those discussions.

including satisfactory unclassified substitutes providing defendant "with substantially the same ability to make his defense as would disclosure of the specific classified information," cannot be fashioned, it must provide relief, including, where appropriate, by a dismissal of the indictment.

*Id.* at 31-32, quoting CIPA § 6 (18 U.S.C.A. App. 3 § 6(c)(1)). *Accord, United States v. Lee*, 90 F.Supp.2d 1324, 1325-26 (D.N.M. 2000).

The government concedes that CIPA § 6 requires that any substitution provide Mr. Nacchio with substantially the same ability to make his defense. (Government Response at 3-4)

Additionally, in *Poindexter*, Judge Greene further explained:

[S]ection 5 of CIPA does not require a defendant to specify whether he will testify or what he will testify about. The statute requires merely a general disclosure as to what classified information the defense expects to use at the trial, regardless of the witness or the document through which that information is to be revealed. In other words, defendant need *not* reveal what he will testify about or whether he will testify at all. ... All he is required to do under CIPA is to identify the classified information on which his side intends to rely in the course of its overall presentation, not who will disclose it as part of any particular testimony.

*Id.* At 33; *accord, Lee*, 90 F.Supp.2d at 1327 (citing *Poindexter*); *see also United States v. Wilson*, 571 F.Supp. 1422, 1427 (S.D.N.Y. 1983) ("The notice rules ... require only that a 'brief description of the classified information' be provided.").

The description of the relevant classified information known to Mr. Nacchio, as set forth here and in his initial Section 5 Submission, we submit, should constitute sufficient notice under CIPA Section 5.

#### The Body Of Classified Materials Is Properly Admissible

The issue is whether the classified information in our submission and the body of related independent classified testimonial and documentary materials which we seek to obtain should, under the Federal Rules of Evidence, be admissible at the trial:

CIPA does not create new law governing the admissibility of evidence. [*United States v. Collins*, 720 F.2d 1195, 1199 (11th Cir. 1993)] It simply ensures that questions of admissibility will be resolved under controlled circumstances calculated to protect against premature and unnecessary disclosure of classified information. Thus, the district court *may not* take into account the fact that evidence is classified when determining its “use, relevance, or admissibility.” [*United States v. Juan*, 776 F.2d 256, 258 (11th Cir. 1995)]; *Collins*, 720 F.2d at 1199. The relevance of classified information in a given case is governed solely by the well-established standards set forth in the Federal Rules of Evidence. [*United States v. Anderson*, 872 F.2d 1508, 1514, *cert. denied*, 493 U.S. 1004 (1989)]; *see* Fed.R.Evid. 401-03.

*United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363-64 (11th Cir. 1994) (emphasis added).

The government suggests that Mr. Nacchio must surmount a higher burden than the Rules of Evidence, that in addition to relevance under Fed.R.Evid. 401, he “must show that the information would be helpful to his defense” and that “where the Defendant seeks to discover or

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use classified information the Court must apply a materiality test as well as a relevance test.”

Government Response at 3. This is a misreading of the law. Earlier this month, United States District Judge Reggie B. Walton published a decision in *United States v. Libby*, -- F.Supp.2d --, 2006 WL 2692740 (D.D.C. September 21, 2006).<sup>6</sup> The District Court there rejected the identical argument which the government asserts here. The Court definitively ruled that only “the Federal Rules of Evidence and the restrictions they impose control whether information subject to CIPA proceedings is admissible during a trial.” 2006 WL 2692740, \*1. The Court found that the cases relied upon by the government “ignore the clear language of the statute and the unambiguous mandate from Congress that the standard evidentiary rules applicable in federal courts apply with equal force in Section 6(a) hearings.” *Id.*, \*5. We submit that the law is clear that it is the Rules

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<sup>6</sup> For the Court’s ease of convenience, a copy of this opinion is attached as Exhibit 2.

of Evidence as applied in an ordinary trial setting that govern the admissibility of both classified and unclassified information at trial. *Id.*, \*6.

As elucidated during the sealed portion of the August 25, 2006 hearing, Mr. Nacchio's state of mind is an essential element of the charged offense, that is, an intent to defraud the buyers when he sold his shares of Qwest stock. (Sealed Transcript of Proceedings, 38:18 - 39:2 (August 25, 2006)) See *United States v. O'Hagan*, 521 U.S. 641 (1997); *Elbel v. United States*, 364 F.3d 127 (10th Cir. 1966), *cert. denied*, 385 U.S. 1014 (1967). Thus the government must not only prove that the "warnings" given to Mr. Nacchio were, in fact, material, but also that they motivated Mr. Nacchio to sell with the intent to defraud his buyers. Mr. Nacchio's reasonable belief concerning significant additional 2001 revenue from classified government

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work, which was not included in Qwest's public guidance and which motivated him to discount contrary views of others is, therefore, both relevant and highly probative of this scienter element, and clearly admissible under Federal Rule of Evidence 401. Also squarely at issue in this case is the defense of good faith, which the Court itself acknowledged during the August 25, 2006 hearing. (Sealed Transcript of Proceedings, 38:6-9 (August 25, 2006)) See *Steiger v. United States*, 373 F.2d. 133, 136 (10th Cir. 1967). These additional business opportunities go to the heart of that defense, as well.

