UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**11-CR-187 (EGS)**
v.	:	
XUN WANG,	:	
Defendant	:	

GOVERNMENT'S MOTION FOR REVOCATION OF MAGISTRATE JUDGE'S ORDER SETTING CONDITIONS OF RELEASE OR, IN THE ALTERNATIVE, AMENDMENT OF CONDITIONS OF RELEASE

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully moves this Court to revoke the Magistrate Judge's order setting conditions of release or, in the alternative, to amend the defendant's conditions of release. Further, the government respectfully requests that the defendant remain held without bond until such time as this Court resolves the government's motion for revocation and/or review of the Magistrate Judge's release order. In support thereof, the government states further as follows:

I. INTRODUCTION

The defendant, Xun Wang, has been charged in a four-count Indictment with the unlawful export of high performance epoxy coatings from the United States for use inside the containment area of a nuclear facility in Pakistan owned and/or operated by the Pakistan Atomic Energy Commission (PAEC), a restricted entity on the Department of Commerce's (DoC) Entity List. The Indictment is related to the December 21, 2010, corporate guilty plea of PPG Paints Trading (Shanghai) Co., Ltd. ("PPG Paints Trading"), to a four-count Information before United States District Judge Rosemary Collyer. Together, PPG Paints Trading and its parent company, PPG

Industries, Inc. ("PPG Industries"), paid $3,750,000 in criminal and administrative fines and over $32,000 in restitution. PPG Paints trading is also serving 5 years of corporate probation. The defendant**,** a former Managing Director of PPG Paints Trading, is the senior most PPG Paints Trading corporate executive responsible for the unlawful export scheme that was the subject matter of the PPG Paints Trading guilty plea and now the Indictment.

She is a serious flight risk. She faces substantial charges that implicate both the national security and the foreign policy of the United States. The export controls that the defendant chose to violate were enacted to combat the proliferation of nuclear weapons and technology by Pakistan, a country that has refused to sign the Nuclear Non-proliferation Treaty, and that it has been reported has proliferated its nuclear knowledge and technology to North Korea, Libya and Iran. Indeed, the DoC considered a license application for the specific exports at issue and denied it because the Department determined they "would be detrimental to the U.S. Nuclear Non-proliferation policy."

Further, as described below, the government's case against the defendant is very strong. As the senior most corporate executive responsible for the criminal conspiracy charged in the Indictment – and its primary architect – she faces the potential of a lengthy prison sentence. Further, she is a citizen of the PRC, a country from which the United States would be unable to secure her return if she flees. This is so because the United States has no extradition treaty with the PRC. Further, the defendant is a sophisticated business person with established contacts in the PRC. She is also wealthy. In or around April 2006, she sold a successful export company

she owned with her husband, Innovative Decoration International ("IDI"),[1] to PPG Industries for over $17 million. In 2009, she and her husband purchased property in California for over $2.3 million. Counsel for the defense has informed the government that the property is not encumbered by any mortgage. Thus, the defendant has the means necessary to finance her flight from the United States or circumvent whatever conditions this Court may place on her release, including purchasing her freedom by paying whatever bond this Court might set for her release.

Most importantly, the defendant has previously expressed her intent to remain outside the reach of the United States if her export diversion scheme were to be discovered by U.S. authorities. In June 2006, when the criminal conspiracy that is the subject matter of the Indictment was on-going, the defendant told a cooperating witness that if the United States government discovered the scheme it would not be a problem because, as Chinese citizens, the ***"U.S. government can't really touch us . . . The most that will ever happen to me is that I will not travel to the U.S. anymore. I don't need to travel to the U.S. I don't care. It's okay.***" The defendant now knows that she is, in fact, the target of a federal Indictment. She thus has all the incentive she needs to make good on her own word and flee back to the safety of China if she is released by the Court. Again, because there is no extradition treaty, when she does so, neither this Court nor the United States will have the power to seek her return. For all of these reasons, the government respectfully requests that the Magistrate Judge's order granting the defendant's release be revoked and the defendant be held without bond pending trial.

[1] IDI's principal business was the export of PPG products from the United States for sale in China.

II. PROCEDURAL BACKGROUND AND THE MAGISTRATE JUDGE'S RELEASE ORDER

On June 16, 2011, the defendant was arrested on the sealed Indictment by the Atlanta Police Department at the Atlanta Hartsfield-Jackson International Airport. She was transferred into federal custody on June 20, 2011. At her initial appearance that same day the defendant conceded her identity and the government moved for the defendant to be held without bond pending trial because she is a serious risk of flight under 18 U.S.C. § 3142(f)(2)(a). The government filed a Memorandum in Support of Detention on June 22, 2011 in case no 1:11-mj-956 in the Northern District of Georgia [Docket # 11]. A detention hearing on the government's motion was held before United States Magistrate Judge King of the United States District Court for the Northern District of Georgia on June 23, 2011. Following the detention hearing, counsel for the defense represented to the undersigned that the defense communicated to the Magistrate Judge the defendant's desire to forego further review of the government's detention motion pending the defendant's removal to this District. On June 27, 2011, Magistrate Judge King ordered the defendant removed to this District and detained pending her removal. The Court's commitment and removal order also noted the defendant reserved her right to further review of the "bond/detention decision" following her removal to this District. See Exhibit 1.

The United States Marshal's Service transferred the defendant to this District on July 6, 2011. On July 6, 2011, the government filed with the Court a Supplemental Memorandum in Support of Detention moving again for the defendant's detention pending trial in this matter because she poses a serious risk of flight under section 3142(f)(2)(A) [Docket #7]. Magistrate Judge Robinson conducted a detention hearing on the government's motion on July 12 and 13,

2011. On July 12, 2011, the Magistrate Judge denied the government's request to hold the defendant without bond pending trial. On July 13, 2011, the Magistrate Judge ordered that the defendant be released on the following conditions:

- posting as bond a piece of property owned by the defendant and her husband in the Northern District of California that is worth, according to the defense, approximately $2 million;[2]
- placement in the Northern District of California's "home incarceration" program but permitting the defendant to leave her California property for medical appointments, visits to this District for court matters, religious services, and "children's activities;"[3]
- placement in the Northern District of California's location monitoring program; and
- surrender of defendant's passports and prohibition on applying for or possessing any passports.

Exhibit 2.

On July 14, 2011, following the detention hearing, undersigned counsel discussed this matter with Alan Lew, Supervisor, United States Pretrial Services Officer, for the Northern District of California. Mr. Lew indicated that because Magistrate Judge Robinson's release order permits the defendant to leave her California property for reasons other than legal and medical visits, the order, as written, does not actually place the defendant in the Northern District of

[2] The defense offered the California property as bond in the detention hearings before United States Magistrate Judge King and Robinson. It proffered that the property is unencumbered by a mortgage and is worth approximately $2 million.

