UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	10 CR. 0096 (DLC)
v.	**DECLARATION OF KEVIN H. MARINO**
SERGEY ALEYNIKOV,	
Defendant.	

KEVIN H. MARINO, hereby declares, pursuant to 28 U.S.C. § 1746(2), as follows:

1. I am a member of the law firm Marino, Tortorella & Boyle, P.C., attorneys for defendant Sergey Aleynikov ("Aleynikov") in this matter. I am fully familiar with the facts of this case and make this Declaration in support of Aleynikov's Motion to Admit Statements of the Government under F.R.E. 801(d)(2)(B) and (D), which is being filed contemporaneously with this Declaration.

2. Attached hereto as Exhibit A is a document containing true and correct excerpts from the transcript of the detention hearing in this matter on July 4, 2009 before the Honorable Kevin N. Fox, U.S.M.J. and from the transcript of the hearing in this matter on June 29, 2010 regarding Goldman Sachs's motion to quash a defense counsel subpoena seeking discovery of those components of its trading platform the defendant is not alleged to have stolen.

3. Attached hereto as Exhibit B is a true and correct copy of the complete transcript of the detention hearing in this matter on July 4, 2009 before the Honorable Kevin N. Fox, U.S.M.J.

4. Attached hereto as Exhibit C is a true and correct copy of the complete transcript of the hearing in this matter on June 29, 2010 regarding Goldman Sachs's motion to quash a defense counsel subpoena seeking discovery of those components of its trading platform the defendant is not alleged to have stolen.

5. Attached hereto as Exhibit D is a true and correct copy of the court's decision in United States v. Paloscio, No. 99 Cr. 1199 (LMM), 2002 U.S. Dist. LEXIS 12976 (S.D.N.Y. July 17, 2002).

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746(2), that the foregoing is true and correct.

Dated: November 22, 2010
Chatham, New Jersey

Respectfully submitted,

MARINO, TORTORELLA & BOYLE, P.C.

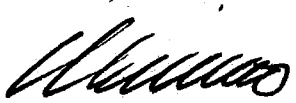
By: 

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EXHIBIT A

Excerpts from transcript of Detention Hearing (July 4, 2009)

THE COURT: What is the government's position on the bail?

MR. FACCIPONTE: We seek detention at this time, Your Honor.

THE COURT: Under what theory or theories?

MR. FACCIPONTE: On theory of danger to community and risk of fight.

(7/4/09 Tr. at 6:11-17.)

***

MR. FACCIPONTE: Thank you, Your Honor. We believe the defendant poses both a substantial risk of flight and danger to the community. I'll address the danger issue first as I believe it is the more serious and guiding principle in this case. What the defendant is accused of having stolen from this investment bank, which is a major investment bank in New York, is their proprietary, high-quantity, high-volume trading platform with which they conduct all of their trades in all major markets within the United States and other places. It is something which they had spent millions upon millions of dollars in developing over the past number of years and it's something which provides them with many millions of dollars of revenue throughout this time. They guard the secrecy of this code very strictly and they have no know instance of this code going anywhere except the defendant's malfeasance here, except for some exceptions that are noted in the complaint. If this code is allowed to go to a competitor or to an entity that is not necessarily legal but can start trading on this, the bank itself stands to lose its entire investment in creating this software to begin with, which is millions upon millions of dollars. The bank's profit margin will be eroded – and I'll explain why in a minute – by the other competit[ive] activity. In addition, because of the way this software interfaces with various markets and exchanges, the bank has raised a possibility that there is a danger that somebody who knew how to use this program could use it to manipulate markets in unfair ways. . . . As we stand right now, according to the defendant's post-arrest statements to the government, he transferred his view -- unwittingly, but nevertheless amidst to having transferred --

MS. SHROFF: I'm sorry, Your Honor, did he say unwittingly?

MR. FACCIPONTE: In the defendant's view in his post-arrest statement. Nevertheless --

THE COURT: Share the statement with defendant's counsel.

MR. FACCIPONTE: I have provided the copy of the statements to Ms. Shroff and also to Your Honor's deputy. In his view he transferred it unwittingly, but nevertheless admits to having transferred it. And it is sitting on a server that we believe is in Germany right now. He admits to having made several copies of that, that he downloaded to his personal computer, his laptop computer, and to a flash drive. And he has given consent for the government to seize those items but the copy in Germany is still out there. And we at this time do not know who has access to it and what's going to happen to that software. We believe that if the defendant is let at liberty

there is a substantial danger that he will obtain access to that software and send it on to whoever may need it. And keep in mind, this is worth millions of dollars.

THE COURT: Well, what makes you think that it hasn't already been transferred since you do now know whether other people have access to the Germany server? It's already compromised, so the financial institution has to take steps now if you've made it aware of the compromise to adjust for the loss of its trading platform.

MR. FACCIPONTE: Your Honor is correct. I could've been disseminated in this time. It does not mean, however, that if it has not been disseminated we should not take steps to prevent the defendant from disseminating information if it is not already out there.

THE COURT: But my point is if you've made the financial institution aware, that is date of the compromise, and resides in the server in Germany, prudence dictates the financial institution now has to take steps, if it hasn't already, to address the loss of that information. It can't guess that no one has access to it. It has to operate as if someone does have access to it and can use it and can affect the financial institution adversely. So I have to image in that it's already taken steps if you've alerted of the existence on the Germany server, the institution I have to imagine has already taken steps to contain any damage that may befall it.

MR. FACCIPONTE: My understanding from the financial institution, they are aware of this, Your Honor, is that they do not believe that any steps they can take would mitigate the danger of this program being released. In other words, they can take steps, they can start building a new program, they can -- I'm not exactly sure what steps they can take. But even if they could take steps, my understanding from them is that any dissemination of this program would be a substantial loss to them, a very substantial loss to them. And so if has, by some miracle, it has not been disseminated already, the government requests that the defendant be remanded so that there is no possibility that he can affect any transfer of the software that is in Germany.

THE COURT: Well, whether he is detained is irrelevant. The financial institution cannot gamble, if I'm to believe your presentation that markets will be affected and so forth, they can't gamble that no one else is going to get access. It has to operate as if someone's got access and has got to take steps to insulate or reduce any damage it could possibly reduce, not only to itself but to the financial markets.

MR. FACCIPONTE: May I have one moment, Your Honor?

(Pause in proceedings)

MR. FACCIPONTE: I believe, Your Honor, that the financial institution, I think the position here is that whatever steps the financial institution can take, the financial institution essentially has no way to effectively protect itself against the loss of this program. Once it is out there, anybody will be able to use this. And fair market share would be adversely affected. They would've lost the substantial investment of millions upon millions of dollars that they've placed into this software. Even if they take the most prudent steps available to them we should not run the risk that something which has not been let out of the box yet, could be let out of the box if the

defendant is released. And if he's released, he doesn't need necessarily access to his home computer. A smart phone, a black berry, or an Iphone, something that gives him access to the Internet is all he needs, and maybe ten minutes. So until we can say that this information is secure to the best of your knowledge, the government maintains the defendant is danger to the community. In addition, Your Honor, he poses a risk of flight and I believe the risk of flight in connection to a substantial amount of money that could be made in selling this software ought to be noted by the court. He is a dual citizen with the Russian federation. He has ties to Russia in the sense that his parents are there and he visits Russia about every other year or so. He is facing, if the court were to find a maximum amount of loss possible here, in the worst-case scenario, a very substantial sentence in this case. And considering that he's already partially allocuted to some of the elements of the offense in his post-arrest statement and the other evidence that we're developing and the evidence presented in the complaint, the proof against him is strong at this point. And so therefore, there's just a possibility of substantial sentence combined with the profit to be made by selling this software, combined with the fact that he can flee to Russia, the government believes that the defendant be detained at this time.

THE COURT: If as you say, the material is on the server in Germany, if anyone can access the material through that server, that is to say it is not only the defendant who can access it; he might be able to provide other persons with information that would allow them to access it, if that's so, then what difference does it make whether he's detained or not if he can communicate that information?

MR. FACCIPONTE: Right now our understanding is that the server can only be accessed by someone who has his user name and password.

THE COURT: Who has what, sir?

MR. FACCIPONTE: His user name and password.

THE COURT: Okay. So if he gives that to you, you can access that, isn't that correct?

MR. FACCIPONTE: That is correct, Your Honor.

THE COURT: So whether he's detained or not doesn't him from communicating that information to you or anyone else. And therefore the server could be accessed and the financial institutions and the markets compromised as you have described.

MR. FACCIPONTE: It would certainly be more difficult, Your Honor. And I don't believe the public ought to bear the burden or the risk of that coming to past. In addition --

THE COURT: But if he's detained, what prevents him from communicating the information? That's what I don't understand.

MR. FACCIPONTE: It would be a lot harder. He would have to at the very least enlist and accomplice.

THE COURT: Okay.

MR. FACCIPONTE: Which people may not want to be accomplices.

THE COURT: That's true whether he's detained or at liberty.

MR. FACCIPONTE: Okay. But if he's at liberty he would not necessarily -- he would not need an accomplice. He could just pass it on to another server somewhere.

THE COURT: He may already have accomplices who may have the information that can access the server in Germany. Whether he's detained or not, I still don't understand why being detained means the information can't be disseminated to access the server.

MR. FACCIPONTE: Because the server -- if the server had been in the United States, Your Honor, we would already be preparing process to free --

THE COURT: But it's not.

MR. FACCIPONTE: The government needs a few days, given the holiday weekend, it would be difficult to do that. But the government needs a few days to consult with German authorities to take the steps to freeze that server.

So if the court is not prepared to detain the defendant on a general showing, the government would at least ask that the defendant be detained until such time as they can secure the server, which we are moving to do even as we speak now.

THE COURT: I still don't understand why detaining him prevents him from communicating information so that someone can access the server. If you make that clear to me, then I understand more acutely why you're arguing that he should be detained.

MR. FACCIPONTE: Well, he would --

THE COURT: If it just makes it difficult, lots of things are difficult, but not impossible.

MR. FACCIPONTE: If he were detained now, for example, I don't believe he would have immediate access to telephone privileges at the NCC or MDC. I believe it takes days to set those accounts up. He would have to tell somebody physically. I don't believe anybody would -- he would have to enlist a co-conspirator right now. And I think when you weigh the probability of him engaging in that behavior and being able to pull that together, first is the potential risk of just letting him go, I believe he ought to be detained. Because he still has more burdens in prison to disseminate his information than he does if he's out in the street. So if he's out in the street, he just needs access to a cell phone. In prison, he needs to get access to a phone which is not a right if he is detained. He would need to write a letter. A letter takes several days to get to where it needs to go. In the meantime, we would have -- we would very likely have the server locked down at that point in time.

THE COURT: All right. Ms. Shroff?

MR. FACCIPONTE: Actually, Your Honor, if I may, earlier I represented that there had been no breaches before for the bank. I should put that there's never been any breaches in anywhere of this magnitude before of the bank where the entire platform has gone out. I can't represent that there have been absolutely in the past no breaches whatsoever. But I do want to use that segue into one thing I overlooked, which is when we talk about this platform having been sent out, we're talking about what he did on the last day of his job, on June 5th, 2009. We have access of substantial file transfers that are listed in the complaint from June 4th and June 1st because the banks have not been able to recover the command history for what he did at those times. [W]e have no idea of what he took from the bank on those occasions. He admits in his post-arrest statement that he has taken other information from the bank. So I do want to say that this is the most substantial theft that the bank can remember ever happening to it, in the sense that the entire platform has been stolen. In addition, the defendant has, on other occasions, taken information from the bank and we don't know what that information is or what use he's made of it or where it is even. I mean, it also -- some of that was also sent to the server in Germany but we haven't had access to that server yet.

(7/4/09 Tr. at 7:2-17:15.)

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MR. FACCIPONTE: Okay. First of all, in the government's discussions with the investment bank, we have heard nothing to indicate that the investment bank at any time has ever sanctioned the defendant taking any software out of the bank and doing anything else with it. The bank officers were quite clear that they consider whatever software is being worked on my Goldman Sachs employees that that software is proprietary and stays within the bank. In fact, one bank officer recollected that there was a time when defendant himself had asked permission to take what could be considered open soft source software which in the programming community is software which programmers consider anyone can use in that intellectual property rights don't strictly attach to and place it back onto the market, and he was told no. And the fact that he asked shows that he is aware that he cannot just take software and put it out into the market. And the defendant signed a confidentiality agreement that is quite clear that nothing that has anything to do with Goldman Sachs goes outside of Goldman Sachs without their permission. So the notion that they would have to be something we have not heard as the government from the bank. Because everything that we have heard is that this was not sanctioned conduct whatsoever from him. . . . Third, the notion that the software, the proprietary platform is much bigger than a 32 megabytes. Our understanding from the bank is that what he took was essential software to the platform that puts them in extreme jeopardy of having their software out there in the market. I also know for the one instance where we do have logs of what he did, he ran a program that compressed the files that were a resident on Goldman Sachs' servers, and compressed it down to a smaller size. So whether the total size of this software -- it could be much bigger – it's also true that he has run a compression program on at least on the software that went out on that Friday.

(24:20-27:4.)

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And in light of the fact that the bank has made many representations that this would be very harmful to the bank and would lose it millions and millions of dollars we believe that detention is the only way to insure that that harm does not occur.

(7/4/09 Tr. at 28:13-17.)

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MR. FACCIPONTE: Just briefly, Your Honor. Goldman Sachs has not known about this since June 1st. Goldman Sachs has known about this for a matter of days.

THE COURT: For how long?

MR. FACCIPONTE: For a matter of days, Your Honor.

THE COURT: But the complaint says differently.

MR. FACCIPONTE: The complaint says that two weeks ago they instituted a program of scanning their https logs for unusual file transfers. That resulted in them determining that this had been taken. My understanding is that Goldman Sachs realized that this was a problem based upon their review of those logs just a few days ago. The government was not contacted until Wednesday about this matter.

(7/4/09 Tr. at 32:20-33-9.)

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And even if the complaints are ambiguous or inartfully worded someplace, I can represent to you that my understanding from Goldman Sachs is they did not know of this as of June 1st. They learned of this much more recently and --

(7/4/09 Tr. at 38:20-24.)

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We do believe that in this situation the bail statute provides that the government can show by preponderance of the evidence that he, the defendant, poses a danger to the community in the form of the defendant going out and disseminating software which would cause millions of dollars of damage….

(7/4/09 Tr. at 40:23-41:3.)

Excerpts from transcript of hearing on defense subpoena to Goldman (June 29, 2010)

MS. ROHR: As stated by Goldman's counsel the government has not alleged theft of the entire trading platform, the indictment in paragraph 12 makes that clear. The complaint also did not allege the entire trading platform. There were statements at the bail argument about the platform, but in any case the indictment now alleges just a portion of the trading platform and as I said in my paper that has been provided to the defendant.

(6/29/10 Tr. at 15:7-13.)

THE COURT: The thrust of the written presentation by the defendant, and he moved beyond that, but at least initially the thrust of his presentation which was presented to the court in a memorandum was to focus on the government's statements at his detention hearing. Whatever those statements were and whether they were overbroad characterizations in the heat of the moment, whatever they were that is not the charge that the defendant is going to trial on. I've read the indictment with care. There is nothing in the indictment that would permit the defendant to be confused and, indeed, he is not confused, about whether or not he is charged with the theft of the entire platform.

(6/29/10 Tr. at 15:22-16-9.)

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MR. MARINO: I have a lot of questions in my mind now about how if the government initially thought the entire platform was taken and then alleged in the indictment that something less was taken what caused it to go from point A to point B, but that's not for your Honor today.

THE COURT: No, and I don't think I would spend too much time on that, Mr. Marino. You are a very experienced and savvy attorney. You know that people say things in hearings that are perhaps less precise than when they are crafting a document. So, you know, I don't want to revisit my ruling on number 1.

(6/29/10 Tr. at 20:2-12.)

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	Docket No. 09m1553
UNITED STATES OF AMERICAS	:	
Plaintiff,	:	
- against -	:	
SERGEY ALEYNIKOV,	:	New York, New York
	:	July 4, 2009
Defendant.	:	
----------	:	

PROCEEDINGS BEFORE
MAGISTRATE JUDGE KEVIN N. FOX,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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FEDERAL DEFENDERS OF NEW YORK
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Proceedings recorded by electronic sound recording;
Transcript produced by transcription service

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E X A M I N A T I O N S

Witness	Direct	Cross	Re-Direct	Re-Cross
None				

E X H I B I T S

Exhibit Number	Description	ID	In	Voir Dire
None				

THE CLERK: All rise.

