

IN THE UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF VIRGINIA

Alexandria, Virginia

2006 JUL -5 P 4: 52

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

_____)
UNITED STATES OF AMERICA)
)
v.)
)
DONALD WILLIS KEYSER,)
)
Defendant)
_____)

Crim. No. 1:05CR543

The Hon. T.S. Ellis, III

**MEMORANDUM IN SUPPORT OF MOTION TO FIND DEFENDANT IN
MATERIAL BREACH OF PLEA AGREEMENT
AND TO RELEASE THE GOVERNMENT FROM ITS PLEA OBLIGATIONS**

The United States submits this Memorandum in support of its June 29, 2006, motion to find the defendant in material breach of his Plea Agreement with the government and to release the government from its obligations under that agreement. The government also requests an evidentiary hearing prior to the Court's disposition of the government's motion.

I. INTRODUCTION

On December 12, 2005, the defendant Donald Willis Keyser pleaded guilty to a three-count Criminal Information. Count One charged the defendant with the removal of United States documents in violation of Title 18, United States Code, Section 2071(b). Counts Two and Three charged the defendant with false statements in violation of Title 18, United States Code, Section 1001(a). The defendant received the advice of counsel in entering into the Plea Agreement, and the district court reviewed the terms of the Plea Agreement in detail with the defendant at the plea hearing before accepting his guilty plea. *See United States v. Holbrook*, 368 F.3d 415, 424

(4th Cir. 2004) (plain language of plea agreement was negotiated with advice of counsel and reviewed and approved by the district court).

In Count One, the defendant admitted that he was in unauthorized possession of three thousand, six hundred and fifty nine (3,659) Top Secret, Secret and Confidential documents in hard copy and electronic form at his residence in Fairfax Station, Virginia. A summary of these classified documents and additional classified digital media found in the defendant's residence is attached hereto as Exhibit 1.

In Counts Two and Three, the defendant admitted that he lied to U.S. Department of State investigators about his relationship with a female Taiwanese intelligence officer (Isabelle Cheng) by falsely denying that he had engaged in conduct with her which may make him vulnerable to coercion, exploitation, or pressure from a foreign government. The defendant also admitted that he lied on a U.S. Customs Declaration form in September 2003 by not listing Taiwan as a country that he had visited, when in fact, he had just spent three days in Taiwan.

In paragraph 5 of the Plea Agreement, the defendant agreed to cooperate "fully, truthfully, and completely with the United States, and provide all information known to the defendant regarding any criminal activity and intelligence activity by himself and /or others." The defendant also agreed to undergo debriefings by law enforcement officers and investigators, *see* Plea Agreement ¶ 5a, and to submit to polygraph examinations to be conducted by a polygraph examiner of the government's choice, *see id.* ¶ 5b. In addition, the defendant "stipulate[d] to the admissibility of the results of this polygraph examination if later offered in a proceeding to determine the defendant's compliance with this plea agreement." *Id.* ¶ 5c.

The government also assumed obligations under the Plea Agreement. Of particular importance here, the government agreed that it “will not further criminally prosecute the defendant in the Eastern District of Virginia for the specific conduct described in the information or statement of facts, or for any offense arising out of his relationship with Isabelle Cheng, or her superior, or any other offense arising from the materials seized from his residence.” *Id.* ¶ 11.

The defendant fully understood the consequences if he breached his cooperation obligations under the Plea Agreement.¹ First, he agreed that “[a] failure to cooperate fully, truthfully, and completely is a breach of this Plea Agreement, as determined by the Court.” Plea Agreement ¶ 5. Second, he agreed that if he violated “any provision of the [the Plea Agreement] at any time before the expiration of any period of incarceration, probation, or supervised release, then . . . the United States will be released from its obligations under [the] agreement.” *Id.* ¶ 12a. In that circumstance, moreover, the defendant agreed that he “may not withdraw the guilty plea entered pursuant to [the Plea Agreement.]” *Id.* These contractual terms are plain and unambiguous. *See Holbrook*, 368 F.3d at 424.

After his guilty plea, the defendant was debriefed on four occasions by agents from the Federal Bureau of Investigation and representatives of other U.S. Government agencies.² In addition, he submitted to polygraph examinations on February 14, 2006, and April 5, 2006.

¹ At the December 12, 2005, hearing, the defendant expressly advised the Court that he understood the terms of the Plea Agreement.

² These debriefings occurred on January 18, January 27, February 21, and March 28, 2006.

As more fully discussed below, the defendant has failed to fulfill his cooperation obligations under the Plea Agreement. Instead of volunteering information about matters that he knows are of interest to the government, he has addressed issues of importance only when directly asked. Even then, his answers frequently have been evasive and incredible. Throughout his debriefings, the defendant has sought to conceal the facts regarding his relationship with Taiwanese intelligence officer Isabelle Cheng, his activities while in Taiwan in September 2003, and his knowledge of the classified materials in his house. On several occasions, moreover, he has acquiesced to the truth (and sometimes incompletely) only after being confronted with incontrovertible forensic evidence by the interviewing agents. The defendant's lack of cooperation has been particularly egregious with respect to the true nature of his relationship with Cheng and Taiwan's National Security Bureau, the stockpile of classified materials found throughout the defendant's residence, and his taking a laptop computer and classified material to China, Japan, and Taiwan in 2003.

II. APPLICABLE LEGAL STANDARDS

It is well established that courts construe plea agreements in accordance with principles of contract law so that each party receives the benefit of its bargain. *See Holbrook*, 368 F.3d at 420 (citing *United States v. Ringling*, 988, F.2d 504, 506 (4th Cir. 1993)). The Fourth Circuit has noted that "contract law does not prevent an injured party [here, the United States] from retaining the benefit of the contract [here, the defendant's full and truthful cooperation] up to the date of the breach, while simultaneously pursuing other remedies for the breach." *Holbrook*, 368 F.3d at 422 n.4. Indeed, the court of appeals has stated, "[t]o hold otherwise potentially could create the anomaly of allowing the breaching party to improve his or her position by reason of the breach."

Id. Accord *United States v. West*, 2 F.3d 66, 69-70 (4th Cir. 1993) (party who breaches plea agreement has no right to look for its enforcement). In *Holbrook*, the court of appeals therefore found that the Government was not precluded from enforcing a plea agreement against the defendant in that case “by virtue of [the defendant’s] breach while retaining the benefit of [the defendant’s] pre-breach performance” – *i.e.*, the defendant’s previous plea of guilty. *Holbrook*, 368 F.3d at 422 n.4 (citing *United States v. Scruggs*, 356 F.3d 539, 545 (4th Cir. 2004)); accord *United States v. Bowe*, 309 F.3d 234, 237 (4th Cir. 2002) (“where defendant has materially breached the terms of the plea agreement, the Government is released from its implied reciprocal promise . . . not to appeal the merits of a judgment of conviction or sentence”).

To be released from its obligations under the Plea Agreement, the government must show that the defendant materially breached that agreement. See *Scruggs*, 356 F.3d at 543-44; *Bowe*, 309 F.3d at 237. Whether a breach is material depends on “the extent to which the injured party will be deprived of the benefit which he reasonably expected.” *Scruggs*, 356 F.3d at 533-44 (quoting Restatement (Second) of Contracts § 241 (1981)). The party alleging a material breach must establish by a preponderance of the evidence that the breach occurred. See *United States v. Snow*, 234 F.3d 187, 189 (4th Cir. 2000) (defendant has burden to establish breach of plea agreement by preponderance of evidence); see also *United States v. Benjamin*, 128 F.3d 1069, 1073 (6th Cir. 1998) (government has burden of proving defendant’s breach of plea agreement by preponderance of the evidence); *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 578 (1st Cir. 1987) (government has burden of proving defendant’s breach of plea agreement by preponderance of the evidence); *United States v. Alexander*, 901 F.2d 272, 273 (2^d Cir. 1990) (per curiam) (preponderance of evidence standard applies to breach of plea agreement).

Although the government contends that the defendant has made false statements in his debriefings about material issues – most notably, his travel to Taiwan in September 2003 – the Court should not assess his compliance with his cooperation obligations solely in terms of whether the government can prove that he lied about something material. In *United States v. Harris*, 882 F.2d 902 (4th Cir. 1989), the Fourth Circuit considered whether the defendant in that case had accepted responsibility for his illegal conduct in debriefings with agents. The court considered testimony by an IRS agent that the defendant was “evasive when he responded to questions,” and that as a result of that evasiveness, “an interview which normally should have taken approximately two hours lasted two days.” *Id.* at 904-05. The court also considered testimony by a probation officer that the defendant “reluctantly admitted his culpability, and that [the defendant] made this admission only when asked directly.”³ *Id.* at 905. Although *Harris* concerned whether a defendant was entitled to a reduction in sentence for acceptance in responsibility, there is no principled distinction between the considerations at issue in that context and the considerations that should apply in determining if the defendant here has complied with his cooperation obligations under the Plea Agreement.

