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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 IN CAMERA, UNDER SEAL OPPOSITION TO THE DEFENDANT'S FIFTH MOTION TO COMPEL DISCOVERY

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

[redacted] On July 23, 2013, the defendant filed his Fifth Motion to Compel Discovery ("Fifth Mot. to Compel") with the Classified Information Security Officer ("CISO"). The defendant's motion is unusual in that it raises a number of discovery demands that the defendant concedes are not ripe for review by the Court in

[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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that they are still under discussion between the parties. See Defendant's Fifth Motion to Compel Discovery ("Fifth Motion")[2] at 5-7, 16-18. The United States will not address the issues here that the defendant reports to the Court, but acknowledges, implicitly or explicitly, may be narrowed or resolved in subsequent meet-and-confer sessions. As captioned, the defendant actually moves to compel the production of: (1) intelligence reports and other information that the defendant claims he needs to rebut the government's motive theories; (2) [redacted] (3) intelligence reports created between May 25, 2009 and June 11, 2009, addressing [redacted] (4) "information from [redacted] referenced in the Daniel Russel FBI 302 (with a related request for this Court to re-review that FBI 302) and the [redacted] email, and a new version of the [redacted] email with classification markings; and (5) any [redacted] material related to the [redacted] report at issue that was drafted or circulated prior to the 3:16 p.m. cut-off time, as well as unredacted copies of the [redacted] material produced in response to this Court's CIPA Memorandum Opinion, granting the government's First, Second, and Third CIPA Section 4 Motions. See Fifth Motion at 4-16, 19-23.

[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 motions under CIPA Section 4, and (c) the Court's prior rulings on those motions as follows: (a) First Motion, etc.; (b) First CIPA Section 4 Motion, etc.; (c) First Memorandum Opinion, etc., or CIPA Memorandum Opinion, respectively.

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(U) As demonstrated below, the defendant's Fifth Motion to Compel should be denied. As with the great bulk of the defendant's discovery requests that were the subject of his first four motions to compel, the defendant's requests to compel discovery concerning (1) and (2) above fail to meet his burden under Roviaro v. United States, 353 U.S. 53 (1957), and United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989); Brady v. Maryland, 373 U.S. 83 (1963); or Rule 16 of the Federal Rules of Criminal Procedure. The defendant's requests to compel discovery concerning (3), (4) and (5) above should be denied because they seek to re-litigate issues already decided by this Court in its prior discovery rulings. For the Court's convenience, we address each of the defendant's arguments below in the order in which they are presented in his motion.

[redacted] As an initial matter, however, the defendant's assertion in the introduction of his motion that there is a "significant information asymmetry" between the defendant and the United States is incorrect. Fifth Motion at 2. According to the defendant, "[u]nlike in a typical case, the defense does not have access to [the defendant's] work files, emails, computers or work product from the time period in question." Id. The defendant is wrong. In total, the defense has received over 16,600 pages of unclassified discovery. The defense has also received over 3,500 pages of classified discovery.[3] Specifically with regard to the defendant's "work product," as the Court emphasized in ruling on the defendant's Third Motion to Compel, see Third Memorandum Opinion at 19, the United States has produced:

- an electronic copy of the defendant's unclassified Department of State (DOS) email;

[3] (U) The United States has filed under seal the parties' discovery correspondence to date. See ECF Docket Nos. 58, 80, 91, 93, 94, and 118. That correspondence reflects that the United States has exceeded its obligations in both unclassified and classified discovery.

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- an electronic copy of the hard drive from the defendant's unclassified DOS workstation;
- an electronic copy of the hard drive from the defendant's unclassified Department of Energy (DOE) laptop which was seized during the search of his residence;
- 628 pages of material from the defendant's classified hard drives and email accounts pursuant to a search procedure agreed to by the parties;[4]
- electronic audit records showing the defendant's access to the [redacted] report on June 11, 2009 (i.e., the date of the unauthorized disclosure);
- electronic audit records showing the defendant's other [redacted] activity on the morning of June 11, 2009;
- all non-electronic, hard-copy material photographed, copied, and/or seized from the multiple entries into the defendant's DOS office in August and September 2009;
- all screenshots of the defendant's DOS unclassified workstation and Internet activity from August 24, 2009 through October 1, 2009;[5]
- a copy of the defendant's DOS badge, desk phone, and blackberry telephone records; and
- FBI 302s and underlying agents' notes of over ten interviews of the defendant's work colleagues.

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[4] (U) The production of these documents was the result of a multi-step procedure agreed to by the parties. The defendant first submitted electronic search terms to an Intelligence Community filter team to run against the defendant's classified electronic media. The results of the keyword searches were then provided to the prosecution team which, in turn, reviewed them for discoverability.

[5] (U) The defendant also faults the United States for only producing screen shots from the defendant's unclassified DOS workstation from August and September 2009. See Fifth Motion at 3, n. 2. According to the defendant, those screen shots "do not shed much light on the defendant's work during the relevant time period." Id. The defendant thus implicitly concedes that those screen shots shed some light on his work at the Department of State. The defendant has received all of the screenshots of his use of his unclassified DOS computer that were collected, namely, the period between August 24, 2009 and October 1, 2009.

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All of this material is available to the defendant. He may conduct whatever searches of it that he wishes. The defendant's desire for the production of additional classified material to which he is not entitled does not create an "information asymmetry" in this case. Indeed, as this Court has previously instructed, the defendant's requests for additional classified material should be viewed and evaluated through the lens of "the amount of discovery that has already been provided concerning his work at the Department of State." See Third Memorandum Opinion at 19; see also United States v. George, 786 F. Supp. 56, 58 (D.D.C. 1992) ("Materiality [under Rule 16] is, to some degree, a sliding scale; when the requested documents are only tangentially relevant, the court may consider other factors, such as the burden on the government that production would entail or the national security interests at stake, in deciding the issue of materiality.").

(U) Similarly inaccurate is the defendant's assertion in the introduction of his motion that the United States "did not produce a single page of additional classified or unclassified discovery in response" to the defendant's June 14, 2013, discovery letter. Fifth Motion at 2. In fact, on July 2, 2013, the United States produced 14 pages of classified documents that responded fully to two of the defendant's discovery requests. See Fifth Motion, Ex. 2 at 6 (government's responses to requests 8 and 9).[6] On August 16, 2013, the United States provided information to the defendant that responded to three of his three remaining requests, i.e., requests numbered 6.e, 6.h, and 6.i.[7] Additionally, the United States confirmed in its July 2nd letter that there was either no responsive

[6] (U) On July 2, 2013, the United States also produced an additional 20 pages of discovery in response to the Court's First and Third Memorandum Opinions. See id. at 2-3.

[7] (U) The defendant's request that this Court "set a deadline for the government's response" to these three requests thus should be denied. Fifth Motion at 15.

