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10 United States of America

11 UNITED STATES DISTRICT COURT  
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
13 SOUTHERN DIVISION

14 UNITED STATES OF AMERICA, ) SA CR No. 05-293(B)-CJC  
15 )  
Plaintiff, ) GOVERNMENT'S TRIAL MEMORANDUM  
16 )  
v. ) Trial: March 27, 2007  
17 ) Time: 9:00 a.m.  
CHI MAK, et al., )  
18 )  
Defendants. )  
19 )  
20

21 The United States of America, by and through its undersigned  
22 attorney, respectfully submits this trial memorandum providing an  
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1 introduction to the facts of this case, a briefing of the law,  
2 and a discussion of issues which may be raised at trial.

3 Dated: March 20, 2007

Respectfully submitted,

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5 GEORGE S. CARDONA  
Acting United States Attorney

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GREGORY W. STAPLES  
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9 Assistant United States Attorneys

1 **I. STATUS OF THE CASE**

2 \_\_\_\_\_A. Trial as to defendant Chi Mak is set for March 27,  
3 2007. Trial for the remaining four defendants is set for May 15,  
4 2007.

5 B. Defendant Chi Mak has been in custody since his arrest  
6 on October 28, 2005.

7 C. The second superseding indictment contains fifteen  
8 counts. Count 1 charges defendant with conspiracy to violate  
9 export control laws in violation of 22 U.S.C. § 2778(b)(2) and 22  
10 C.F.R. § 127.1(a)(3). Counts 2 through 4 charge defendant with  
11 attempting to export or exporting a defense article to the PRC in  
12 violation of 22 U.S.C. § 2778(b)(2) and (c), and 22 C.F.R. §  
13 127.1(a)(1) and (d), and § 127.3. Count 6 charges defendant with  
14 acting as an agent of a foreign government, namely the PRC,  
15 without giving prior notification to the Attorney General of the  
16 United States, in violation of 18 U.S.C. § 951. Count 11 charges  
17 defendant with making false statements to the FBI in violation of  
18 18 U.S.C. § 1001.

19 **II. STATEMENT OF FACTS**

20 The government expects the proof at trial to establish the  
21 following:

22 **A. The Copying and Encryption of Defense Technology Files**

23 The defendants were arrested on October 28, 2005, when Tai  
24 Mak and his wife, Fuk Li, were preparing to board a flight to the  
25 PRC. Defendant and his wife, Rebecca Chiu, were arrested at  
26 their home at the same time. Search warrants were executed at  
27 defendants' residences, defendant's workplace, and for the carry-  
28 on and checked luggage of Tai Mak and Fuk Li.

1 In the search of Fuk Li's luggage, agents found a  
2 commercially-produced CD package for learning English. Inside  
3 the cover, hidden behind disk 3 of the commercially produced CDs,  
4 was a CD marked "10/25/05" (the "LAX disk"). The LAX disk  
5 contained two MP3 music files, three Adobe Acrobat files  
6 containing power points of lectures and notes from college that  
7 belonged to Billy Mak, and a file folder with the name "DLL."  
8 Within the DLL folder were three subfolders named Disk 1, Disk 2,  
9 and Disk 3, which contained encrypted files of defense-related  
10 information. When decrypted and extracted, the subfolder files  
11 exactly matched the files on three disks given to Tai Mak by  
12 defendant and Rebecca Chiu. The three disks were found in the  
13 search of Tai Mak's residence. The original three disks used to  
14 make the three copies were found in defendant's home.

15 The encrypted files contained defense-related information,  
16 including two documents that were export-controlled. One of the  
17 documents, co-written by defendant, contained information that  
18 should have been classified as "Confidential/NOFORN." In  
19 addition, export-controlled documents relating to the Navy's next  
20 generation warship (the DDX program) were found on a laptop  
21 belonging to Tai Mak and Billy Mak that had been encrypted in  
22 2004. Evidence recovered from defendant's home shows that he and  
23 his wife traveled to the PRC a few weeks after the DDX files were  
24 encrypted. The original DD(X) disk was found in defendant's  
25 home. The DD(X) information was also found on the shared  
26 computer drive at defendant's workplace. Each version exactly  
27 matches the DD(X) files on the laptop.

