

**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. 3:16-CR-00046

**DEFENDANT ALLEN HO’S SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION TO VACATE ORDER OF DETENTION**

Pursuant to Local Rule 7.1(d), Defendant Allen Ho, by and through his undersigned counsel, respectfully submits this Supplemental Brief in Support of his Motion to Vacate Order of Detention (ECF No. 33). This brief is based upon information provided by the government after the initial filing, and therefore was unavailable before the initial pleading.

I. ARGUMENT

In the government’s Opposition (ECF No. 26), it argues that “[a]ny individual facing the possibility of spending the rest of their life in prison is inherently a high risk of flight.” ECF No. 26 at 1. This argument is premised on the notion that, facing overwhelming evidence and a potential maximum sentence of life in imprisonment, the only logical thing for a defendant like Dr. Ho to do is flee. Even if this premise were correct (it is not),¹ evidence recently provided by the government is so highly exculpatory that it makes flight the least logical choice for Dr. Ho.

¹ The “logic” of this argument is refuted by the fact that every day, defendants facing potential life sentences are released without pre-trial detention—and subsequently appear as ordered. *Cf. United States v. Binford*, No. 13-20271, 2013 WL 5998698, at *2 (E.D. Mich. Nov. 12, 2013) (“[I]t does not appear that Defendant would be a flight risk, although he is facing a maximum of penalty life sentence.”).

Indeed, these materials give Dr. Ho every reason to stay and have his name cleared in court.

A. The case against Dr. Ho will not withstand scrutiny.

Dr. Ho and his company, ETI, are 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. To understand what is meant by “special nuclear material,” one must turn to the statute and regulations.² Although the statute clearly requires a defendant to “produce or develop” “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, China Guangdong Nuclear Power Company (CGNPC), to safely operate existing commercial nuclear power plants. These are not military, weaponized reactors; they are, instead, commercial nuclear power plants, similar to the 100 commercial nuclear power plants that operate today in the United States.

Dr. Ho helped identify qualified nuclear engineers—all U.S. citizens with decades of experience in the field of nuclear energy who worked at the most outstanding laboratories and institutions in the country—to assist CGNPC with the safe operation of its commercial nuclear power plants. These engineers, whose FBI interviews were recently produced to the defense, did not believe their conduct (or, for that matter, Dr. Ho’s conduct) violated U.S. law. Because the information they provided to CGNPC was unclassified, publically available, and pertained to the safe operation of commercial nuclear power plants, the engineers believed that their conduct was entirely lawful and appropriate. The beliefs and understanding of these individuals will be of critical importance at trial. Guilt or innocence will likely turn on the question of criminal intent:

² 42 U.S.C. § 2014(aa) provides that “‘special nuclear material’ means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235.” Similarly, 10 C.F.R. § 50.2 provides a nearly identical definition.

did Dr. Ho knowingly and intentionally violate the law? To answer that question, the jury will have to consider whether a reasonable person in Dr. Ho's shoes would have believed the conduct at issue was wrongful. In answering that question, the jury will be made aware of the following:

- **Charles Beard**, a former software engineer for Westinghouse for approximately 25 years, advised the FBI that the information he “provided to the Chinese was public information available through the Nuclear Regulatory Commission (NRC).” The reports that he provided “had been stripped of all [Westinghouse] proprietary information.” Like most of the witnesses the government interviewed, Mr. Beard “was not aware of what 10 Code of Federal Regulations (CFR) Section 810 was, and did not think that he violated any laws or regulations during his consulting work with CGNPC via ETI.” Ex. 1.
- **Carl Olson**, a retired nuclear engineer from Westinghouse, told the FBI that he was unaware that sharing information with CGNPC required DOE approval, and that he “did not think Ho was doing anything illegal, and would have questioned Ho about it if he had.” Dr. Olson noted “that ‘this is commercial, why is it a problem?’ and stressed that the information was not secret.” Dr. Olson also noted that neither he nor Dr. Ho would have received relevant “export control training while at Westinghouse.” Ex. 2.
- **David Seel**, a retired nuclear engineer from Westinghouse, told the FBI that “99.9% of his CGNPC consulting . . . focused on helping [CGNPC] understand Areva [French builder of nuclear power plants] technical documentation.” In addition, any “misgivings/questions he may have experienced with regards to consulting with CGNPC were mitigated by the assumption that [Westinghouse's] presence in China and [providing a nuclear reactor] illustrated consulting such as his was not prohibited.” Ex. 3.
- **George Rudy**, a retired nuclear engineer, told the FBI that Dr. “Ho does not understand the [10 CFR Section] 810 process” and “could not comprehend or understand it. . . . Rudy does not believe that Ho would purposely circumvent 810, and [any violation of] it is due to his lack of understanding of part 810 and by Ho's failure to accept part 810.” Ex. 4.
- **Yu Chung Lee**, a retired mechanical engineer from Westinghouse, told the FBI that all of the information that he provided to CGNPC “came from open source documents Lee found on the Internet. Lee ‘Googled’ the information and turned it over to CGNPC. Lee explained that the Chinese government prevented access to Google so CGNPC needed the ETI contractors to ‘Google’ that information for them. Lee did not provide CGNPC with non-open source information. Lee believed the information he provided to CGNPC was not restricted technology and did not require authorization.” Ex. 5.
- **Ronald Kesterson**, a retired metallurgist with nearly 40 years of experience in the nuclear industry, was familiar with 10 C.F.R. § 810, but told the FBI that he believed the information he provided was nevertheless permitted because the information he provided was open-source, “technology release” consulting that did not violate the statute. Ex. 6.