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material, or the United States had previously produced all responsive material, for seven of the defendant's discovery requests. See id. at 3-6 (government's responses to requests 1.b, 1.c, 1.d, 1.e, 6.a, 6.d, and 6.j). Finally, as the defendant acknowledges elsewhere in his motion, six of his remaining discovery requests are not ripe for decision now because they are the subject of further discussions between the parties, i.e., requests 1.a, 2, 3, 4.a, 4.b, and 5.a. See id. at 5; Fifth Motion at 16, 17-18. Thus, the defendant's assertion that the United States has "not produced a single page of additional classified or unclassified discovery in response to these requests" and is "unwilling[] to produce any additional discovery" is an inaccurate characterization of the government's response to his June 14, 2013, discovery requests.

(U) II. Factual Background

(U) To assist the Court in its consideration of defendant's discovery requests regarding motive, the United States summarizes next (i) the government's three motive theories, (ii) the government's evidence already produced to the defendant in discovery bearing on those motive theories, (iii) the timing and content of Fox News reporter James Rosen's communication with the defendant seeking specific information concerning North Korea; and (iv) the defendant's four discovery requests related to motive.

(U) A. The Government's Three Motive Theories

[redacted] On May 30, 2013, the Court denied the defendant's prior motion to compel the production of all intelligence reports that the defendant had accessed during the time period of the unauthorized disclosure charged in the Indictment. Third Memorandum Opinion at 17-19. In denying that motion, the Court instructed the United States to notify the defendant if it intended to offer evidence of the defendant's

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[redacted]

motive at trial "so as to allow the Defendant sufficient time to seek discovery at least helpful to the defense in rebutting the Government's evidence of motive." Id. at 18. On June 12, 2013, the United States provided that notice to the defendant. See Fifth Motion, Ex. 3. In its notice, the United States stated that it may present multiple motive theories at trial, to include:

(1) The defendant wanted to resign from his government position and find a new job, including at Fox News as a specialist in Korean and East Asian affairs and national security issues.

(2) The defendant was a disgruntled employee because he believed that his insights regarding North Korea were being ignored or rejected by other government personnel.

(3) The defendant believed that the intelligence information from June 11, 2009, [redacted] report confirmed the accuracy of his view that North Korea [redacted]

Id. The United States advised the defendant in its June 12th notice that neither theory (2) nor (3) above was implicated by the Court's Third Memorandum Opinion. As for theory (1) above, the United States advised the defendant that, to the extent that any classified intelligence reports existed within the criteria set forth in the Court's Third Memorandum Opinion, the defendant's need for them could be resolved by stipulation or summary rather than production of the reports themselves. Id.

(U) **B. The Government's Evidence Bearing on its Motive Theories**

(U) The United States provides below a summary[8] of its evidence concerning each of its three motive theories.

(U) **1. The Defendant Was Seeking Employment at Fox News**

(U) The government's evidence at trial would[9] show that, as of June 11, 2009, the

[8] (U) These summaries do not purport to reflect the entirety of the motive evidence already produced to the defendant.

[redacted]

[redacted]

defendant desired employment at Fox News. The government has produced in discovery a March 2008 cover letter from the defendant to Fox News Chairman and CEO, Roger Ailes, proclaiming the defendant's "deep interest in exploring employment opportunities with Fox News Channel." See US-00014577-14580.[10] The United States has also produced in discovery a FBI 302 of an interview of a witness who recalled that the defendant had described Fox News as his "favorite news" organization and had stated that "I [the defendant] might be a good Fox News Commentator." The witness knew that the defendant had sought employment at Fox News. Nevertheless, when that witness later asked the defendant if he had "ever heard anything from FOX?," the defendant responded that "they wouldn't contact someone like me." CLASS_0001112-1117.

(U) In his first email contact with James Rosen on May 11, 2009, the defendant attached his resume. See US-0002031-0002037. When asked by the FBI in March 2010 why he did so, the defendant told the FBI that he was hoping that Mr. Rosen -- a reporter -- "could help put him in a think tank."

(U) **2. The Defendant Believed His Insights Regarding North Korea Were Being Ignored**

(U) The government's evidence at trial would also show that, as of June 11, 2009, the defendant was a disgruntled employee because he believed that his insights regarding

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[9] (U) We use the word "would" deliberately. The United States advises the Court that if the Intelligence Community's equities that are implicated by the defendant's requests for additional classified information and material regarding a given motive theory cannot be adequately protected in this case, then the government would expect to be required to abandon that theory for trial purposes.

[10] (U) The Bates numbers for the documents cited in this pleading are provided for the convenience of defense counsel and the Court. Because of the volume of documents cited, the United States has not attached them as exhibits. The United States will, of course, provide any of this material to the Court upon request.

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North Korea were being "ignored"[11] by senior government officials. For example, in a February 4, 2009, email the defendant told a work colleague:

> I am SERIOUSLY considering resigning from this entire USG business. I cannot seemingly affect change from within (except for that brief shining moment when I had top access)[12] and so perhaps it is best to do it from the outside. Call me idealistic or radical but I refuse to play this game that deeply undermines our national security. I am confident enough to call these people out as idiots who know nothing about Korea or Asia. If there is an opportunity, I will leave. . . .

CLASS_0002830.

(U) In a March 18, 2009, email, a colleague at the Department of State forwarded to the defendant a background paper on Inter-Korean relations about which the defendant had not been asked to comment. In a reply email, the defendant stated:

> I guess it is to be expected that I am not asked for my comment since I know nothing about Korea. That is fine.
>
> . . . .
>
> I don't even know what to say to such misinformed drivel. . . .
>
> . . . .
>
> No wonder we can't negotiate well [with North Korea]. If we don't even know one of our closest allies (an open, free, democratci [sic], capitalist society deeply influenced by the U.S.), how can we ever even dream of knowing North Korea?
>
> Thanks for forwarding it. At the very least, the anger it stirred made me forget the pain in my neck.

CLASS_0002118.

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[11] (U) By "ignored," we do not mean strictly literally, but rather in the manner of a mid-level employee who perceives that those in more senior positions do not sufficiently appreciate or even realize his superior intellect and insight.

[12] (U) Based on other evidence collected in the investigation, the United States believes that the defendant's reference to "top access" concerns briefings that the defendant gave to Vice President Cheney, National Security Adviser Stephen Hadley, and former Secretaries of State Henry Kissinger and George Schultz, before December 2006 on North Korean regime stability.

[redacted]

[redacted]

(U) In an April 16, 2009, email, the defendant wrote to a colleague at the Department of Energy (DOE):

> . . . I met Amb. Bosworth (Special Envoy for NK) and Sung Kim (Amb to the 6-Party talks . . .) the other day. Wasn't too impressed. Knew it already but confirmed beyond certainty after the meeting. They just don't know North Korea or the North Koreans.

CLASS_0002131.

