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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Criminal No.: 10-225 (CKK)
	)	
v.	)	Filed In Camera and
	)	Under Seal with the Classified
STEPHEN JIN-WOO KIM,	)	Information Security Officer
also known as Stephen Jin Kim,	)	
also known as Stephen Kim,	)	
also known as Leo Grace,	)	
	)	
Defendant.	)	

GOVERNMENT'S MOTION FOR HEARING UNDER SEAL PURSUANT TO CIPA SECTION 6(a) AND NOTICE OF OBJECTIONS CONCERNING USE, RELEVANCE AND ADMISSIBILITY OF CLASSIFIED INFORMATION IDENTIFIED IN THE DEFENDANT'S FIRST CIPA SECTION 5 NOTICE

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(U)[1] **I. Introduction**

(U) The United States, by the United States of Attorney for the District of Columbia and the undersigned attorneys, respectfully requests that the Court conduct an in camera, under seal hearing pursuant to Sections 6(a), 6(b) and 8(b) of the Classified Information Procedures Act, 18

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[1] (U) The classification and control markings affixed to this memorandum and accompanying paragraphs were made pursuant to the requirements of Executive Order 13526 and applicable regulations. The classification level of this memorandum as a whole is the same as the highest classification level of information contained in any of its paragraphs. Each paragraph of this classified document is portion-marked. The letter or letters in parentheses designate(s) the degree of sensitivity of the paragraph's information. When used for this purpose, the letters "U," "C," "S," and "TS" indicate respectively that the information is either "UNCLASSIFIED," or is classified "CONFIDENTIAL," "SECRET," or "TOP SECRET." Under Executive Order 13526, the unauthorized disclosure of material classified at the "TOP SECRET" level, by definition, "reasonably could be expected to cause exceptionally grave damage to the national security" of the United States. Exec. Order 13526 § 1.2(a)(1), 75 Fed. Reg. 707 (January 5, 2010). The unauthorized disclosure of information classified at the "SECRET" level, by definition, "reasonably could be expected to cause serious damage to national security." Exec. Order 13526 § 1.2(a)(2). The unauthorized disclosure of information classified at the "CONFIDENTIAL" level, by definition, "reasonably could be expected to cause damage to national security." Exec. Order 13526 § 1.2(a)(3).

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U.S.C. App. 3 ("CIPA") to make all determinations concerning the use, relevance, and admissibility of classified information identified by the defendant in his notice under CIPA Section 5, filed on July 30, 2013 ("First CIPA Section 5 Notice"). As set forth more fully below, and as will be demonstrated at the hearing, the classified information that the defendant proposes to introduce at trial is irrelevant to any issue in this case, not helpful to the defense, does not overcome the government's classified information privilege, or is otherwise excludable pursuant to the Federal Rules of Evidence. Accordingly, this Court should order that none of it be disclosed at trial.

[redacted] In support of this Motion, the United States has filed with the Classified Information Security Officer, or her designee, for the Court's and the defendant's in camera review: (1) this classified Motion and Memorandum of Law, including Exhibits A-1 through A-9 and Exhibits B-1 through B-12; (2) the classified Declarations of [redacted] attached as Exhibits C-1 and C-2 hereto [redacted] and (3) a proposed order, attached as Exhibit D. The United States also relies on an Ex Parte Classified Addendum to the instant motion, to be filed ex parte, in camera, and under seal shortly with the Classified Information Security Officer, or her designee. The Ex Parte Classified Addendum concerns classified information that is plainly irrelevant to this prosecution and describes classified equities that have not previously been disclosed to the defense.

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(U) Section 6(a) further provides for the hearing to be held in camera with both parties present if the Attorney General certifies that a public proceeding may result in the disclosure of classified information. The undersigned will tender such a certification to the Court prior to the scheduled Section 6(a) hearing once a hearing date has been set and the completion of the parties' Section 6 briefing clarifies what classified information the defendant intends to litigate at the hearing.

(U) II. Factual and Procedural Background

(U) A. The Indictment

(U) On August 19, 2010, a federal grand jury in the District of Columbia returned a two-count indictment against Stephen Jin-Woo Kim. Count One charges the defendant with the Unauthorized Disclosure of National Defense Information, in violation of 18 U.S.C. § 793(d). The Indictment alleges that in or about June 2009, the defendant had lawful possession of information relating to the national defense – that is, a specific, uniquely-numbered intelligence report marked TOP SECRET//SENSITIVE COMPARTMENTED INFORMATION ("SCI")[2] that concerned intelligence sources and/or methods and intelligence about the military capabilities of a particular foreign nation – which information the defendant had reason to believe could be used to the injury of the United States or to the advantage of a foreign nation,

[2] [redacted] As demonstrated in the [redacted], the full classification markings on this intelligence report are themselves classified. Although the unclassified indictment refers generally to the markings as TOP SECRET//SENSITIVE COMPARTMENTED INFORMATION ("SCI"), the full classification markings are as follows: [redacted] 3630-09. For ease of reference, except where otherwise noted, these full classification markings are abbreviated herein [redacted]

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and that the defendant willfully communicated that information to a person not entitled to receive it, namely a reporter for a national news organization. Count Two charges the defendant with False Statements, in violation of 18 U.S.C. § 1001(a)(2). The Indictment alleges that on or about September 24, 2009, the defendant lied to agents of the Federal Bureau of Investigation ("FBI") with respect to his contacts with the same reporter.

(U) **B. <u>The Classified Information that was Unlawfully Disclosed</u>**

[redacted] The classified information at the core of this case, which the defendant is charged with unlawfully disclosing, concerns TOP SECRET//SCI [redacted]

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as [redacted]

[redacted] released an intelligence report, bearing the unique report number [redacted] 3630-09, containing this highly-classified information to certain Intelligence Community personnel through a [redacted] information database called [redacted] the TOP SECRET intelligence information from the [redacted] report was published by Fox News. Specifically, no later than at or around 3:16 p.m. on the afternoon of June 11, 2009, James Rosen, a Fox News reporter working out of the State Department headquarters building, published an article entitled "North Korea Intends to Match U.N. Resolution with New Nuclear Test" on the Fox News website ("the Rosen article" or "Mr. Rosen's June 11th article"). The Rosen article [redacted] contained in the [redacted] report. Further, the Rosen article revealed that the [redacted]

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[redacted] The defendant is charged with the unauthorized disclosure of the classified information from the [redacted] report to Mr. Rosen that appeared later that same day in the Rosen article [redacted] Needless to say, this classified information was not declassified before its disclosure to Mr. Rosen and Fox News, and its public disclosure was never lawfully authorized. Indeed, the classified information at issue in this case remains classified at the [redacted] level to this day.

(U) **C. Classified Discovery**

(U) Following his indictment, the defendant made voluminous discovery requests in this case, including requests that called for the production of classified material. The United States has produced over 3,200 pages in classified discovery to the defense. Each page produced in classified discovery has been uniquely identified by Bates number, beginning with CLASS_0000001. The United States advised the defense with every production that, by producing this classified material to the defense, it was not conceding that it was, in fact, discoverable. Indeed, the United States believes that it has far exceeded its classified discovery obligations in this case.

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(U) To expedite the production of this classified material to the defense, the United States made certain substitutions and redactions throughout the classified discovery to protect specific Intelligence Community equities that were plainly irrelevant to the subject matter of the charged unauthorized disclosure. In its prior discovery rulings, this Court authorized the government's substitutions and redactions for classified information at issue in this motion, including the government's substitutions for [redacted] See Memorandum Opinion (June 3, 2013), granting the government's First, Second, and Third CIPA Section 4 Motions. See also Memorandum Opinion (May 30, 2013), denying defendant's Fourth Motion to Compel.[3]

(U) **D. The Defendant's First CIPA Section 5 Notice**

[redacted] In his First CIPA Section 5 Notice, the defendant identified 21 categories of classified documents that he intends to disclose at trial. See First CIPA Section 5 Notice at 3-6. With only one exception concerning the government's substitution of the [redacted] report's [redacted] in the trial ready version of this document, the defendant's notice contains no argument or assertion concerning the use, relevance, or admissibility at trial by the defense of the documents identified therein. See id. at 2.

[3] (U) The United States redacted the classified internal FBI file number wherever it appeared in any document produced in discovery. Because the actual FBI file number has no conceivable relation to any issue in this case, the United States did not submit this redaction to the Court for its approval under CIPA Section 4. [redacted]

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(U) **E. The Defendant's Refusal to Meet-and-Confer Without Preconditions**

(U) At the government's request, the parties held a meet-and-confer session on September 3, 2013. As the undersigned prosecutors represented to the Court at the August 23, 2013, status conference, the government's intent in requesting the meet-and-confer session was to try to resolve or further narrow certain issues regarding the classified information identified in the defendant's First CIPA Section 5 Notice and thereby preserve the resources of the Court, the parties, and the Intelligence Community. To facilitate the parties' discussion at the meet-and-confer session, and at the defense's request, on August 27, 2013, the United States provided a detailed, written list of seven topics, and related questions, concerning the defendant's First CIPA Section 5 Notice that it believed – based on prior agreements and discussions with the defense – could be productively discussed, and potentially resolved, at the meeting. See Notice of Filing, ECF Docket No. 153, Exhibit 8 (classified letter, dated August 27, 2013). Unfortunately, no such discussion took place.

(U) At the meet-and-confer session on September 3, 2013, the defense stated its position that unless the United States first asserted in writing its "objections," document-by-document, to the classified material identified in the defendant's First CIPA Section 5 Notice, it would not engage in any discussion about the defense's intended use of that information at trial.[4] The

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[4] (U) The defense's suggestion during the meeting that it was the government's initial burden to establish the improper use, irrelevance, or inadmissibility of any material identified in its CIPA Section 5 Notice finds no support in the caselaw. In fact, under CIPA Section 6(a), the defendant bears the burden to demonstrating that the classified evidence it seeks to use at trial is relevant, will be properly used, and admissible. See United States v. Miller, 874 F.2d 1255, 1277 (9th Cir. 1989).