**The Government Improperly Seeks To Use Section 6  
Of CIPA To Impose Its Version Of The Facts On The  
Defense And Prevent The Jury From Deciding Disputed Facts**

The government acknowledges that "[i]t is not the purpose of this pleading to controvert the alleged 'facts' in the § 5 Filing," but then immediately asserts that "they are, in almost every case, simply wrong." (Government Response at 2) In reality, a side by side comparison between

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Mr. Nacchio's Section 5 Submission and the substitutions the government has proposed reveals that the government seeks nothing less than to replace Mr. Nacchio's proffer with their own version of events. Resolving disputes of fact is not permissible in a CIPA § 6 hearing. Disputes of fact must be resolved by the jury. For the purposes of a § 6 hearing, it matters not whether the government contests Mr. Nacchio's assertions. It only matters whether those asserted facts are relevant to his defense. The rest is for the trial.

Moreover, the government's version of the "facts" continues to ignore information given to it by Mr. Payne when he was interviewed on November 14, 2005, just four days after Mr. Nacchio's counsel advised the Department of Justice that Mr. Payne could corroborate that Mr. Nacchio had a reasonable basis to believe that the guidance was correct. It will be recalled that just a few weeks before the indictment the defense offered to toll the statute of limitations and to make a proffer to the government in regard to the classified information which bore on Mr. Nacchio's state of mind. (See Exhibit 3, letters from Mr. Nacchio's counsel to Alice Fisher, Esq. dated November 2 and 17, 2005)

Instead, the government sought to seal off this defense by interviewing a number of witnesses, including Mr. Payne, having people say that all the "prospective" government work -- classified and unclassified -- was already in the guidance. And so, on November 14, 2005, just a month before the indictment, the government reached out to Mr. Payne for that purpose. Nonetheless, on that date, Mr. Payne told the government that prospective classified contracts were *not* included in the annual budgets and that he only identified classified contracts for inclusion in quarterly budgets if they had actually been awarded or were about to be awarded. (See Exhibit 1, the Form 302 from Mr. Payne's interview) In spite of that statement, which

appears two times in the Payne 302, in a volunteered filing on January 17, 2006, the government three times represented to the Court that all "prospective" government work for 2001 was included in the September 7, 2000 guidance. And they have repeated that at least four times in the present filing. (See Government Response at 9-10)

As we have already stated in papers filed with the Court, the government has been placed on notice of this information no less than five times: four times before the indictment, by letter dated November 2, 2005, when orally informed by Mr. Nacchio's attorneys on November 10, 2005, by Mr. Payne himself when he was interviewed on November 14, 2005 (memorialized in a FBI Form 302 memo) (see Exhibit 1), and in a follow-up letter from counsel to the Department of Justice on November 17, 2005; and after the indictment, in our May 1, 2006 Omnibus Discovery Motion at 9-16 and Exhibits C-G. [Doc. No. 65]

Despite this the government persists in proclaiming that Mr. Nacchio's account is "erroneous" and "untrue." (Government Response at 17, 18) The government continues to insist that its version of the facts -- that all *prospective* classified contracts for the entirety of 2001 were included in the September 7, 2000 guidance -- be adopted by the Court and therefore, the government argues, there is no right to use classified information at trial because Mr. Nacchio's assertions are false. (See Government Response at 8-12, 13, 17 (reiterating the position asserted in its January 17, 2006 "Memorandum Brief Regarding CIPA" [Doc. 20-1]))<sup>7</sup>

The government's reliance on Exhibits I and J of its Response is misplaced. Exhibit I is simply a report of actual revenue booked by Qwest in 2001 and 2002 from classified government

<sup>7</sup> Surprisingly, however, at one point the government confirmed Mr. Nacchio's and Payne's assertion, conceding that Qwest only "include[d] in its forecasts all such classified business *that had reached a sufficient level of certainty to be tracked*..." (Government Response at 13)

contracts in hand at the time. The ultimate amount of revenue booked in 2001 and 2002 has nothing to do with Mr. Nacchio's expectations in 2000 through May 2001 concerning revenue for the year 2001. For purposes of the defense of this case, which is based on Mr. Nacchio's state of mind and good faith, what is relevant is Mr. Nacchio's reasonable anticipations during the time he was trading as to the ability of Qwest to achieve the public guidance for the year 2001.

