**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| ANTHONY SHAFFER,<br><br>Plaintiff,<br><br>v.<br><br>DEFENSE INTELLIGENCE AGENCY, *et al.*,<br><br>Defendants. | ) | Civil Action No. 1:10-cv-02119 (RMU) |

**DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

Defendants Department of Defense, Defense Intelligence Agency, and Central Intelligence Agency, through the undersigned counsel, respectfully move the Court to dismiss Plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). In support of this motion, the defendants refer the Court to the accompanying memorandum.

Dated: April 2, 2012.

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

## Introduction

After the defendants moved to dismiss plaintiff Anthony Shaffer's complaint for lack of standing, the Court required him "to submit an amended complaint that fully details the factual basis for the plaintiff's claim of standing." Mem. Order of Jan. 12, 2012, ECF 34, at 2. Shaffer has not done so. Far from curing the problem, Shaffer's amended complaint highlights and exacerbates his failure to demonstrate standing. His amended complaint should be dismissed for lack of jurisdiction.

Shaffer contends that the Government violated his First Amendment rights by requiring the redaction of national security information from *Operation Dark Heart*, a book about his work in Afghanistan. In response to the defendants' argument that he lacked an injury in fact because he had transferred control of his book, Shaffer has made only cosmetic edits to his complaint, admitting that St. Martin's Press owns the exclusive right to publish the book. *See* Am. Compl. ¶ 10. And while he originally claimed in December 2010 that the Government's actions impeded the publication of a paperback version of the book, that edition was published last October. *See id.* ¶ 49. Now, he alleges only a general desire to publish another edition some day. But the publisher has the exclusive right to decide whether to publish future editions, and Shaffer has not alleged, let alone provided evidence showing, that St. Martin's Press has any intent or even interest to do so. Without such an allegation, Shaffer lacks standing because redress of his alleged injury "depends on the unfettered choices made by independent actors not before the courts." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quotation marks and citation omitted). Shaffer is thus left with his claim that, "at some point in the future," all rights in the

book will revert to him. Am. Compl. ¶ 10. Such "some day" harms do not give rise to standing, and Shaffer's amended complaint should be dismissed.

**Background**

Plaintiff Anthony Shaffer was employed by the Defense Intelligence Agency (DIA) from 1995 to 2006 and, until 2011, served as an officer in the U.S. Army Reserve. *Id.* ¶ 3. As a condition of employment in a position of special confidence and trust relating to the national security, and in consideration of being given access to classified information, Shaffer voluntarily, willingly, and knowingly entered into numerous non-disclosure and secrecy agreements with the Department of Defense. *Id.* In those agreements, he committed that he would submit written material to the Department for review and receive written permission prior to taking steps toward public disclosure. *Id.* (conceding that "[h]e is required by virtue of several secrecy agreements to submit all of his writings for prepublication review").

Shaffer contends that he began writing a book in or around February 2007, based largely on his experiences in Afghanistan, where he was stationed in the course of his DIA employment. *Id.* ¶¶ 3, 8, 11. He alleges that he hired a ghost writer and entered into a contractual agreement with a publisher, all prior to providing the contents of the manuscript to any part of the Department of Defense. *Id.* ¶¶ 8-10. In paragraph 1 of that agreement, Shaffer conveyed to the publisher the right to print, publish, distribute, and sell the book. *Id.* ¶ 10. In June 2009, Shaffer submitted a draft manuscript to his Army Reserve chain-of-command, but did not submit the text to other components of the Department, including the Office of Security Review or DIA. *Id.* ¶ 13. In February 2010, Shaffer allegedly forwarded the manuscript to his publisher. *Id.* ¶ 17.

After learning of the manuscript and obtaining a copy to review, DIA determined that it contained a significant amount of classified information. *Id.* ¶ 24. Other components of the U.S.

Government, including the CIA, reached the same conclusion. *Id.* DIA therefore contacted Shaffer's publisher to express its concern that publication of the manuscript would cause harm to the national security of the United States. *Id.* ¶ 30.