(U) In a June 4, 2009, email the defendant sent to a colleague at the Department of State (DOS), he attached a prior email regarding his view that the best sources of information regarding North Korea are certain North Korean defectors. In his June 4, 2009, email the defendant stated:

> This is something I wrote last fall when I first joined VCI. [Assistant Secretary of State] Paula [DeSutter] said she was so taken by this that she wanted to distribute this to [Joseph R.] DeTrani [North Korea Mission Manager at the Office of the Director of National Intelligence] and others at DOE – she did. She got no response. I got no response.
>
> I am giving this to you with the above commentary to underscore my point that 99% of the people don't care and don't know.
>
> A person who has only eaten pork in his life and does not know that cows (or other animals) exist, won't be able to appreciate filet mignon when put in front of them.
>
> That is why I say it's not worth it.
>
> They really don't know anything.

CLASS_0002096.

(U) In a June 12, 2009, email, the defendant wrote to another DOS colleague:

> People who know things ALWAYS (time and culture has no bearing – it is universal) get taken to task for their insights. Unfortunately, most of that small group give up because they don't want to soil themselves with crap from inferiors.

[redacted]

[redacted]

> But the minority of that minority have to carry on . . . . [A] few of us pushed and pushed when everyone was against us. Were we ridiculed at that time? Yes. Did we pay a price? Yes. Do we ever get credit? No.

CLASS_0002104.

(U) On June 14, 2009, just three days after the charged unauthorized disclosure, the defendant sent an email to Fox News reporter James Rosen in which he stated:

> I was thinking that perhaps it would be a good for you to write a longer piece on why the IC got so many things wrong about NK -- and others. Why Chris Hill[13] and company (Bosworth, Sng [sic] Kim, Victor Cha[14]) and his cronies in the IC[15] (esp. those from DOE who railroaded skeptics) got it wrong, etc. Even the usual suspect [sic] of commentators have got it wrong. One can't have a policy when the rudimentary understanding of the country at hand is so misguided.
>
> Just a thought. . . .
>
> Please read and delete.
>
> Thanks.

US-0002012.

[redacted] **3. The Defendant Believed the [redacted] Report Confirmed His View That North Korea [redacted]**

[redacted] The government's evidence at trial would show that the defendant believed that the [redacted] report confirmed his view that North Korea [redacted] on June 11, 2009. The United States has produced numerous documents in classified discovery demonstrating the defendant's belief that

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[13] (U) Christopher Hill was the Assistant Secretary of State for East Asian and Pacific Affairs from April 2005 through April 2009.

[14] (U) Victor Cha was the Director for Asian Affairs on the National Security Council from December 2004 through May 2007, within which time he also served as Deputy Head of Delegation for the United States to the Six-Party Talks.

[15] (U) "IC" is a common acronym denoting "the Intelligence Community."

[redacted]

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North Korea [redacted] as of June 11, 2009. See Section IV.A.2.a. below. Further, the government's evidence would show that the defendant believed that the intelligence information in the [redacted] report regarding North Korea's [redacted] confirmed his own view that North Korea [redacted]. On June 13, 2009, [redacted] the defendant received an email from a DOE colleague the subject line of which stated [redacted] The body of the email stated [redacted] . . ." Approximately two minutes later, the defendant replied to the [redacted] email with an email that included [redacted] See CLASS_0002501-0002508. The FBI has interviewed the other individuals who received the [redacted] emails. Those individuals have told the FBI that the recipients of the emails, including the defendant, believed that North Korea [redacted] believed that [redacted] and believed that [redacted] vindicated them in their belief that North Korea [redacted] See, e.g., CLASS_0002641-0002651.

[redacted] On Monday, June 15, 2009, another DOE colleague sent an email to the defendant, stating in part:

> [We] are kind of going around and around on the news out of NK.
>
> [redacted]

[redacted]

[redacted]

[redacted]

CLASS_0002780. The defendant replied that same day with an email that clearly stated his views concerning the significance of [redacted] The defendant said in part:

> Instead of splitting hairs, why don't you start growing some? :)) . . . .
>
> [redacted]
>
> T.S. Eliot said, humankind cannot bear very much reality. But it seems that some humans cannot bear even a little bit of reality . . . .
>
> Who said I told you so? I did . . . .

CLASS_0002779.

(U) C. The Timing and Content of James Rosen's Specific Requests for North Korean Information

(U) The United States has previously described the email communications between the defendant and Fox News reporter James Rosen that show Mr. Rosen's cultivation of the defendant as a clandestine source of government intelligence about North Korea. See Gov't Omnibus In Camera, Under Seal Opposition to the Defendant's Motions to Compel Discovery ("Omnibus Opposition") at 12-16. To assist the Court's evaluation of the defendant's discovery request's concerning the government's motive

[16] (U) The defendant is fluent in Korean.

[redacted]

[redacted]

theories, the United States emphasizes here the following communications that reveal the timing and content of Mr. Rosen's specific requests for North Korea information from the defendant:

(U) In a May 20, 2009 email, the defendant asked for guidance from Mr. Rosen on information that would be of interest to Mr. Rosen. In his email, the defendant stated in part:

> I am new to this. Do you have any good suggestions on things you might be interested in doing?

US-0002001. Mr. Rosen responded to the defendant's question in a May 22, 2009 email wherein Mr. Rosen identified those specific North Korean topics about which Mr. Rosen sought information because he considered them newsworthy. Mr. Rosen's email stated in full:

> Thanks Leo [a.k.a. the defendant]. What I am interested in, as you might expect, is breaking news ahead of my competitors. I want to report authoritatively, and ahead of my competitors, on new initiatives or shifts in U.S. policy, events on the ground in North Korea, what intelligence is picking up, etc. As possible examples: I'd love to report that the IC sees activity inside DPRK [Democratic People's Republic of Korea, i.e., North Korea] suggesting preparations for another nuclear test. I'd love to report on what the hell Bosworth is doing, maybe on the basis of internal memos detailing how the U.S. plans to revive the six-party talks (if that is even really our goal). I'd love to see some internal State Department analyses about the state of the DPRK HEU[17] program, and Kim's health or his palace intrigues (I see the regime appears to have executed Choe Sung-chol, and purged a few others). In short: Let's break some news, and expose muddle-headed policy when we see it or force the administration's hand to go in the right direction, if possible. The only way to do this is to EXPOSE the policy, or what the North is up to, and the only way to do that authoritatively is with EVIDENCE.
>
> Yours faithfully, Alex [a.k.a., Mr. Rosen].

US-0002002.

[17] (U) "HEU" is a common acronym denoting "highly-enriched uranium."

[redacted]

[redacted]

(U) **D. The Defendant's Four Discovery Requests Concerning the Government's Motive Theories**

[redacted] On June 14, 2013, the defendant requested four types of records related to the government's three motive theories:

- Any classified intelligence report accessed by the defendant between May 1, 2009, and June 11, 2009;
- Any classified intelligence report accessed by the defendant between June 1, 2009 and June 11, 2009, regarding North Korea's [redacted]
- Any documents regarding the defendant's alleged "view that North Korea [redacted]" and
- Any documents or other evidence tending to support or refute the government's claim that the defendant was a "disgruntled employee" and/or that "his insights regarding North Korea were being ignored or rejected by other government personnel."

