IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANTHONY SHAFFER, Plaintiff, v. DEFENSE INTELLIGENCE AGENCY, et al., Defendants.	Civil Action No. 1:10-02119 (RMU)

DECLARATION OF MARK S. ZAID, ESQ.

I, MARK S. ZAID, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this Declaration on personal knowledge and in support of the Reply to Defendants' Response to Plaintiff's Supplemental Brief (filed October 28, 2011)("Defs' Memo").

2. I am the attorney of record for plaintiff Anthony Shaffer ("Shaffer"). I am admitted to practice law in the States of New York, Connecticut Maryland and the District of Columbia, as well as the D.C. Circuit, Federal Circuit, Second Circuit and Fourth Circuit Court of Appeals, and the United States District Courts for the District of Columbia, Maryland, Eastern District of New York, Northern District of New York, the Southern District of New York and the U.S. Court of Federal Claims. I have been litigating cases pertaining to national security since 1993.

3. During the last fifteen years I can safely state that I have handled more prepublication review cases, particularly with the defendants in this action, both at the administrative and litigation stages, than anyone else. See e.g. Stillman v. CIA et al. 209 F. Supp. 2d 185 (D.D.C. 2002), rev'd on other grounds, 319 F.3d 546 (D.C. Cir. 2003); Boening v. CIA, 579 F. Supp. 2d 166, 174 (D.D.C. 2008); Berntsen v. CIA, 511 F. Supp.

2d 108 (D.D.C. 2007); Sterling v. CIA, Civil Action No: 03-0603 (D.D.C.)(TPJ); Wendy Lee v. CIA, Civil Action No. 03-0206 (D.D.C.)(TPJ); Waters v. CIA, Civil Action No. 06-383 (D.D.C.)(RBW); Eddington v. CIA, 96-#### (D.D.C)(civil action number unavailable). I have also handled countless others that I have resolved short of litigation, and at times I even had authorized classified access to the manuscript in question and participated in classified discussions regarding the text, although candidly the Government now refuses to permit such participation.

4. The purpose of this declaration is to provide on the basis of personal knowledge a refutation of some of the relevant facts asserted by the defendants in their Memo.

5. I have represented Shaffer since 2005, and was involved with the defendants during Summer 2010 when they challenged the publication of Operation Dark Heart: Spycraft and Special Ops on the Frontlines of Afghanistan and the Path to Victory (St. Martin's Press, 2010)("Operation Dark Heart").

6. On page 8, footnote 5, of its response, the defendants inaccurately claim:

> Plaintiff did not, however, submit such citations or materials from the public domain to the Government when the manuscript was originally under review. After publication of the redacted book, he then chose to bring suit without notifying Defendants that he wished to publish an unredacted version of the book, and without submitting to Defendants a new request for prepublication clearance or open source material to support his claim.

7. Shaffer did, in fact, submit public domain materials to the Government when he first sought pre-publication approval, which was granted by the agency that last held his interim Top Secret security clearance. During August and September 2010, Shaffer met repeatedly and negotiated with the defendants over the text in his book. Public source material was again submitted to the defendants for their review. It is Shaffer's intention to recount in his sworn declaration the substance of these meetings for the Court so that an assessment can be made of the reasonableness of the defendants' classification

positions then and now. Thus, contrary to the defendants' position, this information is quite material to the Court's analysis. Defs' Memo at 9.

8. Furthermore, I helped negotiate the scheduling of the Summer 2010 meetings. At the same time, I also conveyed Shaffer's legal position to the defendants as to the intended plans to publish an unredacted version of the book, as well as made it clear that litigation would be forthcoming with respect to the text the defendants refused to disclose. To state otherwise to this Court, as contained in the text above, is astounding.

9. On page 10, the defendants claim that there is "no accepted practice of providing such facilities upon request, even if the requestor is subject to a secrecy agreement or has access to classified information." That there is no "accepted practice" is true in light of the fact that the practice, which does exist, is inconsistently applied on an arbitrary basis. Indeed, I, as counsel for other parties, have had authorized access to secure government computers on multiple occasions over the years to draft documents for various courts or administrative proceedings. On occasion the Government has classified much, and sometimes all, of the contents of my documents.

10. In De Sousa v. CIA et al., Civil Action No. 09-00896 (D.D.C.)(BAH), a case I am handling, I used secure government computers to draft a brief with permission from the Department of Justice's Litigation Security Group. I did so because I was concerned that a potential inadvertent disclosure of classified information might occur. In order to gain a tactical litigation advantage, lawyers for the Government threatened the revocation of my security clearance.

11. On page 10, footnote 7, the defendants dispute the fact that Judge Howell ordered the Government defendants in De Sousa to allow me to use a secure Government computer to draft a substantive opposition brief. They point to the text of a Minute Order issued by Judge Howell on May 26, 2011, that conveys the impression that the Executive Branch was afforded the discretion to do so if it so choose, which it did not. Admittedly, the Minute Order absolutely conveys a discretionary option. But the text of that Minute

Order was a mistaken, inaccurate representation of the Court's articulated Order in open court; a fact that was clearly reaffirmed by Judge Howell during a status conference held on August 31, 2011. Of course, this Court can verify this with Judge Howell directly.

12. The notion that the defendants in this case are attempting to protect national security by virtue of preventing Shaffer from accessing a manuscript he wrote, and which can be found in unredacted form online, and utilizing a secure government computer is farcical. It is Shaffer who is the one who is trying to ensure even inadvertent disclosure of classified information never occurs by his requests, just as I did in the De Sousa case. How the defendants justify having any individual draft a document on an unclassified, unsecure computer system knowing it could contain classified information, even if it will be submitted for pre-publication review later prior to filing, makes no sense.

13. As far as the undersigned is concerned, this is nothing but a set-up by the defendants to encourage Shaffer to attempt to use his unsecured computer and draft a precise response that will invariably include "classified" information as far as the defendants are concerned. This will then allow the defendants to prosecute Shaffer, whether civilly or even criminally, for his actions, or deny him a security clearance should he ever reapply.

14. I had this very situation occur ten years ago in Sterling v. CIA (S.D.N.Y.) when I drafted an Opposition brief to challenge the CIA's invocation of the state secrets privilege, particularly to contest the classification of certain information. Although I properly submitted the brief for pre-publication review, I was chastised for including "classified" information in the document, all of which was redacted prior to public filing, and threatened with the revocation of my authorized access to classified information. This occurred notwithstanding the fact that the District Court agreed with my analysis and denied the CIA's Motion to Dismiss based on the state secrets privilege.

15. In Boening, another pre-publication review case referenced above that I handled, the CIA "classified" dozens of published newspaper articles that I submitted as an exhibit

to an Opposition brief. Indeed, the defendants in this action have cautioned this might occur in this case on page 12 footnote 9. How, therefore, is Shaffer to be able to judge what he can or can not write in his sworn declaration based on these inconsistent practices of the defendants to allegedly protect national security?

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: November 7, 2011

/s/

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Mark S. Zaid