SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK, CRIMINAL TERM, PART 41

THE PEOPLE OF THE STATE OF NEW YORK, v. SERGEY ALEYNIKOV, Defendant.	Indictment No. 4447-12 Justice Assigned: Ronald A. Zweibel, J.S.C.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S PRETRIAL MOTIONS

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PRELIMINARY STATEMENT

Defendant, Sergey Aleynikov ("Aleynikov"), respectfully moves to dismiss Indictment 04447/2012 (the "Indictment"), which charges him with two counts of Unlawful Use of Secret Scientific Material ("Unlawful Use"), in violation of New York Penal Law § 165.07, and one count of Unlawful Duplication of Computer Related Material ("Unlawful Duplication"), in violation of Penal Law § 156.30.[1]

Aleynikov is a computer programmer and former Vice President in the Equities Division of Goldman Sachs who helped develop and maintain its high frequency trading system (the "Trading System"). The allegation that animates all three counts of the Indictment is that in June 2009, before leaving Goldman to join another firm, Aleynikov copied computer source code for the Trading System despite "having no right to do so." Counts One and Two (the Unlawful Use counts) describe the source code as "secret scientific material" and allege that Aleynikov's unauthorized copying was done "with intent to appropriate" the use of such material to himself or another; Count Three (the Unlawful Duplication count) describes the source code as "computer data and computer programs" and alleges that Aleynikov's unauthorized copying of that data and those programs "intentionally and wrongfully deprived and appropriated" an

[1] In accordance with New York Criminal Procedure Law ("CPL") § 255.20(2), Aleynikov includes within the motion papers filed today all of his pre-trial motions; the Affirmation of Kevin H. Marino ("Marino Aff.") with accompanying Exhibits; and this memorandum of law, and makes these pretrial motions returnable on November 16, 2012, the date fixed by the Court for oral argument on his motion to dismiss the Indictment. His motions seeking relief other than dismissal of the indictment are addressed in this memorandum of law under the heading "Other Relief," beginning at page 75. Aleynikov will file such other motions as are made necessary by events in this case that transpire after this filing, including motions in limine to exclude or admit evidence.

economic value and benefit of more than two thousand five hundred dollars from their owner, Goldman.

Aleynikov moves to dismiss the Indictment pursuant to CPL § 210.20 because it suffers from a host of fatal defects. As a threshold matter, the Indictment must be dismissed under CPL § 210.20(b) because it is undisputed that, as a computer programmer responsible for the development and maintenance of the Trading System, Aleynikov had a right to copy the computer source code at issue. As "having no right to do so" is an essential element of both Unlawful Use and Unlawful Duplication, the evidence before the grand jury cannot have been legally sufficient to establish either of those offenses or any lesser included offense.[2] Accordingly, all three counts of the Indictment must be dismissed.

The Indictment must also be dismissed pursuant to CPL §§ 210.20(e) and 40.20(2) because this prosecution is barred by a previous prosecution. Specifically, Aleynikov has already been charged with and acquitted of three federal crimes for the "criminal transaction" (indeed, the precise conduct) underlying his present prosecution for misappropriating computer source code for Goldman's Trading System: the Computer Fraud and Abuse Act (the "CFAA"), of which the United States District Court acquitted him as a matter of law prior to trial, United

[2] If, in responding to Aleynikov's motion to dismiss, the People contend there was legally sufficient evidence before the grand jury to sustain the Indictment's Unlawful Use or Unlawful Duplication charges — that is, if they say the grand jury heard evidence that Aleynikov was not authorized to access and obtain Goldman's computer source code — Aleynikov moves for discovery of the grand jury minutes and moves to dismiss the Indictment, pursuant to CPL § 210.20(1)(c), on the additional ground that the grand jury proceeding was defective within the meaning of CPL § 210.35(5). Aleynikov reserves the right to supplement this motion within 45-days of the date of his arraignment. Further, in the event the Indictment is not dismissed and this matter is permitted to proceed to a second trial,, to bring motions in limine directed at the People's evidence and trial exhibits once they have been identified, and to bring such other motions as are otherwise impracticable to bring at this time. CPL § 255.20(3).

States v. Aleynikov, 737 F. Supp. 2d 173, 191 (S.D.N.Y. 2010); and the Economic Espionage Act (the "EEA") and National Stolen Property Act ("NSPA"), of which the United States Court of Appeals for the Second Circuit acquitted him as a matter of law on appeal, United States v. Aleynikov, 676 F. 3d 71 (2d Cir. 2012).[3]

Under CPL § 40.20(2), New York may not prosecute a defendant for the same criminal transaction that animated a prior federal prosecution. Here, Aleynikov was "prosecuted" for these three federal charges (the "Federal Charges") within the meaning of CPL §§ 40.30(1)(b) and 40.20 because he was charged with them in an accusatory instrument (the "Federal Indictment") and the action in which that instrument was filed (the federal prosecution) proceeded to the trial stage and a jury was impaneled. Nor does the exception contained in § 40.20(2)(f), to which the DA has adverted, salvage this re-prosecution. All three federal charges were ultimately dismissed based on the legal insufficiency of the indictment; none was "terminated by a court order expressly founded upon insufficiency of evidence to establish some element of [one of the federal offenses] which is not an element of [Unlawful Use or Unlawful Duplication]," as § 40.20(2)(f) requires. Indeed, the federal CFAA charge was deemed legally insufficient and dismissed for the precise reason the Unlawful Use and Unlawful Duplication charges are legally insufficient: because, as Aleynikov correctly noted in his motion to dismiss that charge, he had authorization to access and obtain Goldman's source code.[4]

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[3] The federal indictment containing these charges is annexed to the Affirmation of Kevin H. Marino ("Marino Affirmation") as Exhibit A.

