[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.	)	

GOVERNMENT'S IN CAMERA, UNDER SEAL OPPOSITION TO THE DEFENDANT'S SIXTH MOTION TO COMPEL DISCOVERY AND REQUEST FOR CLARIFICATION OF THE COURT'S OCTOBER 9, 2013, ORDER

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

[redacted] On October 22, 2013, the defendant filed his sixth motion to compel discovery and request for clarification of the Court's October 9, 2013, Order ("Sixth Motion to Compel").[2] The motion arises from this Court's October 9, 2013, Memorandum Opinion ruling on the defendant's Fifth Motion to Compel Discovery ("Fifth Memorandum Opinion"). In its order, this Court noted that the defendant raised

[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 (December 29, 2009). 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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[2] (U) For ease of reference in this pleading, the United States will refer to each of (a) the defendant's prior motions to compel, (b) the government's oppositions to those motions, and (c) the Court's prior rulings on those motions as follows: (a) First Motion to Compel, etc.; (b) Opposition to First Motion to Compel, etc.; and (c) First Memorandum Opinion, etc., respectively.

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for the first time in his reply in support of his Fifth Motion to Compel demands for (1) the [redacted] related to the June 11, 2009, [redacted] report (the [redacted] Report") and (2) "revisions" to the [redacted] that were drafted or circulated prior to 3:16 p.m. on June 11, 2009. Fifth Memorandum Opinion at 12-13. To permit the United States to respond to these belated requests, the Court instructed the parties to meet and confer on these issues and seek further relief from the Court as appropriate. Id. at 12-13. Defense counsel met and conferred with the United States on these issues on October 18, 2009. Four days later, the defendant filed his Sixth Motion to Compel seeking production of the above-mentioned material. As demonstrated below, the defendant's demands for the [redacted] and pre-3:16 p.m. revisions to the [redacted] should be denied.

[redacted] However, the defendant's motion does not end there. It goes far beyond the issues contemplated by this Court's Fifth Memorandum Opinion. Without expressly saying so, the defendant uses his Sixth Motion to Compel as a vehicle to re-visit discovery disputes that were argued and resolved by this Court at the September 27, 2013, sealed hearing and in its October 9, 2013, Order concerning the government's review of damage [redacted] assessments, if any, related to the [redacted] Report. See Sixth Motion to Compel at 4-11. Indeed, the bulk of the defendant's motion is in fact a motion for reconsideration – or as the defendant puts it, a "request to clarify" – disguised as a new motion to compel. The defendant should not be permitted to compel discovery from the United States that the Court has already ordered the government need not provide. In any event, as demonstrated further below, much like his requests for the [redacted] and revisions to the [redacted] the defendant's requests for other

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relief from the Court should be denied as moot.

(U) **II. Argument**

[redacted] **A. The [redacted] for the [redacted] Report**

[redacted] On April 5, 2013, in response to a defense discovery request, the United States advised the defendant that it had searched for the [redacted] for the [redacted] related to the [redacted] Report and had located no such document that pre-dates the "cut-off time" on June 11, 2009, by which time both parties agree the Rosen article had been published, i.e., 3:16 p.m. See Notice of Filing, ECF Docket No. 118, Exhibit 3 (government classified discovery letter, dated April 5, 2013, item number 12); see also Notice of Filing, ECF Docket No. 93 (defense classified discovery letter, dated December 10, 2012, item number 12). In the intervening months, the government's information has not changed. The United States has not identified any version or draft of the [redacted] that pre-dates the 3:16 p.m. cut-off time.

[redacted] Conversely, the defendant has cited no document, nor proffered any other evidence, to demonstrate that the [redacted] came into existence prior to the cut-off time. Instead, all of the emails that he cites in his motion – one as late as 2:54 p.m. on June 11th (see CLASS_3212) – indicate that the [redacted] was an anticipated "action" item associated with [redacted] Thus, consistent with the government's search, the defendant's own proffered evidence does not demonstrate that the document had in fact been created prior to the cut-off time. Accordingly, the defendant's motion to compel the production of the [redacted] should be denied as moot.