[3] During the detention hearing on July 13, 2011, Magistrate Judge Robinson indicated the defendant would only be permitted to leave her property to attend events at her children's school near the property in the Northern District of California. The actual release order states that the defendant will be permitted to attend "children's activities." The term is not further defined in the order. See Exhibit 2.

California's "home incarceration" program but in its less restrictive "home detention" program. According to Mr. Lew, the more restrictive home incarceration program only permits a defendant to leave the property for legal and medical reasons. See Exhibit 3.

Further, at the detention hearing on July 13, 2011, Magistrate Judge Robinson ordered the defendant into the Northern District of California's Radio Frequency ("RF") electronic monitoring[4] program without Global Positioning System ("GPS") monitoring. At the hearing, both the parties and the Magistrate Judge had been informed that the Northern District of California could not accommodate both RF electronic monitoring and GPS monitoring under either the home incarceration or home detention programs. This was incorrect. On July 14, 2011, Mr. Lew informed undersigned counsel that the defendant could be monitored by a RF monitor when she was on her property and by a GPS tracker when she was off of it, thus permitting her location to be tracked when she left the property, in either the home incarceration or home detention programs. See Exhibit 4.

Because the defendant poses a serious risk of flight, and because the conditions set out in the Magistrate Judge's release order will not reasonably assure the defendant's reappearance in this matter, the government now appeals the Magistrate Judge's release order, seeks its revocation and/or amendment, and requests further that the defendant remain held without bond

[4] According to Mr. Lew, the RF monitoring system in the Northern District of California is provided by the BI Homeguard 200. It is a radio frequency system that continuously verifies the presence or absence of a defendant at a specific location. Exhibit XX. It is offered by the manufacturer as a means of "curfew monitoring." Id. It consists of two parts, a base receiver and an ankle bracelet to be worn by the defendant. Id. The receiver reports the defendant's presence or absence to the monitoring computer through the defendant's home phone line, which determines whether the defendant "is adhering or in violation of his or her authorized schedule." Id. Unlike a GPS system, if the defendant leaves the property, the RF monitoring system will not track the defendant's movements.

until such time as the detention issues in this matter are resolved by this Court.

III. LEGAL PRINCIPLES GOVERNING REQUESTS TO REVIEW MAGISTRATE JUDGE RELEASE ORDERS

This Court is the sole court with authority to review the Magistrate Judge's release order. Section 3145 of Title 18, United States Code, provides as follows:

> **(a) Review of a release order. –** If a person is ordered released by a magistrate judge, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court –
>
> > **(1)** the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release; . . . .
> >
> > The motion shall be determined promptly.

18 U.S.C. § 3145(a)(1) (emphasis added). This court's review of the Magistrate Judge's ruling is *de novo*. United States v. Saani, 557 F. Supp.2d 97, 98 (D.D.C. 2008).

When the government seeks to detain a defendant on the ground that he or she is a risk of flight pursuant to 18 U.S.C. § 3142(f)(2)(A), the government must demonstrate the defendant's flight risk by a preponderance of the evidence. United States v. Xulam, 84 F.3d 441, 442 (D.C. Cir. 1996). Moreover, at a detention hearing following indictment, the government may present evidence by way of a proffer. United States v. Smith, 79 F.3d 1208, 1209-10 (D.C. Cir. 1996).

Section 3142(g) lists four factors that guide a court's detention decision: (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. See 18 U.S.C. § 3142(g).

IV. FACTUAL PROFFER

A. Pakistani Chashma II Nuclear Facility

On June 7, 2011, a federal grand jury in the District of Columbia returned a four-count Indictment charging the defendant with Conspiracy in violation of 18 U.S.C. § 371 and three Unlawful Exports or Attempted Exports in violation of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706, for conspiring to export and reexport, and exporting and reexporting, high performance epoxy coatings from the United States for use inside the reactor containment area of the Chashma Nuclear Power Plant No. II (Chashma II) in Pakistan. See Indictment attached as Exhibit 6.[5] Chashma II is a nuclear reactor owned and/or operated by the PAEC, an entity on the DoC's Entity List. Id. at ¶¶ 12, 13; see also Title 15, Code of Federal Regulations, Supplement 4 to Part 744.

B. The Pakistan Atomic Energy Commission

The PAEC is the science and technology organization in Pakistan responsible for Pakistan's nuclear program including the development and operation of nuclear power plants in Pakistan. See Exhibit 6 at ¶¶ 11 & 12. In November 1998, following Pakistan's first successful detonation of a series of nuclear devices, thereby entering a nuclear arms race with India, the DoC's Bureau of Industry and Security added the PAEC, as well as its subordinate nuclear reactors and power plants, to the list of prohibited end users under the Export Administration Regulations (EAR). Id.; see also 63 Fed. Reg. 64,322 (1998). A United States manufacturer

[5] Pursuant to Federal Rule of Criminal Procedure 49.1, the government has redacted the defendant's personal identifiers from the exhibits filed with the Court in support of this detention memorandum. Unredacted copies of the government's exhibits have been provided to the defense.

seeking to export or reexport any items subject to the EAR to a restricted end-user such as the PAEC, or its nuclear power plants or reactors, including Chashma II, would first need to obtain a license from the DoC in the District of Columbia. See Exhibit 6 at ¶ 12.

C. The PPG Paints Trading Guilty Plea

PPG Paints Trading pled guilty on December 21, 2010, before United States District Court Judge Rosemary Collyer to conspiring to violate IEEPA and the EAR, as well as committing three Unlawful Exports in violation of IEEPA, arising from the same exports to Chashma II which are at issue here. Together, PPG Paints Trading and its parent company, PPG Industries, Inc., paid $3,750,000 in criminal and administrative fines and over $32,000 in restitution as a result of the violations. PPG Paints trading is also serving 5 years of corporate probation.

D. The Defendant: The Senior Most Culpable Executive at PPG Paints Trading

The government investigation revealed that the defendant was the senior most PPG Paints Trading executive responsible for the unlawful export scheme that was the subject matter of PPG Paints Trading's guilty plea and now the Indictment. At the time of the violations, the defendant was employed as a Managing Director of PPG Paints Trading (Shanghai) Co., Ltd. (PPG Paints Trading), a wholly-owned Chinese subsidiary of United States-based PPG Industries, Inc. See Exhibit 6 at ¶ 1. She was terminated by PPG in September 2007 for her involvement in the criminal actions that are the subject matter of the Indictment. She is a Chinese national and lawful permanent resident of the United States. Id.