[4] As his successful motion explained, "Aleynikov moves to dismiss Count Three because he neither accessed a Goldman computer without authorization, nor exceeded his authorized access when he allegedly accessed, copied, and uploaded the Trading System's source code to the German server and then downloaded it to his home computers." Granting that motion, the district court referred specifically to the Government's concession "that Aleynikov was

In the federal action, the Government did not seek reconsideration of the CFAA dismissal or attempt to procure a superseding indictment on that charge. And although the District Court's Order and Opinion dismissing the CFAA charge were part of the record in that action, the Government chose not to appeal that dismissal to the Second Circuit. Under the circumstances, the suggestion that Aleynikov could properly be tried again for misappropriating the same intellectual property, this time under the Unlawful Use and Unlawful Duplication statutes — which, like the CFAA, proscribe only unauthorized use of a computer in a manner that misappropriates information — is ludicrous.

Equally untenable is the following position taken by the Assistant District Attorney at Aleynikov's arraignment, in response to the Court's question as to why this prosecution does not fall within double jeopardy: "[T]he Second Circuit found that the federal court did not have jurisdiction over the offense; and at the time of the oral argument, Mr. Aleynikov's — the defendant's attorney virtually conceded that this case was more accurately prosecuted in state court." (Marino Affirmation, Ex. 22, 9/27/12 Tr. at 17.)

First, that Aleynikov could initially have been prosecuted in state court for theft of trade secrets rather than in federal court under the EEA, the NSPA and the CFAA does not mean he can now be so prosecuted following his federal prosecution and year in prison on a wrongful conviction. (Neither does it mean that such a state prosecution would or should have resulted in

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authorized to access the source code for the Trading System that he allegedly stole." 737 F. Supp. 2d at 191. In its decision reversing Aleynikov's conviction on the EEA and NSPA counts, the Second Circuit also made reference to the CFAA charge, which the court said "was dismissed on the ground that Aleynikov was authorized to access the Goldman computer and did not exceed the scope of his authorization, and that authorized use of a computer in a manner that misappropriates information is not an offense under the Computer Fraud and Abuse Act." 676 F.3d at 75.

Aleynikov's conviction.) In New York, where dual sovereignty has been abolished, the District Attorney simply cannot prosecute a defendant a second time for the alleged criminal transaction underlying his earlier acquittal of an analogous federal charge.

The ADA's first observation, regarding "jurisdiction," reflects the People's narrow focus on the Second Circuit's reversal of Aleynikov's conviction under the EEA and the NSPA, and ignores altogether the Government's failed prosecution of Aleynikov under the CFAA. The charge that Aleynikov violated the CFAA when he "accessed a protected computer without authorization and … copied Goldman's proprietary computer source code," (Marino Aff., Ex. 2, Fed. Indictment ¶ 20), was leveled in the Federal Indictment, the "accusatory instrument" that initiated the criminal "action" against him for allegedly misappropriating Goldman's computer source code. That CFAA charge is the federal equivalent of the Indictment's Unlawful Use and Unlawful Duplication allegations — i.e., that Aleynikov copied Goldman's computer source code while "having no right to do so." Its dismissal as legally insufficient (because Aleynikov had the right to do so) was never revisited throughout the entire prosecution of that action, from jury trial through successful appeal, and cannot be revisited now in this separate prosecution.

It is readily and regrettably apparent that in reaching its erroneous determination that this prosecution was not barred under CPL § 40.20(2), the DA never looked beyond the Second Circuit's reversal of Aleynikov's conviction under the EEA and the NSPA to consider the implications of the district court's binding dismissal of the CFAA count. (Less easy to figure is how the DA could ever have concluded that prosecuting Aleynikov for Class E felonies now, following his wrongful imprisonment for one year on an overturned conviction, would serve the interests of justice. As explained at length below, it does not.)

Moreover, the Second Circuit did not find that there was no federal jurisdiction over the EEA and NSPA offenses that were at issue in its opinion. Rather, the court correctly held that the Federal Indictment containing those charges was legally insufficient to state an offense under either statute — just as the district court correctly held that the Federal Indictment was legally insufficient to state an offense under the CFAA — because Aleynikov's conduct, as described in the Federal Indictment, did not violate them.

In addition to being barred under New York's double jeopardy statute, which abolished dual sovereignty in this state, Aleynikov's prosecution is also barred under the Double Jeopardy clause of the Fifth Amendment. Even in jurisdictions that recognize dual sovereignty — which itself has been criticized harshly by many jurists and scholars, including the Honorable Guido Calabresi, U.S.C.J., the Second Circuit judge and former Dean of the Yale Law School who was a member of the appellate panel that overturned Aleynikov's conviction — it is well settled that one sovereign may not re-prosecute a case as the "tool" of another. The ubiquity in this state prosecution of FBI agent Michael McSwain, who spearheaded the failed federal prosecution of Aleynikov, and the Manhattan District Attorney's newly-minted and clearly-derivative interest in this case more than three years after the fact, raise a valid and significant concern that the federal Government's involvement in this case has gone well beyond "permissible cooperation" to "impermissible manipulation" of the state prosecuting authorities.

Beyond the fact that (a) the Indictment fails to state an offense under either of the statutes it invokes; and (b) this is the second time Aleynikov is being prosecuted under an indictment that is insufficient as a matter of law, this prosecution is barred under the doctrine of collateral estoppel. That doctrine — which applies with equal force in criminal and civil cases — bars re-

litigation of an issue that has been conclusively determined in a prior proceeding between the same parties. That Aleynikov did not, as a matter of law, misappropriate Goldman's computer source code because he had a right to access and obtain that source code was conclusively established in his federal prosecution. The interests of the state prosecuting authorities in this Unlawful Use/Unlawful Duplication case — aggressively prosecuting alleged cybercrime — are precisely the same as those of the federal prosecutors responsible for Aleynikov's EEA, NSPA and CFAA prosecution, and it is clear that the federal authorities more than adequately represented those interests during that first prosecution. Moreover, the federal authorities' open and notorious involvement in the quest to re-prosecute Aleynikov underscores the continuing close identity of these prosecuting authorities. (Indeed, the District Attorney had Aleynikov arrested and incarcerated for one week as a fugitive "flight risk" based entirely on the sworn affidavit of federal agent McSwain, only to find that Aleynikov presents no such risk.) Moreover, New York's abolishment of the doctrine of dual sovereignty as a limitation on the double jeopardy right is entirely consistent with a common-sense view of the "identity of parties" requirement of the collateral estoppel doctrine; it would make little sense to prevent one sovereign from re-prosecuting a defendant for the same criminal transaction prosecuted by another but allow that sovereign to re-litigate an issue determined in the prior prosecution.

