IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA Plaintiff, vs. Szuhsiung Ho a/k/a Allen Ho, Defendant	**Case No.: 16-CR-00046**

DEFENDANT ALLEN HO'S MOTION FOR PRETRIAL RELEASE ON CONDITIONS

Defendant Allen Ho, by and through his undersigned counsel, respectfully moves that the Court order him released pursuant to the conditions set forth herein. Pursuant to 18 U.S.C. § 3142, the nature and circumstances of the alleged offenses, the weight of the evidence, Dr. Ho's history and characteristics, and lack of danger to the community weigh strongly in favor of release. Any perceived risk of nonappearance due to Dr. Ho's ties to China can be addressed with appropriate conditions, including the government retaining his passports, electronic monitoring, and the posting of significant bond, if the Court deems such conditions necessary.

I. BACKGROUND

Allen Ho, Ph.D., is a 66 year-old American citizen. Dr. Ho was born in Taiwan[1] in 1950 and received his undergraduate degree in mechanical engineering in 1971. In 1973, Dr. Ho came to the United States to attend the University of California at Berkeley. After marrying his wife, Anne, in 1974, Dr. Ho received a master's degree in mechanical engineering from Berkeley in

[1] The government's allegation in the Indictment that Dr. Ho was born in the People's Republic of China is incorrect. *See* ECF No. 3 ¶ 3.

1975. In 1980, Dr. Ho completed his work for a Ph.D. in nuclear engineering from the University of Illinois[2] and, the next year, began work at Westinghouse Electric Co. ("Westinghouse") in Pittsburgh.

At Westinghouse, Dr. Ho was a senior engineer working in the field of thermal-hydraulics analysis for commercial nuclear power plants. In 1983, Dr. Ho and his wife became naturalized American citizens. Dr. Ho continued to work at Westinghouse until 1988, when he left to join Public Service Electric & Gas in Salem, New Jersey as a consulting engineer. Dr. Ho worked in New Jersey for the next eight years, until 1996, when he started his own consulting business, Energy Technology International, Inc. ("ETI"). Dr. Ho and his wife have resided in Wilmington, Delaware since 1988. While (as noted below) Dr. Ho travels and spends significant time in China, his permanent residence is a home in Wilmington that he and Anne purchased in 2010, and where he will live if the Court grants release.

ETI eventually took on consulting agreements for clients in the U.S., Taiwan, Japan, and China. Dr. Ho's typical clients were public utilities that operated commercial nuclear power plants and sought Dr. Ho's assistance to assure that the plants were operating safely and efficiently. Dr. Ho has no expertise or experience in the development or production of "Special Nuclear Material."[3]

II. THE INDICTMENT

A. Count One

While the Court need not now judge the merits of the government's legal theories underpinning this prosecution, the Court must consider the nature and circumstances of the

[2] Dr. Ho received his official certificate in May 1982.

[3] 10 C.F.R. § 810.3 defines "Special Nuclear Material" as "(1) plutonium, (2) uranium-233, or (3) uranium enriched above 0.711 percent by weight in the isotope uranium-235."

offense and the weight of evidence. *See* 18 U.S.C. § 3142. This analysis is also relevant to show that Dr. Ho is not a flight risk. He intends to participate fully in his defense.

In Count One of the Indictment, Dr. Ho is charged with conspiring to "directly or indirectly engage or participate in the development or production of any special nuclear material outside the United States" in violation of 42 U.S.C. § 2077. ECF No. 3 ¶ 12. In 2015, Dr. Ho's co-defendant, Ching Ning Guey, became the first person criminally charged with violating this statute, despite the fact that this statute has existed – in one form or another – for over 50 years. Dr. Ho is, therefore, appears to be the second individual ever charged with this offense.

There are no criminal court cases interpreting 42 U.S.C. § 2077. Nor are there any jury instructions that have ever been crafted defining the conduct that violates this statute. Apparently recognizing that Dr. Ho's conduct did not constitute espionage (18 U.S.C. § 794), economic espionage (18 U.S.C. § 1831), theft of trade secrets (18 U.S.C. § 1832), or even false statements (18 U.S.C. § 1001), the government has instead tried to shoehorn Dr. Ho's commercial work on behalf of Defendant China General Nuclear Power Company ("CGNPC") into a statute that has never been employed in its prior half-century of existence. The Indictment is based on the government's novel reading and application of this statute.

