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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>CHI MAK, et al.,<br><br>Defendants. | SA CR No. 05-293(B)-CJC<br><br>GOVERNMENT'S NOTICE OF MOTION AND MOTION IN LIMINE RE 22 C.F.R. § 126.1 TO EXCLUDE EVIDENCE AT TRIAL<br><br>Date: March 19, 2007<br>Time: 9:30 a.m. |

The government files this motion in limine to exclude from the trial of this matter all of the following:

(1) any challenge, whether by evidence or argument, to the Secretary of State's determination that the three documents at issue in this case constitute "technical data" under the International Traffic in Arms Regulations ("ITAR") and are thereby included on the United States Munitions List ("USML"); and

(2) any evidence or argument that defendant Chi Mak

("defendant") did not violate ITAR because the technical data contained in the documents he is accused of passing, or attempting to pass, to the People's Republic of China ("PRC") is in the "public domain" within the meaning of 22 C.F.R. § 125.1 or was not classified.

This motion is based on the attached memorandum of points and authorities, the pleadings, papers, and files of this case, and the argument of counsel at the hearing of this matter.

DATED: March 5, 2007

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Defendant is charged with, inter alia, conspiring to violate, attempting to violate, and violating the ITAR based on his passing, and attempting to pass, certain documents to the PRC that constitute technical data under the ITAR. In response to those charges, the government expects that defendant will argue that he did not violate the ITAR both because the information he passed, or attempted to pass, did not constitute technical data subject to export control and, even if it did, that the information was in the "public domain" and, therefore, fell within an exception to ITAR under 22 C.F.R. § 125.1. As discussed below, the Secretary of State's certification that specific information is technical data subject to export control is non-reviewable under the express terms of the statute, and the public domain exception does not apply as a matter of law because the transfers involved China, which is subject to an arms embargo. The plain language of the ITAR excludes the public domain exception from exports to countries that are subject of arms embargo by the United States. As such, all evidence and argument challenging the certifications or asserting a public domain defense should be excluded.

STATEMENT OF RELEVANT FACTS

The indictment charges that defendant conspired to transfer, attempted to transfer, and actually transferred to the PRC ITAR-restricted "technical data." Specifically, the charges involve the documents entitled "5 MW High Efficiency Quiet Electric Drive Demonstrator" (the "QED document"), "Solid-State Power Switches

for Source Transfer and Load Protective Functions" (the "Solid State document"), and "Proposal, DD(X) Zonal Power, Revision A (RFP DD(X) 00017)" (the "DD(X) document").[1]

The United States Department of State Office of Defense Trade Controls[2] ("ODTC") has certified that each of the three documents constitute "defense articles" as that term is defined in 22 U.S.C. §§ 2778(b)(2), (c) and 22 C.F.R. § 127.1(a)(3) because each document contains technical data within the meaning of the ITAR. While it is clear that ITAR regulates the export of technical data, 22 C.F.R. § 125.1, and that the documents noted above contain information meeting the definition of technical data, the relevant section also provides that "[i]nformation which is in the public domain is not subject to the controls of this subchapter." As such, "technical data" normally does not include information in the "public domain." See 22 C.F.R. §§ 120.10(5) and 120.11.

ITAR defines "public domain" in two separate sections. First, information falls in the public domain if "approved for public release . . . by the cognizant U.S. Government department or agency or Office of Freedom of Information." 22 C.F.R.

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[1] The State Department also certified the following additional documents: "Ship Service Inverter Module (14E0-TPR005-2030)," "DC Load Center (14E0-TPR007-2030)," "Ship Service Converter Module (14E0-TPR006-2030)," "Quiet Electric Drive (QED) Preliminary Design Report" dated September 9, 2005, "QED Conceptual Design Report" dated September 2, 2005.

[2] Under the Arms Export Control Act and the ITAR, the President is vested with authority to establish the USML. That authority has been delegated to the Secretary of State. Within the Department of State, the ODTC is tasked with the formal process of creating the USML and certifying that a particular item is listed on the USML.