E. PPG Industries' Level 1 Nuclear Coatings

According to the Indictment, PPG Industries manufactured a high-performance epoxy

paint system at one of its factories in Watertown, Connecticut, that was tested and certified for use inside the Level 1 containment area of a nuclear reactor (the "Level 1 Nuclear Coatings"). Id. at ¶ 9. The Level 1 containment area is the area immediately surrounding a nuclear reactor's core. The coatings were tested and certified as passing the "American Standard," i.e., testing standards established by the American National Standards Institute (ANSI) and the American Society for Testing and Materials (ASTM) that ensure that the coatings could withstand the harsh environment encountered inside the containment area of a reactor, especially during a loss of coolant accident like that which recently occurred in the Fukushima Daiichi plant in Japan. See Exhibit 7.

The Level 1 Nuclear Coatings were designated EAR 99 by the DoC, meaning they were items subject to the EAR, and thus subject to DoC's export control authority. See Exhibit 6 at ¶ 10.

F. The Chashma II Contract for PPG Industries' Level 1 Nuclear Coatings

In or around December 2005, PPG Paints Trading entered a contract with Company B[6] for the supply of PPG Level 1 Nuclear Coatings for application by Company B inside the containment area of the reactor at Chashma II (the "Chashma II Contract"). Id. at ¶ 15; Exhibit 8. The design specifications for the Chashma II reactor required Level 1 Nuclear Coatings that had passed the American Standard, i.e., that had passed ANSI and ASTM tests for Level 1 coatings. See Exhibit 8.

[6] Company B was a Chinese construction company specializing in nuclear engineering, municipal engineering, fire engineering, road engineering, and steel structure engineering. It was responsible for applying the Level 1 Nuclear Coatings at Chashma II in Pakistan. See Exhibit 6 at ¶ 5.

G. The Export License Application and its Denial by the DoC Because the Proposed Exports Were Detrimental to U.S. Nuclear Non-proliferation Policy

Because Chashma II was a PAEC nuclear facility, on or about January 20, 2006, PPG Industries, on the advice of counsel, submitted a license application to the DoC in the District of Columbia for authorization to export the Level 1 Nuclear Coatings for application at the PAEC nuclear power plant (the "Export License Application"). See Exhibit 6 at ¶ 16. On or about April 10, 2006, the Department of Commerce notified PPG of its intent to deny the Export License Application because the "proposed export poses an unacceptable risk of diversion to activities which raise concerns described under Section 744.2 of the Export Administration Regulations." Exhibit 9. Section 744.2 of the EAR describes nuclear activities of significant concern to the United States, i.e., nuclear explosive activities and unsafeguarded nuclear fuel cycle activities including facilities for the fabrication of nuclear reactor fuel containing plutonium. 15 C.F.R. § 744.2 (1) and (3).

Following an administrative appeal of that intent to deny the Export License Application, on or about June 8, 2006, PPG Industries was informed that the Export License Application would be denied by the DoC. See Exhibit 6 at ¶ 17. The license denial was issued by the DoC on June 14, 2006. The following explanation was provided for the denial: "The Department of Commerce has concluded that this export would be detrimental to the U.S. Nuclear Non-proliferation policy," and incorporated by reference the reasons provided in the April 10, 2006, intent to deny letter, i.e., the "proposed export poses an unacceptable risk of diversion to activities which raise concerns described under Section 744.2 of the Export Administration Regulations." Exhibit 10; see also Exhibit 9.

H. Defendant Is Informed of the Export License Denial and Instructed to Comply with United States Export Law

On or about June 9, 2006, PPG Industries notified the defendant that the Export License Application had been denied and that she "must abide by the ruling" of the DoC. See Exhibit 6 at ¶ 18; see also Exhibit 11.[7] PPG Industries further instructed the defendant that Company B be advised as soon as possible that the Export License Application had been denied. Id. In response, on or about June 9, 2006, other PPG Paints Trading representatives informed PPG Industries by e-mail that Company B had been informed of the license denial and that efforts were being made to help Company B select a supplier of Level 1 Nuclear Coatings other than PPG Industries. See Exhibit 6 at ¶ 19; see also Exhibit 11. The defendant was copied on this e-mail. See Exhibit 11. In another e-mail on June 9, 2006, the defendant indicated that Company B had requested a written notification of cancellation of the Chashma II Contract from PPG Paints Trading. See Exhibit 12. According to the defendant, "such a statement would serve a purpose of officially notifying all the construction parties involved to stop waiting [sic] the arrival of our products and take other alternatives. We think this request is reasonable and legitament [sic]." Id. That written notification was drafted at the direction of the defendant and circulated within PPG Industries on June 11, 2006. Id.

I. The Defendant's Conspiracy to Evade U.S. Nuclear Non-proliferation Export Controls

The defendant also indicated in her June 9, 2006 e-mail that she and other PPG Paints

[7] At no time did PPG Industries, PPG Paints Trading, the defendant, or anyone else, receive or possess a license or authorization from the DoC to export and reexport the Level 1 Nuclear Coatings from the United States to Pakistan for application inside the reactor's containment area at Chashma II. Exhibit 6 at ¶ 20.

Trading representatives would meet face-to-face with an official of Company B on June 15, 2006, in China. Id. On June 16, 2006, the defendant sent another e-mail to PPG Industries' representatives informing them that the June 15th meeting with the Company B representatives had occurred. See Exhibit 13. In her e-mail, the defendant stated it was explained to Company B's representatives at the meeting that:

> the export license applied by PPG was denied by the US government, although PPG has tried very hard to get the license. Even though we really want to do business with [Company B] for this project, but as a US company, we have to follow the US government's rule and regulations.
>
> They told us that if they can not have the paint delivered to the job site on time, they will have to stop the pretreatment of the steel lining that is on going now. The project will thus be delayed. There will be severe consequences as stipulated in their contract with the relevant party of Pakistan.
>
> We suggested them to look into our competitor's products. They are actually doing that. They have a few candidates, including some domestic companies. We expressed our willingness to help them to make the transition easier.
>
> At the end, [Company B] people seemed to understand that we have made good effort in getting them the products and is doing our best in helping them to switch to some one else's products. But still, they made it very clear that if they cannot meet the completion date of the project due to the delay of the paint supply, they will reserve their legal right to sue PPG Shanghai Trading for loss and damage, since they believe that the delivery of the products was guaranteed by the contract between [Company B] and PPG Shanghai Trading.

Id.