Had the defendant fulfilled his cooperation obligations, his debriefings might have been completed in a single day. Instead, his debriefings consumed four days spread over a period of more than two months – as well as two separate occasions when he was polygraphed – and the government still lacks the truth from the defendant.

³ The district court had concluded that it “‘had not seen a clearer case’ of a defendant who had not accepted responsibility for his actions.” *Harris*, 882 F.2d at 905.

III. DISCUSSION

A. The Defendant's Relationship with Isabelle Cheng and Taiwan's National Security Bureau

The defendant has failed to tell the truth about his relationship with Taiwanese intelligence officer Isabelle Cheng and her agency, the National Security Bureau. He has minimized the extent of his contacts with Cheng and the significance of the information he provided to her. He has also been untruthful about the nature of his sexual relationship with Cheng, a matter which is pertinent to the issue of whether the defendant engaged in espionage with Taiwan. And as made clear in the government's classified submission under the Classified Information Procedures Act, he has lied about his conduct while in Taiwan in September 2003.

1. The Defendant's Transmittal of Information to the NSB

During his debriefings, agents questioned the defendant about information that he provided to Taiwanese intelligence officer Isabelle Cheng in 2002-2004, including e-mail communications with Cheng. At his initial debriefing on January 18, 2006, the defendant admitted that he knew that Isabelle Cheng was an intelligence officer with Taiwan's National Security Bureau. He maintained, however, that he spent little time e-mailing Cheng, and that she did not ask him for comments on articles she had sent him. He claimed that he met with Cheng and her superior, Michael Huang (also known as Huang Kuang-hsun),⁴ because he did not believe that U.S. policy was being adequately conveyed to Taiwan, and regarded NSB channels as another means to communicate U.S. policy to the government in Taipei.

⁴ Photographs of Cheng and Huang (as well as the defendant) are attached hereto as Exhibit 1.

E-mail records demonstrate that the defendant provided extensive information to Cheng that he believed was valuable to her work as an intelligence officer for the NSB. Much of this information was provided in frequent e-mail communications with Cheng. Other information was provided in person at lunch meetings or in other personal encounters. For example:

- On October 23 and 26, 2002, the defendant sent lengthy e-mails to Cheng detailing his conversations with Chinese President Jiang during a trip to Texas with President Bush and his analysis of the visit. (See Exh. 2.)
- On November 22, 2002, the defendant analyzed press reports that Cheng had sent him regarding the assumption by Chinese President Jiang Zemin of additional national security responsibilities. (See Exh. 3.)
- On March 28, 2003, while on official business in South Korea, the defendant sent an e-mail to Cheng in which he reported on meetings he had attended with South Korean government officials, as well as meetings with the commander of the Pacific Fleet of the U.S. Navy. (See Exh. 4.)
- On July 20, 2003, the defendant sent a lengthy e-mail to Cheng in which he provided detailed analysis of internal Chinese political developments – analysis which the defendant had sent “earlier today to colleagues in Washington.” (See Exh. 5.)
- On Sept. 17, 2003, the defendant sent an e-mail to Cheng in which he included a separate e-mail concerning discussions at a RAND Corporation Conference on U.S.-Taiwan Military Relations. (See Exh. 6.) The defendant cautioned Cheng that “[a]s [this message] is lifted from a private e-mail group, please keep to yourself and Mr. Huang (cautioning him also that no reference should be made to outsiders regarding this

correspondence.).”

- On November 11, 2003, the defendant told Cheng in an e-mail that “I continue to send to [Cheng’s e-mail address] (and sometime also to Mr. H) various articles that I find interesting. Let me know if there are too many, or if there are categories that you do not want or need to receive.” (See Exh. 7.)
- In a “Secret” cable to NSB headquarters in Taipei dated November 25, 2003,⁵ Cheng reported that on that day, “Donald Keyser, the Principle Deputy Assistant Secretary of State for East Asia Affairs of the U.S., continued to explain the recent diplomatic behavior of the PRC.” (See Exh. 8.)
- In an e-mail on November 27, 2003, the defendant told Cheng that “I’m sure you and your colleagues will be paying close attention to the cross-Strait issue, the U.S. reaction to such developments, and the U.S. preparations for the Wen Jiabao visit. The e-mail circuits are also burning up with this issue, or set of issues. *I’ll try to keep you informed of breaking news items and developments of interest.* There will be two major meetings at NSC next week on all this.” (See Exh. 9 (emphasis added).)
- On November 28, 2003, the defendant sent an e-mail to Cheng in which he asked, “Are you aware . . . and *this is still held very closely*, that Jim M is flying to Zhenbaodao as I write in order to have a mimide huitan with CSB?” (See Exh. 10 (emphasis added).)

⁵ Cheng provided the FBI with this and numerous other such cables on September 4, 2004. According to a translation of Chinese handwriting on the cables, Cheng’s superior Michael Huang, initialed the cables indicating his authorization to send them to NSB headquarters in Taipei.

- According to a “Secret” NSB cable that Cheng sent from TECRO⁶ to NSB headquarters on December 5, 2003, and related e-mail correspondence, the defendant met Cheng and Huang for lunch that day. At the lunch, the defendant provided information about an upcoming visit to the United States by Chinese government official Wei Jiabao.⁷ The defendant also responded to questions from Huang about recent threats by China to use force against Taiwan. (See Exh. 11.)
- According to a “Secret” cable that Cheng sent from TECRO to NSB headquarters on or about May 22, 2004, the defendant met Cheng and NSB Chief of Station Huang for lunch that day for “an in-depth exchange of opinions regarding trilateral relations between the U.S., China and Taiwan.” (See Exh. 13.) Cheng also reported that the defendant “provided written materials for Huang’s reference.”

The defendant maintained in his debriefings that he did not believe he was assisting Cheng in the performance of her official duties as an intelligence officer. See March 28, 2006, Debriefing Tr. at 106 (“No, I don’t think I was helping her.”) The evidentiary record, however, refutes that contention and, additionally, shows that the defendant was very responsive to requests for assistance from Cheng:

- In an e-mail to Cheng on May 23, 2004, concerning information he had recently provided her, he told her that “I’m glad if the background helped. By now you know that, as we

⁶ TECRO is the unofficial representative of the Taiwanese Government in the United States. Its offices are located in Washington, D.C. NSB officers assigned to the United States work out of TECRO’s office.

⁷ The defendant provided Cheng with additional analysis regarding Jiabao’s prospective visit to the United States in an e-mail he sent that evening. (See Exh. 12.)

say, *'your wish is my command.'* All you need to do is ask, and I will do my best to reply quickly, fully and helpfully. *No matter the subject*, whether official or personal.

Anything." (See Exh. 14 (emphasis added).)

- In an e-mail to the defendant at approximately 9:28 p.m. on May 30, 2004 – one day after she and the defendant had returned from a trip together to New York – Cheng stated that “[h]opefully I can find the DoD [Department of Defense] report on [sic] website.” (See Exh. 15.) At approximately 11:22 p.m., the defendant sent a lengthy reply e-mail to Cheng in which he stated “I’ll send you the website of the DoD report in a moment.” (See *id.*)
- In an e-mail to Cheng on August 2, 2004, regarding a diplomatic reception the next day at the Singapore Embassy, the defendant told Cheng that “I’ll take this to be my *'tasking'* for tomorrow evening – to find out from Amb Chan whether the Embassy had made a deliberate decision regarding participation by both sides of the Strait.” (See Exh. 16 (emphasis added).)
- In an e-mail to Cheng on August 13, 2004, he said (in response to her request) that he would resend to her a paper on “PRC weapons.” (See Exh. 17.)

In addition to communicating information to Cheng by e-mail, the defendant also prepared written briefing points that he gave to Cheng (and Huang) at their meetings. Examples of these documents are attached hereto as Exhibits 49, 50, 51, and 52.