Fifth Motion, Ex. 1 at 2. As demonstrated below, the defendant's four demands are either not ripe for decision by the Court or are overbroad and should be denied outright as the defendant has already received all of the discovery to which he is arguably entitled.

(U) **III. Legal Standards**

(U) In his Fifth Motion to Compel, the defendant repeatedly seeks the wholesale compelled disclosure of classified intelligence reports, communications of covert employees, and other information produced in classified discovery that have previously been the subject of motions practice under the standards set for classified discovery implicating the government's classified information privilege. Thus to adjudicate the defendant's motion, the Court necessarily must apply the legal standards for classified discovery. See Roviaro, 353 U.S. 53; Yunis, 867 F.2d 617. The defendant's citation in his brief to Marshall, 132 F.3d at 67, is thus unavailing. See Fifth Motion at 3.

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(U) Marshall did not involve the disclosure of classified information. Rather, it concerned the application of Rule 16 to discovery of unclassified information. Further, even under Rule 16, disclosure is only required when the information sought is "material to preparing the defense"; that is, "there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." Marshall, 132 F.3d at 68 (internal quotation marks and citation omitted). "Although the materiality standard is 'not a heavy burden,' . . . the Government need disclose Rule 16 material only if it 'enable[s] the defendant significantly to alter the quantum of proof in his favor.'" United States v. Graham, 83 F.3d 1466, 1477 (D.C. Cir. 1996) (citations omitted).

(U) For the discovery of classified information, however, the D.C. Circuit in Yunis imposed a more demanding standard than that imposed by Rule 16. In Yunis, the D.C. Circuit held that classified information may be withheld from discovery unless it is both relevant and "helpful to the defense of the accused . . . ." 867 F.2d at 623. While unclassified material may be discoverable under Rule 16, in an appropriate case, if it "help[s] the defense ascertain the strengths . . . of the government's case," see Fifth Motion at 3, the Yunis standard necessarily does not include such inculpatory classified evidence that the government does not seek to use at trial. See United States v. Rahman, 870 F. Supp. 47, 52 (S.D.N.Y. 1994) (under the Roviaro/Yunis standard, "the first and obvious result is that inculpatory material which the government does not intend to offer at trial need not be disclosed"). "Such information cannot conceivably help a defendant, and therefore is both unnecessary and useless to him." Id.; see also United State v. Mejia, 448 F.3d 436, 459 (D.C. Cir. 2006) ("[B]ecause the underlying [non-disclosed] classified

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material is unhelpful to the defendants, they did not suffer from its unavailability. . ."); Yunis, 867 F.2d at 625 (only classified information that is "genuinely helpful" to the defense satisfies the second step in the analysis).

(U) **IV. Argument**

(U) **A. Motive Evidence**

(U) **1. Other Classified Intelligence Reports Accessed by the Defendant**

[redacted] Under this subheading of his motion, the defendant essentially provides the Court with a status report concerning the parties' ongoing discussions concerning his request that the United States produce all intelligence reports accessed by the defendant between May 1, 2009, and June 11, 2009. Fifth Motion at 5. The defendant seeks these reports for the purposes of demonstrating that he had access to intelligence "that would better for satisfying his alleged goal of currying favor with Fox News." Id. As the defendant acknowledges, however, his request is not ripe for decision by the Court because the parties' discussions concerning the scope of this request and the government's search for responsive documents are still ongoing. Id. at 5-6. Indeed, when the defendant filed his motion to compel, the United States was still seeking clarification from defense counsel concerning the government's request that the defendant identify where he believes the United States should search for responsive material other than in the [redacted] system. See id., Ex. 2 at 4. The parties' next meet-and-confer session is scheduled for next Wednesday, August 21, 2013.

(U) Despite the parties' ongoing discussions, the defendant raises with the Court his concern about how long it will take the United States to provide a response to his request for six weeks of highly classified intelligence reports. Id. at 6. To avoid "further

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delays in the CIPA process," the defendant asks this Court to "to set a deadline for the government to respond." Id. The United States respectfully submits that it would be premature for this Court to do so before the meet-and-confer process is complete and the scope of the defendant's request has been determined.[18]

[redacted] The production of six weeks of classified intelligence reports would be time-consuming in any case. It is further hampered here because the defendant's demand is overbroad and bears little relation to the government's motive theory. The [redacted] report that the defendant is charged with disclosing [redacted] The defendant's disclosure of the content of that report to Fox News and James Rosen [redacted] Mr. Rosen in his May 22, 2009, email, i.e., it related to "events on the ground in North Korea," [redacted] The defendant's disclosure to Mr. Rosen was also timely in that it addressed [redacted] the contents of the [redacted] report were publicly disclosed by Fox News and Mr. Rosen. Thus, the defendant's disclosure of its contents to Mr. Rosen satisfied Mr. Rosen's strong desire that any intelligence provided by the defendant qualify as

[18] (U) The United States rejects the defendant's suggestion that it has delayed CIPA proceedings in this case. Both the undersigned prosecutors and the Intelligence Community have worked diligently to formulate a response to not only the defendant's present request for classified information but his numerous other such requests.

[redacted]

[redacted]

"breaking news."[19] Even as the defendant articulates it, to meet the government's motive theory he would have to show that he accessed intelligence reports of even greater value or interest to Fox News and James Rosen that the defendant did not disclose. [redacted]

[redacted] The defendant's discovery request seeking to rebut the government's theory falls well short of that mark. It would plainly require the production of classified intelligence that would be neither relevant nor helpful to the defendant. First, it seeks intelligence reports about any country, when Mr. Rosen inquiries to the defendant focused solely on North Korea. Second, it seeks intelligence reports about any topic, not the actual intelligence topics concerning North Korea that Mr. Rosen expressly requested from the defendant on May 22, 2009. Given that the [redacted] report responded to multiple criteria identified by Mr. Rosen in his May 22nd email, the defendant should not be heard to argue that an intelligence report that met none of those criteria would be helpful in rebutting the government's motive theory. Third, the defendant's request seeks any intelligence report accessed by the defendant as early as May 1, 2009, even though Mr. Rosen did not direct the defendant to gather intelligence for him about specific topics until May 22, 2009. Indeed, as the defendant's May 20th email shows, he was uncertain as to what information Mr. Rosen desired until Mr. Rosen gave his instructions to the defendant on May 22nd. Fourth, the defendant seeks intelligence reports regardless of their classification level, when the defendant is charged

[19] [redacted]

[redacted]

[redacted]

with disclosing a TOP SECRET report, bearing classification markings showing that its contents where further compartmented and thus restricted [redacted], and Mr. Rosen emphasized in his June 11th article the sensitivity of the classified information in that article.