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defense also insisted that if the defendant were to agree not to use a particular piece of classified information identified in the government's August 27th letter, then the United States could not object to the defendant's use at trial of the remainder of any document in which that classified information was found. The undersigned prosecutors explained that what the United States was seeking in the meet-and-confer session was an agreement between the parties to preclude the use of certain categories of plainly irrelevant classified information that appeared throughout classified discovery, including in documents listed in the defendant's First CIPA Section 5 Notice (e.g., names of classified facilities, names of classified computer systems, names of types of classified documents, etc.). By such an agreement, the parties could have avoided the tedious exercise for both the parties and the Court of addressing that classified information in CIPA Section 6 proceedings.

(U) Because many documents identified in the defendant's First CIPA Section 5 Notice contain multiple classified information equities, the United States could not agree to the defense's condition. To take but one example, the United States could not accede to the defense's condition that if the defense agreed to forswear the use of the name of a classified computer system, then the United States would not object to the use of any other classified information contained in any document produced in classified discovery where the name of that classified system appeared. The undersigned prosecutors then offered to discuss each classified document identified in the defendant's First CIPA Section 5 Notice so that the defense's concerns, and the topics raised in the government's August 27th letter, could be addressed within

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the context of concrete examples. The defense refused that offer as well. The meeting ended without any progress on the issues raised in the government's letter. A week after the meeting concluded, the defense sent a letter detailing the multiple steps that it would require the United States to take before the defense would be willing to meet again to discuss the defendant's First CIPA Section 5 Notice. See Notice of Filing, ECF Docket No. 153, Exhibit 10 (classified discovery letter, dated September 9, 2013).[5]

(U) F. The Government's Unilateral Efforts to Narrow and Simplify the CIPA Issues this Court Must Resolve

(U) The United States has unilaterally gone to great lengths to narrow and simplify the CIPA litigation in this matter. On November 1, 2012, the United States advised the defense that it intended to seek to declassify for trial purposes the "core" documents produced in classified discovery once the jury was sworn. See Notice of Filing, ECF Docket No. 18, Exhibit 6 (classified discovery letter, dated November 1, 2012). The defense responded to that letter by suggesting that the government's representation was unreliable because it established only "an intent" to seek the declassification of the core material, not that those documents would, in fact, be declassified. See Notice of Filing, ECF Docket No. 118, Exhibit 6 at 2, n.2 (classified discovery letter, dated May 14, 2013). In response, on July 17, 2013, the United States reiterated its commitment to declassify the core classified documents for trial purposes when the jury is

[5] (U) The defendant's unwillingness to meet-and-confer without pre-conditions is unfortunate. In two recent cases, United States v. Ali Mohamed Ali, Cr. No. 11-106 (ESH) and United States v. Slough, Cr. No. 08-360 (RMU), the U.S. Attorney's Office worked constructively and successfully with defense counsel in multiple meet-and-confer sessions prior to the beginning of CIPA Section 6 proceedings to narrow and resolve classified information issues raised in the CIPA Section 5 Notices filed in those matters.

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sworn and provided the defense with a copy of the "trial ready" versions of those documents.[6] See Notice of Filing, ECF Docket No. 153, Exhibit 3 (classified discovery letter, dated July 17, 2013).[7] The parties have referred to this material as the "trial ready" documents.[8] As the trial ready documents will be declassified for use at trial when the jury is sworn, the United States has advised the defense that it did not need to notice those documents under CIPA Section 5, thereby narrowing the issues that the Court must consider in CIPA Section 6 proceedings.

(U) The defendant refused that offer as well. In his First CIPA Section 5 Notice, the defendant included the vast bulk of the classified trial ready documents[9] and challenged each and every substitution or redaction made to them, whether previously authorized by the Court for discovery purposes or not. See First CIPA Section 5 Notice at 3 (asserting the defendant intends to use in his case-in-chief at trial the "trial ready" documents "in their original form (i.e., without

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[6] (U) The government's representation concerning the trial ready documents was the end result of months of intensive effort by both the prosecution team and the Intelligence Community. The government's decision to declassify a broad swath of TOP SECRET//SCI intelligence information for trial purposes is extraordinary. Advising the Court and the defense of this decision well in advance of trial was (and is) intended to streamline and expedite the CIPA process.

[7] (U) In the event that there is no trial in this case, this material will remain classified.

[8] (U) The United States placed a second classified Bates number on the bottom left-hand corner of each trial ready document produced to the defense. For tracking purposes, the United States also left the original classified Bates number in the bottom right-hand corner of each trial ready document.

[9] (U) The only classified trial ready documents that the defendant did not identify in his First CIPA Section 5 Notice were the defendant's non-disclosure agreements and [redacted]

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additional [sic] substitutions, redactions, and markings)"). The United States declines the defendant's implicit invitation to re-litigate in CIPA Section 6 proceedings the substitutions and redactions that the Court authorized in the CIPA Section 4 proceedings. See Memorandum Opinion (May 30, 2013), denying defendant's Fourth Motion to Compel; and Memorandum Opinion (June 3, 2013), granting the government's First, Second, and Third CIPA Section 4 Motions. (If that is the defendant's intent, then he should seek reconsideration of the Court's prior rulings.) Instead, with respect to the trial ready documents identified in the defendant's CIPA Section 5 Notice, the United States focuses on the differences between the versions of those documents as produced originally in classified discovery and the versions produced as the trial ready set.

(U) Additionally, since the filing of the defendant's First CIPA Section 5 Notice, the United States has sought the Intelligence Community's further review of the documents identified in the defendant's notice to determine whether any of the material identified therein could be deemed unclassified or no longer classified. In Section IV. below, we have identified all such documents in each of the categories identified in the defendant's notice. Accordingly, those documents also do not need to go through CIPA Section 6 proceedings. To the extent that any of those unclassified documents are offered at trial by the defense, the Court can decide at that time whether to admit or exclude them, as it would in any case.

(U) All of the material from the defendant's First CIPA Section 5 Notice that remains is classified and should be reviewed by the Court to determine whether the defendant has met his

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burden of showing that it is relevant and at least helpful to the defense, admissible, and offered for a proper use at trial.[10]

(U) **III. Legal Standards**

(U) **A. Relevance and its General Limitations**

(U) Section 6(a) of CIPA requires that, once the government files its motion, the Court must conduct a hearing to make pre-trial "determinations concerning the use, relevance, or admissibility of classified information." 18 U.S.C. App. 3, § 6(a). "CIPA does not, however, alter the substantive rules of evidence, including the test for relevance: thus, it also permits the district court to exclude irrelevant, cumulative, or corroborative classified evidence." United States v. Passaro, 577 F.3d 207, 220 (4th Cir. 2009). The Federal Rules of Evidence define "relevant evidence" as evidence that has a tendency to make the existence of any fact of consequence in the case more or less probable. Fed. R. Evid. 401. Relevant evidence is admissible "except as otherwise provided by the Constitution of the United States, by Act of Congress, or by [the Federal Rules of Evidence]." Fed. R. Evid. 402. Evidence that is not relevant is not admissible. Id. Hearsay evidence is also not admissible, unless subject to an exception. See Fed. R. Evid. 801-807.

(U) As the Supreme Court has explained, a defendant's right to present relevant evidence "'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial

[10] (U) Barring any concessions by the defense in its opposition, the United States hereby notifies the defendant pursuant to CIPA Section 6(b) that the specific classified information that remains at issue is identified in Section IV. below for each of the categories of documents in the defendant's First CIPA Section 5 Notice.

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process.'" Rock v. Arkansas, 483 U.S. 44, 55 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)). Thus any claim that "the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible." Montana v. Egelhoff, 518 U.S. 37, 42 (1996) (plurality opinion). Relevant evidence offered by a defendant may be excluded where applicable procedural and evidentiary rules dictate. "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410 (1988).

(U) Additionally, as discussed below, various rules and privileges authorize or require that even relevant, non-hearsay evidence be excluded. For example, Rule 403 of the Federal Rules of Evidence provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence." Fed. R. Evid. 403. Moreover, where, as here, an evidentiary privilege applies to the proposed evidence, then even relevant evidence must be excluded under Rule 501 of the Federal Rules of Evidence.

(U) **B. The Classified Information Privilege**

(U) Prior to the enactment of CIPA in 1980, the Supreme Court recognized the existence of a classified information privilege in classified information. United States v. Yunis, 867 F.2d 617, 622-23 (D.C. Cir. 1989). "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Haig v. Agee, 453 U.S. 280, 307 (1981). As a

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result, "[t]he government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." Snepp v. United States, 444 U.S. 507, 509 n. 3 (1980) (quoted by Yunis, 867 F.2d at 623, and CIA v. Sims, 471 U.S. 159, 175 (1985)). Following this long-established precedent, the D.C. Circuit has repeatedly recognized the importance of the classified information privilege in classified information. Yunis, 867 F.2d at 622-23; United States v. Mejia, 448 F.3d 436, 455 (D.C. Cir. 2006).

(U) With this well-established classified information privilege as a backdrop, Congress enacted CIPA and its "mandates [to] protect a government privilege in classified information." Mejia, 448 F.3d at 455 (quoting Yunis, 867 F.2d at 623). One of CIPA's important mandates is the requirement that the defendant notify the United States of the classified information that the defendant intends to introduce at trial. 18 U.S.C. App. 3, § 5. After the defendant complies with that notice provision, then the district court "shall conduct" a hearing, upon the government's motion, to determine before trial the "use, relevance, or admissibility" of the classified information. 18 U.S.C. App. 3, § 6(a). The defendant bears the burden at the CIPA Section 6(a) hearing to show that the classified evidence is relevant and admissible. See Miller, 874 F.2d at 1277. Thus, the text of CIPA Section 6(a) instructs that the defendant must clear the evidentiary hurdle of "relevance," as well as the hurdles of "admissibility" and any limits on the evidentiary "use" of the classified information.