On several occasions, the defendant asked Cheng that she not attribute the information he was providing to him. (See Exh. 18 (e-mail of April 3, 2003); Exh. 19 (e-mail of Nov. 12, 2003) (“You’ll probably find this of some interest. It comes off one of the e-mail listservs to which I

belong. Therefore, as usual, please do not refer to it directly in any conversations you or Mr. H might have with Americans.”); Exh. 20 (e-mail of Nov. 23, 2003) (“This comment by someone who previously served in the U.S. Government seems on the mark to me. Please don’t refer to it in any discussion you may have with other Americans.”); Exh. 21 (e-mail of Dec. 3, 2003) (“Please keep all of this more or less to yourself, or at least please do not attribute any written report to me.”).

The defendant’s stated reason for providing information to Cheng and her superior, Michael Huang, also appears to be a fabrication. As indicated above, in his debriefings the defendant claimed that he provided information to Cheng and Huang because he believed that transmitting information through NSB channels was a better way to ensure that U.S. policy reached senior Taiwanese officials in Taipei, and because he wanted to reinforce U.S. policy. However, in an e-mail on December 30, 2003, to Douglas Paal – then the head of the American Institute for Taiwan, the American counterpart in Taipei to TECRO – the defendant minimized the effectiveness of using NSB for that purpose. Remarking on his assessment of TECRO’s likely analysis of a matter, the defendant told Paal:

I gather that’s how TECRO folks here read [recent statements attributed to the head of TECRO]. I’ve had an extensive exchange – strictly in my well-known ‘private capacity’ of course – today with Michael Huang [the NSB chief of station in Washington, D.C.], whom I believe you know from the golf course once or twice, on all this. *I know where Michael’s reports go, and I doubt they have much beneficial effect, since there is a political filter at work.* But nothing ventured, nothing gained.”

(See Exh. 22 (emphasis added.))

2. The NSB's Reliance on the Defendant as an Intelligence Asset

The defendant acknowledged in his first debriefing that he knew Isabelle Cheng was an intelligence officer for Taiwan's NSB. In his debriefings and during pre-test interviews prior to his polygraph examinations, however, he maintained that he did not believe that Cheng and the NSB were actively involved in intelligence-gathering in the United States. He also said he did not believe he was an intelligence source for the NSB.

The defendant's responses on these issues are not credible. The defendant began his career with the Central Intelligence Agency and, prior to commencing his relationship with Cheng, had recently served in a senior position in the Department of State's Bureau of Intelligence and Research. It is highly implausible, at best, that the defendant was not aware that Taiwan, like China, engages in aggressive intelligence-gathering within the United States. Moreover, documentary evidence establishes that Cheng regarded the defendant as a valuable intelligence asset. On September 4, 2004, the day that FBI agents apprehended the defendant after a lunch meeting with Cheng and her superior, Cheng retrieved a large number of documents from TECRO and provided them to the FBI. These documents included numerous Chinese-language cables (classified "Secret" by the NSB) that Cheng had sent to NSB headquarters in Taipei in which she reported on her dealings with the defendant. Examples include:

- On September 23, 2003, Cheng sent a cable to NSB headquarters in Taipei in which she reported at length on information the defendant had provided her about his attendance at a speech by Chinese Foreign Minister Li Zhaoxing in Washington, D.C., as well as information about a conversation between Foreign Minister Li and U.S. Secretary of State Colin Powell. (See Exh. 23.) At the end of the cable, Cheng told her superiors that "we

still need to understand further the real content of Li's conversation." Cheng also stated that "Keyser's conversation above should only be treated as a reference. Please do not use it in any way in order to maintain mutual trust." Cheng's request to NSB Headquarters was in response to the following written comment by Keyser in the analysis he provided her: "The following views may be of interest to you and Mr. H. [i.e., NSB Chief of Station Huang in Washington, D.C.] They were shared by a senior academic who participates in an e-mail group to which I belong. Please do not cite these views in any public reference or document." (See Exh. 23.)

- On November 3, 2003, Cheng sent a "Secret" cable to NSB headquarters in Taipei regarding information the defendant had provided about a "transit visit" to New York by Taiwan President Chen. In her cable, Cheng stated that "Mr. Keyser's talk is very sensitive. It also involves his e-mail communications with others. In order to keep this mutually beneficial and trusted relationship, please conceal *the intelligence source* of this report if this report is cited." (See Exh. 24 (emphasis added).)
- On November 25, 2003, Cheng sent a "Secret" cable to NSB headquarters in Taipei concerning information she received that day from the defendant about "the recent diplomatic behaviors [sic] of the PRC." (See Exh. 8.) At the conclusion of the cable, Cheng reported that "[t]he source/sources (U.S. Embassy in Beijing, PRC Embassy in Washington, Taiwan government, AIT Taipei office) of Keyser's information is/are unclear. Please do not use this *intelligence* to avoid exposure of *intelligence sources*." (Emphasis added.)

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- On February 2, 2004, Cheng sent a “Secret” cable to NSB headquarters in Taipei regarding information the defendant had provided about a recent speech by Deputy Secretary of State Richard Armitage and other matters. (See Exh. 25.) At the end of the cable, Cheng wrote that “Keyser does not want to have his name revealed. If the [NSB] decides to use this information, please do not reveal the source to prevent damage on mutual trust and future effort of *intelligence gathering*.” (Emphasis added.)
- On March 20, 2004, Cheng sent a “Secret” cable to NSB headquarters in Taipei regarding information that the defendant had provided about the State Department’s reaction to Taiwan’s recent presidential election. (See Exh. 26.) Cheng concluded the cable by stating that “[t]he above information is quite sensitive, please use carefully and hide the source to ensure security, mutual trust, and future utilization of this channel.”

A “Secret” cable that Cheng sent to NSB headquarters on November 14, 2003 (two months after the defendant’s trip to Taiwan), following a lunch meeting that she and NSB Chief of Station Huang had that day with the defendant, is particularly revealing with regard to the nature and value of information that the defendant provided to the NSB. In the introduction to her cable, Cheng described the information contained in the body of the cable as “Keyser’s replies to Huang’s questions.” (See Exh. 27.) Regarding the issue of Taiwanese President Chen’s “transit visit” to the United States, Cheng reported that “Keyser reveals that although he had tried to convince [Assistant Secretary of State] Jim Kelly otherwise, the State Department decided at the last minute not to have Randy Shriver receive[] Chen at the airport so that Taiwan would not misconstrue the courtesy as a support to the Chen-proposed constitution and referendum.” On the subject of the trilateral relationship between the United States, China, and

Taiwan, Cheng reported that “Keyser claims the stand of [the National Security Council] is the same as the State Department regarding Chen’s visit. Keyser adds that the U.S. believes that Taiwan belittles PRC’s military capability while it is convinced that a U.S. rescue is ensured. . . . Keyser reveals that China is asking the U.S. to stop Taiwan from changing the constitution and setting up a referendum. With the impending election, the U.S. does not wish to see a collision among the three states.” Regarding a recent visit to the United States by Chinese government official Wen Jiabao, Cheng stated in her cable that “Keyser reveals that all recent visitors (officials or academics) from China have made the Taiwan issue a major talking point.”

In addition, Cheng’s November 14 cable to NSB headquarters reveals that the defendant was advising the NSB on how to deal with a breach of Taiwanese intelligence by a retired Taiwanese intelligence officer. Specifically, Cheng reported that “Keyser initiates the discussion on the espionage case concerning a retiree from the Taiwanese Military Intelligence Bureau. He opined that Taiwan must assume that its intelligence network in China has been compromised and that it might take a while to validate the degree of damage.” The defendant even referenced his own role in a damage assessment concerning the presence of classified information on a home computer of former CIA Director John Deutch. As Cheng reported in her cable to NSB headquarters, “[a]s to how to proceed with damage assessment, Keyser reveals that no one has yet to figure out former CIA Director Deutch’s intention. . . . For the damage assessment of Deutch’s case, Keyser had to report to the CIA every Saturday to reveal all the classified data.”⁸

⁸ The defendant’s role in the damage assessment of the Deutch case is particularly noteworthy, if not ironic, given the presence in his home of over 3,500 classified documents and numerous computer floppy disks containing classified material.

The defendant's value to the NSB as a source of intelligence appeared to increase when the NSB learned that he was under consideration to become head of the American Institute for Taiwan ("AIT")⁹ in Taipei. On August 2, 2004, Cheng sent a "Secret" cable to NSB headquarters in Taipei entitled "Don Keyser is to assume AIT board of directorship," in which she included information about the defendant's background and work experience.¹⁰ (See Exh. 28.)

Cheng concluded the November 14, 2003, cable with her standard admonition to protect the defendant's identity as the source of the information contained therein. She urged that "[i]n the event that *the intelligence* regarding the conclusive view of U.S. officials and academics on the trilateral relations is being adopted, please conceal the source of the information to maintain the mutual trust of both sides." (Emphasis added.)