Based on discussions among the Government, Shaffer, and the publisher, some modifications were made to the manuscript. *Id.* ¶ 31. The manuscript was published on September 24, 2010, under the title, *Operation Dark Heart: Spycraft and Special Ops on the Frontlines of Afghanistan and the Path to Victory*. *Id.* ¶ 42. As published, the book contains numerous redactions of classified information in the form of black boxes.

Shaffer filed this lawsuit on December 14, 2010, after publication of the book. ECF 1. At that time, Shaffer indicated that he and his publisher sought to publish a paperback or soft-bound edition of the book in October 2011, and that he desired to "disclose as much of the text redacted from the [hardcover edition] as possible." Original Compl. ¶ 49.

The defendants answered the complaint on April 1, 2011, ECF 14, and filed a motion to dismiss or, in the alternative, for summary judgment on May 16, 2011, ECF 18. The defendants' motion argued that Shaffer lacked standing to challenge the redactions because, by his own allegations, he had sold all legal control over the book's text prior to its redaction and thus could not identify an injury in fact. The defendants further argued that, even assuming Shaffer had standing, summary judgment was appropriate because the information redacted from the book remained properly classified. In support of that argument, the defendants submitted both unclassified and classified declarations describing the redacted information.

Shaffer did not respond to that motion in May 2011, but instead commenced a series of ancillary disputes over the manner in which he and his counsel would prepare his response. On July 22, 2011, the parties filed a joint status report summarizing their disagreement. *See* ECF 25.

The parties subsequently filed supplemental briefing at the Court's request. *See* Pl.'s Suppl. Br., ECF 26; Defs.' Suppl. Br., ECF 28; Pl.'s Reply Br., ECF 29.

In that briefing, the plaintiff asked that the Government be compelled to provide him with classified information and access to secure government facilities to prepare a declaration. Pl.'s Suppl. Br., ECF 26, at 12. In response, the defendants noted that the dispute was premature given the pending motion to dismiss for lack of jurisdiction. Defs.' Suppl. Br., ECF 28, at 4-5. Moreover, the defendants explained that the relief requested by the plaintiff was improper and unnecessary. Because Shaffer argued that the redacted information is "supported by open source material," Original Compl. ¶ 56, he must show that the information was publicly released through "an official and documented disclosure," *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). The only relevant information he could provide the Court would by its very nature be unclassified. Consistent with the established practice in prepublication review cases, the defendants asked the Court to limit its review to the Government's submissions and any unclassified filing by the plaintiff. Defs.' Suppl. Br., ECF 28, at 6-7.

On October 31, 2011, the Court required Shaffer to respond to the defendants' motion to dismiss for lack of standing. He did so on November 18, 2011, and for the first time provided a copy of the contract he entered into with the publisher. *See* ECF 30. Based on that submission, the Court ordered him "to submit an amended complaint that fully details the factual basis for the plaintiff's claim of standing." Mem. Order of Jan. 12, 2012, ECF 34, at 2.

Shaffer filed a First Amended Complaint on February 13, 2012. ECF 35. His amended complaint deleted – rather than clarified – his prior concession that he had "absolutely no legal control over the publication of [the book] and could only offer recommendations [to] the publisher." Original Compl. ¶ 31. Shaffer now alleges that he retained ownership of the

copyright in the book even as he conveyed the right to publish, Am. Compl. ¶ 10; that "at some point in the future" the right to publish will revert to him, *id.*; and that he desires to publish a future edition of the book, *id.* ¶ 49.

## Argument

### I. THE PLAINTIFF LACKS STANDING TO PURSUE HIS FIRST AMENDMENT CHALLENGE TO THE REDACTION OF GOVERNMENT INFORMATION

#### A. Applicable Legal Standard

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Gen. Motors Corp. v. Envtl. Prot. Agency*, 363 F.3d 442, 448 (D.C. Cir. 2004) ("As a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction."). Three requirements must be met to satisfy the "irreducible constitutional minimum of standing." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). "First and foremost, there must be alleged (and ultimately proved) an 'injury in fact' – a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Id.* at 103 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. . . . And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury." *Id.* No standing exists if the court "would have to accept a number of very speculative inferences and assumptions in any endeavor to connect his alleged injury with" the challenged conduct. *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980).

