

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

UNITED STATES OF AMERICA, :
v. : **CR. NO. 09-00276 (PLF)**
STEWART DAVID NOZETTE :
Defendant. :

DEFENDANT'S SENTENCING MEMORANDUM

I. Introduction

On September 7, 2011, Stewart Nozette (“Dr. Nozette”) entered a plea of guilty pursuant to Fed. R. Crim. Proc. 11(c)(1)(C) to Count Three of the Second Superseding Indictment charging a violation of 18 U.S.C. § 794(a).

Pursuant to the terms of the agreement, Dr. Nozette is to receive a sentence of 156 months to run concurrently with that imposed in Case # 1:08Cr00371-001. The plea agreement provides that the government will not oppose the defense’s request that the Court recommend to the Bureau of Prisons that Dr. Nozette be placed in the least restrictive facility possible. *See Plea Agreement, ¶ 15.¹* The defense will ask the Court to further recommend that Dr. Nozette be placed in a facility as close to Washington, D.C. as possible.

Consistent with Paragraph 10 of the Plea Agreement and the relevant allegations of the Indictment, Dr. Nozette executed an agreement to forfeit \$ 9600. Thus, the only extant

¹ This provision of the Plea Agreement reads “least restrictive facility which can accommodate the SAMs” (Special Administrative Measures). The SAMS in effect at the time of the plea have been significantly relaxed.

sentencing issues are the length and conditions of supervised release and whether a fine should be imposed. Because Dr. Nozette has been found indigent by this Court, has lost his home, wealth and employment as a result of the events leading to these prosecutions and will be nearing retirement age when released from prison, the Court should not impose a fine. *See U.S.S.G. § 5E1.2(d)(2) & a.n. 3* (fine may be dispensed with upon determination of inability to pay; fact that defendant is represented by appointed counsel should be considered). The circumstances of this case suggest that a term of one year supervised release is sufficient.

Pursuant to its discretion under Fed. R. Crim. Proc. 11(c)(3)(A), the Court accepted the plea agreement on the date it was entered, rather than deferring its decision pending receipt of a presentence report. In light of the Court's acceptance of the agreement, the fact that the terms of the plea agreement resolved all the major sentencing issues and the lengthy factual proffer accepted by Dr. Nozette in open court and filed as part of the public record, the defense informed the government that in its view there was no need for a fulsome sentencing hearing or extensive sentencing memoranda. Rather, the defense suggested that each side limit itself to a brief sentencing presentation of approximately five minutes. The government rejected the defense's offer and informed counsel that, *inter alia*, it intended to play clips of the undercover sting at the sentencing hearing. In light of the government's continued insistence and the fact that to date the public record does not reflect the full story of what took place in the planning and execution of the FBI's undercover operation in this case, the defense submits this sentencing memorandum. Because this case was resolved without the necessity of evidentiary hearings, the only portions of the transcripts of these meetings that appear on the public record are the self-serving selections the government chose to insert in the Complaint, Indictments and Factual Proffer in Support of

the Plea. The Presentence Report perpetuates this cherry-picking approach by regurgitating these same selections. *See PSR ¶¶ 26-38 and 52.*²

The defense intended to attach to this memorandum a DVD containing video clips of the undercover operation that evidence the substance of several points made in this memorandum. Because the FBI wanted to mask the UC's voice, the defense provided cites to these clips to the government on December 15. Despite repeated requests, we have not received them, but we have been assured they will be provided prior to sentencing. The defense will therefore mark the clips at that time and ask they be attached hereto as exhibits. Consistent with its position that the posture of this case does not require either side to play video clips at sentencing - much less only those that the government wants to play which place Dr. Nozette in the poorest light possible and conveniently omit questionable actions of the undercover agent - the defense does not plan to play these, but will stand ready to do so if requested by the Court.

For a variety of reasons explained below, Dr. Nozette sadly succumbed to the FBI agents' overbearing contrivances in this case. But contrary to poisonous inferences which the government spread on the public record in its initial Complaint and the detention hearing, this case is not about a man who had been committing acts of espionage for years. Rather this case is about the FBI wrongly suspecting Dr. Nozette was spying for Israel and then malevolently targeting him in the hopes they could ultimately ensnare him within the nation's espionage laws. The agents well knew that Dr. Nozette was extremely vulnerable as a result of the impending

²This is not meant as a criticism of the presentence writer. Admittedly, this is a complicated case and, in reciting the "facts," the PSR simply quotes from portions of the transcripts of the undercover operation that had been previously edited and unilaterally selected by the government for inclusion in public pleadings, such as the Complaint, Motion for Detention and Indictment(s).

prospect of prison in connection with his fraud case and a host of unusual circumstances discussed below. The agents also were aware that a year of almost constant surveillance had revealed no activity reasonably suggesting espionage. Yet they pressed forward with extensive planning and multi-agency meetings designed to sequence and frame questions in a manner which would lead Dr. Nozette into revealing classified information. They then initiated contact with Dr. Nozette by an FBI undercover employee (UC) posing as a Mossad agent.

Most astonishingly, the UC and the agents conducting the operation pushed and pushed after Dr. Nozette repeatedly said that he was happy to help the Mossad and Israel, a country his deceased father had fervently supported, but he could nevertheless not give them classified information. But in their unbending determination to hit the bulls-eye they had placed on Dr. Nozette, the agents directly played on his heritage and his family's known support of Israel and went out of their way to dangle the prospect of significant financial rewards before him. During the planning and execution of this operation and in an effort to win sentencing concessions in the fraud case, Dr. Nozette was attempting to cooperate with another team of FBI agents uncovering corruption in the space procurement industry, while unbeknownst to him the fraud and espionage agents were working hand-in-glove. The agents' scheme worked - Dr. Nozette reached for the life ring they were ostensibly throwing him and as a result he lost his career, family, wealth, freedom and professional reputation. Adding insult to injury, the agents conducting the espionage operation displayed breathtaking insensitivity and unrestrained glee, mocking and belittling Dr. Nozette's naivete in e-mails to the fraud agents as they saw themselves closing in on their prey.

The disturbing part of this case is that none of this was necessary.

We realize that the questions pops out why the FBI, DOJ and officials from the different cities involved in this operation would go to these lengths, rather than, as discussed below, use far less drastic courses. They were apparently willing to do so because Dr. Nozette had worked on highly sensitive projects that the U.S. government desperately wanted to keep secret from the world.

Dr. Nozette' Background and Career

Dr. Nozette was born and raised in Chicago. From a young age he demonstrated a plastic aptitude with a particular interest in science. Coming of age during the heady days of race to the moon, Dr. Nozette dreamed of someday becoming an astronaut and exploring the universe. His path to this goal began at the University of Arizona where he graduated in 1979 with Honors and Distinction and a degree in Geosciences. From there he went to M.I.T., from which he received a PhD in Planetary Sciences in 1983.

Dr. Nozette began his post-doctorate professional career at the California Space Institute, working on advanced space technology projects, including the Strategic Defense Initiative proposed by President Reagan. In 1984, he was appointed Assistant Professor of Aerospace

³This is consistent with the government's argument at the detention hearing that Dr. Nozette be detained because, *inter alia*, he is, in their words, a "walking safety deposit box" of national defense information.

Engineering at the University of Texas in Austin. While he did some teaching at UT, the bulk of his work involved government research projects. In 1989, President George H.W. Bush appointed him to the National Space Council, which was tasked with coordinating all government space activities for the White House.

For ten years beginning in 1990, Dr. Nozette worked at the prestigious Lawrence Livermore National Laboratory in Livermore, California (LLNL) as a staffer to the Stafford Presidential Commission for Space Exploration. It was here that he came up with the concept behind the Clementine mission, which ultimately discovered ice on the moon. It was Dr. Nozette who sketched the key initial concept on a napkin, which was later exhibited in the lobby of LLNL. The prototype of the Clementine spacecraft is presently displayed as part of the Lunar Exploration Exhibit on the second floor of the National Air and Space Museum. Illustrating its importance to lunar exploration, it hangs above a prototype of the Apollo Lunar Module which took the twelve men who have walked on the moon down to the lunar surface and returned them to Earth.

To understand all the circumstances in this case, it is necessary to briefly recount the importance of Clementine's discovery, the skepticism it generated as the idea conflicted with long-held doctrine about the moon's content and formation and previous assumptions about the future of space exploration (i.e. that the moon was not that important any more), and Dr. Nozette's scientific and professional drive to defend Clementine's findings. All of this sheds light on Dr. Nozette's state of mind in the summer and fall of 2009, as NASA's followup mission to Clementine prepared to land on the moon and hopefully confirm its historic findings - an effort in which Dr. Nozette had a leading role and which he desperately wanted to complete before his

sentencing in the fraud case.

