

UNITED STATES DEPARTMENT OF COMMERCE  
BUREAU OF INDUSTRY AND SECURITY  
WASHINGTON, D.C. 20230

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Data Physics Corporation )  
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San Jose, California, 95110 )  
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1038 Nanjing Road West )  
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Data Physics China )  
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No. 5 Changchunquia Road, )  
Haidian District, Beijing, P.R. China, 100089 )  
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Sri Welaratna, President )  
Data Physics Corporation )  
2025 Gateway Place, Suite 260 )  
San Jose, California 95110 )  
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Bill Chen, Manager, AKA: Yuequan Chen, )  
Data Physics China )  
RM. 1509, Building 2, Xinquduan Jiayan )  
No. 5 Changchunquia Road )  
Haidian District, Beijing, P.R. China, 100089 )  
 )  
..... Respondents..... )

**ORDER RENEWING ORDER TEMPORARILY DENYING EXPORT PRIVILEGES**

Pursuant to Section 766.24 of the Export Administration Regulations ("EAR"),<sup>1</sup> I hereby grant the Bureau of Industry and Security's request for renewal of the Order Temporarily Denying

<sup>1</sup> 15 C.F.R. Parts 730-774 (2006). The EAR are issued under the Export Administration Act of 1979, as amended (50 U.S.C. app. §§ 2401-2420 (2000)) ("EAA"). Since August 21, 2001,

the Export Privileges of Respondents, Data Physics Corporation, Data Physics China (Shanghai and Beijing Offices), Sri Welaratna and Bill Chen for 180 days as I find that renewal of the TDO is necessary in the public interest to prevent an imminent violation of the EAR.

#### **I. Procedural History**

On May 12, 2006, I signed an Order Temporarily Denying the Export Privileges of the Respondents for 180 days on the grounds that its issuance was necessary in the public interest to prevent an imminent violation of the EAR ("TDO"). Pursuant to Section 766.24(a), the TDO was issued *ex parte* and went into effect on May 23, 2006, the date it was published in the *Federal Register*. The TDO is valid through November 19, 2006.

On October 13, 2006, the Bureau of Industry and Security ("BIS"), through its Office of Export Enforcement, filed a written request for renewal of the TDO against the Respondents for 180 days and served a copy of its request on the Respondents in accordance with Section 766.5 of the EAR. On November 6, 2006, Data Physics Corporation, Data Physics China (Shanghai and Beijing Offices) and Sri Welaratna (collectively referred to hereinafter as "Data Physics Group") filed a written opposition to the request for renewal of the TDO. The Data Physics Group also requested the production of documents and a hearing. I approved Data Physics Group's two requests for production of documents as good cause was shown and I ordered that BIS produce the relevant non-privileged documents by 1:00 pm on November 3, 2006. BIS served the Data Physics Group with its responses in a timely manner and a hearing on the record was held on the request for renewal on

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the EAA has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 C.F.R., 2001 Comp. 783 (2002)), as extended most recently by the Notice of August 3, 2006 (71 Fed. Reg. 44,551, (August 7, 2006)), has continued the EAR in effect under the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-1706 (2000)) ("IEEPA").

November 8, 2006 at the U.S. Department of Commerce in Washington, D.C. BIS and the Data Physics Group each presented oral arguments.

## **II. Discussion**

### **A) Legal Standard**

Pursuant to section 766.24(d)(3) of the EAR, the sole issue in determining whether to continue a TDO is whether the TDO should be renewed to prevent an imminent violation of the EAR. "A violation may be 'imminent' either in time or in degree of likelihood." 15 C.F.R. 766.24(b)(3). This includes a violation that "is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations." *Id.* Significant, deliberate, and covert violations are more probative of imminence and the likelihood of future violations than lesser technical ones. *Id.* A "lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation." *Id.*

### **B) Arguments**

BIS's request for renewal of the TDO was based upon the facts underlying the issuance of the initial TDO as well as evidence of continued actions by the Respondents that demonstrate a willingness to disregard U.S. export controls. The initial TDO was issued as a result of evidence that showed the Data Physics Corporation and Data Physics China (Shanghai and Beijing offices), with the knowledge of Data Physics' President, Sri Welaratna, and manager, Bill Chen, engaged in conduct prohibited by the EAR by knowingly selling and exporting spherical couplings and a test shaker, items subject to the EAR, to China HaiYang Electro Mechanical Technology Academy (a.k.a "3rd Academy" or "Beijing 3 yuan"), and

entity engaged in the design, development, production and use of cruise missile systems, without an export license as required by Section 744.3 of the EAR. The evidence further showed that the Respondents attempted to conceal the identity of the end-user by using a false customer name - the "27<sup>th</sup> Locomotive Factory." The new evidence presented by BIS in support of the renewal of the TDO includes documents indicating that Data Physics Corporation exported to a entity in China after it had been informed by BIS's Office of Export Enforcement that the end-user was of missile proliferation concern, that the Data Physics Group may be soliciting an illegal transaction, failing to submit evidence to BIS in accordance with certain license conditions, and negotiating export transactions while the TDO was in effect.