But the overarching reason the Indictment must be dismissed — the reason that informs, and is informed by, all the others — is that Aleynikov's "conviction or prosecution" on the Indictment "would constitute or result in injustice" within the meaning of CPL §§ 210.20(i) and 210.40, the provision that authorizes the court to dismiss an indictment "in furtherance of justice … even though there may be no basis for dismissal as a matter of law." In the extraordinary

circumstances of this case, the People seek to convict Aleynikov of crimes relating to his alleged misappropriation of Goldman's computer source code in June 2009 despite the following facts: (1) he was acquitted as a matter of law of doing precisely what he is again charged with doing; (2) he spent 51 weeks in federal prison for crimes he did not commit before the Second Circuit reversed his conviction and ordered the District Court to acquit him as a matter of law; (3) in addition to serving a year in prison for those crimes — with which he should never have been charged — Aleynikov suffered the loss of his job, his home, his reputation, his opportunity for meaningful employment in his chosen field, his marriage and his life savings as a result of his federal prosecution for allegedly misappropriating Goldman's computer source code.

It is also undisputed that although the Second Circuit reversed Aleynikov's conviction on February 16, 2012, the very day on which it heard oral argument on his appeal, the United States Government to this day has not returned his U.S. or Russian passports (he is a citizen of both countries) despite his attorney's repeated requests for them. What the Government did do in response to Aleynikov's request for his passports (which he desperately needed to gain passage to Russia to visit his mother, who is undergoing cancer treatments) was to advise the Manhattan District Attorney to take steps to prevent him from traveling abroad. That resulted in Aleynikov being illegally declared a "fugitive from justice" although he had no reason to know that the District Attorney had charged or was about to charge him with crimes — and although he has never missed a single court appearance or attempted to evade prosecution. Again, the affidavit underlying that arrest warrant was executed by Agent McSwain, from whom Aleynikov's counsel requested the return of his passports in June 2012. And although Aleynikov has been represented by his present counsel in this highly-publicized case for more than two years, from

the pretrial motion stage through his successful appeal to the Second Circuit, the Manhattan District Attorney chose to have him arrested on a felony arrest warrant rather than seek his voluntary surrender through counsel.

As a result of that strategic maneuver, Aleynikov was incarcerated at the Essex County Jail in Newark, New Jersey from August 2 until August 9, 2012, when he was first given the opportunity to waive extradition, be transported to New York and secure his release on bail. As the ADA explained at Aleynikov's August 9, 2012 bail hearing, "the reason the People sought an arrest warrant is because we learned that the defendant was making steps to obtain his United States and Russian passports, and for that reason we believe that he had a desire to travel out of the jurisdiction and perhaps out of the country." (Marino Aff., Ex. 18, 8/9/12 Tr. at 9:7-12.) The ADA did not explain how a free man's desire to return home to visit his ailing mother rendered him a risk to flee a prosecution of which he was unaware, or justified treating him as a fugitive from justice. Neither did she explain why the Manhattan District Attorney insists on attempting to secure a conviction of Aleynikov, who has already been punished with a year in prison for crimes he did not commit.

Finally, for all the discretion afforded prosecutors in their charging decisions, the law abhors prosecutions borne of genuine animus, whether brought by or on behalf of the prosecutor or the party bearing that animus. In the rare instance where a vindictive prosecution is found, it must be dismissed as such. This unfortunate re-prosecution of a wrongly imprisoned man, shot through with legal infirmities and laced with vengeance, would appear to meet the test. But in all events, it cannot be squared with the pursuit of justice. This motion follows.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. *Aleynikov's Role At Goldman And The Offense Conduct*

Goldman provides financial services in the United States and around the world and is engaged in, among other activities, high-frequency trading on various commodities and equities markets. (Marino Aff., ¶ 7 & Ex. 2, Fed. Indictment, ¶ 1.) High-frequency trading is a type of trading activity carried out in various financial markets that allows orders to buy and sell to be placed electronically. (Id. & Ex. 3, Expert Report of Dr. Jeffrey Harris.) Goldman's high-frequency trading business was supported by a system of computer programs, the Trading System, that rapidly obtained information regarding the latest market movements and trends, processed that information into a form that could be analyzed by Goldman's trading algorithms, and then executed the trades. (Marino Aff., ¶ 8 & Ex. 2, Fed. Indictment, ¶ 5.)

From May 2007 through June 5, 2009, Aleynikov was employed by Goldman as a Vice President in its Equities Division. (Marino Aff., ¶ 9 & Ex. 2, Fed. Indictment, ¶¶ 9, 10.) Aleynikov was a member of the team of computer programmers that was responsible for developing and improving certain source code relating to Goldman's high-frequency trading business. (Id., Fed. Indictment, ¶ 9.)

It is the nature of the high-frequency trading business that the computer source code and algorithms upon which it depends are continually modified and improved. (Id., ¶ 10 & Ex. 3, Harris Report.) As part of their job, the computer programmers in Aleynikov's group were required to check out or acquire a local copy of the code they wanted to modify from Goldman's source code repository in order to make necessary changes and improvements. (Id., ¶ 11 & Ex. 4, 12/1/10 Tr. at 344:6-9 (Walker). Computer programmers were permitted to check in or check out software. (Id. at 350:2-9.) In other words, Aleynikov, as a programmer, had authority to

make copies of the source code as part of his ordinary duties. (Id.) Throughout his tenure at Goldman, Aleynikov also sent portions of code to his personal email address so that he could work at home. (Id.)

In April 2009, Aleynikov accepted an offer to become Executive Vice President of Platform Engineering for Teza Technologies LLC ("Teza"), a Chicago-based start-up company founded by industry luminary Misha Malyshev, who intended to develop his own high-frequency trading business. (Marino Aff., ¶ 12.) Aleynikov's final day at Goldman's offices was June 5, 2009, although he continued to be employed there until June 30, 2009. (Id., ¶ 13.) It is undisputed that during his final days in the office, Aleynikov caused certain computer files to be sent to an offsite repository and that he later downloaded those files to one or more home computers. (Id.)