(U) One of the limits on "admissibility" and "use" of classified information at the time of CIPA's enactment was, and still remains, the classified information privilege in classified

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information. Although it is true that "CIPA creates no new rule of evidence regarding admissibility," Yunis, 867 F.2d at 623, the classified information privilege was not "new" at the time of CIPA's enactment in 1980. To the contrary, the D.C. Circuit in Yunis cited the Supreme Court's recognition of a classified information privilege decades prior to CIPA's enactment. Id. at 622 (citing C. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948) (recognizing classified information privilege), and United States v. Nixon, 418 U.S. 683, 710 (1974) (distinguishing classified information privilege from executive privilege)). Indeed, the recognition that national security information is protected by privilege dates back to the earliest days of the Nation's history. See United States v. Reynolds, 345 U.S. 1, 6-7 (1953); Totten v. United States, 92 U.S. 105, 106-07 (1875); United States v. Burr, 25 F. Cas. 30, 37 (C.C.D. Va. 1807). The classified information privilege derives from the President's Article II powers to conduct foreign affairs and provide for the national defense. Nixon, 418 U.S. at 710 (cited by Yunis, 867 F.2d at 623). The privilege also specifically covers classified information that, if disclosed, would disrupt diplomatic relations. Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983).

(U) C. Privileged Classified Information Is Inadmissible Unless Both Relevant and at Least "Helpful to the Defense"

(U) In light of the classified information privilege, the D.C. Circuit conditions the admissibility of classified information on a finding of relevance and, beyond that hurdle, a finding that the evidence is "helpful to the defense." Yunis, 867 F.2d at 622. In order "[t]o give content to the classified information privilege, Yunis I adopted the test that the Supreme Court had applied to the 'informant's privilege' in Roviaro v. United States, 353 U.S. 53 (1957)."

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Mejia, 448 F.3d at 455 (citing Yunis, 867 F.2d at 622). See also United States v. Smith, 780 F.2d 1102, 1108-09 (4th Cir. 1985) (en banc) (applying same test). The D.C. Circuit in Yunis explained that many of the same "sensitive considerations" that animated the informant's privilege in Roviaro – namely, promoting the ability of the government to gather information and to protect the Nation's security – also underlie the classified information privilege. Id. at 622-23. In Yunis, the defendant sought disclosure during discovery of classified tape recordings of his own conversations. 867 F.2d at 619. The D.C. Circuit concluded that "a mere showing of theoretical relevance" was insufficient to overcome the classified information privilege, even though disclosure of a defendant's own statements had become "practically a matter of right." Id. at 622. The D.C. Circuit held that the government's colorable assertion of the classified information privilege in classified information triggered a "second step" beyond a finding of mere relevance, specifically that defendant had the burden to show "materiality" or helpfulness to the defense. Id.

(U) Holding that the classified tape recordings in Yunis were not discoverable, the D.C. Circuit explained that "a mere showing of theoretical relevance" is insufficient to overcome the classified information privilege. Instead, as the Yunis court analogized, the "helpful to the defense" requirement is similar to the test to evaluate whether the government's deprivation of access to witnesses violates the defendant's trial rights: there must be a "reasonable likelihood that testimony could have affected the judgment of the trier of fact." Id. at 624. Therefore, where the privilege in classified national security information applies in this case, the Court must determine that the information is both relevant and helpful to the defense. In addition, as

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discussed more fully below, the Court should also weigh the government's privilege against the degree to which the evidence is helpful to the defense before moving on to other considerations of admissibility.

(U) D. The Need to Protect Classified Information Can Outweigh the Defendant's Interest in Using the Information at Trial

(U) Even where classified information is relevant and helpful to the defense, the classified information privilege is not overcome unless a balancing of the need to protect the government's information against the defendant's interest in disclosure weighs in favor of the latter. See Smith, 780 F.2d at 1110; United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988). To be sure, the D.C. Circuit has twice declined to decide whether to adopt or reject this additional balancing-screening aspect of the classified information privilege, see Yunis, 867 F.2d at 625; Mejia, 448 F.3d at 457 n. 18. However, in Yunis, the D.C. Circuit "recognize[d] that the language in Roviaro suggests such a balancing test, and that two of our sister circuits [in Smith and Sarkissian] have applied such a test in the CIPA context." 867 F.2d at 625. Indeed, the Supreme Court in Roviaro described the informant's privilege – the very same privilege that the court in Yunis relied upon in supporting the classified information privilege – as the solution to a "problem that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." 353 U.S. at 62.

(U) Not only are the two privileges animated by the same "sensitive considerations" in promoting the government's ability to gather important information, Yunis, 867 F.2d at 621-22, the classified information privilege protects broader interests beyond the typical law enforcement or crime-fighting interest protected by the informant's privilege. Indeed, the government's

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interest in protecting national security is "compelling." Snepp, 444 U.S. at 509 n. 3 (quoted by Yunis, 867 F.2d at 623). The classified information privilege not only protects the contents of classified information for its own sake, but also protects the government's interest in keeping secret its "intelligence-gathering capabilities" and its "sources and methods."[11] Yunis, 867 F.2d at 623. Furthermore, the classified information privilege also protects the government's ability to conduct foreign affairs because the privilege protects information that is classified where disclosure would harm diplomatic relations." Ellsberg, 709 F.2d at 57. In light of the myriad compelling interests advanced by the classified information privilege, it makes little sense for the informant's privilege to provide the United States greater protection than the classified information privilege. Therefore, the same balancing that is employed in cases of the informant's privilege should be applied where the United States invokes the classified information privilege.

(U) The Fourth Circuit in Smith and the Ninth Circuit in Sarkissian recognized the Roviaro balancing test as the best means to accommodate the important national security concerns underlying the privilege, while also protecting a defendant's trial rights. In Smith, 780 F.2d 1102, the district court had deemed classified information admissible at trial in CIPA Section 6(a) proceedings based only on a finding of admissibility, without considering the government's asserted privilege. Id. at 1103. Consistent with Yunis, the Fourth Circuit, sitting en banc, held that while CIPA did not "alter the existing law governing the admissibility of

[11] (U) The motivation for protecting sources and methods are highly analogous to the reasons for protecting informants. Indeed, the sources of information subject to the classified [redacted]

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evidence," the existing rules of evidence were clear that "[n]ot all relevant evidence is admissible at trial." Id. Relevant evidence, the court explained, may be inadmissible because of common law privileges, given force through Federal Rule of Evidence 501. Id. at 1107. The Fourth Circuit recognized the classified information privilege, noting that the United States has "a substantial interest in protecting sensitive sources and methods," and the "gathering of such information and the methods used resemble closely the gathering of law enforcement information." 780 F.2d at 1108. The court rejected the defendant's contention that the privilege should only be considered in CIPA Section 6(c) proceedings, and rejected his argument that relevance was the only determination to be made by the trial court. Id. at 1110. The district court was directed to engage in Roviaro balancing to determine if the "the government's interest was superior, taking all proper factors into account." Id. at 1109.

(U) Likewise, the Ninth Circuit deemed "meritless" a defendant's argument "that CIPA forbids balancing national security concerns against defendant's need for documents" during CIPA Section 4 discovery. Sarkissian, 841 F.2d at 965. The Ninth Circuit similarly held such balancing was permissible to effectuate the privilege. Id. These decisions adopting the balancing of interests as part of the classified information privilege sensibly put that important privilege on a par with the informant's privilege.

(U) The Fourth Circuit has acknowledged that, at least in a case where the evidence at issue is "material testimony that is essential to [the] defense," "the 'balancing' we must conduct is primarily, if not solely, an examination of whether the district court correctly determined that

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information privilege may well be informants of sorts themselves.

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the information the Government seeks to withhold is material to the defense." United States v. Moussaoui, 382 F.3d 453, 476 (4th Cir. 2004). Moussaoui should not, however, be read as a retreat from the balancing set forth in Smith, as the Fourth Circuit has continued to rely on that case, observing that "CIPA provides a procedural framework by which a court balances the defendant's interest in a fair trial and the Government's interest in protecting national security information." Passaro, 577 F.3d at 219-20. See also United States v. Rosen, 557 F.3d 192, 195 n. 4, 198 (4th Cir. 2009) (applying balancing test at Section 6(a) stage). The Fourth Circuit continues to require that trial courts "balance the public interest in nondisclosure against the defendant's right to prepare a defense. A decision on disclosure of such information must depend on the 'particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the [evidence,] and other relevant factors." United States v. Abu Ali, 528 F.3d 210, 247 (4th Cir. 2008) (quoting Smith, 780 F.2d at 1107). "While the court must 'take into account the government's interest in protecting national security,' we have made clear that 'this interest cannot override the defendant's right to a fair trial.'" Id. at 248 (citation omitted).

(U) Although Yunis involved relevance determinations for purposes of discovery in CIPA Section 4 proceedings, rather than relevance and admissibility determinations in CIPA Section 6 proceedings, its reasoning should apply with equal force in both contexts. Indeed, the Fourth Circuit has voiced a strong preference for CIPA Section 6(a) proceedings as the most logical, efficient stage for invocation and consideration of the privilege. See, e.g., United States v. Zettl, 835 F.2d 1059, 1066-67 (4th Cir. 1987) ("the state secret and informer's privilege

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should be asserted in the § 6(a) hearings," but also can be raised during CIPA Section 6(c) proceedings); Passaro, 577 F.3d at 219-20; Rosen, 557 F.3d at 195 n.4, 198; United States v. Drake, No. RDB 10-181, 2011 WL 2175007, *7 (D. Md. June 2, 2011). Moreover, consideration of the classified information privilege only in CIPA Section 4 discovery proceedings would be nonsensical and provide little protection to the privilege where, as here, the United States has sought to expedite and facilitate litigation of the case by producing more information than required, some of which is subject to the classified information privilege. Smith recognized that the interests underlying the classified information privilege can still be protected even where the defendant has had access to the underlying information, because "a significant part of the risk of harm arises from disclosure to the public. The government's interest is still protectable although Smith may have had access to the information. The privilege is not extinguished by previous disclosure to the defendant alone. The government interest to be protected here includes disclosure of the information to the public." Smith, 780 F.2d at 1109.