28 The search of defendant's home resulted in the recovery of

1 hundreds of defense-related documents, including many that were  
2 marked NOFORN<sup>1</sup> or proprietary to certain defense contractors.  
3 Many of the documents found in defendant's home match  
4 technologies and weapon systems found on four tasking lists. Two  
5 of the tasking lists were recovered from defendant's trash during  
6 a search conducted in March 2004, and two were discovered during  
7 the October 28, 2005, search of his home. The evidence will show  
8 that defendant was collecting technical data found on the tasking  
9 lists for the PRC government.

10 Defendant was a senior engineer for Power Paragon, Inc.  
11 ("PPI"), a defense contractor in Anaheim, which, according to its  
12 Facility Director, Fred Witham, does almost all of its business  
13 through contracts or subcontracts with the Navy. The main  
14 project defendant worked on at the time of his arrest was Quiet  
15 Electric Drive ("QED"), which was intended to further decrease  
16 the signature data emitted by U.S. Navy submarines and surface  
17 warships. At trial, the government will offer expert testimony  
18 to show that submarine signature data is extremely sensitive  
19 information, and that revealing it endangers the lives of  
20 officers and sailors who serve on submarines.

21 The investigation of defendant began in February 2004.  
22 Court-ordered wire taps were placed on defendant's home telephone  
23 number in June 2004. Microphones were later placed inside the  
24 residence and the car owned by defendant. A closed-circuit  
25 television camera was placed in defendant's home above his dining

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26  
27 <sup>1</sup> NOFORN is a restriction placed on documents that contain  
28 Naval Nuclear Propulsion Information. NOFORN documents cannot be  
given or shown to anyone who is not a U.S. citizen with a "need  
to know."

1 room table in October 2005. In June 2004, wire taps were placed  
2 on telephones belonging to Tai Mak and Fuk Li. A microphone was  
3 later placed in one of their cars. Based on this surveillance,  
4 the following was learned.

5 On October 19, Tai Mak called a Mr. Pu in the PRC saying he  
6 was from "Red Flower of North America." Tai Mak worked for  
7 Phoenix Satellite Television as a sound engineer. Phoenix  
8 Satellite Television is not referred to as Red Flower of North  
9 America. Testimony at trial will show that other Chinese  
10 intelligence units bear the names of flowers, such as Winter  
11 Chrysanthemum and Autumn Orchid, and that agents are taught to  
12 use cover stories to mask where they are from. Tai Mak told Mr.  
13 Pu that he was coming to Guangzhou to attend a trade fair. The  
14 President of Phoenix Satellite Television was interviewed and  
15 said that Tai Mak was not traveling to China on October 28 for  
16 business purposes. Tai Mak told Pu that he will be coming on  
17 October 30 and will be bringing his "assistant." Pu told Tai to  
18 call him on his cell phone from the airport in Guangzhou using a  
19 calling card.

20 On October 20, Tai Mak spoke to his wife, Fuk Li, on the  
21 phone. They discussed Tai Mak's efforts to reach defendant, and  
22 the need to encrypt the information that defendant would bring  
23 them.

24 On October 21, Tai Mak told defendant that he was going to  
25 Hong Kong. Defendant urged his brother to go to mainland China.  
26 Defendant said that he would bring something for his brother.

27 On October 23, defendant and his wife were seen copying  
28 disks on defendant's laptop computer. While they copied the

1 disks, defendant and his wife could be heard discussing the  
2 contents of the disks they were copying. They were recorded  
3 saying the following: "QED," referring to the program defendant  
4 worked on; "Propulsion 2004" referring to a symposium held in  
5 2004 on propulsion in Navy warships and submarines; "Paragon,"  
6 referring to PPI; "carrier program," referring to an aircraft  
7 carrier program; "American Naval Engineering," referring to ASNE;  
8 and "Jacksonville" and "U.S. Naval Academy," referring to a  
9 conference in Jacksonville. Defendant refers to "programs" that  
10 were written by PPI as opposed to other programs on the disks.  
11 After copying three disks, defendant and his wife were followed  
12 to Tai Mak's home, where the disks were given to Tai Mak.

13       The next day, October 24, defendant called Tai Mak.  
14 Defendant asked "have you got everything prepared for the trip?"  
15 Tai Mak replied "Not yet." Later that day, Tai Mak called Billy  
16 Mak and told him to pick up "three or four CDs, those which can  
17 be used for recording . . . I have something to do with them."

18       On October 25, Billy Mak called Tai Mak from home and asked  
19 for the location of the encryption key so that he could encrypt  
20 the disks. Later that day, Tai Mak called Billy Mak from home  
21 and asked where he was. Tai Mak said "I saw that your computer  
22 is just running like that." Billy replied "Oh yes, that's  
23 because I was burning the CD for you." Billy Mak told Tai Mak  
24 that the CD was burning and that he was coming home to adjust it.