According to a cooperating witness (CW-1),[8] the defendant's e-mail told only half the story about what transpired at the June 15th meeting. According to CW-1, the defendant did tell Company B's representatives at that meeting that the Level 1 Nuclear Coatings could not be

[8] CW-1 was a junior participant in the conspiracy who has received letter immunity from the government concerning the unlawful conduct described in the Indictment.

supplied under the Chashma II Contract because PPG's Export License Application had been denied and U.S. law would not allow it. In response, Company B's representatives indicated that, if a competitor's product would have to be used it would be very expensive because PPG's already-applied base coat of epoxy paint would have to be scraped-off the walls inside the reactor. Company B representatives then asked, "Is there anything else we can do?" According to CW-1, the defendant then suggested the possibility of a diversionary scheme to Company B. The defendant first told the Company B representatives about the American military policy of "don't ask, don't tell," explaining that it meant that if you are a homosexual soldier in the American military and disclose that information to the military, then you cannot be in the military any more. But if a homosexual U.S. soldier does not disclose that information to the military, then he or she can stay in the military. According to CW-1, the defendant then advised Company B's representatives to "pretend this meeting never happened. We never made this trip to visit you. What you need to do is to work with one-off distributors to ask for this product under a different name." In return, the defendant stated that PPG Paints Trading would "pretend that we don't know that you try to pretty much evade the license and do a workaround . . . and we will not say anything to anybody in PPG." Company B's representatives agreed with the defendant's proposal.

J. The Defendant's Expressed Intent to Remain Outside the Reach of the United States if Her Export Diversion Scheme Were Discovered by U.S. Authorities

According to CW-1, in the car ride back from the meeting with Company B, another PPG Paints Trading representative suggested to the defendant that they use a Chinese distributor, Company A identified in the Indictment, see Exhibit 6 at ¶ 4, as the third-party go-between who

would receive the Level 1 Nuclear Coatings from PPG Paints Trading and ship them to Company B at Chashma II in Pakistan. The PPG Paints Trading employee further suggested that they falsely tell PPG Industries that the shipments of Level 1 Nuclear Coatings were for use at the Dalian Shi Zi Kou nuclear reactor under construction in Dalian, China, which did not require a U.S. export license for the receipt of U.S. goods. In this way, the Dalian reactor would serve as a "cover" for the diversionary scheme. The defendant agreed with both suggestions. It was then asked, "What if the U.S. government finds out?" The defendant replied, as Chinese citizens, the ***"U.S. government can't really touch us . . . The most that will ever happen to me is that I will not travel to the U.S. anymore. I don't need to travel to the U.S. I don't care. It's okay."***

K. The Defendant Responds with Derision to Warnings Regarding Criminal Sanctions for U.S. Export Controls Violations

At a meeting a couple of days after the June 15, 2006, meeting with Company B, CW-1 provided the defendant with written materials from a U.S. export controls training the cooperating witness had attended at PPG Industries on May 31, 2006. In the conversation, the defendant was told by CW-1, with respect to the diversionary export scheme, that there "could be severe consequences for the company as well as for individuals involved in the company." Further, CW-1 highlighted for the defendant articles about individuals who had been prosecuted for violating U.S. export controls. The defendant responded with derision, asking CW-1, "are you scared?," and indicated that CW-1 was acting like a coward.

L. The July, September, and December Shipments Pursuant to the Diversionary Scheme

During its investigation, the government collected shipping records from PPG Industries which corroborate three exports of Level 1 Nuclear Coatings under the diversionary export

scheme, namely, 240 gallons exported from the United States between on or about June 21, 2006, through on or about December 18, 2006 (the "First Shipment"), 120 gallons exported from the United States on or about August 7, 2006, through on or about December 18, 2006 (the "Second Shipment"), and 265 gallons exported from the United States on or about October 23, 2006, through in or around March 2007 (the "Third Shipment"). See Exhibit 6 at ¶¶ 27(5) - 27(29), 28 - 33. The exports comprise many of the overt acts for the Conspiracy count of the Indictment (i.e., Count I), and the three substantive IEEPA violations (i.e., Counts II-IV). See id. at ¶¶ 27(5) - 27(29), 28 - 33.

To conceal that the true end-user for each of these shipments was the Chashma II reactor, and to evade United States export controls, the defendant and other co-conspirators, falsely stated, or caused to be stated, that the end-user for the shipments was the Dalian Shi Zi Kou nuclear reactor in Dalian, China, the export of Level 1 Nuclear Coatings to which would not require an export license to. See id. at ¶ 26e. Those false statements, in turn, caused PPG Industries, or its agent, in the United States to fail to submit Shipper's Export Declarations ("SEDs") shipments or to submit an SED containing materially false information to the United States government which impeded its authority and ability to regulate United States exports to restricted entities on the Entity List. See id. at ¶ ¶ 26f. 21-22. According to CW-1, the true shipment path for the First and Second shipments was from:

- PPG Industries/Watertown, Connecticut, to
- PPG Paints Trading, Shanghai, China, to
- Company A, Shanghai, China, to
- Company B/Chashma II in Pakistan

The Third Shipment made it only as far as PPG Paints Trading in Shanghai, China, before it was stopped by PPG Industries, who discovered the diversionary export scheme in January 2007 when CW-1 voluntarily, and without the advice of her counsel, came forward and exposed the diversionary scheme to counsel for PPG Industries in January 2007.

K. The February 6, 2007 Interview of the Defendant During PPG Industries' Internal Investigation

Following the discovery of the diversionary export scheme, the defendant was interviewed by attorneys for PPG Industries during an internal investigation. On February 6, 2007, the defendant made the following statements, among others, during her interview with PPG Industries' counsel:

- In June or July 2006, the defendant visited Company B and "told them PPG could not ship paint to them because of U.S. law" and suggested that "they could use PPG's French competitor, Sigma Kalon, to supply the paint."

- In response, at the meeting Company B was "very upset," refused to accept another seller, and asserted that "PPG had to honor the contract from December 2005 notwithstanding U.S. legal restrictions."

- The defendant claimed that she and other PPG Paints Trading representatives at the meeting were "overwhelmed by the customer [i.e., Company B]."

- The defendant was also "concerned about preserving the relationship with the customer, who had the potential for bringing about more business."

- According to the defendant, PPG "was in even bigger trouble" because Company B was government owned,[9] and, "if PPG did not honor the contract, they would have serious problems."

[9] By "government owned," the defendant was referring to Company B being owned or controlled by the People's Republic of China (PRC).

- Accordingly, "when the customer refused to go to another seller, [the defendant] suggested that if they did not know where the paint was going to end up it was okay to sell the paint."

- At this point during her interview with PPG's counsel, the defendant "referred to the benefits of the 'don't ask, don't tell' policy."

- The defendant stated that she did not "suggest Dalian or [Company A], but she believed that someone would confess to having suggested it."

- Immediately thereafter, the defendant identified another PPG Paints Trading employee present at the Company B meeting who "suggested that [Company B] could use . . . [Company A] as a distributor to get the paint."

- In response, according to the defendant, Company B "said no to using Sigma Kalon but were okay with using . . . [Company A] as a distributor because PPG would still be the supplier."

- Company B "wanted to know exactly how they could get PPG paint through [Company A] and PPG told them how to do it."

- According to the defendant, only the PPG Paints Trading employees who were at the Company B meeting knew what was going on. For herself, however, the defendant asserted that she "intentionally did not want to know what was going on."