B. ***The Circumstances Of Aleynikov's Arrest, Statement And Search***

Internal Goldman documents reveal that several weeks after Aleynikov's final day at work, a Goldman employee discovered that files had been transferred outside of the bank to a source code repository on June 1 and June 5. (Marino Aff., ¶ 14.) Goldman first contacted the Government on Wednesday, July 1, 2009, just two days before Aleynikov's arrest. (Id., Ex. 5, 7/4/2009 Detention Hearing Tr. at 33:6-9 ("The government was not contacted until Wednesday about this matter.").)

Without conducting any independent investigation, FBI agents, led by Special Agent McSwain, arrested Aleynikov at Newark Liberty International Airport on July 3, 2009, as he exited a plane from a meeting at Teza in Chicago. (Id., ¶ 15 & Ex. 1, Fed. Crim. Compl., Count Two, ¶ 13; Ex. 6, 7/6/2009 FBI 302 at 1 (3513-2).) This arrest was without a warrant and was considered by the FBI to be a "probable cause arrest authorized by the United States Attorney's

Office of the Southern District of New York." (Id.) At the time of his arrest, Aleynikov was living with his wife of seven years and his three young daughters between the ages of two and seven. (Marino Aff., ¶ 18.)

Following Aleynikov's arrest but prior to his initial court appearance, FBI agents questioned him at length. (Marino Aff., ¶ 19.) Aleynikov's appointed attorney, Assistant Federal Defender Sabrina Schroff, contacted the United States Attorney's Office while this questioning was in process, informed Joseph Facciponti, AUSA that she represented Aleynikov, and requested that the Government cease and desist from questioning him. (Id., & Ex. 5, 7/4/09 Tr. at 18:13-19.) The Government declined to do so. Following counsel's failed intervention, Aleynikov signed a statement in which he admitted to having transferred certain computer files out of Goldman but denied any criminal purpose, stating that he intended to capture open source software[5] and intended no harm to Goldman. (Marino Aff., ¶ 19.) Federal agents also conducted a consensual search of his residence and seized certain computers and electronic devices that contained the computer files Aleynikov transferred from Goldman. (Id.)

Aleynikov was presented on a criminal complaint in the United States District Court for the Southern District of New York on July 4, 2009. (Marino Aff., ¶ 20 & Ex. 5.) At the detention hearing, AUSA Facciponti made a series of representations to the Honorable Kevin N.

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[5] Open source software is software that is distributed under a license that specifies that (1) the software must be distributed in source code form; (2) recipients of the software must be able to use and/or modify the source code to form derived works; and (3) the derived work must be allowed to be distributed under the same licensing terms as the original work. (Marino Aff., Ex. 4, 12/8/2010 Trial Tr. (Goldberg) at 1338:11-1339:8.) Open source software is, by definition, non-proprietary. (Id. at 1339:9-10) For many years, Aleynikov was and continues to be extremely active in the open source software community, writing code that is freely available for others to use and modify. (Id. at 1333:12-17.) The code Aleynikov transferred from Goldman computers contained a large number of open source files. (Id. at 1339:23 – 1340:5.)

Fox, U.S.M.J., in an effort to have Aleynikov detained without bail until the conclusion of his trial. (Id.) Specifically, in an effort to demonstrate that Aleynikov presented a danger to the community in general and Goldman in particular, AUSA Facciponti claimed Aleynikov had stolen Goldman's entire Trading System: "What the defendant is accused of having stolen from this investment bank . . . 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." (Id., Ex. 5, 7/4/09 Tr. at 7:7-12.) At several points throughout the hearing, Facciponti reiterated that Aleynikov had stolen Goldman's entire Trading System, not copied some of the computer source code for that system. (Id. at 16:16-18 ("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."); id. at 17:8-9 ("the entire platform has been stolen"). The Government thus argued that, because Aleynikov had stolen the entire Trading System, he presented a significant risk to the community if released because he (or someone to whom he might transfer the purportedly stolen material) could readily and without delay use the Trading System "to manipulate markets in unfair ways." (Id. at 8:6-7.) The statements made by AUSA Facciponti to the Court regarding the nature and import of what Aleynikov purportedly did were apparently based entirely upon Goldman's representations. (Id. at 24:20-25:9.)

Aleynikov's arrest and the charges against him in the Criminal Complaint received extensive press coverage and generated substantial public interest. (Id., ¶ 21 & Ex. 8 (7/6/2009 NY Post article; 7/8/2009 Bloomberg article; 8/24/2009 New York Times article.) Eleven days after Aleynikov's July 2009 arrest, Goldman CFO David Viniar was asked about the case during an earnings call with reporters. (Marino Aff., ¶ 22.) As reported by Reuters on July 14, 2009,

Viniar stated, "We still have all the code. It's not like the code had been lost to Goldman Sachs. And even if it had been, it's a small piece of our business." Reuters also quoted Viniar as stating that even if the code had been taken, any losses sustained by the firm would be "very, very immaterial." (Id. & Ex. 9.)

C. ***The Federal Criminal Proceedings***

On February 11, 2010, seven months after Aleynikov's arrest, a federal grand jury sitting in the Southern District of New York returned a three-count Indictment charging him with theft of trade secrets, in violation of the EEA, 18 U.S.C. §§ 1832(a)(2) and (a)(4); transportation of stolen property in interstate and foreign commerce, in violation of the NSPA, 18 U.S.C. § 2314; and unauthorized computer access and exceeding authorized computer access, in violation of the CFAA, 18 U.S.C. § 1030(a)(2)(C) and (c)(2)(B)(i)-(iii). (Marino Aff., ¶ 23 & Ex. 2.) Those charges were based on the allegation that Aleynikov had copied Goldman's computer source code without authorization and transported it across state lines. On July 16, 2010, Aleynikov filed a motion to dismiss the Federal Indictment in its entirety for failure to state an offense as to each of the statutes with which he was charged. (Marino Aff., ¶ 24 & Ex. 10.)

