UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Criminal No. 10-225 (CKK)
	)	
v.	)	Filed with Classified Information Security Officer
	)	
STEPHEN JIN-WOO KIM,	)	CISO [signature]
	)	
Defendant.	)	Date 28 JUNE 2013

DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S RULINGS ON HIS THIRD MOTION TO COMPEL DISCOVERY

Defendant Stephen Kim, by and through undersigned counsel, hereby moves this Honorable Court for reconsideration of its rulings on defendant's third motion to compel discovery (regarding "national defense information"). Defense counsel feels compelled to bring such a motion in this instance, as the Memorandum Opinion's analysis of "information relating to the national defense" under 18 U.S.C. § 793(d) requires further consideration. The defense submits that the standard for reconsideration is met here, for at least three reasons:

- The Memorandum Opinion rejects the construction of § 793(d) adopted in *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), because it would require the jury to "second guess" the classification status of the information at issue. Opinion at 9. This holding contradicts the Court's prior ruling on defendant's motions to dismiss, which held that if the defendant "intends to argue that the information he is charged with leaking was previously disclosed *or was not properly classified*, he may do so as part of his defense." *United States v. Kim*, 808 F. Supp. 2d 44, 55 (D.D.C. 2011) (emphasis added). The Memorandum Opinion also relies on a case, *Scarbeck v. United States*, 317 F.2d 546 (D.C. Cir. 1962), that did *not* involve the Espionage Act

or "information relating to the national defense," but rather addressed an entirely separate statute (50 U.S.C. § 783(b)) that is not at issue in this case.

- The Memorandum Opinion states that the Fourth Circuit's interpretation of the statute in *Morison* does not apply in this case because it was adopted "as a means to avoid potential overbreadth issues," and Mr. Kim "has not brought an overbreadth challenge in this case, raising only a vagueness challenge." Opinion at 7. In fact, the Fourth Circuit adopted a limiting construction in *Morison* to cure both vagueness and overbreadth, *see* 844 F.2d at 1063, 1071, 1084-86, and courts in the Fourth Circuit have continued to apply *Morison* to vagueness challenges. *See, e.g., United States v. Rosen*, 445 F. Supp. 2d 602, 620-22 (E.D. Va. 2006); *United States v. Kiriakou*, No. 1:12cr127, 2012 WL 3263854, at *5-*6 (E.D. Va. Aug. 8, 2012).
- The Court states that "at least one court has utilized" the definition of "national defense information" adopted in the Memorandum Opinion, citing *United States v. Abu-Jihaad*, 600 F. Supp. 2d 362 (D.Conn. 2009). *Abu-Jihaad*, however, cites with approval the same Fourth Circuit authority rejected by this Court. *See, e.g.*, 600 F. Supp. 2d at 385, 387-88. The court in *Abu-Jihaad* also permitted both sides to introduce substantial evidence as to whether the information at issue was potentially damaging to the United States or helpful to a foreign nation. *Id.* at 384-86. *Abu-Jihaad* thus does not support the denial of the defense's requests to access the same type of material in this case.

In addition, the D.C. Circuit has not opined on these issues, but the Fourth Circuit has done so often. The Memorandum Opinion creates a clear split in authority where there is no compelling reason to do so. If the defense and the Fourth Circuit's interpretation ultimately

prevails, the fact that discovery was limited in this case (or the jury was instructed) based upon a faulty reading of the statute could prove particularly problematic. The defense respectfully submits that it is manifestly unjust to subject Mr. Kim to a different legal standard than that which would apply if the government chose to file this case on the other side of the Potomac River, particularly at this early stage of the litigation.

INTRODUCTION

The defendant's third motion to compel discovery sought the production of documents addressing whether the information allegedly disclosed to Mr. Rosen constituted "information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation." 18 U.S.C. § 793(d). In support of its motion, the defense relied on a line of Fourth Circuit cases holding that, to avoid constitutional concerns, the statutory phrase "information relating to the national defense" must be limited to information that is both (1) potentially damaging to the United States or helpful to an enemy; and (2) "closely held," meaning that it has not been disclosed previously and is not available to the general public. *See* Third Motion at 2. These limitations were imposed to ensure that § 793 "avoids fatal vagueness and passes Due Process muster." *United States v. Rosen*, 445 F. Supp. 2d 602, 622 (E.D. Va. 2006); *see also id.* at 618-22 (tracing the history of the doctrine).

