

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LUOKUNG TECHNOLOGY CORP., et al.

Plaintiffs,

v.

U.S. DEPARTMENT OF DEFENSE, et al.

Defendants.

Case No. 1:21-cv-00583-RC

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER AND EXPEDITED DISCOVERY**

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I. INTRODUCTION

Plaintiff Luokung Technology Corp. (“Luokung”) is an independently managed commercial technology company that is publicly traded in the United States on the Nasdaq. Like many other companies, it is headquartered in China but has no affiliation with the Chinese government or military. Despite this, on January 14, 2021, defendant U.S. Department of Defense (“DoD”) falsely designated Luokung as a “Communist Chinese military company” (“CCMC”) under Section 1237 (“Section 1237”) of the National Defense Authorization Act for Fiscal Year 1999, Pub. L. 105-261, 112 Stat. 2160 (Oct. 17, 1998), as amended by Section 1233 of Pub. L. 106-398 and Section 1222 of Pub. L. 108-375 (as amended, “NDAA FY99”), without any notice, any opportunity to be heard, or even any established process to challenge the designation.

This unlawful designation (the “CCMC Designation”) will result in U.S. shareholders being prohibited from acquiring Luokung securities and being forced to divest their shares (the “CCMC Prohibitions”), pursuant to Executive Order 13959, 85 Fed. Reg. 73185 (Nov. 12, 2020), as amended by Executive Order 13974, 86 Fed. Reg. 4875 (Jan. 13, 2021) (as amended, “Executive Order 13959”), which was issued after the recent election, in the waning days of the Trump administration. Without the Court’s intervention, the CCMC Designation and CCMC Prohibitions will cut Luokung off from the capital markets in the United States, interfere substantially with its business and contractual relationships, and cause other immediate and irreparable harm to the company’s operations, standing, and reputation. Likewise, the CCMC Designation and CCMC Prohibitions will deprive Luokung’s thousands of U.S. shareholders, including individual plaintiffs Baomin Li and Raymond Weiman Bai (together, the “Individual Plaintiffs”), who are United States citizens and beneficial owners of Luokung’s shares, of the ability to acquire, freely transact in, or otherwise make their own investment decisions concerning their Luokung securities.

Plaintiffs will suffer such irreparable harm without ever having been provided the opportunity to know why the DoD somehow wrongfully listed Luokung as a CCMC, let alone a fair and reasonable opportunity to show that Luokung is in fact *not* a CCMC, as the facts readily and overwhelmingly demonstrate.

As set forth below, the CCMC Designation and the associated CCMC Prohibitions imposed by Executive Order 13959, as applied to Luokung and the Individual Plaintiffs, violate the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (“APA”), Section 1237, and the Fifth Amendment to the U.S. Constitution. Plaintiffs are likely to succeed on the merits of their statutory and Constitutional claims, and will be irreparably harmed by the CCMC Designation and the CCMC Prohibitions if the Court does not enter a temporary restraining order and set a preliminary injunction hearing within fourteen days. Otherwise, under Executive Order 13959, the CCMC Prohibitions could go into effect against Luokung and its shareholders as soon as March 15, 2021. In fact, Luokung learned on March 4, 2021, that Nasdaq intends to halt trading of, and delist, Luokung’s securities as of March 15, 2021, as a direct result of the CCMC Designation.

A temporary delay in the CCMC Prohibitions becoming effective against Luokung to allow for preliminary injunction proceedings will not prejudice Defendants. This is clearly evidenced by the issuance of General License 1A by the U.S. Department of the Treasury Office of Foreign Assets Control (“OFAC”) on January 27, 2021. Pursuant to General License 1A, U.S. persons may continue to trade in the securities of entities whose names “closely match,” but are not an exact match for an entity identified as a CCMC, for an extended period beyond the initial March 15, 2021 deadline (*i.e.*, until May 27, 2021). Plaintiffs believe that General License 1A clearly applies to Luokung because its name does not exactly match any name identified by the DoD on its January 14, 2021, list of CCMCs (the “Section 1237 List”). Specifically, the Section 1237 List

named “Luokung Technology **Corporation (LKCO)**” (emphasis added) whereas the company’s name is “Luokung Technology Corp.” Understanding that General License 1A therefore applies to Luokung, and that it is thus subject to an effective date of May 27 instead of March 15 of this year, Luokung immediately sought confirmation from OFAC that General License 1A applied to Luokung. However, despite Luokung’s repeated inquiries over the last month, and OFAC’s acknowledgement of those inquiries and assurances that a response would be forthcoming, Luokung has not received the requested confirmation.

These circumstances have left Plaintiffs no available recourse but to seek a temporary restraining order now due to the unacceptable harm of the CCMC Prohibitions being enforced against Luokung and its shareholders as of March 15, as shown by, for example, Nasdaq’s March 4, 2021, decision to delist Luokung as of March 15. In the absence of immediate injunctive relief, Plaintiffs will imminently suffer irreparable harm.

For the reasons set forth herein, and because it is in the public interest to enjoin Defendants’ unlawful actions, Plaintiffs respectfully request that the Court enter a temporary restraining order (1) enjoining the enforcement of the CCMC Designation and the CCMC Prohibitions, (2) requiring expedited discovery of the administrative record relating to this dispute, and (3) setting a briefing schedule and scheduling a preliminary injunction hearing to occur within 14 days.

II. STATEMENT OF FACTS

A. **Luokung is a Commercial Technology Company Unaffiliated with the Chinese Government or Military.**

Luokung is a Nasdaq-traded technology company headquartered in Beijing, China, and incorporated in the British Virgin Islands. Declaration of Baomin Li (“Li Decl.”) ¶ 6. It has thousands of U.S. shareholders, including some of its largest shareholders, and substantial other connections to the United States. *Id.* ¶¶ 14-18.

Through its subsidiaries and affiliates, Luokung offers a broad range of products and location-based services for civilian and commercial use, including cloud platform software for data management, publication, application, and video and audio related services, and image browsing software. *Id.* ¶ 8. Luokung’s primary product is its open-source map platform, which provides online map services. *Id.* Luokung also provides software and hardware support for managing real-time highway traffic in China, and software that provides its customers with recommendations for personalized content and learning experiences. *Id.* Overall, Luokung’s products and services are designed to enable customers to unlock the operational value of data generated from internet networks and usage, such as those used in autonomous vehicles, traffic management, and location-based marketing platforms. *Id.*

Many of these products and services are provided by subsidiaries and affiliates, such as SuperEngine Graphics Software Technology Development (Suzhou) Co, Ltd. (“SuperEngine”), Beijing BotBrain AI Technology Ltd. (“BotBrain”), and Beijing Zhong Chuan Shi Xun Technology Limited. *Id.* ¶¶ 8-12. SuperEngine is a commercial provider of spatial-temporal data technology and services, and owns the world’s first spatial-temporal data management technology with independent intellectual property rights. *Id.* ¶ 10. BotBrain provides personalized content for customers through its learning and voice dialogue technology. *Id.* ¶ 11. Beijing Zhong Chuan Shi Xun Technology Limited provides location-based content services and advertising marketing services for the management and application of video, audio, pictures, text, and other data, as well as providing an LKMap open platform to provide flexible and scalable software development kit and application programming interface services for developers and small and medium-sized enterprises. *Id.* ¶ 12. Luokung also has entered into an agreement to acquire 100 percent of the equity interests of eMapgo Technologies (Beijing) Co., Ltd. (“EMG”) and is in the process of

closing that transaction. *Id.* ¶ 9. EMG is a prominent commercial mapping company in China that provides users with navigation electronic maps, Advanced Driving Assistant System maps, high definition maps of China, and geographic location information through its own map service platform. *Id.* EMG has provided map services for 32 domestic and foreign car manufacturers, and has business relationships with a number of prominent U.S. companies. *Id.* at ¶¶ 9, 17.

Luokung's customers are primarily other private firms. *Id.* ¶ 8. In 2019 and 2020, most of Luokung's revenue was from customers paying Luokung for advertising on Luokung's location-based services data marketing platforms. *Id.* ¶ 13. Its customers are not related to or affiliated with the Chinese military industrial base. *Id.* ¶ 8. Luokung does not design or manufacture any military or defense products, and the company's overall strategy and operations are focused solely on delivering civil and commercial products and services to a global market. *Id.* ¶ 25.

Luokung is not owned by, controlled by, or affiliated with the People's Liberation Army or a ministry of the government of the People's Republic of China. *Id.* ¶ 7; Declaration of Xuesong Song ("Song Decl.") ¶ 5. It is not owned or controlled by an entity affiliated with the defense industrial base of the People's Republic of China. Li Decl. ¶ 7; Song Decl. ¶ 5. No Chinese government or military entity, or any entity affiliated with its defense industrial base, possesses the ability to exert control over the management or operations of Luokung. Li Decl. ¶ 7; Song Decl. ¶ 5. And no such entity is in any way involved in Luokung's management or corporate governance. Song Decl. ¶ 8. Neither Luokung nor any of its affiliated companies is part of the Chinese government or military, nor does the Chinese government or military play any role in shaping the company's strategy, management, governance, operations, or business. *Id.* ¶ 9.