25       On October 28, Tai Mak, Fuk Li, and Billy Mak were followed  
26 from their home in Alhambra to LAX. A microphone in their car  
27 picked up a conversation in which Tai Mak described defendant as  
28 being very nervous about the encrypted information on the LAX

1 disk.

2 **B. Post-arrest Statements by Defendant**

3 **1. Defendant's October 28 statement**

4 Following his arrest on October 28, 2005, defendant was  
5 interviewed at FBI offices in Westwood. Prior to the arrests it  
6 was arranged to videotape the interview.

7 During the interview, defendant first said there was nothing  
8 of importance on the disk. Later he admitted there was some  
9 sensitive information on the disk, but downplayed its importance.  
10 Defendant repeatedly told agents that he had given the disk to  
11 Tai Mak so that he could buy technical books for defendant while  
12 Tai Mak was in Hong Kong. Defendant did admit that there were  
13 export-controlled documents on the disk and that it was illegal  
14 to send some types of information overseas, and that he had  
15 received ITAR training as recently as the previous day.

16 **2. Defendant's October 30 statement**

17 Defendant was interviewed again on Sunday, October 30. The  
18 agents who conducted the interview will testify that they decided  
19 at the spur of the moment to go to Santa Ana Jail and try to  
20 interview defendant again. The interview was not videotaped  
21 because no plans had been made in advance to conduct the  
22 interview. In the second interview defendant admitted he lied  
23 during the first interview, and that he had given the LAX disk to  
24 his brother to deliver to a Mr. Pu, who would deliver the disk to  
25 the government of the PRC. He admitted that the LAX disk  
26 contained export-controlled items that should not have been sent  
27 overseas. Defendant also admitted that he had been passing  
28 information to the PRC since 1983, and named several technologies



1 he had passed. Those technologies included power distribution  
2 technology for the Aegis "Spy-1" radar system.

### 3 **C. Discovery of Documents Gathered by Defendant at His Home**

4 In addition to the documents found on the LAX disk, agents  
5 searched defendant's home and office and found numerous other  
6 documents, including almost a thousand documents at the home.  
7 These documents covered a variety of technical areas, including  
8 power electronics, Virginia class submarines, and QED, to name a  
9 few. While many of the documents were unclassified, some of the  
10 documents carried that caveat NOFORN and involved Naval Nuclear  
11 Propulsion Technology. Some documents were also marked  
12 proprietary, belonging to companies such as Electric Boat,  
13 Raytheon, Ingalls, TRE Semiconductor, Electromask, and Teledyne  
14 Inet. Many of these documents contain sensitive military-related  
15 information that are export-controlled and which match items on  
16 the various tasking lists. The government will call a summary  
17 witness under Federal Rule of Evidence 1006 to testify about the  
18 nature of the documents.

### 19 **D. The Charged Documents**

#### 20 **a. The first ITAR document**

21 One of the encrypted files on the LAX disk is entitled  
22 "Solid-State Power Switches for Source Transfer and Load  
23 Protective Functions." The document was written by defendant and  
24 two other PPI engineers. This document was presented by  
25 defendant on February 17, 2005, at the "ASNE [American Society of  
26 Naval Engineers] Reconfiguration and Survivability Symposium  
27 2005," held in Jacksonville, Florida. The conference was open to  
28 members of ASNE only, which included non-citizens. Defendant did

1 not obtain company authorization prior to presenting the paper at  
2 the conference. The document deals with power disruption on  
3 "mission critical technology on ships." "Reconfiguration and  
4 Survivability" refers to technology that allows a warship that  
5 has been damaged to continue functioning and fighting, in part,  
6 by redistributing power around the damaged area or systems on the  
7 ship.

#### 8 **b. The second ITAR document**

9 A second document found on the LAX disk was entitled "5 MW  
10 High Efficiency Quiet Electric Drive Demonstrator." This  
11 document was presented by defendant at the ASNE Advanced Naval  
12 Propulsion Symposium held at Herndon, Virginia, on November 16-  
13 17, 2004. Defendant did not obtain company authorization prior  
14 to presenting the paper at the conference. The paper discusses  
15 minimizing switching losses and harmonic distortion on U.S. Navy  
16 vessel electrical power systems. The conference was open to  
17 members of ASNE only, which included non-citizens. Review of  
18 this document, co-authored by defendant, by the Office of Naval  
19 Research revealed that it contained unmarked classified  
20 information.