In its opposition to the defense's motion, the government urged the Court to reject Fourth Circuit precedent and hold that the government is *not* required "to prove harm – whether potential or actual – to the national security" to convict a defendant under § 793(d). Government's Omnibus Opposition at 52-58. Although the government had no objection to the requirement that "information relating to the national defense" must be "closely held," *see id.* at

66-67,[1] the government argued that Fourth Circuit precedent establishing the "potentially damaging" requirement was "not binding" and "inapposite."[2] *Id.* at 55. Rather than showing potential damage, the government asserted that "all the United States must show is that the disclosed information *relates to*, or is connected with, the national defense, which is a 'generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.'" *Id.* at 54 (quoting *Gorin*).

In its Memorandum Opinion, the Court rejected the Fourth Circuit's interpretation of the statute for five separate reasons, discussed in turn below. *See* Opinion at 7-10. The Court held that the government is *not* required "to show that the disclosure of the information at issue would be potentially damaging to the United States or might be useful to an enemy of the United States in order to satisfy the statutory requirement that the information relate to the 'national defense.'" *Id.* at 10.

For the reasons set forth below, the defense seeks reconsideration of the Court's ruling, which is inconsistent with precedent and vastly expands the universe of information falling under the draconian sanctions of the Espionage Act. Although the defense acknowledges that some of the specific language employed by the Fourth Circuit is imprecise, the defense respectfully submits that the limits placed on the scope of the Act by the Fourth Circuit are necessary to ensure that § 793(d) is not applied unconstitutionally. The defense recognizes that a motion for

[1] The government presumably accepts the "closely held" requirement because that requirement is grounded in the Supreme Court's decision in *Gorin*. *See Gorin v. United States*, 312 U.S. 19, 28 (1941) ("Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government."); *United States v. Heine*, 151 F.2d 813, 816-17 (2d Cir. 1945); *Rosen*, 445 F. Supp. 2d at 620.

[2] The defense notes that, like this case, *Morison* involved the alleged leak of national defense information to a reporter by a civilian member of the intelligence community. It is therefore one of the more "apposite" of the Espionage Act cases, as most such cases deal with actual espionage, *i.e.*, communications with purported spies or agents of foreign governments.

reconsideration is reserved for limited circumstances, such as where there is a need to correct "clear error," but submits that the Court's reasoning in rejecting the Fourth Circuit's interpretation meets this threshold.

LEGAL STANDARD

Although the Federal Rules do not expressly address motions for reconsideration in a criminal context, courts in this Circuit entertain such motions in appropriate circumstances. *See United States v. Bloch*, 794 F. Supp. 2d 15, 18 (D.D.C. 2011); *United States v. Sunia*, 643 F. Supp. 2d 51, 60 (D.D.C. 2009). Reconsideration is warranted if the moving party demonstrates, *inter alia*, that "there is a need to correct clear error or prevent manifest injustice," or that the Court "patently misunderstood the parties" or "made a decision beyond the adversarial issues presented." *Bloch*, 794 F. Supp. 2d at 19 & n.6. The moving party must also demonstrate "that some harm ... would flow from a denial of reconsideration." *Id.* at 19. Such harm is obvious in this case, as the Court's decision resulted in the denial of several of the defendant's discovery requests and will ultimately determine how the jury is instructed to apply the law.

ARGUMENT

In its Memorandum Opinion, the Court provided five separate reasons for rejecting the Fourth Circuit's interpretation of "information relating to the national defense" under § 793(d). *See* Opinion at 10. Each of these reasons is addressed in turn below.

I. The Fourth Circuit's Interpretation of § 793 in *Morison* Was Not Based Solely on Overbreadth

The first reason cited by the Court for rejecting the Fourth Circuit's interpretation of § 793 is that "the *Morison* court endorsed the trial court's instruction as a means to avoid potential overbreadth issues caused by the statute's use of the term 'national defense,'" and "[t]he

Defendant has not brought an overbreadth challenge in this case, raising only a vagueness challenge in prior motion practice." Opinion at 7. This description of *Morison* is incorrect.