§ 125.4(b)(13). Second, the regulations provide that "public domain" means:

> [I]nformation which is published and which is generally accessible or available to the public:
>
> (1) Through sales at newsstands and bookstores;
>
> (2) Through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;
>
> (3) Through second class mailing privileges granted by the U.S. Government;
>
> (4) At libraries open to the public or from which the public can obtain documents;
>
> (5) Through patents available at any patent office;
>
> (6) Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States;
>
> (7) Through public release (i.e., unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. government department or agency[;]
>
> (8) Through fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental research is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. University research will not be considered fundamental research if:
>
> (i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or
>
> (ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.

22 C.F.R. § 120.11(a)(1)-(8).

It is clear that the definition of public domain contained in § 125.4(b)(13) does not apply here because there is no evidence that the government approved release of any of the relevant documents. Nevertheless, if defendant's presentation at the bail hearing gives any indication of his likely course at trial, then a strong possibility exists that defendant will attempt to assert a public domain defense under § 120.11(a)(1)-(8). As discussed below, however, that defense is not available to defendant as a matter of law.

Finally, defendant has, in public statements as well as in court, made much of the fact that the ITAR-restricted documents were not marked "classified." This is a red herring in that it confuses ITAR –– relating to export restrictions –– with the classification system established by Executive Order. The two are distinct and it is possible that an unclassified document is ITAR restricted. Similarly, a classified document that is not ITAR restricted would still be restricted. Thus, while the classification of at least one of the documents is open to question, more importantly than that is the fact that ITAR applies to unclassified technical data as well. Section 125.2 provides specifically that "[a] license . . . is required for the export of unclassified technical data unless the export is exempt from the licensing requirements of this subchapter." 22 C.F.R. § 125.2.

## DISCUSSION

### I. THE COURT SHOULD PRECLUDE DEFENDANT'S CHALLENGE TO THE SECRETARY'S CERTIFICATIONS

#### A. The Certifications

The indictment charges defendant with attempting to pass two documents, one entitled "5 MW High Efficiency Quiet Electric Drive Demonstrator" and one entitled "Solid-State Power Switches for Source Transfer and Load Protective Functions." In addition, defendant is charged with passing a third document entitled "Proposal, DD(X) Zonal Power, Revision A (RFP DD(X) 00017)." The Secretary of State has certified that each of these documents fall within Category VI(g) of the USML. USML Category VI(g) covers "[t]echnical data (as defined in § 120.10) and defense services (as defined in § 120.9) directly related to the defense articles enumerated in paragraphs (a) through (f) of this category." Paragraphs (a) through (f), in turn, cover submarines generally and naval nuclear propulsion technology in particular, which is the type of information involved here.[3]

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[3] The USML category in which the State Department placed the documents involved in this case, covers the following:

> (a) Warships, amphibious warfare vessels, landing craft, mine warfare vessels, patrol vessels and any vessels specifically designed or modified for military purposes.
>
> (b) Patrol craft without armor, armament or mounting surfaces for weapon systems more significant than .50 caliber machine guns or equivalent and auxiliary vessels.
>
> (c) Turrets and gun mounts, arresting gear, special weapons systems, protective systems, submarine storage batteries, catapults, mine sweeping equipment (including mine countermeasures equipment deployed by aircraft) and other significant naval systems specifically designed or modified for combatant vessels.

B. Section 2778(h) expressly precludes a challenge to the Secretary's certifications

Section 2778(h) provides that "[t]he designation by the President (or by an official to whom the President's functions under subsection (a) of this section have been duly delegated), in regulations issued under this section, of items as defense articles or defense services for purposes of this section shall not be subject to judicial review." 22 U.S.C. § 2778(h). This prohibition applies not only to the Secretary's decision to include category VII(g) on the USML but also to her determination that the particular documents at issue here fall within that category.

In Karn v. United States Dep't of State, 925 F. Supp. 1 (D.D.C. 1996), the plaintiff exporter brought a case against the Department of State challenging the designation of a computer

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(d) Harbor entrance detection devices (magnetic, pressure, and acoustic) and controls therefor.

(e) Naval nuclear propulsion plants, their land prototypes, and special facilities for their construction, support, and maintenance. This includes any machinery, device, component, or equipment specifically developed, designed or modified for use in such plants or facilities. (See § 123.20)

(f) All specifically designed or modified components, parts, accessories, attachments, and associated equipment for the articles in paragraphs (a) through (e) of this category.