#### 21 **c. The third ITAR document**

22 A laptop belonging to Tai Mak contained sixty files that  
23 were copied on to the laptop and encrypted on February 11, 2004.  
24 The files were subsequently deleted. The files were part of a  
25 Technical Purchase Requisition Statement of Work by Northrop  
26 Grumman pertaining to the DDX program. The DDX program involved  
27 the development of the next generation of U.S. Navy surface  
28 warships. The document entitled "Proposal, DD(X) Zonal Power,

1 Revision A (RFP DD(X)00017)" was identified by the State  
2 Department as being on the USML. Each page bears a logo that  
3 states "Future Surface Combatant Program DD(X)." The face sheet  
4 of the document bears the following restriction:

5 DISTRIBUTION STATEMENT D: Distribution authorized to DoD and  
6 DoD contractors only; Critical Technology (date). Other  
7 U.S. requests shall be referred to PEO(S).

8 "PEO(S)" stands for Program Executive Office (Ship), which refers  
9 to a Naval Officer who is the executive officer overseeing a  
10 particular program for the Department of the Navy.

11 The DD(X) documents found on the laptop were also found on a  
12 disk in defendant's residence. The DD(X) documents were  
13 maintained on a shared drive at PPI. Defendant worked on a  
14 proposal for PPI in response to the request. The files on the  
15 PPI shared drive, the disk at defendant's house, and the laptop  
16 at Tai Mak's house were determined to be forensic matches.

17 As noted, the DDX files were encrypted on February 11, 2004.  
18 On March 5, 2004, defendant and Rebecca Chiu traveled to Seoul,  
19 Korea. A handwritten travel itinerary found in defendant's trash  
20 showed that defendant and his wife were in Shenzen in the PRC  
21 during that trip, prior to returning to the U.S. on March 16,  
22 2004. Evidence will show that an e-mail address found on a code  
23 word list was established in China while defendant was in the PRC  
24 on this trip.

25 The government will also offer evidence that the State  
26 Department has certified as export-controlled other documents  
27 found in defendant's home.

28 ////

1           **E.   The Encryption Program**

2           The laptop computer seized from Tai Mak's residence  
3 contained encryption software. The software was a custom  
4 designed program. A "Dr. Cheng" is listed for the program. Also  
5 seized from Tai Mak's house were two floppy disks containing the  
6 encryption key.

7           **F.   PPI Security/ITAR Training**

8           Evidence will show that PPI took a number of steps to  
9 safeguard the technology at PPI. Those steps include the  
10 following:

- 11           1. All classified material was maintained in one of three  
12           GSA-approved safes, with access limited to a few  
13           employees.
- 14           2. NOFORN material was kept in an area separated from the  
15           rest of the PPI plant. That area required special  
16           access.
- 17           3. PPI had in place security policies regarding the  
18           handling of classified and NOFORN documents, including  
19           a prohibition on taking NOFORN documents home.
- 20           4. PPI conducted in-house training to all its employees  
21           regarding the safe handling of documents. This  
22           training included ITAR training.
- 23           5. Signs and posters were placed throughout the PPI  
24           facility warning employees about the restrictions on  
25           the transfer of documents.
- 26           6. PPI had an Export Compliance Coordinator ("ECC") to  
27           assist engineers if they wanted to present papers at  
28           conferences.

1 Evidence at trial will show that defendant received the ITAR  
2 training but that he did not seek approval from the ECC to  
3 present the charged documents at conferences or send the charged  
4 documents to China. Evidence will also show that defendant  
5 engaged in e-mail traffic in March and September 2005 in which he  
6 was advised of the criminal penalties for violating ITAR.

#### 7 **G. Certification by Department of State**

8 The State Department has certified that the two documents on  
9 the LAX disk and the DDX documents are technical data and thus  
10 export-controlled. The State Department has also certified that  
11 none of the defendants applied for a license to export the  
12 charged documents.

#### 13 **H. Certification by the Attorney General**

14 The Attorney General has certified that defendant did not  
15 give notification that he was acting as an agent of the PRC.