(U) The United States acknowledges that a fellow member of this Court gave consideration to this issue and yet declined to recognize the classified information privilege, with the balancing test adopted in Smith, in CIPA Section 6(a) proceedings. See United States v. Libby, 453 F.Supp.2d 35 (D.D.C. 2006) (Walton, J.). The United States respectfully disagrees with that aspect of the Libby decision. The Libby Court recognized that CIPA's procedures "protect a government privilege in classified information," id. at 39 (quoting Yunis, 867 F.2d at 623), and embraced the Roviaro balancing test as the means for assessing that privilege. Id. at 41. Yet the Libby Court held that the classified information privilege and its attendant balancing

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test are to be applied only at the discovery stage, and never at trial, even though the Court acknowledged that "it is well settled that not all relevant evidence is admissible during a trial," and cited Federal Rule of Evidence 501 as "impos[ing] restrictions on the use of relevant evidence." Id. at 40.

(U) As recognized by Yunis, the classified information privilege has a longstanding pedigree at common law, and formed part of the backdrop on which both Rule of Evidence 501 and CIPA were enacted. Yet the Libby Court did not explain why it had chosen to treat the classified information privilege – alone among privileges – as the only one that applied only for discovery and never at trial. Nothing in CIPA purports to abrogate the classified information privilege or any other common law privilege. Federal Rule of Evidence 501, which also predates CIPA, contemplates the exclusion of otherwise admissible evidence on privilege grounds, including the government's privilege.[12] As recognized by Smith and the numerous cases that it cites, the common law classified information privilege could result in the exclusion of evidence from trial when the balance of factors weighs in favor of the government's interests. Smith, 780 F.2d at 1109. The Libby Court took the same position as the defendant in Smith, arguing that under CIPA, the government interests at stake in the classified information privilege could be

[12] (U) Indeed, though Rule 501 as enacted simply gave effect to then-existing common law and allowed it to further develop, the initial proposed rule sought to compel courts to recognize nine specific privileges, including "secrets of state and other official information" and "identity of informer." See Fed. R. Evid. 501, Advisory Committee Notes; Jaffee v. Redmond, 518 U.S. 1, 8 n. 7 (1996). The privileges enumerated for inclusion in Rule 501 were "thought to be either indelibly ensconced in our common law or an imperative of federalism." United States v. Gillock, 445 U.S. 360, 368 (1980). The rule ultimately was adopted without a fixed list "precisely because Congress wished to leave privilege questions to the courts rather than attempt [redacted]

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accommodated in discovery or by substitutions under CIPA Section 6(c), but never by exclusion of evidence on the grounds of privilege. But as the Fourth Circuit recognized, "Adoption of [that] argument would result in a substantive change in the law of evidence, exactly what Congress said CIPA was not designed to do." Smith, 780 F.2d at 1109. CIPA did not change the consequences of invoking the classified information privilege; it simply called upon the government to assert it in advance of trial, and provided a framework for doing so. Id.

(U) The holding in Libby rested on the Court's apparent belief that its decision was preserving the status quo rather than changing it. The Libby Court also was of the view that in enacting CIPA, Congress rejected the common law balancing test. This is a misreading of CIPA, which says nothing at all about what tests should be used to assess relevance, use, and admissibility, and certainly does not purport to abrogate the common law. The Libby Court, however, took such guidance from a fragment of CIPA's legislative history, pointing out that the Department of Justice had requested language in CIPA that would make evidence admissible only if "relevant and material." Libby, 453 F.Supp.2d at 40. Libby concluded that because Congress did not include the suggested language, it necessarily rejected that standard of admissibility. This argument might carry weight if Congress had attempted to craft any definition of admissibility in CIPA, but it did not. It is more accurate to say that Congress abandoned any attempt to define admissibility (and therefore give it a fixed meaning) through the provisions of CIPA, rather than to say that Congress specifically rejected the Roviaro standard that has universally come to define the classified information privilege at common law. This is

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to codify them." United States v. Weber Aircraft Corp., 465 U.S. 792, 803 n. 25 (1984).

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evidenced by the other side of the Congressional debate, which the Libby opinion ignored.

(U) Specifically, whereas the Department of Justice wanted language in CIPA requiring that evidence be "relevant and material" or "relevant and helpful" before it would be admissible, several Senators took the unprecedented position that the statute should make any relevant evidence admissible. See Senate Report 96-823, 96th Cong., (1980), p. 8. But instead of attempting to agree to a fixed definition of admissibility or to a codification of the law of the classified information privilege, CIPA's drafters left the common law as it was and noted that CIPA was "intended to retain current practices."[13] Id.; see also House Conference Report No. 96-1436, 96th Cong., (1980), p. 12 ("Nothing in the conference substitute [which became CIPA, as enacted,] is intended to change the existing standards for determining relevance and admissibility."). Congress thus specifically declined to adopt the very definition of admissibility that Libby embraced, one that "result[s] in a substantive change in the law of evidence, exactly what Congress said CIPA was not designed to do." Smith, 780 F.2d at 1109. Thus, CIPA left the common law untouched; the common law applies a classified information privilege to trial admissibility determinations; and consideration of the classified information privilege requires a balancing of the government's interests against the defendant's trial rights.

(U) As a practical matter, Libby's discovery-only rule does not adequately protect the interests underlying the classified information privilege, because it would only permit the United

[13] (U) The Congressional choice not to codify standards of admissibility and privilege in CIPA is in keeping with Congress' decision, when enacting Rule of Evidence 501, "to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis," Trammel v. United States, 445 U.S. 40, 47 (1980), "because Congress wished to leave privilege questions to [redacted]

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States to block disclosure of information or evidence in discovery and not, for instance, to seek the prohibition of testimony at trial that could reveal national security secrets. Further, Libby's discovery-only holding provides no guidance on how to handle a case such as this one, where the United States has expedited and facilitated pre-trial litigation by disclosing documents that it was not required to disclose in discovery and to which the privilege applies, while reserving its right to assert applicable privileges. As this Court has recognized, proceeding in any other fashion "would bring discovery in this (and likely every other case involving classified information) to a snail's pace as the Court mediates minor disputes at every step of the discovery process." Memorandum Opinion at 9 (July 24, 2013). The Libby holding would have the perverse effect of greatly slowing the course of CIPA litigation by requiring the United States to evaluate each and every page of potential discovery for the classified information privilege and to litigate any such privilege claim prior to making disclosures to cleared counsel pursuant to CIPA protective orders.

(U) By reading the classified information privilege to protect the United States only against disclosure in discovery, Libby ignores that "a significant part of the risk of harm arises from disclosure to the public," and the "government's interest is still protectable although [the defendant] may have had access to the information." Smith, 780 F.2d at 1109. The risk of disclosure at trial to the jury or the public is fundamentally different than the risk of disclosure to cleared defense counsel pursuant to CIPA protective orders, and merits separate consideration. See, e.g., United States v. Sterling, No. 11-5028, 2013 WL 3770692, *26-*29 (4th Cir. July 19,

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the courts rather than attempt to codify them." Weber Aircraft Corp., 465 U.S. at 47.

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2013) (where trial court permitted cleared defense counsel and trial jury to have a list of true names for covert government employees, Fourth Circuit reversed for abuse of discretion, ruling that the negligible utility the list provided to the jurors was outweighed by the grave risk to national security and witness safety).

(U) It should be noted that even in Libby, the Court ultimately made separate determinations that the evidence at issue in that case was both relevant and helpful to the defense, such that it would be admissible under the standard advocated by the United States, and further concluded that "the defendant's interest in putting on a complete defense to the charges against him outweighs the need to protect the classified information from disclosure." Libby, 467 F.Supp.2d at 3-4 n. 4. The result is that where the United States has asserted a classified information privilege over the admission of specific defense evidence at trial, no member of this Court has admitted that evidence solely on the basis that it is relevant, without also assessing the materiality of the evidence and the balance of interests. Given the advantages in making such a determination in CIPA Section 6(a) proceedings, before the consideration of substitutions under CIPA Section 6(c), the Court should make its determinations now as to whether the disputed evidence is relevant and at least helpful to the defense, and whether the interests underlying the classified information privilege outweigh the defendant's interests and warrant exclusion of the evidence.

(U) E. The Federal Rules of Evidence Permit Consideration of the Classified Nature of the Proposed Evidence and Prohibit Introduction of Such Evidence, Where Dangers of Unfair Prejudice, Confusion of Issues, Misleading of the Jury, and Cumulativeness Substantially Outweigh its Probative Value

(U) In any event, whether the Court were to follow Judge Walton's decision in Libby, or

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whether the Court were to conduct the additional balancing of the classified information privilege against the defendant's interest in using classified information at trial, the result should be the same in this case. The Court should exclude the remaining classified evidence that the defendant seeks to use at trial.