(g) Technical data (as defined in § 120.10) and defense services (as defined in § 120.9) directly related to the defense articles enumerated in paragraphs (a) through (f) of this category. (See § 125.4 for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

diskette containing cryptographic software as a defense article under the Arms Export Control Act ("AECA") subject to export licensing. The plaintiff argued that § 2778(h) should be construed narrowly "to cover only the act of listing items on the [USML] contained in Part 121 of ITAR and not the determination whether an item, in this case the plaintiff's diskette, is actually covered by the language of the [USML] pursuant to the definitional provisions contained in Part 120 of ITAR." Id. at 5-6. The court rejected the plaintiff's reading of the statute, calling it "strained and unreasonable," and held that subsection (h) applies not only to the act of listing the items on the USML, but also to the determination of whether an item is actually covered by the USML. Id.

In United States v. Martinez, 904 F.2d 601 (11th Cir. 1990), defendants were charged with violating the AECA by exporting a device called a "Videocpher II," which was designed to permit reception of television programming via satellite through descrambling of pay television signals. Id. at 601. The defendants challenged the certification of the device as a defense article under Category XIII(b) applying to cryptographic devices and software. The court rejected their challenge as a matter of law under the political question doctrine. The court explained that "[t]he question whether a particular item should have been placed on the Munitions List possesses nearly every trait that the Supreme Court has enumerated traditionally renders a questions 'political.'" Id. at 602 (citing Baker v. Carr, 369

U.S. 186, 217 (1962)).[4] And although the court did not apply section 2778(h), which had then only recently been enacted, it noted that "the amendment supports the judicially developed doctrine here applied." Id. at 603.

Although the Ninth Circuit has not addressed judicial review of items placed on the USML specifically, it has held that designation of items on the Commodity Control List ("CCL") is not subject to judicial review. In United States v. Mandel, 914 F.2d 1215, 1223 (9th Cir. 1990), the defendants sought discovery in the district court aimed at challenging the Department of Commerce's decision to include the exported item on the CCL. The district court had granted the request concluding, "defendants in a criminal case are entitled to challenge the Secretary's decision to place specific items on the list, and that limited, 'basis in fact' review of the Secretary's decision does not implicate considerations giving rise to a political question." Id. at 1216. Relying on the decision in United States v. Spawr Optical Research, Inc., 685 F.2d 1076 (9th Cir. 1982), the court rejected the notion that "the Secretary's decision can be subjected to judicial review, or that the basis for his decision

[4] In Baker v. Carr, 369 U.S. 186, 217 (1962) the Court identified six independent factors indicative of a political question: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question; implicating any one of these factors renders a question political.

is material to the defense of an [Export Administration Act] violation[.]" Id.

Finally, in Spawr the defendants collaterally challenged their convictions for exporting laser mirrors to the Soviet Union without a license. The defendants did not "challenge the proposition that, in a criminal trial, the Secretary's decision that particular items should be included on the CCL was not reviewable, but rather challenged the court's deferring to the Secretary's determination that specific items exported by the Spawrs were included on the CCL." Mandel, 914 F.2d at 1220. Rejecting this claim, the Spawr court held that

> In this context, we cannot construe the 1969 Act or its regulations to accommodate judicial factfinding on intricate licensing questions. Congress has designated the Secretary as the coordinating official in the area of export administration. It would severely undermine the Secretary's authority if judges and juries in individual criminal proceedings were permitted to reverse licensing determinations. And it would convert the judicial system into a policy-making forum, one in which the judiciary possess significantly less expertise and resources than the Secretary. Congress did not intend this chaotic and potentially dangerous result.
>
> [T]he Secretary has determined that the Spawrs' mirrors could not be exported without an export license. Right or wrong, the trial court must accept this determination as a matter of law. . . . Because the licensing issue was not an element of the charged offenses, the Spawrs are not denied due process or the right to a jury trial by deference to the Secretary's determination.

Id. at 1473 (emphasis added).