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[redacted] Further, the defendant's assertion that the [redacted] would be relevant and helpful to the defense, even if it were created after the cut-off time, is without merit. According to the defendant, the document "may tend to show what information was likely shared with the White House on June 11, 2009" or the "content of any White House" briefing. See Sixth Motion to Compel at 3. As the defendant acknowledges in his motion, however, [redacted] Id. Any such briefing would have occurred the following day, on the morning of June 12, 2009, when the content of the [redacted] Report would have been [redacted] following the unauthorized disclosure to Fox News reporter James Rosen and the subsequent publication of that intelligence information no later than 3:16 p.m. on June 11, 2009.

[redacted] Similarly unpersuasive is the defendant's assertion that he is entitled to the discovery of "individuals involved in the drafting and dissemination of the [redacted] – presumably following the 3:16 p.m. cut-off time[3] – because they would have had "reason to believe that the information contained in the intelligence report [redacted] Sixth Motion to Compel at 3. According to the defendant's theory, those individuals may have been the source of [redacted] Id. The defendant's theory presupposes, however, that any such individual must have derived that

[3] [redacted] The United States has identified for the defendant the individuals who the government believes were involved in the drafting of [redacted] and its related documents.

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information, even if from the [redacted] prior to the 3:16 p.m. publication of the Rosen article. Identifying other individuals who may have become aware of the [redacted] after the 3:16 p.m. cut-off time would simply not advance the defendant's theory.

[redacted] Finally, the defendant speculates that any alleged analysis in the [redacted] whenever it was produced, "may support the defense's theory" that the [redacted] in the [redacted] Report [redacted] "nothing more than [redacted] and that "someone in Mr. Kim's position would not reasonably have believed that disclosure of the information would damage the United States or help a foreign nation." Sixth Motion to Compel at 3. The defendant's asserted "theory" is unavailing for at least four reasons. First, the defendant never had access to, or authority to access, [redacted] He did not rely on it, and does not, even today, know its contents (assuming it even exists). Therefore that document could have no bearing on his state of mind on June 11, 2009, concerning whether the disclosure of the information from the [redacted] Report could be used to the injury of the United States or to the advantage of a foreign nation. See Third Memorandum Opinion at 17 (rejecting the defendant's argument that the "reason to believe" element could be proved through documents to which the defendant "had no authority or capacity to access"). The statute's plain language requires that the defendant must first be shown to have known the facts from which he reasonably should have concluded that the information could be used for the prohibited purpose. See United States v. Truong Dinh Hung, 629 F.2d 908, 919 (4th Cir. 1980) (citing with approval the district court's jury instructions which defined the term "reason to believe" as meaning

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that "a defendant must be shown to have known facts from which he concluded or reasonably should have concluded that the information could be used for the prohibited purpose")

[redacted] Second, the defendant's speculation as to what the [redacted] may contain is insufficient to satisfy his "heavy burden" required to pierce the government's classified information privilege.[4] See United States v. Skeens, 449 F.2d 1066, 1070 (D.C. Cir. 1971) (defense counsel's speculation as to what the privileged information might show does not satisfy the defendant's "heavy burden" under Roviaro); United States v. Smith, 780 F.2d 1102, 1108 (4th Cir. 1985) ("The defendant must come forward with something more than speculation as to the usefulness of such disclosure."). Third, the defendant's assertion that the [redacted] may corroborate other evidence in his case is also inadequate to overcome the government's privilege. This Court "may order disclosure only when the information is at least essential to the defense, necessary to [the] defense, and neither merely cumulative nor corroborative, nor speculative." See United States v. Abu Ali, 528 F.3d 210, 248 (4th Cir. 2008) (internal quotations omitted).