(U) It is thus not surprising that the defendant effectively concedes in his motion that his request for all intelligence reports that he accessed between May 1, 2009 and June 11, 2009, is overbroad. To ameliorate the government's classified information privilege equities, the defendant suggests that he be permitted to review the titles of all intelligence reports responsive to his request – a list which would itself be classified as it would identify targets of intelligence collection – so that he can then "attempt to narrow the list by identifying those reports that best satisfy . . . the alleged goal of currying favor with Fox News." Fifth Motion at 7. But that is not how the government's classified information privilege works. The defendant's assertion that the United States must produce classified information so that he can determine whether it would be "relevant and helpful" to his defense – an oft repeated defense argument about CIPA – gets it backwards. The D.C. Circuit has repeatedly recognized that a defendant must make the Roviaro/Yunis showing prior to the compelled disclosure of classified information.[20] Yunis, 867 F.2d at 624 ("[T]he information [the defendant and his counsel] seek is not

[20] (U) The Court of Appeals also made clear that the burden of establishing that classified information is "relevant and helpful to the defense" rests squarely on the defendant. Yunis, 867 F.2d at 623 ("[T]he threshold for discovery in this context further requires that a defendant seeking classified information, like a defendant seeking the informant's identity in Roviaro, is entitled only to information that is at least 'helpful to the defense of [the] accused . . .") (emphasis added); see also United States v. Skeens, 449 F.2d 1066, 1071 (D.C. Cir. 1971) (Under Roviaro, the defendant has a "heavy burden . . . to establish that the identity of an informant is necessary to his defense.").

[redacted]

available to them until such a showing is made."); Mejia, 448 F.3d at 458. Moreover, disclosure "is not required despite the fact that a criminal defendant may have no other means of determining what relevant" privileged information may exist. Smith, 780 F.2d at 1108. While that approach may place the defendant at a "disadvantage[] by not being permitted to see the information" before arguing for its helpfulness to the defense, such an approach, according to the D.C. Circuit, is "not without close analogies":

> When a court (rather than the prosecutor alone, as is ordinarily the case) reviews evidence in camera to determine whether it constitutes a witness statement subject to disclosure under the Jencks Act . . . ., or exculpatory material subject to disclosure under Brady, the defendant is likewise "not entitled to access . . . any of the evidence reviewed by the court . . . to assist in his argument" that it should be disclosed.

Mejia, 448 F.3d at 458; see also Yunis, 867 F.2d at 623-24. Indeed, it would defeat the classified information privilege (and the design of CIPA) to hold that the defendant may see classified information in order to argue whether he should be allowed to see it. See United States v. North Am. Reporting, Inc., 761 F.2d 735, 740 (D.C. Cir. 1985) (it would "'defeat the design [of the Jencks Act] to hold that the defense may see statements in order to argue whether it should be allowed to see them'") (quoting Palermo v. United States, 360 U.S. 343, 354 (1959)).

(U) Nevertheless, the United States is searching for intelligence reports that could be responsive to the defendant's request. If any such material is identified and there is any question as to what classified information or documents should be produced, the United States will seek the Court's direction under CIPA Section 4.

[redacted]

[redacted]

[redacted] **2. The Defendant's View on North Korea's** [redacted] Under this subheading, the defendant moves to compel the production of documents regarding (i) the defendant's view that North Korea [redacted] and (ii) any intelligence report accessed by the defendant between June 1, 2008 and June 11, 2009, regarding North Korea's [redacted] Fifth Motion at 7. The defendant seeks this material to rebut the government's motive theory that the defendant believed that the intelligence information in the [redacted] report confirmed his view that North Korea [redacted] on June 11, 2009. See id., Ex. 3. For the reasons set forth below, the Court should deny both requests.

(U) **a. Documents Regarding the Defendant's Alleged View** [redacted] As an initial matter, the defendant's request seeking any documents regarding the defendant's view that North Korea [redacted] program should be denied because it is overbroad. The government's motive theory is narrowly focused on the defendant's beliefs on June 11, 2009. Documents reflecting the defendant's beliefs about North Korea's [redacted] in 2007 or 2008, for example, would not be relevant to rebut the government's evidence demonstrating that he believed (rightly or wrong) that North Korea [redacted] on June 11, 2009.

[redacted] In any event, the government has produced all discoverable classified documents[21] responsive to the defendant's request in its possession, custody or control, including:

[21] (U) Over two-and-a-half years ago, the United States also produced the defendant's

[redacted]

[redacted]

- FBI-302s of interviews of the defendant's work colleagues who discussed the defendant's beliefs regarding [redacted][22]
- The defendant's own writings concerning North Korea, including his views on North Korea's [redacted][23] and
- Emails concerning the defendant's belief that North Korea [redacted][24]

It is for this reason that the United States referenced its prior productions in its July 2nd response to the defendant's request. See Fifth Motion, Ex. 2 at 4 (government's response to request 5.b.).[25] Indeed, the United States has disclosed far more classified material bearing on the defendant's beliefs concerning North Korea's [redacted] than it was obligated to produce given that its motive theory is focused on the defendant's beliefs on the day of the crime – June 11, 2009. To the extent there is any additional responsive classified material on the defendant's classified electronic media, it is inculpatory, i.e., it further demonstrates the defendant's belief that North Korea [redacted]

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unclassified electronic media, including multiple images of his DOS unclassified workstation hard drive and unclassified work email accounts.

[22] (U) See, e.g., CLASS_0002720-0002724; CLASS_0002489-0002500; CLASS_0002509-0002515; CLASS_0002618-0002631; CLASS_0002641-0002651; CLASS_0002670-0002675; and CLASS_0002676-0002682.

[23] (U) See, e.g., CLASS_0001870-0001894; CLASS_0001895-0001927; CLASS_0001936-0001968; CLASS_002063-0002073; CLASS_0002074-0002091; CLASS_0002198-0002229; and CLASS_0002230-0002242.

[24] (U) See, e.g., CLASS_0002779-0002781; CLASS_0002501-0002508.

[25] [redacted] The United States has also produced all material in its possession, custody or control demonstrating the defendant's belief that the intelligence information in the [redacted] report concerning North Korea's [redacted] confirmed his view that North Korea [redacted], including FBI 302s reflecting interviews with the defendant's work colleagues (see, e.g., CLASS_0002641-0002651) and emails (see, e.g., CLASS_0002501-0002508, and CLASS_0002779).

[redacted]

[redacted] The United States does not intend to offer any of that classified material into evidence at trial. Accordingly, it is not discoverable under Roviaro/Yunis. See United States v. Rahman, 870 F. Supp. 47, 52 (S.D.N.Y.1994) (under the Roviaro/Yunis standard, "the first and obvious result is that inculpatory material which the government does not intend to offer at trial need not be disclosed"). "Such information cannot conceivably help a defendant, and therefore is both unnecessary and useless to him." Id.; see also Mejia, 448 F.3d at 459 ("[B]ecause the underlying [non-disclosed] classified material is unhelpful to the defendants, they did not suffer from its unavailability. . ."); Yunis, 867 F.2d at 625 (only classified information that is "genuinely helpful" to the defense satisfies the second step in the analysis).

