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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CRIMINAL NO. 99-1417 JP
	)	
WEN HO LEE,	)	
	)	
Defendant.	)	

**GOVERNMENT'S MOTION FOR SUBSTITUTIONS PURSUANT TO CIPA § 6(c)(1)  
AND INCORPORATED MEMORANDUM OF LAW**

The United States of America, by and through its attorneys, Norman C. Bay, United States Attorney for the District of New Mexico, and George A. Stamboulidis, Assistant United States Attorney, pursuant to subsection (c)(1) of section 6 of the Classified Information Procedures Act, 18 U.S.C. app. III, § 6(c)(1), moves for the use of substitutions in lieu of disclosure at trial of certain specific classified information found relevant and admissible by the Court in its order of August 1, 2000, and requests an additional two weeks to submit additional proposed substitutions.<sup>1</sup>

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<sup>1</sup>CIPA § 6(c)(2) provides that the government may, "in connection with a motion under [CIPA § 6(c)(1)], submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information." This is a reference, of course, to the classified information that the government wishes to substitute for. The government will be providing such an affidavit prior to the hearing on this matter.

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### Procedural Background

The Court's August 1 Order generally concerns the use, relevance and admissibility at trial of the classified contents of Files 1 through 19 and Tape N,<sup>2</sup> as described in the Indictment, as to which defendant Wen Ho Lee ("provided notice on April 26, 2000, pursuant to CIPA § 5(a), of his intent to disclose at trial. These files, of course, are the very computer files that Lee is charged with illegally tampering, gathering and retaining. In addition, the Court's ruling addressed the issue of classified user manuals and material identification documents. User manuals are documents that serve generally as guides to the classified nuclear weapons simulation codes contained within the charged files. In the context of this case, material identification documents are internal Los Alamos National Laboratory (LANL) classified documents that expressly identify certain substances used in nuclear weapons and assigns each of them a unique number. They are linked to input decks, which appear in many of the charged files, because in some cases, but not all, the input decks identify substances only by number.<sup>3</sup>

The Court's ruling reflects that the parties agreed that the contents of these files were relevant and admissible for certain purposes, specifically, the issues of Lee's criminal intent, and whether the files are related to or connected with "the national defense," within the meaning of 18 U.S.C. § 793(c) and (e). In addition, the Court held that the contents of the files were relevant

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<sup>2</sup>Hereafter, unless specifically stated otherwise, any reference to "files" is intended to refer to both Files 1 through 19 and to Tape N.

<sup>3</sup>Input decks are alpha-numeric descriptions of the materials used in a nuclear device, and the geometry of the primary and/or secondary component of the device, at a particular moment during the nuclear detonation process. They are the input used by the weapon simulation code to generate a computer model of the device depicted by the deck as the device explodes. Some input decks identify the substances involved only by number, other input decks use numbers for some substances and expressly identify others. Both types are involved in this case.

and admissible as to the issue of whether the files constituted "Restricted Data," within the meaning of sections 225 and 226 of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2275, 2276. In addition, the Order indicates that the contents are relevant to allow the defense to challenge the credibility of government witnesses who testify as to the significance, sensitivity or readability of the files.

The Court's Order also explains how the file contents are relevant to the issues of Lee's intent and the national defense and Restricted Data elements. Specifically, the Court held the contents relevant in order to allow the defense at trial: (1)

(2) to present evidence that user manuals and material identification documents are necessary to understand the contents of certain files; (3) to contrast the contents of input decks with "a nuclear weapons blueprint," Order at 4; (4) to discuss the "benchmarking process," *id.*; (5) to present evidence that the classified nuclear weapons codes involved in the case<sup>4</sup> have "flaws and imperfections" in them, *id.* at 3; and (6) to present evidence that the files at issue related to Lee's work assignments at LANL.

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<sup>4</sup>The specific files or component files containing classified codes are: 1.2 (Code A Cray computer version); 2.1, 2.2, 2.5 - 2.13, 2.16 - 2.21, 2.24, 2.26, 2.27.1, and 2.27.3 (collectively, Code A Sun computer version); 4.12 (Code D 4.17 and 4.18 (each Code F 8 and 11 (each Code H, 13.3, 13.4, and 14.7 (each Code G, 16 (Code K, 18.1 (Code J); and N.1 (Code B). The foregoing list is based on the classified attachment to the government's letter to counsel for Lee dated July 7, 2000, a copy of which has been provided to the Court. In addition, Lee had stored one other classified nuclear weapon computer source code (Code J), on a directory he maintained on the open partition of the LANL computing system. Although not charged in the Indictment, this incident is discussed in the government's notice under Rule 404(b) of the Federal Rules of Evidence, filed on August 11, 2000.