(U) Fourth, the defendant should not be heard, yet again, to demand the disclosure of classified information so that he and his attorneys can conform or construct, post hoc in late 2013, what he purportedly believed on June 11, 2009. Such an approach does violence to the D.C. Circuit's holding in United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989). Prior to the compelled production of any classified information, the defense

[4] [redacted] The Intelligence Community has informed the undersigned that, if the [redacted] were to exist, it would be classified because [redacted]

[redacted]

[redacted]

cannot just advance a "theory" but must make a substantive showing of what the defendant knew at the time of the charged unauthorized disclosure that informed his "reason to believe" – at the time of the offense, not at the time of trial – that the unauthorized disclosure at issue could not be used to the injury of the United States or to the advantage of any foreign nation, including the documents, or other information, on which he relied to substantiate that knowledge. See Yunis, 867 F.2d at 624 ("[T]he information [the defendant and his counsel] seek is not available to them until such a showing is made."); United States v. Mejia, 448 F.3d 436, 459 (D.C. Cir. 2006); see also United States v. Passaro, 577 F.3d 207, 220 (4th Cir. 2009) ("We recognize that such a showing may well be difficult given national security concerns, but at the very least [the defendant] could have proffered a specific conversation that he had with a superior, or a particular document on which he relied, that purported to [substantiate his defense]."). [5] Such a showing would provide a basis for the Court to evaluate the defendant's claimed need for the classified information and to balance that need against the equities underlying the government's classified information privilege.

[redacted] Requiring the defendant to make this showing would not impose upon him any more of a burden of "absolute memory, omniscience, or superhuman mental capacity" than was faced by the defendant in Yunis. Id. at 624. It was surely memorable for the defendant to provide covertly the contents of a TOP

[5] (U) Nor should the defendant be heard to object that any substantive proffer he may provide could be used against him by the United States at trial. The United States has agreed not do so. Furthermore, CIPA protects against such trial use of statements of a defendant in CIPA proceedings. See 18 U.S.C. App. 3 § 2 ("No admission made by the defendant at [a pretrial] conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant.").

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SECRET//SENSITIVE COMPARTMENTED INFORMATION intelligence report [redacted] to a national news reporter and then see that same intelligence information broadcast to the world only a few hours later. During the pendency of these criminal proceedings, the defendant has never claimed that he has forgotten this event.[6] Thus, this Court should deny the defendant's motion to compel any [redacted] post-dating the 3:16 p.m. cut-off time because he has failed to make a sufficient, substantive showing of what he knew, and his basis for knowing it, bearing on his alleged belief on June 11, 2009, that the unauthorized disclosure of classified information from the [redacted] Report could not be used to the injury of the United States or to the advantage of any foreign nation, or because he has otherwise failed to meet his "heavy burden" under Yunis and Roviaro.

[redacted] **B. Proposed Revisions to the [redacted]**

[redacted] The defendant's motion to compel "proposed revisions" to the [redacted] prior to the 3:16 p.m. cut-off time should also be denied. See Sixth Motion to Compel at 3-4. The United States has responded to this request multiple times. See Opposition to

[6] [redacted] Nor can the defendant simply rely on (feigned) memory loss to obtain the classified discovery that he seeks. See United States v. Smith, 780 F.2d 1102, 1108 (4th Cir. 1985) (disclosure of classified information "is not required despite the fact that a criminal defendant may have no other means of determining what relevant" privileged information may exist). Further, a post-indictment failure of memory related to the defendant's purported "reason to believe" would run straight into his pre-indictment statements to the FBI, which were quite specific on this score. When interviewed by the FBI in March 2010, the defendant did not suggest that he (or anyone else) would have reason to believe that the unauthorized disclosure could not harm the United States. To the contrary, the defendant told the FBI that the unauthorized disclosure was "egregious," "bad," involved [redacted] and could result in at least three potential harms to the United States, namely, that: [redacted]

[redacted]

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Fifth Motion to Compel at 41. Without conceding its discoverability, the United States searched for, and produced, the [redacted] material prior to the 3:16 p.m. cut-off time. See id. Included in those productions were any drafts – or revisions – of the [redacted] itself. The Court has reviewed the government's redactions to those materials multiple times and has determined that they contain no discoverable information. The defendant's motion to compel proposed revisions to the [redacted] prior to the 3:16 p.m. cut-off time should be denied as moot.