- The defendant stated that "[e]very day there were many things going on, so [she] did not really think about shipments to [Company B]," but "she did suspect that the paint must have been shipped to [Company B] because they never got any complaints from [Company B]."

- The defendant was "85% certain" that "the paint in the [Shanghai] warehouse [i.e., the December Shipment] was meant for Pakistan."

- "With the [December Shipment] being stopped, [the defendant] believed that [Company B] was going to be very upset about not getting the paint and would sue PPG."

- The defendant "admitted that she was more senior than [another PPG Paints Trading employee at the Company B meeting] and was ultimately responsible for the paint being shipped to Pakistan through [Company A]."

L. The Defendant's September 20, 2007 Post-Termination Letter

On September 13, 2007, PPG Industries terminated the defendant and CW-1 for "violations of PPG's Global Code of Ethics." Following the defendant's termination, on September 20, 2007, she sent a letter to PPG Industries which stated:

> I am writing to you regarding PPG's decision in terminating my employment with PPG on Sept. 13, 2007. I am not trying to get my job back. However, I do want to set the record straight. I believe I did nothing wrong in respect of export control matters. The cause cited in your decision of my termination is simply false.
>
> I agree that this export deal should not have happened at the time when PPG signed the contract with the customer. I want to emphasize that I was not even with PPG when the contract was signed, or even the first batch of products was shipped. Once you signed the contract with a customer, I believe it is not right to breach a contract binding by the Chinese law between two Chinese companies or we would be violating Chinese contract law. I felt strongly that the actions I took in this matter were all legal and ethically sound. Between violating U.S. government regulation or Chinese law, there was simply no right decision for me to make. I tried to negotiate with the customer to persuade them [to] back out of the contract. They were very angry and would sue us if we didn't fulfill the contract. As a Chinese registered company, we are obligated to honor the contract.
>
> I hope that PPG will put a better system for internal control so such a deal can be stopped before entering any contract. I took the fall for PPG's mistake this time. I don't want my fate repeated with someone else in PPG.
>
> Sincerely, Xun Wang

Exhibit 14.

V. THE MAGISTRATE JUDGE'S RELEASE ORDER SHOULD BE REVOKED AND THE DEFENDANT HELD WITHOUT BOND PENDING TRIAL

Under the factors set forth in 18 U.S.C. § 3142(g), the government has demonstrated by substantially more than a preponderance of the evidence that the defendant is a serious flight risk. Accordingly, the Magistrate Judge's release order should be revoked and the defendant held

without bond pending trial.

A. The Nature and Circumstances of the Offense

The U.S. export control that the defendant violated is among the most serious promulgated by the United States. In general, entities are placed on the DoC's Entity List because they have engaged in activities that could result in the increased risk of diversion of export items to weapons of mass destruction programs, to nuclear proliferation activities, to activities sanctioned by the Department of State and to activities contrary to our national security and foreign policy interests. See Exhibit 6 at ¶ 12. The Pakistan sanctions we implemented in 1998, following Pakistan's first successful detonation of a series of nuclear bombs which started a nuclear arms race with India that has made the border between those two countries one of the most dangerous in the world. Accordingly, in May 1998, the President of the United States instructed the relevant federal agencies to take necessary actions to impose sanctions on Pakistan in accordance with section 102(b) of the Arms Export Control Act. See 63 Fed. Reg. 64,322 (1998). In response, in November 1998, the DoC added the PAEC to the Entity List, as well as its subordinate nuclear reactors and power plants, and other Pakistani government, quasi-governmental and private entities that the DoC had determined were involved in the Pakistani nuclear and missile programs. See id. The defendant's conduct in aiding and abetting the PAEC and Pakistan's nuclear program was in direct contravention of the critical nuclear non-proliferation aims that the Pakistan sanctions are intended to serve. Pakistan has refused to join international non-proliferation agreements and put its nuclear programs under international oversight. In so doing, it poses a threat to our national security and upsets stability in one of the most volatile regions in the world. Indeed, the defendant's criminal conduct occurred soon after

discoveries by arms investigators in North Korea, Iran and Libya indicating that Pakistan played a key role in spreading nuclear weapons technology to these countries. See "From Rogue Nuclear Programs, Web of Trails Leads to Pakistan," New York Times, January 4, 2004, attached as Exhibit 15; see also "Pakistani Says N. Korea Paid Bribes for Nuclear Expertise," The Washington Post, July 7, 2011, attached as Exhibit 16. Thus it is not surprising that in denying the Export License Application for the specific exports to Chashma II that the defendant nevertheless conspired to cause, the DoC adjudged that such exports "would be detrimental to the U.S. Nuclear Non-proliferation policy." Exhibit 10.[10] Such sanctions, critical to the security of our country and the Indian subcontinent, cannot work effectively if they are disregarded by individuals like the defendant, and not treated seriously by the legal system when violations of the sanctions are discovered and prosecuted.

Congress' view of the seriousness of the defendant's crimes cannot be gainsaid. For each of her three violations of IEEPA, 50 U.S.C. § 1705, she faces 20 years of imprisonment and a $250,000 criminal fine. See 50 U.S.C. § 1705; 18 U.S.C. § 3571(b)(3). Indeed, on March 9, 2006, just prior to the criminal conduct at issue here, Congress increased the penalty provision of IEEPA (50 U.S.C. § 1705(b)) from a 10-year felony to a 20-year felony. Adding another 5 years for the defendant's violation of 18 U.S.C. § 371, she faces up to 65 years of imprisonment for her crimes. See 18 U.S.C. §§ 371, 3571(b)(3).

The Federal Sentencing Guidelines range for her criminal conduct also reflects the

[10]Further, it has been suggested that Pakistan is building at the Chashma II site a plant to reprocess spent nuclear fuel from the reactor into weapons-grade plutonium. See "Chashma Nuclear Site in Pakistan with Possible Reprocessing Plant," Institute for Science and International Security, January 18, 2007, attached as Exhibit 17.

seriousness of her offenses. Because a national security and nuclear non-proliferation export control was violated, the offense level for each of the defendant's export violations is a level 26. See U.S.S.G. § 2M5.1(a); United States v. McKeeve, 131 F.3d 1, 14 (1st Cir. 1997) (holding that an IEEPA violation is an evasion of a national security control, regardless of the nature of the good itself). It is also likely that the defendant will receive a four-level increase under U.S.S.G. §3B1.1(c) for her role as an organizer or leader of the export diversion conspiracy which had five or more participants. Even with a criminal history category of I, an offense level of 30 translates into a sentencing guidelines range of 97 to 121 months of imprisonment.[11] Eight years at the low end is a substantial period of incarceration for anyone, but especially for an individual like the defendant who has never previously faced prison. That significant, looming punishment provides a compelling motivation to avoid it at all costs and flee the United States.