To the contrary, Luokung is a publicly traded, independently managed corporation that provides services for civilian and commercial use. Li Decl. ¶ 21; Song Decl. ¶ 6. Luokung's

eleven largest investors own approximately 60% of its ordinary shares. Li Decl. ¶ 23. None of those investors is in any way affiliated with the Chinese military or government, nor is Luokung aware of any other shareholder having any affiliation with the Chinese military or government. *Id.* Luokung is overseen by a board of directors including two executive directors and three independent directors, none of whom is affiliated with the Chinese government or military. Li Decl. ¶ 21; Song Decl. ¶ 6. Luokung’s business is managed on a day-to-day basis by an executive management team under the oversight of Luokung’s Chief Executive Officer, Xuesong Song, who is also the Chairman of the board of directors. Li Decl. ¶ 21; Song Decl. ¶ 1, 6. Mr. Song, a civilian businessperson, who is not a part of, or affiliated with, the Chinese government or military, has served as an executive or director of several commercial companies. Song Decl. ¶¶ 2-3. In addition to serving as Luokung’s Chairman and CEO, Mr. Song is also Luokung’s largest shareholder, holding both the largest percentage of the company’s ordinary shares as well as an amount of preferred shares that accord him a supermajority of the company’s voting rights. *Id.* ¶ 7. As such, Mr. Song has ultimate control of the company. *Id.*

In summary, Luokung is not owned by, controlled by, or affiliated with the Chinese military or government. Li Decl. ¶¶ 20-25; Song Decl. ¶¶ 5-9.

B. The DoD Issued the CCMC Designation without Notice, Explanation, or an Opportunity to be Heard.

1. Congress enacted Section 1237 in 1999, but the DoD did not act until 2020.

As part of Section 1237, Congress directed the Secretary of Defense to identify “Chinese Communist military companies” that “operate directly or indirectly in the United States, or in any of its territories or possessions,” by issuing a list of CCMCs on or before March 1, 2001, and updating that list on an annual basis. *See* NDAA FY99 § 1237(b). As relevant to this action, Section 1237 defines a CCMC as a person that:

(i) is owned or controlled by, or affiliated with, the People's Liberation Army or a ministry of the government of the People's Republic of China or that is owned or controlled by an entity affiliated with the defense industrial base of the People's Republic of China; and (ii) is engaged in providing commercial services, manufacturing, producing, or exporting.

Id. § 1237(b)(4)(B). "People's Liberation Army" is defined as "the land, naval, and air military services, the police, and the intelligence services of the Communist Government of the People's Republic of China, and any member of any such service or of such police." *Id.* § 1237(c).

Although Section 1237 directs the DoD to issue the first list of CCMCs by March 1, 2001, and to update the list annually, the DoD did not issue any such list until more than 19 years later. Indeed, it appears that the DoD was not aware of Section 1237 until it was brought to the attention of the DoD by a letter from Senator Tom Cotton in 2020. *See* Declaration of Shawn Larsen-Bright ("Larsen-Bright Decl.") Ex. A. Upon being informed of Section 1237, the DoD prepared the first list of CCMCs and published it in June 2020. *Id.*

2. Then-President Trump issued and then amended Executive Order 13959.

On November 12, 2020, just days after the election was publicly called for Joe Biden, then-President Trump issued Executive Order 13959, entitled "Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies." Larsen-Bright Decl. Ex. B. Two months later, on January 13, 2021, one week before his exit from office, then-President Trump amended Executive Order 13959 via Executive Order 13974. *Id.* Ex. C. The amendment altered and clarified the restrictions imposed in the original executive order and further effectively provided, among other things, that United States persons are required to divest the securities of any company designated as a CCMC. *Id.*

Pursuant to Executive Order 13959 as amended, United States persons are forbidden from engaging in "any transaction in publicly traded securities, or any securities that are derivative of,

or are designed to provide investment exposure to such securities, of any Communist Chinese military company.” *Id.* Ex. B at § 1(a). A “Communist Chinese military company” includes any person listed as a CCMC pursuant to Section 1237. *Id.* § 4(a)(i). As relevant to this action, for persons designated as CCMCs after the issuance of the Executive Order, all such transactions are barred beginning 60 days after the designation. *Id.* § 1(a)(ii). However, United States persons may engage in transactions “solely to divest, in whole or in part” from securities in a CCMC for 365 days from the date of determination, and must divest all such securities within that time frame. *Id.* § 1(c); *see also* Larsen-Bright Decl. Ex. C. Pursuant to the terms of Executive Order 13959, the CCMC Prohibitions will go into effect with respect to Luokung as of March 15, 2021 (unless General License 1A extends the effective date to May 27, 2021, as otherwise discussed herein).

3. The Government processes relating to the Executive Order, its amendment, and the CCMC Prohibitions were highly unusual.

Charles Steele is a former senior Treasury Department official and an expert in the field of economic sanctions. Declaration of Charles M. Steele (“Steele Decl.”) ¶¶ 6-10 and Ex. A. Mr. Steele previously served as Chief Counsel for OFAC, where he led a team providing advice and support to OFAC and other Treasury Department personnel in the formulation, implementation, and enforcement of economic sanctions. *Id.* Prior to that appointment, he served in a number of other senior government positions pertaining to sanctions and related issues. *Id.*

As explained in his accompanying declaration, Mr. Steele has analyzed Executive Order 13959 and its amendment, and the publicly available facts and circumstances surrounding the executive order, its amendment, and the CCMC Designation and CCMC Prohibitions. *Id.* ¶¶ 5, 12-47. Based on his substantial expertise in this area, Mr. Steele has opined that: (a) the timing, circumstances, and substance of Executive Order 13959 and its amendment, and of related public statements and guidance, indicate that the interagency governmental process used in the

formulation and implementation of Executive Order 13959 and its amendment was materially different than interagency processes used with respect to other International Emergency Economic Powers Act (“IEEPA”)-based executive sanctions orders over the past several years; (b) the process appears to have been rushed and haphazard as the change in presidential administrations approached; and (c) input from those with primary responsibility for implementing and administering U.S. economic sanctions – particularly OFAC – appears to have been either not sought or disregarded to a degree that, in Mr. Steele’s experience, would be highly unusual. *Id.* Overall, the process followed by the government was extremely atypical. *Id.*

4. The DoD designated Luokung as a CCMC on January 14, 2021, but has never provided Plaintiffs with any explanation for the designation.

The day after the Trump Administration amended Executive Order 13959, on January 14, 2021, the DoD designated “Luokong Technology Corporation (LKCO)” as a CCMC. Larsen-Bright Decl. Ex. D. The CCMC Designation was a complete surprise to Luokung: it is not in fact a CCMC and it obtained no notice it might be designated as one, as it first learned of the designation from public reports when the Section 1237 List was released to the public. Li Decl. ¶ 20; Song Decl. ¶ 11. The DoD has never provided any explanation as to why Luokung was designated as a CCMC, either in connection with the initial public release of the list or subsequently. Li Decl. ¶ 27; Song Decl. ¶ 11.

Despite the government’s failure to provide any notice or information about why it was designated as a CCMC, Luokung has made best efforts to attempt to learn this information after the fact, to no avail. Following the CCMC Designation, Luokung submitted a Freedom of Information Act (“FOIA”) request to the DoD, along with a request for expedited processing, seeking information regarding the CCMC Designation. Larsen-Bright Decl. Ex. E. The DoD rejected the request for expedited processing, stated that it would not process the FOIA request

even within the 20-day statutory time period, and explained that Luokung's request would be processed in the order received in light of several thousand other pending requests. Larsen-Bright Decl. Ex. F. Luokung immediately submitted an appeal of the DoD's denial of the request for expedited processing. Larsen-Bright Decl. Ex. G. The DoD responded that it would not be issuing a decision on the appeal within the statutory time requirement, and no further information has been provided as to when its decision will be forthcoming. Larsen-Bright Decl. ¶ 8 and Ex. H. Because the DoD failed to provide notice initially, will not timely respond to Luokung's subsequent requests, and has not provided any information regarding the designation by any other means, Luokung does not even know the purported basis for the CCMC Designation.

5. Defendants have not provided any administrative avenue for relief prior to the effective date of the CCMC Prohibitions.

Plaintiffs do not have any means to challenge the CCMC Designation through any form of administrative process. There is no established administrative process at all, let alone a process that could provide a reasonable opportunity for relief before the CCMC Prohibitions go into effect. Unlike other sanctions programs, no regulations or guidance have been published by the DoD, OFAC, or any other government agency regarding any process for challenging the CCMC Designation and seeking removal from the Section 1237 List. Declaration of Lawrence Ward ("Ward Decl.") ¶ 6; *see also* Steele Decl. ¶¶ 36-38. In the context of other government sanctions programs, OFAC provides a process for designated persons to seek delisting, pursuant to procedures set forth in 31 CFR § 501.807. Ward Decl. ¶ 6. Because no information has been published regarding a delisting procedure relating to Section 1237, Luokung inquired with OFAC as to whether the 31 CFR § 501.807 procedures would apply to seeking removal from the Section 1237 List. *Id.* Ex. B. OFAC stated that the DoD would be handling any potential removal process, rather than OFAC; however, the DoD has not issued any regulations or guidance regarding a

delisting procedure, nor, to the best of Luokung's knowledge, are there any other sanctions programs in which the DoD administers a similar delisting process. *Id.* ¶ 6. Luokung is therefore unaware of any existing procedure that would allow it an opportunity to be heard at any time, and certainly not before the CCMC Prohibitions go into effect.

6. Luokung has attempted, but been unable, to confirm that General License 1A applies.

On January 27, 2021, OFAC issued General License 1A, which allows an extended period of time (until May 27, 2021) for U.S. persons to trade the securities or derivatives of entities whose names "closely match" but are not an exact match for those appearing on the Section 1237 List. Ward Decl. Ex. A. As noted above, the Section 1237 List identifies "Luokong Technology Corporation (LKCO)" as a CCMC. Plaintiff Luokung's legal name is "Luokung Technology Corp." Thus, the Section 1237 List incorrectly states the first word in the name of the company as "Luokong" (emphasis added), and also incorrectly states the third word in the name of the company as "Corporation," when the actual word in the name is "Corp." The name on the Section 1237 List therefore closely matches, but is not an exact match for, Luokung's name.

