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September 6, 2001

Honorable Nicholas H. Politan
United States District Judge
King Building
50 Walnut Street
Newark, New Jersey 07101-0999

Re: United States v. Nicodemo S. Scarfo, et al., Crim. No. 00-404

Dear Judge Politan:

On August 23, 2001, the United States filed a Request for Modification of this Court's August 7, 2001 Order so as to comply with the procedures set forth in the Classified Information Procedures Act, Title 18, United States Code, Appendix III, (hereinafter "CIPA"). Defendant Scarfo has since objected to the Government's invocation of CIPA on the basis that the Government has not made a sufficient showing that the information concerning the Key Logger System has been properly classified.

Specifically, the defense has requested an affidavit by the Government which would include among other things (i) the official and the agency that authorized the components of the Key Logger System to be classified; (ii) the level of classification; and (iii) the date of classification (Defendant's Reply at 6). Defendant argues that the date of the classification of any part of the Key Logger System is most material (Defendant's Reply at 3) because if the Key Logger System was classified in order to avoid discovery, that would not be the proper classification envisioned by CIPA. While the United States disagrees with defendant's proposition, that issue is not relevant in the instant case since the components of the Key Logger System were not classified to avoid discovery.

Enclosed please find the Affidavit of Neil J. Gallagher, Assistant Director, Federal Bureau of Investigation dated September 6, 2001. As noted in Mr. Gallagher's Affidavit, all functional components of the Key Logger System utilized in the Scarfo

investigation were classified as "Secret" no later than November 1997, at least 14 months prior to the FBI Laboratory Division being asked to assist in the investigation.

This Affidavit should satisfy defense's concerns that components of the Key Logger System were properly classified pursuant to Executive Order 12958 and the Government should proceed under CIPA.

Respectfully submitted,

ROBERT J. CLEARY
United States Attorney

Ronald D. Wigler

By: RONALD D. WIGLER
Assistant U.S. Attorney

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA)
)
 V.)
)
 NICODEMO S. SCARFO, and)
 FRANK PAOLERCIO)

Criminal No. 00-404

HON. NICOLAS H. POLITAN, U.S.D.J.

AFFIDAVIT OF NEIL J. GALLAGHER

I, Neil J. Gallagher, Assistant Director, Federal Bureau of Investigation, hereby declare, under penalty of perjury, the following:

1. I am the Assistant Director for the National Security Division of the Federal Bureau of Investigation ("FBI"), United States Department of Justice, an Executive Department of the United States. In this capacity, I am responsible for the various counterintelligence investigations and operations of the FBI and have official supervision and control of the counterintelligence files and records of the FBI, including those relating to the use of electronic surveillance and technical search and seizure capabilities in support of national security operations. The matters stated herein are based upon my personal knowledge, my review and consideration of documents and information available to me in my official capacity, information furnished by Special Agents and other employees of the FBI and my conclusions based thereon. In this regard, I am familiar with the technology that was used by the Laboratory Division to capture the encryption key and key related

information¹ in support of the investigation of Nicodemo S. Scarfo (hereafter: the "Key Logger System" (KLS)). It is based upon that collective and specific knowledge, information and belief, which I, in fact, believe to be true, that I submit this affidavit.

2. On April 17, 1995, President William Jefferson Clinton signed Executive Order 12958 which, by its terms, became effective 180 days thereafter. Executive Order 12958 superseded prior Executive Order 12396 and mandated new procedures for classification. Specifically, Section 2.3 of Executive Order 12958 mandates that agencies with original classification authority issue "Classification Guides" to facilitate the proper and uniform derivative classification of information.
3. Section 1.1(g) and 1.4(a)(2) of Executive Order 12958, provide that "agency heads" have "original classification authority." Section 1.1(i) defines "agency" as any Executive Agency as defined in 5 U.S.C. §105 which, in turn, further defines an agency as any "Executive department, a Government corporation, and an independent establishment." The Department of Justice is an Executive department and the FBI is an Agency of the Department of Justice.
4. According to records of the Department of Justice, on October 24, 1996, then Attorney General Janet Reno delegated original classification authority to the occupants of the positions of FBI, Assistant Director of National Security Division (NSD) and to the FBI NSD Section Chief (NS-6)(FBI Security Programs Manager (SPM)).

¹Key and key related information refers to passphrases, passwords, encryption keys as well as the identity of the particular encryption algorithm used, and if public key encryption is used, the public and private keys used in the functionality of the encryption product.

5. Pursuant to section 2.2 of Executive Order 12958, the definition of "Use of Derivative Classification" makes clear that "[p]ersons who only apply classification markings as directed by a classification guide, need not possess original classification authority."
6. According to FBI records, in January 1997, then Assistant Director, National Security Division, Robert Bryant, being a person in a position having original classification authority delegated by the Attorney General, directed the issuance to the FBI, pursuant to Executive Order 12958, of a revised "Classification Guide" known as "G-3." The G-3 Classification Guide was issued by Mr. Bryant through then NS-6 Section Chief Robert Opfer who himself occupied a position which had/had original classification authority. Because the G-3 Classification Guide is Secret, its express terms cannot be disclosed in this affidavit. I am familiar with the terms and requirements of the G-3 classification guide, and in particular, I am familiar with those provisions of G-3 which, consistent with section 1.5 of Executive Order 12958 (e.g. scientific and technological matters relating to national security) prescribes the classification as "SECRET" to those techniques with certain specified characteristics and exempts those techniques from declassification pursuant to Section 1.5(d)(1) ("would reasonably be expected to . . . reveal an intelligence source, method, or activity, or a cryptologic system or activity"). I have reviewed the G-3 classification guide and it is my conclusion that the characteristics of the KLS technique are such that it is, and has been, appropriately classified under the provisions of G-3.

- 7. In addition, according to the FBI Laboratory Division, it is in possession of records which corroborate the fact that all functional components of the KLS utilized in the SCARFO investigation that are currently classified were previously classified and marked "SECRET" pursuant to the FBI G-3 Classification Guideline, either in their current form or in an earlier design, no later than November 1997.
- 8. According to the FBI Laboratory Division, it was first requested to assist in this investigation no earlier than January of 1999.
- 9. I have reviewed the relevant information relating to the KLS, considered the possible effects of disclosure, and have consulted with the FBI's Laboratory Division and other FBI personnel. As an FBI official with original classification authority, I have concluded that, consistent with Executive Order 12958 and the FBI G-3 Classification Guide, the details of the KLS technique have been appropriately classified at the "SECRET" level and should remain so classified on the basis that any unauthorized disclosure of the specific details of the KLS technique could reasonably be expected to cause serious damage to the national security of the United States.
- 10. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 06 day of September, 2001, at Washington, D.C.

Neil J. Gallagher

 Neil J. Gallagher
 Assistant Director
 National Security Division
 Federal Bureau of Investigation