While working at LLNL, Dr. Nozette was a pioneer of the idea of a new generation of robotic spacecraft that would carry sophisticated lightweight instrumentation in an effort to image unexplored polar areas of the moon. The result was the launching of the Clementine satellite, a joint project between the Ballistic Missile Defense Organization (previously the Strategic Defense Initiative Organization) and NASA in 1994. Clementine carried a series of high-resolution optical instruments whose purpose was to test their usefulness in an extended space environment and make scientific observations of the Moon and near-Earth asteroids. One particular experiment, primarily conceived and improvised during the mission by Dr. Nozette, was designed to look for evidence of ice at the lunar poles. Although the possibility of ice on the moon had been suggested as early as 1961, the manned moon landings had been far from the dark polar regions where such water, if it existed, was likely to be found. Because these areas of the moon receive no direct solar illumination, they cannot be observed from the earth. Detailed analysis of signals sent from the improvised radar on board Clementine ultimately suggested the presence of volatile ice in the Moon's polar surface regions. *See Nozette et al, The Clementine Bistatis Radar Experiment, Science, 29 November 1996, excerpt found at <http://www.sciencemag.org/content/274/5292/1495.full> (visited 3-2-11).*

Although NASA announced in 1998 that a subsequent mission known as Lunar Prospector had confirmed the presence of enough water in the polar craters to support a human colony and rocket fueling station, this was still considered a revolutionary discovery and

significant doubt was harbored in some quarters of the scientific community.⁴

During the late 1990s and after his move to the Naval Research Lab (NRL) in 2000, Dr. Nozette began working on the adaptation of miniaturized computer and cell phone technology to the creation of even smaller and more efficient space radar, hoping this would someday lead to a return to the moon and final confirmation of his Clementine work. The effort ultimately became known as Mini-RF (miniaturized radio frequencies). Mini-RF, also known as Mini-SAR (synthetic aperture radar), is actually a small, powerful scientific instrument consisting of an antenna and electronic boxes, which enables the user to map and analyze very small surfaces not only on earth but in the solar system. Essentially, this work involves application of modern digital technologies to space exploration, an idea embodied in the phrase “faster, better, cheaper.” Many of Dr. Nozette’s concepts were first developed in a scientific, non-classified context as part of his efforts to confirm Clementine’s work. Not surprisingly, U.S. military agencies soon developed an interest in these technologies, some of which were later classified. These after-the-fact classifications led to some of the problems Dr. Nozette eventually encountered with

⁴The discovery of ice on the moon does not merely satisfy scientific curiosity. Since there is no other source of water on the Moon and it is impractical to ship it there in significant amounts, its discovery could eventually play a significant role in space exploration, serving as a potential source of oxygen (for breathing) and hydrogen (for rocket fuel) and since water is needed for life, enabling future astronauts to use the moon as an extended base for further exploration of the universe. Indeed, the presence of water on the moon would be a significant factor in any future attempts to colonize the moon. See Potter, Water on the Moon: NASA Probe Hit Pay Dirt, ABC WORLD NEWS, <http://abcnews.go.com/Technology/nasa-moon-bombing-finds-lunar-water/story?id=9076967#.T1C1iZg5tuQ> (visited 3-2-12). In fact, NASA has stated that the permanently shadowed area of the moon where ice was discovered “could hold a key to the history and evolution of the solar system. . . .” See LCROSS Impact Data Indicates War on Moon, http://www.nasa.gov/mission_pages/LCROSS/main/prelim_water_results.html (visited 3-2-12).

allegations that he had improperly retained these originally unclassified materials in his home after they became classified.

Dr. Nozette left NRL in 2002 and began to further develop his ideas at the Department of Defense's Defense Advanced Research Agency (DARPA). He then took his Mini-RF work back to the civilian arena when he signed an IPA with NASA in 2004.⁵ Exploration of the moon was in a quiescent stage as there had been no lunar missions since Lunar Prospector, but in January 2004, President George Bush came to NASA Headquarters and announced that the United States was returning to the moon. Suddenly Dr. Nozette was now able to pursue his abiding interest in another moon mission which he confidently expected would put to rest any doubts as to what Clementine had found. NASA's plans involved a lunar mission using Mini-RF concepts. The plan was to first place a Mini-RF instrument as a payload on India's first lunar launch known as Chandrayaan-1, which was designed to map both polar regions. NASA would later place a second more sophisticated instrument on its planned Lunar Reconnaissance Orbiter (LRO) mission. These two radar instruments would map the lunar poles, search for water ice, and demonstrate future NASA communication technologies. While the Chandrayaan mission and NASA's LRO mission were designed to be mutually supportive, it was NASA's satellite that was

⁵The Intergovernmental Personnel Act is a vehicle which permits the temporary assignment of personnel between the Federal government and other eligible organizations, such as local and state governments, corporations and qualifying non-profits. The specifics of how the program works and its relationship to the fraud case is discussed at length in the Sentencing Memorandum in Case # 1:08Cr000371-001. After his departure from LLNL in 2000, Dr. Nozette's work for NRL and DARPA was done pursuant to an IPA, as was his NASA work at the outset. After the issues with his IPA and related personal tax returns surfaced, Dr. Nozette's NASA work was just billed at a straight-forward hourly rate plus expenses. Although not necessary to the discussion here, this method was more remunerative to Dr. Nozette and costly to the government than the IPA arrangement.

to carry the more advanced Mini-RF that would hopefully confirm Clementine's discoveries.⁶

In June 2009, as Dr. Nozette was frantically attempting to satisfy the fraud agents' demands and get his sentencing continued, *infra*, and while the espionage agents were tailing him and laying their traps, NASA launched the LRO/LCROSS mission. Dr. Nozette was heavily involved as he was PI on the LRO Mini-RF experiment.⁷ Two payload satellites were launched, with the second, known as The Lunar Crater Observation and Sensing Satellite (LCROSS), designed to further explore the issue of ice in the moon's polar regions. Simplified, the idea was that the launch vehicle's spent upper stage would be guided to crash near the lunar pole with a small satellite trailing it that would measure complex spectrometer readings from the plume created by the crash working in conjunction with the Mini-RF and other instrumentation onboard the orbiting LRO. Finally, on October 9, 2009, as the undercover operation was in full swing and nearing its conclusion, impact and successful measurement was achieved.

After a month's study of the data (and within a few weeks of Dr. Nozette's arrest) NASA announced that LCROSS had indeed confirmed the work of Clementine. The Chandrayaan, LRO and LCROSS missions put to bed the skepticism previously expressed in some scientific quarters as to whether Clementine had actually discovered water on the moon, . See Space Com, "Significant Amount" of Water Found on the Moon, 11-13-2009, www.space.com/7530-.htm

⁶Mini-RF focused on the lunar poles, described as "mysterious and relatively unexplored regions that preserve materials from the early history and evolution of the solar system." <http://lunar.gsfc.nasa.gov/mini-rf.html> (Visited 3-2-12). Although the LRO had advanced optical cameras on board, the mini-RF instrument can pick up features hidden from the optical camera. Their combination enables scientists to pick up features down to several meters below the lunar surface. See http://www.nasa.gov/mission_pages/Mini-RF/science/index.html (visited 3-2-12).

⁷The PI is the Principal Investigator, roughly equivalent to the head of the team.

significant-amount-water-moon.html (visited 2-27-12); CNN Tech, NASA Finds ‘Significant’ Water on Moon, 11-13-2009 (referencing NASA announcement and quoting chief lunar scientist at NASA as opining that discovery “could unlock the mysteries of the solar system”); http://articles.cnn.com/2009-11-13/tech/water.moon.nasa_1_lunar-crater-observation-anthony-colaprete-solar-system?_s=PM:TECH (visited 2-27-12). The importance of this discovery to future space exploration cannot be underestimated. As one NASA LCROSS scientist put it, “It wasn’t an ‘Aha!’ moment (when they found the water) It’s really been a ‘Holy Cow’ moment every day, as we find out more and more.” Potter, *supra*; or put another way, “it’s a game-changer in the sense of future human exploration to the moon.” See Moskowitz, SpaceCom, Water Makes Moon Suddenly a More Attractive Destination, www.space.com/7335-water-moon-suddenly-attractive-destination.html (visited 3-2-12).

While the agents were hell-bent on luring Dr. Nozette into commission of the instant offense, his attention was focused on greater horizons - his life’s work had been validated.

III. Brief Synopsis of the Undercover Operation

A short recital of the sequence of events during the undercover operation may be useful for following the remaining discussion:

On September 3, 2009, the UC phoned Dr. Nozette and asked to meet him at the Mayflower Hotel. When Dr. Nozette arrived the UC introduced himself as a member of the Mossad, invited him to lunch and eventually to a room in the Mayflower, pitched him on working with the Mossad and left him some written questions to answer. The UC asked Dr. Nozette to return the following day.