While Luokung believes that General License 1A therefore applies to Luokung, based on its plain language, without confirmation from OFAC or this Court, it is unable to conclusively verify for its investors, Nasdaq, and other interested parties that the purchase of Luokung securities by U.S. persons after March 15, 2021, will not be considered to violate Executive Order 13959. (In fact, as discussed further below, Nasdaq notified Luokung that it intended to delist Luokung as of March 15, 2021, based on its understanding of Executive Order 13959 and without reference to General License 1A). Based on its concerns of such misunderstandings, beginning on February 1, 2021, Luokung sought written confirmation from OFAC that General License 1A applies to Luokung, and that the CCMC Prohibitions, if applicable to Luokung at all, would consequently

not go into effect as to Luokung until May 27, 2021. Ward. Decl. ¶¶ 4-5 and Ex. B. Luokung then sent numerous follow up requests, and OFAC repeatedly acknowledged those requests and assured Luokung that it would provide a response. *Id.* However, after weeks passed with no substantive response, and, in light of the March 15 deadline that would apply absent General License 1A, Luokung requested a definitive answer by March 2, 2021, or it would have no choice but to seek relief from this Court to clarify its rights under General License 1A. *Id.* No such response was received by March 2, nor has any response been received to date. *Id.*

C. Plaintiffs Are Experiencing, and Will Continue to Experience, Irreparable Harm as a Result of the CCMC Designation.

The CCMC Designation, and the associated CCMC Prohibitions, have caused, and will continue to cause, immediate and irreparable harm to Luokung and its shareholders, including the Individual Plaintiffs. By tarnishing Luokung's reputation, injuring its shareholders, and cutting it off from public capital markets, the CCMC Designation and CCMC Prohibitions will interfere with and damage the company's business relationships, its ability to raise capital, and its ability to conduct and expand its business; and will harm its reputation and goodwill among business partners, investors, vendors, suppliers, and consumers. Li Decl. ¶¶ 29-36.

Luokung operates in highly competitive technology fields that include the autonomous driving, spatial-temporal data management, and Internet location based services industry sectors. *Id.* ¶ 30. Remaining competitive in these industries, which are characterized by rapid innovation, frequent introduction of new products and services, and intense competition in the market, requires significant capital spending, including in research and development, marketing, and building and maintaining stable customers and sales channels. *Id.* Due to the demands of the fields in which it operates and intense competition, it is critical that Luokung has the ability to grow rapidly and to upgrade existing products and technologies continuously. *Id.* Luokung's business requirements

thus include significant new investments on an ongoing basis. *Id.* The growth of Luokung to date has been made possible by hundreds of millions of dollars of investments it has received, most of which was facilitated through the U.S. capital markets. *Id.* Luokung's ability to grow and succeed is being harmed by the CCMC Designation and CCMC Prohibitions. *Id.*

Since its listing on the Nasdaq, Luokung has raised approximately \$190 million, of which approximately \$100 million was raised from U.S. investors or through U.S. financial institutions. *Id.* ¶ 31. However, the CCMC Designation and CCMC Prohibitions will cut off Luokung's access to investment from U.S. investors. *Id.* The U.S. capital markets are the world's largest and most liquid source of funding, and are by far the most important source of funding for Luokung. *Id.* As a result of the impacts of the CCMC Designation and CCMC Prohibitions, Luokung's ability to raise external capital will be significantly reduced and its cost of capital will increase. *Id.* This will cause the company to put on hold or delay the progress of projects important to its business, including outstanding business cooperation with U.S. companies (which will in turn negatively impact those U.S. companies). *Id.* Absent the CCMC Designation and CCMC Prohibitions, Luokung could proceed with such projects without interruption. *Id.* This will significantly harm Luokung's business, standing, and reputation. *Id.*

A ban on investments in Luokung by U.S. investors will not only adversely affect Luokung's ability to obtain capital from U.S. investors and to engage in strategic transactions with U.S. companies, it will likewise harm Luokung's strategic relationships with U.S. financial institutions, particularly those with headquarters based in the United States. *Id.* ¶ 32. In addition to underwriting capital markets transactions, U.S. financial institutions also act as trusted advisors to Luokung in connection with, for example, identifying potential transactions or business opportunities, such as acquisitions, in which Luokung could participate. *Id.* U.S. financial

institutions also play an important role in facilitating Luokung's ability to obtain capital from non-U.S. investors. *Id.* If the CCMC Prohibitions take effect in light of the CCMC Designation, these U.S. organizations will be much less motivated to maintain relationships with Luokung and will focus on building relationships with its similarly situated competitors that have not been designated. *Id.* Once these critical business relationships (which are often sticky and ongoing) are formed with competitors, it will be difficult or impossible for Luokung to repair the resulting damage to its business from the loss of these relationships and connections, even if the CCMC Designation and CCMC Prohibitions are eventually lifted. *Id.*

The CCMC Designation and CCMC Prohibitions will also result in substantial downward pressure on Luokung's share price, as existing U.S. shareholders will be required to sell their shares and as U.S. investor demand for Luokung share purchases disappears. *Id.* ¶ 33. This downward pressure will put Luokung at a disadvantage to its competitors and other similarly situated companies that have not been designated as CCMCs. *Id.* Beyond the fundamental disadvantage resulting from the inability to raise capital from U.S. investors, the reduction in Luokung's share price will also hinder the company's ability to raise capital elsewhere. *Id.* These hindrances will negatively impact Luokung's ability to develop new technology platforms and pursue and complete major company projects, which could be expected to lead to loss of market share. *Id.* Even if the CCMC Designation and CCMC Prohibitions are ultimately revoked later, Luokung will not be able to cure the injury to its business suffered during the period they were in effect, and many of the business opportunities it loses during that time period will not reappear. *Id.*

The CCMC Designation and CCMC Prohibitions will also have an ongoing adverse effect on Luokung's business by damaging its brand reputation and market credibility. *Id.* ¶ 34. Luokung has invested heavily in its core product and service areas to build a recognizable and well respected

brand. *Id.* If Luokung's global customer base comes to see Luokung as a proxy for the Chinese military, due to the false CCMC Designation, it will be more difficult to maintain and grow this brand. *Id.* In addition, the CCMC Designation and CCMC Prohibitions have eroded market confidence in Luokung's ability to operate, and there are indications that some of its business partners will sever their relationships with Luokung due to the CCMC Designation. *Id.* This damage to the company's reputation and goodwill will result in lower sales results, further downward pressure on Luokung's share price and a weakening of its competitive position, and will have a devastating impact on Luokung's long-term business prospects. *Id.*

The CCMC Designation and CCMC Prohibitions also have had, and will continue to have, a significant negative impact on Luokung's ability to recruit and retain talented employees. *Id.* ¶ 35. As a high-tech company, Luokung relies on a pool of technical professionals and senior engineers to create and refine innovative, high-performance products and service offerings. *Id.* Given the importance of talent to Luokung's business and competitive standing, the company's management has spent a significant amount of time recruiting senior engineers and scientists. *Id.* The CCMC Designation and CCMC Prohibitions have hampered its recruiting efforts, damaged its international brand and corporate reputation, and created uncertainty about its future business prospects. *Id.* Since the CCMC Designation was announced, several potential recruits for senior technical positions have informed Luokung that they are reluctant to join Luokung because of the measures the U.S. government has taken against it. *Id.*

In addition, the CCMC Designation and CCMC Prohibitions will make it more difficult for Luokung to retain its existing talented employees. *Id.* ¶ 36. Most of Luokung's employees receive Luokung shares and/or stock options as part of their compensation, pursuant to the company's employee incentive plan, the 2018 Omnibus Equity Plan (the "Incentive Plan"). *Id.* As with many

technology companies, these equity grants are a very significant component of many employees' overall compensation packages. *Id.* In 2020, for example, 73% of total compensation for Luokung's core employees was provided in the form of stock and stock options. *Id.* The impact of the CCMC Designation and CCMC Prohibitions on Luokung's share price will significantly reduce the value of these benefits to its employees, which will lead to further attrition of the company's core employees, and ultimately further negatively impact Luokung's business. *Id.*

The CCMC Designation and CCMC Prohibitions also will cause imminent, severe, and irreparable harm to the Individual Plaintiffs, U.S. citizens Baomin Li and Raymond Weiman Bai. Once the CCMC Prohibitions go into effect, these individuals will be prohibited from purchasing Luokung's securities and will no longer be able to receive Luokung's shares or stock options as a form of compensation under the Incentive Plan. *Id.* ¶¶ 36, 38-39; Declaration of Raymond Weiman Bai ("Bai Decl.") ¶ 4. These individuals must also divest their holdings of Luokung securities by no later than January 14, 2022, a requirement that will force them to sell their shares under a compressed timeframe at a time when all other U.S. persons also would be required to divest their shares – market conditions that would depress Luokung's share price and result in a lower realization for the Individual Plaintiffs and all Luokung shareholders forced to sell their shares. Li Decl. ¶ 39; Bai Decl. ¶ 4. Accordingly, the effects of the CCMC Prohibitions will not only cause Mr. Li and Mr. Bai to sell their shares at a price significantly lower than it would normally be, to their detriment, but they will also be prevented from benefiting from future share appreciation. Li Decl. ¶ 39; Bai Decl. ¶ 4. Mr. Bai may be compelled to terminate his relationship with the company if he is no longer able to receive awards under the Incentive Plan, which are a significant component of his compensation. Bai Decl. ¶ 4. With respect to Mr. Li, the CCMC Prohibitions will have a devastating impact and will force him to sever his relationship with the

company that he has been greatly involved in developing for the past several years. Li Decl. ¶ 39.