THE COURT: Please be seated.

THE CLERK: The United States of American versus Sergey Aleynikov. Would you please state your name for the record?

MR. JOSEPH FACCIPONTE: Good afternoon, Your Honor, Joseph Facciponte for the Government. With me at counsel table is Michael McSwaine (phonetic) of the FBI.

THE COURT: Good afternoon.

MS. SABRINA SHROFF: Good afternoon, Your Honor, for Sergey Aleynikov, Federal Defenders of New York by Sabrina Shroff. My client is standing to my right. Good afternoon.

THE COURT: Good afternoon. May I have the date and time of arrest, please?

MR. FACCIPONTE: Yes, approximately 9:20 p.m. last night, Your Honor.

THE COURT: Thank you. Please raise your right hand.

(Witness is Sworn)

THE COURT: Mr. Aleynikov, the purpose of the proceeding is to advise you of certain rights that you have to inform you of the charge made against you to consider whether counsel should be appointed for you and to determine to what conditions, if any, you might be released. Do you

understand, sir?

MR. ALEYNIKOV: I do.

THE COURT: You have the right to remain silent. You're not required to make any statements. If you've made statements to authorities already, you need not make additional statements. Anything that you do say can be used against you. You have the right to be released either conditionally or unconditionally pending trial, unless find there are no conditions that would reasonably assure your presence in court and the safety of the community.

You have the right to be represented by counsel during all court proceedings and during all questioning by authorities. If you're not able to retain counsel, the court can appoint counsel to represent you.

In that connection I have before me a document which is labeled financial affidavit which I shall show you now. Do you recognize this document, sir?

MR. ALEYNIKOV: Yes, Your Honor.

THE COURT: Would you raise your right hand, please. Do you swear or affirm that the statements contained in this financial affidavit are true statements and that your true signature appears at the bottom of the affidavit?

MR. ALEYNIKOV: It is.

THE COURT: The information that you provided in

the affidavit suggests to me that you can retain counsel. So I will appoint counsel to appear with you only for this proceeding and you will have to make efforts to retain counsel.

If you're not able to retain counsel you should advise the court and the issue of whether counsel will appointed for you will be revisited.

Ms. Shroff, have you received a copy of the complaint?

MS. SHROFF: I have received the complaint, Your Honor. I have provided my client with a copy. He has read the complaint and he waives its public reading at this time.

THE COURT: Very well. Sir, you have a right to have a preliminary hearing held in connection with the charge that is outlying in the complaint. At the hearing, the government would have the burden of establishing that there's probable cause to believe that a crime was being committed as set forth in the complaint and that you committed it.

If probable cause is not established, you will be released from the charge. If it is established, the government will have the right to proceed to trial against you. If you are in custody, the hearing will be held within ten days. If you at liberty, the hearing will be held within 20 days. No hearing will be held before the date in

which it is scheduled. You're either indicted by a grand jury or information is filed against you by the government. I'll fix the hearing date in just a moment, after we address the issue of bail.

Have both parties received a copy of the pre-trial services report?

MR. FACCIPONTE: Yes, your government has, Your Honor.

MS. SHROFF: We have as well, Your Honor.

THE COURT: What is the government's position on the bail?

MR. FACCIPONTE: We seek detention at this time, Your Honor.

THE COURT: Under what theory or theories?

MR. FACCIPONTE: On theory of danger to community and risk of fight.

THE COURT: What is the defendant's position on bail?

MS. SHROFF: Your Honor, the defendant maintains that he should be released according to the recommendation of the pre-trial services officer.

THE COURT: Very well. I'll hear the --

MS. SHROFF: We're ready to proceed at this time.

THE COURT: I'll hear the government in connection with its application.

MR. FACCIPONTE: Thank you, Your Honor. We believe the defendant poses both a substantial risk of flight and danger to the community. I'll address the danger issue first as I believe it is the more serious and guiding principle in this case.

What the defendant is accused of having stolen from this investment bank, which is a major investment bank in New York, is their proprietary, high-quantity, high-volume trading platform with which they conduct all of their trades in all major markets within the United States and other places.

It is something which they had spent millions upon millions of dollars in developing over the past number of years and it's something which provides them with many millions of dollars of revenue throughout this time.

They guard the secrecy of this code very strictly and they have no known instance of this code going anywhere except the defendant's malfeasance here, except for some exceptions that are noted in the complaint.

If this code is allowed to go to a competitor or to an entity that is not necessarily legal but can start trading with this, the bank itself stands to lose its entire investment in creating this software to begin with, which is millions upon millions of dollars.

The bank's profit margin will be eroded -- and

I'll explain why in a minute -- by the other competit activity. In addition, because of the way this software interfaces with the various markets and exchanges, the bank has raised a possibility that there is a danger that somebody who knew how to use this program could use it to manipulate markets in unfair ways.

What this program does is connect and draw information from stock exchanges around the country, and it draws them in very small increments of time. One of the bank officers described it as milliseconds of time. And it is very efficient at processing that stock information and sending to the bank's programs that conduct trades based upon algorithms that are developed by mathematicians and physicists.

As we stand right now, according to the defendant's post-arrest statements to the government, he transferred his view -- unwittingly, but nevertheless amidst to having transferred --

MS. SHROFF: I'm sorry, Your Honor, did he say unwittingly?

MR. FACCIPONTE: In the defendant's view in his post-arrest statement. Nevertheless --

THE COURT: Share the statement with defendant's counsel.

MR. FACCIPONTE: I have provided the copy of the

statements to Ms. Shroff and also to Your Honor's deputy. In his view he transferred it unwittingly, but nevertheless admits to having transferred it. And it is sitting on a server that we believe is in Germany right now.

He admits to having made several copies of that, that he downloaded to his personal computer, his laptop computer, and to a flash drive. And he has given consent for the government to seize those items but the copy in Germany is still out there. And we at this time do not know who has access to it and what's going to happen to that software.

We believe that if the defendant is let at liberty there is a substantial danger that he will obtain access to that software and send it on to whoever may need it. And keep in mind, this is worth millions of dollars.

THE COURT: Well, what makes you think that it hasn't already been transferred since you do now know whether other people have access to the Germany server? It's already compromised, so the financial institution has to take steps now if you've made it aware of the compromise to adjust for the loss of its trading platform.

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information if it is not already out there.

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So I have to image in that it's already taken steps if you've alerted of the existence on the Germany server, the institution I have to imagine has already taken steps to contain any damage that may befall it.

MR. FACCIPONTE: My understanding from the financial institution, they are aware of this, Your Honor, is that they do not believe that any steps they can take would mitigate the danger of this program being released.

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defendant be remanded so that there is no possibility that he can affect any transfer of the software that is in Germany.

THE COURT: Well, whether he is detained is irrelevant. The financial institution cannot gamble, if I'm to believe your presentation that markets will be affected and so forth, they can't gamble that no one else is going to get access. It has to operate as if someone's got access and has got to take steps to insulate or reduce any damage it could possibly reduce, not only to itself but to the financial markets.

MR. FACCIPONTE: May I have one moment, Your Honor?

(Pause in proceedings)

MR. FACCIPONTE: I believe, Your Honor, that the financial institution, I think the position here is that whatever steps the financial institution can take, the financial institution essentially has no way to effectively protect itself against the loss of this program. Once it is out there, anybody will be able to use this. And fair market share would be adversely affected. They would've lost the substantial investment of millions upon millions of dollars that they've placed into this software.

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So until we can say that this information is secure to the best of your knowledge, the government maintains the defendant is danger to the community.

In addition, Your Honor, he poses a risk of flight and I believe the risk of flight in connection to a substantial amount of money that could be made in selling this software ought to be noted by the court.

He is a dual citizen with the Russian federation. He has ties to Russia in the sense that his parents are there and he visits Russia about every other year or so. He is facing, if the court were to find a maximum amount of loss possible here, in the worst-case scenario, a very substantial sentence in this case.

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substantial sentence combined with the profit to be made by selling this software, combined with the fact that he can flee to Russia, the government believes that the defendant be detained at this time.

THE COURT: If as you say, the material is on the server in Germany, if anyone can access the material through that server, that is to say it is not only the defendant who can access it; he might be able to provide other persons with information that would allow them to access it, if that's so, then what difference does it make whether he's detained or not if he can communicate that information?

MR. FACCIPONTE: Right now our understanding is that the server can only be accessed by someone who has his user name and password.

THE COURT: Who has what, sir?

MR. FACCIPONTE: His user name and password.

THE COURT: Okay. So if he gives that to you, you can access that, isn't that correct?

MR. FACCIPONTE: That is correct, Your Honor.

THE COURT: So whether he's detained or not doesn't him from communicating that information to you or anyone else. And therefore the server could be accessed and the financial institutions and the markets compromised as you have described.

MR. FACCIPONTE: It would certainly be more

difficult, Your Honor. And I don't believe the public ought to bear the burden or the risk of that coming to past. In addition --

THE COURT: But if he's detained, what prevents him from communicating the information? That's what I don't understand.

MR. FACCIPONTE: It would be a lot harder. He would have to at the very least enlist and accomplice.

THE COURT: Okay.

MR. FACCIPONTE: Which people may not want to be accomplices.

THE COURT: That's true whether he's detained or at liberty.

MR. FACCIPONTE: Okay. But if he's at liberty he would not necessarily -- he would not need an accomplice. He could just pass it on to another server somewhere.

THE COURT: He may already have accomplices who may have the information that can access the server in Germany. Whether he's detained or not, I still don't understand why being detained means the information can't be disseminated to access the server.

MR. FACCIPONTE: Because the server -- if the server had been in the United States, Your Honor, we would already be preparing process to free --

THE COURT: But it's not.

MR. FACCIPONTE: The government needs a few days, given the holiday weekend, it would be difficult to do that. But the government needs a few days to consult with German authorities to take the steps to freeze that server.

So if the court is not prepared to detain the defendant on a general showing, the government would at least ask that the defendant be detained until such time as they can secure the server, which we are moving to do even as we speak now.

THE COURT: I still don't understand why detaining him prevents him from communicating information so that someone can access the server. If you make that clear to me, then I understand more acutely why you're arguing that he should be detained.

MR. FACCIPONTE: Well, he would --

THE COURT: If it just makes it difficult, lots of things are difficult, but not impossible.

MR. FACCIPONTE: If he were detained now, for example, I don't believe he would have immediate access to telephone privileges at the NCC or MDC. I believe it takes days to set those accounts up. He would have to tell somebody physically. I don't believe anybody would -- he would have to enlist a co-conspirator right now.

And I think when you weigh the probability of him engaging in that behavior and being able to pull that

together, first is the potential risk of just letting him go, I believe he ought to be detained. Because he still has more burdens in prison to disseminate his information than he does if he's out in the street.

So if he's out in the street, he just needs access to a cell phone. In prison, he needs to get access to a phone which is not a right if he is detained. He would need to write a letter. A letter takes several days to get to where it needs to go.

In the meantime, we would have -- we would very likely have the server locked down at that point in time.

THE COURT: All right. Ms. Shroff?

MR. FACCIPONTE: Actually, Your Honor, if I may, earlier I represented that there had been no breaches before for the bank. I should put that there's never been any breaches in anywhere of this magnitude before of the bank where the entire platform has gone out.

I can't represent that there have been absolutely in the past no breaches whatsoever. But I do want to use that segue into one thing I overlooked, which is when we talk about this platform having been sent out, we're talking about what he did on the last day of his job, on June 5th, 2009.

We have access of substantial file transfers that are listed in the complaint from June 4th and June 1st

because the banks have not been able to recover the command history for what he did at those times. He have no idea of what he took from the bank on those occasions.

He admits in his post-arrest statement that he has taken other information from the bank. So I do want to say that this is the most substantial theft that the bank can remember ever happening to it, in the sense that the entire platform has been stolen.

In addition, the defendant has, on other occasions, taken information from the bank and we don't know what that information is or what use he's made of it or where it is even. I mean, it also -- some of that was also sent to the server in Germany but we haven't had access to that server yet.

THE COURT: Ms. Shroff?

MS. SHROFF: Your Honor, let me just pick up with the issue the court sort of raised and that occurred to me while I was listening to Mr. Facciponte. Mr. Facciponte is assuming, sitting here today, that nobody else has the password or nobody else can access the server in Germany.

For all he knows, my client was at liberty to give it to me and may have given it to several other people before today. So I don't think detention necessarily has impact on what -- and I'm not referring to my client here; I'm referring to any generic defendant who would be accused

of this kind of crime.

Because once the government attributes the motive of theft, then one has to assume that if his goals was to actually steal the proprietary information, he certainly is not so bound that he would not make sure the theft materializes into a profit.

So I'm going back to the defendant's post-arrest statement where it very clearly tells the government that at no point did he intend to, nor did he actually sell any part of the proprietary information. The proprietary information was never used nor has it been used. And the government, I believe had custody of my client and spoke to him for well over four hours.

I say this because last night at midnight I emailed Mr. Facciponte and asked him to have his agent stop speaking with the person who was arrested because I was under the impression that the had counsel already but hadn't had a call into me.

And I was informed by the U.S. Attorney's Office that they did not consider counsel and therefore would continue speaking to the client. And the continued to speak to him. And as far as I can tell, after four hours of speaking to him were the following facts?

Number one, Goldman Sachs, or whatever the entity is, has known before that this how I work on the program.

I've done it before during the course of my employment and Goldman Sachs has had nothing to say about it. I have no intention of ever selling this information nor did I have any intention of ever using the information in a way contrary to my employment agreement with Goldman Sachs.

I have not sold this information to anybody. I have not offered to sell it to anybody. In fact, I'm fully cooperating with your entity because I did not think I was doing anything wrong.

I'm going to go ahead, Mr. FBI agent and AUSA and sign a consent form so you can go to my home which has my three little children in it, my wife in it, and I'm going to tell my wife to let you come on into my home and take all the computers that are over there.

I'm happy to sit down and talk to you and let you know what other electronic equipment I have, and you can go right ahead and seize it.

All of this the government has. So the government has all of his personal computers. The government is also fully knowledgeable about the fact that this employer was in the past aware that this is how his common work practices were and Goldman Sachs never took any steps to stop those work practices.

So I'm somewhat confused by how the government can say that there have been numerous breaches but none of the

breaches were addressed by Goldman Sachs that should've resulted in an earlier arrest.

The other thing that the prosecutor just referred to, and I'm going to ask you just to take a look at page seven of paragraph seven of the complaint itself. It says that there are transfers from between June 1 to June 5th of 32 megabytes. I'm told that the entire platform would consist of 1,224 megabytes at the very least.

So out of 1,224, the government is alleging 32 were transferred. I don't understand how the government can say my client has allocuted to any part of this crime because his statement is replete with his saying, I never had any intention of using this in any non-proprietary way. I have violated no non-compete agreement. He says that very clearly in what I have received to be his statement.

So I don't think detaining Mr. Aleynikov has any relation to danger to the community. And the one side point I do want to make is that the server happens to be in Germany is not known to anybody, nor was it a deliberate attempt. Because when you see a URL you don't know where the server is.

So I'm really not sure what difference that makes. And finally, if the government wants to take steps with Germany, I'm pretty confident that nobody in Germany is celebrating the 4th of July. I don't think they got

independence the same year we did and I think the government is well equipped to deal with whatever they want without requesting that the time they need to necessarily result in my client not being at liberty where he's otherwise fully qualified for bail.

This brings me to risk of flight. It is absurd to say that he's had risk of flight. He had three young girls who are under the age of five, the last on being eleven months old. His wife is a United States citizen; she is in court today. His father lives in the United States. Although they are not close, he is here.

My client's entire married into family. His father and mother are in the courtroom today. His mother-in-law is not here because she's watching the three girls, but both of them would be willing to sign the bond.

So the only person he has in a country other than this country is his mother and step-father. His mother is certainly not a draw enough to my client to have not bought a home in this country, not once but twice, and is certainly not a draw enough for him to even visit her more than, maybe once year.

I am told, and I asked the agent to show me the passport, but the passport was not available to me, but in the last 19 years that my client has lived in the United States he has visited his home country or his mother's home

country ten times, which is less than once every year.

My client's post-arrest statement belies guilt here. My client's actions certainly belie guilt. He gave them the entire computer. As I understand it, they have seized every equipment that was in their home, this morning. And my client's wife let them in through the door and handed it over.

I'm also told that my client's passport, both of them, one which was in his home. I think his Russian passport, which I'm not even sure if valid now, but whatever it is, it's with the agent. The United States passport is also with the agent, so my client is certainly not at risk for flight.