On September 4, 2009, the UC and Dr. Nozette again meet at the Mayflower. Dr. Nozette brought written answers to the questions from the preceding day (they did not contain classified information). Dr. Nozette was instructed that further communications with the UC would take place through a “clean” phone being provided and a designated post office box.

On September 10, 2009, the agents left questions in the P.O. Box. Despite Dr. Nozette's expressed intention not to reveal classified information, the questions were carefully designed for him to do so. The agents also left \$ 2,000 in the box and passport-related documents.

On September 16, 2009, Dr. Nozette left answers to the September 10 questions in the P.O. box and a note suggesting he was now willing to reveal sensitive information.

On September 17, 2009, the agents left another set of questions in the box designed to elicit classified information and in which they scolded him for previously only providing information otherwise available in the public domain.

On October 1, 2009, Dr. Nozette left the answers to the questions placed in the box on September 17 and retrieved \$ 9,000 that had been left in the box by the FBI.

On October 19, 2009, Dr. Nozette met with the UC for the third and final time, admitted that despite his initial reluctance he had now "crossed the Rubicon" and could no longer pass security-related polygraphs, accepted \$ 10,000, and was arrested.

IV. The Fraud Case and Circumstances Leading to the Espionage Investigation

Brief Background of the Fraud Case:

Dr. Nozette was not an employee of NRL, DARPA or NASA. Rather, by use of the aforementioned IPAs he contracted with the various government agencies through Alliance for Competitive Technology (ACT), a not-for-profit entity which he incorporated in California in 1990 and which is given tax-exempt status pursuant to Section 501 of the Internal Revenue Code. Simply stated, such a corporation passes its income to its employees, who pay taxes thereon and claim appropriate deductions related to their employment.

Dr. Nozette's difficulties began in the fall of 2005 when NASA security officials opened an investigation concerning his alleged misuse of his government-issued credit card for personal expenses. This investigation eventually mushroomed into allegations that he and/or ACT had fraudulently filed false tax returns. In late 2006, the NASA OIG referred a fraud case against Dr.

Nozette to the US Attorney for prosecution. Without getting into details concerning the fraud case, which will be discussed by his counsel in that case, it is interesting to note that Dr. Nozette's wife, who signed the tax return, is a lawyer with a Master's Degree in Taxation from Georgetown. He also had a personal accountant who reviewed the tax returns. Dr. Nozette's plea agreement, entered in January 2009, provided that his wife would not be prosecuted in connection with the false tax return. As discussed in more detail below, sentencing in the fraud case was delayed several times in order to afford Dr. Nozette the opportunity to cooperate in another ongoing fraud investigation being conducted by the FBI ("the fraud agents").

The Fraud Case Leads to the Espionage Investigation:

In February 2007, several computer drives were seized from Dr. Nozette's residence pursuant to a search warrant ostensibly sought in connection with the fraud investigation. Review of these drives and previously subpoenaed materials revealed that Dr. Nozette had been working for almost a decade as a paid consultant for Israel Aircraft Industries (IAI), an aerospace company wholly owned by Israel. This, in turn, generated the espionage investigation by a separate team of FBI agents, working in tandem with the fraud agents and those from NASA, IRS and the Naval Criminal Investigative Service.

Beginning as early as June 2008, FBI agents surveilled and tailed Dr. Nozette on a regular basis. The ensuing fifteen months of surveillance revealed no evidence that he was operating as an agent of a foreign power. He was never seen delivering documents to suspicious individuals or so-called dead drops or engaging in any other conduct reasonably suggesting espionage. Neither did a pen register placed on his phone reveal evidence corroborating espionage activity. During this period the agents also quietly began interviewing Dr. Nozette's colleagues, and,

having been unable to uncover evidence to confirm their (unfounded) suspicions that Dr. Nozette was spying for Israel, they eventually decided to go ahead with an undercover operation to test whether he could resist an aggressive approach from an implacable agent posing as a representative of the Mossad.

The Premise Underlying the Undercover Operation Was Incorrect as Dr. Nozette was Not Spying for Israel

Before proceeding further it should be pointed out that the agent's suspicions were incorrect. Paragraph 24 of the PSR states that classified documents were found in the February 2007 search and that based on this, an ill-considered e-mail and "other information," the FBI decided to conduct an undercover operation. This statement is triply misleading. First, the reference to the e-mail that Dr. Nozette sent five years previously to a colleague "threatening to take a classified program he was working on, 'to [foreign country] or Israel and do it there selling internationally. . .'" leaves an incomplete and false implication. The program referenced in the e-mail was not classified at that time. This dispute involved an interagency tiff over the Mini-RF program that Dr. Nozette had initially developed at NRL and which he was attempting to carry over to his work at DARPA. The program was classified *well after* the referenced e-mail. While, as discussed below, the espionage agents themselves expressly belittled Dr. Nozette for his naivete during the investigation, it is preposterous to believe that he would write in an e-mail that he intended to commit espionage and announce that he was going to sell a classified program to a foreign government. Thus, while the statement in Paragraph 24 may be literally correct in that Dr. Nozette did, in a pique over NRL's attempt to block his access to a program he had created, threaten to take it to another country, it was not, as implied, classified *at that time*.

Second, the so-called “classified” documents found in the search did not bear classification markings. They were documents that Dr. Nozette had downloaded on his computer at a time before they later became part of a classified program. At most, Dr. Nozette’s possession of these documents reflected negligence in not ensuring their return to and treatment within classified status after this change.

Finally, Paragraph 24's reference to the “other information” particularly needs exposition. This “other information” was a series of monthly reports over a number of years that Dr. Nozette prepared in his capacity as a consultant for a company identified in the Complaint as an ‘aerospace company wholly owned by the State of Israel, which is, as noted, IAI. The Complaint went on to point out that Dr. Nozette worked as a consultant for this aerospace company between November 1998 and January 2008 and alleged that “the company would propose questions or taskings” about once a month that Dr. Nozette would answer” and that he received approximately \$ 225,000 in payments over these years. *Id.*, ¶ 25. The government's reference to this misleading allegation was an overt attempt to spread on the public record the idea that Dr. Nozette had been committing espionage for a number of years for Israel, a strategy it again pursued in connection with documents filed in connection with its motion to detain Dr. Nozette. See Government's Memorandum In Support of Detention Pending Trial, Docket # 14, at 8. This allegation was untrue and it has since disappeared from the case, not being mentioned in the Indictment or Proffer of Facts, nor referenced in the PSR. If the agents did not know its implications were untrue at the time, they should have, as several factors suggesting that Dr. Nozette was indeed not knowingly engaging in unlawful espionage for IAI were known to them long before they began their unnecessary operation:

- IAI not only openly operates in this country but partners with the U.S. government and U.S. companies on sensitive military projects. When speaking with the UC, Dr. Nozette made it crystal clear that the purpose of his consulting relationship with IAI was to help the Israeli aerospace company partner with the U.S. in *government-to-government* projects as well as to help IAI get commercial satellite business in the United States. For instance, on September 3 he told the UC more than once that he had been trying to hook up the Israeli company with NASA - “pure unclassified work”- and that he had been trying to convince the aerospace company of the need to work cooperatively with US government in “government-to-government” deals - in other words that he was essentially playing the role of “matchmaker” in trying to give the Israelis an opportunity to do work for some of the U.S. agencies he worked for and expose the latter to Israeli technology that was more advanced than ours in some areas. *Infra.* Again, on September 4 he explained to the UC that “... the interesting thing with IAI was in a sense, I was taking their stuff into the US. Not trying to export our stuff.”⁸ Tr. 9-4-09, at 21. But, the agents did not have to wait until Dr. Nozette explained this to the UC. His emphasis on government-to-government cooperation between the Israeli aerospace company and the U.S. government was abundantly clear from the monthly IAI reports, which they had seized and examined long before planning the undercover operation - the same reports which were tendered to the defense in their entirety as unclassified discovery.
- The alleged \$ 225,000 that Dr. Nozette received for a decade of consulting work for IAI on highly technical matters involving potentially multi-million dollar contracts was a pittance in this day of thousand dollar hammers billed for defense department projects and other well-publicized abuses, a conclusion the agents could easily have drawn from an objective evaluation of the monthly reports and consideration of usual hourly rates charged by such experts.
- The agents were aware that a Director of a Directorate at a U.S. intelligence agency was not only aware that Dr. Nozette had a relationship with IAI, but had introduced Dr. Nozette to the company years ago and even attended meetings at the company with Dr. Nozette. Other government officials likewise accompanied Dr. Nozette to meetings at IAI.