- **Wenyi Ouyang**, a former professor at Columbia University where he provided nuclear testing and research for several companies, told the FBI that “he was not aware of the need to seek approval from the Department of Energy before providing assistance to China’s nuclear program”; nor was he “aware of 10 C.F.R. 810 or the National Nuclear Security Administration”; he “advised that he never looked at the regulations because his work was all unclassified and did not involve proprietary information.” Ex. 7.
- **Tsu-Te Alan Wu**, a former Westinghouse nuclear engineer, who also worked at the Savannah River National Laboratory (SRNL) where he had the highest level of security clearance (above Top Secret). Wu told the FBI that the information he provided to CGNPC “was not new technology, all of which he believed was available in the public domain”; “Wu did not believe he was manipulated by Ho or Chinese entities to provide any information Wu was not legally authorized to provide. . . . Wu reiterated that all of the work he performed or provided calculations on for Ho was ‘open literature.’ . . . Wu reiterated that because the information he was working with as a consultant for Ho was in the public domain and because he had previously received authorization from SRNL to work as a consultant, he was not concerned about dealing with restricted information. . . . At no time did Wu believe that Ho was doing anything wrong or deceptive by ETI working with China.” Ex. 8.
- **Charles Rombough**, a former nuclear engineer at Babcock and Wilcox (B&W), provided consulting services to CGNPC in the area of criticality and safety; Dr. Rombough was aware that 10 CFR dealt with nuclear power generally, but he was not familiar with Part 810; when advised that his conduct may have violated Part 810, he stated “that whoever wrote the report is inappropriately treating nuclear engineering information and commercial nuclear power information as controlled, and whoever is determining where the line is with regards to whether the information should be controlled, is wrong.” Rombough further stated that the information he provided to CGNPC was “publicly available, open source information.” Ex. 9.

These men are not traitors or criminals. Indeed, none have been charged with violating any law. Nor is Dr. Ho a mastermind who duped these experienced scientists to violate the law.³ These scientists all reasonably believed that providing unclassified, public information to assist the safe and efficient operation of commercial nuclear power plants in China was not a violation

³ Even Ching Guey, an alleged coconspirator who has admitted that he provided export-controlled materials to CGNPC, told the FBI that “[Dr.] Ho instructed Guey to only provide [CGNPC information] which he felt comfortable sharing.” Ex. 10. At no point did Mr. Guey claim that he believed Dr. Ho’s conduct was illegal.

of any law.⁴ The testimony that these witnesses will provide at trial will enable Dr. Ho to present a compelling case that the government's novel application of 42 U.S.C. §§ 2077, 2242—statutes that have *never* been employed criminally before this investigation—is either unknown or widely misunderstood among nuclear engineers with decades of experience, and that Dr. Ho reasonably believed that his conduct was entirely lawful.

Given the evidence that will be available for him at trial, there is simply no reason for Dr. Ho to forfeit his family's home, the home of his sister-in-law, and the home of his childhood friend to become a fugitive fleeing the country.⁵

II. 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.

⁴ Dr. Ho's Motion to Dismiss (ECF No. 36) provides a detailed explanation of why these scientists' intuition was correct, and explains why Dr. Ho's alleged conduct violated no laws.

⁵ The government's argument for detention assumes, without explanation, that Dr. Ho would somehow be capable of slipping his electronic monitoring bracelet, evading the Marshall's service, and fleeing the country without the benefit of a passport. To rebut the unfounded suspicions and innuendo offered by the government, Dr. Ho has provided a total of six letters from friends and family attesting to his integrity. *See* Exs. 11–16.

Dated: August 10, 2016

Respectfully submitted,

/s/ Peter Zeidenberg
Peter Zeidenberg (*pro hac vice*)
ARENT FOX LLP
1717 K Street, NW
Washington, DC 20006
Tel: (202) 857-6000
Fax: (202) 857-6395
Email: peter.Zeidenberg@arentfox.com

Wade V. Davies [BPR # 016052]
Ritchie, Dillard, Davies & Johnson, P.C.
606 West Main Street
Suite 300
Knoxville, TN 37902
Tel: 865-637-0661
Fax: 865-524-4623
Email: wdavies@rddjlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2016, I caused true and correct copies of the foregoing document and Exhibits 1–16 to be filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to the attorneys of record in this matter.

/s/ Peter Zeidenberg _____
Peter Zeidenberg