The defendant knew that Cheng reported her contacts and communications with him to her superiors at the NSB. On March 6, 2003, for example, the defendant sent Cheng an e-mail about a lunch engagement they had had that day. (See Exh. 29.) In his e-mail, the defendant stated the following:

Knowing that you are obliged to write up these lunchtime conversations, I tried not to say too much so as to spare you excessive labors. But I hope I didn't say too little, and therefore cause you and Mr. Huang [the NSB chief of station in

⁹ AIT serves as the unofficial representative of the U.S. Government in Taiwan, as the United States and Taiwan have not had formal diplomatic relations since the United States extended diplomatic recognition to China in 1979.

¹⁰ In a note that the defendant wrote on a copy of the cable when the FBI showed it to him, he indicated that he had not told Cheng about his consideration for the AIT post. Yet in an e-mail from Cheng to the defendant on August 4, 2004, she stated that she had told her "partner" that "you'll take the AIT job," indicating that the defendant had, in fact, disclosed the job possibility to Cheng.

Washington, D.C.] to wonder what on earth we were all doing there, except exchanging stories and consuming an excellent international meal. I'm sure that NSB will begin to have questions if it appears that good taxpayer money is going toward excellent meals in nice restaurants that produce nothing of reporting interest.

On March 16, 2003, the defendant replied to an e-mail from Cheng in which she thanked him for information he had provided her. (See Exh. 30.) In his response, the defendant wrote that he hoped "I haven't inundated you . . . I think I've sent you the key items, at least as I read the developing news. I'll stop sending now so that you can 'digest' and write whatever you need to write. My yinmou gui, of course, is to *keep you as well informed as possible* so that your *people in Taipei* consider you to be the indispensable officer in Washington" (Emphasis added.)

Other e-mail communications further refute the defendant's contention in his debriefings that he was not assisting Cheng in performing her duties as an intelligence officer for Taiwan. On May 9, 2004, the defendant sent an e-mail to Cheng regarding a work assignment that Cheng had received, stating: "I'm not sure precisely *what your people want*, but I've tried to spare you a little trouble by *culling from the internet* the following information on think tanks and academic institutions."¹¹ (See Exh. 31 (emphasis added).) Thus, the defendant himself conducted research for the NSB in response to tasking that Cheng had received from her superiors.¹²

¹¹ Lest the Court believe that public source information such as material published by think tanks and similar organizations is of little intelligence value, it should be noted that foreign intelligence organizations, including the Central Intelligence Agency, expend substantial resources in gathering such information for incorporation into intelligence analysis.

¹² The following day, May 10, 2004, the defendant re-sent materials to Cheng by e-mail from his computer at the Department of State. (See Exh. 32.)

Cheng acknowledged to the defendant the importance of the information he was providing the NSB. In an e-mail to the defendant on June 3, 2004, she stated the following:

This evening, as I mentioned, I am supposed to go to a U.S.-China Business Council reception and dinner, extending from about 6:30 to 9:15. This will sound funny, and I don't want you to take it the wrong way, but *you are an extremely high priority for me, now more than ever*, and if you wanted a ride, or to talk, I would gladly skip the dinner.

(See Exh. 33 (emphasis added).)

3. Defendant's Identification of Other Potential Recruits for the NSB

The defendant even identified other Americans to Isabelle Cheng whom he believed were suitable for recruitment by the NSB. On May 8, 2004, the defendant sent an e-mail to Cheng regarding an individual who had served his career in the Foreign Service and was then at a think tank. (See Exh. 34.) After telling Cheng about the individual's¹³ career frustrations at the Department of State, the defendant stated the following:

This is the kind of person who is *ripe for recruitment* by careful, methodical, serious *intelligence agencies*. In the days of the Cold War, Soviet and East German intelligence officers were quite practiced at identifying people like this, people who did not wake up one day and say "I want to be a traitor" but people whose relatively minor weaknesses and ego gratification needs made them *potential targets*. (Emphasis added.)

When confronted with this e-mail at his first debriefing, the defendant claimed that the FBI was taking it out of context. At his second debriefing, he became visibly agitated when asked about it again. He claimed that he was trying to tell Cheng that officials at the Department of State knew the subject official was turning against them, and that he was merely trying to let Cheng know that the State Department officials knew. Given the plain language of the

¹³ In the copy of the e-mail attached hereto as Exhibit 34, the name of the individual identified by the defendant has been redacted.

defendant's e-mail, however, and his knowledge that Cheng was a foreign intelligence officer, the defendant's explanation is not credible.

4. The Defendant's September 2003 Trip to Taiwan

The government's highest priority in its debriefings of the defendant has been to determine if he engaged in espionage with Taiwan. Of particular concern has been the defendant's three-day trip to Taiwan in September 2003, which he concealed from the Department of State and admittedly lied about on the Customs Declaration form he completed upon his return to the United States. Fueling the government's concern is the defendant's intimate relationship with Isabelle Cheng (also known as Cheng Nian-Tzu), a female foreign intelligence officer of Taiwan who was based in Washington, D.C. During the period of 2002 through early September 2004, the defendant had numerous private encounters with Cheng, as well as meetings with Cheng and her superior. E-mail correspondence and FBI surveillance establish that the defendant routinely had lunch with Cheng, frequently picked her up at the Washington, D.C. offices of TECRO,¹⁴ engaged in sexual activity with Cheng in the defendant's car, and spent time with Cheng at her apartment.¹⁵ FBI surveillance also revealed that the defendant and Cheng traveled together by train to New York City on May 29, 2004.¹⁶

¹⁴ The defendant often advised Cheng by e-mail that he would pick her up at TECRO and drive her home. For example, on December 5, 2003, he sent Cheng an e-mail in which he stated that "[u]nless I hear to the contrary from you, I'll plan to be at the door to TECRO at 9 pm tonight." (See Exh. 35.)

¹⁵ The fact that during this period, Cheng was engaged to be married to a British citizen with whom she lived, also contributed to concerns regarding her motivation for engaging in an intimate relationship with the defendant.

¹⁶ According to an e-mail that the defendant sent Cheng on May 30, 2004, he and Cheng had lunch in New York before returning together by train to Washington, D.C. (See Exh. 15.)

The defendant has been given numerous opportunities to tell the truth about his trip to Taiwan, and he has consistently lied about that matter. At his first debriefing on January 18, 2006, the defendant told agents that he did not meet with any Taiwanese intelligence officials (other than Isabelle Cheng) during his visit to Taiwan. He also said he was never offered money (or sex) in exchange for information.

On February 14, 2006, an FBI polygrapher administered a polygraph examination to the defendant. Prior to the examination, the polygrapher (an experienced agent) interviewed the defendant extensively about a wide range of subjects, including the defendant's travel to Taiwan in 2003. During that pre-test interview, the defendant maintained that he did not meet with anyone other than Cheng during his stay in Taiwan. During the polygraph examination, the defendant was asked the following questions:

1. Did you meet with anyone other than Isabelle [Cheng] in Taiwan?
2. Did you ever illegally provide classified information to any foreign intelligence service? The defendant answered "No" to both questions. As to both questions, the polygrapher found that deception was indicated.

A few weeks after the polygraph examination, the U.S. Attorney's Office learned of intelligence information relating to the defendant's travel to Taiwan in 2003.¹⁷ As a result of this information, the defendant was questioned again on March 28, 2006, about his activities in Taiwan. In that debriefing, which was recorded on tape with the defendant's knowledge and

FBI agents also observed the defendant and Cheng having drinks together at a hotel in New York.

¹⁷ This information was set forth in the government's June 29, 2006, classified, *ex parte* motion under the Classified Information Procedures Act, 18 U.S.C. App. 3.

consent (and in the presence of defense counsel), the following exchanges with the defendant occurred:

Agent: [W]ho did you meet with when you went to . . . Taiwan?

Defendant: Just Isabelle Cheng.

Agent: [Are] you sure that Isabelle Cheng is the only person you met with?

Defendant: I'm certain.

....

Agent: So the only person you decided to see while you were in Taiwan in 2003 was a known intelligence officer of the NSB. Is that what you're saying to us today?

Defendant: The only person I saw when I was there was Isabelle Cheng.

....

Agent: You didn't meet with any head of the NSB?

Defendant: No. No. I did not.