The CCMC Designation and CCMC Prohibitions will also harm third-party investors – both individuals and institutions – who currently hold or plan to purchase publicly traded Luokung securities. Li Decl. ¶ 37. As a consequence of the CCMC Designation and CCMC Prohibitions, U.S. persons will no longer be able to purchase publicly traded Luokung securities once the CCMC Prohibitions go into effect, and must divest their holdings by January 14, 2022. *Id.* Luokung’s thousands of U.S. shareholders will be directly harmed by these restrictions and limitations. *Id.* And all of Luokung’s shareholders – both U.S. and foreign – will be unfairly and irreparably harmed by the devaluation of their shares and lack of liquidity that will result from the effects of the CCMC Designation and CCMC Prohibitions. *Id.*

D. Nasdaq Informed Luokung that it will Halt Trading and Delist Luokung’s Securities as of March 15, 2021.

On March 4, 2021, the Director of Nasdaq Listing Qualifications, W. Wayne Bush, informed Luokung’s securities counsel, Elizabeth Fei Chen, that, due to the CCMC Designation, Nasdaq would halt all trading in Luokung’s securities and delist Luokung as of March 15, 2021. Declaration of Elizabeth Fei Chen (“Chen Decl.”) ¶ 2. Luokung’s counsel responded that, among other things, it is Luokung’s position that General License 1A applies to Luokung, and that March 15, 2021 is thus not the effective date for the CCMC Prohibitions. *Id.* ¶ 3. At the request of Mr. Bush, Luokung promptly submitted a letter to Nasdaq outlining its position. *Id.* Ex. A.

Shortly after receiving Luokung’s letter, Mr. Bush telephoned Ms. Chen and informed her that Nasdaq was concerned that it could not distinguish permissible transactions of non-U.S. shareholders from impermissible transactions of U.S. shareholders. *Id.* ¶ 4. Mr. Bush further stated, however, that Nasdaq may update its decision if OFAC confirms that General License 1A applies to Luokung. *Id.* Nasdaq then issued a letter confirming Nasdaq’s decision. *Id.* Pursuant

to this letter, Nasdaq stated that it had “determined that the continued listing of [Luokung’s] securities are no longer warranted” effective March 15, 2021, due to the CCMC Designation. *Id.* Ex. B at 1. While Luokung may choose to appeal this determination, Nasdaq will halt trading of Luokung’s securities on March 15, 2021, notwithstanding any appeal. *Id.*

E. Plaintiffs Filed Suit and now Seek a Temporary Restraining Order.

Plaintiffs filed this action on March 4, 2021. Although Plaintiffs believe that General License 1A applies to Luokung, given OFAC’s inaction to confirm its applicability and the harm that Plaintiffs are already incurring (including Nasdaq’s intent to delist Luokung as of March 15, 2021), and will continue to incur, as a result of the CCMC Designation and the CCMC Prohibitions, Plaintiffs are filing this motion for a temporary restraining order. Plaintiffs’ Complaint names as defendants the DoD, which was the agency responsible for publishing the Section 1237 List designating Luokung as a CCMC; Secretary of Defense Lloyd J. Austin III, who is sued in his official capacity as the person designated by Section 1237 to identify CCMCs; the United States Department of the Treasury (“USDT”), with whom the DoD was required to consult before designating Luokung as a CCMC; Secretary of the Treasury Janet L. Yellen, who is sued in her official capacity as the senior official of the USDT, which is authorized by Executive Order 13959 to promulgate rules and regulations to carry out its purposes; and President Joseph R. Biden Jr., who is sued in his official capacity for conduct by then-President Trump.

Plaintiffs assert seven claims, alleging that Defendants’ actions are *ultra vires* and violate the APA and the Fifth Amendment. In particular, Plaintiffs allege that Defendants’ actions violate the APA because they are arbitrary and capricious, run counter to any accurate information that was before Defendants, and did not comply with the requirements for the exercise of their authority. Plaintiffs further allege that Defendants’ actions were *ultra vires* because Luokung does not qualify as a CCMC under Section 1237 and Executive Order 13959, and because the DoD

failed to comply with the requirements for the exercise of its authority. Plaintiffs also allege that Defendants' actions violate the Due Process Clause of the Fifth Amendment because Plaintiffs received no notice or explanation of the CCMC Designation and have not received an opportunity to respond and be heard, and because Section 1237 is unconstitutionally vague because it does not define "affiliated with." Finally, Plaintiffs assert a declaratory judgment claim, seeking a declaration from the Court that General License 1A applies to Luokung and that the CCMC Prohibitions therefore will not go into effect, if at all, until May 27, 2021.

Defendants have not yet disclosed any administrative record in connection with the CCMC Designation. Upon filing the Complaint, Plaintiffs' counsel provided notice to the Department of Justice of the Complaint and the imminent filing of a motion for a temporary restraining order.

III. ARGUMENT

"The standard that applies to preliminary injunctions also applies to temporary restraining orders." *Bayer HealthCare, LLC v. FDA*, 942 F. Supp. 2d 17, 23 (D.D.C. 2013). To obtain a temporary restraining order, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). These elements are readily satisfied here.

The DoD issued the CCMC Designation without any basis in fact, without any notice to Luokung or the thousands of affected U.S. shareholders whose rights are being infringed as a result of the designation, and without any means for Luokung or anyone else to meaningfully challenge the designation before the irreparable harms resulting from the CCMC Prohibitions will go into effect. Moreover, although Luokung believes the effective date of the CCMC Prohibitions under General License 1A is May 27, 2021, the government has not responded to repeated requests to

confirm this fact, putting Luokung and its shareholders at risk of restrictions taking effect as soon as March 15, 2021. This is exactly the kind of situation that a temporary restraining order is designed to address. Because Plaintiffs are likely to succeed on the merits and will suffer irreparable harm absent an injunction, and because the balance of equities favors Plaintiffs and is in the public interest, the Court should issue a temporary restraining order to allow Plaintiffs a meaningful opportunity to challenge the CCMC Designation and assert their claims.

A. Plaintiffs are Likely to Succeed on the Merits of Their Claims.

The “first and most important factor” in establishing entitlement to a temporary restraining order is whether the plaintiff has “established a likelihood of success on the merits.” *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014). Because Plaintiffs are likely to succeed on each of their seven claims, this factor weighs strongly in Plaintiffs’ favor.

1. General License 1A Applies to Luokung.

a. Declaratory relief is appropriate in this case.

To determine whether declaratory relief is appropriate pursuant to 28 U.S.C. § 2201, “the question . . . is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Nat’l R.R. Passenger Corp. v. Consol. Rail Corp.*, 670 F. Supp. 424, 428 (D.D.C. 1987) (quotations omitted). In deciding whether to issue declaratory relief, the Court must exercise its discretion “in the public interest and in such a way as to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief.” *Hanes Corp. v. Millard*, 531 F.2d 585, 592 (1976) (quotations omitted) (abrogated on other grounds). A declaratory judgment is “an instrument of practical relief” that should be issued where it would serve a “useful purpose.” *Id.* (quotations omitted).

In this case, there is a clear and substantial controversy of great immediacy: Plaintiffs

assert that General License 1A, which would delay the effective date of the CCMC Prohibitions until May 27, 2021, applies; absent the application of General License 1A, however, the CCMC Prohibitions will go into effect on March 15, 2021. Once the CCMC Prohibitions go into effect, U.S. persons, including the two Individual Plaintiffs, will be prohibited from purchasing Luokung securities or derivatives, and face severe penalties if they do so. *See* 50 U.S.C. § 1705 (authorizing civil and criminal penalties for violation of orders issued under IEEPA). Plaintiffs have repeatedly sought confirmation from OFAC that General License 1A applies, beginning on February 1, 2021. *See* Ward Decl. Ex. B. While an OFAC representative repeatedly acknowledged the inquiries and stated that OFAC intended to respond, to date no response has been provided. *Id.* Because of the impending March 15 effective date, Luokung specifically requested a response by no later than March 2, 2021, noting that Luokung would otherwise need to seek court intervention if OFAC did not confirm the applicability of General License 1A. *Id.* Luokung has not received any response. Ward Decl. ¶ 4. Given the severe penalties associated with violation of orders under IEEPA, OFAC's refusal to confirm the applicability of General License 1A is tantamount to a denial of its applicability, or at least has the same effect. Questions such as the "applicability of statutes and regulations" in this context are appropriate for declaratory relief. *Constructores Civiles de Centroamerica, S. A. (Concica) v. Hannah*, 459 F.2d 1183, 1192 (D.C. Cir. 1972).

Immediate declaratory relief is particularly appropriate here because, without the Court's intervention, Luokung, the Individual Plaintiffs, U.S. shareholders, and other affected third-parties must either conduct themselves as if the CCMC Prohibitions apply as of March 15, 2021, even if they do not, or risk facing severe penalties, even though the USDT itself determined that it was appropriate to delay effectiveness as to circumstances like Luokung's until May 27. Without immediate relief, Plaintiffs will be deprived entirely of the benefits of General License 1A. So too

will *all* shareholders and potential shareholders, regardless of status as a U.S. person, as a result of Nasdaq’s decision to halt trading in and delist Luokung securities as of March 15 – a decision it has indicated it is willing to update if General License 1A is determined to apply to Luokung.

b. General License 1A plainly applies to Luokung.

General License 1A relevantly provides:

[A]ll transactions and activities prohibited by section 1(a) of [Executive Order 13959] involving publicly traded securities, or any securities that are derivative of, or are designed to provide investment exposure to such securities, of an entity whose name **closely matches, but does not exactly match**, the name of a Communist Chinese military company as defined by section 4(a) of E.O. 13959, as amended, are authorized through 9:30 a.m. eastern daylight time, May 27, 2021.