The statutory structure of the Export Administration Act ("EAA") and the AECA are analogous. The EAA and AECA are both part of the larger United States export scheme and possess an analogous structural scheme. See Karn, 925 F. Supp. at 7. The

AECA provides the Executive Branch with the power to impose export controls on defense articles, for the purpose of world peace, security, and foreign policy, a power the President has delegated to the Secretary of State. Similarly, the EAA provides the Secretary of Commerce with the power to impose export controls on certain commodities, for the purpose of national security, foreign policy, or domestic short supply. See 50 U.S.C. App. §§2402(2), (10), and 2404-06. The AECA export controls are implemented through licensing requirements. 22 U.S.C. § 2778. Similarly, the EAA export controls are implemented through licensing requirements. 50 U.S.C. App. § 2403(a).

Pursuant to the AECA, the Secretary of State designates certain items as defense articles. These articles make up the USML, and are subject to regulation under ITAR. Id. at 4; 22 C.F.R. §120.1-127.1. Similarly, pursuant to the EAA, the Secretary of Commerce designates those "items not regulated by ITAR, but which have both commercial and potential military application -- as dual use items." These items make up the Controlled Commodities List ("CCL"), and are subject to regulation under the Export Administration Regulations ("EAR"). 15 C.F.R. §§ 768-99, 50 App. U.S.C. §§2401-20. Both ITAR and EAR contain descriptions and procedures for placement of the items on the USML and CCL, respectively. See 22 C.F.R. part 120, 121.1 and 15 C.F.R. part 799. Both the AECA and the EAA contain a judicial review prohibition. 50 App. U.S.C. §2412(a) and 22 App. U.S.C. §2778(h). Accordingly, Spawr provides compelling

authority that the Secretary of State's certification that an item is technical data is not subject to review or challenge.

In addition to Spawr, there is at least one other analogous area that militates in favor of the holding in Karn. In the relatively recent case of United States v. Afshari, 426 F.3d 1150 (9th Cir. 2005), the defendant was charged with providing material support to a designated foreign terrorist organization ("FTO") in violation of 18 U.S.C. § 2339B(a)(1). The FTO, Mujahedin-e Khalq ("MEK"), was designated as an FTO in 1997 by the State Department. The defendants argued that § 2339B "denies them their constitutional rights because it prohibits them from collaterally attacking the designation of a foreign terrorist organization." Id. at 1155. Following the lead of the Fourth Circuit in United States v. Hammond, 381 F.3d 316 (4th Cir. 2004), the court rejected this argument. In doing so, the court relied on 8 U.S.C. § 1189(a)(8) -- a provision that closely resembles § 2778(h) -- which provides:

> If a designation . . . has become effective . . . a defendant in a criminal action or an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation or redesignation as a defense or an objection at any trial or hearing.

Id. As the court put it, this section "prevents [defendants] from contending, in defense of the charges against them . . ., that the designated terrorist organization is not really terrorist at all." Id. The court continued,

> Congress clearly chose to delegate policymaking authority to the President and Department of State with respect to designation of terrorist organizations, and to keep such policymaking authority out of the hands of the United States Attorneys and juries. Under § 2339B, if defendants provide material support for an

> organization that has been designated a terrorist organization under § 1189, they commit the crime, and it does not matter whether the designation is correct or not.

Id. at 1155-56.

The decision to designate an organization as a FTO is closely analogous to the decision to designate a particular item on the USML. As such, the Afshari decision provides further evidence that the Ninth Circuit, if faced with the issue presented under § 2778(h), would defer to Congressional intent and place the decision of whether a particular item is on the USML beyond the hands of the court, United States Attorney, and jury, as the court did in Karn. See also United States v. Gregg, 829 F.2d 1430, 1437 (8th Cir. 1987) (executive branch not courts have final word on which items should be restricted under CCL).

Both the EAA and the AECA are part of a unified export scheme. The nearly identical structure and similar purpose of these statutes suggest that the same considerations regarding judicial review of the EAA would apply to the AECA. The Mandel court noted the desire not to undermine the Secretary of Commerce's authority regarding export administration because the Congress delegated this power to him. If the court were permitted to review the Secretary's determinations, it could potentially severely undermine this authority. Similarly, Congress delegated to the Secretary of State the power to regulate exportation of defense articles. If the court were permitted to review the Secretary of State's determinations regarding such exportation, his authority could as well be severely undermined.