The Court also found that, separate and apart from the file contents themselves, user manuals and material identification documents were relevant to the issue of Lee's intent and to Lee's ability to challenge the credibility of government witnesses who testify as to the readability of certain files. Id. at 4.<sup>5</sup>

As the Court has found the contents of the files relevant and admissible, the next step under CIPA is for the government to propose substitutions for Lee to use at trial in lieu of disclosing this classified information. A substitution can consist of "a statement admitting relevant facts that the specific classified information would tend to prove" or "a summary of the specific classified information." 18 U.S.C. app. III, § 6(c)(1). Such a substitution is adequate if the Court finds that "the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." Id.

Earlier in this case, Chief Judge Conway held that "when determining the use, relevance and admissibility of the proposed evidence, the court may not take into account that the evidence is classified." United States v. Lee, 90 F. Supp. 2d 1324, 1326 n.3 (D.N.M. 2000). Use,

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<sup>5</sup>Although Lee provided notice on April 26, 2000 that he intended to disclose the contents of the files at trial in order to make the point that some of them could not be understood without "proper user manuals or similar documents," he did not formally provide notice of his intent to disclose classified user manuals and material identification documents themselves.

provide formal notice that he intended to disclose the user manuals,

recent notice is scheduled for August 15, 2000,

On July 5, 2000 Lee did  
Code I) and Code B)

Although the hearing on this more

relevance and admissibility, of course, are the subjects considered by a court under CIPA § 6(a), and were considered by this Court when it issued its Order of August 1. Now that the Court must consider the adequacy of substitutions under CIPA § 6(c), however, it is proper for the Court to take into consideration that the evidence being substituted for is classified. United States v. Juan, 776 F.2d 256, 258 (11th Cir. 1985) (per curiam). Specifically, in considering a proposed substitution, it is proper for the Court to weigh the interests of national security against the need to provide Lee with a fair trial. See United States v. Fernandez, 913 F.2d 148, 161 (4th Cir. 1990). As the court held in Fernandez, "not every substitution that puts the defendant at a disadvantage need be rejected." Id. at 162.

#### Proposed Substitution Concerning

The government's proposed substitution covering these issues is currently being reviewed by the Department of Energy.

#### Proposed Substitution Concerning User Manuals and Material Identification Documents

The government proposes the following substitution concerning user manuals and material identification documents. With respect to user manuals, the government would admit to the following statement:

User manuals are classified documents that provide an overview of a particular classified nuclear weapons code, including the type of code, the physics options available in it, and the types of computers it runs on. The user manual governing code A explains how the code fits into the overall picture of nuclear weapons design, that is, how it interacts with other codes and with the nuclear weapon design process.

A user manual also provides instructions on how to start up the code, how to load an input file, and how to enter commands. Each includes explanations of: explanations of the

particular code's interaction with input decks, opacity files, equation-of-state files, and other data files. Each further provides a general overview and insight regarding how to set up particular problems, and how to turn on certain options, and provides descriptions of the commands used.

A user manual also includes a description of the output products generated by running a particular code.

User manuals are periodically updated and amended. During the period between \*\*\* and \*\*\*, the user manual for code A varied between \*\*\* and \*\*\* pages in length, the user manual for code B varied between \*\*\* pages and \*\*\* pages, the user manual for code G varied between \*\*\* pages and \*\*\* pages, the user manual for code I varied between \*\*\* and \*\*\* pages, the user manual for code J varied between \*\*\* and \*\*\* pages, the user manual for code K varied between \*\*\* and \*\*\* pages, the user manual for code \* varied between \*\*\* and \*\*\* pages, and the user manual for code \* varied between \*\*\* and \*\*\* pages.<sup>6</sup>

The foregoing substitution provides Lee with substantially the same ability to make his defense -- a defense in this instance tied to the fact that most of the codes at issue in this case<sup>7</sup> have classified user manuals associated with them that make them more "readable." The pertinent points for Lee's defense are that the user manuals are classified, i.e., difficult for an unauthorized user to obtain, and that they provide at least some assistance in operating and understanding the codes. Their specific content is not overly relevant.

With respect to material identification documents, the government proposes a substitution that would admit that specific input files involved this case identify the substances that make up a nuclear device by number, and not expressly, and that the number is only expressly identified in a

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<sup>6</sup>The government will provide Lee with the missing page lengths.

<sup>7</sup>There is no user manual specifically associated with (Code H).

separate classified material identification document. The government has not yet specifically analyzed each input file to determine which ones rely on such numbers in whole or in part.<sup>8</sup> Assuming this proposed substitution is approved by the Court, the government will do so and provide this information to the defense.

Such a substitution provides Lee with substantially the same ability to make his defense -- in this case that the input files lack "readability" without the relevant material identification documents. It is not necessary to this defense theory to disclose such an input file itself, which contains detailed information about the materials used in, and the geometry of, a nuclear device. Accordingly, by proceeding in this fashion, national security is protected.

#### Proposed Substitution Concerning Nuclear Weapon Blueprint

The government proposes the following substitution to address the issue of the distinction between an input deck and an actual "nuclear weapon blueprint."<sup>9</sup>

Certain information appears in a nuclear weapon blueprint that does not appear in an input deck. Typically, such information includes: (1) the express identification of particular materials used in the weapon, including, for example, the precise type of uranium or plutonium, (2) the shape, size, components and other features of the detonators, (3) the shape, size and location of the gas insertion device, and (4) the location and size of the tape joint of the radiation case.