⁸These assertions were corroborated by interviews with IAI officials long before the undercover operation. For instance, on December 13, 2007, an official with IAI explained to an IRS agent that Dr. Nozette provided “consulting advice to IAI [and] facilitated business contacts and other contracts for IAI including agreement with the National Aeronautics and Space Administration (NASA) and Mississippi State University.” See US-0009786. Indeed, Dr. Nozette’s repeated and apparent monotonous obsession with suggesting that IAI undertake government-to-government projects with the United States jumps out in one of the reports when he promises an IAI official that he will no longer pester him about “G2G.”

- Dr. Nozette disclosed his association with the State of Israel and/or IAI on disclosure reports and to security officials.⁹ For instance, on September 3, after the UC asked a question designed to incriminate Dr. Nozette by suggesting that he had not wanted his relationship with IAI disclosed to the U.S. Government, Dr. Nozette noted that he had, in fact, disclosed the relationship in his security interview as commercial consulting, that “nobody really cared” and, in fact, they [his U.S. security handlers] “encouraged” him to continue the interactions, going on to explain that he just kept the IAI work as a “separate compartment from my regular work.” He went on to later explain that his security people just told him not to transmit anything classified or ITAR, and that he was “pretty good about that as [IAI] didn’t want to know those things” and, in any event, his U.S. security handlers were more interested in him providing information concerning a different foreign aerospace company with which he also dealt. Statements made by the agents interrogating Dr. Nozette on October 19 indicated they were perfectly aware of all this.
- As noted, each of the monthly reports which Dr. Nozette provided the aerospace company were provided in *unclassified discovery*, confirming they did not contain particularly sensitive information.¹⁰
- After the execution of the search warrant and discovery of the monthly reports, the government served a subpoena on the IAI for all its records related to Dr. Nozette’s employment as a consultant. Although it never told Dr. Nozette about the subpoena, approximately six months later IAI decided not to renew Dr. Nozette’s contract. At one point the government claimed that this termination evidenced Dr. Nozette’s status as a Israeli agent, reasoning that the subpoena put the company and Dr. Nozette’s imagined Israeli “handlers” on notice that the relationship with Dr. Nozette was being investigated. This unsupported speculation actually flies directly in the face of logic, as this subpoena was issued months before the undercover operation and, if the facts were as imagined by the

⁹At one point the government attempted to attach significance to the fact that Dr. Nozette listed the aerospace company “last” (in a list of three) in a DARPA “Notification of Planned Foreign Travel” form, reasoning that the fact that he listed it at all was, in the government’s strange reasoning, a classic “fig leaf” for espionage activity. The defense rejected this “damned if you do (disclose), damned if you don’t (failure to disclose)” theory out-of-hand.

¹⁰The government later tried to claim that one item in these ten years of reports referenced a government agency’s classified connection to a failed project but Dr. Nozette explained that in his view the connection of the Department of which the particular agency is a part was widely known.

government, IAI, and an organization as sophisticated as the Mossad or Israeli intelligence is reputed to be, would have immediately informed Dr. Nozette of the investigation and warned him to be careful. As discussed below, it is clear from what ultimately took place this was not the case. Further, the agents well knew this to be the case before commencing their operation, as evidenced by the fact that the lead espionage agent sent an e-mail to her colleague on July 13, 2009, remarking that Dr. Nozette has “[no]clue that there is another investigation in the works.” Indeed, when approached by the UC, Dr. Nozette initially asked only that his consulting contract with IAI be renewed. This is not a case where the FBI moved in and made an arrest before the suspect could be warned. There was an abundance of time and a multitude of opportunities for IAI or Israeli intelligence to warn Dr. Nozette if they viewed him as a knowing and cooperating intelligence asset. Indeed, in a celebrated case involving an Israeli spy, the evidence showed that the spy’s “handlers” had worked out an elaborate code to warn him if it appeared the U.S. authorities were closing in. *See United States v. Pollard*, 959 F.2d 1011, 1016 (D.C. Cir. 1992).

The above evidence was clearly known to or easily discernible by the agents *prior to* their decision to lure Dr. Nozette into actually violating the nation’s espionage laws - his later conversations with the UC confirmed that he had not been using his consulting contract with IAI to spy for Israel. In evaluating what he was saying to the UC, it should be remembered that during the undercover operation Dr. Nozette clearly had no inkling he was talking to a federal agent. Rather he believed he was talking to a representative of the Mossad/Israeli government. Thus, he had no apparent motive to fabricate when he repeatedly told the UC that he had never revealed classified information to IAI. For instance, in the first meeting on Sept. 3, 2009, Dr. Nozette told the UC:

“And I have to be careful in what I write [the monthly IAI reports] because I don’t want them to disclose classified information and things like that.” Transcript 9-3-09, at 8543.

IAI did not attempt to get sensitive information from Dr. Nozette and he was careful to only put unclassified and public domain information in his reports, which were signed by him. *Id.*, at 8556-57.

“They [US Government] wanted to . . . ask me what . . . I knew about [IAI]. . . Yeah so

my security people were always like, okay. They never said stop it, they just said don't do any classified, or transmit classified or any know how with ITAR . . . And I was pretty good about that. They [IAI] never wanted to know those things." *Id.*, at 8559; *see also id.*, at 8545; 8563-64.

The only "sensitive" information he gave [IAI] was from another foreign company - information he also shared with the U.S. *Id.*, at 8617-18.

Continuing, the next day, September 4:

"I was pretty careful with them [IAI] on the classified . . . So basically the sensitive was the political." Transcript 9-4-09, at 21.

And, again, in the third and last meeting with the UC on October 19, 2009, when he had already in his words "crossed the Rubicon" and had no conceivable motive to fabricate:

Speaking of the \$200,000 he was paid over the years through his consulting relationship with [IAI]: "That was really for all basically open source information . . . No ITAR (PH) protect[ed] information. No classified information. Nothing." Transcript 10-19-09, at 10.

Similarly, Dr. Nozette told the UC more than once that the *oral information* he gave IAI was either "open source" or political gossip. For instance, in the September 4 meeting after the UC tried to lead Dr. Nozette into saying he had given "the more sensitive information" orally, Dr. Nozette immediately interjected that he also never provided IAI with ITAR or classified information in their face-to-face meetings and "so, basically, the sensitive was the political." Transcript 9-4-09, at 21.¹¹

¹¹At the detention hearing, the government contended that Dr. Nozette had admitted to the agents questioning him on October 19 that he had orally given IAI classified information. A close reading of the transcripts shows this is not the case. The subject was initiated by the agents near the conclusion of the interrogation in an apparent attempt to draw an admission contrary to what Dr. Nozette had repeatedly and unequivocally told the UC - that he had never supplied IAI classified information and IAI had never requested sensitive information. The agent's strategy was to suggest that Dr. Nozette nonetheless helped IAI "connect the dots." While Dr. Nozette responded that he had, he said nothing about revealing sensitive information in so doing. *Id.* In effect, he was simply saying he did what he initially offered to do for the UC - help "the Center"

As noted, many of the above facts suggesting that Dr. Nozette was indeed not spying for Israel could have easily been deduced by the government agents upon a fair and objective consideration of the situation before they went down the road they did. Nonetheless, the government could charitably be given the benefit of the doubt on their decision to conduct this operation against Dr. Nozette had they actually set out to conduct a fair and objective investigation into whether he was spying for Israel. But, as the circumstances below evidence, they did not. Instead, the FBI and other government agents, with blinders tightly in place and steely determination, set out to get Dr. Nozette at all costs - plain and simple - relentlessly engineering and taking advantage of events to ensnare him, repeatedly baiting him to provide classified information after he expressly stated on multiple times that he could not do so and finally gloating at his naivete as they circled over their prey.

V. Dr. Nozette, as the Agents Found Him in the Fall of 2009

Like any accomplished hunter, the agents studied their quarry's vulnerabilities well before striking. As noted, they had spoken to numerous colleagues (upon promises of

distill information that was in the public domain (the technical aspects of Dr. Nozette's work were largely unclassified). See Transcript 9-4-09, at 76-78. The agents immediately followed up by repeatedly attempting to lure Dr. Nozette into a potentially damaging admission by inserting the term "classified information" into the predicate of their ensuing questions, but Dr. Nozette never directly accepted their invitation. He seemingly confirmed that he may have revealed the classified connection of a particular agency to one of the otherwise unclassified projects, but when then questioned whether the information was classified or harmful, he pointed out that this connection had been "publicly and eventually acknowledged." In fact, as the government knows, a high official in the referenced (but here unidentified) agency had indeed given an interview to a scientific publication acknowledging the connection. A close reading of the transcript reveals that the agents, in their last-ditch efforts to obtain their objectives (they knew Dr. Nozette would soon be afforded counsel on the espionage case and that his attorneys on the fraud case were soon to find out what was going on) were intent on adding the "classified information" gloss - one which Dr. Nozette essentially did not buy into. See Transcript 10-19-09, at 258 *et seq.*

confidentiality) and had even engaged behavioral experts to advise how to best corner their target. As a result they knew they were dealing with an emotionally and mentally damaged subject who was facing the loss of his life's work and prison because of the fraud case. And, given their goal, it was fortuitously known to the pursuers that their game had already expressed thoughts of suicide and was desperate to complete confirmation of his discovery of water on the moon, only weeks away. In fact, they were aware of several factors that made it likely that their drowning target might reach for any hand extended his way.