### 16 **III. ELEMENTS OF OFFENSES**

#### 17 **A. ITAR**

18 Title 22, United States Code, Section 2778(b)(2) states the  
19 following:

20 (2) Except as otherwise specifically provided in  
21 regulations issued under subsection (a)(1) of this section,  
22 no defense articles or defense services designated by the  
23 President under subsection (a)(1) of this section may be  
24 exported or imported without a license for such export or  
25 import, issued in accordance with this chapter and  
26 regulations issued under this chapter, except that no  
27 license shall be required for exports or imports made by or  
28 for an agency of the United States Government (A) for

1 official use by a department or agency of the United States  
2 Government, or (B) for carrying out any foreign assistance  
3 or sales program authorized by law and subject to the  
4 control of the President by other means.

5 \* \* \*

6 (c) Criminal violations; punishment

7 Any person who willfully violates any provision of this  
8 section or section 2779 of this title, or any rule or  
9 regulation issued under either section . . . shall upon  
10 conviction be fined for each violation not more than  
11 \$1,000,000 or imprisoned not more than ten years, or both.  
12 The elements of the crime are as follows:

13 (1) Defendant exported, or attempted to export, a defense  
14 article that was listed on the United States Munitions List  
15 ("USML");

16 (2) Defendant did not obtain the required license or written  
17 approval for such export from the Department of State,  
18 Office of Defense Trade Controls; and

19 (3) Defendant acted willfully - that is, deliberately and  
20 intentionally with the purpose of violating a known legal  
21 duty not to export defense articles from the U.S.

22 Contrary to statements made by defendant's counsel in court, the  
23 USML does not "list" specific documents, such as the documents  
24 charged in this case. The USML lists types of technology that  
25 are export-controlled. It is therefore inaccurate to state that  
26 the QED document, for example, was not on the USML until it was  
27 certified by the State Department following defendant's arrest.  
28 The technology was on the USML. The certification by the State

1 Department is that the document in question contains technology  
2 that requires an export license before sending to another country  
3 or giving to a foreigner in this country.

4 **1. Willfulness**

5 An ITAR violation is a specific intent crime. This requires  
6 that the government prove a defendant acted with the intent to  
7 violate a known legal duty not to export the given items. It  
8 does not require proof that a defendant knew of the licensing  
9 requirement specifically.

10 In United States v. Lizarraga-Lizarraga, 541 F.2d 826 (9th  
11 Cir. 1976), the Ninth Circuit held that the precursor statute to  
12 § 2778 required a specific intent instruction. This required  
13 that the government prove that the "defendant's act or failure to  
14 act is voluntary and purposeful [and was] committed with the  
15 specific intent to do or fail to do what he knows is unlawful."  
16 Id. at 828. "[T]he government must prove that the defendant  
17 voluntarily and intentionally violated a known legal duty not to  
18 export the proscribed articles." Id. at 829.

19 **B. ITAR Conspiracy**

20 Title 22, United States code Section 2778 provides, in  
21 pertinent part as follows:

22 (b) Registration and licensing requirements for  
23 manufacturers, exporters, or importers of designated defense  
24 articles and defense services

25 \*\*\*\*\*

26 (2) Except as otherwise specifically provided in  
27 regulations issued under subsection (a)(1) of this  
28 section, no defense articles or defense services

1 designated by the President under subsection (a)(1) of  
2 this section may be exported or imported without a  
3 license for such export or import, issued in accordance  
4 with this chapter and regulations issued under this  
5 chapter, except that no license shall be required for  
6 exports or imports made by or for an agency of the  
7 United States Government (A) for official use by a  
8 department or agency of the United States Government,  
9 or (B) for carrying out any foreign assistance or sales  
10 program authorized by law and subject to the control of  
11 the President by other means.

12 \*\*\*\*\*

13 (c) Criminal violations; punishment

14 Any person who willfully violates any provision of this  
15 section or section 2779 of this title, or any rule or  
16 regulation issued under either section . . . shall upon  
17 conviction be fined for each violation not more than  
18 \$1,000,000 or imprisoned not more than ten years, or both.

19 Regulation 22 C.F.R. § 127.1 provides, in pertinent part, as  
20 follows:

21 (a) It is unlawful:

22 (1) To export or attempt to export from the United  
23 States, or to reexport or retransfer or attempt to  
24 reexport or retransfer from one foreign destination to  
25 another foreign destination by a U.S. person of any  
26 defense article or technical data or by anyone of any  
27 U.S. origin defense article or technical data or to  
28 furnish any defense service for which a license or



1 written approval is required by this subchapter without  
2 first obtaining the required license or written  
3 approval from the Directorate of Defense Trade  
4 Controls;

5 (2) To import or attempt to import any defense article  
6 whenever a license is required by this subchapter  
7 without first obtaining the required license or written  
8 approval from the Directorate of Defense Trade  
9 Controls;

10 (3) To conspire to export . . . any defense article or  
11 to furnish any defense service for which a license or  
12 written approval is required by this subchapter without  
13 first obtaining the required license or written  
14 approval from the Directorate of Defense Trade  
15 Controls. . . .