Ward Decl. Ex. A (emphasis added). Based on its plain language, General License 1A applies to Luokung. The Section 1237 List names “Luokong Technology Corporation (LKCO)” as a CCMC. *See* Larsen-Bright Decl. Ex. D. The Section 1237 List thus misspells “Luokung” (replacing the second “u” in the name with an “o”) and spells out “Corporation” where Luokung’s proper legal name includes the word “Corp.”

Defendants cannot plausibly assert that the name listed on the Section 1237 List “exactly” matches Luokung’s name because it does not; it merely “closely matches.” Despite Plaintiffs repeated requests over more than a month, however, Defendants have not acknowledged that General License 1A applies to Luokung, necessitating this claim. Plaintiffs are therefore likely to succeed on the merits of their claim that General License 1A applies to Luokung (Count 7).

2. The CCMC Designation Violated the APA for Numerous Reasons.

a. The CCMC Designation is a final agency action subject to review under the APA.

The APA empowers the courts to set aside a “final agency action for which there is no other adequate remedy in a court” if that action is, among other things, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “unsupported by substantial

evidence.” 5 U.S.C. §§ 704, 706(2)(A) and (E).¹

The CCMC Designation is indisputably a final agency action reviewable pursuant to the APA. As the Supreme Court has explained:

As a general matter, two conditions must be satisfied for agency action to be “final”: First, the action must mark the consummation of the agency’s decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow.

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal quotations and citations omitted). Here, there is nothing tentative or interlocutory about the CCMC Designation, and legal consequences began flowing from the decision immediately. It was publicly announced by the DoD as its final decision and it had immediate and concrete effects under Executive Order 13959.

The CCMC Designation, moreover, is the sort of agency action that this Court has already found to be reviewable. *See, e.g., TikTok Inc. v. Trump*, No. 1:20-cv-02658, 2020 U.S. Dist. LEXIS 232977, at *39 (D.D.C. Dec. 7, 2020) (“[T]he decision-making process an agency employs to effectuate an executive order issued under IEEPA is subject to arbitrary and capricious review.”) (citing *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003)). The CCMC Designation, moreover, does not fall within the APA’s exemption for where “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). This narrow exemption applies only where “the statute is drawn so that a court would have no meaningful standard against which

¹ Where there is a prescribed administrative remedy, litigants are required to exhaust that remedy before seeking judicial relief unless “the reasons supporting the doctrine are inapplicable.” *See Comm. of Blind Vendors v. District of Columbia*, 28 F.3d 130, 133 (D.C. Cir. 1994). Here, where there are no regulations setting forth any process for an administrative remedy, and where Plaintiffs face irreparable harm, exhaustion is not required. *See, e.g., Bracco Diagnostics v. Shalala*, 963 F. Supp. 20, 31 (D.D.C. 1997) (“Lacking a specific congressional mandate as to the plaintiffs’ administrative remedy and finding plaintiffs faced with irreparable harm, the Court concludes that exhaustion of administrative remedies in the circumstances of this case is not required.”).

to judge the agency’s exercise of discretion.” *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 642 (D.C. Cir. 2020) (quotations omitted). Here, Section 1237 sets forth both the process and the criteria by which the DoD may designate an entity a CCMC, *see* NDAA FY99 § 1237(b)(4), and (c), providing the “meaningful standard” against which the Court may review the DoD’s decision. *See, e.g., Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 99 (D.C. Cir. 2021) (finding agency action reviewable where statute provides limitations on discretion).

b. The DoD has not provided any basis for the CCMC Designation.

An agency *must* “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotations omitted). If the agency does not articulate such a reasoned basis for its action, the Court “may not supply” one. *Id.* The agency’s action, moreover, must be supported by “substantial evidence” – that is, evidence that a “reasonable mind might accept” as “adequate to support a conclusion.” *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (quotations omitted); *see also Defs. of Wildlife v. Jewell*, 815 F.3d 1, 9 (D.C. Cir. 2016) (explaining that “substantial evidence means enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict”) (quotations omitted).

Luokung is likely to succeed on the merits because the DoD has not only failed to provide a reasoned basis for the CCMC Designation, but it has not articulated any basis whatsoever. The Section 1237 List merely lists a name similar to Luokung’s, without providing even a token explanation for how it meets the requirements to be designated as a CCMC. *See* Larsen-Bright Decl. Ex. D. The DoD has not provided any further explanation for the CCMC Designation, either in publicly-released materials or directly to Luokung. Li Decl. ¶ 27; Song Decl. ¶ 11.

Defendants may not engage in such unexplained decision-making; the law requires far more. *See Motor Vehicle Mfrs.*, 463 U.S. at 43. Absent a satisfactorily reasoned explanation, the

court “must undo” the agency’s action. *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999). Having failed altogether to articulate any basis for the CCMC Designation – let alone a reasoned basis supported by substantial evidence – the CCMC Designation is in clear violation of the APA and Plaintiffs are likely to succeed on the merits of their claim (Count 1).

c. The CCMC Designation is unsupported by substantial evidence and is arbitrary and capricious.

Because the DoD has not articulated any reason for the CCMC Designation, Luokung is unable to address the specific basis – assuming any such purported basis exists – for the designation. However, it is clear that whatever evidence the DoD considered, if any, cannot meet the requirements of the APA that it be “substantial.” *See Jewell*, 815 F.3d at 9. The DoD’s action is, moreover, arbitrary and capricious. Agency action is arbitrary and capricious where “the agency has relied on factors which Congress has not intended it to consider[,] . . . offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *State Farm*, 463 U.S. at 43. The CCMC Designation must fail on all counts because Luokung is not a CCMC and does not in any way satisfy the legal definition of a CCMC.

Section 1237 provides two statutory bases to designate an entity as a CCMC. The entity must either be: (1) “owned or controlled” by the People’s Liberation Army, a ministry of the Chinese government, or an entity affiliated with the defense industrial base of the Chinese government, or (2) “affiliated with” the People’s Liberation Army or a ministry of the Chinese government. NDAA FY99 § 1237(b)(4)(B)(i). “People’s Liberation Army” means, for purposes of Section 1237, “the land, naval, and air military services, the police, and the intelligence services of the Communist Government of the People’s Republic of China, and any member of any such service of such police.” Section 1237 does not define “own,” “control,” or “affiliated with.” Each

term must therefore be given its “ordinary, contemporary, common meaning.” *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quotations omitted). Under the ordinary meaning of these terms, or any reasonable meaning for that matter, Luokung is not owned by, controlled by, or affiliated with the People’s Liberation Army or the Chinese government.

The term “own” is commonly understood to refer to possession, legal title, and/or control. *See, e.g.*, Own, Black’s Law Dictionary (11th ed. 2019) (“to rightfully have or possess as property; to have legal title to”); Own, Merriam-Webster Online Dictionary (“to have or hold as property; to have power or mastery over”); *see also Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1273 (10th Cir. 2017) (relying on Black’s Law Dictionary of “own”). The term “control” is commonly understood to mean “something closer to, in dictionary parlance, ‘to exercise directing or restraining influence over.’” *Mass. Lobstermen’s Ass’n v. Ross*, 349 F. Supp. 3d 48, 63 (D.D.C. 2018) (quoting Webster’s First Dictionary) (determining that the government controlled the ocean where it had broad sovereign authority to regulate the area, had the specific authority to regulate the area for purposes of marine conservation, and no other person had comparable dominion). These definitions are consistent with the USDT regulatory definitions used in other IEEPA-based sanctions programs. *See, e.g.*, 31 C.F.R. § 561.322 (defining “owned or controlled” to mean entities in which a sanctioned government “owns a 50% or greater interest or a controlling interest, and any entity . . . which is otherwise controlled by that government”).

The phrase “affiliated with” is commonly understood to involve the effective control or subordination of one entity by the affiliated entity. *See, e.g.*, Affiliated, Merriam-Webster Online Dictionary (“closely associated with another typically in a dependent or subordinate position”); *Mey v. DIRECTV, LLC*, 971 F.3d 284, 289 (4th Cir. 2020) (“An affiliate is commonly understood ‘as a company effectively controlled by another or associated with others under common

ownership or control.’’) (quoting Webster’s Third New Int’l Dictionary 35 (2002)); Affiliate, Black’s Law Dictionary (9th ed. 2009) (“[a] corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent or sibling corporation”).

No entity of the People’s Liberation Army or Chinese government can conceivably be understood to “own” or “control” Luokung within the ordinary meaning of these terms, nor can Luokung be identified as an “affiliate” of those entities. To the contrary, Luokung is a publicly-traded, independently managed commercial company. Li Decl. ¶ 21; Song Decl. ¶ 6. It is managed and operated by a board of directors and an executive management team – none of whom has any connection to the Chinese government or military – and it is ultimately responsible to its shareholders, *not* the Chinese government or military. Li Decl. ¶ 21; Song Decl. ¶ 6. Moreover, a supermajority of voting rights in the company are held by Luokung’s Chairman and CEO, Mr. Xuesong Song, a civilian businessperson unaffiliated with the Chinese government or military. Song Decl. ¶¶ 3, 7-8. Indeed, to Luokung’s knowledge, *none* of Luokung’s shares (which are publicly available via Nasdaq) is held by persons controlled by Chinese governmental or military entities. Li Decl. ¶ 23. No entity owned, controlled, or affiliated with the Chinese government or military has been part of any financing arranged by Luokung. *Id.* The Chinese government and military do not play any role in shaping the company’s strategy, management, operations, or business. *Id.* ¶ 25. Luokung does not design or manufacture any military or defense products, and the company’s overall strategy and operations are focused on delivering civil and commercial products and services to a global market. *Id.*

Because Luokung is not, in fact, owned by, controlled by, or affiliated with any prohibited entity, the CCMC designation is necessarily unsupported by substantial evidence and arbitrary and capricious. Plaintiffs are therefore likely to succeed on the merits of their claim (Count 1).

d. The CCMC Designation was made without observance of procedure required by law.