Based on U.S. intelligence information and other evidence, the government continued to find that the defendant's statements regarding his conduct in Taiwan were not credible. Consequently, the FBI administered a second polygraph examination to the defendant on April 5, 2006.¹⁸ In that examination, the defendant was asked two questions:

1. Other than Isabelle [Cheng], did you meet with anyone from the Taiwanese Government during your 2003 trip to Taipei?

¹⁸ The same agent who administered the polygraph examination on February 14, 2006, also administered the second polygraph examination. He is prepared to testify at an evidentiary hearing regarding his methodology and analysis. As discussed above, in the Plea Agreement the defendant stipulated to the admissibility of the results of polygraph examinations "if later offered to determine the defendant's compliance with this plea agreement." Plea Agreement ¶ 5c.

2. Other than Isabelle, did you meet with anyone from the NSB during your 2003 trip to Taiwan?

The defendant answered “No” to both questions. Once again, the polygrapher found that deception was indicated in both of the defendant’s responses.

Immediately after the polygraph examination, the agent who administered the examination questioned the defendant further about individuals with whom he had contact during his 2003 trip to Taiwan. The defendant maintained that he had contact in Taiwan only with “clerks, shopkeepers,” and similar individuals during his stay in Taiwan. When pressed further on this subject, the defendant said he wanted to have his attorney present.¹⁹ He again claimed, however, that he did not meet with anyone in Taiwan other than Isabelle Cheng.²⁰

The intelligence information contained in the government’s CIPA motion and the defendant’s two failed polygraph examinations, without more, warrant a finding by the Court that the defendant has breached his obligations under the Plea Agreement to provide full and truthful cooperation regarding his dealings with Isabelle Cheng and the NSB. *See United States v. Wakefield*, 112 Fed. Appx. 257, 258-59 (4th Cir. 2004) (defendant’s failure of polygraph constituted breach of cooperation obligation and relieved government of obligations under plea agreement) (unpublished); *United States v. Gore*, 93 Fed. Appx. 569, 570 (4th Cir. 2004) (where plea agreement contained language that defendant’s failure to pass polygraph “would result in the

¹⁹ According to established FBI policy, defense counsel may not be present during the administration of a polygraph examination because of the adverse impact their presence can have on the conduct and results of the examination.

²⁰ The defendant has not been questioned further about his activities in Taiwan since the April 5, 2006, polygraph examination, and the questioning that occurred immediately after that examination.

Government's obligations becoming null and void at its discretion," government was not bound by plea agreement) (unpublished); *United States v. Morrison*, 1996 WL603248, at *2 (4th Cir. 1996) (upholding the admission of polygraph results at sentencing to determine whether defendant had fulfilled his obligations under the plea agreement, including his entitlement to a downward departure); *United States v. Levaux*, 1999 WL 22887, at *2 (4th Cir. 1999) (failed polygraph examination provided a legitimate objective basis for finding that defendant breached his plea agreement). Such a finding, however, is buttressed by substantial additional information regarding the defendant's conduct.

During his debriefings, the defendant has made false and misleading statements about the timing of his decision to go to Taiwan in 2003. In his first debriefing on January 19, 2006, the defendant told agents that he planned to travel to Taiwan only if the opportunity presented itself.²¹ His e-mail communications with Isabelle Cheng, however, indicate that they began planning for him to visit Taipei as early as June 2003. See Exh. 36 (June 28, 2003, e-mail in which the defendant says "I look forward to hearing [a story] from you personally when you take me on the grand Plan A or Plan B tour around Taipei"); Exh. 37 (July 12, 2003, e-mail in the defendant says "Please keep working on that 'Plan X.' . . . Or Plan A, B, or C.")²² On August 18, 2003, the defendant e-mailed to himself flight information about travel from Tokyo to Taipei on September 3, 2003. (See Exh. 38.) On August 22, 2003, the defendant e-mailed to himself

²¹ The defendant departed the United States for China on August 31, 2003. After attending meetings in China, he traveled to Japan. On September 3, he traveled from Japan to Taiwan, returning to Japan on September 6 for his trip back to the United States.

²² The defendant's statement was in response to an e-mail earlier that day from Cheng, who told the defendant, "Hope you enjoy the trip to the Far East . . . and I shall . . . revise . . . the PLAN X at this end." (See Exh. 37.)

information about hotels in Taipei. (See Exh. 39.) On August 28, 2003, Cheng sent an e-mail to the defendant in which she stated, “Hope you can make the trip to Taipei” (See Exh. 40.) On August 30, 2003, the defendant e-mailed Cheng, stating he was “glad that the logistical plan seems OK. I’ll try hard for 1830 and I’ll let you know if something prevents – also let you know when I’m in striking distance.” (See Exh. 41.) And on August 31, 2003, the defendant sent an e-mail to Cheng after his arrival in Qing Dao, China – when he knew she already was in Taiwan – in which he stated:

Since I seem to have navigated the most [complex] part of the journey successfully, I’m encouraged that the departure plan will work equally smoothly – on Tuesday from Qingdao to Seoul to Tokyo. If all that works, I’ll continue on the rest of the journey as planned. If something happens, I’ll do my best to let you know by cell phone and internet e-mail.

(See Exh. 42.)²³

The defendant’s statements during his debriefings about the permissibility of his travel to Taiwan as a senior Department of State official also reveal that he has been uncooperative. In his first debriefing on January 18, 2006, the defendant said that there were no Department of State rules prohibiting his travel to Taiwan, and that he did not need official permission to travel to Taiwan. This contention is at odds with an e-mail he sent to a colleague on June 11, 2001, prior to his elevation to Deputy Assistant Secretary of State. In the e-mail, the defendant stated that “[s]peaking of stealth, since *I will be unable to visit Taiwan in my new job (our rules preclude*

²³ The defendant’s travel itinerary also masked his intended travel to Taiwan. On the itinerary, he characterized the period of September 3-6 as “annual leave,” without reference to where he was spending that time. (See Exh. 43.)

anyone going at the DAS level), I will be making a quick trip to Taipei June 25-27 for quiet get-acquainted talks there.” (See Exh. 71 (emphasis added).)

The defendant also deceived his superior, Assistant Secretary of State James Kelly, about his intentions to visit Taiwan. On September 1, 2003, while he was in Qingdao, he sent an e-mail to Kelly in which he fabricated a story to mask his impending travel to Taiwan:

Right now, I plan to stay in Japan the remainder of the week, but to be on annual leave. Through brilliant timing, I hit a period when virtually everyone I would have wanted to see has dispersed to the four corners of the globe, from Washington to Seoul to Beijing. As it happens, I have some personal friends in Japan I’ve wanted to catch up with, including an old friend whose wife passed away in June following a battle with leukemia. Back in the office Monday morning, Sept. 8.

(See Exh. 44.)²⁴ Similarly, in an e-mail message he sent from Japan to a colleague on September 2, 2003, he said that he intended to take annual leave in Japan “to catch up with old friends” – when in fact, he planned to go to Taiwan. (See Exh. 45.)

The defendant’s concern that his clandestine presence in Taiwan might be disclosed was also revealed in an e-mail he sent to Cheng on September 4, 2003, while he was in Taiwan. In that e-mail, he commented upon his anxiety at noticing the message light on his telephone when he returned to his hotel room. (See Exh. 46.) He told Cheng that “I found my heart racing as I notice the red “message” light flashing on my phone. A thousand thoughts raced through my head, none of them good ones.”

²⁴ When asked at his March 28, 2006, debriefing why he did not later tell Kelly he was in Taiwan, the defendant replied, “Just because I didn’t.”

5. The Defendant's Sexual Relationship with Isabelle Cheng

During his debriefings, agents questioned the defendant about his physical relationship with Isabelle Cheng because of the concern that there was a connection between that physical relationship and information that the defendant provided to Cheng for the NSB. The defendant consistently has minimized the extent of his sexual relationship with Cheng.

In his first debriefing on January 18, 2006, the defendant told agents that his relationship with Cheng did not become physical until June 2004, and that at that time their physical relationship consisted only of kissing and embracing each other. Upon further questioning, the defendant added that he did not receive sexual favors from Cheng, and that it was always he who touched Cheng in a sexual nature (*i.e.*, Cheng never touched the defendant in a sexual nature).

FBI surveillance, corroborated by e-mail records, are inconsistent with the defendant's account of his sexual relationship with Cheng.