While his pretrial motions were pending, Aleynikov and his wife separated. (Marino Aff., ¶ 26.) Although his wife and her family had been supportive of Aleynikov following his arrest, the strain of the criminal proceedings soon became too great to bear. (Id.) On August 25, 2010, Aleynikov's wife filed for divorce. (Id.) By this time, the family residence had been mortgaged to pay Aleynikov's legal expenses. (Id.)

On September 3, 2010, the Honorable Denise L. Cote, U.S.D.J., granted Aleynikov's motion to dismiss the Federal Indictment in part and denied that motion in part. (Marino Aff., ¶ 27.) The court's order dismissed the CFAA count for failure to state an offense, but declined to

dismiss the EEA and NSPA counts, on which Aleynikov proceeded to trial. United States v. Aleynikov, 737 F. Supp. 2d 173 (S.D.N.Y. 2010). The district court dismissed the CFAA count because it was undisputed that Aleynikov had the right to access and obtain the materials he was alleged to have improperly copied. Specifically, the district court held, "the phrases 'accesses a computer without authorization' and 'exceeds authorized access' cannot be read to encompass an individual's misuse or misappropriation of information to which the individual was permitted access." Id. at 192.

Aleynikov's trial on the remaining EEA and NSPA charges commenced on November 29, 2010. (Marino Aff., ¶ 28.) SA McSwain, who sat at the prosecution table throughout the trial, testified against Aleynikov on December 7, 2010. (Id.) The evidence demonstrated that Aleynikov downloaded only a portion of Goldman's Trading System — several hundred thousand lines of a system comprising millions of lines. (Id., ¶ 30 & Ex. 4, 12/1/10 Tr. at 374:20-25 (Walker); 12/2/10 Tr. at 606:19-607:18 (Schlesinger).) It was also established that Aleynikov had sufficient technical ability and administrative access rights to simply download the entire trading system if he so desired. (Id., 12/2/10 Tr. at 564:3-17 (Schlesinger).)

On December 10, 2010, after eight days of trial, the jury found Aleynikov guilty of violating the EEA and NSPA. (Marino Aff., ¶ 34.) In a press release issued by the USAO on December 10, 2010, United States Attorney Preet Bharara stated that his office would "use the full force of the federal law to prosecute those who steal valuable and proprietary information from their employers, whether those firms are on Wall Street or Main Street." (Id., & Ex. 11.) USA Bharara also praised the investigative work of the FBI, which posted the press release on its website. (Id.)

On March 18, 2011, Judge Cote sentenced Aleynikov to a term of imprisonment of 97 months. (Marino Aff., ¶ 36.) Aleynikov's harsh sentence received considerable publicity. (Id., Ex. 13, 3/18/2011 N.Y. Times article.) The U.S. Attorney again praised the investigative work of the FBI, which posted another press release on its website, (Id., ¶ 37 & Ex. 14, FBI Press Release), and thanked Goldman for its cooperation in the investigation).) Aleynikov, who had been held at the MCC and then the MDC prior to sentencing, was ultimately transferred to the Federal Correctional Institution in Fort Dix, New Jersey, where he continued serving his sentence. (Marino Aff., ¶ 38.)

On March 23, 2011, Aleynikov timely filed a notice of appeal to the United States Court of Appeals for the Second Circuit. (Marino Aff., ¶ 39.) The Second Circuit held oral argument in the morning of February 16, 2012, and, that evening, reversed Aleynikov's conviction and indicated that an opinion would follow in due course. (Id.) Aleynikov was released from prison the following day, February 17, 2012. (Id.)

The Second Circuit issued its opinion on April 11, 2012. After noting that the district court had dismissed the CFAA count as legally insufficient and that the Government had not appealed that dismissal, United States v. Aleynikov, 676 F.3d 71, 75 (2d Cir. 2012), the court explained its conclusion that Aleynikov's conduct did not constitute an offense under the NSPA or the EEA, and that those counts of the Indictment were also legally insufficient. Id. On June 5, 2012, following the issuance of the Second Circuit's Mandate, the District Court entered a judgment of acquittal in favor of Aleynikov, thereby confirming his successful defense of the Federal Charges in their entirety. (Marino Aff., ¶ 41.)

Aleynikov's successful appeal received extensive press coverage, undoubtedly embarrassing the Government, including US Attorney Bharara, AUSAs Facciponti and Rebecca Rohr, who tried the case, FBI Special Agent McSwain, and Goldman itself. For example, a New York Times article dated February 17, 2012, stated that the reversal dealt "a major blow to the Justice Department, which has made the prosecution of high-tech crime and intellectual property theft a top priority." (Id., ¶ 42 & Ex. 15, 2/17/2012 N.Y. Times article.) The article also reported that the Second Circuit's decision was a loss for Goldman, which had reported Aleynikov to federal authorities and "had portrayed itself as the victim of a brazen crime." (Id.) As another example, a New York Post article dated February 18, 2012 reported that the Second Circuit's ruling was "a black eye for US Attorney Preet Bharara" and satirized the event in a re-touched photograph depicting Mr. Bharara — who had been the subject of considerable positive publicity for his pursuit of financial fraud — with a black eye and a band-aid on his forehead. (Id., Ex. 15, 2/18/2012 NY Post article.) The February 21, 2012 edition of Forbes stated explicitly that the Second Circuit's decision "may prove a bit of an embarrassment and black eye for federal prosecutors." (Id., Ex. 15, 2/21/2012 Forbes article.)

Although he was successful on appeal, the federal criminal prosecution had a devastating impact on Aleynikov's life. He was deprived of his liberty for one year for offenses he did not commit, his reputation was irreparably damaged, his marriage disintegrated, he lost his career and his home and is without sufficient funds to pay his debts. (Marino Aff., ¶ 43.) He was ready, however, to rebuild his life.

D. ***The New York Criminal Action***

Aleynikov was not far along the road to recovery when disaster struck again, in the form of this prosecution. Following his acquittal on the federal charges, Aleynikov's counsel

endeavored to secure the return of his passports and personal property from the Government. (Marino Aff., ¶ 44.) But rather than return his passports and property, the Government advised the Manhattan District Attorney's office of his intent to travel, and assisted the DA in preparing an application to have Aleynikov charged with violating state law. (Id.) In a Felony Arrest Warrant dated August 1, 2012, now Supervisory SA McSwain alleged that on June 5, 2009, at Goldman's offices in New York, New York, Aleynikov committed the Unlawful Use and Unlawful Duplication charged on which he was later indicted. (Id. & Ex. 16) SA McSwain was the same federal agent who arrested and testified against Aleynikov in the federal case; he is also the federal agent from whom Aleynikov's counsel requested the return of his passports in June 2012. (Id.)