Dr. Nozette's Depressed Mental State and Threats of Suicide: Less than seven months before the undercover operation the agents had been told by one of his colleagues that Dr. Nozette said he had a gun, it was loaded and he planned to kill himself if the U.S. government put him in jail. Two months after that another colleague confirmed this, telling the agents that Dr. Nozette had threatened to shoot himself in an e-mail. The agents were also aware that Dr. Nozette was represented in the fraud case by highly competent attorneys from one of the most respected law firms in the city. Callously choosing to make the hidebound judgment that their "operation" trumped humanitarian concerns, no attempt was made by the agents or those supervising them in the Department of Justice to communicate this information, either directly or indirectly, to Dr. Nozette's attorneys or to family representatives or other concerned persons who might hopefully intervene to sidetrack a possible tragedy.¹²

Dr. Nozette's Attempted Cooperation in the Fraud Case: The espionage were also aware that Dr. Nozette was simultaneously attempting to cooperate with the agents in the fraud

¹²Unknown to the agents, Dr. Nozette had actually purchased a firearm in the spring of 2008, as his depression increased.

case in a corruption investigation, that the fraud agents had wired him and that he and his attorney had expressed fears of retaliation on several occasions. In fact, unbeknownst to Dr. Nozette (or his attorneys), the two teams were cooperating and freely communicating with one another - in fact, the fraud agents were going to so far as to share the wire tapes made by Dr. Nozette with the espionage agents in an effort to help the latter "get into his head." *See infra.*

Dr. Nozette had pled guilty in the fraud case in January 2009. Sentencing was originally set for April 1 and Dr. Nozette was afforded an opportunity to earn a substantial cooperation reduction. Throughout the summer and fall of 2009, Dr. Nozette's attorney regularly communicated by phone and e-mail with AUSA Michael Atkinson concerning Dr. Nozette's attempted cooperation with the fraud investigators. A review of these and other communications reveals the forces all coming down on him during the summer and early fall of 2009. Dr. Nozette was aware that the LRO/LRCOSS mission was set to launch in June 2009 and he was desperate to see it through to conclusion. His fraud case, however, was presenting a serious obstacle, as the government planned to unseal his indictment and plea, which, Dr. Nozette knew would result in his access to NASA being denied and the likely end of his role in the planned lunar mission. After Dr. Nozette retained new attorneys, sentencing was continued until September 15, 2009, to afford him further opportunity to cooperate. After much discussion, an agreement was reached to partially unseal the indictment to permit NASA security knowledge of what had taken place. NASA security then continued to press Dr. Nozette to turn in his badge. In fact, in early September, during the crucial initial days of the undercover sting and a few weeks prior to the scheduled moon landing, Dr. Nozette was, for the first time, denied entry into Goddard Space Center, significantly increasing his frustrations. The NASA security officials were during this

period communicating with the FBI agents.

In addition, Dr. Nozette faced extended financial pressures as a result of the fraud case. There was a significant dispute over the amount of restitution, which the government claimed was up to a quarter of a million dollars and his attorneys thought should be far less. Dr. Nozette had also incurred large legal fees in connection with his representation, which he still owed and this was a subject of extended discussion, especially in September as the sting proceeded. The effect of his losing his security clearances as well as access to unclassified government projects, which he depended on in large part for his livelihood (due to its nature the exploration of space is primarily undertaken by governments), coupled with the pressures of the mounting legal fees and uncertain restitution, constituted additional overlays of pressure to that he already felt by the prospect of prison and his drive to see the moon project to completion.

Completing the perfect pressure storm was that engendered by Dr. Nozette's cooperation. AUSA Atkinson was telling Dr. Nozette's attorneys in August that the indictment would be completely unsealed on September 1 unless his cooperation "uncovered gold" before then. Thus, as September rolled around and the UC's visit unknowingly lurked only a few days away, Dr. Nozette was particularly anxious, as he knew the unsealing would likely doom his participation in the climax of the LRO/LCROSS mission.

Despite the risks he undertook in cooperating with the FBI fraud agents, both sets of agents repeatedly mocked his predicament. For instance, on July 13, 2009, the lead espionage agent sent her colleague an e-mail, observing that Dr. Nozette was cooperating because he is out to "save his own skin." Two weeks later the fraud agent leading the cooperation effort, who had urged Dr. Nozette to wear a wire in furtherance of her investigation, wrote the lead espionage

agent that "Nozette wants to keep milking this for as long as possible". Yet, all the while he was exposing himself to danger at their direction, the agents were scheming how to directly use the results of his cooperation to reach their ultimate quest, to the point of even permitting the espionage agents to listen to the tapes Dr. Nozette made in his undercover capacity although the former agents had nothing to do with the fraud investigation. For instance, on, July 20, 2009, the lead espionage agent excitedly wrote the fraud agent that she "[C]an't wait to hear the tapes [produced during Dr. Nozette's cooperation]. I'm sure they will be a *big help in helping us wrap our heads around him*. Good luck with everything!" (emphasis added).

Dr. Nozette's Religion and His Family's Support of Israel: The agents were also well aware that Dr. Nozette was Jewish, had frequently expressed a preoccupation with and abiding interest in the Holocaust and came from a family which had strongly supported the State of Israel. As noted below, the UC directly attempted to play on this the day after Dr. Nozette had explained at length his Jewish background, including his Bar Mitzvah, observance of Jewish practices in remembrance of his mother and the history of his Jewish family's immigration from Russia at the end of the nineteenth century and remarked that "I'm a friend of Israel. . . I'm not gonna screw the state of Israel." Transcript 9-3-09, at 8636.

VI. Execution of the Undercover Operation

The Introduction: As noted, the operation began on September 3 when the UC arranged a meeting with Dr. Nozette and began by introducing himself as a representative of the Mossad. It is true as the allegation of the Complaint and ¶ 26 of the PSR reflects, Dr. Nozette promptly stated that he was "happy to be of assistance," but the government has attempted to attach inordinate weight to this knee-jerk response. Dr. Nozette's initial responses to the UC's

overtures, as detailed below, suggest that he did not anticipate providing classified or sensitive to this man. Rather, the “happy to be of assistance” response was hardly surprising given Dr. Nozette’s known background. Many Jews in this country are proud and public supporters of Israel and have high respect for the Mossad, an agency that is well-known to have played a crucial role in the nation’s survival. Indeed, support across the political horizon for the State of Israel and, by implication, an agency as central to its collective psyche as the Mossad, was heartily reaffirmed by the reception given Prime Minister Netanyahu in his address to the U.S. Congress last year. See Cooper and Bronner, *Netanyahu Gives No Ground in Congress Speech*, New York Times, 5-24-2011 (“Mr. Netanyahu received so many ovations that at times it appeared the lawmakers were listening to his speech standing up.”); <http://blogs.abcnews.com/the note/2011/05> (Netanyahu’s speech interrupted by applause more times than President Obama’s State of the Union address: Netanyahu 29, Obama 25). As noted below, the evidence reflects that from the very outset the government agents attempted to capitalize on Dr. Nozette’s religious and cultural background as well as his emotional perspective on the historical tribulations of Jews. What is most noteworthy here is not what country’s intelligence service the UC said he represented, but *whose he did not*. The UC and the espionage and other government agents who charted their course were likely well-aware that the reception would have been far more frosty had he whispered that he was from the Ministry of State Security of China, the Ministry of Intelligence and Security of Iran, or Russia’s Foreign Intelligence Service.

Dr. Nozette Repeatedly Says He Will Not Provide Classified Information:

Even more disturbing than the decision to execute the undercover operation was the

method in which the agents chose to proceed. The unremitting effort to entice Dr. Nozette into revealing information that would potentially subject him to the death penalty or incarceration for life dramatically leaps from the record. While admittedly Dr. Nozette told the UC he was “happy to assist,” he also initially made it perfectly clear that he could not do so by providing classified information:

In response to UC pushing him in initial meeting to take home the questions and answer them as “scientist to scientist,” Dr. Nozette responds “As long as I don’t have to do something (UI) as long as I don’t, uh, I won’t divulge classified. . . I can, I can, within the limits of what I can give you.” Transcript 9-3-09, at 8579-80.