Although the government has charged Dr. Ho, ETI (his business), and CGNPC (his client) with conspiring to "to directly or indirectly engage or participate in the development or production of special nuclear material outside the United States," the overt acts outlined in the Indictment simply describe the work Dr. Ho did to assist his client, CGNPC, to safely operate existing commercial nuclear power plants or to assist with design changes to improve safety. These were not military, weaponized reactors; they are, instead, commercial nuclear power plants that generate electricity, similar to the 100 commercial nuclear power plants that operate

today in the United States. Indeed, the international nuclear community regularly collaborates to improve safety at existing and future reactors to avoid Chernobyl or Fukushima-type accidents. And the United States has the most operational experience to maintain the highest safety levels in the industry. In sum, collaboration on commercial nuclear operational safety is commonplace and is in the interest of the United States.

The government will apparently contend that by simply assisting CGNPC in the safe and reliable operation of its commercial nuclear reactors that Dr. Ho violated this heretofore never-employed statute and should be subjected to a ***potential life sentence***. While such a draconian punishment would be appropriate for a criminal enterprise focused on diverting uranium enrichment technology to an enemy of the United States so the uranium could be enriched into bomb-grade materials to be used against the United States, this is not the type of conduct has been alleged regarding Dr. Ho.[4]

Dr. Ho's involvement focused exclusively on front-end commercial nuclear plant safety and efficiency. The government's apparent premise in criminalizing this activity is that when uranium fuel undergoes nuclear fission inside a commercial nuclear power plant, an unintended—and indeed unwanted—byproduct is a small amount of plutonium.[5] This is the case in commercial reactors in the United States, just as it is in France and China. Nothing that Dr. Ho did was intended to affect, nor could have affected, the amount of plutonium or other waste products present in the spent fuel.

Dr. Ho's conduct was of the type routinely approved by the U.S. Government. In fact,

[4] Uranium enrichment technology is defined as "Sensitive Nuclear Technology" ("SNT") in 10 C.F.R. § 810. The Indictment does not allege that SNT is involved in this case.

[5] A small amount of the abundant uranium-238 isotope in nuclear fuel is converted to plutonium-239 after an entire fueling cycle.

the very statute that Dr. Ho is accused of violating carves out an approval path that allows exactly the same conduct the government now claims is illegal. For example, there is no violation if the activity is "authoriz[ed] by the Secretary of Energy after a determination that such activity will not be inimical to the interest of the United States." 42 U.S.C. § 2077(b). The Secretary of Energy has frequently authorized the transfer of technology and nuclear technical assistance to China and to Chinese foreign nationals. And the U.S. has had an agreement with China for peaceful nuclear cooperation that has been in place since the mid-1980s.[6] Yet, the government has charged Dr. Ho under a never-before-used statute, which carries a potential life sentence, for conduct that in the past has been routinely approved by the DOE and for which there are U.S.-China country-level approvals.

The applicable regulations cited by the government provide additional exceptions authorizing much – if not all – of Dr. Ho's activities. For example, the following activities do not require a specific authorization from the Secretary of Energy because the Secretary has already determined, through rulemaking, that they are of such low concern that the Secretary does not need to be involved with each instance of technology transfer or assistance: "Furnishing information or assistance, including through continuing programs, to enhance the operational safety of an existing civilian nuclear power plant in a country listed in § 810.8(a) [China is listed here] or to prevent, reduce, or correct a danger to the health and safety of the off-site population posed by a civilian nuclear power plant in such a country . . . ." 10 C.F.R. §

[6] *See* Agreement for Cooperation Between the Government of the United States of America and the Government of the People's Republic of China Concerning Peaceful Uses of Nuclear Energy, U.S.-China, July 23, 1985, T.I.A.S. No. 12027; Agreement for Cooperation Between the Government of the United States of America and the Government of the People's Republic of China Concerning Peaceful Uses of Nuclear Energy, U.S.-China, Oct. 29, 2015, T.I.A.S. No. 15-1029.

810.7.[7] Here, much of Dr. Ho's work with CGNPC was meant to enhance the operational safety of existing civilian nuclear power plants in China, and therefore could have been authorized under § 810.7.