"This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the

burden of establishing its existence." *Steel Co.*, 523 U.S. at 103-04. "[A] deficiency on any one of the three prongs suffices to defeat standing." *US Ecology, Inc. v. U.S. Dep't of the Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). As the party invoking jurisdiction, the plaintiff here has the burden of establishing each element. *Id.*

Article III standing cases teach that the relevant substantive law underlying each case determines who is the owner of each cause of action, and thereby determines who has standing to advance each cause of action. *Int'l Primate Prot. League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 76 (1991) ("[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents."); *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1339-41 (Fed. Cir. 2007). A First Amendment plaintiff is not excused from satisfying the constitutional requirement of standing, but must also demonstrate that he has suffered some concrete personal harm and injury in fact to have standing to challenge government action. *See In re Navy Chaplaincy*, 534 F.3d 756, 760-61 (D.C. Cir. 2008), *aff'g* 516 F. Supp. 2d 119 (D.D.C. 2007) (navy chaplains who do not allege specific personal injury do not have standing); *see also Valley Forge Christian Acad. v. Americans United*, 454 U.S. 464, 485-86 (1982) (lack of distinct injury under First Amendment destroys standing).

### B. Shaffer's Amended Complaint Fails To Address His Earlier Concessions Showing That He Lacks an Injury in Fact

To satisfy the requirement of an injury in fact, a plaintiff must have suffered "an invasion of a legally protected interest." *Defenders of Wildlife*, 504 U.S. at 560. That requires a plaintiff to demonstrate an injury that "affect[s] the plaintiff in a personal and individual way." *Id.* at 560 n.1. *See also Raines v. Byrd*, 521 U.S. 811, 819 (1997) (party must have personal stake in the outcome of the litigation to have standing).

As the Government's original motion noted, an individual lacks a First Amendment interest in a work that he has sold to another party. *See, e.g.*, *Burke v. City of Charleston*, 139 F.3d 401, 403 (4th Cir. 1998) (artist who was commissioned to paint a mural lacked an injury in fact to challenge ordinance restricting its display because he "relinquished his First Amendment rights when he sold his mural to the restaurant owner, who alone has the right to display the mural"); *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1049 (2d Cir. 1988) (artist could not bring First Amendment challenge because he had "relinquished his own speech rights in the sculpture when he voluntarily sold it").

Shaffer alleges that his First Amendment rights were violated by the Government's refusal to allow the publication of certain information. *See* Am. Compl. ¶¶ 63-74. But when he filed this suit, Shaffer alleged that he had transferred "full legal control" over the book's text to the publisher by February 2010, before DIA intervened to express its concerns about the book.[1] Original Compl. ¶ 17. Shaffer further alleged that he, "as the author, had absolutely no legal control over the publication of *Operation Dark Heart* and could only offer recommendations that the publisher, which was willing to cooperate with the defendants as much as possible, could accept or reject as it saw fit." *Id.* ¶ 31. Shaffer's own complaint thus alleged that the Government had required the redaction of text that he did not own or control. The Government relied on his own allegations to argue that he lacked standing, given that an author relinquishes his speech rights in a work he has sold to a third party. *See Serra*, 847 F.2d at 1047.

[1] The Government reserves the right to challenge the factual basis for allegations made in Shaffer's complaint, for purposes of contesting the merits of the claim. But because a plaintiff has the burden of alleging and proving facts sufficient to establish the basis of the Court's jurisdiction, *see Defenders of Wildlife*, 504 U.S. at 561, for purposes of its motion the Government accepted that allegation as true.

Shaffer's amended complaint fails to correct this problem. When the Government relied on his allegations in moving to dismiss, Shaffer conceded that the argument was reasonable but complained that the Government took his own words "too literally."[2] Pl.'s Opp'n to Mot. to Dismiss, ECF 30, at 4. Now, rather than clarify his meaning, he simply has deleted the problematic sentences from his complaint. *Compare* Original Compl. ¶¶ 17, 31 *with* Am. Compl. ¶¶ 17, 31. Shaffer has been given the chance to correct or clarify his prior statements, but he has chosen not to do so. His original allegations warrant dismissal because it is a "well-settled rule that a party is bound by what it states in its pleadings." *Soo Line R. Co. v. St. Louis Sw. Ry. Co.*, 125 F.3d 481, 483 (7th Cir. 1997).