The APA directs reviewing courts to “hold unlawful and set aside agency action” where that action was made “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D). Section 1237 expressly requires the Secretary of Defense to consult with the Attorney General, the Director of Central Intelligence, and the Director of the Federal Bureau of Investigation when designating entities as CCMCs. *See* NDAA FY99 § 1237(b)(3).

The courts do not assume that an agency has followed the statutorily required steps before taking agency action. “When a statute specifically requires an agency to consult with an outside entity during the course of a rulemaking, the administrative record should contain some evidence that such a consultation took place.” *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 323 (D.D.C. 2016) (finding that the USDT’s Financial Crimes Enforcement Network failed to demonstrate that it performed the required consultations with the Secretary of State, the Attorney General, and other entities prior to imposing special measures against a bank accused of money laundering, where the administrative record merely stated that such consultations had occurred).

There is presently no evidence that the DoD engaged in the required consultation; nothing in the public domain indicates that such consultations occurred, and Defendants have not disclosed any information regarding the basis for the CCMC Designation or any consultations that occurred prior to the designation. There were also significant anomalies in the government processes associated with Executive Order 13959 and its amendment that indicate reason to doubt all normal and appropriate procedures were followed. *See* Steele Decl. ¶¶ 9-47. Absent sufficient evidence in the administrative record that the required consultation and processes occurred, Plaintiffs are likely to succeed on merits on this basis as well (Count 2).

3. Section 1237 is unconstitutionally vague.

As noted above, Section 1237 does not define “affiliated with.” Under the ordinary meaning of “affiliated with,” there is no basis to determine that Luokung is affiliated with any prohibited entity identified in Section 1237. To the extent that Defendants contend that some other meaning applies, however, Section 1237 is void for vagueness as to the provisions that incorporate the undefined and unconstitutionally vague term “affiliated with.”

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). This is so because “we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly” and because “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” *Id.* A statute that “give[s] those enforcing [the] prohibition an impermissibly wide discretionary range in which to determine who is in violation” is therefore void. *Cnty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1395 (D.C. Cir. 1990).

While there is ample basis to apply the ordinary definition of “affiliated with” set forth above and determine that Luokung is *not* affiliated with any prohibited entity, Defendants have recently publicly taken the position that “affiliated with” should be interpreted far more broadly than its common understanding, to include merely associations with a common purpose or shared characteristics. *See* Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction (Dkt. #16) at 16, *Xiaomi Corp. v. U.S. Dep’t of Def.*, Case No. 21-cv-00280 (D.D.C.). Based on this proffered definition, which does not appear in any statute or regulation, the DoD apparently concluded that Xiaomi Corporation is “affiliated with” Chinese governmental and military entities because the founder of the company personally won a social award from a government ministry and the company is involved in developing 5G and AI technologies, like many other companies.

See Declaration of Andrew J. Pahutski (Dkt. No. 16-1), Case No. 21-cv-00280 (D.D.C.).

To the extent that Defendants proffer a similar definition of “affiliated with” and advance similar reasons for the CCMC Designation at issue here, such reasoning would vividly illustrate why the undefined phrase in Section 1237 is impermissibly vague. It shows both the basic ambiguity of the phrase, as recognized by prior courts considering similar terminology, and the fact that, due to its ambiguity, the phrase provides “an impermissibly wide discretionary range” for determining whether an entity is a CCMC. *Cnty. for Creative Non-Violence*, 893 F.2d at 1395.

Multiple courts have found that “affiliated with” and similar language is impermissibly vague. See, e.g., *Pratt v. State*, 516 So. 2d 328, 328 (Fla. Dist. Ct. App. 1987) (rejecting bail condition instructing defendant “not to be affiliated with the legal profession” as unconstitutionally vague because it did not apprise him of which otherwise lawful acts were prohibited); *Child Evangelism Fellowship of Va. v. Williamsburg-James City Cty. Sch. Bd.*, No. 4:08cv4, 2008 U.S. Dist. LEXIS 61392, at *3, 14 (E.D. Va. Aug. 8, 2008) (granting injunction where school board’s policy did not define what it meant to be “affiliated” with the school, and noting that proposed definition of “affiliated with” to mean “in direct support of” was “incredibly vague”).²

The decision in *Humanitarian Law Project v. Dep’t of Treasury*, 463 F. Supp. 2d 1049 (C.D. Cal. 2006), is particularly instructive. There, the court addressed an executive order permitting the Secretary of the Treasury to designate as a “specially designated global terrorist”

² The Supreme Court addressed the challenges of determining whether parties are “affiliated” in *Bridges v. Wixon*, 326 U.S. 135 (1945), in the context of determining whether an individual was subject to deportation due to an “affiliation” with the Communist Party. There, unlike here, the statute defined “affiliation,” yet the Supreme Court still found the concept difficult to define and held that the lower court had construed the term too broadly, explaining: “Common sense indicates that the term ‘affiliation’ in this setting should be construed more narrowly.” *Id.* at 143 (holding that affiliation means more than cooperation); cf. *Inland Steel Co. v. NLRB*, 170 F.2d 247, 262 (7th Cir. 1948) (Major, J. dissenting) (regarding *Bridges*, “[t]he court’s discussion is convincing that [the meaning of affiliation] would be quite beyond the reach of the ordinary citizen”).

individuals who were “otherwise associated with” a designated terrorist group. Plaintiffs challenged the executive order on a number of grounds, including that “otherwise associated with” was impermissibly vague. The court found that the “otherwise associated with” provision was improper because it contained “no definable criteria” and thus “on its face gives the Government unfettered discretion in enforcing it.” *Id.* at 1070-71. The court subsequently reconsidered its finding, but only after the government issued new regulations so that there was an actual definition of the term at issue, specifically defining “to be otherwise associated with” to mean “(a) [t]o own or control; or (b) [t]o attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to.” *Humanitarian Law Project v. Dep’t of Treasury*, 484 F. Supp. 2d 1099, 1105 (C.D. Cal. 2007).

Here, there is no definition of “affiliated with” and no definable criteria that could be applied to determine whether a person is affiliated with a prohibited entity. Left to apply the language of Section 1237 without any such guidance, the DoD has been given an unconstitutional level of unfettered discretion. The lack of any definition of “affiliated with” renders the statute unconstitutionally vague and unconstitutionally ripe for arbitrary and capricious agency action of the very type at issue here. Plaintiffs are likely to succeed on the merits of their claim as to the impermissibly vague language in Section 1237 (Count 6).

4. The CCMC Designation and the CCMC Prohibitions are *ultra vires*.

In addition to violating the APA, the CCMC Designation and the CCMC Prohibitions are *ultra vires* and are subject to this Court’s review on that basis as well. *See Chamber of Com. of the United States v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (“When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority.”). The CCMC Designation and CCMC Prohibitions are *ultra vires* for at least three reasons detailed above: (1) Luokung is not and does not qualify as a CCMC under the criteria set forth in Section 1237; (2)

there is no evidence that the DoD engaged in the required consultations with other agencies, as required under Section 1237; and (3) because Luokung does not qualify as a CCMC, the application of the CCMC Prohibitions exceeds the authority granted by Executive Order 13959.

Section 1237 grants the DoD the authority to designate entities as CCMCs only if they meet statutory requirements, and Executive Order 13959 imposes prohibitions on trading in the securities of entities only to the extent that they are designated pursuant to Section 1237. Because Luokung does not satisfy the statutory conditions, the CCMC Designation and CCMC Prohibitions are *ultra vires*, and Luokung is likely to succeed on these bases as well (Counts 3 and 4).

5. The CCMC Designation and CCMC Prohibitions violate the due process clause of the Fifth Amendment.

The United States Constitution requires that individuals and entities be afforded due process of law before being deprived of property or liberty interests. *See* U.S. Const. Amend. V. The right to due process is fundamentally “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Kessler v. Surface Transp. Bd.*, 635 F.3d 1, 6 (D.C. Cir. 2011) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). National security concerns do not vitiate the requirements of the Fifth Amendment; even where a deprivation is based on classified information, “due process requires, at the least, that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence.” *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 319 (D.C. Cir. 2014).

Plaintiffs have been afforded *no* process in connection with the CCMC Designation and CCMC Prohibitions. Plaintiffs learned of the CCMC Designation along with the rest of the public, when the Section 1237 List was published. Luokung has not received any explanation for the CCMC Designation, let alone evidence supporting the designation. And there is no established process to challenge the CCMC Designation; the normal OFAC delisting process – under which

Plaintiffs still would not be able to obtain a decision before the CCMC Prohibitions go into effect – does not apply here, and no other process for relief has been established. Because Plaintiffs will be deprived of their liberty and property interests, and have not been afforded due process to challenge that deprivation, Plaintiffs are likely to succeed on the merits of their claim that the CCMC Designation and CCMC Prohibitions violate their due process rights (Count 5).

a. Plaintiffs are protected by the Due Process Clause.

Both Luokung and the Individual Plaintiffs are protected by the Due Process Clause of the Fifth Amendment. The Individual Plaintiffs Baomin Li and Raymond Weiman Bai are United States citizens. Li Decl. ¶ 2; Bai Decl. ¶ 1. As such, the Individual Plaintiffs are protected by the Due Process Clause, regardless of whether they are physically located in the United States or elsewhere. *See, e.g., Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion).

Foreign corporations like Luokung are protected by the Due Process Clause where they have “come within the territory of the United States and established substantial connections with this country.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). Defendants have conceded that Luokung operates in the United States: in its press release announcing the designation of Luokung and eight other companies as CCMCs, the DoD identified Luokung as a company “operating directly or indirectly in the United States.” Larsen-Bright Decl. Ex. D. This is consistent with the language of Section 1237, which directs the Secretary of Defense to identify CCMCs “operating directly or indirectly in the United States or any of its territories and possessions.” NDAA FY99 § 1237(b)(1). That is, Luokung’s substantial connection to the United States is a condition precedent to its designation as a CCMC pursuant to Section 1237. That alone is enough to confer due process protections.