Thus, the crimes here are very serious within the meaning of § 3142(g)(1) even though they are not crimes of violence or terrorism, narcotics offenses, or crimes involving a firearm or minor victim. Magistrate Judge Robinson suggested in her ruling denying the government's detention motion that only such enumerated crimes could satisfy section 3142(g)(1). By its express terms, however, section 3142(g) focuses on "the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device." 18 U.S.C. § 3142(g)(1) (emphasis added). By its use of the word "including" in the language quoted above, Congress intended that the question of whether a defendant's conduct falls into one of the

[11] Even if there is no leadership enhancement, and she pleads guilty, the defendant is facing a guidelines range beginning at 46 months. That alone is a significant incentive to flee.

categories identified in the section be simply one of the measures – but not the sole measure – of the seriousness of the charged crime.

In United States v. Saani, 557 F. Supp.2d 97, 98-99 (D.D.C. 2008), for example, Chief Judge Lamberth held that section 3142(g)(1) weighed in favor of detention in a tax perjury case. Specifically, the defendant was alleged to have "falsely reported on his Form 1040 Schedule B no interest in or signature or other authority over a financial account in a foreign country, such as a bank account, when he did in fact have such an interest or authority." Id. at 99. In holding that the defendant should be detained, Chief Judge Lamberth reasoned:

> While this is not a crime of violence, nor a terrorism or narcotics offense, it is a crime of deception with direct relevance to Defendant's ability to support himself overseas. Defendant's alleged access to funds in foreign bank accounts, and Defendant's alleged purposeful and illegal concealment of that access, is directly relevant to Defendant's flight risk. Thus, the nature and circumstances of the offense charged, see 18 U.S.C. § 3142(g)(1), weighs in favor of continued detention.

Id. at 98-99. Similarly here, underlying the export diversionary scheme the defendant orchestrated was an overseas web of deceit that relied on convoluted transactions requiring contacts, communications, and the movement of money and goods in both China and Pakistan, all of which is directly relevant to the defendant's risk of flight.[12] See Exhibit 6 at ¶¶ 23(b), 26a. - 26c, 26e.-26f. The scheme, and the defendant's later statements to CW-1, when confronted again with the requirements of U.S. export law, demonstrated a callous indifference to this country and its authority to control exports to restricted entities. This does not bespeak the defendant's good character and should give this Court pause before it trusts her representations

[12] It is for this reason that the defendant stands indicted under 18 U.S.C. § 371 under a Klein conspiracy theory. See Exhibit 6 at ¶ 23(b).

that she will return to court to face the charges against her. Thus, the nature and circumstances of the offense charged weigh in favor of detention.

Further, there is precedent for pre-trial detention in export cases. For example, in United States v. Khalid Mahmood, Cr. No. 04-365 (D.D.C. October 19, 2004), attached as Exhibit 18 hereto, Judge Lamberth considered an identical defense argument that an export offense was not serious enough to warrant detention. See Mahmood slip op. 3, n.1. Mahmood had been charged with violating IEEPA and the Iranian Transactions Regulations, 30 C.F.R. Part 560, by transshipping parts for heavy equipment forklifts to Iran through the U.A.E. in violation of the Iranian sanctions Id. at 2. Judge Lamberth rejected the argument that an export violation is not sufficiently serious a crime to warrant detention. Id. at p. 3, n.1. Again, Mahmood's violations of the U.S. Iran embargo dealt in purely civilian commodities. Here the defendant has violated a critical nuclear non-proliferation control by providing Level 1 Nuclear Coatings required by a nuclear facility in Pakistan. See also United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990) (allowing detention in case involving the illegal export of computers to the Soviet Union).[13]

---

[13] Chief Judge Hogan made the same error as Magistrate Judge Robinson in United States v. Karni, 298 F. Supp.2d 129 (D. D.C. 2004), relying solely on the fact that an export violation does not satisfied section 3142(b) because it is neither a crime of violence nor a crime involving narcotics. 291 F. Supp.2d at 131. Like the defendant here, Karni had been charged with violating nuclear non-proliferation controls. Id. at 130. Nevertheless, there are several reasons why Karni should not control here. As an initial matter, the government in Karni had filed a motion to reconsider the ruling and had provided the Court with a textual analysis of § 3142(g)(1). However, Chief Judge Hogan never had an opportunity to rule on the motion, because, upon his arrival in the District of Columbia, Karni began cooperating with the government and agreed to remain detained as part of his cooperation. Another significant difference between Karni and this case is that, in Karni, the defendant was, at the time of his arrest, only charged by way of complaint. The defendant, by contrast, has been charged in a detailed four-count, 18-page indictment. Most importantly, the defendant here, unlike Karni, has

B. The Nature and Seriousness of the Danger to Any Person or the Community that Would be Posed by the Defendant's Release

The government is presently unaware of criminal conduct after that which is outlined in the Indictment.

C. The Weight of the Evidence against the Defendant

Without belaboring the discussion of the evidence above against the defendant, it is sufficient to say that the case against her is very strong. The difficulty that the government sometimes faces in these types of prosecutions is in proving that the defendant acted with the requisite scienter. However, here, the evidence that the defendant acted with knowledge that she was circumventing U.S. export controls is powerful. She was told that PPG had sought a license for the export of the Coatings for use at Chashma II in Pakistan and that the license request had been denied by the government. She was instructed by PPG Industries to tell Company B, the Chinese contractor responsible for applying coatings at Chashma II, that PPG Paints Trading would be unable to supply the Coatings under the Chashma II Contract. Nevertheless, despite that clear directive from PPG Industries, the defendant met with Company B just days later on

---

explicitly expressed her intent to remain outside the reach of the United States if her export diversion scheme were to be discovered by U.S. authorities. Where the District Court for the District of Columbia has found strong circumstantial evidence of a defendant's interest in fleeing the jurisdiction and an intent to do so, it has ordered pre-trial detention. Compare United States v. Anderson, 384 F. Supp.2d 32, 36 (D.D.C. 2005) (ordering pre-trial detention where there was "strong circumstantial evidence of [the defendant's] clear interest in fleeing the jurisdiction and his intent to do so" by virtue of his use of aliases and false identities and possession of literature on how to disguise identity and to hide assets) with United States v. Hanson, 613 F. Supp.2d 85, 89-90 (D.D.C. 2009)(in export case, releasing on bail the defendant, an American citizen with long standing ties to the United States and a residence in the D.C. area, where the government had proffered "no evidence of [the defendant's] intent to flee."). Here, the government has direct evidence of the defendant's intent to remain outside the reach of the United States if the export diversionary scheme were discovered by the government.

June 15, 2006, and engineered with other co-conspirators the circuitous transaction that diverted the Coatings to Chashma II via a third-party distributor in China. She then made false statements to PPG Industries about what took place at that meeting. The timing of shipments immediately following the license denial, the diversionary structure of the transaction, and the defendant's own false statements, all are strong circumstantial proof that she knew that was acting in a way that was unlawful.