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<sup>8</sup>Classified input decks are contained in files 2.15.13, 2.15.14, 2.15.17, 2.15.18, 2.15.19, 2.15.26, 3.1, 3.2, 3.4, 3.8, 4.23, , 6.1, 6.3, 6.6, 6.7, 9.1, 9.2, 9.3, 9.4, 9.5, 9.8, 9.9, 9.15, 9.16, 9.17, 9.18, 9.19, 9.20, 9.21, 12.14, 12.20, 12.21, 15.26, 15.27, 15.28, 15.29, 15.31, 15.46, 15.47, 15.48, 15.49, 15.50, 15.51, 15.52, 15.53, 17.2, 17.11, 18.6, 18.7, 18.8, 18.9, 18.19, 18.21, 18.22, 18.71, N.5, and N.6.

<sup>9</sup>LANL uses the term "assembly drawing" instead of "blueprint." There is no difference, however, between the LANL term and the general understanding of the term "blueprint."

The above substitution provides Lee with substantially the same ability to make his defense -- in this instance that nuclear weapons blueprints to which he had access at LANL were more sensitive than the input decks that he compromised. The above substitution is based on a comparison between the classified input deck in file 18.22 and the corresponding assembly drawing, but is generally accurate across the board. Not every assembly drawing at LANL has a corresponding input deck. Specifically, many assembly drawings provide far less detail than an input deck because they are at a larger scale. That is, input decks focus on the shape and components of a primary and a secondary, while assembly drawings look at a device from a larger point of view. Obviously, a substitution that focuses on information present in an input deck but missing from an assembly drawing is of no benefit to Lee. Furthermore, the government's national security interest in preventing the disclosure of detailed input decks that describe nuclear weapon primaries and secondaries is plain.

#### Proposed Substitution Concerning Nevada Test-site Data and Benchmarking

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

#### Proposed Substitutions Concerning "Flaws and Imperfections" in the Codes

##### 1. Substitution Concerning

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

2. Substitution Concerning Commercially Available Code

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

3. Substitution Concerning

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

4. Substitution Concerning Issue of Material Jetting Along Z-axis in Codes B

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

5. Substitution Concerning Issue of Code B's \_\_\_\_\_ and Code A's  
Modeling of Devices Using Insensitive High Explosives

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

6. Substitution Concerning Code B's \_\_\_\_\_ and Code A's  
Calculations of High-Explosive Burn Speed in "Shadow Regions"

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

7. Substitution Concerning Conservation of Energy in Code B

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

# SECRET/RD

8. Substitution Concerning

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

9. Substitution Concerning Code A and Yield Strength and Shear Modulus

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

10. Substitution Concerning Code A and "Sliding Lines"

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

11. Substitution Concerning Codes B and A and Certain Velocity Calculations

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

12. Substitution Concerning Code A and Terminating Lines

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

13. The Issue of Code A and Artificial Viscosity

The government is unable to propose a substitution with respect to this issue. Lee has argued that

In his July 25 submission the

defendant gives a specific example of such an equation and states that

Response of Dr. Wen Ho Lee to Government's Supplemental Filing Concerning Use, Relevance, and Admissibility of the Information Covered by the First CIPA § 5 Notice, at 15.

The government, however, has determined:

It is also not "arbitrary" in any sense of the term.

Prior to the hearing on substitutions, the government will attempt to discuss this issue with the defense further in order to determine whether a substitution is necessary.

14. Substitution Concerning Code A and Conservation of Computer Time

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

15. The Issue of Code A's

In his classified response submitted on July 25, 2000, Lee argues the government missed this point when the government, in its post-hearing submission of July 21, addressed the question of:

Response of Dr. Wen Ho Lee to  
Government's Supplemental Filing Concerning Use, Relevance, and Admissibility of the  
Information Covered by the First CIPA § 5 Notice, at 15.

However, the July 12 hearing transcript indicates that counsel for Lee stated:

Transcript at 89 (emphasis added). In fact, at no time did the defense ever bring up at the hearing (or in any pre-hearing submission).

Accordingly, the government has not yet explored this issue with its experts, but will do so in short order. The government will keep in mind the spirit of the Court's August 1 Order that "flaws and imperfections" are generally relevant. If there is any substance to Lee's contention that

the government will propose a substitution.

16. Substitution Concerning Code H and Adjustable Parameters

The government's proposed substitution concerning these issues is currently being reviewed by the Department of Energy.

Conclusion

For the reasons expressed above, the Court should accept the government's proposed substitutions under CIPA § 6(c) concerning the issues of blueprints, user manuals and material identification documents, and grant the government an additional two weeks to propose the remaining required substitutions.

Respectfully submitted,

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I hereby certify that a true copy of the foregoing document will be hand delivered to defense counsel of record as set forth below on the morning of August 15, 2000.



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