The Mandel court also stated the desire to avoid policy making. The court stated that this was not Congress' intent, nor does the judiciary have the resources to determine policy relating to the complex issue of export licensing. As evidenced by the text of the AECA, it was not Congress' intent for the judiciary to determine policy relating to export of defense articles either. Further, the issue of export licensing regarding defense articles is similarly complex, suggesting that the judiciary lacks the resources needed to determine policy relating to ths issue as well. Lastly, Mandel prohibited judicial review of the CCL determinations because the nature of export control has a significant impact on national security.

The Court should read § 2778(h) in keeping with the decisions in Karn, Mandel, Spawr, and Afshari. Doing so, it is clear that the certifications at issue in the ITAR counts here -- for the Solid State document, the DD(X) document, and the 5 MW document -- are beyond the hands of the court and jury. As such, any evidence or argument from the defense that seeks to challenge those certifications or to explore the process of certification would be entirely irrelevant. Moreover, allowing such evidence and argument would be unduly confusing for the jury and should be excluded on that basis as well.

## II. THE COURT SHOULD EXCLUDE EVIDENCE AND ARGUMENT THAT THE INFORMATION IN ITAR CERTIFIED DOCUMENTS IS IN THE PUBLIC DOMAIN

As noted above, 22 C.F.R. § 125.1 creates an exception to ITAR for material in the "public domain," as that term is defined in the regulations. The material at issue here falls outside the regulation's definition of public domain, which is expressly

limited to the narrow means of public dissemination enumerated in the regulations. None of those enumerated means of dissemination are at play here. But more fundamentally, 22 C.F.R. § 126.1 excludes the public domain exception for exports to China:

> It is the policy of the United States to deny licenses and other approvals for exports and imports of defense articles and defense services, destined for or originating in certain countries. This policy applies to Belarus, Cuba, Iran, North Korea, Syria, Venezuela and Vietnam. This policy also applies to countries with respect to which the United States maintains an arms embargo (e.g., Burma, China, Liberia, Somalia, and Sudan) or whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States. . . . The exemptions provided in the regulations in this subchapter, except § 123.17 of this subchapter, do not apply with respect to articles originating in or for export to any proscribed countries, areas, or persons in this § 126.1.

These regulations make plain that the exemption in ITAR, including the public domain exception, do not apply to exports to the PRC because the PRC is subject to an arms embargo.

In response to the Tiananmen Square protests and subsequent government reprisals, on June 5, 1989 then-President George H. W. Bush announced, "I am ordering the following actions: suspension of all government-to-government sales and commercial exports of weapons[.]" Pres. News Conf., June 5, 1989 (reprinted at http://www.presidency.ucsb.edu/ws/index.php?pid=17103). Shortly thereafter, on June 6, 1989 the Department of State published notice that "all licenses and approvals to export defense articles and defense services from the United States to the People's Republic of China pursuant to section 38 of the Arms Export Control Act are suspended effectively immediately." 54 Fed. Reg. No. 103 (6/7/1989). Then, on February 16, 1990,

Congress passed a law providing that "issuance of licenses under section 38 of the Arms Export Control Act for the export to the People's Republic of China of any defense article on the United States Munitions List, including helicopters and helicopter parts, shall continue to be suspended, subject to subparagraph (B), unless the President makes a report under subsection (b)(1) or (2) of this section." PL 101-246 (HR 3792), Sec. 902(a)(3)(A) (Feb. 16, 1990).

This arms embargo was subsequently included in the listing of embargoed countries in 22 C.F.R. § 126.1. See B-West Imports Inc. v. U.S., 75 F.3d 633 (Fed. Cir. 1996) ("[a]lthough China's status on the proscribed list has varied through the years, it has been explicitly listed since 1993 as one of the countries with which the United States maintains an arms embargo"); United States v. Hsu, 364 F.3d 192 (4th Cir. 2004) (citing 22 C.F.R. § 126.1(a) court noted that "[b]ecause of the United States' arms embargo with the People's Republic of China, the State Department will not approve a license to export any Munitions List items . . . to that country").