B. Count Two

In Count Two of the Indictment, Dr. Ho is accused of conspiring to act "as an agent of a foreign government, to wit, the People's Republic of China," in violation of 18 U.S.C. § 951. ECF No. 3 ¶ 78. An "'agent of a foreign government' means an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official." 18 U.S.C. § 951(d). Importantly, this statute includes an exception excluding "any person engaged in a legal commercial transaction." 18 U.S.C. § 951(d)(4). Here, the evidence will show that Dr. Ho's conduct fell within this exception because he had a lawful commercial consulting agreement with CGNPC. Therefore, the statute does not apply to Dr. Ho's conduct.

Even a very preliminary review of the discovery provides abundant evidence demonstrating a lack of any criminal intent by Dr. Ho to violate any U.S. law. Indeed, Dr. Ho's conduct has been transparent and inconsistent with anyone engaged in a criminal conspiracy. In 2013, Dr. Ho sent two separate requests for specific authorizations under Part 810 to engage in the same general activities now alleged in his Indictment. *See* Exs. A–B (Sept. 30, 2013 letters to U.S. Department of Energy and to Richard Goorevich, a Senior Policy Advisor at the U.S. Department of Energy). In one of the letters, Dr. Ho thanked Mr. Goorevich "for meeting with me and ETI's outside counsel on July 29, 2013 to discuss this matter." Ex. B. Dr. Ho received a single response from Mr. Goorevich, noting "that the activities [involving nuclear reactor-related

[7] The rules in 10 C.F.R. § 810 were revised in March 2015. Section 810.7 is the citation under the old rules, which were in effect at the time of the alleged conduct, to the extent dates are specified in the Indictment.

computer codes[8]] ***do not fall within the scope of Part 810***." Ex. C (Nov. 4, 2013 letter from R. Goorevich) (emphasis added). No response was received for the other letter.

Two years later, Mr. Goorevich—who had met with Dr. Ho and his attorney—wrote a "pre-trial certification" letter to the prosecutor and agent in charge of this case that described some of Dr. Ho's activities as "involv[ing] Part 810-controlled technology/assistance." Ex. D (Mar. 17, 2015 letter from R. Goorevich). In that letter, Mr. Goorevich acknowledged that "[a] request for specific authorization was submitted on September 30, 2013, from Energy Technology International signed by Mr. Allen Ho, President." *Id.* He also acknowledged that the activities now deemed illegal by the government "were included in the September 30, 2013 request for specific authorization," but noted that the "request is on hold pending this investigation." *Id.* Thus, rather than simply advising Dr. Ho that the conduct he wished to engage in was prohibited, it appears that in response to Dr. Ho's open and transparent requests for permission to conduct certain activities, the government engaged in a lengthy investigation that culminated in this Indictment. Needless to say, it is almost unimaginable that someone engaged in a criminal conspiracy would write and then meet with the relevant government officials – with counsel present – and seek permission to engage in conduct that they understood to be illegal.

* * *

Dr. Ho never developed, either directly or indirectly, any "special nuclear material" outside the United States. Nor did he ever act as an agent of the Chinese government. He instead acted as a consultant on behalf of a Chinese-owned civilian utility company – one of his

[8] *See* Indictment ¶ 69, wherein the government alleges Dr. Ho conspired to provide CGNPC with three nuclear reactor-related computer codes.

many clients – that generates electricity by using nuclear power. Dr. Ho was not a foreign agent of CGNPC; he acted as a professional recruiter hired by CGNPC to find engineers to help it maintain its civilian nuclear power plants. Acting on behalf of a foreign client in this fashion to conduct or pursue lawful business in the United States does not make one guilty of acting as an unregistered foreign agent and the government's legal theory will not, we believe, withstand judicial scrutiny.

III. PRIOR PROCEEDINGS

Dr. Ho was arrested on April 14, 2016, while traveling in the Eastern District of Georgia. He appeared that day before the Honorable Janet F. King. Dr. Ho waived his right to have his bond hearing in the Eastern District of Georgia, electing instead to have it in this Court. On April 26, Dr. Ho appeared before the Honorable H. Bruce Guyton. Dr. Ho waived a detention hearing at that time, but reserved his right for a hearing at a later date. Judge Guyton ordered Dr. Ho detained. Dr. Ho now seeks the hearing he postponed.