(U) Furthermore, when conducting the required balancing under Rule 403 of the Federal Rules of Evidence, this Court may properly consider the classified nature of the evidence in evaluating the dangers of unfair prejudice, confusion, misleading the jury, or waste of time. For instance, in United States v. Morison, 844 F.2d 1057 (4th Cir. 1988), a case involving the prosecution of a former defense department official for leaking classified information to the press, national security concerns served as the basis for the exclusion of otherwise relevant evidence under Rule 403. The defendant in Morison sought to introduce evidence at trial regarding the foreign countries with whom the United States shared intelligence information, as well as information the government had obtained regarding Soviet counterintelligence measures. 844 F.2d at 1078. The Fourth Circuit affirmed the district court's ruling that this evidence was inadmissible under Fed. R. Evid. 403, reasoning in part that disclosure would harm the national security:

> To require the Government to produce evidence of countermeasures by the Soviets would likely force the Government to disclose its ongoing intelligence operations in a critical area and might seriously compromise our intelligence-gathering capabilities. Such evidence would add little or nothing to defendant's defense but could be of great damage to our intelligence capabilities. We think the district judge correctly refused to be diverted into such excursions in the presentation of evidence which offered no particular benefit to defendant's defense but which would pose the likelihood of grave injury to our national interests.

Id.

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(U) Other courts have agreed that even where relevant, classified information can be inadmissible under Fed. R. Evid. 403 where it "will have the tendency to focus attention on what cannot be doubted is the controversial character of foreign covert intelligence and counter-intelligence operations" in a manner that is distracting to the jury, will be time-consuming, or will result in undue delay. United States v. Wilson, 586 F. Supp. 1011, 1016 (S.D.N.Y. 1983), aff'd, 750 F.2d 7 (2d Cir. 1984). See also Miller, 874 F.2d at 1277 (excluding classified information pursuant to Fed. R. Evid. 403 based on confusion of the issues, misleading the jury, and waste of time). "[A] defendant's right to present relevant evidence is not unbounded but rather is subject to reasonable restrictions," which "will not be deemed to abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" United States v. Lea, 249 F.3d 632, 642-43 (7th Cir. 2001) (quoting Rock, 483 U.S. at 56). Such reasonable restrictions can include barring the admission of relevant evidence that would be confusing or cause undue delay, United States v. North American Reporting, 740 F.2d 50 (D.C. Cir. 1984), or excluding evidence where common law privileges apply. Lea, 249 F.3d at 641-43 (rejecting defendant's claim that district court violated his right to present a defense by relying on the marital communications privilege to preclude the testimony of a witness).

(U) IV. The Designated Classified Information is Irrelevant, Not Helpful to the Defense, Inadmissible or is Otherwise Excludable under the Federal Rules of Evidence

(U) For the convenience of the Court, the United States will address each of the categories of classified information that the defendant seeks to use at trial under the same

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headings as provided in his First CIPA Section 5 Notice. Preliminarily, the defendant's notice is devoid of any argument or assertion in support of the use, relevance, or admissibility of any of the classified information designated in it (but for one exception, discussed below). The United States will, therefore, have to await the defendant's brief to see what evidentiary theory (or theories) he sets forth as to each item of classified information designated in his notice, before it can respond meaningfully. As mentioned, at the CIPA Section 6(a) stage the defendant has the burden of establishing the use, relevance, and admissibility of each and every item of classified information that he intends to use at trial. Because the basis for the defendant's offer of classified information as evidence at trial is uncertain at this time, the United States expressly reserves its right to challenge the admission of such evidence on any ground, including under Fed. R. Evid. 401, 402, and 403. In any event, it generally appears that the defendant may seek to introduce at trial the classified documents designated in his First CIPA Section 5 Notice to impeach potential government witnesses, to challenge the government's assertion that the defendant disclosed information that was closely held, or to try to present a third-party perpetrator defense.

(U) **A. <u>The "Trial Ready" Documents</u>**

(U) As the trial ready documents will be declassified for use at trial when the jury is sworn, those documents do not need to go through the CIPA Section 6 proceedings. To the extent that any of those to-be-declassified documents are offered at trial by the defense, the Court can decide at that time whether to admit or exclude them, as it would in any case. Nevertheless, in his First CIPA Section 5 Notice, the defendant identified most of the trial ready documents for

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purposes of challenging in CIPA Section 6 proceedings every substitution or redaction the United States made to them. See First CIPA Section 5 Notice at 3 (asserting the defendant intends to use in his case-in-chief at trial the "trial ready" documents "in their original form (i.e., without additional [sic] substitutions, redactions, and markings)"). As an initial matter, the defendant's challenge to the substitutions and redactions that the United States made to those documents, for purposes of their original production in classified discovery, must fail. This Court authorized those substitutions and redactions pursuant to CIPA Section 4, when it granted the government's First, Second, and Third CIPA Section 4 Motions, see Memorandum Opinion (May 30, 2013), and relatedly when it denied the defendant's Fourth Motion to Compel. See Memorandum Opinion (May 30, 2013). This Court's rulings that the substituted or redacted material was irrelevant to any issue in this case apply equally, if not more so, to the use of that same material at trial. The United States will not re-litigate here the propriety of substitutions and redactions that the Court has already authorized pursuant to CIPA Section 4.

(U) The United States made additional substitutions and redactions[14] to some of the trial ready documents for trial purposes. The additional substitutions and redactions reflect the portions of the documents that would remain classified once the jury is sworn, while the remainder of those documents would be declassified at that time. The Court should decide that the classified information underlying those additional substitutions and redactions is not relevant

[14] (U) In his notice, the defendant states that CIPA Section 6(c) permits substitutions but "does not authorize redactions." First CIPA Section 5 Notice at 2. Without conceding that is a correct interpretation of CIPA Section 6(c), CIPA explicitly authorizes the redaction – "excision" – of classified information from trial exhibits. See CIPA Section 8(b).

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or helpful to the defense and should not otherwise be admitted at trial by the defense.[15] To facilitate the Court's review of that material, Exhibit A includes two versions of each of the trial ready documents, separated by tabs that correspond with the numbering in the defendant's First CIPA Section 5 Notice. In the first version of each trial ready document, the underlying information that was substituted or redacted for trial purposes is uncovered (in other words, the document appears with all of the information produced to the defense in classified discovery). The substituted information is boxed in blue; the redacted information is boxed in red. The second version constitutes the same trial ready documents with the proposed substitutions and redactions for trial purposes (again, marked in blue and red boxes, respectively). A comparison of the boxed information in the two versions of the trial ready documents reveals the material that has been substituted or redacted for trial purposes and should assist the Court in determining the relevance, helpfulness, use, and admissibility by the defense of the underlying material at trial. As set forth more fully below, the defendant's request to use at trial the classified information underlying the substitutions and redactions in the trial ready documents should be denied.

[redacted]**1. The** [redacted] **report and its predecessor documents, including the "drafting" emails.**[16] The United States substituted or redacted the following

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[15] (U) The United States reserves the right to propose additional substitutions and redactions as deemed necessary depending upon any specific defense objections to the proposed trial ready set or additional information that the United States learns about the defense theories of the case.

[16] (U) The classified discovery versions of these documents are Bates numbered [redacted]

[redacted]

additional categories of classified information found in the trial ready versions of the [redacted] report and its predecessor documents:

[redacted]

[redacted] Declaration further describes these classified equities with respect to the [redacted] report and its predecessor documents. See ¶¶ 15-18 [redacted]; ¶¶ 19-21 [redacted]; ¶¶ 22-24, 27-32 [redacted], ¶ 33 [redacted]; ¶¶ 35-36 [redacted]; and ¶¶ 37-39

CLASS_0000001-0000024, 0001668-0001669. The trial ready versions are Bates numbered CLASS_0003551-0003574. Both versions can be found at Tab 1 of Exhibit A.

[redacted]

[redacted] None of the forgoing substituted or redacted information from those reports would be relevant or helpful to the defense at trial. Without conceding that such a defense could be properly presented at trial, the United States has provided the defense with all of the information in the reports that it might claim that it needs to present a third-party perpetrator defense: namely, the substantive classified information that the defendant is charged with disclosing (whether it appeared in the [redacted] report or its predecessor documents) and all information concerning the dissemination of the reports themselves. Even assuming that the defendant were to meet his burden of demonstrating that any of the substituted or redacted classified information is relevant and helpful to his defense, the United States either has proposed, or can propose in CIPA Section 6(c) proceedings, substitutions that will provide the defendant with the same, or substantially the same, ability to make his defense as would disclosure of the underlying classified information at trial.[17]

[redacted] The only portion of these materials that the defendant expressly challenges in his First CIPA Section 5 Notice is the excision from the [redacted] report's [redacted] First CIPA Section 5 Notice at 3. That classified information is neither

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[17] [redacted] Upon further review, there were a few erroneous redactions of [redacted] in the trial ready versions of those few documents. The defense already has the erroneously redacted information as originally produced in classified discovery. See, e.g., CLASS_0000019 [redacted] and CLASS_0001668 [redacted] Contemporaneously with CIPA Section 6(c) proceedings, the United States expects to file a motion in limine, seeking to protect [redacted] See footnote 31, below.

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relevant nor helpful to the defense at trial. The [redacted] does not say that the [redacted] Indeed, its states that [redacted] The statement is thus indeterminate, speculative, and incapable of proving, or even tending to prove, what the defense presumably would like to show at trial: that the intelligence information at issue was not closely held because it was already in the public domain.[18] Such speculation would be inadmissible at trial in any case. See, e.g., Marbury Law Group, PLLC v. Carl, 09-cv-1402, 2013 WL 4583558 at *10 (D.D.C. July 21, 2013) (Kollar-Kotelly, J.) (speculation is inadmissible as evidence because "witness testimony must be 'rationally based on the witness' perception.'") (quoting Fed. R. Evid. 701(a)); Stryker Spine v. Biedermann Motech GmbH, 684 F.Supp.2d 68, 99-100 (D.D.C. 2010) (Kollary-Kotelly, J.). This is especially so, when such speculation is weighed against the national security interest (protected by the classified information privilege) in not revealing what the Intelligence Community knows and does not know. See [redacted], ¶¶ 18, 20. See also Gorin v. United States, 312 U.S. 19, 29 (1941) (counter-intelligence reports could be used by a foreign government "as a check on this country's efficiency in ferreting out foreign espionage.").