(U) C. **The Defendant's Challenges to this Court's Rulings at the September 27, 2013, Sealed Hearing and in its October 9, 2013, Order**

[redacted] The defendant spends the rest of his brief effectively seeking reconsideration of multiple decisions this Court made at the September 27, 2013, sealed hearing and in its October 9, 2013, Order. See Sixth Motion to Compel at 4-11. It is not proper for the defendant to seek to compel relief from the United States that the Court has ordered the government need not provide. Compare id. at 5, 8, n. 3 (moving to compel the production of "any classified intelligence reports [redacted] as the charged intelligence report" and any documents addressing the [redacted] with October 9, 2013, Order at 2-3 (ordering that "the Government shall gather all intelligence reports accessed by the Defendant . . . [redacted] as the [redacted] report, regardless of the [redacted] Where litigants have "once battled for the Court's decision, they should [not] , . . . without good reason[,] [be] permitted to battle for it again," much less do so in a motion styled as anything other than a motion for reconsideration. United States v. Sunia, 643 F. Supp. 2d 51, 61 (D.D.C. 2009) (citation and internal quotations omitted). The defendant's multiple complaints with this Court's rulings concerning the review of

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damage [redacted] assessments, if any, related to the [redacted] Report are both procedurally improper and substantively without merit. Nevertheless, to avoid further litigation on the matter and to preserve judicial resources, the United States has voluntarily taken additional steps that make the defendant's flawed demands moot.

[redacted] **1. Review of Intelligence Reports** [redacted]

[redacted] Without conceding the relevance or helpfulness of such classified material or any obligation to search for it, the United States advises that it has now searched for any [redacted] report accessed by the defendant between June 1, 2008 and June 11, 2009, and [redacted] The government's search identified no such reports. Accordingly, the defendant's demand that the United States compare such material regarding the [redacted] to [redacted] related to the [redacted] Report, if any exist, should be denied as moot. See Sixth Motion to Compel at 4-7.

(U) **2. Review of Defendant's Emails to Determine Intelligence Reports Known to the Defendant**

[redacted] Without conceding the relevance or helpfulness of such classified material or any obligation to search for it, the United States has also searched within the defendant's classified electronic media for any North Korean intelligence information attached to, or contained within, emails sent or received by the defendant between May 1, 2009 and June 11, 2009. The United States will include any such material within the collection of reports that it will compare to damage assessments related to the [redacted] Report, if any exist, as directed by the Court in its October 9,

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2013, Order. Accordingly, the Court should deny as moot the defendant's demand that the United States include any such material found within the defendant's classified email when making that comparison. See Sixth Motion to Compel at 7-8.

[redacted] **3. Review of the Defendant's Classified Electronic Media for Discoverable Information Concerning** [redacted]

[redacted] Without conceding the relevance or helpfulness of such classified material or any obligation to search for it, the United States has also searched the defendant's classified electronic media for any information concerning the [redacted] the [redacted] Report, that was accessed by the defendant between May 1, 2009, and June 11, 2009. It found none. Accordingly, this Court should deny as moot the defendant's demand that the United States consider such material in the Court-ordered review of [redacted] related to the [redacted] Report, if any exist. See Sixth Motion to Compel at 8-9.

[redacted] **4. Review of the Collected Intelligence Reports for Discoverable Information Concerning the** [redacted]

[redacted] Without conceding the relevance or helpfulness of such classified material or any obligation to search for it, the United States will review the collected intelligence reports accessed by the defendant between June 1, 2008 and June 11, 2009, for discoverable information concerning the [redacted] the [redacted] Report "independent of the comparison process" of [redacted] if any exist, described by the Court in its October 9, 2013, Order. Accordingly, the Court should deny as moot the defendant's demand that the United States do so. See Sixth Motion to Compel at 9-11.

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(U) **III. Conclusion**

(U) For all of the foregoing reasons, the defendant's Sixth Motion to Compel should be denied in its entirety.

Respectfully submitted,

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