The defendant in *Morison* challenged the constitutionality of § 793 on both vagueness and overbreadth grounds, *see* 844 F.2d at 1063, and the Fourth Circuit first discussed the trial court's instructions regarding "potentially damaging" within the context of vagueness, not overbreadth. *Compare id.* at 1071 (addressing defendant's vagueness challenge and discussing the trial court's instructions regarding "potentially damaging") *with id.* at 1075 ("Turning to the claim of overbreadth...."). Although the Fourth Circuit relied on the same limiting instructions to cure any overbreadth, *see id.* at 1076, nothing in the opinion indicates that the court's earlier analysis of vagueness turned on the defendant's overbreadth challenge, nor is there any reason to believe that the court would have interpreted § 793 differently if the defendant had raised only a vagueness challenge.

To the contrary, the concurring opinions in *Morison* make clear that the limits imposed by the Fourth Circuit were necessary to save the statute from being "both constitutionally overbroad and vague." *Id.* at 1085-86 (Phillips, J., concurring); *see also id.* at 1084 (Wilkinson, J., concurring) (discussing the limiting instructions as the product of "the requirements of the vagueness and overbreadth doctrines").[3] Consistent with this understanding, courts in the Fourth Circuit have continued to apply the *Morison* framework to both vagueness and overbreadth challenges. *See, e.g.*, *Rosen*, 445 F. Supp. 2d at 620-22; *United States v. Kiriakou*, No. 1:12cr127, 2012 WL 3263854, at *5-*6 (E.D. Va. Aug. 8, 2012) (applying *Morison*'s requirements to defendant's vagueness challenge). The courts have done so because, contrary to

[3] The concurring opinions are controlling on this point. Judge Wilkinson and Judge Phillips formed a majority holding that First Amendment interests were implicated, but that limiting instructions saved the Act from being unconstitutional. *See id.* at 1085 (Phillips, J. concurring).

the statement in the Memorandum Opinion, the "potentially damaging" requirement was *not* adopted solely as "a means to avoid potential overbreadth issues." The fact that Mr. Kim has not brought an overbreadth challenge in this case therefore is not a reason to reject *Morison*'s interpretation of § 793.

II. The "Reason to Believe" Scienter Requirement Demonstrates that the Nature of the Information Is an Element of the Offense

The second reason cited by the Court for rejecting the Fourth Circuit's interpretation of § 793 hinges on the specific language used in *Morison*. The Court noted that "[i]t would be illogical to require the Government to show that the information might be useful to *an enemy* of the United States when the scienter requirement [of § 793(d)] broadly refers to information that could be used to the advantage of *a foreign nation*." Opinion at 8 (emphasis added). The defense agrees with the Court that the "enemy" language employed in *Morison* is inconsistent with § 793(d), as the statute plainly speaks in terms of an advantage to any "foreign nation," not just an enemy.[4] *Id.*

By focusing on the specific verbiage employed in *Morison*, however, the Court did not focus on the defense's larger point, which is that § 793(d)'s scienter requirement supports the Fourth Circuit's interpretation of the statute. Section 793(d) requires the government to prove that the defendant had "reason to believe [that the information] could be used to the injury of the United States or to the advantage of any foreign nation." It would be illogical to require such a showing unless § 793(d) applies only to information that satisfies that criteria, *i.e.*, only to information that "could be used to the injury of the United States or to the advantage of any foreign nation." Indeed, it is difficult to understand how a reasonable person in Mr. Kim's

[4] However the inquiry is framed, the key point is that the Act is targeted at those disclosures which genuinely affect national security. *See Rosen*, 445 F. Supp. 2d at 639.

position could objectively believe that the information "could be used to the injury of the United States or to the advantage of any foreign nation" unless the information could be used for those purposes. By definition, it would be objectively unreasonable to harbor such beliefs about information that could not be used to the injury of the United States or to the advantage of a foreign nation.

While the defense thus agrees with the Court that the specific "enemy" language used in *Morison* is imprecise, the defense submits that it is equally clear that the scienter requirement makes little sense unless § 793(d) requires proof that the information "could be used to the injury of the United States or to the advantage of any foreign nation." Such an interpretation was correctly adopted by the Fourth Circuit to prevent the statute from sweeping in any information that "relates to, or is connected with, the national defense" in any way, as the government urges in this case. The fact that the Fourth Circuit used the term "enemy" rather than "foreign nation" should not serve as a basis for dispensing with this requirement altogether.