16 The elements of an ITAR conspiracy are as follows:

17 (1) There was an agreement between two or more persons to  
18 commit at least one crime;

19 (2) The defendant became a member of the conspiracy knowing  
20 of at least one of its objects and intending to help  
21 accomplish it.

22 The government is not required to prove an overt act under an  
23 ITAR conspiracy.

### 24 **C. Foreign Agent Charge**

25 Title 18, United States Code, Section 951 provides, in  
26 pertinent part, as follows:

27 (a) Whoever, other than a diplomatic or consular officer or  
28 attache, acts in the United States as an agent of a foreign

1 government without prior notification to the Attorney  
2 General if required in subsection (b), shall be fined under  
3 this title or imprisoned not more than ten years, or both.

4 \* \* \*

5 (d) For purposes of this section, the term "agent of a  
6 foreign government" means an individual who agrees to  
7 operate within the United States subject to the direction or  
8 control of a foreign government or official. . . .

9 The elements of the crime are as follows:

10 1. Defendant acted in the United States as an agent of a  
11 foreign government, in this case, the government of the  
12 People's Republic of China;

13 2. Defendant failed to notify the Attorney General of the  
14 United States that he would be acting in the United States  
15 as an agent of the People's Republic of China prior to so  
16 acting; and

17 3. Defendant acted knowingly, and knew that he had not  
18 provided prior notification to the Attorney General.

19 Since 1989, there has been an arms embargo against the PRC  
20 as a result of the Tiananmen Square Massacre in 1989. The  
21 embargo restricts the export to the PRC of defense articles,  
22 defense services, and technical data. Pursuant to C.F.R. 126.1,  
23 this restriction applies regardless of whether the technical data  
24 was in the public domain. Thus, the transfer of any technical  
25 data relating to military systems to the PRC is prohibited  
26 regardless of whether that information is in public domain.

27 **D. False Statement**

28 Title 18, United States Code, Section 1001 provides, in

1 pertinent part, as follows:

2 (a) Except as otherwise provided in this section, whoever,  
3 in any matter within the jurisdiction of the executive,  
4 legislative, or judicial branch of the Government of the  
5 United States, knowingly and willfully-

6 \* \* \*

7 (2) makes any materially false, fictitious, or  
8 fraudulent statement or representation . . .  
9 shall be fined under this title, imprisoned not more than 5  
10 years. . . .

11 The elements of the crime are as follows:

- 12 1. The defendant made a false statement in a matter within  
13 the jurisdiction of the FBI.  
14 2. The defendant acted willfully, that is deliberately,  
15 and with the knowledge that the statement was untrue.  
16 3. The statement was material to the FBI's activities or  
17 decisions.

18 **IV. EVIDENTIARY ISSUES**

19 **A. Admissions of Defendant**

20 The government will seek to introduce certain statements  
21 made by the defendant, including statements captured on  
22 microphone and telephone recordings during the investigation, his  
23 recorded and unrecorded post-arrest interviews, and statements he  
24 made to co-workers and other third parties. Such evidence is  
25 admissible as "admissions by a party opponent." FRE  
26 801(d) (2) (A) .

27 It is well settled that a statement by a party may be  
28 offered against him as an admission, and is therefore nonhearsay.

1 United States v. Nixon, 418 U.S. 683, 702, n. 13 (1974); United  
2 States v. Warren, 25 F.3d 890, 895 (9<sup>th</sup> Cir. 1994) ("A defendant's  
3 own out-of-court admissions . . . surmount all objections based  
4 on the hearsay rule . . . and [are] admissible for whatever  
5 inferences the trial judge [can] reasonably draw").

6 It is also established that writings, such as  
7 correspondence, by a defendant may constitute admissions. United  
8 States v. Moran, 759 F.2d 777, 786 (9<sup>th</sup> Cir. 1985).