The government persists in ignoring what it was told during its interview of Mr. Payne about Exhibit J, an "initiative sheet" dated "as of April 13, 2001," which the government submits as "proof" that "all information concerning federal contracts and prospective federal business, classified or unclassified, that would or *might* produce revenue was included in Qwest's forecasts and reports, both internally and externally." (Government CLPA Memorandum at 4 (emphasis

added) [Doc. 20-1]) When the government interviewed Mr. Payne on November 14, 2005, Mr. Payne told them that he knew nothing about these initiative sheets:

Payne was asked about initiative sheets and he said he had not seen them, nor was he familiar with them. It was explained to him that deals were classified by and reported in initiative categories A, B or C depending on their likelihood of closing. He said it made sense, but that he was not familiar with it.

(See Exhibit 1 at 4)

More importantly, what Mr. Payne did know and what he told the government on November 14, was that he and Mr. Nacchio were aware of *prospective* classified contracts: "Nacchio would know about potential projects that were in the funnel" (Exhibit 1 at 2); "Nacchio was aware of the speculative government transactions, particularly the large ones" (*id.* at 3); and that these prospects were not included in the budgets that he prepared. Mr. Payne also told the government that he never shared that information with Qwest's budgeting personnel; he only

reported classified contracts to the company when they actually were awarded or were about to be awarded. Therefore, contrary to the government's assertion, these initiative sheets could not have included prospective classified work.<sup>8</sup> None of the information contained in Exhibit J, dated April 2001, was necessarily relevant to the projections made in September 2000 and confirmed thereafter.

Among the other things Mr. Payne told the government that day were:

- As "Senior Vice President and General Manager of the federal group" he was "very cautious about what he included in his reporting. He only included those deals that were ready for closure. Payne was guided by the booking guidelines that were very rigid. It was an audited process. He included all real revenue possible on a *quarterly* basis." (Exhibit 1 at 1, 4 (emphasis added))
- "The government process was long-term and Qwest focused on the short term. ~~No one ever asked how things were going to look six months from now. He [Payne] informed them how he expected to make his numbers and only included the government contracts that were pertinent to the time frame they were looking at, quarter-by-quarter.~~ There was always a strong possibility that circumstances could change. For instance, 80% of government contracts could be sole source contracts. ~~He only included those contracts that he had "won."~~ He would not have included those numbers he had not "won" and he would not set expectations that he would not be able to meet." (*Id.* at 3 (emphasis added))
- Finally, far from telling the government that prospective classified government projects, such as "Ferrari," would be "included on various schedules and forecasts, using... coded information" (Government CIPA Memorandum at 5-6 [Doc. 20-1]), Payne told the government unequivocally that project Ferrari was not included in his sales forecast, because the contract had not been signed, and that "[i]t would have been foolish, improper, and fraudulent to have included [Ferrari] in his revenue forecast." (*Id.* at 4) (emphasis added))

Thus, Mr. Payne's statements not only refute the government's factual assertion that all prospective classified government work "that might produce revenue" was "included in Qwest's

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<sup>8</sup> It must be remembered that the guidance was put out to the public on September 7, 2000 for the year ending December 31, 2001.

forecasts and reports," but support Mr. Nacchio's assertion that he had in mind prospective classified contracts when he weighed the "warnings" he received from persons who lacked any knowledge about these prospective revenues. We have already noted that the two main government witnesses confirmed that assertion by the contemporaneous statements which Mr. Nacchio made to them.

In the final analysis, for purposes of a CIPA determination of relevance and use, the government has offered nothing more than its preferred explanation as to the meaning of Exhibit J, with that explanation discredited by Mr. Payne's statements to the government on November 14, 2005.<sup>9</sup> But that dispute is not for CIPA resolution. Certainly, the government can offer its version of the facts at trial, Mr. Payne can testify to the contrary, and the jury can decide whom

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to believe. But the government may not ask the Court, under the guise of a Section 6 CIPA hearing, to adopt its version of the facts -- a demonstrably incorrect version, at that -- and to reject the facts set forth here, in our Section 5 Submission and in Mr. Payne's corroborating statement, and to cut off access by the defense to such further corroboration.