Further, as indicated above, CW-1 will testify at trial concerning the defendant's key role in instigating the diversionary export scheme and concealing that the ultimate destination of the Level 1 Nuclear Coatings was still Chashma II in Pakistan. CW-1's testimony will be corroborated by the shipping documents related to the three unlawful exports. It will also be corroborated by the defendant's own statements. During an interview with PPG Industries' attorneys she admitted, among other things, that during the meeting with Company B she "told them PPG could not ship paint to them because of U.S. law," but "when the customer refused to go to another seller, she suggested that if they did not know where the paint was going to end up it was okay to sell the paint." Further, she "admitted that she was more senior than [another PPG Paints Trading employee at the June 15, 2006 meeting] and was ultimately responsible for the paint being shipped to Pakistan through [Company A]." Similarly, following her termination from PPG on September 20, 2007, the defendant sent a letter to PPG Industries admitting that she understood that she had violated "U.S. government regulation" in order to avoid breaching a Chinese contract that she felt obligated to honor.

It is also significant that, at this point, the defendant was not merely arrested on a complaint, but has been indicted. A federal Grand Jury has found probable cause to believe that

the defendant has committed the serious crimes with which she is charged in the Indictment. Thus, the weight of the evidence also favors detention.

D. The Defendant's Characteristics/Risk of Flight

The defendant's characteristics demonstrate her ready ability and incentive to flee. She is a Chinese citizen who holds a Chinese passport. See Exhibit 19. Indeed, she was using her Chinese passport to exit the United States at the time of her arrest on July 16, 2011.[14] The fact that the Magistrate Judge has ordered the defendant to surrender her passport and agree as a condition of her release not to seek a new passport will not impede her ability to flee. See United States. v. Cohen, 2010 WL 5387757 (N.D. Cal. Dec. 20, 2010) (rejecting offer by defendant to "turn in his passports, to 'renounce' his Israeli citizenship, and have someone 'instruct' the Israeli Embassy to deny new documents or travel authorizations to the defendant, as well as waive extradition;" holding "Defendant offers no authority about the real impact of these offers or whether they are enforceable in Israel if defendant were to flee there."). The defendant need only go to any Chinese consulate in North America and get a replacement passport. There are six such consulates, including one located in San Francisco just 24 miles from her property in Hillsborough, California. See Exhibit 20; Exhibit 21. The consulate charges Chinese citizens a fee of only $105 for the replacement of lost passports. See Exhibit 20. Consistent with our treaty obligations with the PRC, on July 17, 2011, the Department of Commerce notified the Chinese consulate of the defendant's arrest. As a citizen of the PRC, the consulate stands ready to assist the defendant.

[14] The defendant was en route to a multi-week vacation to Italy, when she was detained at Hartsfield-Jackson.

The defendant can easily afford the expense of purchasing a replacement passport as well as any other conceivable expense associated with fleeing the United States. She has substantial financial resources at her disposal. Starting in or around 1995, she co-owned with her husband a successful import/export business selling PPG Industries' coatings in China. During its investigation, a witness informed the government that the defendant's company would purchase in a given year around $3 million of PPG Industries' coatings and then turn and sell them in China for $9 million. In or around April 2006, she sold that company to PPG Industries for over $17 million. In 2009, she and her husband purchased property in California worth over $2.3 million for cash (the same property that the defendant now freely offers to the Court as a property bond). Exhibit 22. Thus, the defendant has far more than the means necessary to circumvent whatever conditions this Court may place on her release, to finance her flight from the United States, and to live a very comfortable life in China, the country of her birth.

Further, the defendant has no known connections to the District of Columbia and her connections to the rest of the United States are subject to doubt. Notably, upon her arrest, the defendant stated she maintained no employment in this country. Although she owns property in California and claims to have "resided" in the United States since 2008, according to government records of her travel, she has been outside of the U.S. more than she has been in it. Since April 2008, government records show that the defendant has been outside of the United States for 561 days. Specifically, she has she traveled for:

- 76 days to Beijing, China, between 04/09/2008 and 06/25/2008;
- 127 days to Beijing and Shanghai, China, between 08/30/2008 and 01/25/2009;
- 7 days to on a cruise to an unknown location between 01/31/2009 and 02/07/2009;

- 47 days to Shanghai, China between 02/08/2009 and 03/20/2009;
- 85 days to Shanghai and Beijing, China between 04/08/2009 and 07/02/2009;
- 58 days to Seoul, South Korea between 09/20/2009 and 11/18/2009;
- 19 days to Beijing, China between 11/29/2009 and 12/18/2009;
- 21 days to Shanghai, China between 01/13/2010 and 02/03/2010;
- 28 days to Shanghai, China between 03/31/2010 and 04/28/2010;
- 51 days to Hong Kong and Shanghai, China between 10/02/2010 and 11/22/2010;
- 17 days to Seoul, South Korea, between 01/04/2011 and 01/21/2011; and
- 25 days to Shanghai, China between 04/24/2011 and 05/17/2011

Exh. 23.

Clearly, the defendant maintains substantial business and personal contacts in China and South East Asia. This is not surprising given that she is a sophisticated business person who, for the 10 years prior to April 2006, owned and operated IDI, a successful multi-million dollar U.S. coatings export business in China. Even after IDI was purchased by PPG Industries in April 2006 for over $17 million, the defendant was employed by PPG Paints Trading in Shanghai, China, because of her business contacts and relationships in China. According to her husband, who was interviewed by DoC agents following the defendant's arrest, his mother owns a residence in Shanghai, China, where defendant has stayed when she travels to China. While the defendant has relatives who the defense claims are living in the United States, the defendant's wealth, could allow them to visit or live with her in China, an option that would be far more palatable than the lengthy separation caused by the defendant's conviction on the Indictment.

Finally, the defendant has previously expressed her intent to remain outside the reach of

the United States if the export diversion scheme were to be discovered by U.S. authorities. In June 2006, when the criminal conspiracy that is the subject matter of the Indictment was on-going, the defendant told CW-1 that if the United States government finds out about the scheme it would not be a problem because, as Chinese citizens, the ***"U.S. government can't really touch us . . . The most that will ever happen to me is that I will not travel to the U.S. anymore. I don't need to travel to the U.S. I don't care. It's okay.***" The defendant now knows that she is, in fact, the target of a federal Indictment. She thus has all the incentive she needs to make good on her own word and flee back to the safety of her homeland if she is released by the Court.

