

REDACTED

FILED WITH THE
COURT SECURITY OFFICER
CSO: [Signature]
DATE 10/31/06

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.

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

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 leave granted during the sealed proceedings of October 12, 2006, respectfully submits this Third Section 5 CIPA Submission.

I. INTRODUCTION

During the sealed portion of the proceedings of October 12, 2006, the Court granted leave to Mr. Nacchio to make supplemental Section 5 CIPA submissions, in order to provide additional detail as to the classified information which he reasonably expects to disclose or cause to be disclosed at trial. In his first two § 5 CIPA submissions, Mr. Nacchio sought to provide notice of a developing and blossoming relationship with U.S. government clandestine agencies, which

REDACTED

led to lucrative contracts for Qwest and, more to the point of this proceeding, the prospect of lucrative government contracts which Mr. Nacchio reasonably believed would justify the publicly announced guidance during the relevant indictment period.

Mr. Nacchio presented evidence of contacts with four agencies: [REDACTED]

[REDACTED] At the October 12, 2006 Section 6 hearing, after the Court made findings and conclusions (later reduced to writing in its October 24, 2006 "First Memorandum Opinion And Order Pursuant To Section 6(a) Of The Classified Information Procedures Act" (First CIPA Order), the Court acknowledged Mr. Nacchio's need to make supplemental Section 5 submissions as to areas preliminarily found too vague to be admissible and/or based on newly acquired information.

In his Third Section 5 CIPA Submission, Mr. Nacchio seeks to provide the detail concerning [REDACTED] that the Court found wanting and, in addition, submits additional classified information for the Court to determine use, relevance and admissibility. This Third Section 5 Submission comprises all additional potentially classified information which is presently known to the defense and believed to be relevant.

Commencing October 13, 2006, Mr. Nacchio was further interviewed by his counsel, counsel has conducted factual research, counsel has reviewed documents and has conducted such witness interviews it was able to arrange on limited notice. Mr. Nacchio now provides the following additional classified information which he intends to present at trial.

II. [REDACTED]

In the First CIPA Order, the Court ruled that with very limited exception, Mr. Nacchio's

Section 5 proffer concerning [REDACTED] was relevant, admissible and could be used at trial

However, the Court also directed Mr. Nacchio to provide as much detail as he could about his relationship with all the agencies. Consequently, we provide the following additional details.

In late 1997, Dean Wandry advised Mr. Nacchio that he had received a call from [REDACTED]

[REDACTED] Wandry reported that a general officer wanted to meet

Mr. Nacchio. [REDACTED] showed up two weeks later with a (three star) Lieutenant General and his aide, a First Lieutenant. The meeting took place in Denver, at 555 17th St. They told Mr.

Nacchio they'd heard about Qwest's new network. Mr. Nacchio described it to them and talked about his background at ATT, with which they were already familiar. They asked if the General and Wandry could then meet privately and Mr. Nacchio said yes.

The General and Wandry stepped into a separate conference room. The General told Mr.

Wandry that he ran the largest telecom operation in the world, he had looked at Qwest's network and he wanted to use it for government purposes. The General also told Wandry that he wanted

Wandry to meet with [REDACTED] within the next week at [REDACTED]. After the

people left that first meeting, Mr. Wandry told Mr. Nacchio that there was a big opportunity here for Qwest, and that [REDACTED] also wanted Mr. Nacchio to obtain a security clearance.

When Mr. Wandry arrived at [REDACTED] to meet [REDACTED] the next week, he

learned that he had already been granted security clearance and was "read in" to those programs relevant to [REDACTED] use of Qwest's network. Mr. Nacchio received his own clearance a short time later. [REDACTED]

¹ Mr. Wandry preceded Mr. Payne as manager of Qwest's government group.

The first Qwest project began with [REDACTED] putting out an industry wide Request for Information ("RFI"). Qwest, through Mr. Wandry, prepared a response to the RFI in an extremely short turn-around time. [REDACTED] quickly concluded that only Qwest had the capability to fulfill the contract requirements, which led to a phone call to Qwest shortly thereafter, informing them they would get the work. Mr. Nacchio then wanted to announce it publicly, but [REDACTED] refused permission. [REDACTED]

Mr. Nacchio understood at the time that this was the beginning of a relationship which had enormous potential for future work. This proved increasingly true as time went on. Indeed, in the Fall of 1999, when Mr. Wandry was leaving Qwest, he advised Mr. Nacchio that the relationship with [REDACTED] if managed correctly, would become extremely lucrative for Qwest.