IV. ARGUMENT

A. The Governing Legal Standard

Under the Bail Reform Act, "liberty is the norm and detention prior to trial . . . is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 751 (1987). The Court must release Dr. Ho where conditions can be set that will reasonably assure his appearance and the community's safety. *See* 18 U.S.C. §§ 3142 (e)(1), (f)(1)(B). In making its determination, the Court considers: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. *See* 18 U.S.C. § 3142(g). The statute requires that the Court impose "***the least restrictive . . . conditions***, or combination of conditions, that [the Court] determines will reasonably assure the

appearance of the person as required." 18 U.S.C. § 3142(c)(B) (emphasis added). Because the factors listed above all militate in Dr. Ho's favor, and because this Court can fashion conditions less restrictive than pre-trial detention that will reasonably assure Dr. Ho's appearance at trial, this Court should permit Dr. Ho to be released, pending the posting of an appropriate bond and the imposition of other reasonable conditions outlined below.

B. <u>There are conditions of release that can reasonably assure Dr. Ho's appearance and community safety.</u>

The charged offenses here are not of the sort that Congress has seen fit to impose a presumptive risk of non-appearance. *See* 18 U.S.C. §3142(e)(3). Nor is there a presumption that Dr. Ho presents either a flight risk or danger. *See* 18 U.S.C. §§ 3142 (e)(2), (3).[9] Therefore, the presumption is in favor of pre-trial release.

The Court must consider the following factors in determining whether pre-trial release is appropriate. *See* 18 U.S.C. § 3142(g)(1)–(7).

1. "The nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or controlled substance, firearm explosive, or destructive device."

This is not a crime of violence, does not involve terrorism, a minor victim, a controlled substance, a firearm, or destructive device. First, Dr. Ho assisted with commercial nuclear power plants used to generate electricity. Dr. Ho's conduct consisted of helping the company so that these power plants would operate safely and efficiently. Second, the charged statute is one

[9] Because the charges in this indictment are not the type for which Congress created the rebuttable presumption pursuant to 18 U.S.C. § 3142(e)(3), a rebuttable presumption against pre-trial release exists only where a defendant "has been convicted of a Federal offense involving a crime of violence" or while on release for a state or Federal offense, or committed the instant offense within five years of a prior conviction. 18 U.S.C. §§ 3142(e)(2)(A–C). Because Dr. Ho has never been convicted of any crime, either state or federal, these provisions do not apply and, therefore, the government enjoys no rebuttable presumption against pre-trial release.

that, until this case, has never been employed. Thus, it is far from clear that Dr. Ho, or anyone standing in his shoes, would have been on reasonable notice that the conduct at issue was violative of any U.S. laws. Third, far from being a crime of violence, Dr. Ho's conduct appears, if anything, to be – at worst – a regulatory-type offense. *See* 42 U.S.C. § 2282(a) (promulgating civil penalties for violation of licensing and certification provisions of § 2077).

2. "The weight of the evidence against the person."

The evidence against Dr. Ho appears to be scant. The emails referenced in the Indictment do not evince any intent to conspire to violate U.S. law. *See* ECF No. 3. There is no hint of subterfuge or evidence that supports consciousness of guilt. In fact, none of the emails referenced in the Indictment suggest in any way that Dr. Ho had any inkling that he was violating U.S. law. Nor is there anything about the charged statute that would make it clear to a reasonable person that simply assisting a foreign entity with the safe operation of its civilian nuclear power plant would constitute the illegal "development or production of any special nuclear material."

3. "The history and characteristics of the person, including – (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law."

Dr. Ho is a 66 year-old American citizen and has lived in the United States since 1973. He currently resides in Wilmington, Delaware, with his wife of 42 years. Dr. and Mrs. Ho own a home in Wilmington that Dr. Ho and his wife are willing to pledge as collateral to assure his return to Court.

Furthermore, Dr. Ho has no criminal history of any kind. Nor does he have any drug or

alcohol problems. Although Dr. Ho in recent years spent extensive time in China both for work and to visit a young child he fathered in 2007,[10] this does not change the fact that Dr. Ho has no intention of becoming an international fugitive who could never again return to the United States or, for that matter, enter any of the more than 100 countries with which the United States has an extradition treaty. On the contrary, Dr. Ho intends to confront these charges, which are based on novel and untested legal theories, and clear his name.

Moreover, the government has possession of Dr. Ho's U.S. and Taiwanese passports. Leaving the U.S. without them to travel internationally would be impossible. There simply is no indication that Dr. Ho would not appear for trial. The government has the burden of proving the flight risk. The government then has the burden of proving that there is no combination of conditions that would reasonably insure his presence. *United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007) (describing this "dual burden"). The statute requires that the government prove a "serious" risk. 18 U.S.C. § 3142(f)(2)(A).