Luokung has other substantial connections to the United States. It has been listed on Nasdaq for a decade, first through the American Depository Shares of its predecessor and currently

through a listing of its ordinary shares, and has raised millions of dollars in capital in the United States – leading to millions of dollars of revenue for the U.S. financial institutions underwriting those transactions. Li Decl. ¶¶ 14, 16. Luokung has *thousands* of U.S. shareholders, including multiple of its largest shareholders. *Id.* ¶ 15. Moreover, Luokung’s Chief Technology Officer, Plaintiff Baomin Li, is a U.S. citizen who resides in and conducts his business on behalf of Luokung in the United States. *Id.* ¶ 18. One of Luokung’s directors, as well as Luokung’s Vice President, Plaintiff Raymond Weiman Bai, are U.S. citizens as well. *Id.* ¶ 18; Bai Decl. ¶¶ 1-2. Luokung also maintains a banking relationship in the United States. *Id.* ¶ 18. These connections to the United States are more than sufficient to afford Luokung the protections of the Fifth Amendment. *See, e.g., Atamirzayeva v. United States*, 524 F.3d 1320, 1328 (Fed. Cir. 2008) (noting that where a foreign corporation was formed by United States citizens and received property from those citizens, and a United States citizen was appointed liquidating trustee, the corporation had sufficient contacts to confer due process protections); *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 203 (D.C. Cir. 2001) (holding that plaintiff’s claimed interest in a small bank account was sufficient to confer due process protections).

b. Plaintiffs were entitled to due process prior to the deprivation of their interests.

“[T]he fundamental norm of due process clause jurisprudence requires that *before* the government can constitutionally deprive a person of the protected liberty or property interest, it must afford him notice and hearing.” *Nat’l Council of Resistance of Iran*, 251 F.3d at 205 (emphasis added) (citing *Mathews*, 424 U.S. at 334-35). In other words, it is not sufficient that Plaintiffs can now pursue emergency relief from this Court; Plaintiffs were entitled to due process *before* the CCMC Designation was made, and are entitled to due process before the CCMC Prohibitions go into effect. Defendants, however, have provided no process whatsoever.

To justify postponing a person's Constitutional right to notice and hearing until after the deprivation, Defendants must demonstrate that: "(1) the deprivation was necessary to secure an important governmental interest; (2) there has been a special need for very prompt action; and (3) the party initiating the deprivation was a government official responsible for determining, under the standards, of a narrowly drawn statute, that it was necessary and justified in the particular interest." *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 76 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003).

Defendants cannot make that showing. Plaintiffs deny that there was any important governmental interest at issue here or that the action here was necessary or justified under the circumstances, for all of the reasons set forth herein. But even if Defendants could satisfy those elements, there was no "special need for very prompt action." The CCMC Designation was made based on a statute enacted two decades ago but never invoked until 2020, and the CCMC Prohibitions themselves make clear that there was no need for "very prompt action" in this case. None of the prohibitions authorized by Executive Order 13959 goes into effect until at least 60 days after the designation pursuant to Section 1237 is made. This is not a case where, for instance, the Government must immediately freeze tainted assets to prevent them from being removed from the United States. *Cf. Holy Land Found.*, 333 F.3d at 163-64 (finding that the government was justified in blocking or freezing assets prior to notice to prevent transfer of assets). Executive Order 13959 does not prevent the transfer of assets at all; instead, it prohibits purchases of securities by U.S. persons after a waiting period of at least 60 days, and directs divestment by U.S. persons within a year of the designation. There is no basis to conclude that there was a "special need for very prompt action" to start a clock that will eventually prohibit U.S. persons from trading in Luokung's securities, and therefore no basis for Defendants to deprive Plaintiffs of due process

– or *any* process whatsoever – prior to the CCMC Designation and the CCMC Prohibitions.

c. The CCMC Designation and CCMC Prohibitions will deprive Plaintiffs of liberty and property interests without due process of law.

Without the Court’s intervention, Luokung will be deprived of numerous liberty and property interests without due process of law, including by subjecting Luokung to severe stigma and damage to its reputation and business, and depriving Luokung of its existing and future contractual relationships. The Individual Plaintiffs will likewise be deprived, without due process, of their liberty and property interests, including as to the securities they currently hold and are entitled to hold in the future, and related personal and investment decisions.

The CCMC Designation subjects Luokung to severe, government-imposed stigma. The United States government has declared that China is “exploit[ing] United States investors to finance the development and modernization” of the Chinese military, and that this purported exploitation constitutes a national emergency, because China is “developing and deploying weapons of mass destruction, advanced conventional weapons, and malicious cyber-enabled actions against the United States and its People.” *See* Larsen-Bright Decl. Ex. B at 1. This stigmatizing declaration is paired with an “alteration of legal status” sufficient to trigger due process protections. *See Paul v. Davis*, 424 U.S. 693, 708 (1976).

The United States government’s declaration that Luokung is involved in a direct threat to the United States is both false and deeply damaging to Luokung’s reputation and business. *See Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972) (“[W]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”) (quotations omitted); *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993) (airline had liberty interest in avoiding damage to its reputation and business, and was entitled to due process prior to stigmatizing suspension);

Doe v. Dep't of Justice, 753 F.2d 1092, 1104-05 (D.C. Cir. 1985) (plaintiff had liberty interest in professional reputation and was entitled to due process in connection with charges of unprofessional conduct and dishonesty); *Old Dominion Dairy Prod., Inc. v. Sec'y of Defense*, 631 F.2d 953, 955-956 (D.C. Cir. 1980) (“[W]hen the Government effectively bars a contractor from virtually all Government work due to charges that the contractor lacks honesty or integrity, due process requires that the contractor be given notice of those charges as soon as possible and some opportunity to respond to the changes before adverse action is taken.”).

Moreover, the CCMC Designation and associated CCMC Prohibitions deprive Luokung of its existing contractual relationships with U.S. persons holding Luokung shares, and prevent Luokung from forming future contracts with U.S. persons. The right to contract has been recognized as a liberty interest protected by the Due Process Clause for a century. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract.”).

With respect to the Individual Plaintiffs, each owns hundreds of thousands of Luokung shares, in which they undeniably possess property interests. Bai Decl. ¶ 3; Li Decl. ¶ 38. Each will be forced to divest these shares, and do so on the timeline set forth by Defendants rather than one of their own choosing. Their forced divestment, furthermore, will come at a time when all other U.S. persons are also required to divest, when the CCMC Prohibitions are inhibiting Luokung’s ability to operate, and when Nasdaq has delisted Luokung’s securities, depriving the Individual Plaintiffs of the only public trading market for Luokung shares. *Cf. Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) (noting that even a temporary attachment triggers due process concerns because, among other things, it clouds title and impairs the ability to sell or alienate the property). Additionally, although each of the Individual Plaintiffs has a right, under Luokung’s

Incentive Plan, to receive stock and stock options – which forms an important part of their employment relationship with Luokung and compensation – they will be prohibited from exercising those rights. Bai Decl. ¶ 3; Li Decl. ¶ 38; *see Lynch v. United States*, 292 U.S. 571, 579 (1934) (holding that contract rights are property rights for Fifth Amendment purposes).

“Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *United Student Aid Funds v. Espinosa*, 559 U.S. 260, 272 (2010) (quotations omitted). While the extent of the process required depends on a number of factors, *see Mathews*, 424 U.S. at 335, where, as here, there are no procedures that allow Plaintiffs to “rebut the factual premises underlying” the challenged action, that is “plainly not enough to satisfy due process.” *Ralls Corp.*, 758 F.3d at 320. In this case, as detailed above, Plaintiffs neither know the basis for the CCMC Designation nor have they had any opportunity to rebut that purported basis, either before the CCMC Prohibitions go into effect or after. “[H]owever weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero – that is, the government is never relieved of its duty to provide *some* notice and *some* opportunity to be heard prior to final deprivation of a property interest.” *Propert v. District of Columbia*, 948 F.2d 1327, 1332 (D.C. Cir. 1991). Plaintiffs are likely to succeed on the merits of their Constitutional claim.

B. The Remaining Factors Support Injunctive Relief.

1. The CCMC Designation and the CCMC Prohibitions have caused, and will continue to cause, irreparable harm to Plaintiffs.

a. Luokung has been and will be irreparably harmed.

Luokung has suffered, and will continue to suffer, irreparable harm unless the Court enters a temporary restraining order. First, and fundamentally, deprivation of Constitutional rights constitutes, in itself, irreparable harm. *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C.

Cir. 2009) (“It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”) (internal quotations omitted); *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 104-05 (D.D.C. 2012) (holding that violation of Fifth Amendment right to due process constitutes irreparable harm).

As described above and as detailed in the accompanying declarations, Luokung is suffering, and will continue to suffer, irreparable harm to its business operations as a result of the CCMC Designation and the CCMC Prohibitions. For example, as a company working in the technology industry, Luokung relies on a pool of technical professionals and engineers to create and refine innovative, high-performance products and services. Li Decl. ¶ 35. The announcement of the CCMC Designation has damaged Luokung’s ability to recruit highly skilled employees; by way of example, since the announcement, several potential recruits for senior technical positions have expressed reluctance to join the company because of the U.S. government’s actions. *Id.*

The CCMC Designation and the CCMC Prohibitions have also eroded market confidence in Luokung’s ability to operate, and Luokung has seen indications that some of its business partners will sever their relationships with Luokung due to the CCMC Designation. *Id.* ¶ 34. This kind of reputational damage will have significant long-term effects on Luokung’s business prospects. *Id.* In addition, Luokung’s most important source of funding is the U.S. capital markets; deprivation of its access to those markets will require Luokung to put on hold or delay important projects, including outstanding business cooperation with U.S. companies. *Id.* ¶ 31. This, too, is irreparable harm. *See Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 43 (D.D.C. 2000).