In United States v. Posey, 864 F.2d 1487, 1491 (9th Cir. 1989), defendant was convicted of transferring non-classified material to South Africa in violation of the AECA and the Comprehensive Anti-Apartheid Act (CAAA). Defendant argued that under 22 C.F.R. § 125.1 the trial court should have instructed the jury that "it could not convict him if the technical and design handbooks he exported were in the 'public domain.'" Id. at 1492. The court rejected the argument, first holding that proof the items were not in the public domain was not an element

of a conspiracy. The court also rejected Posey's public domain defense as to the CAAA conviction as well. The court held that even if the information was in the public domain, under § 126.1 the public domain exception under § 125.1 did not apply to South Africa.[5] Finally, the court held that the government's power to restrict transfer of information "was not affected by the domestic availability of the regulated data [and that] [g]iven the unquestionable legitimacy of the national interest in restricting the dissemination of military information, the claim of public availability in the United States is not a defense recognized by the Constitution." Id. at 1496.

The Posey decision and § 126.1 precludes evidence or argument that information in the relevant documents or the documents themselves are in the public domain.

III. THE COURT SHOULD EXCLUDE EVIDENCE THAT ITAR-CERTIFIED DOCUMENTS WERE UNCLASSIFIED

The government also anticipates that defendant will argue that ITAR-certified documents were not classified. Even unclassified information, however, if it constitutes a defense article would be barred from transfer to China under ITAR and the terms of the arms embargo. See Colonial Trading Corp. v. Department of Navy, 735 F. Supp. 429 (D.D.C. 1990) (upholding Navy's denial of FOIA request where even though blueprints sought unclassified they were still prohibited from transfer under ITAR); United States v. Edler Industries, Inc., 579 F.2d 516 (9th

[5] The court also rejected the defendant's argument that the trial court erred in failing to provide jury instructions that the jury could not convict him if the exported items were available under the Freedom of Information Act or if the exported items were unclassified. Posey, 864 F.2d at 1493.

Cir. 1978) ("[e]xport controls regulate the transmission of unclassified information by mail, hand carriage, participation in foreign symposia, and domestic plant visits"); 22 C.F.R. § 125.2 (requiring license for export of unclassified technical data).

By way of background, Executive Order 12958 ("the Order") signed by President Clinton on April 17, 1995 creates a uniform system of classifying, safeguarding, and declassifying national security information. The Order defines "national security" as "the national defense or foreign relations of the United States" and "information" as "any knowledge that can be communicated or documentary material . . . that is owned by, produced by or for, or is under the control of the United States Government[.]" Information falling into one of the prescribed categories –– such as, "military plans, weapons systems, or operations" or "scientific, technological, or economic matters relating to the national security" –– can be classified in one of three ways, "Top Secret," "Secret," or "Confidential."

In addition to the three classifications contained in the Order, there are also restrictions on the disclosure of what is referred to as "sensitive unclassified" information, which falls into two categories: (1) Naval Nuclear Propulsion Information ("NNPI") and (2) Unclassified Controlled Nuclear Information ("UCNI"). NNPI is defined and protected under 10 U.S.C. § 130 and includes information about shipboard and prototype naval nuclear propulsion plants, technical requirements pertaining to how those plants are designed, analyzed, and operated, and standards and practices that apply to nuclear powered ships and

Navy support facilities. The vast majority of the information involved in this case is unclassified NNPI.

Unclassified NNPI can also be marked with what is known as a "caveat." For example, the Naval Reactors division, which is a joint program run under the auspices of the Department of Defense and the Department of Energy, is entitled to mark documents with the caveat "NOFORN" –– standing for "Not Releasable to Foreign Nationals" –– whether the document is classified under the Order or not. Information designated as NOFORN that involves NNPI is by covered by ITAR.

In this case, ITAR-restricted documents that defendant is accused of passing or attempting to pass were unclassified NNPI. As discussed above, however, the fact that the documents were not classified top secret or secret does not alter the prohibition on their transfer to China under the terms of ITAR and the arms embargo. As such, all evidence or argument relating to the classification of those documents would be irrelevant. Moreover, were defendant allowed to raise the issue the potential for confusing to the jury is high.[6] In order to avoid that potential confusion, the evidence and argument should be excluded at the outset.

## CONCLUSION

For all of the reasons discussed above, the government respectfully requests that the Court grant this motion in its entirety.

[6] It also bears noting that with respect to at least one of the ITAR-restricted documents that it should have been classified.

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