When Mr. Payne replaced Mr. Wandry in August 1999, [REDACTED] was an still ongoing contract. [REDACTED] kept coming up with "Pearl Harbor" internet scenarios, that is to say, that the system might fail either through natural causes or under attack. These concerns caused the to continue expanding the project, purchasing multiple fiber pairs from Qwest in order to enhance redundancy.

In 1998, even before Mr. Payne took over for Mr. Wandry, [REDACTED] was expanded when

[REDACTED] came to Qwest with a project known at Qwest as [REDACTED]

identifies this project by the code name, [REDACTED] This was the construction of a fiber

optic network from Qwest's international gateway at [REDACTED]

where a local vendor then extended the network [REDACTED]

Mr. Wandry told Mr. Nacchio that [REDACTED] had a "big requirement" for a

fiber network to [REDACTED] Although the Court made a determination based only on the prior

submissions that the purpose of this network is not relevant, in this Third Section 5 CIPA

Submission we suggest that the jury must be allowed to hear about the purpose of the network in

terms of its vital role in the national defense, in order to appreciate the close role that Qwest

played with [REDACTED] In other words, [REDACTED]

[REDACTED] and the importance of these projects to national security was, in itself, a further

reason why Mr. Nacchio could reasonably and in good faith expect that promises of similar

future work from [REDACTED] were likely to be kept, particularly as they were for projects of such

importance.

Because of this [REDACTED] contract, Qwest acquired [REDACTED]

[REDACTED] again awarded this contract to Qwest as a sole source

project which might go as high as \$500 million. Although begun on Mr. Wandry's watch, the

project continued following Mr. Payne's arrival, in August 1999.

Our original submissions suggested that [REDACTED] generated revenue in late 1998 or

1999 in the range of \$150-200 million. It may be, however, that the revenue was generated in

1999, 2000 or perhaps even later since, although the project was initiated during Mr. Wandry's

tenure, it was put on hold due [REDACTED] and Senatorial maneuvering and did not get completed

until Mr. Payne was on the scene. We will not be able to be more precise until the return date of our 17(c) subpoena.

██████████ conducted semi-annual award fee ceremonies based on a company report card that rated over 60 parameters. The award fee was a \$1 million bonus. These events would often lead to conversations at a senior level, at which Qwest would be told that it had demonstrated unprecedented success in achieving its goals. Qwest achieved a rating of 96.

Qwest's success with ██████████ was so beyond the norm that Mr. Payne shared with Mr. Nacchio his increasing belief that ██████████ was serious about giving big new business to Qwest in 2001. ██████████ told Qwest that a rating of 96 was highly unusual and that most companies were only rated in the 70s. Indeed, ██████████ would come to Denver once a year and would want to meet personally with Mr. Nacchio. Mr. Payne would attend these meetings. Mr. Payne will testify to the unusually close nature of this relationship.

██████████ discussions with Qwest moved increasingly to work to be done OCONUS (outside continental United States). Mr. Nacchio met with ██████████

██████████ We are unable to give the exact dates of the meetings until the return of our Rule 17(c) subpoena, but we believe that they took place between September 2000 and February 2001. The discussions concerned the extension of the network that Qwest built for

into Europe and the Middle East. ██████████ represented that ██████████ was seriously interested in Qwest doing this project, which he stated would result in Qwest receiving greater revenue than in the prior project.

Qwest's European network ended at Prague, and Mr. Nacchio concluded that he would have to go out and get routes from there down through the Red Sea and into India to create a

fully global network.² Mr. Payne emerged from the meeting very optimistic about the prospect for future work, and he shared this with Mr. Nacchio.

The relationship between [REDACTED] and Qwest was sufficiently important to [REDACTED] that the Agency would constantly monitor Qwest's financial health, particularly after the "dot.com" bubble burst. Mr. Payne would get calls after a fluctuation in Qwest's stock price, seeking reassurance that Qwest remained ready, willing and able to continue performing for the agency.