Moreover, once the CCMC Prohibitions go into effect, U.S. citizen employees will no longer be able to purchase or vest Luokung securities, and will be required to fully divest their holdings by January 14, 2022, at the same time that all other U.S. persons are required to do so.

Li Decl. ¶ 31. Shares and stock options form a major part of Luokung’s employee compensation, pursuant to its Incentive Plan. *Id.* ¶ 36. The importance of this Incentive Plan to Luokung’s business is significant; indeed, Mr. Li, Luokung’s Chief Technology Officer, will ultimately be compelled to leave the company should the CCMC Prohibitions go into effect, because he would no longer be able to receive his anticipated compensation in the form of equity. *Id.* ¶ 39. Each of these effects has a substantial impact on Luokung’s ability to operate its business, and constitute irreparable harm. *See, e.g., Mylan Pharm*, 81 F. Supp. 2d at 43 (“[C]ourts have found irreparable harm where the movant has made a strong showing that the economic loss would significantly damage its business above and beyond a simple diminution in profits.”); *TikTok Inc. v. Trump*, No. 1:20-cv-02658, 2020 U.S. Dist. LEXIS 177250, at *11 (D.D.C. Sept. 27, 2020) (holding that the inability to recruit and retain employees to build or maintain business constitutes irreparable harm).

Finally, the delisting and/or halting of trading of Luokung’s securities by Nasdaq – the only public trading market for Luokung’s shares – as a direct result of the CCMC Designation will both exacerbate the other harms incurred by Plaintiffs and constitute irreparable harm standing alone. *See, e.g., Norlin Corp. v. Rooney, Pace, Inc.*, 744 F.2d 255, 267-68 (2d Cir. 1984) (affirming finding that, among other things, “delisting of securities generally is a serious loss of prestige and has a chilling effect on prospective buyers”).

b. The Individual Plaintiffs have been and will be irreparably harmed.

If the CCMC Prohibitions go into effect, the Individual Plaintiffs Mr. Li and Mr. Bai will likewise suffer irreparable harm. Each is a United States citizen, and each currently beneficially owns, and is entitled to receive in the future, in connection with Luokung’s Incentive Plan, shares and stock options. Bai Decl. ¶¶ 1, 3; Li Decl. ¶¶ 2, 28, 36, 38-39.

Plaintiff Mr. Bai, Vice President of Luokung, is the beneficial owner of 540,000 ordinary

shares of Luokung. Bai Decl. ¶ 3. Mr. Bai also is a beneficiary of Luokung's Incentive Plan. *Id.* A significant amount of Mr. Bai's compensation consists of grants pursuant to the Incentive Plan, and the Incentive Plan was an important factor to Mr. Bai when deciding whether to join Luokung and in deciding to stay with Luokung. *Id.* Similarly, Plaintiff Mr. Li, Chief Technology Officer of Luokung, is the beneficial owner of 1,000,000 ordinary shares of Luokung. Li Decl. ¶ 38. He is a beneficiary of Luokung's Incentive Plan as well, which forms a significant portion of his compensation; the CCMC Prohibitions will dramatically impact his compensation by prohibiting future awards under the Incentive Plan. *Id.* ¶ 39.

If the CCMC Prohibitions go into effect, each of the Individual Plaintiffs will be required to divest their shares within one year, and will be prohibited from purchasing or receiving shares, including through the Incentive Plan. They will, moreover, be required to divest at a time when all other U.S. shareholders will be required to divest as well, resulting in depressed share prices. This will take place either before having an opportunity to be heard, in this litigation or otherwise, or after Nasdaq has delisted and/or halted trading of Luokung securities. Each will also lose the opportunity to benefit from future appreciation of their shares. Such injuries, particularly where damages cannot be recovered due to sovereign immunity, constitute irreparable harm. *See Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008) (recognizing that the APA does not waive sovereign immunity for damages).

2. The balance of equities and the public interest support injunctive relief.

Where, as here, the party opposing the temporary restraining order is the U.S. government, the final two *Winter* elements – consideration of “harm to the opposing party” and “the public interest” – merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The Court must weigh the harm to Luokung if an injunction is not entered to the harm to Defendants if an injunction is entered. *See Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016).

Absent immediate injunctive relief, Plaintiffs will suffer the serious, irreparable harms set forth above. Defendants, by contrast, will not suffer any harm if the CCMC Prohibitions are enjoined pending resolution of Luokung's claims on the merits.³ First, Defendants have *already unilaterally* determined that it is appropriate to postpone implementation of the CCMC Prohibitions if the name included on the Section 1237 List is not an exact match for the targeted company's name; in doing so, Defendants have acknowledged that the CCMC Prohibitions can be reasonably postponed. Second, the timing of the implementation of the CCMC Prohibitions, even where General License 1A does not apply, demonstrates that a delay will not cause any harm. Executive Order 13959 provides that the first of the CCMC Prohibitions does not go into effect for at least 60 days, and the full extent of the CCMC Prohibitions do not go into effect for 365 days. Defendants cannot reasonably argue that delaying implementation of the CCMC Prohibitions long enough to resolve Luokung's claims on the merits will harm the public interest where substantial delays in implementation are already part of the process created by Defendants. There is, moreover, "generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

C. The Court Should Order Expedited Discovery of the Administrative Record.

In order for the Court, and Plaintiffs, to be fully informed at the preliminary injunction hearing, the Court should order Defendants to produce the full administrative record relating to the decisions at issue in this case, including without limitation all documents and information that were considered by the DoD or the other Defendants in connection with the CCMC Designation,

³ Under Fed. R. Civ. P. 65(c), the Court has discretion as to the amount of security required, if any, when a party seeks a temporary restraining order. Courts have the authority to waive the requirement for a bond where, as here, there is no risk that Defendants will suffer monetary harm. *See, e.g., DSE, Inc. v. United States*, 169 F.3d 21, 33 (D.C. Cir. 1999); *Fed. Prescription Serv. v. Am. Pharm. Ass'n*, 636 F.2d 755, 759 (1980).

within seven days of the entry of Plaintiffs' requested temporary restraining order.

Federal courts have broad discretion to order expedited discovery. *See, e.g., Garnett v. Zeilinger*, No. 17-cv-1757 (CRC), 2017 U.S. Dist. LEXIS 231397, at *4-5 (D.D.C. Dec. 15, 2017) (citing *Watts v. SEC*, 482 F.3d 501, 507 (D.C. Cir. 2007)). Expedited discovery "may be particularly appropriate in case 'involving requests for a preliminary injunction.'" *Garnett*, 2017 U.S. Dist. LEXIS 231397, at *5 (quoting Fed. R. Civ. P. 26(d) advisory committee's notes to 1993 amendment). To determine whether a request for expedited discovery should be granted, courts look to five factors: "(1) whether a motion for preliminary injunction is pending, (2) the discovery request's breadth, (3) the purpose for requesting expedited discovery, (4) the burden on the defendant to comply with the requested discovery, and (5) how far in advance of the typical discovery process the request is made." *Garnett*, 2017 U.S. Dist. LEXIS 231397, at *5. These factors strongly support awarding the limited expedited discovery requested by Plaintiffs here.

As detailed above, Plaintiffs have made multiple attempts to obtain any explanation from Defendants for the CCMC Designation, but no such information has been provided to date. Larsen-Bright Decl. Exs. E-H. Ordinarily, Local Rule 7(n) requires agencies to file a certified list of the contents of the administrative record within 30 days of service of the answer or simultaneously with the filing a dispositive motion, and the parties then provide the court with an appendix containing copies of those portions of the administrative record which are cited or relied upon in support of, or in opposition to, any dispositive motion. LCvR 7(n)(1). However, in evaluating Plaintiffs' APA claims at the preliminary injunction stage, the Court will review the agency decision based upon the administrative record. *See, e.g., Shalala*, 192 F.3d at 1021-23 (finding agency's explanation for agency action was not supported by the administrative record).

Accordingly, the first and third factors weigh in favor of granting expedited discovery, as

there is a preliminary injunction motion pending – as an extension to this motion for a temporary restraining order – and the purpose of the expedited discovery is to allow the Court, and Plaintiffs, access to the material that will be central to the Court’s determination of Plaintiffs’ request for a preliminary injunction. The second, third, and fifth factors also weigh in favor of granting the request. The requested discovery is narrow and reasonable in scope, as it seeks only the administrative record, rather than broader document and deposition discovery. And the burden on the government is not significant. The most pertinent materials should be readily available and, in fact, should have already been gathered in response to Luokung’s FOIA request (the DoD’s response to which is already past due by statute). Furthermore, the government ordinarily provides the administrative record at the outset of the lawsuit under LCvR 7(n)(1), and thus the requested expedited discovery is not a major departure from the disclosures Defendants would be required to make very soon regardless.

Accordingly, it is appropriate for the Court to order Defendants to produce the full administrative record within seven days of the entry of the temporary restraining order.

IV. CONCLUSION

For the foregoing reasons, Luokung respectfully requests that the Court (1) enter a temporary restraining order enjoining the enforcement of the CCMC Designation and the CCMC Prohibitions; (2) set a briefing schedule and a preliminary injunction hearing within fourteen days; and (3) order expedited discovery of the administrative record in advance of the preliminary injunction hearing. Plaintiffs also request that the Court confirm the applicability of General License 1A as to Luokung, as set forth herein.

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Respectfully submitted,

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