- On December 4, 2003, FBI agents conducting surveillance of the defendant and Cheng at a restaurant in Washington, D.C., observed physical intimacy between them during a lunch meeting.
- On the evening of December 19, 2003, FBI agents observed the defendant pick up Cheng from TECRO in Washington, D.C. in his personal vehicle, drive to a restaurant where they had dinner, then drive her to her residence in Maryland. According to FBI logs, the defendant entered Cheng's residence with Cheng at approximately 10:58 p.m. and did not exit the residence until approximately 11:45 p.m.²⁵

²⁵ During a pre-test interview before his first polygraph examination on February 14, 2006, the defendant said that while he was in Cheng's apartment, she removed all of her clothes and he touched her all over her body. He maintained, however, that they did not engage in any

- On July 23, 2004, FBI agents observed the defendant pick up Cheng in his personal vehicle from TECRO in Washington, D.C., at approximately 8:10 p.m., then drive to a secluded location in Maryland and park there at approximately 8:41 p.m. During the next 20 minutes, agents observed the defendant in the driver's seat with the seat reclined and his head leaning back against the headrest. Agents also observed Cheng in the front passenger seat leaning across toward the defendant with her back facing upward and head below the line of observation.
- On the afternoon of August 11, 2004, FBI agents observed the defendant and Cheng parked in the defendant's vehicle on a sidestreet in Washington, D.C. Agents observed movement in the car for approximately 20 minutes, during which time they observed Cheng's head leaning toward the defendant and disappearing in front of him. In a cellular phone call to Cheng only minutes after she exited the defendant's vehicle, the defendant told Cheng: "The food was good, the wine was good, the champagne was good and you were good."²⁶

The defendant apparently became infatuated with Cheng. In an e-mail to Cheng on May 30, 2004, following their return from a trip to New York, he commented on her fatigue during the return train ride to Washington: "Having my arm around your shoulder, your head resting against my shoulder, and then on my chest, your hand in mine for a couple of hours while you

sexual act. The defendant made no reference to this event in his debriefings after the Plea Agreement.

²⁶ During the pre-test interview before his polygraph examination on February 14, 2006, the defendant said that he and Cheng engaged in "heavy petting" on two to four occasions, but added that they never removed their clothes and kept their seatbelts buckled.

were in ‘Dreamland’ was more than ample compensation. . . . Now I’m going to have to think a particularly cunning plan to induce you to come to Honolulu in the middle of June.” (See Exh.

15.) On August 1, 2004, the defendant sent an e-mail to Cheng in which he stated:

After two years of sharing thoughts – and increasingly intimate thoughts – I can no longer imagine how it could be otherwise. . . . I mentioned long ago that you were incredibly easy (for me) to talk to And so I continue to say silent prayers (though I’m not religious) and make silent wishes that somehow that will be able to endure.

(See Exh. 47.)

6. Defendant’s Concealment of Meetings with Isabelle Cheng

The defendant had numerous meetings alone with Isabelle Cheng, whom he admittedly understood to be a foreign intelligence officer. Although the defendant maintains that his meetings and communications with Cheng were in furtherance of U.S. foreign policy interests (and later in connection with his romantic feelings toward Cheng), the defendant never told his superior (Assistant Secretary of State James Kelly) or any of his colleagues at the State Department’s Bureau of East Asian and Pacific about *any* of his private meetings with Cheng, including numerous lunch meetings where they discussed official business.

In addition, the defendant’s conduct at some of his meetings alone with Cheng is consistent with espionage tradecraft:

- On the evening of June 30, 2004, FBI agents observed the defendant and Cheng walking together through White Flint Mall in Rockville, Maryland.²⁷

²⁷ Approximately one month later on August 2, 2004, the defendant wrote an e-mail to Cheng in which he stated: “Careful about telling me where you’ll be on a Saturday afternoon . . . it’s been a while since I practiced my ‘accidental encounter’ methodology at White Flint.” (See Exh. 48.)

- On July 31, 2004, FBI agents observed the defendant park his vehicle at the Potowmack Landing restaurant in Alexandria, Virginia, for a lunch meeting with Cheng and NSB Chief of Station Huang. Agents then observed the defendant walk toward the entrance to the restaurant carrying two or three manila-colored envelopes. When the defendant exited the restaurant approximately two hours later, he was observed carrying a manila envelope that was folded up.²⁸
- On August 4, 2004, an FBI surveillance team observed the defendant enter a restaurant in Washington, D.C. carrying a piece of paper, then have lunch alone with Ms. Cheng. During the lunch, agents observed the defendant place a piece of paper on top of Ms. Cheng's menu. Ms. Cheng read the piece of paper, then returned it to the defendant.
- On Saturday, September 4, 2004, the day the defendant was apprehended by the FBI, agents observed the defendant as he walked from the parking area to the entrance of the Potowmack Landing restaurant in Alexandria, Virginia, for a lunch meeting with Cheng and NSB Chief of Station Huang. Agents observed the defendant look around as he approached the restaurant's entrance in a manner indicating that he was concerned he might be under surveillance.

The defendant's falsification of calendar entries for meetings with Ms. Cheng on his Department of State computer provides further evidence that he sought to conceal his relationship with her for reasons other than a desire to prevent his family from learning about his extramarital relationship. At least as early as October 2002, the defendant on several occasions

²⁸ Later that evening, agents observed the defendant and Cheng kissing in the defendant's vehicle.

entered fictitious names on his computer calendar for private meetings with Ms. Cheng. On October 3, 2002, for example, the defendant and Ms. Cheng made plans by e-mail to meet at the Washington, D.C. restaurant Les Halles at 12:30 p.m. (See Exh. 53.) On his official electronic calendar that day, however, the defendant recorded a meeting at Les Halles at 12:30 p.m. with “Juergen Probst.” (See Exh. 54.)²⁹ The defendant’s claim that he was prohibited from entering appointments with officials of Taiwan on his Department of State calendar does not withstand scrutiny. He could, for example, have simply entered the name “Isabelle” or the initials “IC” without disclosing that he was meeting with an official of Taiwan, or simply record the meeting as a “private appointment.” Indeed, in an e-mail to Cheng on October 19, 2003, the defendant acknowledged that “our standard practice [in the East Asian and Pacific Affairs Bureau] in publishing our daily schedules is to show something like ‘private engagement’ or ‘private appointment’ when indeed one is [doing] something other than the nation’s business at breakfast, lunch or dinner. . . . So I guess that even when the lunch appointment is for business, it is safer to show it as ‘Private Lunch’ or ‘Private Engagement.’”³⁰ (See Exh. 72.) Similarly, on June 1,

²⁹ The defendant’s falsification of electronic calendar entries for meetings with Ms. Cheng was repeated on numerous occasions. See Exh. 55 (Jan. 16, 2003, e-mail and calendar entry for lunch with “Ranade”); Exh. 56 (Aug. 6, 2003, e-mail and calendar entry for lunch with “Gustav Dreyer”); Exh. 57 (Aug. 21, 2003, e-mail and calendar entry for lunch with “Jacques Viteau”); Exh. 58 (Sept. 11, 2003, e-mail and Sept. 12, 2003, calendar entry for lunch with “Vince Maloney”); Exh. 59 (Nov. 26, 2003, e-mail and calendar entry for lunch with “John Metcalf”); Exh. 60 (Dec. 4, 2003, e-mail, Dec. 5, 2003, cable from TECRO to NSB headquarters, and Dec. 5 calendar entry for lunch with “Zhang Ruisheng”); Exh. 61 (June 1, 2004, e-mail and June 3, 2004, calendar entry for lunch with “Ian Patterson”).

³⁰ Notwithstanding this message, on November 4, 2003, the defendant stated the following to Cheng about another prospective lunch engagement: “Unless somebody has put something on my calendar in my absence, a ‘business-oriented’ lunch on Thursday should be fine with me. . . . Wonder what name I should put down on my calendar this time – maybe I’ll use ‘Mr. Gold’ of Security Services Incorporated. After having ‘dinner with niece’ shown on the

2004, the defendant explicitly told Cheng that he was going to record their upcoming lunch on June 3 as “lunch with Ian Patterson,” a retired U.S. Army colonel whom the defendant had studied with at the National War College. (See Exh. 61.)