On one occasion, Mr. Payne got a call from [REDACTED] during a time of media speculation over a Deutsche Telecomm bid for Qwest. [REDACTED] expressed concern at the prospect of a Qwest take over by a foreign company. This led to a meeting at which [REDACTED] sought to dissuade Qwest from considering such a merger by assuring Mr. Payne that there was great upside for the future.

III. [REDACTED]

Qwest had a few small contracts with [REDACTED] during Mr. Wandry's tenure at Qwest. In late December 1999, Mr. Payne met with Qwest government group staff members "to discuss the potential opportunity with the Maryland customer," with the expectation of Mr. "Nacchio becoming involved." (See Exhibit A, email from Robert Seidel to James Payne (December 28, 1999).) A follow-up meeting was held in mid-January 2000. A meeting with [REDACTED] personnel was scheduled for Mr. Nacchio's office in Denver for March 8, 2000, but was cancelled due to illness on the [REDACTED] side.

Qwest's serious involvement with [REDACTED] was initiated by its employees, and Mr. Payne was meeting with [REDACTED] headquarters as early as March

² Indeed, it was due to inter-connectivity among the agencies that Qwest's European network extended to Prague. [REDACTED]

2000. On July 6, 2000, Mr. Payne traveled to [REDACTED] to participate in a security briefing held in [REDACTED] (See Exhibit B, James Payne Outlook Calendar entry (July 6, 2000).) At this briefing, Mr. Payne was "read into" the various tickets which would allow them to discuss [REDACTED] programs with the agency. Next, in or around September 2000, as part of contract for an "Army customer" which wanted access to [REDACTED]

Mr. Payne had been working his way into a relationship with the agency. By early 2001, a new NSA project were being sought and had reached the point for Mr. Nacchio to join the effort to obtain the contract. This new NSA project was called "Groundbreaker," and Qwest's portion consisted of a \$50-100 million opportunity, planned for implementation in 2001, to construct a CONUS private fiber network and provide related network services. The contemplated work was similar to what Qwest had already done for [REDACTED]

[REDACTED]

In a March 13, 2001 email from Mr. Payne to a group including Mr. Nacchio, Mr. Payne wrote:

Attached is a one page "opportunity profile" for the NSA "Groundbreaker" that was profiled in today's Wall Street Journal. Qwest is on the CSC team. On February 27 Joe Nacchio and I met with this agency. General Hayden, the NSA Director was not available but we did meet with the lead NSA official that looks at "Commercialization". Qwest joined the CSC team in early 1999.

In addition to the above team we are "ghosting" NSA Groundbreaker by exploring the utilization of existing Qwest contract vehicles. Network service under Groundbreaker has been delayed until 2002.

(See Exhibit C, email from James Payne to a group including Joseph Nacchio (March 13, 2001)

(Bates No. QDSECAM0867435).)

Qwest was a sub-contractor/member of the Groundbreaker "Eagle Alliance," headed by managing partner Computer Sciences Corporation ("CSC"). The Groundbreaker project grew out of the aftermath from a fire at Ft. Meade which destroyed a large NSA data center. It was thereafter decided to outsource much of this work to private industry. The project was described in a July 31, 2001 press release issued by CSC as providing "secure and non-secure telephony and network services, distributed computing services, and enterprise and security management of the non-mission information technology infrastructure at NSA headquarters and surrounding offices." (See Exhibit D, CSC press release (July 31, 2001)

(<http://www.csc.com/newsandevents/news/1454.shtml>); see also Exhibit E, NSA press release (July 31, 2001) (<http://www.nsa.gov/releases/relea00034.crm>).)

As the March 13, 2001 email corroborates, Qwest was in active negotiations with NSA during February and March -- the heart of the time period when Mr. Nacchio was trading. Indeed, Mr. Payne's email makes clear that Qwest was "ghosting" the Groundbreaker project, which meant that Qwest was looking for ways to obtain an even greater portion of the work for itself, using "existing Qwest contract vehicles" such as [REDACTED]. We intend to prove that, had Qwest succeeded, it would have received a contract to build a private, fiber optic network for NSA similar to the ones it had already created for [REDACTED].