Beyond his failure to correct his earlier concessions, Shaffer's amended complaint adds only minimal new detail. Referring to the publishing agreement he entered with St. Martin's Press, he now alleges:

> Paragraph 3 of the agreement is clear that Shaffer retains ownership of the copyright in the Work, and all rights not explicitly granted to the publisher. Conveyed to the publisher in paragraph 1 was simply the "right to print, publish, distribute and sell . . . in the English language in book form . . ." In fact, at some point in the future all rights surrounding the book will revert back to Shaffer. In any event, at all times Shaffer has maintained a legal and ownership interest in his book, and continues to do so to this day.

Am. Compl. ¶ 10. But this new detail does nothing to demonstrate standing. The fact that Shaffer retained the rights not granted to the publisher misses the point, because it is the rights that he *did* grant to the publisher that he claims were infringed. By his own previous allegations, he sold to the publisher the right to control the text and publication. *See* Original Compl. ¶¶ 17,

[2] At the same time, Shaffer's own argument supported the Government's motion to dismiss. Referring to the time in September 2010 when the Government sought redactions, Shaffer told the Court that, "[b]y the terms of the publishing agreement, the publisher had every legal right to proceed with the publication, notwithstanding anything Shaffer could do at that specific point in time." Pl.'s Opp'n to Mot. to Dismiss, ECF 30, at 4-5 n.2.

31. He does not now allege otherwise; to the contrary, he confirms having transferred away the right to publish. Under his own allegations, he could suffer no personal injury when alterations were made by the publisher at the request of the Government, because he had no protected legal interest in or control over the publication of the book.

Shaffer is left with his allegation that he has retained the copyright in the book. Am. Compl. ¶ 10. The allegation of copyright ownership does not confer standing on Shaffer because he is not suing to protect any retained interest represented by the copyright. He claims a "right to publish," but that is precisely the exclusive right he sold to St. Martin's Press. The ownership of the bare copyright therefore does not support Article III standing when the gravamen of the complaint concerns injuries to other interests. *See Serra*, 847 F.2d at 1047 (recognizing that artist determines whether to retain rights that could give rise to standing; "if he wished to retain some degree of control as to the duration and location of the display of his work, he had the opportunity to bargain for such rights in making the contract for sale of his work").

Afforded the opportunity to amend his complaint, Shaffer has thus failed to fully detail a factual basis for standing to raise his First Amendment challenge. Because he has not met his burden of alleging facts establishing standing, *see Defenders of Wildlife*, 504 U.S. at 561, Shaffer's claim should be dismissed.

### C. Because He Fails to Allege that a Future Publication is Reasonably Imminent, Shaffer's Claim is Remote, Speculative, and Not Redressable

Far from clarifying the basis for standing, Shaffer's amended complaint actually places him even further from a justiciable controversy. A close look at his amended complaint reveals both that he has failed to demonstrate an injury-in-fact and that his claims are not redressable. He bases his alleged injury on a desire to publish another edition of *Operation Dark Heart*, but he does not say when that will happen. Such "someday" intentions are too remote and

speculative to give rise to a cognizable injury. Until that day comes, St. Martin's Press has complete discretion over whether to publish another edition of the book, and yet Shaffer has not even alleged that the publisher is interested in doing so.

When he originally brought suit in December 2010, the publisher already had distributed a hardcover edition of *Operation Dark Heart*. *See* Original Compl. ¶ 42. Shaffer did not bring suit prior to that publication, but instead alleged that the publisher wished to publish a paperback version in October 2011, and that "the desire is to disclose as much of the text redacted from the" hardcopy edition as possible. *See id.* But St. Martin's Press published a paperback edition in October 2011, with the same redactions as the hardcover edition. Am. Compl. ¶ 49.

Now, Shaffer no longer speaks of an upcoming publication date. Instead, he alleges that he "desires to have published a future edition of his book where the redacted text is revealed to the public." *Id.* But the publishing agreement indisputably gives the publisher (and not Shaffer) the exclusive right to publish future editions. The publisher that has the "sole and exclusive right to print, publish, distribute and sell" *Operation Dark Heart*. *See* ECF 31-1 at 1, ¶ 1.[3] That includes "all the rights in all revised editions of the Work that the Publisher has in the original work," and specifically the right to decide whether it will ever issue new editions. *Id.* at 7, ¶ 13.