[redacted] Finally, as for the defendant's Brady demand, see Fifth Motion at 9, the United States has searched for exculpatory information bearing on this issue, including within the defendant's classified electronic media, and has found none. That is, the United States has identified no material showing either that the defendant believed North Korea [redacted] on June 11, 2009,[26] or that he believed that the intelligence information in the [redacted] report did not confirm his belief that North Korea [redacted]. With that, any discovery obligation concerning the defendant's demand for documents regarding his own views on North Korea's [redacted] should be deemed satisfied, and the defendant's request for this classified discovery should be denied.

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[26] [redacted] Although it has no obligation to do so given the narrowness of its motive theory, to avoid further litigation on the matter, the United States advises the defendant that the United States has also not identified any documents in the year prior to June 11, 2009, tending to show that the defendant believed that North Korea [redacted]

[redacted]

[redacted]

[redacted] **b. Intelligence Reports Regarding North Korea's** [redacted]

[redacted] This Court should also deny the defendant's related demand that the United States produce all classified intelligence reports accessed by the defendant between June 1, 2008 and June 11, 2009, regarding North Korea's [redacted] According to the defendant, he needs over a year's worth of classified intelligence reports on North Korea's [redacted] in order to "assess" whether he "viewed [redacted] as sufficient to confirm his view" that North Korea [redacted] See Fifth Motion at 10. The defendant is plainly wrong. The government's motive theory focuses only on the defendant's beliefs concerning [redacted] on June 11, 2009. It is irrelevant whether his beliefs regarding that program at that time were right or wrong, tentative or firm, well-founded or unfounded. It is also irrelevant to the government's motive theory whether his beliefs were supported or refuted by other classified North Korean intelligence reports, or whether the [redacted] report was, in fact, "noteworthy," or did, in fact, confirm the existence of North Korea's [redacted], or was, in fact, the first such intelligence report to do so. All that matters to the government's motive theory are the defendant's belief regarding [redacted] on June 11, 2009, and his belief that the [redacted] report confirmed his views. All discoverable material demonstrating those beliefs has been produced to the defense. See Section IV.A.2.a. above. A post-hoc review (indeed, years later) by defense counsel of other classified North Korean intelligence reports would not and could not shed light on the defendant's views regarding North Korea's [redacted] on June 11, 2009, or his belief

[redacted]

[redacted]

about the significance of the [redacted] report at the time that he is alleged to have disclosed the contents of that report to Fox News and James Rosen.

[redacted] The defendant's asserted rationale for seeking over a year's worth of classified North Korean intelligence reports is also counterfactual. While the defendant may now assert that the [redacted] report did not confirm [redacted] or was "far from authoritative" on that issue because the [redacted] report [redacted] it is undisputable that that was not the defendant's view on June 11, 2009. See Fifth Motion at 10. When [redacted] – the defendant's assessment of the significance of [redacted] as it related to his own beliefs was simple, direct and to-the-point: "Who said I told you so? I did . . . ." The defendant should not be permitted to pierce the government's classified information privilege based on fanciful assertions. The defendant's request for the compelled production of over a year's worth of classified North Korean intelligence reports should be denied.

(U). **3. Disgruntled Employee Theory**

(U) Under this subheading, the defendant moves to compel the production of "any documents or other evidence tending to support or refute the government's claim that [the defendant] was 'a disgruntled employee' and/or that 'his insights regarding North Korea were being ignored or rejected by other government personnel." Fifth Motion at 11. As demonstrated below, this request should also be rejected.

[redacted]

[redacted]

(U) As an initial matter, the defendant's request is overbroad. First, the defendant's request seeks any documents or evidence that was disgruntled for any reason. See Fifth Motion, Ex. 1 at 2 (request 5.d., requesting documents or evidence related to "the government's claim that [the defendant] was 'a disgruntled employee' and/or that 'his insights regarding North Korea were being ignored or rejected by other government personnel'") (emphasis added). The government's motive theory, however, is more specific, i.e., that the defendant was disgruntled because he believed that his insights regarding North Korea were being ignored by senior government officials whom he derided in his emails, like Stephen Bosworth, Christopher Hill, Sung Kim, and Victor Cha. An email indicating that the defendant was unhappy about his job because he believed his pay was too low would be unrelated to the government's motive theory. Second, the defendant's discovery demand is also unbounded by any time restriction. Materials reflecting that the defendant was disgruntled in 2008, or when he was employed outside of the Department of State, for example, would not be relevant to rebut the government's motive theory.

(U) In any event, the defendant's assertion that the United States has refused to produce any documents responsive to this request is incorrect. Fifth Motion at 12. A summary of the government's evidence -- produced in discovery -- is outlined above. See Section IV.A.3. Further, the United States has produced responsive material in both classified and unclassified discovery that could respond to the government' motive theory, including:

- The defendant's Performance Appraisal and letter from Assistant Secretary of State Rose Gottemoeller, dated August 6, 2009, which details the defendant's "outstanding performance" in the prior year while serving

[redacted]

[redacted]

as Senior Advisor for Intelligence in the DOS's Verification, Compliance, and Implementation Bureau;[27] and

- The FBI 302 of interview of Paula DeSutter, Gottemoeller's predecessor, who was complimentary about the defendant's performance.[28]

It is for this reason that the United States referenced its prior production of responsive material in its July 2nd response to the defendant's request. See Fifth Motion, Ex. 2 at 4 (government's response to request 5.d.). Moreover, over two-and-a-half years ago, the United States produced to the defendant his unclassified electronic media, including multiple images of his DOS unclassified workstation hard drive and unclassified work email accounts. The defendant can conduct whatever searches he wishes of that material to rebut the government's motive theory. As for the defendant's classified electronic media, the United States has produced all inculpatory material that it intends to use at trial. It has also completed a Brady review of the classified electronic media, and it believes that it has met its obligations with respect to the government's motive theory.[29] Accordingly, the defendant's motion to compel on this topic should be denied.

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[27] (U) See US-0015476-0015480.

[28] (U) See CLASS_0002525-0002535.

[29] (U) The defendant's suggestion during the meet-and-confer sessions that the United States may be obligated to produce any email wherein the defendant's views were met with a "Thanks" response email – a position seemingly abandoned in the defendant's motion to compel, see Fifth Motion at 12, n. 8 – is not tenable. The government's proffer of a motive theory that the defendant was disgruntled because he believed his insights regarding North Korea were being ignored by senior government personnel does not entitle the defendant to the production of every positive statement or affirmation, however insubstantial, that the defendant may have received during his government service.