And I think probation recommendation is proper give the fact that my client is almost 40 years old, has no prior arrest, no prior contact with the criminal justice system, and detention is wholly improper given the facts of this case.

If I've left out anything, Your Honor, I'm happy to answer it here but I think the court is correct. There seems to be no logical relationship between the relief being sought and the harm that they seek to curtail. That there is absolutely no way to say that a person should be detained because they think that he may not have already passed on access devices to some proprietary code.

And again, Your Honor, the government has yet to tell the court in any way, shape or form, that there was any intent to sell or misuse this proprietary information. So my client's statement is very clear, after four hours with the agent, he tells the agent, look, I didn't mean to misuse this information. I have not stolen it. I have not made any arrangements to steal it and this is the way I worked when I was fully employed at Goldman Sachs.

And also, Your Honor, January 1st to January 5th I'm pretty sure what time periods between which his employment -- I'm sorry -- June, his employment with Goldman Sachs was not over. I just want to leave the court with one final thought.

If Goldman Sachs cannot possibly protect this kind of proprietary information that the government wants you to think is worth the entire United States market, one has to question how they plan to accommodate any other breach. But that seems like a very farce, wide-open statement to say, that Goldman Sachs has no way of keeping track of their own proprietary information.

I mean, I think that the market is at risk no matter what then. It's not necessarily attributable to my client's actions. So I think that pre-trial service's recommendation should be followed. If the court by any chance were to think that their recommendation is not

enough, we are happy to have, come Monday, confessed judgment in the home. We're happy by any conditions that the court imposes, including that my client not have access to any electronics, including a telephone or including a cell phone. I have no objection to that.

And I have two people who are ready to sign the bond in court. His father-in-law works for ADP and I'm told his yearly income is about $100,000. His mother-in-law would be the second co-signer. She's a piano teacher. And my client's wife would be the third co-signer if the court would need a person that does not make money but has moral estuation over Mr. Aleynikov.

Unless the court has any questions, I'm done.

THE COURT: Thank you. Anything else on behalf of the government?

MR. FACCIPONTE: Yes, Your Honor, if I may respond to a few points?

THE COURT: Sure.

MR. FACCIPONTE: Okay. First of all, in the government's discussions with the investment bank, we have heard nothing to indicate that the investment bank at any time has ever sanctioned the defendant taking any software out of the bank and doing anything else with it.

The bank officers were quite clear that they consider whatever software is being worked on my Goldman

Sachs employees that that software is proprietary and stays within the bank. In fact, one bank officer recollected that there was a time when defendant himself had asked permission to take what could be considered open soft source software which in the programming community is software which programmers consider anyone can use in that intellectual property rights don't strictly attach to and place it back onto the market, and he was told no.

And the fact that he asked shows that he is aware that he cannot just take software and put it out into the market. And the defendant signed a confidentiality agreement that is quite clear that nothing that has anything to do with Goldman Sachs goes outside of Goldman Sachs without their permission.

So the notion that they would have to be something we have not heard as the government from the bank. Because everything that we have heard is that this was not sanctioned conduct whatsoever from him.

Second, I do want to address a few small points. When the agents were interviewing the defendant last night, he had signed a written consent to be interviewed and a waiver of his Miranda rights. He did not have counsel appointed at that time. He did not request counsel to be appointed during that time.

Ms. Shroff was his counsel at that time. She had

not been appointed yet by this court. The U.S. Attorney's Office position was that the defendant is not asking for counsel at that point in time and he has no appointed counsel, that Ms. Shroff could unilaterally instruct the government to terminate the interview, and that's why we did not terminate the interview.

In any event, I personally did not receive Ms. Shroff's communication until just about the time when the interview was being terminated anyway, although she did attempt to communicate with another assistant in the office last night.

The second point is the contention that I said that the defendant had gone to Russia every year. I believe I said every other year. And if Ms. Shroff says he's been in this country nearly 20 years and he's been to Russia 10 times, that would be correct.

Third, the notion that the software, the proprietary platform is much bigger than a 32 megabytes. Our understanding from the bank is that what he took was essential software to the platform that puts them in extreme jeopardy of having their software out there in the market.

I also know for the one instance where we do have logs of what he did, he ran a program that compressed the files that were a resident on Goldman Sachs' servers, and compressed it down to a smaller size. So whether the total

size of this software -- it could be much bigger – it's also true that he has run a compression program on at least on the software that went out on that Friday.

Ms. Shroff made some representations about the defendant's motivations and consenting to searches. You know, it's often true that defense attorneys look for evidence of innocence in a defendant's consent to search. Another way to look at that is how did they arrest the defendant might figure that we already know about certain activities of his and we're going to get a search warrant anyway, so perhaps he should start cooperating.

We have no indication, however -- well, let me put it to you this way: Again, his main contention is that, in his post-arrest statement, that he took this unwittingly; he had meant to take something else. Now the script that he ran to take this information was very specific as to which files would be taken and copied and uploaded into his server.

So I don't know how there could've been a mistake there, but even assuming there was a mistake, when he discovered the mistake, which he says he discovered, why not give it back immediately? Why hold on to it for a month. And leave in mind it should be said that he is now working in a start-up company that is developing the same kind of software and his salary increased three fold just by joining

that start-up company.

And so it does raise a strong inference that if he's hold on to this software, and he's working in a company that is looking to create its own software that does similar things, that he intends to use this.

Finally, to get back to the court's original concern, there is no guarantees of anything, Your Honor, in terms of what may have happened and what may happen to the defendant. However, we do know right now that in a few days we can seize that server, or at least deny anyone access to it.

And in light of the fact that the bank has made many representations that this would be very harmful to the bank and would lose it millions and millions of dollars we believe that detention is the only way to insure that that harm does not occur.

It may be too late but there is also a substantial risk that the bank should not have to endure. And unless Your Honor has any additional questions, I'm prepared to rest.

MS. SHROFF: Your Honor, if the bank does not bear the risk of insuring that its proprietary information is safe, it's certainly not fair for the bank to stand up and say detain somebody while I put into place procedures that I should have assured the American public that I

already had in place when I first took your money. That's preposterous. I mean, essentially what Mr. Facciponte is telling us is this financial institution that takes millions and millions of dollars of the American public should not bear the risk of making sure that their millions and millions of dollars are safe, and that burden in fact should rest on one of maybe two hundred employees at Goldman Sachs that has access to their software code. And gee whiz, because Goldman Sachs didn't bother to do it, could you just detain him for a couple of days so that Goldman Sachs can get his act together? That's an absurd argument to make.

It's just as absurd as saying that this guy who you want to say in the next four days might use the code, and it's such a big feat, would not have put things in place to make sure what he took over a month ago was not already stolen or already put to malfeasance use.

So essentially what the government is saying to you is this: Listen, a month ago this guy went and stole something that Goldman Sachs values so much that they didn't bother to properly protect. For a month they did nothing. He just kept on going on, using the source code, or whatever code it is, and for a month and a half, a month at the very minimum, Goldman Sachs did nothing.

Now suddenly Goldman Sachs has realized that they want this code that they shouldn't be wherever they think it

is out there. So now they want to come to you and say, hey, detain him because for a month we did nothing. Even though all the other factors show that this guy might actually be innocent. Because were he not innocent, in a month that it took for him to keep this code, he didn't sell it to anybody. They don't have any proof of any selling to anybody. He hasn't disseminated to anybody that the government can pass it to you.

In fact, in all the -- the 20 minutes he's been talking, he has never once told you what he did with the code. It seems the code is encrypted, safe, not spent, and out there just sitting. Because surely he started the start-up way before this weekend, right? In fact, they've known about this by their own admission since June 4th.

So whatever start-up he has, if he was going to use it, he would've used it already. It would already be over there and obviously they know it's not over there. So it's a very strange argument to say, especially when they're arguing for detention. And they're basically saying to you, the only reason we want to now detain him is we're scared Goldman Sachs can't get its act together. That's not a reason in the Bail Reform Act format to detain somebody. Okay?

And there is no indication here that his actions could or would prevent any harm to the general public.

That's the first argument.

The second argument is, I didn't talk about his computers being taken because I'm fishing for some innocent excuse. I'm telling you he's innocent. I'm not fishing for an excuse, and I'm also telling you that whatever access he has, they have reduced his access. And if he really wanted access that badly, he could've had access by now. He's had the damn thing -- I'm sorry -- he's had it for a month. He could've done any number of things he wanted with it for a month. They have yet to tell you that he has sold this or made mal use of it. Surely Goldman Sachs would've known is he's made mal use of it. It's been a month.

So my point to you in telling you that all of the computers have been taken from his home is to assure you, Your Honor, that were you do release him as you should, he would not have access to it. And he would agree, as a person of almost 40 years of age with no prior criminal record, that he would not avail himself of any steps to access anything else. And as an officer of the court, I'm positing to you that those conditions would be honored by my client.

Finally, Your Honor, he is a United States citizen, he's naturalized, he's lived here for 20 years. And there is nothing in all that the government has said that require detention. Nobody but Goldman Sachs, according

to them, is at harm. And Goldman Sachs has known about this since June 1. We are now on July 4th.

Finally, Your Honor, I just want to make sure that the little anecdote that the government just said was actually factually incorrect as far as I can tell. The question posed to Goldman Sachs was not about accessing software. The question was whether a particular thing could be revealed into open source.

This material that they're claiming is so highly sensitive is not accessible. It's encrypted and again, I cannot make this point more strongly, for a month he has not sold it. Every single time he's talked about this code, the word he's used is Mr. Aleynikov took it. Taking. He took it and he did nothing with it. They still haven't showed any sell, anything that is done with it to put Goldman Sachs or the American public at risk, so he should be released.

THE COURT: Anything else we have from the government?

MR. FACCIPONTE: Just briefly, Your Honor. Goldman Sachs has not known about this since June 1st. Goldman Sachs has known about this for a matter of days.

THE COURT: For how long?

MR. FACCIPONTE: For a matter of days, Your Honor.

THE COURT: But the complaint says differently.

MR. FACCIPONTE: The complaint says that two weeks ago they instituted a program of scanning their https logs for unusual file transfers. That resulted in them determining that this had been taken.

My understanding is that Goldman Sachs realized that this was a problem based upon their review of those logs just a few days ago. The government was not contacted until Wednesday about this matter.

I think what Ms. Shroff is confusing is Goldman's civil remedies, to the extent that it has any, and this criminal case. Maybe Goldman can go out and get whatever the German equivalent is of a TRO. But this is, in the government's view, a crime that we have shown probable cause for, and therefore it is possible that the defendant may compound his crime and pose a danger to the community. And the bail statute allows the court to detain him if he is a danger.

In addition, there is some notion that this is somehow Goldman Sachs' fault. Goldman Sachs has safeguards in place. It was the defendant who had to engage in subterfuge to attempt to cover his tracks when he ran these programs. If this was an innocent thing why was he attempting to cover his tracks? Why he was deleting, attempting to delete the batch history? Why did he encode this and then delete the encryption program afterwards if

this was such an innocent

activity on his part?

And finally, there is a notion of what the defendant may have done or may have done with the program before he knew his activity was detected and what he may do now. Maybe he didn't disseminate the program before he knew it was detected because he figured he had all the time in the world; he had gotten away with it. He can wait to find the highest buyer. He can wait to implement it in his new position, slowly over time, so that his new employers in SLU's factory where he was getting his code from.

But now that he has been caught and it is very likely that we will know what is in that German server within a matter of days. And he may have other stuff there. He has a very strong incentive to get rid of that evidence; to move it some place else.

And because he has that strong incentive, he poses a danger and that's why we ask for detention.

MS. SHROFF: Your Honor, the government's complaint says that as of June 1st Goldman Sachs saw some activity that they decided looked strange. And since June 1st until this weekend, or 24 hours, Goldman Sachs did nothing, nothing, absolutely nothing.

I don't know what Goldman Sachs did other than flag it or take steps. But they certainly didn't call the U.S. Attorney's Office by their own admission until almost a

month later.

Secondly, Your Honor, it's -- the government is essentially saying to you that for 30 days they thought some activity was strange but they did nothing about it. And for 30 days my client had this proprietary information but he sat back and he said even though I'm going to do the start-up company, I'm going to just sit around and wait and see who I can sell this proprietary information to, and who is going to be my highest bidder.

They can't have it both ways. I mean, basically their argument is, he stole it, he hid it, but look. He didn't really do anything with what he's took. And I'm not confusing a civil remedy with a criminal case. I was an associate at Weill Gotshal for seven years. I know what a civil remedy is.

My point here is they have no proof of a criminal act because if he did, he wouldn't keep saying Mr. Aleynikov took the code. He wouldn't keep saying -- he would be able to stand there and tell you what he did with it. He would be able to tell you Goldman Sachs thinks that the market is compromised because of something he did. There is no indication that this quote/unquote harm that they are worried about, or that they claim to be worried about, Goldman Sachs did anything about it for a whole month.

So essentially basically what they're saying to

you is, why don't you detain him until we've figured out exactly what we can or cannot do? And that is something that the bail reform act asks you to weigh within a conglomerate of other factors, including the inferences that we draw from misconduct. And the conduct that the court should focus on is his lack of having done anything improper with the proprietary information.

And, Your Honor, every single personal fact behind this defendant supports release. There is no prior criminal history, there's not bench warrant history, there's nothing to indicate he's a risk of flight, there's nothing to indicate he doesn't have family here. There's absolutely nothing to indicate that he would do or take any wrong steps here.

And I think the government is sort of cavaliering throwing out hypotheticals. Maybe he would compound his criminal behavior. Well, the equal inference is maybe he wouldn't. As he said in his statement he took this unwittingly. If he took this unwittingly, it is certainly must greater an inference that he wouldn't do anything improper with the information.

And again, to just go back to the point you raised, there is no correlation between him being detained and him releasing the proprietary code. In fact, I could throw out another hypothetical. Maybe he'll think, oh, I'm

detained. I might as well have this sold to the highest bidder so that my three children and my wife can be taken care of. I'll just rot in jail. That's an equally plausible inference or an equally plausible thought that a person may have.

There has to be some correlation, as you said, between the remedy they seek and the harm they seek to prevail. Detention is not appropriate here. What might be appropriate is extremely stringent circumstances, and that should more than suffice given the facts of this case.

THE COURT: Can you be heard further on behalf of the government?

MR. FACCIPONTE: Not necessarily, Your Honor. I just don't know where Ms. Shroff sees in the complaint that Goldman Sachs is aware as of June 1st. Goldman Sachs began running programs within the past few weeks, recently identified and issue. There was no contention in the complaints.

And even if the complaints are ambiguous or inartfully worded someplace, I can represent to you that my understanding from Goldman Sachs is they did not know of this as of June 1st. They learned of this much more recently and --

MS. SHROFF: Your Honor, I think page eight, I mean, paragraph eight, as of June 5th, 2009 the financial

institution has recovered a record of series of commands entered in Aleynikov's desktop which is also known as a batch history. So what were they aware of as of June 5th?

MR. FACCIPONTE: It's not as -- it's as to June 5th. And what we were trying to say there is as of the June 5th transfer the government has -- the financial institution has recovered a series of commands that are related to that transfer on June 5th. It's not when Goldman Sachs discovered the transfer. They didn't discover the transfer the day it happened.

MS. SHROFF: And paragraph seven says as a result of the review the financial institution learned that the worktop desk and the review is noted in the first line of paragraph seven. According to representatives of the financial institution within the past few weeks I have learned that the financial institution has begun monitoring.

So they start monitoring in June but they don't really pay any attention to what they're monitoring. Is that what the government wants us to think? So they stop monitoring in early June, they start noticing something in June 1st, but they say, hey, we'll just wait until the 4th of July and then bring it up?

MR. FACCIPONTE: I really think Ms. Shroff is misconstruing the allegations in the complaint.

MS. SHROFF: It's clear --

MR. FACCIPONTE: In any event --

MS. SHROFF: The English is clear. What am I misconstruing? It says, as a result of that review the financial institution learned that the worktop that -- it doesn't say the financial institution learned in July. And if they learned in July --

MR. FACCIPONTE: It also doesn't say the financial institution hasn't learned --

MS. SHROFF: -- then surely there is something wrong.

MR. FACCIPONTE: -- in June.

MS. SHROFF: Don't interrupt. You shouldn't, I mean if you're doing a review, surely you look at what you're reviewing within the time frame that you're reviewing it. Either it's that important to you or it's not.

It can't be that important to you that you don't review it for a month and then say detain him because two days are so important to us that the entire American public is going to fall on its face. It's one or the other; it can't be both.