Shaffer has neither alleged that he has the right to publish another edition of the book nor that the publisher intends to do so. He first notes that "*at some point in the future* all rights surrounding the book will revert back to Shaffer." Am. Compl. ¶ 10 (emphasis added). But

[3] The publishing agreement was quoted in Shaffer's amended complaint (but not attached as an exhibit). It can properly be considered in ruling on the defendants' motion. *See Artis v. Greenspan*, 223 F. Supp. 2d 139, 152 n. 1 (D.D.C. 2002) ("A court may consider material outside of the pleadings in ruling on a motion to dismiss for lack of . . . subject matter jurisdiction."); *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C.1999), *aff'd*, 38 Fed. Appx. 4 (D.C. Cir. 2002) ("[W]here a document is referred to in the complaint and is central to the plaintiff's claim, such a document attached to the motion papers may be considered without converting the motion to one for summary judgment.").

even if that were certain to happen one day – and it may not – a plaintiff cannot demonstrate an injury in fact by relying on speculative and remote future plans. He must show that his alleged injury is "actual or imminent" rather than "conjectural or hypothetical." *Steel Co.*, 523 U.S. at 103.

To the extent Shaffer is alleging that he will "at some point" have the right to publish a revised edition, these "someday" plans are insufficient to give rise to standing. "Article III requires not only that an alleged injury be concrete and particularized, but also that it be imminent." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) (internal quotation omitted). Standing requirements do not permit a plaintiff to rely on what may, hypothetically, happen at some uncertain time in the future. *See, e.g.*, *Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991) (holding that author lacked standing to seek remedy against speculative potential for future censorship).

By offering only a general desire to publish another version, the plaintiff here aligns himself with the plaintiffs in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). There, the Supreme Court found that the plaintiff's "intent" to engage in conduct that would give rise to harm, at some time in the future, did not provide a basis for standing. The Court explained that "[s]uch 'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* at 564. By alleging that he would like to publish a revised version, and that legal rights regarding publication will revert to him "at some point in the future," Shaffer has not alleged an injury of sufficient imminence to constitute standing.

To the extent Shaffer seeks to publish a revised edition prior to the rights reverting to him, he also lacks standing because he has not shown that St. Martin's Press has any interest, let alone intent, in publishing yet another version of the book.[4] His claim thus lacks redressability.

As the third prong of standing, redressability requires the plaintiff to show "a likelihood that the requested relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 103. The redressability prong requires a plaintiff to show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 560-61. The Supreme Court has recognized that when the existence of standing

> "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," . . . it becomes the burden of the plaintiff to adduce facts showing that these choices have been or will be made in such manner as to produce causation and permit redressability of injury.

*Id.* at 562 (quoting *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)). In these circumstances, "standing is not precluded, but it is ordinarily '*substantially more difficult*' to establish." *Id.* (emphasis added; quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). While a plaintiff need not show that redress of his injury would be *guaranteed* by a favorable decision, he "must demonstrate that a favorable decision would create 'a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Klamath Water Users Assoc. v. Fed. Energy Regulatory Comm'n*, 534 F.3d 735, 739 (D.C. Cir. 2008) (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)). A plaintiff cannot meet that burden by

[4] Moreover, to the extent Shaffer seeks to publish a future revised edition containing different text, his secrecy agreements require him to submit the text for prepublication review. The Government must be given the opportunity to review such proposed text prior to its proposed publication, and any assertion Shaffer now makes concerning how the defendants might respond to such a future request would be completely hypothetical. Moreover, by submitting proposed revisions to the Government for its review, Shaffer would exhaust his administrative remedies and ensure that a complete record is presented to the Court.

relying "on conjecture about the behavior of other parties." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005). *See also Crete Carrier Corp. v. EPA*, 363 F.3d 490, 494 (D.C. Cir. 2004).