[redacted] Further, the statement suggests nothing more than the

[18] [redacted] The United States has confirmed that the [redacted]

[redacted]

possibility that the intelligence information may have been [redacted] For this independent reason, the statement is neither relevant nor helpful to establish that the United States failed to keep "closely held" the intelligence information in the [redacted] report. Evidence suggesting that the [redacted] intelligence may have been [redacted] is irrelevant to whether it was in the public domain vis-à-vis the United States and would not demonstrate that the intelligence information at issue was not "closely held" by United States. See United States v. Abu-Jihaad, 600 F.Supp.2d 362, 387 (D. Conn. 2009) (information is not "closely held" only if it either (1) "has been made public by the United States Government and is found in sources lawfully available to the general public;" or (2) "where sources of information are lawfully available to the public and the United States Government has made no effort to guard such information"); United States v. Squillacote, 221 F.3d 542, 576-80 (4th Cir. 2000) (same); United States v. Dedeyan, 584 F.2d 36, 40 (4th Cir. 1978) (same).

[redacted] **2. The June 11, 2009 Fox News article written by James Rosen.**[19] The defense does not object to the government's redaction [redacted] Mr. Rosen's June 11th article. See First CIPA Section 5 Notice at 3, n. 2. (When the parties refer to

[redacted]

[19] (U) The classified discovery version of the June 11th article is Bates numbered CLASS_0000025-0000026. The trial ready version is Bates numbered CLASS_0003575-0003576. Both versions can be found at Tab 2 of Exhibit A.

[20] [redacted]

[redacted][21]) The defendant does object, however, to the classification markings that the United States has added to the portion-marked version of the June 11th article. The United States produced the portion-marked version so as to put the defendant on notice of the precise classified and national defense information that he was charged with disclosing and its proper classification. Without conceding that litigation over a CIPA Section 5 notice provides a vehicle for the defendant to object to the government's use of classified information at trial, the United States is willing to agree that the version of the article to be used at trial will not include classification markings. A version of the June 11th article, without classification markings, that the United States proposes to be used at trial can be found at Tab 2 of Exhibit A (behind the versions previously produced in classified discovery).

(U) **3. The FBI 302s relating to interviews of the defendant, along with agents' notes of those interviews and the defendant's investigative questionnaire.**[22] Even prior to producing these documents in classified discovery, the United States redacted the classified,

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[redacted]

[21] [redacted]

[22] (U) The classified discovery versions of these documents are Bates numbered CLASS_0000040-0000084. The trial ready versions are Bates numbered CLASS_0003577-0003621. Both versions can be found at Tab 3 of Exhibit A.

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[redacted]

internal FBI file number for the investigation that led to the defendant's prosecution.[23] It has no relevance to any issue at trial, and should remain redacted in any exhibit at trial wherever it appears.

[redacted] Additionally, the United States substituted or redacted the following general categories of classified information found in the trial ready versions of the defendant's FBI 302s, agents' notes, investigative questionnaire, and statement and waiver:

[redacted]

The Declarations filed in support of this motion further describe the basis for these classified

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[23] (U) The redactions of the FBI file number appear as "black outs" on the bottom or top of the defendant's FBI 302s (e.g., CLASS_0000040-0000041). As noted above, see footnote 3, the United States redacted the classified FBI file number wherever it appeared in any document produced in discovery.

[24] (U) The United States also redacted from the trial ready documents references to the June 12, 2009, Associated Press article entitled "South Korea Braces for 3rd Nuclear Test by North." After further consultation with the Intelligence Community, the June 12th Associated Press article was deemed to contain no classified information.

[redacted]

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information equities. See [redacted] at ¶¶ 22-24, 27-32 [redacted] ¶ 26 [redacted] ¶ 33 [redacted]; and ¶¶ 37-39 [redacted]. See also Ex Parte Classified Addendum (describing classified information equities relating to the last two bullet points immediately above). The United States will declassify for use at trial all of the remainder of the defendant's FBI 302s, agents' notes, investigative questionnaires, and statement and waiver. Thus, the defendant will have available to him all of the substance of his statements to the FBI concerning the charged unauthorized disclosure that he will need for purposes of preparing for cross-examination and, if necessary, impeachment of the FBI agents who may testify as to their content.[25] The United States will not elicit from those agents in its case-in-chief at trial any of the classified information underlying the substitutions and redactions from the defendant's statements to the FBI. Thus, none of that classified information would be relevant or helpful to the defense at trial. Even assuming the defendant were to meet his burden of demonstrating that any of it is relevant and helpful, the United States either has proposed, or can propose, substitutions that will provide the defendant with the same, or substantially the same, ability to make his defense as would disclosure of the underlying classified information at trial.

(U) **4. Photographs taken during the warrantless entries by law enforcement of the defendant's State Department office, of both the office space and documents contained**

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[25] (U) While the United States can offer the defendant's statements to the FBI against him, see Fed. R. Evid. 801(d)(2)(A), the defendant cannot offer documentation of those statements as substantive evidence at trial.

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therein. The photographs of the defendant's State Department office include many images of the defendant's handwriting. Because the photographs were of the defendant's office inside a Secure Compartment Information Facility (commonly known as a SCIF), they should undergo a classification review before their use at trial is decided. Because the defendant's handwriting is difficult to read, some of it is in Korean, and little of it contains internal sourcing information, the Intelligence Community has identified the photographs as among the "Treat As" material that will be "more difficult" to classified. The parties have discussed various options to minimize the burden of that review. These include having: (1) the parties identify from the available photographs those that they will seek to use at trial; (2) the defense provide a transcription of the defendant's handwriting in those photographs; and (3) the United States blur out the visible content of irrelevant material in the photographs to be used as trial exhibits. The parties' discussions are continuing, and the defense has agreed that the photographs do not need to be submitted for classification review until those issues are resolved. See CIPA Section 5 Notice at 4, n. 3.

(U) To advance that discussion, the United States identified in the trial ready documents those photographs of the defendant's office that the government intends to use at trial. The trial ready photographs are Bates numbered CLASS_0003649-0003654, 0003655-0003658, and can be found at Tab 4 of Exhibit A. Where the United States only seeks to use a portion of a given photograph at trial and will electronically blur the remainder, the government has boxed the portion it will use in red. See, e.g., CLASS_0003649. The United States has completed a

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classification review of those portions of the photographs that the government will use at trial, and deemed them to be unclassified. As best the United States can determine, none of the remaining portions of the photographs that the government proposes be blurred for use at trial are relevant or helpful to the defense.

[redacted] One of the office photographs that the defendant has designated in his First CIPA Section 5 Notice is actually a copy of a document found inside a safe in his office. This document is a handwritten list of [redacted] reports that, as described in the [redacted], is itself classified.[26] See ¶ 34. The handwritten list includes the [redacted] report number and the defendant's handwritten note next to the number that appears to state [redacted] For use of this document at trial, the United States has redacted all of the reports from the list other than the [redacted] report, and, as in the other trial ready documents, has proposed a substitution for the [redacted] document type [redacted] which appears in the defendant's handwriting immediately below the [redacted] report number at issue. None of the substituted or redacted information from the defendant's handwritten list would be relevant or helpful to the defense at trial. Even assuming the defendant were to meet his burden of demonstrating that the remaining photographs are relevant and helpful, the United States either has proposed, or can propose, substitutions that will provide the defendant with the same, or substantially the same, ability to

[26] (U) The classified discovery version of the handwritten list of intelligence reports is Bates numbered CLASS_000314. The trial ready version is Bates numbered CLASS_0003655. Both versions can be found at Tab 4 of Exhibit A.

[redacted]

make his defense as would disclosure of the underlying classified information at trial.

[redacted] **5. Electronic audit materials reflecting the defendant's [redacted] activity on June 11, 2009.**[27] The United States has proposed substitutions to the following categories of classified information found in the trial ready version of the electronic audit material reflecting the defendant's [redacted] activity on the morning of June 11, 2009:

[redacted]

The [redacted] further describes the classified equities that [redacted] these proposed substitutions. See ¶¶ 22-24, 27-32 [redacted]; and ¶¶ 35-36 [redacted]. The classified terms [redacted] on the audit report are neither relevant nor helpful to the defense. Even assuming the defendant were to meet his burden of demonstrating that these classified markings and terms are relevant and helpful, the substitutions proposed by the United States will provide the defendant with the same, or substantially the same, ability to make his defense as would disclosure of the underlying classified information at trial.

[redacted] **6. Audit materials reflecting the defendant's access to the [redacted]**

[27] (U) The classified discovery versions of these documents are Bates numbered CLASS_0001403-0001411. The trial ready versions are Bates numbered CLASS_0003659-0003667. Both versions can be found at Tab 5 of Exhibit A.

[redacted]

report on June 11, 2009.[28] Similarly, the United States has proposed substitutions to the following categories of classified information found in the trial ready version of the electronic audit material showing the defendant's multiple accesses to the [redacted] report on June 11, 2009:

[redacted]

The [redacted] further describes the classified equities that the [redacted] these proposed substitutions. See ¶¶ 22-24, 27-32 [redacted]. The classified terms [redacted] on the [redacted] audit report are neither relevant nor helpful to the defense. Even assuming the defendant were to meet his burden of demonstrating that these classified terms are relevant and helpful, the substitutions proposed by the United States will provide the defendant with the same, or substantially the same, ability to make his defense as would disclosure of the underlying classified information at trial.

(U) **7. All charts and letters identifying the individuals who accessed the intelligence report, their agency affiliation, time of first electronic access, and facility badge records.** As the defendant notes in his First CIPA Section 5 Notice, the United States has not yet produced

[28] (U) The classified discovery versions of these documents are Bates numbered CLASS_0001801-0001808. The trial ready versions are Bates numbered CLASS_0003670-0003677. Both versions can be found at Tab 6 of Exhibit A.