MR. FACCIPONTE: Our point stands, Your Honor. We do believe that in this situation the bail statute provides that the government can show by preponderance of the evidence that he, the defendant, poses a danger to the community in the form of the defendant going out and

disseminating software which would cause millions of dollars of damage, if he hasn't done so already, and we have no reason to believe that he has --

MS. SHROFF: It's not disseminated. It is not disseminated.

MR. FACCIPONTE: It could be disseminated.

MS. SHROFF: If were disseminated, the damage would be done and he would still be released. And by the way, this is not a presumption case and the issue is risk of flight.

MR. FACCIPONTE: I said the government has the burden here. I did not say this was a presumption case.

MS. SHROFF: This is a non-presumption case. He is entitled to the presumption. The presumption is in favor of release, and the government certainly hasn't overcome its burden by claiming that they've reviewed something from June 1st and didn't bother to do anything about it until July 4th.

MR. FACCIPONTE: Your Honor, that's a specious argument, that the bank began its review not on June 1st, much later, and when it discovered there was a problem, it brought it to the government's attention promptly.

(Pause in proceeding)

MS. SHROFF: Your Honor, may I just -- Your Honor, I'm sorry.

THE COURT: Yes.

MS. SHROFF: Maybe I'm mistaken, but as I recollect, Judge Ellis, he wrote the opinion on the United States versus Madoff. I think he drew a distinction on cases that have a presumption of release versus a presumption of detention. And there is no presumption of detention in a case that has no violence or drug history. The relevant inquiry remains on risk of flight and not on dangerousness.

I don't have the cite in front of me, and I apologize for that. But I'm pretty sure the inquiry on a case where there is no presumption of detention as the government has to concede this case is. The issue is not dangerousness; the issue is risk of flight and there is no risk of flight here.

THE COURT: Is it your view that in the absence of an offense described in 18U.S.C.3142(f) that an accused can never present as a danger to the community?

MS. SHROFF: No, not that they can ever present as a danger to the community but I could be wrong. I'm telling you candidly, but I think the inquiry isn't on dangerousness. The inquiry is on risk of flight.

THE COURT: The inquiry is determined by the nature of the application. If the application is to detain someone based upon a risk of flight only, fine, then you've

addressed issues with respect to flight only.

But if the application is one such as here where there is an allegation by the government that the person presents both as a risk of flight and a danger to the community, you can't ignore either. You have to analyze both of the problems under which the application's being made.

MS. SHROFF: Your Honor, I think, again I'm not sure I'm correct, but I think that in a non-presumption case the sole inquiry then would be risk of flight.

THE COURT: But that can't be the case if the argument is that someone who does not commit an offense described in (f) presents as a danger to the community.

MS. SHROFF: But then --

THE COURT: If you stole mail, let's say --

MS. SHROFF: Right.

THE COURT: -- and threatened your supervisor in a mail facility, if you were to be released, you would present as a danger to that person in the community. Notwithstanding the fact that the underlying offense, stealing mail, is not one recited in (f). You could present as a danger.

MS. SHROFF: Well, unless he is also charging him with the threat, then I would have to say yes, I'm of the opinion that you wouldn't consider that.

THE COURT: Even if you did not, if you made a post-arrest statement and said I hate my supervisor. When I get out of here, he or she's in for it. I'm going to do harm to that person. Whether you charged it or not, you now have information that a person in the community may be in risk or at risk if the person's at liberty.

MS. SHROFF: That may be. That may be that the person's at risk.

THE COURT: So depending upon how the application is made, what theories under which you are pursuing, in this case the government is pursuing both theory of flight and danger to the community. Both theories have to be analyzed by the court. You can't ignore one just because the underlying offense is recited in Supplement (f) of 18 U.S.C. 3142.

MS. SHROFF: Well, Your Honor, I guess I'm not saying you should ignore it but I am saying that I'm not quite sure that that's -- that prong is relevant on a non-presumption case. But I abide by what you are saying. Like I said, I am not sure.

I think I have -- I don't have a presumption to overcome here; they do. But I think that all the steps that could possibly be taken and again, relying on my recollection of the Ellis/Madoff opinion, the question isn't whether all risk is eradicated. The question under the --

THE COURT: Of course. You can never eliminate all risk. Otherwise insurance companies wouldn't be in business.

MS. SHROFF: Thank you, Judge.

THE COURT: In a circumstance where an application is made that a person be detained, 18U.S.C.36142 requires that certain factors be considered. Among others, the nature of the charged offense, the evidence against the accused, the background of the accused, his or her ties to the community, employment history, prior criminal history if any, whether at the time of the alleged offense that the accused is under the supervision of a parole or probation entity.

In the instance case, the accused has ties to the community, had an employment history, has no prior criminal history, is not under the supervision of a parole or probation entity.

The strength of the evidence against him is tempered somewhat by the statement that he gave post-arrest, although there is evidence proffered and outlined in the complaint that may demonstrate a degree of strength that militates in favor of the application made by the government.

I am not unmindful that apparently a month has elapsed since the -- almost a month. Tomorrow will be a

month since the accused severed his ties with this prior employer, a financial institution, whose proprietary information is at the heart of the complaint. And there is no evidence that has been proffered that the material was taken, or alleged to have been taken, from the financial institution has been used to harm it or anyone else.

Much during the course of this proceeding is based on speculation. But we don't deal with speculation when we come to court; we deal with facts.

Given all of the information that has been presented to me in support of and against the application that the accused be held without bail, on the issue of danger, the court has to find that there is clear and convincing evidence that the defendant would present as a danger. I don't think that clear and convince evidence has been presented to me, so I do not find that he should be detained under the theory of danger.

With respect to flight, I also am not persuaded that the quantum of information that's been presented to me permits a conclusion that the defendant could not be at liberty under conditions that would insure that he be in court whenever he is directed to do so. So I'm going to deny the application that the defendant be detained without bail.

(Pause in proceeding)

THE COURT: Bail condition will be as follows: A $750,000 personal recognizance bond must be co-signed by three financially responsible persons. Bond is to be supported by $75,000 cash or property.

Defendant’s travel is restricted to the Southern and Eastern Districts of New York and the District of New Jersey and he must surrender the travel documents he may possess and not seek or obtain any new or replacement travel documents while this criminal action is pending.

He’ll be subject to regular pre-trial supervision and he shall not access the computer data that is the subject of the criminal action.

The pre-trial services office shall be permitted to the extent possible to monitor defendant’s use of computers or other electronic devices at his home or place of business to insure that the defendant does not access the data that is the subject of this criminal action. All bail conditions must be satisfied before the defendant’s release.

Sir, if you’ve satisfied the bail conditions and are at liberty, you must appear in court whenever you are directed to do so. If you fail to do so, you and any co-signers on your bond will be liable to the government for the full amount of the bond.

Any property or cash posted in support of the bond before fitted to the government, a warrant may issue for

your arrest, and you may expose yourself to a new charge in connection with your failure to appear in court, which would have a penalty that is independent of any penalty that might be imposed upon you should you be found guilty of the offense that is outlined in the complaint. Do you understand, sir?

MR. ALEYNIKOV: I do.

THE COURT: What date would you like for a preliminary hearing date?

MS. SHROFF: Your Honor, first may I just request that the United States Attorney's Office order my client to be produced on Monday so that all conditions can be met. I'm told that those conditions will be met by Monday. So I'm going to ask Mr. Facciponte to please produce my client.

And assuming that he does, then I would like the 30th day.

MR. FACCIPONTE: Your Honor, I --

THE COURT: Please have the defendant available so that, if the conditions are satisfied, he may be released on Monday.

MR. FACCIPONTE: Your Honor, we'll put in a prison production order with the Marshals immediately after this conference.

THE COURT: August 3 will be the preliminary hearing day. Is there anything else that we need to

address?

MR. FACCIPONTE: Nothing from the government. Thank you, Your Honor.

MS. SHROFF: No, Your Honor, thank you.

(Whereupon the matter is adjourned to August 3rd, 2009.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, United States of American v. Sergey Aleynikov, was prepared using digital electronic transcription equipment and is a true and accurate record of the proceedings.

Signature_____

Date: July 6, 2009

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

v. 10 Cr. 96 (DLC)

SERGEY ALEYNIKOV,

Defendant.

----------x

June 29, 2010,
9:30 a.m.

Before:

HON. DENISE L. COTE,

District Judge

APPEARANCES

PREET BHARARA,
United States Attorney for the
Southern District of New York
REBECCA ROHR, ESQ.,
Assistant United States Attorney

KEVIN H. MARINO, ESQ.,
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JOHN BOYLE, ESQ.,

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Attorneys for Goldman Sachs & Company
5301 Wisconsin Avenue, N.W.
Washington, D.C.
MATTHEW FRIEDRICH, ESQ.,
ALAN B. VICKERY, ESQ.,

ALSO PRESENT:

MICHAEL McSWAIN, Special Agent FBI

- - -

THE CLERK: United States of America against Sergey Aleynikov.

Is the government ready to proceed?

MS. ROHR: Yes. Good morning, your Honor. Rebecca Rohr for the United States.

With me is Special Agent Michael McSwain from the FBI.

THE CLERK: For the defendant, are you ready to proceed?

MR. MARINO: Yes.

Good morning, your Honor. Kevin Marino and John Boyle on behalf of the defendant Sergey Aleynikov.

THE COURT: Counsel for Goldman Sachs & Company.

MR. FRIEDRICH: Matt Friedrich from Boies Schiller along with my colleague Alan Vickery.

THE COURT: Good morning, everyone.

I want to thank you, Mr. Friedrich, for I assume traveling to New York to meet and confer. Was there any further progress made?

MR. FRIEDRICH: I wish that I could have made it here. The time changed. I had my shuttle ticket, three flights were cancelled and I was not able to make it here, but I was able to participate by phone.

THE COURT: Good.

Was there any further progress made?

MR. FRIEDRICH: The only progress I can report, your Honor, I believe I have an agreement with Mr. Marino as to the content of our proposed protective order.

THE COURT: Great. Good.

Okay.

I received submissions from all the counsel, and I am going to be working from Exhibit A provided by the defendant.

I marked my Exhibit A in light of the report I got from Mr. Friedrich in his June 28 submission and I appreciate

the attachments to that June 28 submission, they were helpful to me, and, of course, yesterday I also received another submission from the government.

And so what I think I would like to do is march through these remaining disputes in terms of categories, and I think the first broad category has to do with -- and I am looking at Mr. Friedrich's June 28 letter -- the requests that asks for more source codes from Goldman Sachs. They include, one -- well, let's start with 1. Let's just start with 1. And then we will resolve 1 and see how that ruling might apply to any additional requests that are related.

So, Mr. Marino.

MR. MARINO: Thank you very much, your Honor.

I appreciate the court's manner of proceeding beginning with item 1 and then seeing what else that impacts, because actually I think the court is correct that these requests are interrelated.

Item number 1, we have a fundamental disagreement with the government as to the relevancy of the rest of the platform, for lack of a better phrase, and much of what is sought, there is some variation and I'm sure, your Honor, we will get to that, but much of what is sought in these requests goes to that need to have the rest of the platform.

The reason we need that, your Honor, is this is not simply a case of the government alleging the theft of a trade

secret without more. That's not a federal crime. The theft of a trade secret, as the court is well aware, is a matter that is in the normal course handled in the civil courts.

The Economic Espionage Act is a very specific type of legislation and codifies a specific intent crime. It's not about simply taking something that was proprietary or a trade secret. That's why when the government initially introduced these charges with such fanfare it was at pains to tell the court at a detention hearing that what had been taken was the entire platform, and it didn't say that once or twice, it said it repeatedly. It's the gist of what the government was saying.

What the defendant is accused of having stolen from this investment bank, which is a major investment bank in New York, is their propriety high-quantity high-volume trading platform with which they conduct all of their trades in all major markets in the United States and other places. If this code is allowed to go to a competitor or to an entity that is not necessarily legal but can start trading with this, the bank itself stands to lose its entire investment in creating this software to begin with, which is millions upon millions of dollars.

THE COURT: I think that was the thrust of your argument in your opening brief to me, the statement that the government made at the detention hearing.

MR. MARINO: That is the beginning of the story, but it doesn't change in a material way in the indictment.

The indictment alleges, and I'm looking at paragraph 5, which is at the bottom of page 2, at all times relevant to this indictment, Goldman's high-frequently trading was supported by a proprietary system of computer programs, the platform, which, among other things, rapidly obtained information regarding the latest market movements and trends and so forth.

Paragraph 7. Goldman's high-frequency trading system, the platform and the trading algorithms were complied of different computer programs.

And paragraph 8, the top of page 4, Goldman has taken various measures to protect its high-frequency trading system's source code, and goes on to describe it.

When you go to page 10 and get to the statutory allegation, the allegation is that Sergey Aleynikov -- I'm at paragraph 16 -- downloaded a trade secret with intent to convert such trade secret that was related to and included in a product that was produced for and placed in interstate and foreign commerce to the economic benefit of someone other than the owner thereof and intending and knowing that the offense would injure the owner of that trade secret, to wit, Aleynikov, while in New York, New York, and elsewhere, without authorization, copied and transmitted to his home computer

Goldman's proprietary computer source code for Goldman's high-frequency trading business with the intent to use that source code for the economic benefit of himself and his new employer.

The heart of what is being alleged in this indictment is that what Mr. Aleynikov downloaded and took was of value. It was not just a trade secret, but it was a trade secret that he would be able to benefit himself by, that is, he could sell it to a third party and benefit himself, that he could hurt Goldman by, that is, by taking something of value from Goldman.

That is going to be very much contested at this trial.

THE COURT: Which part of that?

MR. MARINO: That what Mr. Aleynikov downloaded was of independent inherent intrinsic economic value.

What the government says --

THE COURT: You are saying that what he took the government will not be able to show would benefit others?

MR. MARINO: That's correct, without showing, without showing the platform which comprised it.

THE COURT: Are you saying that you are also going to be contesting that what he took did not have value in that it would not hurt Goldman to have it shared with others?

MR. MARINO: Yes.

THE COURT: So those are the two defenses that you want me to focus on?

MR. MARINO: Yes.

And the reason I want you to focus on those, your Honor, they shine the light on what's really going on here. When they came to court -- and I return to that for a couple of reasons, but the heart of this case when they came to court was if you don't detain this fellow, he's going to alienate something of value of us, to wit, our entire trading platform.

Now, the judge rejected that for a whole bunch of reasons, but when the indictment emerges, although it doesn't specifically state he took the entire platform, it persists in the allegation that what Mr. Aleynikov downloaded was of value to Goldman in that it was part of the trading platform.

So they make the allegations that we just went through in the initial portion of the indictment where they say he executed the transfer of hundreds of thousands of lines of source code for Goldman's high-frequency trading system and then, of course, the statutory allegation at paragraph 16 simply parrots the wording of the statute itself saying that he downloaded a trade secret with intent to convert it and specifically stating that it was related to and included in a product that was produced for and placed in interstate and foreign commerce to the economic benefit of someone other than the owner and intending and knowing that the offense would injure the owner.

If we don't have the platform that comprises what it

is that Mr. Aleynikov downloaded, then we cannot defend that allegation. The allegation -- in other words, if this was just about the theft of a trade secret without having to show that that trade secret had value, then their position would be perfectly understandable, what we told you what you took and that's all you need to know to defend it, you come in and show us that you either didn't take it or what have you, come up with whatever defense you have.

The point is because of the nature of the Economic Espionage Act and how specific it is about what the government has to prove, that you converted a trade secret to the economic benefit of someone other than the owner himself and intending that the offense injures the owner and they describe it as Goldman's proprietary computer source code for its high-frequency trading business.

We don't have to take them at their word that what was downloaded would, in fact, be and was, in fact, part of the larger whole, we are entitled to know what the larger whole was so that we can refute the suggestion that this was something of value.

I believe, your Honor, that what will be demonstrated once we have the platform, I believe that our expert will be able to show and will be able to testify that what was taken was of no utility whatsoever without the rest of the platform, that what was taken did not have independent value, and it

simply isn't enough to say you've got the code, we told you what you took, what more do you want. That's not good enough because I can't defend the case without being able to undermine the core allegation that it was something of value.

When they tell the grand jury in presenting the indictment that the value was, it was a part of or related to this trading platform, that becomes the heart of the charge against him. They didn't go to the grand jury and say indict this case because Mr. Aleynikov downloaded some proprietary information. That's not a crime. To be the crime -- your Honor looks quizzical.