Most importantly, if the defendant were released and permitted to flee to the PRC, she would be gone for good. The United States has no extradition treaty with the PRC. Further, Chinese extradition law requires that requests for extradition of Chinese nationals, like the defendant, be denied. See Exhibit 24, Article 8(1). Indeed, all the defendant would need to do is enter the safe harbor of any one of the six Chinese consulates in the United States or the Chinese Embassy in Washington, D.C. Once there, neither this Court nor U.S. law enforcement would have the power to enter that inviolate space and bring her to court. Again, one such Consulate is located in San Francisco a mere 30 minute drive from the defendant's property in California.[15]

---

[15]It is for this reason that reliance on either EF or GPS monitoring is entirely inadequate to ensure the defendant's reappearance. As the Ninth Circuit has held, "[w]earing electronic devices offer no assurance against flight occurring before measures can be taken to prevent a detected departure from the jurisdiction." United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990); see also United States v. Anderson, 384 F. Supp.2d 32, 41 (D.D.C. 2005) (PLF)("The Court also is not confident that any monitoring system could effectively prevent Mr. Anderson from leaving the jurisdiction. . . . Conventional electronic monitoring also would only apprise authorities of whether Mr. Anderson was in or out of his home, and would likewise give him ample lead time if he wished to flee."); United States v. Ali, – F. Supp.2d –, 2011 WL 2552938 * 5 (D.D.C. June 24, 2011) ("Furthermore, electronic monitoring would give Mr Ali ample lead time if he wished to flee the country."). That is certainly the case when freedom is just a 30

In sum, as other courts have held, when a defendant, like Xun Wang, has strong ties to another country from which she cannot be extradited, even the loss of a large bond amount is a small price to pay to secure her freedom from prosecution. See United States v. Khalid Mahmood, Cr. No. 04-365-01, slip op. at 3 (D.D.C. Oct. 19, 2004)(RCL) (attached as Exhibit 18); see also United States v. Epstein, 155 F. Supp.2d 323, 326 (E.D. Pa. 2001) ("[A defendant's] forfeiture of $1 million worth of assets in the United States would not deter him from flight when in Brazil he has significant wealth, a lucrative job, the presence of his family, and insulation from ever being forced to stand trial.").

VI. IN THE ALTERNATIVE, THE MAGISTRATE JUDGE'S RELEASE ORDER SHOULD BE AMENDED TO IMPOSE CONDITIONS THAT WILL REASONABLY ASSURE THE DEFENDANT'S REAPPEARANCE IN THIS MATTER

In the alternative, if the Court denies the government's motion to revoke the Magistrate Judge's release order, for the same reasons stated above, the government respectfully requests that this Court review and amend the Magistrate Judge's conditions of the defendant's release to impose conditions of release that will reasonably assure the defendant's reappearance in this matter. The Court should impose the most restrictive conditions on the defendant that can be provided by the Northern District of California, namely, 24-hour home incarceration monitored by both RF and GPS systems and with authorization to leave the property only for medical or legal visits.

Further, the Court should establish the net worth of the defendant and her husband and amend the property bond condition set by the Magistrate Judge consistent with the Bail Reform

---

minute drive from her property in California.

Act. Section 3142(c)(1)(B)(xi) of the Act instructs that release conditions may include the requirement that the defendant:

> execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the judicial officer may specify.

18 U.S.C. § 3142(c)(1)(B)(xi). As the First Circuit held in United States v. Patriarca, 948 F.2d 789, 795 (1st Cir. 1991), however, "[p]lainly contemplated by this language is some exploration of the defendant's assets or net worth." According to the First Circuit, "[w]ithout such information we fail to see how a judicial officer could arrive at a forfeiture amount which would reasonably assure compliance." Id.; see also Banks v. United States, 414 F.2d 1150, 1153 (D.C. Cir. 1969) ("It is the duty of the judicial who is asked to set bail to inquire concerning available financial and nonfinancial conditions of release. . . . Counsel should assist the court in this task and present reasonable alternative plans for release.") (internal quotations omitted); United States v. Geerts, 629 F. Supp. 830, 832 (E.D. Pa. 1985) (denying bond because the "defendant's net worth is not known with certainty and, thus, the amount of bail necessary to assure his appearance is also unknown."). In Patriarca, the trial court ordered the release of the defendant on the condition that he execute an agreement to forfeit $4 million, collateralized by real estate, upon a determination by the court that he has violated a condition of his release. Id. at 793. On appeal, the First Circuit found that the "$4 million worth of real estate was freely offered up by [the defendant]" and the "record did not suggest what portion of [the defendant's] worth the forfeiture represents." Id. at 795.[16] Accordingly, the Court of Appeals ordered a remand for

[16]Undersigned counsel requested in both detention hearings in this matter that the defense produce financial information sufficient to determine the net worth of the defendant and her

further fact finding concerning the defendant's net worth and its relationship to the forfeiture amount. Id. Without doing so, the First Circuit held that the trial court could not be reasonably assured that the surety was "'so vital to defendant that he sought long and hard to avoid offering it.'" Id. (quoting United States v. O'Brien, 895 F.2d 810, 816 (1st Cir. 1990)); see also United States v. Townsend, 897 F.2d 989, 996 (9th Cir. 1990) ("'The purpose of bail is not served unless losing the sum would be a deeply-felt hurt to the defendant and his family; the hurt must be so severe that defendant will return for trial rather than flee.'") (quoting United States v. Szott, 768 F.2d 159, 160 (7th Cir. 1985)).

As in Patriarca, the Magistrate Judge did not require here, and the defense did not produce, financial information establishing the defendant's net worth. Especially given the defendant's wealth, it cannot be said that the property in California, which the defense "freely offered" as bond just as in Patriarca, is sufficient to reasonably assure her reappearance in this matter. Accordingly, the government requests that the Court engage in such fact finding now and, if the Court denies the government's request that the Magistrate Judge's release order be revoked, set a forfeiture amount consistent with the requirements of the Bail Reform Act.

VII. CONCLUSION

WHEREFORE, the United States respectfully prays this Court revoke the Magistrate Judge's order setting conditions of release or, in the alternative, amend the defendant's conditions of release. Further, the government respectfully requests that the defendant remain held without bond until such time as this Court resolves the government's motion for revocation and/or review of the Magistrate Judge's release order.

---

husband. Thus far, the defense has failed to do so.

Respectfully submitted,

RONALD C. MACHEN JR.
UNITED STATES ATTORNEY
D.C. Bar Number 447-889

By:

/s/

G. MICHAEL HARVEY
Assistant United States Attorney
D.C. Bar Number 447-465
National Security Section
United States Attorney's Office
555 4th Street, N.W., Room 11-850
Washington, D.C. 20530
Phone: (202) 252-7810
Michael.Harvey2@usdoj.gov

/s/

JOHN W. BORCHERT
Assistant United States Attorney
D.C. Bar Number 472-824
National Security Section
United States Attorney's Office
555 4th Street, N.W., Room 11-860
Washington, D.C. 20530
Phone: (202) 252-7811
John.Borchert@usdoj.gov

July 15, 2011