. . . “I’m not gonna divulge classified information. I’m not gonna divulge, uh, but I will, I think what’s out there. I think there’s enough in the public domain I can give you.” *Id.*, at 8587-88.

And, as evidenced by the written “Answers” Dr. Nozette provided the UC the following day which were provided in unclassified discovery, it is clear that is exactly what Dr. Nozette intended not to do. But equally patent is that the UC, and those orchestrating this operation, were intent on Dr. Nozette not following his heart and initial inclination to provide only unclassified information or that readily available in the public domain.¹³ Although not evident to the unwary (or naive), the UC’s statements throughout the sting manifestly show that the bulls-eye had already been placed on Dr. Nozette and that the agent’s mission was a singular and narrow one - to get Dr. Nozette to give them what they wanted, whether he was initially so inclined or not.

¹³The UC’s repeated protestations that he was uninterested in Dr. Nozette’s offer to provide information that could be found in the public domain was not chance. The UC had clearly been briefed on the relevant legal principles and was aware that “information lawfully accessible to anyone who [is] willing to take the pain to find, sift and collate it” does not constitute national defense information within the meaning of 18 U.S.C. § 794(a). See *United States v. Soblen*, 301 F.2d 236, 243, n. 2 (2d Cir. 1962); *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006) (similarly interpreting § 793 and collecting cases).

The efforts began on the first meeting with the UC ignoring Dr. Nozette's stated intent not to provide classified information and overtly encouraging him to proceed otherwise, telling him that: "Based on information provided the price will be assessed." Transcript 9-3-09, at 8593. As that first meeting neared conclusion, the UC returned to his recurring theme in referencing the Questions he was giving Dr. Nozette to take home:

"... whatever you're going to put on the paper. I would recommend and you know, we're not young kids anymore but, do the best you can. Because there's going to be a lot of judgement based on that and I know that because you know every time the [C]enter tasks me and they got to see people, I bring it back. I can guarantee that they're going to look through that piece of paper as if, okay, we know this person has talent but what can he, how can he, how can his talent be applied to certain tasking that we provide. . . . And that's why, it'll be crucial. Critical and crucial to, to make it right." *Id.* at 180-81.

After Dr. Nozette delivered his unclassified responses to the UC's written questions the following day, the UC decided to turn up the heat:

UC: The "Center" wants him to emphasize they are not interested in "open source" or material that can be found on the internet. "... They wanted me to emphasize that . . . if we're gonna continue the relationship . . . we need to get away from open source and a little more sensitive." Transcript 9-4-09, at 17.

UC: "... looks like a lot of data in here . . . but I'm hoping that this is not something the [C]enter either already has by pulling open source or internet research." *Id.*, at 19.¹⁴

UC: "... so as I told you before you know, open source information, internet, nah, it's good but it's not what I'm here for." *Id.*, at 47.

After Dr. Nozette says he no longer has classified clearances, the UC tells him "that's not really important . . . I mean, what's . . . important is what you do keep in there [referencing his head]." *Id.*, at 49.

UC: "Everything depends on information provided . . . I mean, if I'm gonna get

¹⁴On September 4, Dr. Nozette did give the UC a large amount of unclassified technical data. The technical aspects of Dr. Nozette's work was largely unclassified.

an internet article and, or, they're gonna get internet article, I mean, I can tell you right now they're not gonna be . . . excited about it. *Id.*, at 55

UC complains when Dr. Nozette tells him that certain study files are FOUO. "That's not even ITA-, ITAR right?" *Id.*, at 56.¹⁵

When Dr. Nozette offers to pass proprietary information of another foreign aerospace company with whom he had worked, the UC indicates he only wants "information hidden by the U.S. government." Apparently concerned that Dr. Nozette was not getting the point of, or not cooperating with, the assigned charter, the UC promptly declined the offer of non-restricted information. *Id.*, at 72. When Dr. Nozette nonetheless states he will provide this non-classified information, UC repeats "keep in mind that what, what's open source and internet we probably already have." *Id.*, at 73.

UC emphasizes that the Center will pose written questions concerning the matters they are most interested in. *Id.*¹⁶

After Dr. Nozette refers to this "flood of information out there," *id.*, at 76, UC again advises him: "Just, again, keep in mind, open source, internet, we already have people . . . let's get to . . . a little more . . . serious information." *Id.*, at 77.

Although there was no more direct contact between Dr. Nozette and the UC until October 19, 2009, the agents continued to pursue their obsession that Dr. Nozette reveal what they were after. On September 10 the Agents placed a second set of questions in the PO Box. These questions were specifically designed to elicit classified or national defense information and were accompanied by the injunction that "the Center is not interested in information that is available in the public domain or in a distillation of information," disregarding the perfectly appropriate offer

¹⁵Documents only marked FOUO (for official use only) and matters subject to ITAR (International Traffic in Arms Regulations) do not, standing alone, rise to the level of classified information.

¹⁶Of course, these questions later put in the P.O. Box were very specifically designed to elicit incriminating information. *Id.*

Dr. Nozette had made several times on September 4.

Finally, on September 17, after Dr. Nozette had delivered materials to the P.O. Box on September 5 and the preceding day, the agents, apparently unsatisfied with their incriminatory nature, or otherwise unsure at that point of the success of their ploy, left a note pointedly chastising Dr. Nozette for not providing what they were intent on getting:

“The Center’s evaluation of the material you have provided thus far continues. The Center did not find the type of documents you provided last week helpful. They have asked me to stress that they are not interested in publicly available information or in your distillation of publicly available material. The Center has allowed us to give you extra time to collect the information in this communication. It is critical that your answers reflect your financial expectations.¹⁷

The Center is in the process of arranging for the assignment of the holdings you requested to a reserve fund for you. These funds will not be released unless the quality of the information improves. As discussed previously, it is important to the Center that you provide the information requested based upon your unique knowledge and access to the sensitive information of interest.”

In sum, before Dr. Nozette’s ultimate surrender, the record shows that the UC impressed on him *at least 11 times* that he was only interested in classified or hidden information, while rejecting Dr. Nozette’s repeated offers to assist the “Mossad” with proprietary or public domain information or in distilling readily available information. Admittedly, Dr. Nozette made some statements suggesting his susceptibility if the agents continued with and refined their ploy, but on the whole the record clearly shows that Dr. Nozette clearly did not come to the meeting on September 3rd with any mind set suggesting that he either spied for Israel in the past or intended to communicate anything other than unclassified and public information when so requested.

¹⁷Insertion of the word “critical” would have been more honestly chosen had the phrase “to our goals in the operation” been added immediately thereafter.

What is particularly sad about this case is that the agents could easily have stopped there - they did not have to push to "make a case."¹⁸ Coupled with what they should have easily been able to cull from the information they already had, Dr. Nozette's statements that he had not given IAI classified information and his resistance to the UC's overtures, they could have *at that point, at least*, communicated whatever lingering concerns they may have had to his attorneys and alerted them and his family to information suggesting his mental fragility.

The UC and the Agents Egg Dr. Nozette On to Make Financial Demands: Again simply lifting non-contextualized excerpts of the government's pleadings, ¶ 28 of the PSR quotes Dr. Nozette in the September 3 meeting as responding "Oh, you could pay me," when the UC directly asked him what he would want in return for answering the first set of questions (that did not require classified responses). But this isolated snippet is taken out-of-context as Dr. Nozette immediately signaled that his intent was far different from that contemplated by the UC or suggested by the phrase, clarifying that "you can get my consulting contract back for one thing," a reference to his \$2,000 a month consulting contract with IAI that had been terminated after

¹⁸Discovery revealed that the agents had initially planned to simply question Dr. Nozette about his work with IAI and other concerns they may have harbored. As noted, the government agents must have known before commencing this operation that, objectively evaluated, the evidence in their possession did not show that Dr. Nozette had been spying for Israel. Knowing this, they apparently decided they would try to create a crime they could hopefully more easily prove. Granted that the agents could theoretically have decided on the undercover operation to test whether Dr. Nozette had been spying rather than to lure him into attempting to do so, but this theory does not travel well when the September 3 and 4 transcripts are read in their entirety, as they clearly reflect Dr. Nozette's insistence that he had never passed sensitive or classified information to IAI and they had never asked him to. Indeed, the major thrust of the lengthy 9-3 meeting is the UC's attempt to find out everything he could concerning Dr. Nozette's relationship with IAI. Thus, if the agents' intent was to merely confirm or deny their suspicions, they could have easily ended everything right there.

receipt of the subpoena.¹⁹ See Tr. 9-3, at 8578-79. And, as stated, that contract did not involve espionage but was nothing more than basically providing advice, including political viewpoints, as to viability and prospects of IAI getting satellite business with commercial concerns and the United States Government.