III. Classification Status Is Not Determinative of Whether Information Is "NDI"

The third reason cited by the Court for rejecting the Fourth Circuit's interpretation of § 793 is that, "in cases like this which involve the alleged unauthorized disclosure of *classified* information, the *Morison* approach invites (if not requires) the jury to second guess the classification of the information." Opinion at 9 (emphasis added). According to the Memorandum Opinion, "[u]nder the Defendant's construction of the phrase 'information relating to the national defense,' the Jury would be left to determine whether disclosure of this classified information 'would be potentially damaging to the United States or might be useful to an enemy of the United States," despite its prior classification as information, the disclosure of which 'reasonably could be expected to cause exceptionally grave damage' to national security." *Id.*

The Court states that it wishes to avoid the "absurdity" of converting the trial of the defendant "into a trial of the classifying party," relying on the D.C. Circuit's opinion in *Scarbeck v. United States*, 317 F.2d 546 (D.C. Cir. 1962). The Court's reasoning relies on a statute not at issue in this case and also goes well beyond any issue presented by the parties.

First, the Memorandum Opinion's description of this case as involving the "unauthorized disclosure of *classified* information" and its reliance on *Scarbeck* indicates that the Court based its decision on a separate statute, covering a different offense. *Scarbeck* was not an Espionage Act case.[5] *Scarbeck* involved a prosecution under 50 U.S.C. § 783(b), which makes it unlawful for any officer or employee of the United States to communicate any "information of a kind which shall have been *classified*" to "*an agent or representative of any foreign government.*" 317 F.2d at 550 (emphasis added). To secure a conviction under section 783(b), the government does *not* have to prove the defendant disclosed "information relating to the national defense," nor does it have to prove the defendant had "reason to believe" that the information "could be used to the injury of the United States or to the advantage of any foreign nation." *Compare* 18 U.S.C. § 793(d) *with* 50 U.S.C. § 783(b). Rather, section 783(b) requires the government to prove only "the fact of classification" and that the defendant knew or had reason to know that the information "has been so classified." *See Scarbeck*, 317 F.2d at 550; *United States v. Boyce*, 594 F.2d 1246, 1251 (9th Cir. 1979).

Scarbeck's reasoning does not apply in a case (like this one) brought under 18 U.S.C. § 793(d), which does not criminalize the mere disclosure of classified information. Section 793(d) applies only to the disclosure of national defense information, which the courts have repeatedly

[5] This is the defense's first opportunity to address the applicability of *Scarbeck*, as neither of the parties cited that opinion in their pleadings on the defense's motions to compel.

held is *not* synonymous with "classified information."[6] *United States v. Rosen*, 599 F. Supp. 2d 690, 694-95 (E.D. Va. 2009) ("NDI, it is worth noting, is not synonymous with 'classified'; information that is classified by the executive branch of government may or may not qualify as NDI .... [E]vidence that information is classified does not, by itself, establish that the information is NDI."); *see also United States v. Drummond*, 354 F.2d 132, 152 (2d Cir. 1965) (en banc) (approving jury instruction stating, "Whether any given document relates to the national defense of the United States is a question of fact for you to decide. It is not a question of how they were marked."); *Morison*, 844 F.2d at 1086 (Phillips, J., concurring) ("[N]otwithstanding information may have been classified, the government must still be required to prove that it was in fact 'potentially damaging ... or useful,' *i.e.*, that the fact of classification is merely probative, not conclusive, on that issue.... This must be so to avoid converting the Espionage Act into the simple Government Secrets Act which Congress has refused to enact."). There is therefore no reason to assume, as the Memorandum Opinion does, that "the *Morison* approach invites (if not requires) the jury to second guess the classification of the information" and risks "a trial of the classifying party," as classification status is not an issue that the jury will have to decide in this case.

Second, it is also well-established that the question of whether the information at issue satisfies the requirements of § 793(d) is a question for the jury, not a classification officer. *See Gorin*, 312 U.S. at 31-32. Since the Supreme Court's decision in *Gorin*, the courts have repeatedly held that whether information constitutes "information relating to the national defense" should be left to the jury, which should "examine the documents" and "consider the

[6] Conflating "classified information" with "information relating to the national defense" also undermines legislative intent, as Congress must be presumed to have acted intentionally when it used different language to describe the type of information falling under the two statutes. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

testimony of witnesses ... as to their content and their significance and ... the purpose and the use to which the information could be put." *Drummond*, 354 F.2d at 151; *see also Abu-Jihaad*, 600 F. Supp. 2d at 385-88. Indeed, this Court reached the same conclusion in its prior Order addressing the defendant's pretrial motions. *See Kim*, 808 F. Supp. 2d at 53.