9 Although the government may offer a statement into evidence  
10 against a defendant as an admission, the defendant cannot offer  
11 his prior statements on his own behalf for proof of the truth of  
12 the matter asserted therein since these self-serving statements  
13 are hearsay. See United States v. Ortega, 203 F.3d 675, 682 (9<sup>th</sup>  
14 Cir. 2000) (defendant could not introduce non-self-inculpatory  
15 statements because they were inadmissible hearsay).

16 In Williamson v. United States, 512 U.S. 594, 600 (1994),  
17 the Court declared that the "fact that a statement is collateral  
18 to a self-inculpatory statement says nothing at all about the  
19 collateral statement's reliability." The Court went on to find  
20 that there was "no reason why collateral statements, even ones  
21 that are neutral as to interest . . . should be treated any  
22 differently from other hearsay statements that are generally  
23 excluded"). If a defendant were allowed to introduce his  
24 exculpatory statements without subjecting himself to cross-  
25 examination, he would be doing precisely what the hearsay rule  
26 forbids. United States v. Fernandez, 839 F.2d 639, 640 (9<sup>th</sup> Cir.  
27 1988).

28 ////

1       **B. Statements of Co-Conspirators**

2       The government intends to offer into evidence statements by  
3 the other defendants in this case. These statements were made  
4 during recorded telephone calls and by microphones during the  
5 investigation.

6       Pursuant to Rule 801(d)(2)(E), statements of a co-  
7 conspirator made in furtherance of the conspiracy are not  
8 considered hearsay, and are admissible against a defendant  
9 without a showing that the declarant is unavailable. See United  
10 States v. Inadi, 475 U.S. 387 (1986); United States v. Layton,  
11 720 F.2d 548, 555 (9<sup>th</sup> Cir.). Moreover, such statements are not  
12 barred by the rule enunciated in Bruton v. United States, 391  
13 U.S. 123 (1968). Bruton does not apply to statements made by co-  
14 conspirators during the course and in furtherance of the  
15 conspiracy. United States v. McCown, 711 F.2d 1441, 1448-49 (9<sup>th</sup>  
16 Cir. 1983).

17       To admit a co-conspirator's statements against a defendant,  
18 the government must establish that the conspiracy existed by a  
19 preponderance of the evidence; that the declarant making the  
20 statement was a member of the conspiracy; and that the statement  
21 was made during the course of and in furtherance of the  
22 conspiracy. Bourjaily v. United States, 483 U.S. 171, 175-76  
23 (1987); United States v. Mason, 658 F.2d 1263, 1269 (9<sup>th</sup> Cir.  
24 1981). A showing of the unavailability of declarant is not  
25 necessary. United States v. Paris, 812 F.2d 471, 476-77 (9<sup>th</sup>  
26 Cir. 1987). Additionally, the person to whom the statement was  
27 made need not have been a member of the conspiracy. United  
28 States v. Williams, 989 F.2d 1061, 1068 (9<sup>th</sup> Cir. 1993).

1 The order of proof is in the sound discretion of the trial  
2 judge. The general rule is that a "trial court may make the  
3 conspiracy determination either prior to trial or during trial,  
4 or may conditionally admit coconspirator hearsay prior to a  
5 finding of conspiracy involvement, subject to the hearsay being  
6 'connected up' to the alleged conspirator." United States v.  
7 Powell, 982 F.2d 1422, 1432 (10th Cir. 1992); see also United  
8 States v. Zavada-Serra, 853 F.2d 1512, 1514 (9<sup>th</sup> Cir. 1988).

9 The Court has already granted the government's motions in  
10 limine to admit certain statements by Gu Weihao and by the co-  
11 defendants made during questioning following their arrests.

### 12 **C. Hearsay**

13 Defendant has given notice that he intends to offer into  
14 evidence statements made by Harvey Cohen to defendant's  
15 investigator. Mr. Cohen has since died. The statements that  
16 defendant intends to offer relate to whether defendant worked on  
17 military projects.

18 The statements are inadmissible hearsay. They are out of  
19 court statements offered to prove the truth of the matters  
20 asserted. No hearsay exception applies. The statements by Mr.  
21 Cohen were not under oath, the government was not present at the  
22 interview, and therefore had no chance to cross-examine Mr.  
23 Cohen. At trial, the government will object to the admission of  
24 any statements by Mr. Cohen through defendant's investigator.

### 25 **D. Documentary Evidence**

#### 26 **1. Authentication of documents**

27 The requirement of authentication is satisfied by evidence  
28 sufficient to support a finding that the matter in question is

1 what its proponent claims. F.R.E. 901(a). The government "need  
2 only make a prima facie showing of authenticity so that a  
3 reasonable juror could find in favor of authenticity." United  
4 States v. Workinger, 90 F.3d 1409, 1415 (9<sup>th</sup> Cir. 1996).