It was this pending opportunity that lead to Mr. Nacchio's first meeting with NSA, which took place on February 27, 2001 at the NSA Headquarters at Ft. Meade, Maryland. Mr. Nacchio

expected to discuss the \$50-100 million "Groundbreaker" opportunity at this meeting, and he thought great progress was made on the substantive discussions.

Mr. Nacchio

walked out thinking that the NSA \$50-100 million opportunity remained viable.

It wasn't until July 31, 2001, when Mr. Nacchio saw the public announcement of the Groundbreaker contract with Qwest left off the list of subcontractors, that he realized that his expectation for the work had been frustrated. We intend to prove that Mr. Nacchio's expectations during the period of his trading were reasonable

company prior to the merger with US West.

In a July 26, 2006 Amended Complaint that was filed in

McMurray, et al v. Verizon Communications Inc., et al, Index No. 06 CV 3650 (LBS)

(S.D.N.Y.)³ (see Exhibit F), the following allegations were made:

- "Within eleven (11) days of the onset of the Bush administration, and at least seven (7) months ~~prior to the attacks of September 11, 2001~~, defendant ATT began development of a center for monitoring long distance calls and internet transactions and other digital information for the exclusive use of the NSA." *Id.*, ¶ 81.

- "The center was put into development by ATT following a proposal by the NSA for the construction and development of a network operations center identical to ATT's own network operations center located in Bedminster, New Jersey for the exclusive use of the NSA." *Id.*, ¶ 82.

- "Such a data center would also enable the NSA to tap into any call placed on the ATT network and to monitor the contents of all digital information transmitted over the ATT network." *Id.*, ¶ 85.

- "Said data center would enable the NSA to tap into any phone line and to monitor any digital transfer of information on ATT's networks including voice telephone calls, facsimile transmission and all internet traffic." *Id.*, ¶ 87.

- "The NSA program was initially conceived at least one year prior to 2001 but had been called off; it was reinstated within 11 days of the entry into office of defendant George W. Bush." *Id.*, ¶ 89. "The NSA program was code-named *Pioneer-Groundbreaker* and was also

³ By August 9, 2006 Order of the Multidistrict Litigation Panel, this matter was among 16 cases transferred to the Northern District of California for coordinated or consolidated pretrial proceedings.

known at ATT Solutions division as GEMS (Groundbreaker Enterprise System)." *Id.*, ¶ 90 (emphasis added).

We have been told by plaintiff's counsel in the *McMurray* matter that these allegations have been confirmed by an AT&T employee who personally saw documents corroborating these facts. We thus intend to corroborate the accounts of Messrs. Wandry, Nacchio and Payne,

[REDACTED]


We recognize that the Court, on the

basis of our earlier Section 5 submission, has found that submission "too vague, conclusory and general to form the basis for any good faith influence that NSA was contemplating any contract with Qwest during the relevant time period." (See First CIPA Order at 22) Our present submission clearly overcomes our previous failure. The interview of Payne and the Payne email (Exhibit C) certainly provide the substantiation the Court found lacking in the earlier submission. Our present Rule 17(c) application, if granted, can provide even more.

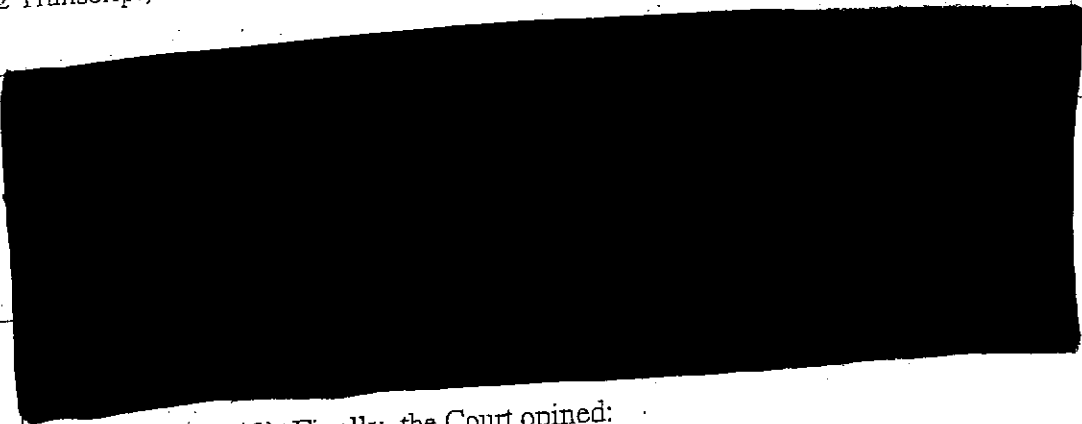
So substantiated, this proffer conforms to the Court's observations that a ruling of relevance would depend on the authentication that a contract between Qwest and NSA was more than a "gleam in the eye" or just a supposition. During the October 12, 2006 closed hearing, the Court stated:

It depends, it really depends. Suppose that the truth is that there was a \$200 million contract that NSA and Payne had been talking about, and Payne is reporting back to Nacchio and saying, we've got this \$200 million contract, it's going to be awarded to us in the next six months. And then Nacchio goes to this meeting in Washington, D.C., thinking he's going to firm up the contract, close the deal, and

[REDACTED]

 as he represents. And he says, no, and the contract suddenly dries up, that's relevant.

(October 12 Transcript, 65:1-13) The Court went on to note:

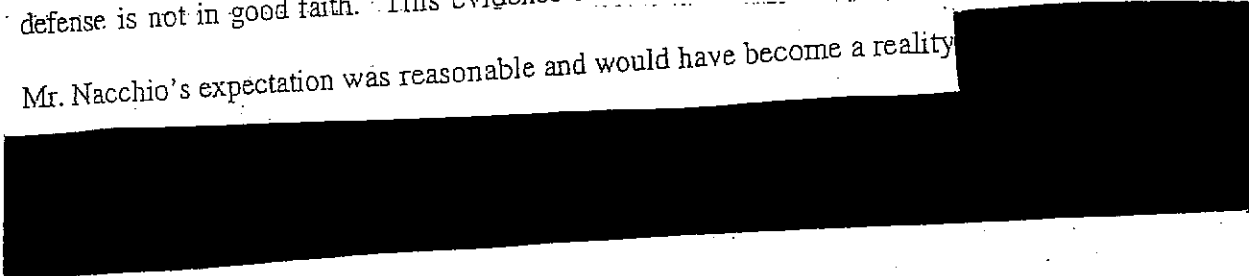


(October 12 Transcript, 66:7-18) Finally, the Court opined:

All right. I understand what is being said now. And the Court believes that it is still relevant. ~~If there was such a contract to be awarded during the relevant time and as a matter of fact that contract was not awarded because of Mr. Nacchio's reactions, then the fact that it was not awarded or that he did not learn of the reasons until after May 29 is something that certainly comes out in front of the jury and can be evaluated by the jury, but it doesn't make it inadmissible.~~

(October 12 Transcript, 68:9-17)

The evidence is also relevant for another reason. Specifically, the government persists in offering evidence that Qwest did not, in fact, achieve significant revenue in 2001 from classified government contracts, implying that Mr. Nacchio's expectations were unreasonable and his defense is not in good faith. This evidence counters any such inference by demonstrating that Mr. Nacchio's expectation was reasonable and would have become a reality



IV. [REDACTED]

Mr. Payne told Mr. Nacchio sometime in 1999 that there was a classified \$500 million world-wide RFI that would be awarded in pieces. [REDACTED]

[REDACTED] Mr. Nacchio knew, from Messrs. Wandry and Payne, that the agencies talked to each other about Qwest's capabilities and Mr. Nacchio understood that Qwest's prior successes for [REDACTED] had likely been conveyed [REDACTED]. Consequently,

Mr. Nacchio had a reasonable expectation that Qwest would receive some portion of this \$500 million contract.

[REDACTED] bid set up

By mid-August 2000, Mr. Payne's staff was working on a [REDACTED] as a one-year contract with four one-year renewal options, the overall value of which could exceed \$50 million. (See Exhibit G, email from Thomas Mallaney to Roger Hoaglund (August 17, 2000) (Bates No. QILL0002154762).) Mr. Payne's key staff person was Joe Canale

[REDACTED]

(See Exhibit H, email from Liza Burns to Chris Howell (January 22, 2001) (Bates No.