The government attempts to distract us from the issues by adducing "proof" that the actual revenue which Qwest ended up booking from classified contracts in 2001 was less than Mr. Nacchio hoped to receive. (See, e.g., Government Response at 11, 17) All that matters for purposes of the trial is what Mr. Nacchio reasonably thought would happen during the period he was selling stock. See, e.g., *Steiger*, 373 F.2d at 136 (retrospective view of what actually

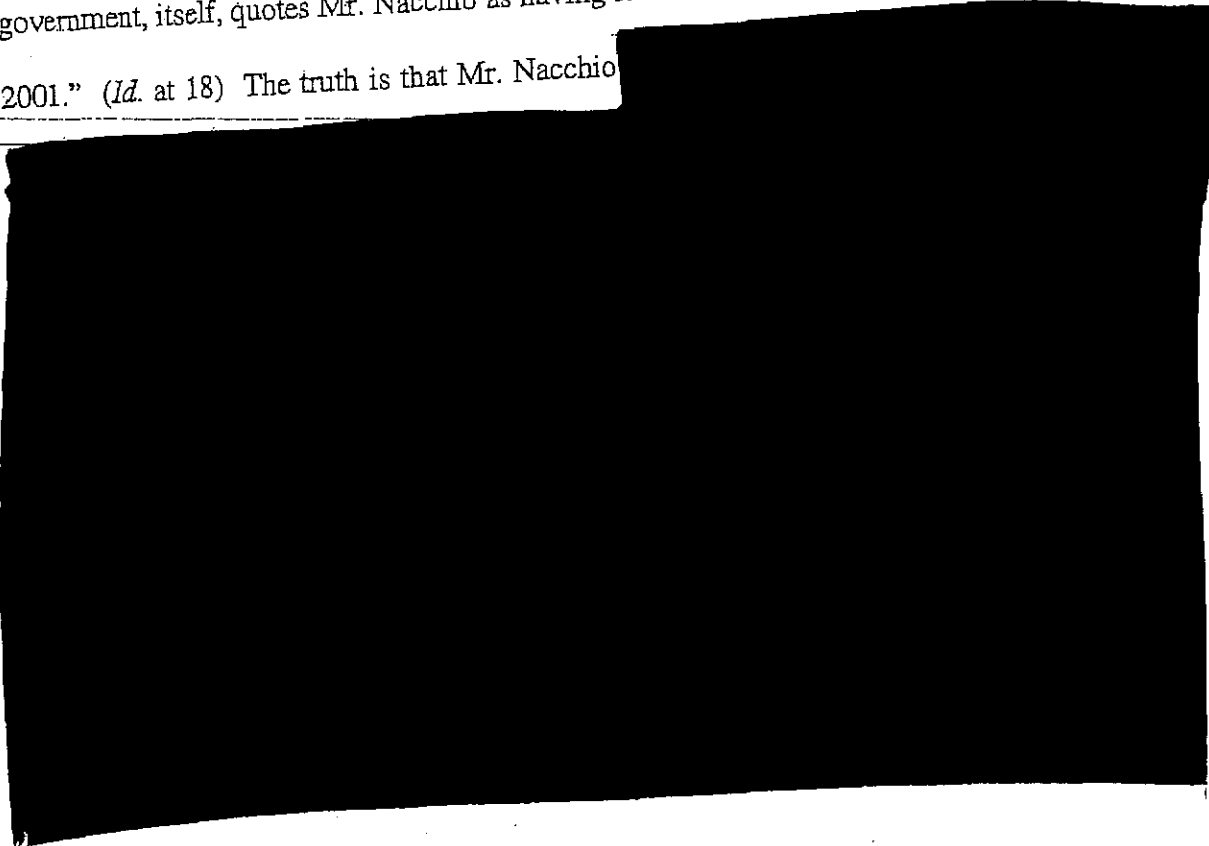
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<sup>9</sup> Indeed, the government does not, and cannot, explain how Exhibit J -- a document dated April 2001 -- includes what it claims were, at that time, mere prospects for classified contracts that were not likely to close, yet those same prospects were nevertheless included in the 2001 guidance, which was created on September 7, 2000, more than six months earlier.

happened does not defeat a good faith defense).<sup>10</sup> In any event, we intend to offer proof that Mr. Nacchio's expectations were frustrated in part, because he refused to accede to improper government requests, although he did not anticipate that retaliation.

In this regard, and apparently out of confusion, the government has merged two separate incidents into one. It rejects as "irrelevant" Mr. Nacchio's refusal to accede to [REDACTED]

[REDACTED] (see Mr. Nacchio's Section 5 Submission at 9 n.5) because "his disagreement with [REDACTED] arose after September 11, 2001." (Government Response at 18-19). At the same time, the government, itself, quotes Mr. Nacchio as having said the event took place "in late 2000 or early 2001." (*Id.* at 18) The truth is that Mr. Nacchio [REDACTED]



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<sup>10</sup> It is for this reason that Exhibit I to the Government Response is irrelevant: it only shows what actually ended up being booked by the end of 2001, *not* what Mr. Nacchio believed, during the trading period which ended in May, constituted viable prospects for the end of the year.