[redacted]

[redacted]

(U). B. [redacted]

[redacted] Under this subheading, the defendant moves to compel the production of government [redacted] records regarding [redacted] In his Fourth Motion to Compel, the defendant demanded [redacted] This Court denied that request holding that given (1) there was no evidence to suggested that [redacted] sufficient to render [redacted] relevant and helpful to the preparation of the defense. [redacted] The Court also faulted the defendant's request because, "[d]espite the breadth of affirmative information provided [by the United States] regarding [redacted] the Defendant makes no attempt to demonstrate, based on information already in its possession, that [redacted] would be helpful to the defense." Id. at 11.

[redacted] The defendant has yet to make such a showing concerning [redacted] In his June 14, 2013, letter, the defendant demanded ten categories of records or information concerning [redacted] without demonstrating how that material would be relevant and helpful to the defense. Fifth Motion, Ex. 1 at 3. Nevertheless, without conceding that it had any obligation to do

[redacted]

[redacted]

so, the United States has search for, and produced, whether in response to the defendant's June 14, 2013, letter or previously, records and information for [redacted] in the following seven of the ten requested categories of material:

[redacted]

[30] [redacted] The defendant was confused by the government's use of the phrase "to our knowledge" in its July 2, 1013, response to his discovery requests numbered [redacted] about the subject matter of the [redacted] eport, respectively. [redacted] Had this issue been raised during the meet-and-confer sessions, it could have been quickly addressed. The government's use of this language was not "intended to signal something other than full disclosure after a thorough search." Id. at 14. The United States has searched for and produced all records falling into these categories for [redacted] in its possession, custody or control.

[31] [redacted] As suggested by the Court in its ruling on the defendant's Fourth Motion, the United States identified in this category [redacted] For the Court's information, [redacted]

[32] [redacted] Thus far, [redacted]

[33] [redacted] Only [redacted]

[redacted]

[redacted]

None of the documents or information produced, whether considered alone or in combination with other information, would be deemed exculpatory as to the defendant. The defendant remains the only individual on the Access List who was in communication with Mr. Rosen on June 11, 2009. Indeed, most strikingly, the defendant had telephone contact with Mr. Rosen at the same time that electronic records show he was accessing the [redacted] report. Despite the voluminous discovery the defense has received concerning [redacted] the defendant has failed to come forward with substantive evidence suggesting [redacted][34]

[redacted] As for the three remaining categories of records or information sought by the defense, the defendant has (i) reserved his rights to seek to compel at a later date the production of [redacted][35] see Fifth Motion at [redacted] and (ii) abandoned his request for information indicating whether [redacted]

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[34] [redacted] In his Fifth Motion, the defendant wrongly asserts (again) that the United States has conceded the relevance [redacted] The defendant made the same assertion in his Fourth Motion. [redacted] In denying the defendant's Fourth Motion, the Court rejected that claim. Fourth Memorandum Opinion at 9. As this Court recognized then, the defendant's claim ignores that the United States repeatedly and explicitly instructed the defense that its production of material in discovery in this case should not be construed as any such concession. Id.

[35] (U) The United States has refused to produce this classified information because it is not discoverable under the Roviaro/Yunis standard.

[redacted]

[redacted] Thus, the only remaining categories of records or information in dispute are the defendant's demands for the production of all government [redacted] for June 10-11, 2009. Id. at 14-15. As demonstrated below, these requests should be denied.

[redacted] As for the government [redacted] records, without conceding discoverability, the United States will produce on or before August 23, 2013, government [redacted] records for [redacted] in its possession, custody or control. [redacted][36] As demonstrated below, the defendant's request for any additional [redacted] records – or any [redacted] records – should be denied.

[redacted] First, the defendant's rationale for requesting these records is plainly insufficient. According to the defendant, he needs the [redacted] records [redacted] to try to determine whether [redacted] That is nothing more than a fishing expedition that would

[36] [redacted]

[redacted]

[redacted]

invade the government's classified information privilege as to, among other things, [redacted][37] Id. at [redacted] In its Fourth Memorandum Opinion, denying the defendant's request for such classified information, this Court instructed the defendant to use the voluminous discovery provided to date to establish an evidentiary basis for a narrowed request concerning [redacted]. Fourth Memorandum Opinion at [redacted]. The defendant has failed to do that here. Rather, his stated rationale for requesting [redacted] records is nothing more than a guess, i.e., perhaps [redacted] The defendant's speculation comes nowhere close to satisfying his "heavy burden" under Roviaro/Yunis. Skeens, 449 F.2d at 1070 (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."). Indeed, the defendant's position here is similar to that reject by the D.C. Circuit in Skeens when applying the Roviaro standard:

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[37] [redacted] Identifying, reviewing and separating any unclassified information from classified information in [redacted] would be a very time-consuming and resource-intensive for both the undersigned prosecutors and the Intelligence Community. As demonstrated above, there is no basis to believe such an effort would result in the production of any relevant, much less helpful, information to the defense. Once again, this appears to be no more than a form of "process graymail." See Omnibus Opposition at 42.

[redacted]

> If the informer's relation to the acts leading directly to or constituting the crime may be assumed from a fertile imagination of counsel, the Government in practically every case would have to prove affirmatively that the informant had not done any such likely acts. Having done that, all would be revealed and the informer privilege deemed essential for the public interest, for all practical purposes would be no more.

Skeens, 449 F.2d at 1070 (quoting Miller v. United States, 273 F.2d 279, 281 (5th Cir. 1959)). Determining the helpfulness of privileged information to a defendant is a sensitive inquiry by the Court. It should not be a "judicial guessing game." United States v. Grisham, 748 F.2d 460, 464 (8th Cir. 1984). Because that is all the defendant offers the Court, his request for [redacted]

[redacted] Indeed, the defendant's stated rationale, if deemed sufficient to require further disclosure [redacted] threatens to continue the government's discovery obligation ad infinitum and thus delay the trial of this case into the equally unreachable future. For example, if allowed, there would be little reason to deny future defense demands for the [redacted] records of [redacted] and so on, and so on. Certainly, the government's classified information privilege provides more protection than that.

[redacted] Moreover, there is in fact no basis to believe that a response to the defendant's demand for the [redacted] records [redacted] would result in the disclosure of any relevant evidence to the defendant. Indeed, as this Court emphasized in its Fourth Memorandum Opinion, "it is important to note what the Defendant does know about" [redacted] "based on information already in its possession." Fourth Memorandum Opinion [redacted]. Namely, there is (1) no evidence to

[redacted]

suggest [redacted] Most importantly, [redacted] Further, as this Court is aware, the United States has completed a thorough electronic search and review of [redacted] for June 10 and June 11, 2009, including [redacted] and no discoverable material was identified other than the records already produced to the defendant in this matter, e.g., [redacted] See Gov't In Camera, under Seal Response to the Court's Order (May 30, 2013); Gov't Supplement to its In Camera, Under Seal Response to the Court's Order (May 30, 2013). This search would have included [redacted] regarding the contents of the [redacted] report or the June 11th Rosen article prior to 3:16 p.m. on June 11, 2009. Other than what it has already produced, the United States found none. Accordingly, there is simply no reason to believe that producing [redacted] to the defendant en masse for his review would lead to the discovery of relevant, much less

[redacted]

[redacted]

helpful, material under the Roviaro/Yunis standard. Thus, the defendant's request for the [redacted] records [redacted] for June 10-11, 2009, should be denied.