[redacted]

[redacted]

a trial ready version of the final, comprehensive Access List or Time of First Access chart.[29] See First CIPA Section 5 Notice at 4, n. 4. Both will be produced by the United States closer to trial, when the number of individuals on the Access List and the [redacted] The number of individuals on the Access List might decrease prior to trial,[30] for example, if it can be shown that Mr. Rosen's June 11th article was published earlier than 3:16 p.m. [redacted][31]

[redacted] The Court does not need to wait for those final determinations in order to rule on the instant motion regarding the Access List and related documents. Pursuant to CIPA Section 6, the United States seeks to protect from disclosure [redacted]

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[29] (U) The classified discovery version of the Time of First Access chart is Bates numbered CLASS_0001853-0001859. The current trial ready version is Bates numbered CLASS_0003678-0003684. Both versions can be found at Tab 7 of Exhibit A.

[30] (U) The number of individuals on the Access List currently stands at 170, including the defendant.

[31] [redacted] The United States also advises the Court that it will file a motion in limine seeking to protect [redacted] The United States expects to file its motion in limine contemporaneously with CIPA Section 6(c) proceedings, when the issue of other substitutions and redactions will be presented for the Court's consideration. With respect to [redacted]

[redacted] The United States understands that the defendant will object to the government's substitution or redaction at trial of [redacted] The defendant has yet to demonstrate, however, the relevance, much less helpfulness to the defense, of such [redacted] information.

[redacted] Indeed, the defendant has come forth with no evidence demonstrating that any of the individuals on the Access List (other than himself) had any contact with Mr. Rosen on June 10th or 11th.[32] Thus, there is no basis for the defendant to admit at trial the Access List, or any other document, [redacted]

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[32] (U) Other than the defendant's contacts with Mr. Rosen, the United States possesses no evidence that any of the individuals on the Access List had any contact with Mr. Rosen in May or June 2009. In the course of its investigation into the unauthorized disclosure charged in this Indictment, the United States has searched for and not found any record of any work email contact between any of the other individuals on the Access List and Mr. Rosen during that time period. The United States has searched for and not found any record of any work phone contact between any of the other individuals on the Access List and Mr. Rosen during that time period. With respect to Mr. Rosen's own records, the United States has not found any record of any contact between Mr. Rosen and any other individual on the Access List either on June 10, 2009, or on June 11, 2009, the date of the Rosen article. Further, at the defense's request, the United States has confirmed that none of the individuals on the Access List has ever been the subject of a formal criminal investigation for the unauthorized disclosure of national defense information. Further, at the defense's request, the United States has confirmed that none of the individuals on the Access List has ever failed a polygraph concerning his or her handling of classified information. [redacted]

[redacted]

[redacted] In any event, assuming the defendant were to meet his burden of demonstrating the relevance at trial of [redacted] the United States will request in CIPA Section 6(c) proceedings to have the [redacted] The United States will also request, in a motion in limine to be filed contemporaneously with CIPA Section 6(c) proceedings, [redacted]

(U) **8. June 15, 2009, emails among the defendant, John Swegle, and Theodore**

[redacted]

[redacted]

McCarthy.[33] The United States made no substitutions or redactions to the trial ready version of the June 15, 2009, emails among the defendant, John Swegle and Theodore McCarthy. Thus, there are no classified information equities in those emails that need to be resolved in CIPA Section 6 proceedings. To the extent that those emails are offered as exhibits at trial by the defense, upon declassification with the other trial ready materials as described above, the Court can decide at that time whether to admit or exclude them, as it would in any case.

(U) **9. The screenshot of the June 11, 2009, email from John Mattey.**[34] The United States made no substitutions or redactions to the trial ready version of the June 11, 2009, John Mattey email.[35] Thus, there are no classified equities in the email that need to be resolved in CIPA Section 6 proceedings. To the extent this email is offered as an exhibit at trial by the defense, upon declassification with the other trial ready materials as described above, the Court can decide at that time whether to admit or exclude it, as it would in any case.

(U) **B. <u>First Set of "Treat as Classified" Documents</u>**

(U) By letter dated July 17, 2013, the United States produced the first set of "Treat As"

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[33] (U) The classified discovery version of these emails is Bates numbered CLASS_0002779-0002781. The trial ready version is Bates numbered CLASS_0003685-0003687. Both versions can be found at Tab 8 of Exhibit A.

[34] (U) The classified discovery version of the June 11, 2009, John Mattey email is Bates numbered CLASS_0001190. The trial ready version is Bates numbered CLASS_0003691. Both versions can be found at Tab 9 of Exhibit A.

[35] [redacted] Because the screenshot of the June 11, 2009, John Mattey email does not include the [redacted]

[redacted]

documents that had undergone classification review. See Notice of Filing, ECF Docket No. 153, Exhibit 2 (classified discovery letter, dated July 17, 2013). Following that classification review, these documents were re-produced in classified discovery with new classification markings. The United States placed a second Bates number on the bottom left-hand corner of each page of the re-produced document. For tracking purposes, the United States also left the original Bates number in the bottom right-hand corner of each page of the re-produced document. When referring to the re-produced "Treat As" documents in this brief, the United States will use the bottom left-hand corner Bates numbers.

(U) The defense noticed over 220 pages of the re-produced "Treat As" documents in his First CIPA Section 5 Notice. For the convenience of the Court, those documents are attached as Exhibit B hereto. Their use, relevance and admissibility at trial are addressed below under the same headings used in the defendant's notice. Because the first three categories of information disclosed in the defendant's notice raise the same issues, they will be addressed together immediately below.

(U) **1. Investigative questionnaires completed by individuals who accessed the intelligence report at issue, as well as accompanying FBI cover memoranda and notes.**

(U) **2. Badge records for individuals who accessed the intelligence report at issue.**

(U) **3. Phone records for individuals who accessed the intelligence report at issue.**

[redacted] These three categories of documents include the questionnaires, statements and waivers, FBI 302s and agents' notes, badge records and work phone records of 23 individuals on the Access List. These materials contain the following classified or statutorily-

[redacted]

protected information;

[redacted]

The [redacted] further describe these classified information equities. See [redacted] at ¶¶ 22-24, 27-32 [redacted] and ¶¶ 37-39 [redacted]. See [redacted] at ¶ 12a.-b., d.-e. [redacted]

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[36] [redacted] Questions 4, 12, 13, 15, and 16 of each individual's investigative questionnaire, as well as each statement and waiver, make reference to either [redacted] or June 12th Associated Press article. As mentioned above, see footnote 24, after further consultation with the Intelligence Community, the June 12th Associated Press article was deemed to contain no classified information.

[37] [redacted] Question 17 of each investigative questionnaire references [redacted] See, e.g., CLASS_0003257. The handwritten comments on a number of the questionnaires also refer to [redacted] or types of classified documents [redacted] See CLASS_0003257, 0003267, 0003276, 0003292, 0003300, 0003318, 0003326, 0003336, 0003351, 0003358, and 0003400.

[38] (U) See CLASS_0003320.

[39] (U) See CLASS_0003393, 0003394 and 0003395.

[redacted]

[redacted] See also Ex Parte Classified Addendum (describing classified information equities relating to the first bullet point immediately above). Because they are hearsay, none of the investigatory materials that the defendant has noticed would be admissible at trial. See Fed. R. Evid. 801. Moreover, neither those materials nor the classified and statutory protected information that they contain would be relevant or helpful to the defense at trial. Indeed, the defendant's notice of these investigatory materials does not reflect any filtering by the defense for relevance. Rather, the defense has simply listed all investigatory questionnaires, statements and waivers, and badge and phone records, for every person on the Access List that were available for the defendant to notice as of the deadline for his First CIPA Section 5 Notice – that is, all such "Treat As" materials that had undergone classification review as of that time. The defense has made no showing as to the relevance of these materials to any issue at trial. Again, the defendant has not demonstrated that any of the individuals on the Access List (apart from himself) had any contact with Mr. Rosen on June 10th or 11th, much less the individuals who are the subject of these investigatory materials. Even if deemed marginally relevant, it is beyond doubt that the probative value of these investigatory materials is far outweighed by danger of unfair prejudice to the United States, confusion of the issues, misleading the jury, and needless presentation of cumulative evidence. Additionally, with respect to [redacted], the Court has already ruled that the defense is not entitled to the [redacted] See Memorandum Opinion (June 3, 2013), granting the government's First, Second, and Third CIPA

[redacted]

Section 4 Motions. See also Memorandum Opinion (May 30, 2013), denying defendant's Fourth Motion to Compel. Moreover, apart from [redacted], there is nothing relevant about the phone records themselves. In any event, the defendant has not demonstrated that the specific classified information that these materials contain is relevant or helpful to his defense. Even if he could do so, substitutions can be proposed in CIPA Section 6(c) proceedings that will provide the defendant with the same, or substantially the same, ability to make his defense as would disclosure of the underlying classified information at trial.

(U) **4. The FBI 302 for a February 25, 2010, interview with Eric Richardson.** After further consultation with the Intelligence Community following the filing of the defendant's First CIPA Section 5 Notice, Mr. Richardson's FBI 302[40] was deemed to contain no classified information other than the FBI case number for this investigation that was redacted prior to the production of the FBI 302 in classified discovery.[41] Accordingly, the United States proposes that it produce an unclassified version of Mr. Richardson's FBI 302 to the defense with the classified FBI case number redacted. To the extent that the defense offers that version of Mr. Richardson's FBI 302 as an exhibit at trial, the Court can consider at that time any objection the United States may have to its admission, as the Court would in any case.

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[40] (U) Mr. Richardson's FBI 302 is Bates numbered CLASS_0003374-0003376 and can be found at Tab 4 of Exhibit B.

[41] (U) As it attempted to do with all documents produced in discovery, the United States redacted all personal identifiers from Mr. Richardson's FBI 302 consistent with Fed. R. Crim. P. 49.1 (e.g., his social security number, date of birth, home address, home telephone number, personal email address, and cell phone number).