THE COURT: No. I mean, it's an element of the crime.

MR. MARINO: Yes, it is.

THE COURT: It's not the complete crime, there are many elements, but it is part of the crime to take.

MR. MARINO: Without a doubt, to take a trade secret is undoubtedly part of the crime. But to turn what is essentially a civil allegation, you stole our trade secrets, that crops up in civil cases all the time, to turn that into a violation of the criminal laws of the United States, there are other essential elements without which not. Those other essential elements go to exactly what role that alleged trade secret played in the larger platform.

That's why when we went to court they said he took the whole platform, we've never had a theft on this scale before,

this is something worth millions and millions of dollars. None of that is true, none of that. What was downloaded does not have a value.

Remember, in this case even though the allegation is, well, you left Goldman to make more money at Teza and the allegation specifically is Teza was the party that was going to benefit --

THE COURT: And the defendant.

MR. MARINO: And the defendant. That's the specific allegation.

I'm not mincing words. What I'm trying to say to your Honor the notion was, and I don't think anybody would walk away from it, I certainly hope not, he was taking the platform from Goldman, going to Teza and he was going to benefit Teza and, therefore, himself, he was going to make three times the money and basically he was taking something that did not belong to him, something that belonged to Goldman and was bringing it to Teza. That's the gist of the what they're saying. Okay?

That's not true. We know, first of all, that it is completely unsupported by any allegation that Teza ever was offered or paid for anything of the sort.

THE COURT: Well, let's, if I could, if we could bring you back to your first request.

MR. MARINO: Yes.

THE COURT: Okay. And obviously we are not trying the

case in front of the jury yet, so if we could just focus on the first request.

Is there anything else that you wanted to say to make your case for requiring Goldman to respond to your first request?

MR. MARINO: I can't defend the case that alleges that my client took something of value to Goldman, to wit, a part of its proprietary trading system, unless my expert is able to analyze the proprietary trading system. I can't do it.

This is like a scenario in which you are alleged to have injured Coca-Cola by taking a trade secret Mr. Coca-Cola that was part of its formula for Coke and what we find is what you took was sugar.

When you tell me that I took sugar and you tell me -- tell my expert and here's the role that plays in the overall trade secret, the notion that I violated a federal criminal law becomes clear, the notion that it becomes silly it becomes clear.

Their position is in part they got a concern that Mr. Aleynikov ought not to be able to have access to this because it's a secret. Well, he had access to it throughout his entire tenure at Goldman and we have agreed readily to whatever protective order they want.

I note in their papers they indicated if your Honor is inclined to require Goldman to produce the remainder of the

platform, that they would want a further protective order.

I don't care what protective order is entered. There is no part of our defense that is interested in having this material free and clear of some protective order, but I don't understand how the government is going to be able to come into court and prove the allegations of Count 1 of this indictment that Mr. Aleynikov violated the Economic Espionage Act without showing what relation the code he downloaded bore to the whole, and that's the essence of why, unless I have it, I can't undercut that and have my expert testify, no, it didn't, this is actually something that was in a developmental stage, this is actually something that was of no utility whatsoever outside the platform.

Those are critical facts that bear on this type of allegation of an economic espionage violation and that's why we need what is in item number 1.

THE COURT: Thank you.

Mr. Friedrich.

MR. FRIEDRICH: Thank you, your Honor.

We pick up with the analogy that Mr. Marino raised --

THE COURT: Sugar?

MR. FRIEDRICH: This isn't about sugar. If Coca-Cola, and I heard rumors, I don't represent them, it is alleged a rumor that different people within the company know different aspects of the formula and if one of those people who knew

different aspects about what went into one part of Coca-Cola went out and sold how much sugar, how much corn syrup, how much bubbly, that is an intellectual property and that would be an intellectual property crime.

Here, again, the government has made clear in its filing indictment, the indictment makes clear on its face that this is not the theft of the entire platform.

The government says the papers it filed in this matter it is a theft of many of the files and, indeed, paragraph 12 of the indictment makes clear that the transfer of hundreds of thousands of lines of source code for Goldman's high-frequency trading system or Goldman's computer network, including files relating to the platform and the trading algorithms.

I submit it is clear from the face of the indictment, even it is not it is clear from the government's papers that they have submitted that they are not alleging the theft of the entire platform.

The defendant has had produced to him that portion of the code which it is alleged he has stolen. He doesn't need the remainder of the code, the remainder of what is highly sensitive, the remainder of what is highly proprietary in order to make the argument that he espoused here.

Unless the court has any questions about our submission or the arguments we made on that point, I don't have anything else, other than to emphasize this is incredibly

sensitive information, it is incredibly sensitive industry.

Thank you.

THE COURT: And briefly, Ms. Rohr, do you have anything you want to say on behalf of the government?

MS. ROHR: Yes, just briefly, your Honor.

As stated by Goldman's counsel the government has not alleged theft of the entire trading platform, the indictment in paragraph 12 makes that clear. The complaint also did not allege the entire trading platform.

There were statements at the bail argument about the platform, but in any case the indictment now alleges just a portion of the trading platform and as I said in my paper that has been provided to the defendant.

The defendant can defend himself in this case. He doesn't need the rest of the platform to argue -- to make his arguments about intent or to make the argument about the value of the item stolen. The rest of the platform and the other computer files are really irrelevant to those arguments.

THE COURT: Okay.

I am going to deny the request for production in response to request number 1.

The thrust of the written presentation by the defendant, and he moved beyond that, but at least initially the thrust of his presentation which was presented to the court in a memorandum was to focus on the government's statements at his

detention hearing.

Whatever those statements were and whether they were overbroad characterizations in the heat of the moment, whatever they were that is not the charge that the defendant is going to trial on.

I've read the indictment with care. There is nothing in the indictment that would permit the defendant to be confused and, indeed, he is not confused, about whether or not he is charged with the theft of the entire platform.

So he has been given in discovery, and it is undisputed, the Rule 16 discovery, the specific portion of Goldman's trade secrets that he is alleged to have taken in violation of law.

So the argument that is being made now by the defendant has moved on to identify two specific issues, and that is his contention that he will be unable to show that the theft of the particular items he has discovery of, which are a portion of the trading platform, that the theft of those items, one, don't benefit others and, two, will not hurt Goldman if disclosed to others, and this is what he wants to show at trial and what he believes the government has the burden of showing in the affirmative, that it will benefit others and would hurt Goldman if it was disclosed.

In making that argument he makes and analogy, and I don't want to hoist him on his own petard analogy, if its sugar

it's sugar and if he wants to show that what was taken is equivalent to taking sugar, he can show that now. You have a chemist come in and analyze it as sugar; you have a computer expert come in and analyze it as the computer equivalent of sugar.

I don't find that he carried his burden at all of showing that there is any need to have access to the entire Goldman trading platform in order to either put the government to its burden or to craft a defense along the lines that he has suggested. As a result, I'm going to deny the request.

I have to say, and the circuit has spoken to the issue this month in its decision on City of New York, a civil case, June 9 decision by the Court of Appeals in Dinler against the City of New York, about the limitation of protective orders, either in attorneys' eyes only or filing under seal or any number of levels of protection which we customarily apply when we are dealing with highly sensitive material, and the parties have made some arguments about protective orders in this case.

I don't feel I need to reach, with respect to request number 1, the protective order issue. I find on its merits the defendant has not made a showing that it has either a need for or there is evidentiary value in having the specifics of the additional trading platform code that the government is not alleging the defendant stole.

That said, it's important to focus with care on that

issue, because we are dealing with matters that are highly sensitive. This is not a trivial decision, this is not a decision that can be made quickly or without care. A lot of this takes care for all the parties before me and so I have taken particular care in thinking about this request, studying the indictment as carefully as I can, understand precisely what is being alleged and what a defendant would need to show in response.

So with that ruling on item or request number 1, which other items, then, are impacted by that ruling such that we don't need to further consider them?

MR. MARINO: Are you addressing me, your Honor?

THE COURT: Whoever can answer that.

MR. MARINO: Well, it gets a little bit complicated, because, as you go to item number 7, that seeks the content of the logs from the specific corporate proxy serve containing certain protocol records.

THE COURT: Well, 7 Goldman made a counterproposal so I don't think I need to consider 7 right now.

MR. MARINO: If you go to items 9 through 12, the intent there, your Honor, is to demonstrate the evolution of the source code and, thus, the value of what was taken.

I'm not sure how to understand the court's ruling with respect to the government's need to show the value of what was taken. I think the government, as I read the Economic

Espionage Act, is going to have to show that what was taken is a thing of value. I don't think there is any doubt that showing merely that what was taken was a trade secret or had proprietary value -- I'm sorry -- was of a proprietary nature is sufficient.

So I guess as I'm hearing the court's --

THE COURT: Excuse me, I want to be precise because I don't want to mislead anyone.

When we look at page 10 of the indictment, and that is paragraph 16, that the defendant was asking me to focus on, the issue of benefit and injury is, I believe, in terms of intent, with the intent to convert such trade secret to the economic benefit of someone other than the owner and intending and knowing that the offense would injure the owner.

MR. MARINO: That's how I read it, yes, your Honor.

THE COURT: Okay. So we are talking about scienter issues with respect to those two elements.

MR. MARINO: Yes.

THE COURT: And, of course, the fact that something would benefit someone or would injure Goldman is relevant to the scienter inquiry --

MR. MARINO: Yes.

THE COURT: It might be circumstantial evidence of scienter, but the thrust of it is the scienter issue.

MR. MARINO: I completely agree with your Honor, the

thrust of it is the scienter issue, and when I look at this I see an allegation -- of course, I have a lot of questions in my mind now about how if the government initially thought the entire platform was taken and then alleged in the indictment that something less was taken what caused it to go from point A to point B, but that's not for your Honor today.

THE COURT: No, and I don't think I would spend too much time on that, Mr. Marino. You are a very experienced and savvy attorney. You know that people say things in hearings that are perhaps less precise than when they are crafting a document. So, you know, I don't want to revisit my ruling on number 1.

MR. MARINO: I understand.

THE COURT: I take my question off the table. I can tell this is not a productive way to go. So we will just march through these in the order in which they are listed and see if we can make progress that way.

So number 2, I understand that there is consent to that.

Number 3, I understand that a production has been made and a search is still on-going.

Numbers 4 on 5, I understand there is consent to that.

So I think that takes us up to number 6, and that is the specific written policy regarding the copying.

And if I remember the written presentations I received

on that, some policies of confidentiality policies, I will call them, from Goldman have already been produced and I take it the government has produced those on which it is intending to rely at trial.

Is that correct, Ms. Rohr?

MS. ROHR: Yes, your Honor.

The defendant's revised item 6 had been modified a little bit.

The government does not believe that it has or that it has provided policies relating to working at home or the copying or using of computer source codes specifically.

THE COURT: Okay. So you have provided the more general confidentiality policies that have been reduced to writing on which the government intends to rely at trial?

MS. ROHR: That's correct, your Honor.

THE COURT: Okay.

MR. FRIEDRICH: Just to clarify, I take it that that would be in conjunction with the policies that Goldman Sachs is producing with the other items earlier in the request.

In other words, those haven't been produced yesterday. We are agreeing to produce them. If we have a confidentiality order we should have them to Mr. Marino by the end of the week.

THE COURT: Okay.

Well, the government has produced what it is relying on at trial, that's it's Rule 16 obligation, the written

documents on which it is relying on at trial. The defendant is seeking additional written policies. They are being agreed to and produced at least in part by Goldman.

So let me ask with respect to number 6, Mr. Friedrich, is there a specific written policy of the kind that is being described in paragraph 6?

MR. FRIEDRICH: Your Honor, let me answer it this way:

The answer is I don't believe so, but I want to make sure that I'm clear about the basis for that belief.

The indictment itself in terms of working outside the home, that portion of the indictment, I believe what defendant is referring to is that portion of the indictment -- and I just want to get it -- I believe is set out in paragraph 14 in the indictment.

MR. MARINO: That's correct, your Honor.

MR. FRIEDRICH: This does talk about transferring certain files to one's home, but also about a lot of other things, and saying I don't believe there is a specific policy that has been identified about working at home, I don't want to say that there are no policies that relate to this paragraph because I believe that there are. So with that clarification, I don't believe we have anything.

MR. MARINO: That clarification sort of swallows the explanation from my perspective, your Honor.

THE COURT: Well, let's not talk about paragraph 14,

let's talk of this indictment, let's talk about paragraph 6 of Exhibit A. That is what is being requested.

MR. MARINO: Yes.

THE COURT: So does Goldman have reduced to writing a written policy as described in paragraph 6 that has not yet been produced or that it is not planning to produce?

MR. FRIEDRICH: I don't believe so, your Honor, no.

THE COURT: So this is no further policy is responsive.

Then with respect to items 7 and 8, there was a counterproposal made by Goldman, I believe.

MR. MARINO: The counterproposal for 7 is sufficient, your Honor.

Eight, however, what we need are the host names. We ask for the specific ID addresses --

THE COURT: Let's not do that. Counsel, it is difficult for the reporter to take down this kind of code reference.

MR. MARINO: I apologize.

THE COURT: And we are all looking at item eight.

MR. MARINO: Yes, your Honor.

THE COURT: So did you make a request yesterday in the meet and confer process about the further modification you would like to make to number 8.

MR. MARINO: Your Honor, the meet and confer process I

don't think was exactly what you may expect so the answer is --

THE COURT: Did you request it?

MR. MARINO: I asked or requested to talk about each and every one of these items and was told that Goldman would go no further than what was in its written submission. So that's where we are.

THE COURT: I am not going to get into this, okay, back and forth, I'm just not going to.

Did you make a request in writing or otherwise of the kind that you are making now on the record?

MR. MARINO: Actually, your Honor, I'm not making a request, I'm just clarifying that the host names are what is important here and that is responsive to papers that Goldman filed yesterday morning.

THE COURT: Okay.

So I will let counsel talk about that and you will get back to me if you can't reach agreement and if there is a problem.

Okay. That takes us to item 9.

Mr. Marino, you are going to have to give me some background with respect to item 9. Don't read it.

MR. MARINO: The production of source code of the type that was downloaded on June 5 actually goes through stages. It's an evolutionary process. And what we are requesting in seeking the full content of the specific files and

subdirectories is to demonstrate the evolution of the source code and, thus, the value of what was taken.

In other words, if you are provided with the full content of the specific files and subdirectories as requested here, and I won't read the code letters, but if you are provided with that, an expert can explain exactly where in the evolutionary process what was downloaded existed, and this, of course, has a direct bearing on the value of what was taken. That's what that's about.

THE COURT: Okay.

Your "of course" is not clear to me. Whether it was developed over the course of a decade or over the course of a month, whether it was developed by teams of hundreds of people or by one brilliant person, I'm not quite sure how that makes a difference with respect to your ability to defend this charge.

MR. MARINO: The way it makes a difference is if you see where in the evolutionary chain what was downloaded exists, you will understand that its value was negligible in terms of moving forward this platform.

No matter how you slice it, as I understand this whole process, the value of the source code that was downloaded obviously can only be assessed in the larger context in which it was used as a trading device.

If an expert is provided with the full content of the specific files and subdirectories, the expert will be able to

say, okay, what was downloaded is not, in fact, something that would be of value to anyone outside the context in which Goldman used it.

And so, again, in proving, and I take your Honor's point, in proving intent or disproving intent as the case may be, that's a very important thing.

I mean, it's just how I understand the statute and it's how I understand what's been charged here. So I don't know how we can ask an expert to assess and be Rule 703 helpful to the trier of fact on the subject of the value of what was, in fact, downloaded if we don't place it in some sort of context for the expert, and having this full content of the specific files would enable the expert to explain exactly what was taken. It still has to be something that you had intent to harm economically the victim by taking.

And so, I mean, I don't want to re-engage the court in a discussion of item 1, but I would love to know what the product is that was prepared for or placed into interstate commerce to know how I'm going to defend my client, who stands charged with economic espionage, and that's -- I don't mean to course over it, your Honor, I apologize if I have, but that's where I'm coming from.

THE COURT: Thank you very much.

Mr. Friedrich.

MR. FRIEDRICH: This is analytically the same as item

number 1 as to which the court has already ruled, because it is simply a developmental version of the same program. All the same arguments both ways would apply. On that basis we object. And the same thing can be said for five or six other requests I take it we are going to go through.

THE COURT: Okay. Item 9, I don't have a clear description from the defendant of what is important with respect to the additional information it seeks through item 9.

