



THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

UNITED STATES OF AMERICA )

v. )

ZACARIAS MOUSSAOUI )

Criminal No. 01-455-A  
Hon. Leonie M. Brinkema

**DEFENDANT'S REPLY TO  
GOVERNMENT'S INITIAL CIPA SECTION 6 RESPONSE**

Defendant, Zacarias Moussaoui ("Moussaoui"), through counsel, herewith files his reply to the Government's Initial CIPA Section 6 Response to Defendant's Section 5 Designations (filed Jan. 17, 2006, dkt. no. 1458) (the "Response"). The Response addresses three categories of designations: [REDACTED] "Enemy Combatants," "Purported Particularization of Prior Designations," and "Completely Irrelevant Items." Response at 4-7. Each of these categories is discussed in turn.

A. [REDACTED] Enemy Combatants

Approximately 21 of Defendant's CIPA § 5 designations consist of post-9/11 [REDACTED] statements from certain enemy combatant witnesses. As the Government correctly notes, all of these ECW statements but one [REDACTED] are the subject of pending litigation before the Court. The defense has proposed non-CIPA substitutions for these ECWs and, as indicated in previous filings with the Court, should the Court agree to those substitutions, then, barring some unforeseen circumstance, nearly all of these documents will no longer be needed and the § 5 designations for them will be withdrawn. The status for any remaining active designations in this category will be

[REDACTED]

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[REDACTED]

addressed in Defendant's Fifth Supplemental Status Report on his CIPA Section Five Designations, which will be filed later this week.

**B. Particularization of Prior Designations Under CIPA § 5**

Since the January 5, 2006 hearing, and in accordance with the Court's directions from that hearing, the Defendant has filed his Third and Fourth Supplemental CIPA § 5 Status Reports<sup>1</sup> in which he updates the Court and the Government on the status of his designations in certain categories of relevance and identifies the particular information he needs for all of the remaining active documents. Defendant will file his Fifth Supplemental Status Report this week addressing all of the remaining active CIPA designations. These filings comport with the Court's directions, and fully satisfy Defendant's obligations under CIPA § 5.

**C. Relevancy of Certain Designations Under CIPA § 6(a)**

As the defense noted in its Third and Fourth Supplemental CIPA Status Reports, the defense is prepared, at the Court's convenience, for § 6 hearings regarding the relevance and admissibility of all of the remaining active designations addressed in those pleadings. In its Response, the Government challenges the relevance of certain documents, to which the defense responds below.

Before doing so, however, it is necessary to address the admissibility standard that the Government adopts, to wit, that each item must be "essential to the defense." See, e.g., Response at Chart 2, item 11. This standard does not accurately state

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<sup>1</sup> The Government had not received the Fourth Supplemental Report before it filed the Response.

[REDACTED]

Fourth Circuit law. In *United States v. Fernandez*, the Fourth Circuit stated the test of admissibility as follows: "[*United States v.*] *Smith* requires the admission of classified information that is 'helpful to the defense of an accused, or is essential to a fair determination of a cause.'" 913 F.2d 148, 154 (4th Cir. 1990) (quoting *Smith*, 780 F.2d 1102, 1107 (4<sup>th</sup> Cir. 1985)) (emphasis added). Similarly, in *United States v. Moussaoui*, the Fourth Circuit stated:

In the CIPA context, we have adopted the standard articulated by the Supreme Court in *Roviaro v. United States*, 353 U.S. 53 (1957) . . . , for determining whether the government's privilege in classified information must give way. See *United States v. Smith*, 780 F.2d 1102, 1107-10 (4th Cir. 1985) (*en banc*). Under that standard, a defendant becomes entitled to disclosure of classified information upon a showing that the information "is relevant and helpful to the defense . . . or is essential to a fair determination of a cause." *Id.* at 1107 (quoting *Roviaro*, 353 U.S. at 60-61 . . . ); see *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990) (explaining that "*Smith* requires the admission of classified information" once the defendant has satisfied the *Roviaro* standard).

*United States v. Moussaoui*, 382 F.3d 453, 471-72 (4th Cir. 2004). Thus, all that the defense need show is that a particular document or information in a particular document would be helpful to the defense.

**PAGES FOUR THROUGH ELEVEN  
REDACTED  
IN THEIR ENTIRETY**

[REDACTED]

[REDACTED]

Conclusion

For the foregoing reasons, Defendant requests that the Court find that the CIPA designations addressed in Defendant's Third and Fourth Supplemental CIPA § 5 Status Reports comply with CIPA § 5 and that all of those documents and the documents discussed in Part C above are relevant and admissible in Moussaoui's defense.

Respectfully Submitted,  
Zacarias Moussaoui

By Counsel

[REDACTED]

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January 2006, a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David J. Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by hand-delivering a copy of same to the Court Security Officer.<sup>2</sup>

/s/

Kenneth P. Troccoll

<sup>2</sup> Pursuant to the Court's Order of October 3, 2002 (dkt. no. 594), on the date that the instant pleading was filed, a copy of the pleading was provided to the Court Security Officer ("CSO") for submission to a designated classification specialist who will "portion-mark" the pleading and return a redacted version of it, if any, to defense counsel. A copy of this pleading, in redacted form or otherwise, will not be provided to Moussaoui until counsel receive confirmation from the CSO and/or classification specialist that they may do so.