Even though SA McSwain was in direct contact with Aleynikov's counsel at the time, knew Aleynikov had no travel documents, and knew Aleynikov had no knowledge about the imminent New York State charges, the arrest warrant issued based on SA McSwain's complaint stated that the Court was "satisfied that the defendant will not respond to a summons." (Id., ¶ 46 & Ex. 17, Warrant of Arrest signed by Hon. J. Burke dated 8/1/12 ("8/1/12 Arrest Warrant").)

Thus, fewer than six months after the Second Circuit's reversal of Aleynikov's federal conviction, on August 1, 2012, he was again arrested at a friend's home in New Jersey as an alleged "fugitive from justice" based on the New York charges of which he was completely unaware. (Marino Aff., ¶ 17, 8/1/12 Arrest Warrant.) Due to his status as an alleged "fugitive," Aleynikov was incarcerated in the Essex County Jail in Newark, New Jersey for one week while awaiting extradition to New York, where he was eventually released on bail on August 9, 2012. (Id.)

As with the federal criminal proceeding, Aleynikov's arrest on the state charges received much publicity. (Marino Aff., ¶ 48 & Ex. 19 (8/9/2012 New York Times article; 8/14/2012 Reuters article; 8/9/2012 Wall Street Journal article; 8/16/2012 CNN article).) In a press release issued on August 9, 2012 announcing the charges, District Attorney Cyrus R. Vance, Jr. ("DA Vance"), thanked SA McSwain and also thanked Goldman for its assistance and cooperation in the investigation. (Id., ¶ 49 & Ex. 20.)

On or about September 26, 2012, the grand jury returned the three-count Indictment against Aleynikov charging him with two counts of violating Penal Law § 165.07 on June 1, 2009 and June 5, 2009, respectively, and one count of violating Penal Law § 156.30(1) on June 5, 2009. (Marino Aff., ¶ 50 & Ex. 21, Indictment.) Specifically, the Grand Jury charged Aleynikov with Unlawful Use for making a tangible reproduction of secret scientific materials despite having no right to do so and no reasonable ground to believe that he had such right, on June 1 and June 5, 2009. (Id., Counts 1 and 2.) The Grand Jury also charged Aleynikov with Unlawful Duplication based on the allegation that on or about June 5, 2009, having no right to do so, he copied computer data and programs and thereby intentionally and wrongfully deprived and appropriated from Goldman an economic value and benefit in excess of $2,500. (Id., Count 3.)

Aleynikov entered a plea of not guilty to the charges in the State Indictment on September 27, 2012, and requested expedited consideration of his motion to dismiss the complaint. (Marino Aff., ¶ 52.)

LEGAL ARGUMENT

I. THE INDICTMENT MUST BE DISMISSED BECAUSE THE EVIDENCE BEFORE THE GRAND JURY WAS NOT LEGALLY SUFFICIENT TO ESTABLISH THE OFFENSES CHARGED.

Aleynikov moves for dismissal of the Indictment in its entirety pursuant to CPL § 210.20(1)(b), which provides that the Court may dismiss an indictment upon the ground that "[t]he evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense."[6] CPL § 210.20(1)(b). As provided in CPL § 190.65(1), a Grand Jury may not indict a person for an offense unless "(a) the evidence before it is legally sufficient to establish that such person committed such offense provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense is absent, and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense." CPL § 190.65(1).

Although clause (b) of CPL § 190.65(1) states that reasonable cause for indictment must be based upon competent and admissible evidence, on a motion to dismiss the indictment under CPL § 210.20(1)(b), the Court's review of evidentiary sufficiency is limited to legal sufficiency under clause (a); the court may not examine the adequacy of the proof to establish reasonable cause under clause (b) because that inquiry is exclusively the province of the Grand Jury. People v. Deegan, 69 N.Y.2d 976, 515 N.Y.S.2d 651, 652 (1987); People v. Jennings, 69 N.Y.2d 103, 69 N.Y.S.2d 652, 657 (1986). On a motion to dismiss an indictment, the sufficiency of the

[6] As detailed below in section IV.A, Aleynikov also moves in the alternative, pursuant to CPL § 210.30(2), for an examination of the grand jury minutes for the purpose of confirming the People's failure to present legally sufficient evidence to support the charges in the Indictment.

People's presentation of evidence "'is properly determined by inquiring whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury.'" People v. Jensen, 86 N.Y.2d 248, 630 N.Y.S.2d 989, 991 (1995) (quoting Jennings, 69 N.Y.2d at 114, 69 N.Y.S.2d at 657). The Grand Jury must be presented with evidence that is "legally sufficient" to establish a prima facie case of criminal conduct. Id. The CPL defines "legally sufficient evidence" as "competent evidence which, if accepted as true, would establish ***every element*** of an offense charged and the defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent." CPL § 70.10(1) (emphasis supplied); see also Jensen, 86 N.Y.2d at 252, 630 N.Y.S.2d at 991.

Applying that standard here, the Indictment must be dismissed pursuant to CPL § 210.20(b) because the evidence before the grand jury was not legally sufficient to establish either Unlawful Use or Unlawful Duplication, the only two offenses charged in that instrument. Specifically, the evidence presented to the Grand Jury on each of the counts was not legally sufficient to establish the element that Aleynikov duplicated the source code "having no right to do so," as required for a prima facie case of both Unlawful Use and Unlawful Duplication.