[redacted]

[redacted]

[redacted] **5. Documents related to** [redacted] **policies, entitled "SOP for** [redacted]**" and "Security Warning."** These documents were part of the trial ready set of documents. The defense may have included them in the "Treat As" section of the defendant's First CIPA Section 5 Notice in error.[42] The United States has proposed substitutions to the following categories of classified information found in these documents:

[redacted]

The [redacted] further describes the classified equities that the [redacted] these proposed substitutions. See ¶¶ 22-24, 27-32 [redacted]. The [redacted] related documents are neither relevant nor helpful to the defense. Even assuming the defendant were to meet his burden of demonstrating that they are relevant and helpful, the substitutions proposed by the United States will provide the defendant with the same, or substantially the same, ability to make his defense as would disclosure of the underlying classified information at trial.

(U) **6. List of SCI compartments and access privileges for VCI personnel.** This document contains the names of 88 SCI compartments and the defendant's access privileges to 79 of them.[43] As further described in the [redacted] the list of SCI compartments is

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[42] (S//NF) The classified discovery versions of the [redacted] related documents are Bates numbered CLASS_0001400-0001402. The trial ready versions are Bates numbered CLASS_0003688-0003690. Both versions can be found at Tab 5 of Exhibit B.

[43] (U) The list of SCI compartments is Bates numbered CLASS_0003438-0003475 and can be found Tab 6 of Exhibit B. The United States redacted the full last name (leaving the full first name and last initial) for each of the defendant's former VCI colleagues who appear on this [redacted]

[redacted]

classified. See ¶ 25. The parties previously agreed during classified discovery to enter a stipulation that the defendant had access to at least 79 different SCI compartments as of June 2009, and that his Bureau at the State Department (i.e., VCI) placed him in charge of managing the access of other VCI employees to such information. See Notice of Filing, ECF Docket No. 80, Exhibit 10 (classified discovery letter, dated June 22, 2012). That stipulation resolves the defendant's need for this document at trial.

(U) **7. Non-disclosure Agreement signed by Jeffrey Eberhardt.** After further consultation with the Intelligence Community, Mr. Eberhardt's non-disclosure agreement[44] was deemed to contain no classified information. Accordingly, the United States will produce an unclassified version of this document to the defense.[45] To the extent that the defense were to offer it as an exhibit at trial, the Court can consider at that time any objection the United States may have to its admission, as the Court would in any case.

(U) **8. Article entitled "North Korean Defector Describes Inner Workings of Isolated Regime," written by James Rosen.**

(U) **9. Article entitled "The Madness of Chris Hill," written by James Rosen.**

[redacted] The United States placed [redacted]

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list. These redactions were not taken pursuant to CIPA Section 4.

[44] (U) Mr. Eberhardt's non-disclosure agreement is Bates numbered CLASS_0003514-0003515, and can be found Tab 7 of Exhibit B.

[45] (U) In the new version of Mr. Eberhardt's non-disclosure agreement, the United States will continue to redact his social security number as required by Fed. R. Crim. P. 49.1.

[redacted]

[redacted] classification headers on the foregoing news articles identified by the defendant in his First CIPA Section 5 Notice, because those articles were two in a series of articles provided during a single FBI interview (of Jeffrey Eberhardt) and which included the June 11, 2009, Rosen article. Thus, the classification header of the series of articles bore the highest level of the classified information contain in the articles, that is [redacted] for James Rosen's June 11, 2009, article.

(U) The United States will produce to the defense another version of both articles without any classification headers. In so doing, the United States will not confirm whether the articles entitled "North Korean Defector Describes Inner Workings of Isolated Regime" and "The Madness of Chris Hill," in fact, contain classified information. Without such confirmation, both articles fall outside the CIPA Section 6 process. To the extent that the defense were to offer the articles as exhibits at trial, the Court can consider at that time any objection the United States may have to their admission.

[redacted] **10. Email regarding the charged article sent by [redacted] over an unclassified system on June 16, 2009.** In this email, [redacted] emailed [redacted] a copy of the June 11th article, five days after it was published.[46] In the version of this email that was produced in classified discovery, the United States substituted [redacted]. The unsubstituted version of the email thus contains the following classified

[46] (U) The email is Bates numbered CLASS_0003536-0003537 and can be found at Tab 10 of Exhibit B.

[redacted]

information:

[redacted]

If the defendant were to agree to the use at trial of a version of the email that includes the substitution [redacted] and a redaction [redacted] then the Court's decision of any objection to the defendant's use of this email could wait for trial. Barring such an agreement, the United States would object to the use of the classified email at trial as neither it nor the classified information it contains would be admissible if offered by the defendant. As an initial matter, the Court has already ruled that the defense is not entitled to [redacted] See Memorandum Opinion (June 3, 2013), granting the government's First, Second, and Third CIPA Section 4 Motions. See also Memorandum Opinion (May 30, 2013), denying defendant's Fourth Motion to Compel. Additionally, the email is hearsay. See Fed. R. Evid. 801. Moreover, its content is not relevant or helpful to the defense. The fact that a [redacted] sent an open source version of the June 11th article to [redacted] five days after the article was published, without more, demonstrates nothing. In any event, the defendant cannot show that the specific classified information – [redacted] – are relevant and helpful to the defense.

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[47] [redacted] classified information at issue in this case. That information will be declassified once the jury is sworn, thus it does not need to be addressed in CIPA Section 6 proceedings.

[redacted]

[redacted]

(U) **11. Email sent by Melanie Higgins on June 11, 2009, as well as the forwarded email contained therein.** The United States included the Melanie Higgins June 11, 2009, email in the trial ready documents.[48] See Notice of Filing, ECF Docket No. 153, Exhibit 3 (classified discovery letter, dated July 17, 2013). The email will be available for use at trial by the parties once the jury is sworn and the core information in this case is declassified. Thus, there are no classified information equities in the email that need to be resolved in CIPA Section 6 proceedings. To the extent that the defense were to offer the email as an exhibit at trial, the Court can decide at that time any objections that the United States to its admission.

[redacted] **12. The FBI 302 and agent's notes from a September 20, 2010, interview with** [redacted] FBI 302 and agent's notes[49] contain references to the following [redacted] further describes [redacted] See ¶ 12c. If the defendant were to agree to refer to [redacted] as well as to forgo the disclosure at trial of [redacted]

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[48] (U) Melanie Higgin's June 11, 2009, email is Bates numbered CLASS_0003546, and can be found at Tab 11 of Exhibit B.

[49] (U) [redacted] FBI 302 and agent's notes are Bates numbered CLASS_0003547-0003550, and can be found at Tab 12 of Exhibit B.

[redacted]

[redacted] then the Court's ruling on any objection to the defendant's use of the FBI 302 and agent's notes of [redacted] September 8, 2010, interview can await trial. Otherwise, barring such an agreement, the United States would object to the use of those materials by the defense at trial. As an initial matter, the FBI 302 and agent's notes are hearsay. See Fed. R. Evid. 801. Moreover, [redacted] not relevant or helpful to the defense. The defense has no need to disclose at trial [redacted]

(U) V. **The Designated Information is Protected by the Classified Information Privilege**

[redacted] The [redacted] Declarations set forth the basis for the government's assertion of a classified information privilege [redacted] in the documents and information described above. The United States also relies on an Ex Parte Classified Addendum, to be filed ex parte, in camera, and under seal shortly, in support of the instant motion. In considering the use, relevance, and admissibility of the classified material that the defendant seeks to disclose at trial, it is essential for the Court to understand the government's important national security interests that are at stake. Disclosure of the documents would pose grave risks to the national security interests of the United States.

(U) VI. **The Designated Information Should be Excluded Even if Deemed Relevant**

(U) The Court can and should exclude the designated classified evidence that the defendant seeks to use through an application of Federal Rules of Evidence 401, 402, and 403,

[redacted]

whether or not the Court conducts the additional balancing of the classified information privilege against the defendant's interest in using this classified information at trial. There can be no serious dispute, however, that the defendant's purported need for this classified information at trial is far outweighed by the need to protect it on national security grounds. Simply put, even assuming marginal relevance, the defendant cannot overcome the classified information privilege, which provides the additional basis for precluding this classified evidence.

(U) **VII. Conclusion**

(U) For all of the foregoing reasons, the United States respectfully requests that, at the conclusion of the upcoming CIPA Section 6 hearing, this Court find inadmissible the remaining classified documents designated by the defendant for use at trial because they are irrelevant, not helpful to the defense, do not overcome the classified information privilege, or are otherwise excludable pursuant to the Federal Rules of Evidence. A proposed order is attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 18th day of September, 2013, I caused a true and correct copy of the foregoing classified, sealed filing to be served on defense counsel of record by delivery via a Court Security Officer.

G. Michael Harvey
Assistant United States Attorney

[redacted]

[redacted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	**Criminal No.: 10-225 (CKK)**
	)	
v.	)	**Filed In Camera, and**
	)	**Under Seal with the Classified**
STEPHEN JIN-WOO KIM,	)	**Information Security Officer**
also known as Stephen Jin Kim,	)	
also known as Stephen Kim,	)	
also known as Leo Grace,	)	
	)	
Defendant.	)	

ORDER

Based upon the Government's Motion for Hearing Under Seal Pursuant to CIPA §6(a) and Notice of Objections Concerning Use, Relevance, and Admissibility of Classified Information Identified in the Defendant's First CIPA § 5 Notice, any opposition or reply filed thereto, and any oral argument at a hearing held pursuant to Section 6(a) of the Classified Information Procedures Act, 18 U.S.C. App. 3 ("CIPA"), it is this _____ day of _____, 2013, hereby

ORDERED that the classified information designated by the defendant for use at trial is inadmissible for the reasons set forth in writing separately, as required by CIPA Section 6(a).

_____
Colleen Kollar-Kotelly
District Judge
United States District Court
for the District of Columbia

copied to:
All counsel of record

[redacted]