In its opposition to the request for renewal of the TDO, the Data Physics Group challenges BIS's evidence that was the basis for the initial TDO as well as the new evidence that was included in the request for renewal of the TDO.<sup>1</sup> Data Physics made multiple arguments opposing the basis for the initial TDO, including arguing that the 27<sup>th</sup> Locomotive was a legitimate end-user, that the transactions posed no traditional "red flags," the evidence supporting BIS's claim that it was exporting to the 3<sup>rd</sup> Academy is not credible as it is based on hearsay statements of a terminated employee who retracted his statements, and the documents obtained from a Data Physics computer were not probative of Data Physics and the President's knowledge. The Data Physics Group also presented evidence arguing that the new evidence submitted by BIS in support of the renewal (the export to Shanghai Xinyue Instruments Factory, that the Data Physics Group may be soliciting an illegal transaction, failing to submit evidence to BIS in accordance with certain license conditions and

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<sup>1</sup> None of the Respondents appealed the initial TDO.

negotiating export transactions while the TDO was in effect) was not correct and/or was insufficient to prove that renewal of the TDO was appropriate.

### **III. Findings**

As to the new evidence submitted by BIS in support of its request for renewal of the TDO, I find that the Data Physics Group, through its written submission and oral arguments, provided sufficient evidence to rebut a significant part of BIS's evidence concerning the issues that the Data Physics Group may be soliciting an illegal transaction, failing to submit evidence to BIS in accordance with certain license conditions, and negotiating export transactions while the TDO was in effect, and that BIS did not provide further evidence to rebut this evidence presented by the Data Physics Group.

However, I do find that the evidence presented by BIS in its renewal request as to Data Physics Corporation's export to the Shanghai Xinyue Instrument Factory is persuasive and credible evidence that proves that the TDO should be renewed to prevent an imminent violation of the EAR and that the Data Physics Group did not provide sufficient or persuasive evidence to rebut BIS's evidence. First, it is uncontested that Data Physics Corporation exported a vector vibration controller, an item subject to the EAR, in September 2005 to the Shanghai Xinyue Instrument Factory in China without a BIS export license or otherwise consulting with BIS after Data Physics and its President, Sri Welaratna, were advised by Special Agent in Charge ("SAC") Salcido that the Shanghai Xinyue Instrument Factory was of missile proliferation concern. While the Data Physics Group tried to dispute the significance of this transaction by arguing that the notification by SAC Salcido occurred in 2002, the notification was in response to a March 2002 letter from Data Physics' President, Sri Welaratna, to OEE regarding sponsorship of three visitors from Shanghai Xinyue Instrument Factory by Data Physics, and BIS has not placed Shanghai Xinyue on the Entity List or any other list, I find those arguments unpersuasive and troubling as the evidence on this export

further demonstrates the Respondents' willingness to knowingly export to entities of missile proliferation concern without seeking advice or authorization from the U.S Government prior to exporting. Significantly, in between the time of SAC Salcido's e-mail notification to Mr. Welaratna and Data Physics that Shanghai Xinyue is of missile proliferation concern and the September 2005 export to Shanghai Xinyue by Data Physics, two significant events happened. First, the export occurred after OEE executed a search warrant on Data Physics Corporation in connection with believed illegal exports. In April 2005, OEE agents executed a search warrant at Data Physics and during execution of the search warrant, OEE agents found copies of Part 744 of the EAR in the office of the Data Physics manager who is responsible for export compliance. Second, this Data Physics manager attended a May 2005 BIS sponsored seminar on export training during which an OEE agent gave a presentation that focused on Part 744 of the EAR, the Enhanced Proliferation Control Initiative, and specifically recommended doing research on customers, including internet searches, prior to exporting<sup>2</sup>. Notwithstanding these events, Data Physics still exported a vector vibration controller to the Shanghai Xinyue Instrument Factory, an entity of missile proliferation concern, without any consultation with BIS after having been notified by OEE that the end-user was of missile proliferation concern. Significantly, the evidence indicates that Data Physics only checked the BIS Entity List and other lists before exporting a vector vibration controller to Shanghai Xinyue. This limited action by Data Physics is particularly troubling as the uncontested facts prove that Data Physics and its President, Sri Welaratna, know that Data Physics sells and exports items that have military end-uses, including for the design, development and production of missiles, and were notified that Shanghai Xinyue was of missile proliferation concern. While, I find this evidence

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<sup>2</sup> The Data Physics Group contests that OEE recommended conducting internet searches. The basis of this challenge was that the advice regarding conducting internet searches was not included in the power point slides.

alone is a sufficient basis for renewal of the TDO against all Respondents, I also find that the evidence serving as the basis of the initial TDO is a further basis for renewal of the TDO against all Respondents.