Redressability is an independent and critical component of the plaintiff's burden, and courts do not hesitate to dismiss claims lacking redressability. For example, in *US Ecology, Inc. v. U.S. Department of the Interior*, 231 F.3d 20, 21 (D.C. Cir. 2000), the plaintiff hoped to build a waste disposal facility on land in California, and sued the federal government for failing to transfer the land to California. The D.C. Circuit found a lack of redressability because the plaintiff had provided inadequate reason to believe that California would actually proceed with the project if the federal government transferred the land, and without such action by the state the plaintiffs' injury would not be redressed. *Id.*

To the extent that Shaffer claims he has been injured by a denial of his right to publish an unredacted version of *Operation Dark Heart*, his desire to publish is similarly dependent on the actions of a third party, the publisher, that has complete discretion over whether to publish yet another edition of the book. Even were he to obtain a favorable decision, only St. Martin's Press has the right to publish a new edition. While he previously alleged that the publisher intended to publish a paperback edition of the book – and even provided evidence of that intent in the form of a letter from the publisher, *see* ECF 3-2 – that publication was completed last year. Now, Shaffer conspicuously does not aver that the publisher intends (let alone agrees) to exercise its exclusive rights to publish an unredacted version of the book in the hypothetical event that Shaffer were to prevail on his First Amendment claim. It is impossible to know how St. Martin's Press, which already has published two editions of *Operation Dark Heart*, would exercise its

contractual discretion in the future. Shaffer's theory of redress thus depends entirely on impermissible conjecture regarding the behavior of a third party.

Notably, the defendants previously raised this issue in support of their motion to dismiss. *See* Defs.' Reply in Supp. of Mot. to Dismiss, ECF 33, at 3 ("In this case, because it is unknown whether or not plaintiff's publisher might ever choose to exercise its exclusive right to publish an unredacted edition of *Operation Dark Heart* if plaintiff were to succeed on his First Amendment claims, plaintiff has failed to demonstrate injury-in-fact that can be redressed by his requested relief."). Despite being afforded the opportunity to fully detail the factual basis for standing, Shaffer has done nothing to address this critical flaw.

For these reasons, Shaffer has failed to establish injury-in-fact and redressability, and thus lacks standing to raise a First Amendment challenge to the redaction of the book.

## II. BECAUSE THE PLAINTIFF'S REMAINING CLAIMS ARE ANCILLARLY TO A CLAIM THAT HE LACKS STANDING TO BRING, THEY SHOULD ALSO BE DISMISSED

In his amended complaint, Shaffer also attempts to elevate collateral disputes over the Court's resolution of his classification challenge into separate free-standing claims. He contends that the Government has violated the First Amendment by refusing to allow him access to a Government computer and by failing to respond to a request his counsel made just four days before he filed his amended complaint. *See* Am. Compl. ¶¶ 76, 85-89. These claims are entirely derivative of his first claim, as they attempt to raise procedural disputes about what material can be presented to and reviewed by the Court as it resolves the merits of Shaffer's First Amendment challenge to the book's redaction.

If the Court does not reach the merits of Shaffer's first cause of action – which it should not, given that he lacks standing for the reasons set forth above – then the consideration of his

remaining causes would be an exploration of hypothetical constitutional questions.[5] A "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). Consistent with that principle, Shaffer's remaining counts should also be dismissed.

**Conclusion**

The Court has given the plaintiff the opportunity to amend his complaint to provide a detailed factual basis sufficient to support his claim of standing. He has not done so. For the reasons stated herein, Shaffer's own allegations fail to demonstrate standing to bring this case, and his complaint should be dismissed.

Dated: April 2, 2012.

Respectfully submitted,

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[5] The defendants also submit that Shaffer's derivative claims are wholly without merit. For example, he is incorrect in arguing that the First Amendment requires the Government to provide him with classified information or entitles him to submit classified information to the Court. *See Doe v. CIA*, 576 F.3d 95, 106-07 (2d Cir. 2009); *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003); *Boening v. CIA*, 579 F. Supp. 2d 166, 170-75 (D.D.C. 2008). Shaffer is also wrong in alleging that his requests for discovery could give rise to an independent cause of action. *See Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002) (recognizing that a claimed right of access to courts "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court"). While the Court need not, and should not, reach these issues, the defendants reserve all rights and arguments with respect to Shaffer's claims.

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