If the argument is that what was taken is of no value without the additional information, without having taken the additional information reflected in request number 9, well, that, which is what I understood the defendant to be saying, that an expert can opine on, what was taken was worthless and --

MR. MARINO: Can I just say briefly on that, very briefly --

THE COURT: Mr. Marino, we are not going to go backwards because we have a long way to go here. So your request number 9 is denied. Okay.

So request number 10.

MR. MARINO: Request number 10, 11 and 12 for a recursive list of these specific files, again, it's going to show -- what is going to be developed here bears on the value. I won't belabor the point. I understand the ruling that your Honor has placed on the record. I understand.

I mean, I don't know what else to do unless you know how a particular downloaded file interacts with the other elements of the platform, you cannot articulate its value, and that minds more sophisticated than mine in a technologically sense, I don't know enough about it to opine on it, but I am telling you what I have been charged with coming to Goldman and getting is something that would enable this expert far more learned in these matters than I am to say no, what was downloaded, unless you tell me what it was interacting with, I cannot speak to the value and no one could have -- no computer programmer with this man's expertise could conceivably have intended that it would be used to benefit a third party or harm Goldman because it just doesn't exist in the abstract, and that's the point.

I understand your Honor's ruling and I don't want you to revisit it, but that is the cause of these requests. That's where it is coming from, because you have to --

THE COURT: Will you explain to me what a recursive list is or not?

MR. MARINO: I think we are approaching the limit of my understanding of it, but it's basically a list of file names and trajectory. You can trace where this has been and analyze these codes based on this list, sort of explains to you how it would work.

Without that -- I mean, I know that your Honor has

made clear that you think that an expert could assess this and say this is of value, this is not of value, but truthfully, I mean, the government is bearing the burden of proof at trial is going to have to show that it is of value, and I sure hope they are not coming into this courtroom with that platform, I hope they are not going to show this jury here's where this particular thing he downloaded fits into the platform, because then I really would be completely disadvantaged in my attempt to defend the case, because I can assure you that I am going to come in and argue that it didn't have a value and they are going to have to say yes, it did, here is how it interacted with the algorithms to enable Goldman to dart in and out of these funds and make these mean millions of dollars. That's how they are going to have to present the case.

Again, it's just -- maybe conceptually, I know your Honor has graciously referred to me as savvy, I'm not feeling that savvy this morning, I'm feeling kind of ridiculous. I tell you, I'm looking at this thing and trying to understand what is the product that they are referring to and how do you ever prove economic espionage unless you can prove what product it' was that you either took or it comprised something that you took?

How do you proof economic espionage with a statute that specifically says on its face with intent to convert such trade secrets that was related to and included in a product

that was produced for and placed in interstate and foreign commerce without letting me know what the product was or see the product or have the product or that my expert analyze the product?

That's where I am.

THE COURT: Thank you.

Okay. So with respect to number 12, I think that Goldman's response was that there were no responsive files with respect to 12, if I remember correctly.

MR. FRIEDRICH: Yes, your Honor.

THE COURT: Okay.

So we are really dealing with items 10 and 11 right now. And I don't want to accept on the record with no response what is sort of asserted as a foundational point in Mr. Marino's last argument, which is that the government cannot show and the defendant cannot defend this case without explaining how the stolen material fits in the larger trading platform and computerized trading system operated by Goldman and, therefore, as a result the government is going to have to bring into court and we will have to bring into court the content of the remaining portions of the trading platform, all the other source codes, the algorithms, everything in order to make that first point, which is the stolen material relates to a valuable trading program.

I don't accept that premise that you need to show the

to the jury the specifics that the government has the burden or the defendant would be advantaged by having the specifics of the rest of the source code available to it.

So that is that fundamental premise, I think, lurking behind defense counsel's last argument and I don't want to leave it unaddressed.

So to the extent that items 10 and 11 are seeking information that would reflect the other portions of the source code and components of the trading platform from Goldman that the stolen material interacted with, that request is denied, so 10 and 11 are denied.

That brings us to 13, and those -- 13, 14 and 15, it's possible we can take those as a group, I don't know.

MR. MARINO: Thirteen is withdrawn, your Honor.

Fourteen and 15, again, for recursive list.

I think that this list is going to demonstrate that the platform consisted of several packages. To build and use a package one would need all the files on which the package depends and that Mr. Aleynikov did not download all the elements necessary to build even one of these packages.

But, again, I see that it is somewhat related although not exactly co-extensive with the other requests, but I think your Honor understands. Obviously we have a fundamental disagreement over what the statute requires with respect to the proofs that it is going to require.

Perhaps I'm mistaken as to the importance of the products to the Economic Espionage Act, but I don't, I don't, I don't think so, I think I'm aware of that. I'm not sure how to find out what the product is, unless I have either the actual platform produced or the recursive list that we have asked for, I'm not sure I understand how we're going to defend a charge that we took something that either was related to or was included in a product that was produced for and placed in interstate and foreign commerce.

I don't know what the product was, but that's what I'm trying to get at.

THE COURT: I actually don't think there is any fundamental disagreement on what the statute requires, at least I haven't heard one, and I think it is somewhat disingenuous to say you don't know what the product is that was stolen or how what was stolen fits into the product.

In any event, request number 14 -- yes, counsel.

MR. FRIEDRICH: I'm sorry, your Honor. I just wanted to make a brief factual point for the record that takes me to the limits of my computer understanding.

I believe that recursive lists are a good bit more detailed than just simply a list of files. It is a list of files, but it also gives indication of the files that those files interact with and how they interact.

THE COURT: That's what I understood from Mr. Marino's

description. It would basically, if you have it, show how the stolen trade secrets -- and I'm just using that as a shorthand so we know what we are talking about what is charged in the indictment as having been taken in violation of law related to the rest of the trading platform, and if you have the recursive list you basically get to see everything the stolen material interacted with in the course of it being used.

That's what I understood Mr. Marino to be explaining to me.

Okay. Fourteen and 15 is denied for the reasons already stated.

With respect to 16, I believe there is agreement.

With respect to 17, Goldman says there is nothing responsive.

That brings us to item 18.

Goldman's response deals with 18, 19 and 20 in a group, and so it may be possible for us to deal with 18, 19 and 20 as a group, but, Mr. Marino, I leave it to you.

MR. MARINO: Your Honor, I think we can deal with them as a group.

I assure the court I'm not being disingenuous in any way when I say I don't know what the product is that was produced for or placed in interstate commerce. I don't know what the product is.

I have had the benefit of a great deal of research and

reading by commentators on what product means in the context of the Economic Espionage Act. I assure you there is no product in this case that fits within that definition.

So no, I'm not being disingenuous, I am being very honest and forthright.

THE COURT: Now you are focusing on a different word.

MR. MARINO: Product, your Honor.

THE COURT: So this is a different argument than I think I've understood you to make so far, so let's deal with that.

I'm on page 10, paragraph 16 of the indictment, and it requires proof by the government that the defendant acted with intent to convert such trade secrets that was related to and included in a product that was produced for and placed in interstate and foreign commerce, et cetera.

So are you now focusing on the word "product" as it is used in that paragraph?

MR. MARINO: Yes, your Honor.

THE COURT: And what argument do you want to make about the word "product"?

MR. MARINO: I don't know what the product is. That's the question. In other words, all of these requests at some level are directed toward understanding what the product was.

We spoke for a while about value and I won't replow that ground, but we're talking now about product. I read the

Economic Espionage Act to require that there be the theft of a trade secret or the intent to convert a trade secret that was related to and included in a product and not just any product broadly conceived, but a product that was produced for and placed in interstate and foreign commerce.

Was the platform produced for and introduced into interstate and foreign commerce? Are they selling their platform? Do they produce a product and place it into the stream of commerce and is that what he's alleged to have done, stolen a trade secret that related to that product that was produced for and placed into interstate commerce?

I don't think so, but they are not being required to produce the platform, we are not being required to identify the platform, they are not being required to identify the product, but we are being required to defend the allegation in the indictment, and that's, that's where my consternation comes from.

They say in paragraph 6, Goldman has not licensed its trading algorithms or trading platform and has not otherwise made them available to the public.

Is the trading platform the product within the meaning of the Economic Espionage Act?

I'm not being disingenuous with the court, I'm being very direct. That's a huge issue in the Economic Espionage Act scholarship and I would like to know what the product is.

THE COURT: Okay. Of course, that is a different issue here -

MR. MARINO: Yes.

THE COURT: -- than has been identified before.

MR. MARINO: It absolutely is, and I don't mean to suggest, and I didn't mean to suggest that it had been identified to you before, but I want the court -- as you can see, it troubles me greatly to ever have a respected and distinguish jurist to suggest that I have been disingenuous. I don't ever try to do that and I wasn't doing it here. But I think there is something fishy going on with this product and I would love to know what it is.

THE COURT: Okay. So if there is a question about the specificity of an indictment, that is dealt with through a bill of particulars mechanism.

So if the issue is identification of the product and understanding whether the government, as I think you alluded to, Mr. Marino, paragraph 16 as is customary is putting in all of the elements of the statute and they are listed with the "and" as the linkage when obviously as we all know the government can prove one or the other, so it can prove that the intent was to convert such trade secret that was related to a product that was produced for interstate commerce or a product that was placed in interstate commerce, and if a defendant is confused about the government's theory and what proof it's

going to have to meet at trial, it is absolutely entitled to engage in that conversation with the government, and in this district as everyone well knows you have to have those informal discussions before you make a motion on seeking further discovery.

Have you had such discussions with the government already?

MR. MARINO: Yes, I have had many discussions with the government. I have not -- let me just address -- respond to one thing that your Honor said.

Obviously, I agree with your general comment about the manner in which the grand jury is permitted to return an indictment that parrots with the wording of the statute and the fact that it says, for example, in this statute copied, duplicated, sketched through, photograph, any one of those would suffice.

I do not agree that that applies to the portion of the statute that speaks to the requirement that this be related to and included in a product that was produced for and placed in interstate and foreign commerce. I think that is not disjunctive, that is conjunctive, but I don't think that has bearing necessarily on my argument, because I don't think the quote unquote product definition fits here at all.

I don't think there is a product. Not only do I not think there was a product that was produced for interstate

commerce, I don't think there was a product that was placed in interstate commerce, I don't think it is a product at all. I don't understand it.

Now, product has a definition under law. Now, that is a subject for a motion to dismiss an indictment, and I would love to make the motion to dismiss the indictment before -- obviously I intend to make it on July 16 or whatever date your Honor has set, I think it's July 16.

THE COURT: It is.

MR. MARINO: And obviously we have prepared that motion in skeletal form awaiting the information that we are requesting here because I think it will be very enlightening to the court.

I know that I'm being a pain in the neck here, your Honor, I'm not trying to be but I feel that I am, but I need to get to the bottom to present your Honor with why I believe this Economic Espionage Act claim against Sergey Aleynikov is not well made.

I would love to know from them. They can tell me this very easily without my having to go through, as your Honor said, you should go through the meet and confer style instead of making motions and bill of particulars, what's the product that is described in the indictment? What was the product that was produced for and placed in interstate and foreign commerce?

THE COURT: Ms. Rohr.

MS. ROHR: Thank you, your Honor.

This is a new argument. This was not previously raised before. I am happy to engage in a discussion with defense counsel before any motions are filed, but I do think that regardless of that issue, the items subpoenaed are not necessary to prove it's case. The items subpoenaed here that is before the court is separate from a potential motion or request for a bill of particulars on the word "product."

THE COURT: Okay. Good.

First of all, Mr. Marino, I am exquisitely conscious of the fact that every lawyer before me has a job to do and a client to represent, and you are not a pain in the neck, you are a very skilled advocate who it is a pleasure to have in my courtroom. But I am working hard to understand the arguments here so I can respond directly.

I appreciate that we now have a new word and clause to focus on in the indictment. I am going to let the government and defense counsel focus on it and I'm going to return to requests 18, 19 and 20, and with respect to 18, 19 and 20, I think we sort of lost our way a bit.

MR. MARINO: These are part of the same, these are part of the same argument or in the same vein.

For example, 18, 19 and 20 are related to one another.

Twenty seeking a dump of the contents of stock trading parameter tables, well, those are necessary to make granular

adjustments to the platform's behavior and the other elements of the platform are inoperable without them and none of these tables was included in the file transfers.

I'm trying to move through this conceptually, but candidly, this is all part of the same thrust. I know your Honor has given some -- you reacted to requests that we have made. I don't want to suggest that you are ruling on a carefully briefed motion addressed to each of these points because you're not. We haven't given you the benefit of that, we haven't put you in a position to do that and it's not right to suggest otherwise, I haven't done that.

I made a request, I thought I was on firm ground issuing the subpoena without coming to court in the first place. As it turns out I should have not only come to court and sought the subpoena, but laid out in exquisite detail why I wanted these things and even group them together for you.

The motion that we made for approval nunc pro tunc was made after we had made this -- prepared this list and, you know, as you can see, we started out with 36 items, we are now down to 26 items so we got rid of ten items right off the bat. But I don't want there to be less than a full appreciation by the court of why -- this is not a frivolous request. These interconnected and interrelated requests, first of all, they are not broken into bite sized pieces to makes it vexatious or burdensome for Goldman, it is not being don for that reason.

I tried to with the endeavor of my client, who is an expert in this area, to get to the very bottom of exactly what was taken and why it could not be proven that what was taken fits within the meaning of the statute.

I say this sort of to -- it's a longwinded way I think of short-circuiting in some respects, but I don't want the court to think that, you know, we are coming at this from all these different angles for any reason other than to really try to get our arms around exactly what it is that is going to be presented at the trial against Mr. Aleynikov and what he can present in his own affirmative defense to demonstrate that he never intended to violate the Economic Espionage Act, and I think to do that you really have to have an understanding of exactly what he took and when he took it, and I just think the only difference of opinion that we're having today goes to whether and to what extent the other aspects of the platform are necessary to enable one to understand exactly what the nature of those downloaded files is. They just don't exist in the abstract in a way that is understandable or meaningful. Once you see them in their appropriate context then you have a really clear insight into what any reasonably intelligent computer programmer with Mr. Aleynikov's expertise could have been thinking when he downloaded them, and that's what it's all about.

Candidly, we can go through them individually, but

these last three, from here we move to security issues, but the last ones that go to the platform, they are really all emanating from that same way of looking at the case.

And I will be honest with you, it's my way of looking at the case, it's sort of how I see it, it's how I have seen it from the beginning.

You know, we're not -- I don't have a degree in computer programming, I apologize, I confess to the court, I don't have that. I tried to learn what I needed to learn to translate that somewhat arcane world into a world I do understand and to kind of distill from what has been charged here what I really would need to get from the system to be able to explain or be helpful to a jury that has, I'm suspecting, less familiarity -- at least by that time I probably will know more than I want to know about it, but they are expected to know a lot less and I need to illuminate that for them. That's what I owe Mr. Aleynikov for. That's what makes all of these requests.

I explain it that way because I hear myself going over and over and I don't want to be vexatious to the court but I'm trying to understand it and I'm trying to explain it and I'm trying to get them to identify it because I don't think that is an Economic Espionage Act fit and that's what much of the case law and scholarship that I have steeped myself in over the past six weeks has taught me and I'm trying as a preliminary

appraiser to bring that to your Honor to make sure that I have this whole thing nailed down and understood in the right wait. That's where I'm coming from.

THE COURT: Okay. Thank you.

I can assure you you are not being vexatious, it is important to make sure that I am analyzing this carefully and thoroughly and the defendant has a full opportunity to be heard.

Obviously I denied the first requests for a conference for a failure to comply with Rule 17(c) and then defense counsel made a written submission, I believe, as an order to show cause to that effect, but I have to go back and look at the specific papers, but that I understood to be a written 17(c) submission so I think the defendant had a full opportunity to present whatever it wanted in terms of writing to support these requests. Obviously, we have gone through a process meet and confer to try to make sure that only real disputes are presented to me.

I think Mr. Marino's oral explanation, again, with respect to 18 to 20 confirms in my mind there is absolutely no need to produce the specifics, that is, the precise content and source code used in the aspects of the trading platform that the defendant did not take from Goldman.

To the extent the defendant wants to make an argument, which he apparently has described through his counsel and

apparently from what counsel is saying is supported by a defense expert that what the defendant took and what has been produced to him in Rule 16 discovery is the basis for the government's charges of theft, and, again, I'm using that as a shorthand, is only one component of what you would need to run a successful trading program and platform.