5 **a. Self-authentication**

6 Self-authentication of certain documents, pursuant to Rule  
7 902, eliminates the requirement of providing extrinsic evidence  
8 of authenticity. Included in this category are domestic public  
9 documents under seal: " A document bearing a seal purporting to  
10 be that of the United States . . . or of a political subdivision,  
11 department, officer, or agency [bearing] a signature purporting  
12 to be an attestation or execution" is self-authenticating.  
13 F.R.E. 902(1). Extrinsic evidence of authenticity is not  
14 required as a condition precedent of admissibility. Id.

15 In this case, the government will introduce certifications  
16 bearing the seal of the Department of State and signature of the  
17 Secretary of State that the three charged ITAR documents were on  
18 the United States Munitions List. The government will also  
19 introduce a certification from the Attorney General of the United  
20 States that defendant never gave notice that he was acting as an  
21 agent of the PRC.

22 **b. Chain of custody**

23 The chain of custody required in authenticating an item  
24 depends on whether the item is unique, has been made unique, or  
25 is neither of the above. Defects in the chain of custody go to  
26 the weight of the evidence and not to the document's  
27 admissibility. United States v. Harrington, 923 F.2d 1371, 1374  
28 (9<sup>th</sup> Cir. 1991). There is, however, a presumption of regularity

1 in the handling of exhibits by public officials. United States  
2 v. Kaiser, 660 F.2d 724, 733 (9<sup>th</sup> Cir. 1981). Absent specific  
3 chain of custody issues raised by defendant, the government will  
4 introduce the evidence seized during the searches in this case  
5 through the case agent, as opposed to calling a different agent  
6 for each search.

7 **c. Use of copies**

8 The government intends to offer photocopies of certain  
9 documents into evidence during the trial. The use of copies is  
10 specifically permitted by Rule 1003 of the Federal Rules of  
11 Evidence, unless a genuine question is raised as to the  
12 authenticity of the original, or unless it would be unfair to  
13 admit the duplicate in lieu of the original.

14 **E. Summary Witnesses/Admissibility of Charts and Summaries**

15 \_\_\_\_\_In light of the volume of documents and their technical  
16 nature, the government intends to offer Steve Schreppler of the  
17 Office of Naval Research as a summary witness. Mr. Schreppler  
18 will summarize, among other things, documents found in  
19 defendant's possession that match technologies on the tasking  
20 lists. The government will also offer NCIS analyst Erin  
21 Abernathy who compiled an index of the documents found in  
22 defendant's home based on her review of those documents.  
23 Finally, the government will call FBI Investigative Analyst  
24 Colleen Campbell who prepared a summary of travel by defendant  
25 based on documents found in his home.

26 Evidence may be summarized by any qualified person who has  
27 examined the original documents and heard the testimony in court.  
28 See e.g., Goldberg v. United States, 789 F.2d 1341, 1343 (9th



1 Cir. 1986). The documents underlying the summaries have been  
2 produced to defense in discovery and will be made available in  
3 court for inspection.

4 F.R.E. 1006 allows the use of summaries when the documents  
5 are unmanageable or when the summaries would be useful to the  
6 judge and jury. In light of volume of documents found in this  
7 case, most of a highly technical nature, the proposed summaries  
8 will greatly contribute to the clarity of the presentation and  
9 reduce the potential for confusion on the part of the Court or  
10 the jury.

11 The government will move to have the summaries admitted into  
12 evidence, and given to the jury for their deliberation.

#### 13 **F. Classified Information**

14 The government intends to make use of one classified  
15 document in unredacted form during the trial. Two classified  
16 documents were found in defendant's workspace. The government  
17 intends to use redacted copies of those documents, which will not  
18 require any special handling. The government intends to offer  
19 into evidence the classified booklet that was the source of the  
20 two articles. It is not possible to redact that original  
21 booklet. The government will advise the Court and defendant  
22 prior to the anticipated use of the classified booklet so that  
23 arrangements can be made in advance to clear the courtroom. The  
24 government will bring the classified booklet to Court on the day  
25 it will be offered. The government will leave the classified  
26 document with the Court to be placed in its safe, or will retain  
27 the classified booklet and make it available when if requested to  
28 do so by the Court.

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