As to the evidence underlying the initial TDO, I do not find the Data Physics Group provided sufficient credible evidence to rebut BIS's credible and persuasive evidence that that Respondents knowingly participated in the sale and unauthorized exports of spherical couplings and a test shaker, items subject to the EAR, to the 3<sup>rd</sup> Academy, an entity engaged in the design, development, production and use of cruise missile systems, and took actions to conceal these transactions by using a false end-user name. This evidence is the basis of the TDO. I further find that the evidence before me, presented both in the written submissions and oral arguments, regarding the Respondents knowingly selling and exporting spherical couplings and a test shaker to the 3<sup>rd</sup> Academy without an export license reveals violative actions that were significant, deliberate and covert and indicate a likelihood of future violations absent continuation of the TDO. Hence, on this basis alone I find that renewal of the TDO is appropriate.

First, the Data Physics Group incorrectly contends that BIS is arguing that the 27<sup>th</sup> Locomotive does not exist, and that if it does exist, that it would not use the type of equipment at issue. The evidence submitted by BIS does not go to the existence of the 27<sup>th</sup> Locomotive but to the fact that the Respondents used the name of the 27<sup>th</sup> Locomotive in attempts to conceal the fact it was selling and exporting spherical couplings and a test shaker to the 3<sup>rd</sup> Academy, an entity engaged in the design, development, production and use of cruise missile systems. I find that these arguments raised by the Data Physics Group are not on point and unpersuasive.

The Data Physics Group further argues that there were no traditional "red flags" relating to exports to the 27<sup>th</sup> Locomotive as the 27<sup>th</sup> Locomotive is not on BIS's Entity List or any other such

list. This argument too is unpersuasive as BIS is basing its charges on Section 744.3 of the EAR and because of the internal Data Physics' e-mails that clearly and unequivocally provide that references for the customer Beijing 3 Yuan (a.k.a 3<sup>rd</sup> Academy) should be referred to as the 27<sup>th</sup> Locomotive. This evidence is persuasive and indicates that several Data Physics employees (not just Bill Chen) were aware of attempts to conceal the identity of the 3<sup>rd</sup> Academy. Further, Data Physics Corporation is a company of less than 40 employees and it knows that the items it sells, including spherical couplings and test shakers, have military end-uses. Hence, I find these arguments of the Data Physics Group to be unpersuasive.

The Data Physics Group also argues that a significant portion of BIS's evidence, statements from a disgruntled former Data Physics employee who was terminated and who subsequently retracted his statements, is not credible and is hearsay and, as such, is inadmissible. Again, the Data Physics Group's arguments fall short. The evidence submitted by BIS in support of its initial TDO clearly shows that there is independent evidence that corroborates the allegations from the former employee. Specifically, there is a series of e-mails between the former employee, Bill Chen, and at least two other current Data Physics employees that expressly provide that the customer name of the 27<sup>th</sup> Locomotive should be used when referring to the 3<sup>rd</sup> Academy or Beijing 3 Yuan. The evidence is admissible<sup>3</sup> and based upon the corroborating evidence, I find the statements persuasive. In addition, the Data Physics Group also contended that Bill Chen was gone from the company and that any threat did not continue. I disagree. Bill Chen is on administrative leave from Data Physics and at least one of the employees involved in the e-mail exchange directing the 3<sup>rd</sup> Academy to be referred to as the 27<sup>th</sup> Locomotive is still with Data Physics.

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<sup>3</sup> The Federal Rules of Evidence do not apply and evidence that was relevant and material was entertained and given appropriate weight. 15 C.F.R. 766.13.



Further, the Data Physics Group tried to argue that BIS's evidence that the 3<sup>rd</sup> Academy is engaged in design, development, production and use of cruise missile systems was not reliable as it consisted of searches from the internet. These arguments also were not persuasive. Again the evidence is admissible and the Data Physics Group did not provide any evidence as to what types of activities the 3<sup>rd</sup> Academy is engaged in. Rather, their arguments focused on whether the 27<sup>th</sup> Locomotive was a legitimate end-user. Hence, all the evidence on the 3<sup>rd</sup> Academy before me provides that the 3<sup>rd</sup> Academy is engaged in the design, development, production and use of cruise missile systems.