The Memorandum Opinion is inconsistent with binding precedent, as it leaves nothing for the jury to decide. The Court reasons that the jury should not be asked to "second guess" the out-of-court judgment of a classification officer that the information at issue was of a type, "the disclosure of which 'reasonably could be expected to cause exceptionally grave damage' to national security." Opinion at 9 (quoting definition of Top Secret/SCI classification level). But if juries are not permitted to decide on their own whether disclosure of the information "reasonably could be expected to cause exceptionally grave damage to national security," there is nothing left to decide – by virtue of classification status, both the generic "connection with" or "relation to" national defense and § 793(d)'s scienter requirement would already be established.

Such reasoning is not only inconsistent with *Gorin*, but also would improperly broaden the sweep of the statute. As the parties and the Court have already seen in this case, the government's classification system is far from perfect. According to a recent study by the Brennan Center for Justice, government officials estimate that between 50% and 90% of "classified" information does not reflect "legitimate protection of secrets." Elizabeth Goitein & David M. Shapiro, *Reducing Overclassification Through Accountability* 4-6 (Brennan Ctr. for Justice 2011). The Brennan Center notes that each of seven separate governmental studies on the classification system since 1940 "has reported widespread overclassification," including the classification of such things as a federal study on "Shark Attacks on Human Beings" and a diplomat's description of a typical Dagestani wedding ceremony. *Id.* To prohibit juries from

questioning whether the disclosure of "classified" information "reasonably could be expected to cause exceptionally grave danger to national security" risks subjecting defendants to prosecution under the Espionage Act for the alleged disclosure of information which no reasonable person could view as threatening to national security or helpful to any foreign nation.

To take but one example from this case, during classified discovery the government produced an FBI-302 for a telephone interview with Mr. Kim's son, Edward. *See* Exhibit 1. At the time of the interview, Mr. Kim's son was eleven years old. The interview covered a single topic: whose phone number the FBI had just called (it was Edward's). Inexplicably, this FBI-302 was marked classified as the "SECRET/NOFORN" level, meaning that its disclosure "reasonably could be expected to cause serious damage to national security." *See* Omnibus Opposition at 4 n.1 (discussing classification levels).

Based on the Memorandum Opinion, the mere fact that some unnamed classification officer marked the Edward Kim FBI-302 "SECRET/NOFORN" precludes the jury from questioning whether its disclosure "reasonably could be expected to cause serious damage to national security." Anyone who disclosed the Edward Kim 302 without authorization could therefore be guilty of violating the Espionage Act, irrespective of whether a jury could ever conclude, on its own, that disclosure of the 302 was potentially damaging to the United States or helpful to a foreign nation. That should not be the law – and, in fact, is not the law in the Fourth Circuit, which has expressly limited the scope of § 793(d) to ensure that the Act only applies to the disclosure of information that is potentially damaging. But that is the result mandated by the Court's opinion, which flows from an erroneous conflation of "classified" information and "information relating to the national defense."

Third, the Memorandum Opinion's discussion of "second guessing" classification decisions also contradicts the Court's own prior rulings. In denying the defendant's pretrial motions, the Court expressly held, "To the extent that Defendant intends to argue that the information he is charged with leaking was previously disclosed *or was not properly classified*, he may do so as part of his defense, but such arguments do not render the statute vague." *Kim*, 808 F. Supp. 2d at 55 (emphasis added). That was the understanding upon which the defense has operated in planning a defense, making discovery requests, and submitting motions to compel discovery. The Court now states the opposite, holding that the classification status of the information at issue precludes the jury from considering whether its disclosure "'reasonably could be expected to cause exceptionally grave damage' to national security." Opinion at 9. The Memorandum Opinion does not cite or refer to the Court's prior ruling, nor does it explain how the defendant could argue that the information "was not properly classified ... as part of his defense" if the jury is not permitted to reconsider the classification of the information at issue. In light of the Court's own prior rulings (and the law upon which it was correctly based), the Memorandum Opinion's discussion of classification status is clearly erroneous.

IV. The Court's Opinion Is Inconsistent with Precedent, Including *Abu-Jihaad*

The fourth and fifth reasons cited by the Court for rejecting the Fourth Circuit's interpretation of § 793 relate to precedent in other Circuits. The Memorandum Opinion states that the Court was unable to locate a single case outside of the Fourth Circuit employing the *Morison* standard, *see* Opinion at 9-10, and that at least one court has utilized the broader definition of "national defense information" urged by the government. *Id.* at 10 (citing *United States v. Abu Jihaad*, 600 F. Supp. 2d 362, 385 (D. Conn. 2009), *aff'd*, 630 F.3d 102 (2d Cir. 2010)).