The defendant’s claim that he created fictitious entries for his meetings with Cheng because it was impermissible for him to record meetings with Taiwanese government officials is belied by his own actions. On November 11, 2003, for example, Cheng sent the defendant an e-mail in which she referred to “Mr. H” (an apparent reference to NSB Chief of Station Huang) and confirmed that “*we’ll* meet you for lunch on Friday.” (Emp hasis added).). Soon thereafter that same day, Cheng sent another e-mail to the defendant reiterating that “the Friday lunch is very OK with *us*.” (See Exh. 62 (emphasis added).) On the defendant’s electronic calendar for Friday, November 14, 2003, he recorded “Lunch w/Huang.” (See Exh. 63.) An e-mail the defendant sent to Cheng on November 14, 2003, at approximately 3:35 p.m. confirmed that he had had lunch with both Cheng and NSB Chief of Station Huang. (See Exh. 64.) Moreover, Cheng sent a “Secret” cable to NSB headquarters in Taipei on November 14, 2003, entitled “Talking Points of the Conversation Between Huang and Keyser,” in which she reported on matters discussed during the lunch. (See Exh. 27.) The defendant recorded another meeting with NSB Chief of Station Huang on his official Department of State electronic calendar on Saturday, May 22, 2004. (See Exh. ____ (calendar entry for May 22, 2004) and Exh. ____ (e-mail to Huang on May 28, 2004, referencing lunch on May 22).)

calendar, I have become increasingly cautious.” (See Exh. 65.) The defendant subsequently stated on his calendar that he was having lunch on November 6 with “Jason Gold.” (See Exh. 65.)

The defendant's reactions to an incident that occurred on August 17, 2004, underscores his efforts to conceal his relationship with Cheng. On that day, a passerby approached the defendant and Cheng while they were parked in the defendant's car (in suburban Maryland) and told them that he had seen a Caucasian man in a car with District of Columbia tags taking photographs nearby. In a telephone conversation the next day, the defendant discussed the construction of a cover story with Cheng in case they were questioned. According to a transcript of the conversation, the defendant told Cheng, "[W]e just have to think a little bit about . . . explanations and then work out from there . . . it's obviously . . . not a particularly delightful development . . . there are probably as many as five different explanations. I don't especially like any of them, but . . . we just need to think through what each one might mean and then . . . figure out . . . how to address it." Later in the conversation, as if he knew the call was being recorded, the defendant told Cheng, "you know and I know that nothing bad has occurred in terms of anything that . . . is contrary to anybody's law or regulation . . ."

To minimize suspicion that he and Cheng were under physical surveillance, the FBI arranged for a Fairfax County detective to go to the defendant's home on August 27, 2004, and pretend to be investigating possible counterterrorism activity near public utilities³¹. After the police officer departed, the defendant telephoned Cheng and left the following voice-mail message: "I just had an interesting experience . . . but I don't want to share it over the phone. Suffice it to say that the . . . mystery . . . that we experienced a while back has now been resolved.

³¹ The defendant and Cheng had been parked near a PEPCO facility when approached by the individual who told them about someone taking photographs nearby.

And, actually, the outcome is probably the best possible one that we might've imagined. . . . But I'll talk about it later."³²

B. Classified Materials in the Defendant's Residence

FBI agents discovered an enormous amount of classified material in the defendant's home during their search of the home on September 4, 2004. The agents found a total of approximately 3,659 classified documents, including 28 documents classified at the Top Secret level (some of which contain Special Compartmented Information) and 1,976 documents classified at the Secret level. These classified documents were located throughout the defendant's house:

approximately 478 documents (including 109 documents classified Secret") were found in a closet in the upstairs master bedroom, and 1,580 documents (including 992 documents classified Secret) were found on the shelves of a bookcase in a finished basement den. Several documents at the Secret and Confidential levels also were found in the defendant's ground floor office, and approximately 841 documents classified Secret were found in a basement closet. Of the total number of hard-copy classified documents found in the house, 97 post-dated 1995, including 56 documents classified Secret. These documents were found on the bookshelf of the defendant's ground floor office, on a bookshelf in the finished basement, and in a basement closet.

The FBI also found a large quantity of classified digital material in Keyser's home. Keyser's personal laptop computer, which was found in his ground floor office, contained approximately 40 classified files classified at the Secret level. Agents also found 27 floppy disks

³² The defendant followed up with an e-mail to Cheng at approximately 9:56 p.m., in which he stated that "[t]he issue of a couple of weeks ago has now been clarified. Nor more mystery. Or so it seems. And it was none of those scenarios we had imagined. So you can relax 100%" (See Exh. 68.)

in the defendant's ground floor office containing approximately 120 documents classified at the Secret level, as well as a floppy disk on a dresser in the upstairs master bedroom that contained 14 documents classified Secret. The dates of classified documents found on floppy disks in the defendant's home ranged from 1980 to 2004.

A forensic examination of the laptop computer and the floppy disks resulted in a determination that Keyser used the laptop to access eight classified files from the floppy disks while he was in China. The forensic examination of the computer also resulted in a determination that Keyser subsequently used the laptop computer a few days later during his clandestine visit to Taiwan.³³

The defendant has not been candid or forthcoming about classified materials found in his home. In his first debriefing on January 18, 2006, he said that a temporary secretary mistakenly had boxed up classified documents among other materials at the end of a tour at the Department of State, and that he had taken the boxes home and put them in a closet without knowing there was classified material inside. He also said he was unaware that any classified documents were in his basement until 2003, when his wife told them she had discovered classified material while sorting through the boxes in the basement closet, and asked him to look at the material and do something about it.³⁴ The defendant said he did not act on his wife's request because he didn't "hear" her. He also claimed that his wife, not him, must have removed classified documents

³³ There is no forensic evidence that Keyser accessed classified material from the laptop computer while in Taiwan, although there is substantial evidence that he used the laptop there.

³⁴ The defendant said that his wife discovered the classified material in the basement sometime after renovations of the basement had been completed. According to an interview the contractor who performed the work, the renovation was completed by early 2003.

from the boxes and placed them in the basement bookcase, where FBI agents found them on September 4, 2004, when they searched the house.

At the beginning of his second debriefing on January 27, 2006, the defendant attempted to “clean up” his previous statements about the classified documents found in his basement. He said that he was careless and that the documents were his responsibility. But he maintained that when his wife told him she had discovered classified material in the basement, he did not believe her. He also maintained that he never went into the finished basement, even though he had spent thousands of dollars to renovate it.

The defendant responded to further questions about classified material found in his home during a pre-test interview before his first polygraph examination on February 14, 2006. Again he blamed the mistakes of a temporary secretary for the presence of classified material in the basement dated up to 1995.³⁵ As for his wife’s notification in 2003 that classified materials were in the basement, the defendant now maintained that he did not recall her telling him that she had discovered any classified materials. But he lamely added, “if she said, she said that.”

The defendant told the agent that he “cannot account” for classified material found in his home that post-dates the end of his assignment in 1995. He speculated that classified documents were accidentally placed in a folder (he did not say by whom), taken home, removed from the folder, and placed on his home office desk.

³⁵ The defendant told the agent that he had given the secretary specific instructions to segregate classified material from unclassified material and to put the classified material into a safe for the defendant’s successor.

The defendant was afforded another opportunity to provide truthful cooperation about the classified material in his home during a debriefing on March 28, 2006, and failed again to fulfill his obligation under the Plea Agreement to be truthful.

When asked to explain the presence in his home of classified documents that post-date 1995 – when he claims his temporary secretary at the Department of State accidentally boxed up classified material that he unknowingly took home – the defendant’s responses defy credulity:

Defendant: From time to time *by mistake* I definitely took that kind of thing home, in other words, I brought it back thinking it was only *unclassified material* that I was bringing home. . . . I was *careless*. . . . [W]hen I did this, it was *not for the purpose of bringing the classified material home*, you know, to have it there or to consult there

(Emphasis added.)

When asked what he did with classified documents that he discovered among materials that he had brought home, the defendant maintained that “if I saw a classified [document] in it, I would take it back the next day.” He also told agents that he never noticed classified markings on documents in his home that post-dated 1995.

Agents also asked the defendant to explain the presence in his home of numerous floppy disks containing classified material dating back many years, including disks containing classified material that post-dates 1995.. The defendant asserted that he created these disks “because I had a short time fuse, I had to get something done in a hurry”

The defendant has even recanted his admissions regarding his knowledge of the presence of classified documents in his house made in the Statement of Facts and in open court during the plea hearing, which admissions are critical as they relate to an element of the charged crime. In the Statement of Facts, the defendant admitted the following:

For at least one year prior to September 4, 2004, Keyser knew that he had classified documents and materials in his home, yet he did not return any of the classified documents or materials to the U.S. Department of State or to any other U.S. Government department or agency.

Additionally, the defendant made the following statement at the plea: “At some point I came to understand that there was classified material in the basement, but I did not take action to return it.”³⁶ During his debriefing on March 28, 2006, however, the following colloquy occurred:

Q: Is it your position that you had no idea that those folders [in the basement] contained classified documents? Is that your story?

A: Ah, that’s, that’s, yeah that’s my, yes that’s my, that’s the truth. . . .

Q: And your wife.

A: Yeah.

Q: Says that she told you in late 2004 that there was classified there, do you dispute that?

. . . .