Further, as with his insistence on overcoming Dr. Nozette's initial reluctance to provide classified information, the UC was equally determined not to let him get by with such a modest demand as renewal of his consulting contract. Rather, the UC urged Dr. Nozette to make more demands:

After telling Dr. Nozette that he would relay the passport request, UC: "I mean I got them [the "Center"] the financial stuff [i.e. renewing his IAI consulting contract]. . . . Was there anything else that you, you might, somebody needs. I mean, what, what are your needs? Anything, um, we don't want, we don't want people, you know to suffer financially. . . because then you get jammed up." Transcript 9-4-09, at 51.

After Dr. Nozette responded by making a demand less than satisfactory to the operation's goals, the UC clearly communicated that he needed Dr. Nozette to start thinking *bigger*: *Id.*, at 52-53 (UC volunteers that Dr. Nozette needs to plan how to secretly handle large amounts of cash that will be forthcoming and which will enable him to buy "five carat diamonds" and other "expensive things").

The same theme resurfaced in the September 17 note left in the drop box when, after

¹⁹The transcript of September 3 is clear that Dr. Nozette initially thought that the UC was connected with IAI. While the UC stated his role was different, he also feigned familiarity with IAI's personnel and operations. Dr. Nozette's reference to renewing his consulting contract was perfectly logical, as he explained that an IAI official had recently called him seeking advice on a contemplated joint project (unclassified) with NASA in mapping Venus, using Israeli advanced technology similar to Mini-RF. Dr. Nozette was thus hopeful that IAI would now renew his contract while, as described above, the UC was intent on leading him into making more incriminating financial demands.

scolding him for only providing information readily available in the public domain, the agents urged: “[i]t is critical that your answers reflect your financial expectations.”

The UC Follows Strategies Recommended By Its Professional Behavioral Consultant to Seduce Dr. Nozette

In planning their approach, the agents were not content with the UC merely making a straight-forward approach representing himself as a member of the Mossad, making the request and then objectively evaluating Dr. Nozette’s unaided willingness to pass along classified information. If for no other reason, this is evident from their refusals to accept his multiple protestations that he could only give them unclassified information. But this determination to reel in their mark was not spontaneously made in the heat of the operation. The evidence refutes any inference that these were happenstance or off-the-cuff remarks. Rather it suggests that the UC was acting pursuant to carefully orchestrated long-planned stratagems designed for no purpose other than to get Dr. Nozette. Well before the operation the agents sought the assistance of FBI Behavioral Consultants in the execution of their plans. These FBI specialists recommended that the agents “play to” or “stroke” Dr. Nozette’s “ego.” True to his apparent instructions, the UC repeatedly did so. *See e.g.* Transcript 9-3-09, US 8645 (UC: “. . . when I got briefed for my people on you I mean there was nothing but, you know, great . . . Stu-, great, great . . . stuff to talk about you.”); Transcript 9-4-09, at 18 (UC: “You seem like a great guy to me. . . and the [C]enter is talking so highly of you. I mean, I want to bring you onboard . . .”); *Id.*, at 39 (UC: referring to the mini-RF program that “you pretty much fathered.”).

Similarly following the Behavior Consultant’s recommendation, the agents purchased an “expensive bottle of wine” to be used as a “prop” to “help play into the subject’s, ego.” The UC

brought the bottle of wine to the September 3 meeting and almost immediately began referencing it once they got to the room. *See Transcript 9-3-09, US at 8538* ("I don't know if you like wine at all, but a friend of mine insisted. He brought me last night, this beautiful bottle of wine and he's like we gotta open this because it's one of the best ones he could find."); *Id.*, at 8373 (UC: "if I can't share that bottle with you."); *Id.*, at 8594 (After Dr. Nozette asks for water, having earlier told the UC that he does not drink before 5 pm, UC responds: "Since you totally don't want to drink my wine. . . Are you saying you would take my bottle of wine without sharing it with me?").

The UC Carefully Phrases Leading Questions Which Were Designed to Lure Dr. Nozette into Revealing Classified Information and Attempts to Place Words in His Mouth That Would Help Prove a Violation of 18 U.S.C. § 794(a):

That the agents were determined to induce Dr. Nozette to pass along classified information which they hoped would bring him within the reach of the nation's espionage laws is not only evidenced by the above overtures, but by specific questions that were designed for this and no other purpose. For instance, one program that Dr. Nozette worked on had two sides, only one of which was classified. In broaching the subject, the UC deliberately attempted to lead Dr. Nozette into the classified area and implied that he already knew the distinction, anyway:

UC: "Two different sides of the program, I understand right? Two um, [deleted program name] is just one side which is supposed to be DoD. . ." Transcript 9-4-09, at 13.²⁰

The UC also went out of his way to subject Dr. Nozette to liability under the espionage laws by using leading questions that tracked the necessary statutory elements that the government

²⁰This approach is also designed to minimize the potential harm in the target's mind as the UC presumably already knows the information. The UC followed this same strategy when he brought materials to the 9-3 meeting that also suggested he already had certain information.

would have to prove at trial. For instance, 18 U.S.C. § 794(a) requires the government to prove that the information conveyed or attempted to be conveyed would be harmful to the United States or “advantageous” to a foreign country. *See United States v. Gorin*, 312 U.S. 19, 29-30 (1941). Knowing this, the UC attempted to lead Dr. Nozette by suggesting that commercial, non-classified information Dr. Nozette gave IAI (concerning a competitor) nonetheless provided an “advantage” to IAI.

UC: “Okay, but it’s pretty hard to get, right? As for as, for IAI, was an *advantage*, right?” Transcript, 9-4, at 23. (Emphasis added).

Similarly, when Dr. Nozette was attempting to explain (as he did several times throughout the meetings) that the oral information he gave IAI was mostly unclassified political gossip, the UC attempted to pry this into § 794(a) by suggesting it nonetheless provided a “benefit” to IAI.

SN: “The face to face [sic] problem was mostly the political. . . sensitivities about about, you know, how, what congressmen and what senators were doing what . . . I remember I talked to John Warner one time . . . about um, doing some joint stuff with Israel. . . And he said he’d love to. Bring him some specifics.” *Id.*, at 31.

UC: “Was that information suppose, I mean. . . When we found out, when IAI found out about that is it *beneficial* for them?” *Id.* (Emphasis added).

Throughout their meetings the UC also attempted to lead Dr. Nozette into accepting the UC’s attachment of meaningless sinister implications to acts that were never so intended. For instance, in the first meeting when UC attempted to suggest that IAI had destroyed papers in an effort to hide certain things including, inferentially, Dr. Nozette’s relationship to the company, Dr. Nozette innocently responded that was not the case as he had notified the U.S. government of his relationship with IAI. Transcript 9-3-09, at 8545-46. At times, the UC’s attempts to put a sinister connotation on even the most innocuous statements of Dr. Nozette simply bordered on

the comical. *See Transcript 9-3-09, at 8664-65* (After Dr. Nozette, who had already admitted that he provided signed monthly reports to IAI for almost ten years, notes that at times he did not follow always follow IAI's procedures for signing-in at the front desk, the UC, unilaterally attempting to attach a conspiratorial flavor, responds: "That's good. Smart.").

And, as noted, it is clear that all the questions that were meticulously put together by the agents and others were designed with one purpose in mind.