The Data Physics Group further argues that the e-mails and other documents reflecting communications between Bill Chen and other Data Physics employees which contained the statements that the 3<sup>rd</sup> Academy should be referred to as the 27<sup>th</sup> Locomotive were not known to any Data Physics employees in the United States and do not demonstrate an intent by certain Respondents to conceal the true identity of the end-user from BIS. I disagree. These e-mails were obtained from Bill Chen's Data Physics' lap top computer which was in the United States and Mr. Chen worked in the United States and China for Data Physics. Further, the exports to the 3<sup>rd</sup> Academy could not have been handled by just one or two persons. In fact, e-mails were seized at Data Physics California headquarters that had 27<sup>th</sup> Locomotive in the subject line but had "3 Yuan 3..." hand written in the upper right hand corner.<sup>4</sup> Further, the Data Physics Group did not provide any credible evidence to explain the statements directing that the 3<sup>rd</sup> Academy be referred to as the 27<sup>th</sup> Locomotive. In fact, while several affidavits submitted by the Data Physics Group contained explicit statements that "I do not recall ever hearing any references to the customer 27<sup>th</sup> Locomotive using another entity name, nor do I recall seeing documentation that referred to this entity under

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<sup>4</sup> The Data Physics Group has submitted evidence that this is Bill Chen's handwriting.

another name;" the affidavit from an individual who was included in the e-mails does not contain a similar statement.

I find that the evidence presented by BIS demonstrates that the Respondents have violated the EAR, that such violations have been significant, deliberate and covert, and that there is a likelihood of future violations. As such, a Temporary Denial Order ("TDO") is needed to give notice to persons and companies in the United States and abroad that they should continue to cease dealing with the Respondents in export transactions involving items subject to the EAR. Such a TDO is consistent with the public interest to preclude violations of the EAR.

Accordingly, I find that renewing the TDO naming Data Physics Corporation, its two offices in China, Sri Welaratna and Bill Chen should be continued for 180 days as it is necessary in the public interest to prevent an imminent violation of the EAR.

The Data Physics Group also requested that to the extent the TDO is renewed that it be limited to exports and reexports to China. Based upon the evidence, I disagree.

#### **IV. ORDER**

##### **IT IS THEREFORE ORDERED:**

FIRST, that the Respondents, DATA PHYSICS CORPORATION, 2025 Gateway Place, Suite 260, San Jose, California, 95110, and DATA PHYSICS CHINA, 1605B Westgate Tower, 1038 Nanjing Road West, Shanghai, P.R. China, 200041, and DATA PHYSICS CHINA, RM. 1509, Building 2, Xinquan Jiayan, No. 5 Changchunqia Road, Haidian District, Beijing, P.R. China, 100089, SRI WELARATNA, President, Data Physics Corporation, 2025 Gateway Place, Suite 260, San Jose, California, 95110, and BILL CHEN, Manager, AKA: Yuequan Chen, Data Physics China, RM. 1509, Building 2, Xinquan Jiayan, No. 5 Changchunqia Road, Haidian District, Beijing, P.R. China, 100089 (collectively the "Denied Persons"), may not, directly or indirectly, participate

in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Export Administration Regulations ("EAR"), or in any other activity subject to the EAR, including, but not limited to:

- A. Applying for, obtaining, or using any license, License Exception, or export control document;
- B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR; or
- C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR.

SECOND, that no person may, directly or indirectly, do any of the following:

- A. Export or reexport to or on behalf of the Denied Persons any item subject to the EAR;
- B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Persons of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Persons acquires or attempts to acquire such ownership, possession or control;
- C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Persons of any item subject to the EAR that has been exported from the United States;
- D. Obtain from the Denied Persons in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Persons, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Persons if such service involves the use of any item subject to the EAR that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

THIRD, that, after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to any of the Denied Persons by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

FOURTH, that this Order does not prohibit any export, reexport, or other transaction subject to the EAR where the only items involved that are subject to the EAR are the foreign-produced direct product of U.S.-origin technology.


In accordance with the provisions of Section 766.24(e) of the EAR, the Respondents may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202-4022.

In accordance with the provisions of Section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. The Respondents may oppose a request to renew this Order by filing a written submission with the Assistant Secretary of Commerce for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

Order Renewing Order Temporarily Denying Export Privileges  
Data Physics Corporation et al.  
Page 13 of 13

A copy of this Order shall be served on the Respondents and shall be published in the  
Federal Register.

This Order is effective immediately and shall remain in effect for 180 days.

  
DARRYL W. JACKSON  
Assistant Secretary of Commerce  
for Export Enforcement

Entered this 17<sup>th</sup> day of November, 2006.