As defined in Penal Law § 165.07, Unlawful Use — the offense charged in the first two counts of the Indictment[7] — entails "writing, photographing, drawing, mechanically or

[7] Closely tracking the language of Penal Law § 165.07, the First and Second Counts of the Indictment allege that, on June 1, 2009 and June 5, 2009, respectively, Aleynikov, "with the intent to appropriate to himself and another, the use of secret scientific material, and ***having no right to do so*** and no reasonable ground to believe that he has such right, he makes [sic] a tangible reproduction and representation of such secret scientific material by means of writing, photographing, drawing, mechanically and electronically reproducing and recording such secret scientific material."

electronically reproducing or recording" secret scientific material by a person ***"having no right to do so and no reasonable ground to believe he has such a right."*** Id. (emphasis supplied). Thus, Unlawful Use of secret scientific material can only be committed by a person who is not authorized to copy such material by the means defined in that statute. Similarly, a person only commits Unlawful Duplication under Penal Law § 156.30 — the offense charged in the third count of the Indictment[8] — "when ***having no right to do so,*** he or she copies, reproduces or duplicates" computer related material. Id. (emphasis supplied). Thus, Unlawful Duplication, like Unlawful Use, can only be committed by a person who is not authorized to copy, reproduce or duplicate such material.

But Aleynikov undeniably was authorized to copy the Trading System's computer source code, which the Indictment variously describes as "secret scientific material" and "computer related material." It is undisputed that Aleynikov enjoyed unfettered access to Goldman's entire Trading System; equally beyond question is that Goldman's computer programmers do their work by making and working on copies of computer source code. (Marino Aff., ¶ 29 & Ex. 4, 12/1/10 Tr. at 344:6-9 (Walker)). As Judge Cote held in acquitting Aleynikov of violating the CFAA, a federal computer crime statute that also proscribes unauthorized duplication or use, "The Government's theory that the CFAA is violated whenever an individual uses information on a computer in a manner contrary to the information owner's interest would … require a departure from the plain meaning of the statutory text." Aleynikov, 737 F. Supp. 2d at 192. The

[8] The Third Count of the Indictment charges Aleynikov with unlawful duplication of computer related material in violation of Penal Law § 156.30(1), alleging: "The defendant, in the County of New York, on or about June 5, 2009, ***having no right to do so***, copied, reproduced and duplicated computer data and computer programs and thereby intentionally and wrongfully deprived and appropriated from the owner thereof, to wit, Goldman Sachs, an economic value and benefit in excess of two thousand five hundred dollars."

court went on to state, "The Government's argument that Aleynikov, ***who the Government concedes was authorized to access the Trading System's source code***, violated [the CFAA] by misappropriating the source code must therefore be rejected." Id. at 194 (emphasis supplied). The Second Circuit would later note, in describing Judge Cote's correct determination that the CFAA charge against Aleynikov was legally insufficient, "Count Three was dismissed on the ground that Aleynikov was authorized to access the Goldman computer and did not exceed the scope of his authorization, and that authorized use of a computer in a manner that misappropriates information is not an offense under the Computer Fraud and Abuse Act." Aleynikov, 676 F.3d at 75.

Further, the evidence at Aleynikov's federal criminal trial established beyond dispute that he was authorized to make copies of the source code for the Trading System to carry out his job responsibilities. During Aleynikov's federal criminal trial, Paul Walker ("Walker"), a partner at Goldman and a Government witness (Marino Aff., Ex. 4, 12/1/2010 Tr. at 331:1-11), testified that computer programmers were permitted to "check out or acquire a local copy of the code they want to modify from the CVS repository" and then make changes and put it back into the CVS repository. (Id. at 344:6-9). Walker reiterated that computer programmers were permitted to check software in or check out. (Id. at 350:2-9.) On June 1, 2009 and June 5, 2009 (the dates of the alleged duplication of the source code), Aleynikov was employed by Goldman and was a member of a team of computer programmers responsible for developing and improving certain aspects of the Trading System. (Marino Aff., Ex. 2, Fed. Indictment, ¶ 9.) As a computer programmer employed by Goldman, Aleynikov was permitted to copy the firm's source code, as Walker testified. Because Aleynikov had a right to duplicate the source code, the People could

not have presented to the Grand Jury legally sufficient evidence that when he duplicated the source code, he had "no right to do so" — an essential element of both Unlawful Use and Unlawful Duplication.

Because (a) the evidence before the grand jury was not legally sufficient to establish that Aleynikov lacked the right to copy Goldman's computer source code; and (b) an essential element of both Unlawful Use and Unlawful Duplication is that the defendant had no right to copy secret scientific or computer-related material, the Indictment must be dismissed under CPL § 210.20(b).

II. THE INDICTMENT MUST BE DISMISSED AS BARRED BY THE NEW YORK DOUBLE JEOPARDY STATUTE, THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND THE NEW YORK STATE CONSTITUTIONS AND THE DOCTRINES OF COLLATERAL ESTOPPEL AND VINDICTIVE PROSECUTION.

Beyond its clear failure to state an offense, the Indictment must also be dismissed pursuant to (a) CPL §§ 210.20(e) and 40.20(2), provisions of New York's double jeopardy statute, and the double jeopardy clause of the New York State Constitution; (b) the double jeopardy clause in the Fifth Amendment to the United States Constitution; and (c) the common law doctrines of collateral estoppel and vindictive prosecution — both of which are legal impediments to Aleynikov's conviction within the meaning of CPL §§ 210.20(h) — all by reason of the federal prosecution discussed above, Aleynikov, 737 F. Supp. 2d 173; and must also be dismissed pursuant to CPL §§ 210.20(c) and 210.35, which proscribes defective grand jury proceedings.

A. CPL § 40.20(2) And The Double Jeopardy Clause Of The New York State Constitution Bar Aleynikov's Re-Prosecution For The State Offenses With Which He Is Charged And The Indictment Must Therefore Be Dismissed.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." That Clause is enforceable against the states, including New York, through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969); People v. Vasquez, 89 N.Y.2d 521, 655 N.Y.S.2d 870, 873 (1997). The same double jeopardy guarantee is also found in Article I, section 6 of the New York State Constitution, which similarly provides, "No person shall be subject to be twice put in jeopardy for the same offense." The purpose of the federal and state constitutional prohibitions against double jeopardy "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 187-88 (1957).