You can make that argument and explain all the functions that a trading platform performs and must be able to perform to function effectively without having the precise source code that does that for Goldman or for any other firm. You can demonstrate that to be able to take quickly and analyze and catalog trading that has just occurred on an exchange, on a variety of exchanges and somehow translate that and organize it in a way that the formulae that you have developed for your own trading strategy can learn from it and react to it and create a revised trading strategy, all of that can be explained to a jury without having access to and demonstrating to the jury the precise solution that Goldman has created for each step of that process.

Goodman is not alone in doing this kind of high-volume high-frequency trading. These are things that are known in the industry and there are a lot of different solutions that companies have developed and what makes the program valuable to Goldman is is its their solution, other firms have other solutions, and apparently a company that had wanted to hire the

defendant wanted to have its solution as charged in the indictment.

So requests 18, 19 and 20 are denied.

That brings us to 21 through 26.

MR. MARINO: And these all proceed from a single argument as well, your Honor.

The fundamental disagreement here is there isn't any doubt that it's an element of the offense that what was taken was something that the owner took reasonable measures to protect. That falls within the definition of a trade secret. And all of these requests for the various security access lists and specific list, all of these go to this security issue.

I guess Goldman's position is we just have to show it's reasonable, we don't have to show that other additional measures could have been taken.

I will stand corrected in one way.

23, 24 and 25 also go to exceeding authorized access. Those are issues on unauthorized access.

But between the reasonable methods they used to protect trade secrets and the authorized access issues, I think your Honor understands why we feel we need those to adequately defend the case.

I guess the point being, it's really not enough to say, well, judged by some objective standard these are reasonable measures if we can identify and demonstrate that, in

fact, there were many, many measures that Goldman could have taken to protect that it did not.

Maintaining a firewall which was designed to prevent outsiders from accessing the information stored on Goldman's computer network is an allegation made at page 4, paragraph 8(a) of the indictment.

So whether Goldman maintained a firewall that was designed to prevent outsiders from accessing information stored on its computer network creates a need on our part to assess those firewalls and that's what these requests are designed for.

THE COURT: Mr. Friedrich.

MR. FRIEDRICH: Let me break these into pieces, if I can, your Honor. I will deal first with 21, 22 and 26 and then 23, 24 and 25.

As to the first set, the language that Mr. Marino just read from the indictment talking about firewalls is specifically referencing designing to prevent outsiders from accessing the information.

The requests that he has phrased are not about outsiders getting in, they are geared toward insiders getting out, and that's a key distinction. They have asked for something different than what is alleged here in terms of the firewall policies.

Secondly, they are asking for information that is

incredibly granular in nature, give us all of your policies.

I would note requests 21 and 22 have no date parameters whatsoever. These are incredibly broad requests that are asking for incredible granular details about something that is incredibly sensitive to Goldman, how they protect insiders from sending things outside of the company.

From the prospective of Goldman it is something that is overbroad, it's not necessary. Saying the government has to prove reasonable measures I don't believe entitles the defendant to every single detail of routing, whether or not it had anything to do with this case or not during a complete non-specified points of time.

Then as to 23, 24 and 25, similarly, here, your Honor, there is just a difference of opinion as to what the 1030 charge means. This is not a case in which the defendant hacked into an internal system, the indictment itself makes clear the defendant had access, but that what he used that access for and what he used it to do otherwise ran afoul of the company's internal policies.

So all of the information they asked for in 23, 24 and 25 is really technical information about who was allowed access to what as a matter of Goldman's internal security system. That is not an issue in Count 3. The indictment itself makes clear that the programmers who worked on the code had access to the code.

THE COURT: I'm going to hear from you again, Mr. Marino, I just want to make sure I captured Mr. Friedrich's last point before I do.

In fact, I'm going to go back. Let's go to 21, 22 and 26.

What is a security access list? Information security access list?

MR. FRIEDRICH: I believe that that is what ACL appeared there as well which I believe is access control list, which is apart of the instructions that are part of the firewall.

THE COURT: Okay.

And request 21 and 22 further includes the phrase "outbound access."

MR. FRIEDRICH: Yes.

THE COURT: So that is your point about these are security protocols that Goldman has put in place to try to monitor whether people who have authorized access to information and/or are employed by Goldman are sending the information out of Goldman in a way that raises suspicion?

MR. FRIEDRICH: Yes, that's correct, or in some instances may simply stop the traffic.

And if I may just finish, the portion of the indictment that Mr. Marino read at page 8, paragraph A, the measure -- maintaining a firewall which was designed to prevent

outsiders from accessing.

MR. MARINO: And C goes to insiders. C goes to blocking certain transfers of information outside of Goldman's computer network and monitoring some transfers of information by employees outside of Goldman's computer network.

MR. FRIEDRICH: To me that is a different and new argument.

All that I would say even in the cases that they cite, for example, I believe it's the Sheer case out of the Central District of California, it makes clear when you are talking about reasonable measures, the focus of that is the outside-in as opposed to the other way around, that that is supposed to be the focus of the inquire.

Even if that information is irrelevant, our position would be that still shouldn't entitle defendant to granular access every single step whether it has anything to do with this defendant or this indictment that the company took to protect its internal systems.

THE COURT: I want to put 23 to 25 aside for a moment and just deal with 21, 22 and 26 and lay that to rest if I can.

Mr. Marino, is there one of the three counts that this is most pertinent to in your mind?

MR. MARINO: Yes, Count 3.

THE COURT: So in paragraph 20 of the indictment there is the phrase, "access a protected computer without

authorization and exceeded authorized access."

Is that the phrase you are focusing on here?

MR. MARINO: Yes, your Honor. And below, access a computer server maintained by Goldman and copied Goldman's proprietary computer source code for Goldman's high-frequently trading business.

(Pause)

THE COURT: I don't know why Count 3 requires the information solicited in paragraphs 21, 22 and 26. Part of the government's theory, as I understand it, in the indictment is that -- I'm looking at paragraph 9 -- is that Mr. Aleynikov, while employed at Goldman, worked on source codes relating to the platform's connection to NASDAQ and that at no time during his employment was he responsible for developing or maintaining any of Goldman's trading algorithms, but what he downloaded were files relating to both the platform and the algorithms, the trading algorithms.

So that's part of the background information in the indictment.

Then in Count 3 we have we have a charged violation of Title 18, United States Code, Section 1030, and this charges the defendant, again, he had to have acted with the defined scienter for commercial advantage and private financial gain, et cetera, but the act is that he accessed the protected computer without authorization and exceeded authorized access,

and then, of course, the charge continues.

So I don't know why you would need Goldman's processes and procedures for tracking what is described in 21 and 22 as outbound access and 26 as firewall policies. I don't see the linkage either in what the government will have to prove or what the defendant would like to show.

MR. MARINO: Your Honor, if 23, 24 and 25, if we have those items, we would be able to show that Mr. Aleynikov never accessed anything that he wasn't authorized to access.

THE COURT: I'm on 21, 22 and 26.

MR. MARINO: I'm sorry, your Honor, 21, 22 and 26, your Honor go to, from my perspective, these are firewall policies that are impacted, right, and I think if you look at page 4, paragraph 8(c) of the indictment, at various times relevant to this indictment, Goldman had taken various measures to protect its high-frequency trading systems source code, including the following, and item C is blocking certain transfers of information outside of Goldman's computer network and monitoring some transfers of information by employees outside of Goldman's computer network.

So that's a specific charge as to the measures that Goldman took to the protect its system from these transfers. And the requested information, I believe, goes directly to that, to the reasonableness of those procedures.

THE COURT: Okay.

So let us say the government fails to offer any evidence in support of this background paragraph 8(c) at trial, well, it's not going to make any difference with respect to its ability, I don't think, to prove a violation of Count 3.

Let us say that the government does provide evidence that Goldman took various measures to protect its source code as described subparagraph C, blocking transfers outside -- is the government planning to offer evidence at trial to that effect?

MS. ROHR: Your Honor, the government intends to, the government intends to offer evidence of the reasonableness of the steps taken to protect the confidential information. The government intends to offer testimony about the measures taken, but doesn't intend to offer the granular level policies about firewalls and other restrictions as sought for in this request.

THE COURT: Okay.

We are focusing now on Goldman's policies to track outward bound delivery of restricted information, not the steps that Goldman is taking to prevent hacking into a system. The focus now is on subparagraph 8(c) and requests 21, 22 and 26.

So is the government planning to offer evidence at trial with respect to Goldman's efforts to prevent its employees who otherwise had access, besides, you know, the restrictive policies and communication of confidentiality needs, but its programs and internal policing mechanisms to

prevent the hijacking of information by employees, the theft of information by employees?

MS. ROHR: The government plans on introducing testimony to that effect, but not on introducing any written policies or computer codes that are designed to effect those mechanisms.

THE COURT: Okay. Well, you just said policies. I think you already produced written policies.

MS. ROHR: What I am trying to say is the government plans on introducing testimony to the fact that these procedures exist, but not actual electronic or paper procedures and processes. The government does not intend to get into the details of how these programs function, which is our understanding of what these requests seek, but the existence generally of the existence of such policies, yes, the government planned on introducing testimony to that effect.

MR. MARINO: This is exactly my point, your Honor. The government IS GOING to put someone from Goldman on the stand and that person is going to testify that Goldman took reasonable measures, and specifically, they are going to testify they have firewalls in place that protect against just this sort of improper conduct.

The only problem is, I'm not going to have had access to those firewalls so I'm not going to be able to effectively cross-examine that person and, in fact, the government proves

too much with that answer as it relates back to the platform because that's how they are going to address the platform, too. Someone is going to get on that witness stand and say to the jury this was a critical part of our platform. And what am I going to say, no, it wasn't?

THE COURT: Well, you already described, you know, you have an expert who is going to say what the defendant took is useless information, that a platform requires a whole host of components and without the theft of that broad array of components what was taken was absolutely of no value to anyone.

MR. MARINO: How about they get on the witness stand from Goldman and say, as the indictment alleges and as they said all along, what was taken was really critical, really valuable, really, really essential to our entire multi-million dollar trading platform.

What am I going to do? I'm going to cross-examine them, and believe me, I know how to do that, but I'm not going to be able to cross-examine them in any kind of meaningful way. I'm not going to be able to develop my case in the way that I should be permitted to develop my case because this is a "trust me" scenario. They are going to get up and say this is really important, and I want to be able to say, okay, let's walk through exactly what you had there and let me show you why it wasn't really important.

Isn't it tremendously helpful to the trier of fact to

actually have meat on the bones with that? I mean, that's, that's, that's what it is all about.

Yes, they are going to say, yeah, we had reasonable measure, by the way, we had firewalls in place, but if I have already got the firewalls I can say let's walk through each and every one of those firewalls, and I will put my expert on the stand and the expert is going to way these firewalls wouldn't in anyway, shape or form, prevent not just Mr. Aleynikov but anyone working there from moving these things freely about. Well, then they haven't made out what they need to make out to show the reasonableness of their measure, but I'm being deprived of the opportunity of doing that.

That's the gist of my argument.

MS. ROHR: Briefly, your Honor, we are discussing items 22, 23 and 26. We are moving backwards by the suggestion the government is going to intend to offer evidence relating to portions of the platform that the defendant did not allegedly steal. We haven't may any representation to the effect, and I don't need defense counsel to put words in my mouth about what we intent to offer at trial.

THE COURT: Well, I wouldn't restrict yourself, Ms. Rohr.

This is not the trial. I don't have motions in limine, I don't have the expert reports before me that might prompt motions in limine.

I suspect that both sides in the case are going to explain generally how what the defendant took fits in the larger goal of the high-speed trading program that is described in the indictment and how it relates to that.

The issue is, does the government need to show or would it be helpful to the defendant to show the source code and the specific algorithms that constitute the other components of the Goldman's trading strategy, and my analysis is absolutely not, that would not be helpful to the jury. They would not be able to understand it. It's not going to be helpful to the defendant.

The way this will be litigated and the only way conceptually it could be litigated is not down with the specifics of the source code or the algorithms, but on a much higher plane with respect to a description of the elements more generally that constitute a trading platform and a trading strategy in terms of high-speed trading.

Some issues will be in dispute, some will not at this trial, and the fact that Mr. Aleynikov was working on a component of Goldman's high-frequency trading business I don't think is in dispute, at least I haven't heard that it is.

Okay. So returning to the firewalls, insofar as Goldman has them to track and police, monitor outbound access of security information, this is, I think, another excellent example of requests that are too specific.

Well, I like specific requests to give us all the ability to talk about the same thing, but the problem is not that it is a specific request is that it is asking for the underlying data, it's not asking for the existence of policies or procedures on a general enough level that it would actually be useful in the way the defendant is describing it to me.

You do not need the actual access list as described in 21 and 22. Now, there may be a component of 26 that I will require Goldman to respond to. So I'm denying 21 and 22.

I am going to ask -- I think this is our second request, number 8 was the other one, that I'm reserving on.

I want Goldman to explore with defense counsel whether there is a way that, in generic terms, firewall policies blocking outward bound Internet access can be provided to the defendant, and I'm hoping that the government will be involved in these discussions because it may very well be on the level of generality that the government's witness or witnesses are going to want to convey to the jury so the defendant should not be hearing for the first time at trial, then, the kinds of policies or mechanisms in generic sense that Goldman uses to block outward bound access. Okay.

So I'm hoping everyone will consult on that.

Let's go to 23 and 24 and 25.

I'm going to impose on you, Mr. Friedrich. I want you to start again with your analysis of those three.

MR. FRIEDRICH: Yes, your Honor.

Maybe I can explain it this way:

In cases that talk about the way in which 130 is charged, there are many cases that talk about the distinction between someone broke in by means of overcoming a security barrier and then there are cases that talk about regardless of the barriers this is a violation of policy.

I don't speak for the government, but in terms of this indictment on its face, it would seem to be the latter based upon the portions of Count 3 that lay out the statutory language as the court has mentioned and then after the part that says to wit, it says follows:

In violation of Goldman's policies and its confidentiality agreement with Goldman accessed a computer server maintained by Goldman and copied Goldman's proprietary computer source code for Goldman-type frequency trading business, and then it goes on and so forth.

Based on the indictment on its face, this would seem to be a case of violation of policies which have already been or will be produced as opposed to the things that the defendant has asked for within 23, 24 and 25.

All of those are about, as I read them, sort of who was in the desires club in terms of what employees have access. That's not relevant to this case because the indictment, again, on its face in paragraph, page 4, paragraph 8(b), when the

indictment within paragraph 8(b) speaks to the limiting access only to Goldman employees who had reason to access that source code such as programmers.

From the face of the indictment it is clear that the programmers were allowed access. I don't believe there is anything in the indictment that suggests this was about breaking in or not having computer access itself, rather, it's a case about violation of policies and that's the basis for the 1030 charge.

THE COURT: And have both policies been produced either by the government or by you in response to this subpoena?

MR. FRIEDRICH: What we are agreeing to produce by our letter, we will have those to the defendant by the end of the week.

MR. MARINO: 23 asks for that specific policy. 23 requests for UNIX group membership policies showing the group names of which the Aleynikov account was a part of 6/5/2009.

MR. FRIEDRICH: My understanding of the use of the word policies as used in 23 and 26 where the court has asked us to confer and, of course, I am happy to do that, policies for the purposes of UNIX chosen firewalls has a far more technical meaning than attorneys might use the word policies in terms of something of general application, more in the order of rules, so as I understand it, when we talk about UNIX policies it is

more on the order of X is allowed, Y is not, then Z is something different as opposed to something of general application.

To come back to my overall point, all of these specific requests the defendant has made are really questions that go to underlying computer access to the code which doesn't seem to be disputed from the face of the indictment and on that basis those requests are not relevant. This is not the type of 1030 case that would implicate those requests.

MR. MARINO: Your Honor, Count 3 of the indictment charges that Mr. Aleynikov accessed a computer server maintained by Goldman and copied Goldman's proprietary computer source code for Goldman's high-frequency trading business. The allegation is exceeded access.

In a relatively recent decision from the northern district of California, United States versus Nosal, the court said, an individual only exceeds authorized access if he has permission to access a portion of the computer system but uses that access to obtain or alter information in the computer that he or she is not entitled to so obtain or alter.

There is simply no way to read that definition to incorporate corporate policies governing use of information unless the word "altered" is interpreted to mean misappropriate. Such an interpretation would define the plain meaning of the word alter as well as common sense.

That is exactly the argument that Goldman is making here that was rejected there.

This Count 3, notwithstanding Mr. Friedrich's characterization of it, is inexplicably, from my perspective, a charge of unauthorized access or exceeding authorized access.

Once the policy is produced showing that Mr. Aleynikov had authorized access to the entire system, that count will go by the wayside, but I need to have that from Goldman. I can't get it except from them.