Q: Okay 2003, right.

A: Ah, that’s the same, my wife has said that she has said that and you know, we, we went over this the last time but yes, she indeed said that she said that, if she says this I have no doubt that she said it and ah.

Q: But you don’t remember being told that you had classified material . . .

A: I, I, I do

Q: . . . in your house?

A: I, I, I do not remember that, I believe, I believe . . .

Q: (Inaudible) something you remember if somebody told you that you had classified information in your house?

³⁶ The government does not possess a transcript of the plea hearing and is relying on the written allocation document provided to the government by the defense. The defendant read this document when asked to tell the Court, in his own words, what had happened.

A: Ah, I'm very sorry, I don't remember it, ah, it didn't, it did not register with me as I explained to others last week what I heard and I'm sure this came late at night, my wife probably stuck her head into the study and said hey, ah, you gotta go check stuff down in the basement, I, you know, at which she must have said there is classified, what I heard her say was you'd better check all that stuff in the basement and go through it, think some of the stuff, ah, you need to look at.

Q: And why wouldn't your hair catch on fire upon being told that there is classified material in your house?

A: I, I assume, cause it didn't register with me what she said.

March 28, 2006, Debriefing Tr. at 12 -14.

Beyond the incomplete and incredible responses by the defendant discussed above, the defendant offered no information about numerous classified documents (and one floppy disk containing classified information) found in his master bedroom, or the presence of classified material on his personal laptop computer.

C. Laptop Computer and Classified Materials Taken Overseas By the Defendant

The defendant has not fulfilled his cooperation obligations with respect to a laptop computer and classified information that he took with him on his trip to Asia in 2003. At his initial debriefing on January 18, 2006, he said he had one of two laptop computers with him when he entered Taipei on September 3, 2003: either his personal laptop or his official Department of State laptop. During the pre-test interview before his first polygraph examination on February 14, 2006, however, the defendant said he could not recall if he had brought a computer with him on his trip to Taiwan. He also stated that he "categorically did not use one" during his trip to Qing Dao, China, where he attended official meetings.

Agents questioned the defendant further about the laptop at his debriefing on March 28, 2006:

Agent: Did you take a laptop with you on that trip?

Defendant: I don't remember whether I did or not I don't think I would have needed it.

. . . .

Agent: So you don't remember taking a laptop with you?

Defendant: I, I don't remember, I, I don't, I don't remember it.

. . . .

Agent: So you didn't have a laptop and you didn't have any other . . . modes of accessing any kind of floppy disks or anything like that.

Defendant: No.

. . . .

Agent: You did not take any floppy disks with you on your trip or anything like that?

Defendant: No, no, no. . . . I mean there would have been no need

March 28, 2006, Debriefing Tr. at 24.

The facts concerning the defendant's travel with, and use of, a laptop computer during the 2003 trip to Asia support a finding that the defendant deliberately has been untruthful in discussions with agents about this matter. In an e-mail to another Department of State official on August 30, 2003, the defendant explicitly stated that he was bringing a "laptop and accessories" with him on the trip. (See Exh. 69.) The comparison of a floppy disk found in the defendant's home with data on the hard drive of his personal laptop computer also indicates that the defendant accessed classified information from the laptop while he was overseas. According to

the FBI's computer forensic analysis, the floppy disk contains 34 files, 9 of which are classified.³⁷ All 34 files on the floppy disk show a "date created" and "date last modified" of August 29, 2003 – two days before the defendant departed the United States for China – indicating that he downloaded all of the files onto the floppy to take with him overseas.³⁸ Moreover, 9 of the classified files on the floppy disk show a "date last accessed" of September 1, 2003, and all 9 of those files have corresponding "link" files on the hard drive of the laptop, indicating that they were accessed from the laptop on September 1, when he was in China. Finally, information recovered from the defendant's personal laptop computer establishes that he sent numerous e-mail messages from the computer as early as August 31, 2003 – the day he arrived in Qingdao – including an e-mail that day to Cheng. (See Exh. 70.) Forensic analysis also establishes that he used the laptop to send e-mail messages while he was in Taipei.

On several occasions during debriefings the defendant was asked whether he took classified information on a laptop computer to China and Taiwan. Debriefing agents were keenly interested in his answers because the FBI's forensic analysis of the defendant's computer established that eight classified documents had been accessed on the defendant's laptop computer on September 1, 2003, when the defendant was in Qingdao, China. Not only was the taking of classified information to a foreign country on a laptop computer against State Department regulations, but the government has received information from a former senior official in the East

³⁷ Eight of the nine classified documents on the floppy disk are classified Secret.

³⁸ A "screen shot" of the directory of the floppy disk, depicting the file names and the dates the files were created, last modified, and last accessed, is attached hereto as Exhibit 73.

Asian and Pacific Division at the State Department, who is familiar with the defendant, that the defendant had no need to either take or access those documents while in China.

During the pre-test interview before his polygraph on February 14, 2006, the defendant denied ever having classified information on the laptop he took to China and Taiwan, and stated categorically that he did not use a laptop while in Qingdao. However, when later confronted with forensic evidence that 8 classified documents were accessed on his personal laptop computer while he was in Qingdao, the defendant simply stated, “Well, if so, I did it.” March 28, 2006, Debriefing Tr. at 27.³⁹ When subsequently asked to explain, the defendant replied, “I can’t answer.” Backtracking, he then stated, “from what you said obviously I must have taken the laptop and I must have . . . looked at something on it while I was there . . . I don’t remember but I must have done that.” *Id.* When subsequently asked whether he genuinely did not remember, or was pretending not to remember, the defendant responded, “No . . . it’s not something that . . . made *an impression* on me.” *Id.* (emphasis added).

Later in the March 28 debriefing, when pressed further on the classified material he took to China, the defendant offered weak rationalizations, some of which conflict with previous statements he had made in the same debriefing:

Defendant: I acknowledge if I did this, I shouldn’t have done this but what . . . I need to emphasize is this . . . was material that the Chinese knew, they were at the meetings where these

Agent: Then why did you take it?

³⁹ While claiming to have no recollection of whether he took a laptop containing classified information to the People’s Republic of China, the defendant was able to recall in intricate detail long walks that he took with Isabelle Cheng just three days later.

Defendant: Then why take it? (Laughs.) Because I needed to study it myself, to be certain I knew what our official position was.

Id. at 30.

Still later in the March 28 debriefing, the defendant refused to confirm that he had taken a laptop computer with him to China, Japan, and Taiwan in 2003:

Defendant: I'm trying to be 100 percent honest with you, okay? I genuinely do not remember what I had and what I did. . . . If I had a laptop and *that's still an if* because I did not remember if I had a laptop, I would never leave it in my room, I would indeed keep it with me at all times

March 28, 2006, Debriefing Tr. at 96 (emphasis added).

In sum, the information provided by the defendant about the laptop computer and classified information he took to Asia in 2003 falls far short of the cooperation required under the Plea Agreement, and in many respects is simply not credible.

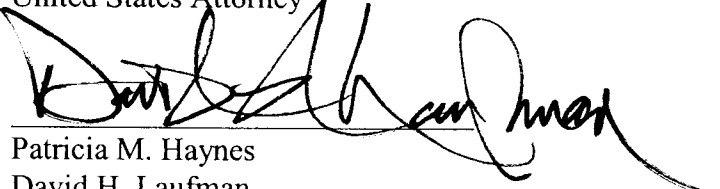
IV. CONCLUSION

For all the reasons set forth above, the Court should find that the defendant failed to fulfill his obligation to provide complete and truthful cooperation as required under the Plea Agreement, and that the government therefore should be released from its own obligations under that agreement.

Respectfully submitted,

Chuck Rosenberg
United States Attorney

By:

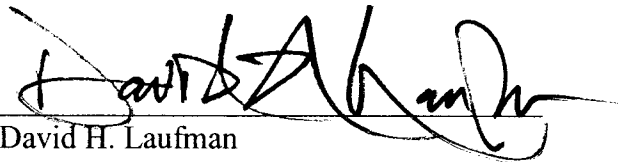


Patricia M. Haynes
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Assistant U.S. Attorneys

CERTIFICATE OF SERVICE

The undersigned certifies that on the 5th day of July, 2006, copies of the foregoing Memorandum in Support of Motion to Find Defendant in Material Breach of Plea Agreement and to Release the Government From Its Plea Obligations were transmitted by facsimile and first-class mail to:

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A handwritten signature in black ink, appearing to read "David H. Laufman", is written over a horizontal line. The signature is stylized and cursive.

David H. Laufman
Assistant United States Attorney