(U) **C. Additional Intelligence Reports**

[redacted] Under this subheading, the defendant has moved to compel yet again the disclosure of potential source documents other than the material already disclosed by the United States, i.e., the [redacted] report, its predecessor documents, and [redacted] material. Fifth Motion at 19. As the defendant concedes, the Court previously denied the same request when ruling on his First Motion to Compel. Id.; see First Memorandum Opinion at 6-8. The defendant provides no basis for this Court's reconsideration of that decision now. Indeed, the defendant expressly bases his Fifth Motion on the same "reasons provided in its original motion" that this Court has already denied. Fifth Motion at 19; see also First Memorandum Opinion at 6-8.

(U) Further, the United States has informed the defendant that it has produced all discoverable material responsive to this request. The defendant contends that the government's response was inadequate because the United States did not disclose the scope of its search for responsive material. Fifth Motion at 19. Unlike the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure do not require the United States to respond to interrogatories or requests for admission from the defense. See Fed. R. Crim. P. 16. Because the defendant's demand for further information implicates classified information encompassed within the government's ex parte CIPA Section 4 filings, the United States will not address this point further here.

[redacted]

[redacted]

[redacted] **D. Report from** [redacted]

[redacted] Under this subheading, the defendant requests that the Court review again, and compel the production of, unredacted copies of [redacted] [redacted] email and the Daniel Russel FBI 302. Fifth Motion at 19-20. The defendant made the same request in his First Motion to Compel. First Motion at 11-15. It was denied by the Court. First Memorandum Opinion at 11-14. Prior to denying the request, the United States provided unredacted copies of both documents to the Court for its review. Id. at 11, n. 8. The Court reviewed those documents, approved of the government's redactions to the Daniel Russel FBI 302, and ordered the production of a redacted copy of the [redacted] email. First Memorandum Opinion at 11-14. Importantly, the Court ordered the disclosure of the redacted [redacted] email only because much of its content had already been disclosed to the defendant [redacted] email. See id. at 12 ("The Court agrees with the Defendant that insofar as portions of the [redacted] email were quoted verbatim in the unredacted portions of [redacted] email, there is no apparent justification for the Government to withhold the [redacted] email in toto.").

[redacted] Unsatisfied with the Court's ruling on this issue, the defendant now seeks reconsideration of that ruling without expressly saying so. In his June 14, 2013, discovery letter, the defendant requested identification of the report from [redacted] referenced in the Daniel Russel FBI 302. See Fifth Motion, Ex. 1 at 3. In its July 2, 2013, discovery letter, the United States responded to this inquiry by identifying the [redacted] email. See Fifth Motion, Ex. 2 at 6 & Ex. 5. Now the defendant has moved to compel the same information again. The United

[redacted]

[redacted]

States is perplexed by the defendant's position on this issue. The defendant both disbelieves the government's representation concerning the [redacted] email and the Daniel Russel FBI 302 and questions the adequacy of the Court's review of unredacted versions of both documents prior to denying the defendant's first motion to compel. Fifth Motion at 20-21; First Memorandum Opinion at 11-14. The United States advises the defendant yet again that the [redacted] email reflects [redacted] that is referenced in Daniel Russel's FBI 302, or, as the defendant puts it, [redacted] referred to by Mr. Russel matches the [redacted] in the [redacted] email." Id. at 21. There is nothing more for the United States to say on the issue or documents for it to produce. The Court should reject the defendant's attempt to begin again the laborious process that brought this issue to conclusion in May.[38]

(U) E. [redacted]

[redacted] Under this subheading, the defendant demands again the production of [redacted] derived from, referencing or discussing the contents of [redacted] [i.e., the [redacted] report] that was drafted or circulated prior to 3:16 p.m. on June 11, 2009." Fifth Motion at 22. The United States has already responded to this request. It searched for, and produced, the pre-2:21 p.m. [redacted] material on November 30, 2012 (i.e., CLASS_0003085-3125), and the pre-3:16 p.m. [redacted] material on July 2, 2013 (i.e., CLASS_0003205-3218). Among these materials were actual [redacted] pieces

[38] (U) The defendant also demands to know the classification of the [redacted] issue. Fifth Motion at 21. The Court made clear in its ruling, however, that the classification of the [redacted] email was not determinative of its decision regarding the disclosure of the contents of the email. First Memorandum Opinion at 11-13. Nevertheless, to avoid further litigation on this issue, and without conceding that it had any obligation to do so, the United States will produce to the defendant the [redacted] with classification markings.

[redacted]

[redacted]

that reflected the content of the [redacted] report at issue. The defendant demands in his motion that the United States be "ordered to identify [redacted] by Bates number." Id. While the United States believes that the documents speak for themselves, the government advises the defendant that the [redacted] pieces that reflect the content of the [redacted] report can be found at the following Bates-numbered pages: CLASS_0003104-3105, CLASS_0003109, CLASS_0003118-3119, and CLASS_0003207. There is nothing more for the United States to say on the issue.

[redacted] As this Court has already held, the defendant's reliance on the statement reflected in [redacted] FBI-302 concerning a [redacted] attached to his 2:41 p.m. email, is misplaced. Compare Fifth Motion at 21-22 with First Memorandum Opinion at 14. The last time the defendant demanded this document, the Court reviewed [redacted] unredacted 2:41 p.m., and concluded (consistent with the government's prior representations concerning the email) that it did "not attach [redacted] as suggested by the FBI 302 [redacted] interview." First Memorandum Opinion at 14.[39] Further, the Court held that the 2:41 p.m. email was not discoverable as it was not "relevant or helpful to the defense." Id.; see also Omnibus Opposition at 37-39. The defendant's attempt to re-litigate this issue – again without expressly moving for reconsideration – should be denied.[40]

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[39] [redacted] The United States has searched for and not located any [redacted] that was circulated prior to the 3:16 p.m. cut-off on June 11th.

[40] [redacted] The defendant's challenge to the redactions that the United States took in the [redacted] material it produced in classified discovery on July 2, 2013, will be addressed in government's Fourth CIPA Section 4 Motion filed with the Court today.

[redacted]

(U) V. **Conclusion**

(U) For all of the foregoing reasons, the defendant's Fifth Motion to Compel should be denied in its entirety. A proposed order is attached hereto as Exhibit A.

Respectfully submitted,

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