THE COURT: Okay.

Ms. Rohr, what is the government's theory with respect to Count 3 and authorization or lack thereof?

MS. ROHR: The government's view is that the defendant had authorization to access the source code that he stole, but that in accessing it the way he did and for the purposes he did he exceeded authorized access or then there is also case law at that point he lacked authorized access because at that point he was not accessing the material for the purposes that he was supposed to be accessing them.

THE COURT: Is there any written Goldman policy that you are relying on that would explain what purposes he was given access for so that he can reasonably be said to understand from that policy that he did not have authorization for some other purpose?

MS. ROHR: The government does not have in mind a

particular Goldman policy that is set forth access, no.

In other words, your Honor, if I might clarify that, the government intends at trial to introduce evidence the defendant access rights and confidentiality of the information and the purposes to which the defendant was allowed to access the computer code, but the government did not have in mind any tracking logs or UNIX group membership policies of the kinds sought by these requests.

THE COURT: So it sounds like the government and the defendant are going to stipulate that the defendant had, or not disputing whether you stipulate or not, are not disputing that the defendant had authorization to access the particular parts of the computer system that the government then contends the defendant downloaded and stole?

MS. ROHR: Yes, to the extent as contrasted to somebody, say, hacks in from outside of the system or someone who did not have any access at all to the computer source code. The government's contention is, as I said, when he did access it, it was an improper intent, he exceeded authorized access. There his no dispute that the defendant in the course of his job duties had assess to the code that he stole.

THE COURT: So Count 3 depends on the government's legal theory that even if you have authorized access, if you act with an improper purpose, then you are violating the statute?

MS. ROHR: Yes, your Honor, because at that point he exceeds authorized access or he lacked authorized access. The authorization assumes that a person will be using the materials for the purposes for which they are granted access.

THE COURT: Whether that raises a host of other issues about the legal viability of the government's theory on Count 3 I leave for another day, but with respect to the issue before me, which is the defendants need for the information sought in 23 through 25, I deny those requests as unnecessary given what the government has just represented on the record.

And you agree, Mr. Marino?

MR. MARINO: I do, your Honor.

THE COURT: So that leaves two items that I may have to resolve if the parties are unable to reach agreement, and that is items 8 and 26. Good.

MR. FRIEDRICH: Just as a housekeeping matter, your Honor, in terms of confidentiality order, should we just submit it to the court?

THE COURT: I understand you have made some further revisions and you now have agreement, so if you will just get me the revised copy.

Do you have it with you?

MR. FRIEDRICH: Yes, I do.

THE COURT: Okay. I will look at it right now and if I see a problem then it would be efficient for me to raise it

with counsel.

(Handing to the court)

(Pause)

It is fine with me. I am happy to sign it.

Okay. So I've signed the original.

It needs your signature, Mr. Marino, and if you are prepared to sign it then we could make copies for everyone and get the original filed.

MR. MARINO: May I approach, your Honor?

THE COURT: Thank you.

(Pause)

MR. MARINO: I had one further request for the court.

With respect to items 8 and 26 where your Honor has instructed us to confer, I wonder if we might do that now, that is.

THE COURT: Yes.

MR. MARINO: And the last item, I believe it will obviate at least a portion of the motion for bill of particulars if the government, as your Honor suggested, speaks to us about the definition of a product.

I want to file our motion and I'm going to file our motion on July 16. I think it would make it a lot easier if they would just tell me what the product is rather than ask your Honor to order them to tell me what the product is, I would have it in that event.

If I understood your Honor, you instructed us to talk to one another about that.

THE COURT: Yes. I think I refer to the local criminal Rule 16.1. So you have to have those informal discussions with the government and then after you do so you can make an application to me. So I will let the parties have informal discussions first.

MR. MARINO: Fine.

THE COURT: I think we will just give you our jury room. You will or won't be able to make progress.

MR. MARINO: That's great.

THE COURT: Items 8 and 26. I am hoping that you do, but if you need access to phones, those are available, too.

MR. FRIEDRICH: The judicial equivalent of an Allen charge.

THE COURT: Yes.

MR. FRIEDRICH: Does the court have in mind we will report back to you after this or at some other time?

THE COURT: If you resolve it, I don't need to see you.

If you don't resolve it, I'm available to hear you further.

MR. MARINO: Thank you very much.

THE COURT: You will let Ms. Rojas know.

MS. ROHR: Your Honor, if I might, this is the first

time I heard this argument about the significance of product.

THE COURT: I am not ordering you to do anything.

MS. ROHR: Thank you, your Honor.

THE COURT: About the word product.

MS. ROHR: I would just -- rather than meet and confer right now --

THE COURT: I am not ordering you to meet and confer over the word product.

MS. ROHR: Thank you.

THE COURT: Under the local Criminal Rule 16.1, defense counsel has an obligation to raise it with the government in the first instance and I will let that process happen, and counsel, you will figure out how long you need that process to go on before it is ripe for me.

MS. ROHR: Thank you, your Honor.

THE COURT: Yes. Good.

Thank you all.

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EXHIBIT D

Analysis
As of: Nov 20, 2010

UNITED STATES OF AMERICA, - against - WESTLEY PALOSCIO, Defendant.

99 Cr. 1199 (LMM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2002 U.S. Dist. LEXIS 12976

July 16, 2002, Decided
July 17, 2002, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part *United States v. Paloscio, 2003 U.S. Dist. LEXIS 6047 (S.D.N.Y., Apr. 10, 2003)*

PRIOR HISTORY: *United States v. Paloscio, 2002 U.S. Dist. LEXIS 11115 (S.D.N.Y., June 21, 2002)*

DISPOSITION: **[*1]** Defendant's motion for admission of government admissions granted, subject to limitations. Defendant's motion for unsealing and production of search warrants and materials submitted in support of their issuance denied.

LexisNexis(R) Headnotes

Evidence > Hearsay > Exemptions > Statements by Party Opponents > General Overview
[HN1] The evidentiary use of prior jury argument is circumscribed by requiring (1) that the district court be satisfied that the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial, (2) that the inconsistency be clear and of a quality which obviates any need for the trier of fact to explore other events at the prior trial, and (3) that the court find that the statements of counsel were such as to be the equivalent of testimonial statements by the defendant. The district court should, at a hearing outside the presence of the jury, determine that the inference the prosecution seeks to draw from the inconsistency is a fair one and that an innocent explanation for the inconsistency does not exist.

Evidence > Hearsay > Exemptions > Statements by Party Opponents > General Overview
[HN2] The rules set out in McKeon in circumscription of the admissibility of prior statements of counsel are applicable to prior jury argument only.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom
Criminal Law & Procedure > Search & Seizure > Search Warrants > Affirmations & Oaths > General Overview
Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Jencks Act > General Overview
[HN3] The public has no qualified *First Amendment* right of access to warrant materials during the pre-indictment stage of an ongoing criminal investigation. Nor is the public entitled to access to the materials under either the common law or *Fed. R. Crim. P. 41(g)*. This does not mean that, if the persons whose affidavits were submitted to obtain the warrants should testify, their affidavits are exempt from *18 U.S.C.S. § 3500*.

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For WESTLEY PALOSCIO, DEFENDANT: Joseph Tacopina, Howard S. Weiner, Law Offices of Joseph Tacopina, Martin Jay Siegal, New York, NY USA.

JUDGES: Lawrence M. McKenna, U.S.D.J.

OPINION BY: Lawrence M. McKenna

OPINION

MEMORANDUM AND ORDER

McKENNA, D.J.

In this Memorandum and Order, the Court considers a number of the parties' pending motions. In the case of motions described in the government's letter to the Court of May 22, 2002, the numbers assigned to the motions in that letter are indicated.

1.

Defendant's motion (# 11) for exclusion of expert testimony offered by the government regarding tests for the presence of gunshot residue ("GSR") claimed to have been found in a certain automobile is denied. The results of the testing, which was done through scientifically based techniques for identifying GSR, are admissible under the requirements set forth in *Fed.* **[*2]** *R. Evid. 702*, and in *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*, and *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999)*, and their progeny. Defendant has advanced several challenges to the application of those techniques in the present case: such challenges, in the Court's estimation, go to the weight of the expert testimony, but do not render it inadmissible.

2.

Defendant objects (# 12) to the government's proposal to have Danielle Masella (the daughter of Joseph Masella), who will be called as a witness by the government, present during the trial prior to her testimony. Normally, of course, she would be excluded under *Fed. R. Evid. 615*, but the government contends that she is entitled to be present because she is "a person authorized by statute to be present," *id., to wit, 42 U.S.C. § 10606(b)(4)*, which would only permit her exclusion upon a finding that her testimony "would be materially affected if the victim hears other testimony at trial," *id.*, which, according to the government, cannot happen because she "will not be **[*3]** testifying about any incident or conversation as to which the Government plans to call any other witness (or as to which there is, to the Government's knowledge, any other available witness)." (Gov't Letter, Feb. 10, 2002, at 2.) The Court will reserve decision on the issue until the government supplies the Court with a complete proffer as to Ms. Masella's testimony. (*See* Def. Letter, Feb. 4, 2002, at 7.)

3.

Defendant moves (# 9) for an order admitting, pursuant to *Fed. R. Evid. 801(d)(2)(B)* & *(D)*, "various statements of the Government made in the course of their prosecution of the instant case" (Def. Letter, Jan. 23, 2002, at 1): the statements in question were made on the record on December 17 and 21, 1999, during a hearing on the government's motion for pretrial detention of Vincent Palermo held by Magistrate Judge Maas, in a December 29, 1999, letter from the government to this Court submitted on Palermo's appeal from Judge Maas' order detaining Palermo, and on the record on December 29, 1999, during a hearing on the appeal by this Court. The substance of the statements defendant seeks to introduce in evidence is that Palermo, "a top boss of the [DeCavalcante] Family" **[*4]** (*id.* at 2 (quoting Gov't Letter to Court, Dec. 29, 1999, at 3)), "sanctioned and ordered the murder of Joseph Masella." (Def. Letter to Court, Jan 23, 2002, at 3 (quoting Gov't Letter to Court, Dec. 29, 1999, at 7).) The government, subsequent to the Palermo detention hearing and appeal, has come to the "conclusion that Palermo was not involved in Masella's murder." (Gov't Letter to Court, Jan. 30, 2002, at 6.)

The government opposes the motion. *(Id., passim.)*

In *United States v. McKeon, 738 F.2d 26 (2d Cir. 1984)*, the court sustained the admission against a defendant in a criminal case of statements made by the defendant's counsel in a previous trial of the same case, but [HN1] "circumscribed the evidentiary use of prior jury argument," *738 F.2d at 33*, by requiring (1) that the district court "be satisfied that the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial," (ii) that the "inconsistency . . . be clear and of a quality which obviates any need for the trier of fact to explore other events at the prior trial," and (iii) that the court find that "the statements of counsel were such as to be **[*5]** the equivalent of testimonial statements by the defendant." *Id.* The court also said that the district court should, at a hearing outside the presence of the jury, determine that "the inference the prosecution seeks to draw from the inconsistency is a fair one and that an innocent explanation for the inconsistency does not exist." *Id. See also United States v. Orena, 32 F.3d 704, 716 (2d Cir. 1994).*

The *McKeon* holding has been applied to require the admission of a bill of particulars supplied by the government at an earlier trial of the same case, ***United States***

v. GAF Corp., 928 F.2d 1253, 1258-62 (2d Cir. 1991), and of prosecution opening and closing arguments in an earlier related case. *United States v. Salerno, 937 F.2d 797, 811, 952 F.2d 623 (2d Cir. 1991), rev'd on other grounds, 505 U.S. 317, 120 L. Ed. 2d 255, 112 S. Ct. 2503 (1992)*. The Second Circuit has also "suggested that affidavits filed in furtherance of an application for the installation of an electric monitor and a subsequent search may constitute admissions of a party opponent, and be used as such against the government by a criminal defendant." ***GAF, 928 F.2d at 1260*** **[*6]** (citing *United States v. Ramirez, 894 F.2d 565, 570 (2d Cir. 1990)*. The Second Circuit has pointed out that [HN2] the rules set out in *McKeon* in circumscription of the admissibility of prior statements of counsel are applicable to prior jury argument only. *United States v. Arrington, 867 F.2d 122, 127 (2d Cir. 1989)*.

The motion for admission of government admissions is granted, subject to limitations discussed below.

It cannot be said that the admissions will "not contradict a single prior representation made by the Government to the district court." *United States v. Purdy, 144 F.3d 241, 246 (2d Cir. 1998)*. They plainly do. The admissions, moreover, are assertions of fact, and are testimonial since they are proffers of evidence, based on the knowledge of investigating agents. They are also more than an investigative theory, since they were presumably made with the intention that the Court rely on them in detaining Palermo. They are, as well, relevant to the issue of defendant's guilt or not of at least Counts Three and Four of the Tenth Superseding Indictment.

The government says that it has not materially altered its theory of the **[*7]** case with respect to the murder of Masella, but the Court regards the fact that the government now contends that Palermo did *not* sanction the murder to be just as material to the charges contained in Counts Three and Four of the Tenth Superseding Indictment -- alleging that defendant conspired to murder, and murdered and aided and abetted the murder of, Masella, "for the purpose of gaining entrance to and maintaining and increasing [his] position[] in the Decavalcante Organized Crime Family" (Tenth Superseding Indictment PP 20, 22) -- as was the assertion that he did sanction the murder. The government has asserted as fact that Palermo was a top boss of the Family responsible for the supervision of the killing of Masella (Gov't Letter, Dec. 29, 1999, at 3), that Palermo had Masella shot and killed (*id.* at 4), and that "the evidence proffered by the Government [at the original detention hearing before Judge Maas] established in clear and convincing fashion that Palermo sanctioned and ordered the murder of Joseph Masella." (*Id.* at 7.) The government's withdrawal of the contention that Palermo sanctioned and ordered the Masella murder could certainly be viewed by the **[*8]** jury as suggesting that defendant would not have had a motive of the sort alleged in Counts Three and Four to participate in the murder of Masella. [1]

1 The government had, originally, proposed to offer expert testimony by an organized crime expert which would have included testimony to "the fact that the boss must sanction any murder." (Gov't Letter, Jan. 2, 2002, at 2.) The Court understands, however, that the government's present intention is not to offer that testimony.

Fed. R. Evid. 403 does not preclude the offer of the admissions. To the extent that the government is prejudiced, it is fair prejudice. To avoid any unnecessary waste of time, however, defendant is to identify a reasonably brief selection of the admissions, and the government may then identify a similarly reasonably brief selection to show that its theory of the case is not entirely changed. Neither side is to refer, in this connection, to the indictment of Palermo for the Masella murder, since that is not a government admission.

4.

[*9] The government's motion for an order quashing the subpoena served by defendant on the Court's Pretrial Services Office is denied. The subpoena (returnable at the Court's chambers), will, however, be reviewed *in camera* by the Court, *see United States v. Pena, 227 F.3d 23 (2d Cir. 2000)* and disclosed if, and to the extent, appropriate according to that case.

5.

Defendant's motion for the unsealing and production of the search warrants and materials submitted in support of their issuance sealed by Magistrate Judge Azrack of the United States District Court for the Eastern District of New York is denied. [2] Defendant does not assert a personal privacy interest in the automobile which is the subject of the search. The government represents that the warrants, and the materials submitted in support of their issuance, relate to an ongoing investigation of persons other than defendant in connection with the Joseph Masella homicide, and that disclosure might jeopardize the ongoing investigation. (Gov't Letter, July 8, 2002, at 2.) In such circumstances, [HN3] "the public has no qualified *First Amendment* right of access to warrant materials during the pre-indictment stage **[*10]** of an ongoing criminal investigation. Nor is the public entitled to access to the materials under either the common law or *Fed. R. Crim. P. 41(g)*." *Times Mirror Co. v. United States, 873 F.2d 1210, 1221 (9th Cir. 1989)*; *see also In re Search Warrant Executed Feb. 1, 1995, 1995 U.S. Dist. LEXIS 9475*, No. M 18-65, 1995 WL 406276, at *3 (S.D.N.Y. July 7, 1995). This determination does not mean that, if either of the agents whose affidavits were submitted to

obtain the warrants should testify in the present case, their affidavits are exempt from *18 U.S.C. § 3500*.

2 The Court assumes herein, *arguendo*, that it would have the power to unseal matter sealed by order in a different district.

SO ORDERED.

Dated: July 16, 2002

Lawrence M. McKenna

U.S.D.J.