The Agents' Attempt to Play on Dr. Nozette's Religion and Emotional Ties to Israel

Other aspects of the undercover operation are equally unsettling. We recognize that the nation's espionage laws apply to allies such as Israel, but, as noted, the agents deliberately chose not to feign association with countries such as China, Iran or Russia, where a positive response would have been improbable. They instead decided to take advantage of the fact that Dr. Nozette is Jewish and might be more responsive to an approach designed to help a country which is viewed as a close ally to the United States (i.e. no harm in his mind), as well as the homeland to what he viewed as the long-suffering and persecuted Jewish people. As noted above, before beginning the sting, the agents had interviewed witnesses who had related stories of Dr. Nozette frequently referencing the plight of the Jewish people during the Holocaust and were well aware of his family's long-standing support of Israel, a fact that he reaffirmed when meeting with the UC. *See Tr. 9-3, at 8632-35; see also Tr. 10-19, at 176* (Agents tells Dr. Nozette that they know Israel is important to him; that he traveled there as a child and teenager; that his deceased parents Helen and Morris were strong supporters of Israel; and that his family invested in Israel through a family foundation and supported Jewish American causes). With full knowledge of this emotional connection, the UC went out of his way to emphasize the spiritual rewards of helping

the Jewish state:

UC: “ . . . thus far, the state took really good pride in its service like my, my service that a lot of people that we work with, most, I mean, (stammers) they love the state **a lot.**²¹ And they motivated [sic] as far as helping out the state, all that stuff.” Transcript 9-4-09, at 48.²²

Immediately after hearing this, Dr. Nozette nonetheless re-emphasized to the UC that “I don’t have a problem really with any thing that’s proprietary . . .” *Id.*

The Agents’ Mocking and Belittling Dr. Nozette and Ignoring His Constitutional Rights

Perhaps nothing is more illustrative of the agents’ determination to get Dr. Nozette than their dismissive and insensitive attitude toward his situation, culminating in outright mockery, belittlement and a deliberate disregard for his constitutional rights. Approximately halfway through the third meeting with the UC on October 19 at the Mayflower Hotel, the espionage

²¹The video of the 9-4 meeting shows the UC emotionally inflecting his voice (the transcript reflects he is “stammering”) to emphasize “a lot” - i.e. the State of Israel needs his help and Dr. Nozette should be motivated to do so by his love of Israel and what it represents for Jews such as Dr. Nozette. See Video, 9-4-09, Session 3, at 11:42:00. On the preceding day the UC had also remarked that the most important thing is “the state,” causing Dr. Nozette to note that people in Israel are likely concerned that President Obama could end up harming the situation with Iran by giving legitimacy to Ahmadinejad. See Transcript 9-3-09 at 8598. In effect, the UC was implanting the idea that his work was necessary to the survival of Israel, a theme he had tried to subtly suggest to Dr. Nozette at the outset of the 9-3 meeting (“if you wanna preserve a nation there’s certain things you gotta do.”). *Id.*, at 8513

²²In addition to the agents’ knowledge that Dr. Nozette’s prior references to the Holocaust suggested he might be particularly sensitive to concerns about the Jewish nation, this play to “love of the Jewish state” was particularly offensive in light Dr. Nozette’s recital of his family’s history the preceding day. It is common knowledge that, like Dr. Nozette’s forefathers, many Jews fled Russia at the end of the nineteenth century because of the pogroms. See Irwin Michael Aronson, *Troubled Waters: Origins of the 1881 Anti-Jewish Pogroms in Russia* (University of Pittsburgh Press 1991); *:Anti-Jewish Pogroms in the Russian Empire*, http://en.wikipedia.org/wiki/anti-jewish_pogroms_in_the_russian_empire. It is difficult to accept that the UC would not have been fully cognizant of the potential psychological impact of such statements on Dr. Nozette.

agents came into the room and ultimately began questioning him. The agents' scam continued at first, however, with them hustling the UC out of the room and pretending that he was under arrest while implying that Dr. Nozette was perhaps only a witness to the UC's espionage activities. Although he was clearly in custody at time, the agents misled Dr. Nozette into thinking he was not a suspect, telling him, in effect, he was in the "wrong place at the wrong time today, you know," pushed an Advice of Rights form in front of him, urging him to read it "real quick," ignored his questions concerning an attorney and then misrepresented that "we're just going to ask you a few questions and hopefully get you out of here in short order." See Transcript 10-19-09, at 128-30. That these unconstitutional actions were deliberately undertaken is underscored by the fact that the lead agent involved in this activity *had, only a few weeks prior to the arrest, explicitly made fun of Dr. Nozette's naivete as exhibited in his attempts to cooperate in the fraud case.* In an e-mail sent to another FBI agent less than two months before the undercover operation began, she commented on instructions Dr. Nozette had been given before being wired by fraud agents as part of his cooperation:

"She [agent monitoring cooperation on the fraud case] described RT [Dr. Nozette] as very eager to get things moving (so he can save his skin). *She commented that for someone so smart, he needs very explicit instructions. How do I use the recorder, what do I say when. He isn't very creative. She had to tell him to play on his friendship with [deleted] to try to get info. RT was like, wow like's a good idea. I never would have thought of that. She was there when Atkinson told him he wasn't going to travel to India. His big concern was what should he tell work. Atkinson gave him the "I'm sick" cover story. Again, RT was like, yeah, wow, good idea.* She didn't think he has any clue that there is another investigation in the works." (Emphasis added).

In addition to putting the agents on explicit notice of the need not to play games with required constitutional warnings, this description of bumbling naivete is hardly consonant with the idea

that the government was initially attempting to put out to the public (and later to the defense) that Dr. Nozette had for a decade been secretly committing espionage on behalf of Israel.

Conclusion

In completing the public record in this case, Dr. Nozette is neither attempting to withdraw from his plea nor evade responsibility for his conduct. His response to the UC's entreaties was inappropriate and ill-advised regardless of the devious, manipulative and exploitive nature of those overtures. Irrespective of his fragile mental state and the pressures he was feeling, it was Dr. Nozette's duty to promptly and unequivocally scotch those advances despite their persistence.²³ He did not and as a result Dr. Nozette has basically lost all he had in life - his wife, his home, his wealth, career and perhaps his deserved place in the pantheon of space exploration.

²³Regardless of any disputes over the nature or harmfulness of the information Dr. Nozette gave the UC, § 794(a) is violated by an *attempt* to provide closely-held national defense information to a foreign government and Dr. Nozette's conduct crossed this threshold. Whether or not he was entrapped into doing so would likely have been the central issue in a trial. There are two elements to an entrapment defense, inducement and predisposition, with the defendant bearing the burden on the first and if successful, the government bearing the burden on the latter. See *United States v. Hanson*, 339 F.3d 983 (D.C. Cir. 2003). "Inducement involves 'persuasion, fraudulent representations, threats, coercive tactics, promises of reward, or pleas based on need, sympathy or friendship.'" *United States v. Trejo*, 136 F.3d 826 (D.C. Cir. 1998), quoting *United States v. Sanchez*, 88 F.3d 1243, 1249 (D.C. Cir. 1996). For the reasons stated herein, the evidence overwhelmingly established the inducement prong prerequisite to an entrapment instruction. See *United States v. Glover*, 153 F.3d 749, 754 (defendant has burden of introducing "some evidence" of inducement). Thus, the issue would likely have come down to predisposition. While the evidence clearly showed that the government approached Dr. Nozette in an aggressive and pushy manner and, as stated, knowingly pressed emotional buttons, see *Trejo, supra* (playing on sympathy and friendship), other factors weighed against Dr. Nozette on this issue, including the fact that he took money, returned on September 4 and thereafter, did not report the initial contact to either his attorneys, the fraud agents monitoring his cooperation or security officials of the various agencies, was inclined to help Israel when requested ("I'm not going to screw Israel"), accepted the clean phone and drop box idea, and told the UC that he thought he was, at least, indirectly working for Israeli intelligence through his work at IAI, regardless of whether he had actually provided them classified or national defense information. In sum, there was something for both sides on the entrapment issue.

But, it is important that the public, and the scientific community in particular, be aware of the tactics engaged in and the judgment, or lack thereof, exercised by the agents of the FBI and the Department of Justice in this case. As inferred from Dr. Nozette's ultimate surrender, there was evidence of predisposition suggesting his susceptibility to such an approach. But whether government should entice individuals they know to be desperate and vulnerable by playing on their religious sympathies, dangling the prospect of large financial rewards, maneuvering leading questions to deliberately elicit responses that would help prove a violation of espionage laws and pressing forward despite the subject's clearly-stated initial reluctance to reveal classified information is a legitimate matter for public discussion and investigation by bodies charged with regulating and overseeing the Department of Justice. Admittedly, Dr. Nozette ultimately brought this on himself, and he certainly would not be where he is today had he simply picked up the phone and called his attorneys after walking out of the meeting on September 3rd.

Whether this so-called sting resulted from a lack of judgment, overzealousness or, more disturbingly, overweening ambition, this case was unnecessary and gratuitous. As stated, less drastic and more reasonable alternatives were readily available. If the government had convincing evidence that Dr. Nozette had knowingly engaged in the improper removal or storage of classified materials, they could have separately prosecuted him for such offenses or presented such evidence in aggravation of sentencing in the fraud case. Despite the government's attempts to imply in pleadings that Dr. Nozette was delivering classified materials for years to Israel, that simply was not the case and had the agents objectively considered all the available evidence they would have so concluded before starting down this road. And if it really believed that Dr. Nozette had been systematically engaging in spying for a number of years, the government likely

would not have entered into this plea agreement. Irrespective of this country's entrapment law, at the end of the day it was the agents of the FBI who approached Dr. Nozette, not the other way around; and it was those same agents who created, manipulated and exploited the circumstances that led to this offense and sadly to Dr. Nozette's unnecessary fall and disgrace.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby state that on March 7, 2012, I made the above Sentencing Memorandum available to the Court Security Officer for filing.



Robert L. Tucker