While it may be true that no court outside of the Fourth Circuit has expressly adopted the *Morison* standard,[7] phrasing the inquiry in this manner overlooks two salient points. First, given the nature of the offense and the geographic location of this nation's intelligence agencies, it is not surprising that most courts outside the Fourth Circuit rarely, if ever, have the opportunity to address these issues. The vast majority of such prosecutions take place in Virginia,[8] and the defense respectfully submits that it is manifestly unjust to subject Mr. Kim to a different set of legal standards than those that are applied on the other side of the Potomac, where most Espionage Act defendants are prosecuted.

Second, whether or not courts outside the Fourth Circuit have expressly adopted *Morison*, the fact remains that *no court* had expressly rejected *Morison* or its limiting construction of the statute until the Court's Memorandum Opinion. Although the Court draws support from the Connecticut District Court's decision in *Abu-Jihaad*, that decision does not reject *Morison*, nor does it directly address whether the government must prove that the information allegedly disclosed by the defendant could be used to the injury of the United States or to the advantage of any foreign nation. To the contrary, *Abu-Jihaad* cites *Morison*, *Rosen*, and several other Fourth Circuit cases with approval throughout the opinion. *See, e.g.*, 600 F. Supp. 2d at 385, 387-88.

Moreover, *Abu-Jihaad* also makes clear that the court permitted both sides to introduce substantial evidence regarding whether the information disclosed by the defendant could be used to the injury of the United States or to the advantage of any foreign nation. The defendant was permitted to introduce evidence that the information was not "national defense information" because it was inaccurate and "flat wrong," *see id.* at 384-86, the same argument made by Mr.

---

[7] Some Espionage Act cases remain sealed, so it is difficult to know for certain.

[8] Just recently, the government brought its complaint against Edward Snowden in Virginia even though his actions took place elsewhere.

Kim in this case. To rebut that evidence, the government was permitted to introduce testimony from third parties who stated that they "would still have been concerned" about disclosure of the information because it eliminated "one of the key tactical elements that you like to have on your side."[9] *Id.* at 385-86. Although the weight of the evidence was sufficient to support a conviction, the court noted – consistent with Mr. Kim's argument in this case – that "completely inaccurate information" regarding the position of a group of battle ships (a topic that clearly "relates to" the national defense in the broader, *Gorin* sense) "may well *not* relate to the national defense" if there is a "large discrepancy" between the information allegedly disclosed by the defendant and the actual intelligence at issue in the case. *Id.* at 386 (emphasis added). That holding is entirely inconsistent with the standard advocated by the government and adopted by the Court in this case, which would ask only whether the information "referred to the military and naval establishments and the related activities of national preparedness." Opinion at 6.

In short, prior to this Court's Memorandum Opinion, no court had rejected *Morison* or limited the government's discovery obligations in the manner urged by the government. *Abu-Jihaad* is not to the contrary, as the parties contested both the accuracy of the information allegedly disclosed by the defendant and whether that information was potentially damaging to the United States or helpful to any foreign nation. The Court's Opinion thus parts ways with all prior Espionage Act cases as well as its own prior rulings, and subjects Mr. Kim to a legal standard that has not been applied to any other defendant over the past twenty-five years.

[9] The government was also apparently permitted to introduce testimony from third parties that the information allegedly disclosed "could be used to injure the United States." *Abu-Jihaad*, 600 F. Supp. 2d at 388. The opinion provides no indication that such testimony was limited to information known to the defendant at the time of the alleged disclosure.

CONCLUSION

For the foregoing reasons, the defense urges the Court to reconsider its rulings on the defendant's third motion to compel discovery (regarding "national defense information"). Applying the correct statutory definitions and requirements would result in the disclosure of additional material, *see* Opinion at 13, 15-17, and would ensure that further proceedings in this case are consistent with the Court's prior rulings.

Respectfully submitted,

DATED: June 28, 2013

/s/ Abbe David Lowell
Abbe David Lowell (DC Bar No. 358651)
Keith M. Rosen (DC Bar No. 495943)
Scott W. Coyle (DC Bar No. 1005985)
CHADBOURNE & PARKE LLP
1200 New Hampshire Ave NW
Washington, DC 20036

Counsel for Defendant Stephen Kim