QILL0008093640)).

[REDACTED]

Mr. Payne explained that the contract improved the

[redacted] communications abilities from the post-World War II era to current technology, and that [redacted] was enthusiastic about it.

[redacted]

From [redacted] September 2000

through 2001, Mr. Payne shared with

wanted to extend what Qwest did in

Mr. Nacchio that there was a high probability that

[redacted] Europe to other parts of the world, including South America. [redacted] was extremely

pleased with the concept of private [redacted] networks, and asked Mr. Payne if Qwest could do

in South America what it was doing in Europe.

[redacted]

Indeed, Mr. Payne knew that five or six agencies

were all trying to solve problems in Europe, the Middle East and elsewhere, and they were

talking about the possibility of giving it all to Qwest.

Mr. Nacchio recalls the prospect of [redacted] business from the South America project, over

which Mr. Payne was in discussions [redacted] from the latter part of 2000 right through

the first half of 2001. These discussions prompted Mr. Nacchio to order and purchase capacity

in South America. [redacted] told Qwest it wanted a continental backbone capacity in South

America and back to Washington, D.C., [REDACTED] (See Exhibit I, email from William Heil to James Payne (September 27, 2001) (Bates Nos. QDSEC0563612/QILL0005317321).) This would be the same type of network as

which were up-front capital intensive and could "easily" be in the \$100-200 million range.

"Most likely" access cities

[REDACTED] were:

[REDACTED] "Good to have" cities

[REDACTED] were:

[REDACTED] (Id.)

Accordingly, discussions [REDACTED] over the award of a South American network continued unabated, although the project was "not coming together" as quickly as Qwest had expected in the early part of the year. (See Exhibit J, email from Roger Hoaglund to Dan Nimitz

dated July 3, 2001) That Qwest was frustrated at delays in July 2001 actually corroborates Mr.

Nacchio's recollection that, during the relevant period of the indictment, he had reason to believe that this contract would be forthcoming during 2001. The breadth of the expected contract is

further corroborated by a July 9, 2001 email, which noted that "[m]any of the RFPs will require both CONUS and OCONUS circuit pricing." (Exhibit K, email from Richard Fernandez to

Roger Hoaglund (July 9, 2001). In other words, the network would extend from the United States (CONUS) into South America (OCONUS). The constant inter-connectivity between

agencies is illustrated by the question in the email, "[w]hy can't we get it cheaper from [REDACTED]

[REDACTED] of course, was the Qwest code name for [REDACTED]

[REDACTED] to the [REDACTED]

[REDACTED] network.

V. DISA

When [redacted] entered into its contract with Qwest for the network which became known as [redacted] it included an option for another clandestine agency to build its own private fiber optic network. Impressed by [redacted] success and upon the recommendation of [redacted] [redacted] took advantage of this and exercised the option. Dean Wandry informed Mr. Nacchio that DOD wanted to have Qwest build a CONUS fiber network, as Qwest had done for [redacted]. This was necessarily prior to August 1999, when Payne succeeded Wandry.

[redacted] was so successful that, at some point, a DISA representative told Mr. Payne that it would prefer that Qwest didn't do anything but classified work in the area of private fiber networks.

Accompanied by Mr. Payne, Mr. Nacchio met twice with General Raduege in his DISA capacity, first in June 2000 and again in September 2000 (Mr. Nacchio also met with General Raduege as part of their joint participation in NSTAC). The June 2000 meeting was at an army base in northern Virginia. [redacted] was already well under way and Mr. Nacchio knew this was an outgrowth from Qwest's earlier success with [redacted]. They discussed business opportunities with DISA.

The second meeting occurred in the fall of 2000. It was attended by Messrs. Nacchio and Payne, the latter having had earlier meetings with General Raduege. Mr. Nacchio knew that [redacted] was still expanding in CONUS, and there was now interest further expanding the network OCONUS, to Europe. Mr. Nacchio left the second meeting confident that significantly more business would be forthcoming from DISA. General Raduege was responsible for all DOD telecommunications contracts. Ferrari and Moby Dick are each different internal Qwest code