To mitigate any alleged flight risks, Dr. Ho would agree to being confined to his home in Wilmington, Delaware, with an ankle bracelet and electronic monitoring, throughout the pendency of this court proceeding.[11]

As noted previously, Dr. Ho has no criminal history of any kind. Thus, none of the 18 U.S.C. § 3142(g)(3)(B) circumstances apply.

4. "The nature and seriousness of the danger to any person or the community that would be posed by the person's release."

There can be no serious suggestion that Dr. Ho poses any type of danger to any person or

[10] This child is a U.S. citizen and would be free to visit Dr. Ho if he was to be released to home-detention at his Delaware residence. Thus, Dr. Ho can still see his child without travelling.
[11] Dr. Ho would, upon notice and prior permission, seek only to visit counsel in Washington, D.C. – approximately two hours from Wilmington – and to travel to the Eastern District of Tennessee for required Court appearances.

the community.

C. Additional Factors

There is an unopposed motion to have this Court designate this case as "complex." *See* ECF No. 20. The government has advised counsel that the discovery in this case will be voluminous and will include approximately 80,000 emails, about half of which are in Mandarin. It simply will not be possible for counsel to adequately prepare for a trial without the full and complete assistance of Dr. Ho. It will also not be possible to review this volume of evidence with a client who is detained in jail. The subject matter of the Indictment is complicated, specialized, and technical in nature. Understanding the science involved will be critically important, as will carefully reviewing all of the emails to understand what was discussed and the context in which the conversations took place. Dr. Ho's constitutional right to a fair trial will inevitably be compromised if he cannot fully participate in his defense by having full and unfettered access to the evidence against him and the ability to speak and communicate electronically with counsel whenever necessary.

In addition, it cannot be emphasized enough that Dr. Ho is not a young man. He is 66 years old, and, not surprisingly, poorly equipped for dealing with the stress and potential dangers inherent in detention.[12]

The extensive discovery and expected motions practice necessary to litigate this case means that trial will not occur soon. If not admitted to bail, Dr. Ho could very easily spend more than a year in jail on charges that are wholly novel and untested. The likelihood that Dr. Ho may spend extensive time in jail for charges that are ultimately resolved in his favor is too strong to

[12] At one facility Dr. Ho was housed in during transport to the E.D. of Tennessee, jailers had to segregate Dr. Ho from the rest of the population when it was learned that inmates were discussing inflicting physical harm to Dr. Ho.

be ignored.

Taken together, the law and the relevant facts mandate pre-trial release. Dr. Ho respectfully seeks the imposition of bail conditions that will permit him to remain in his home with his wife, so that he can fully participate in his defense of this case.

V. PROPOSED CONDITIONS

Dr. Ho's appearance can be reasonably assured through a combination of conditions that fall short of detention. Dr. Ho will agree to post a $1,000,000 bond, secured by the posting of his family home in Wilmington, Delaware. Thus, Dr. Ho's failure to appear for his Court appearance would result not only in him becoming a fugitive, but also in his wife of more than four decades becoming homeless. In addition, Dr. Ho would agree to home detention, to wear an electronic bracelet at all times, and to be subject to electronic monitoring, pending the resolution of this case. Dr. Ho agrees that the government can continue to hold his passports and agrees not to attempt to acquire any new passport. Dr. Ho would be permitted to leave his residence only to travel, with advance permission from pre-trial services, to visit with counsel in Washington, D.C. or to travel to the Eastern District of Tennessee for required court appearances. Dr. Ho further agrees to any other standard conditions of intensive pre-trial supervision.

VI. CONCLUSION

Defendant Allen Ho respectfully requests that there are any number of conditions that the Court can impose such that he can be released pending trial.

Dated: June 8, 2016

Respectfully submitted,

ARENT FOX LLP

/s/ Peter Zeidenberg

Peter Zeidenberg

1717 K Street, NW
Washington, DC 20006
Tel: (202) 857-6000
Fax: (202) 857-6395
Email: Peter.Zeidenberg@arentfox.com

ATTORNEY FOR DEFENDANT ALLEN HO

CERTIFICATE OF SERVICE

I hereby certify that on June 8th, 2016, I caused true and correct copies of the foregoing document and Exhibits A-D to be filed with the Clerk of the Court using the CM/ECF system, and I further certify I will send a notice of electronic filing to the attorneys of record in this matter.

/s/ Wade V. Davies
Wade V. Davies