Pursuant to the state and federal constitutional double-jeopardy provisions, the New York Legislature enacted a double-jeopardy statute, CPL § 40.20, which states, in pertinent part, "A person may not be separately prosecuted for two offenses based on the same act or criminal transaction," unless one of nine narrow, well-defined exceptions applies. For purposes of that statute, "criminal transaction" is defined as follows:

> "Criminal transaction" means conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective

> as to constitute elements or integral parts of a single criminal venture.

CPL § 40.10(2). As the Second Circuit has noted, the CPL, through § 40.20(2), provides much "greater protections" than do the United States and New York Constitutions, United States v. Friedman, 854 F.2d 535, 565 (2d Cir. 1988); see also 5-55 N.Y. Crim Pract. § 55.01[1] (recognizing that the due process clause of the federal Constitution "provides less protection than the New York Legislature has chosen to grant an accused under CPL Art. 40"). Indeed, the CPL, through § 40.20, has abolished the dual sovereignty doctrine, with certain exceptions. 5-55 N.Y. Crim. Pract. § 55.01[3]; see Matter of Polito v. Walsh, 8 N.Y.3d 683, 840 N.Y.S.2d 1, 5 (2007) ("New York does indeed have relatively broad statutory protection against double jeopardy, and our statutory law does reject, in large part, the dual sovereignty doctrine. To the extent our protections go beyond those afforded by the State or Federal Constitution, however, they are to be found in CPL 40.20(2), not CPL 40.20(1)."); Klein v. Murtagh, 44 A.D.2d 465, 355 N.Y.S.2d 622, 628 (2d Dep't 1974) ("[T]he New York courts do not recognize the dual sovereignty doctrine, but this is due to statutory law, not the Constitution."); Hill v. Eppolito, 196 Misc. 2d 616, 622, 766 N.Y.S.2d 509, 514 (Sup. Ct. Madison Cty. 2003) ("It is further noteworthy that . . . the doctrine of 'dual sovereignty,' or 'separate sovereigns' is not viable under New York jurisprudence. Aside from the language of CPL 40.20 and 40.30 itself, the Court of Appeals has repeatedly determined that the double jeopardy protections offered by these statutes 'offer[s] more protection than the "dual sovereign" doctrine would tolerate.'"). In fact, the New York Court of Appeals has emphasized the broad scope of state's double-jeopardy statute:

> Under CPL 40.20, not only is the "dual sovereignties" doctrine ignored, but double jeopardy protection is extended, generally, to offenses arising out of a common event. Unless one of the

> enumerated exceptions is made out, "[a] person may not be separately prosecuted for two offenses based upon the same act or criminal transaction" (CPL 40.20, subd 2). Restated, absent the statutory exceptions, no matter the number of statutory offenses technically violated, or the number of jurisdictions involved, an accused is not to suffer repeated prosecution for the same general conduct. . . .

People v. Abbamonte, 43 N.Y.2d 74, 400 N.Y.S.2d 766, 769 (1977).

1. CPL § 40.20(2) Mandates Dismissal Of The Indictment Because The Offenses Charged Therein Are Based On The Same Acts And Criminal Transaction Underlying The Federal Offenses Of Which Aleynikov Was Acquitted, Most Notably The Charged Violation Of The CFAA.

Because Aleynikov has already been prosecuted for one offense (a violation of the CFAA) based on the same acts or criminal transaction (unauthorized copying of Goldman's computer source code) that forms the basis for his present, separate prosecution (for the offenses of Unlawful Use and Unlawful Duplication), CPL § 40.20(2) mandates dismissal of the Indictment. To explain, Count Three of the Federal Indictment returned against Aleynikov in the Southern District of New York charged that he "accessed a computer server maintained by Goldman and copied Goldman's proprietary computer source code for Goldman's high frequency trading business, the value of which exceeded $5,000, uploaded the code to a computer server in Germany, and then downloaded it to his home computer, all with the intent to use that source code for the economic benefit of himself and his new employer, Teza." (Marino Aff., Ex. 2, Fed. Indictment, ¶ 20.)

Aleynikov moved to dismiss the Federal Indictment as a matter of law for failure to state an offense under any of the three federal statutes it invoked. With respect to the CFAA, Aleynikov argued that he "did not violate the CFAA by accessing the Goldman computer from which he copied its source code, as Count Three alleges, because (a) the Indictment concedes

that he was authorized to access that computer and computer code; and (b) the CFAA does not prohibit an employee's misappropriation of information to which the employee was given access and which the employee lawfully obtained." (Marino Aff., Ex. 10, Defendant's Motion to Dismiss Federal Indictment at 3.)

The District Court agreed. In an Opinion and Order granting Aleynikov's motion for a judgment of acquittal as to Count Three only, Judge Cote wrote:

> The Government concedes that Aleynikov was authorized to access the source code for the Trading System that he allegedly stole, but argues that a defendant's purpose or intention is a necessary component of the violation. According to the Government, the CFAA is therefore violated whenever an individual accesses information with authorization, but does so in violation of a confidentiality agreement or policies or other obligations that the individual owes to the information's owner.

Aleynikov, 737 F. Supp. 2d at 191. Rejecting that argument, Judge Cote explained, "The Government's theory that the CFAA is violated whenever an individual uses information on a computer in a manner contrary to the information owner's interest would … require a departure from the plain meaning of the statutory text." Id. at 192. The court concluded, "The Government's argument that Aleynikov, who the Government concedes was authorized to access the Trading System's source code, violated [the CFAA] by misappropriating the source code must therefore be rejected." Id. at 194. As the Second Circuit would later explain in its decision reversing Judge Cote's denial of Aleynikov's motion to dismiss Counts One (EEA) and Two (NSPA) of the Federal Indictment as likewise legally insufficient, "Count Three was dismissed on the ground that Aleynikov was authorized to access the Goldman computer and did not exceed the scope of his authorization, and that ***authorized use of a computer in a manner that***

misappropriates information is not an offense under the Computer Fraud and Abuse Act." 676 F.3d at 75 (emphasis supplied).

CPL § 40.30(1)(b) provides, in pertinent part, that "a person 'is prosecuted' for an offense, within the meaning of section 40.20, when he is charged therewith by an accusatory instrument filed in a court of … ***any jurisdiction within the United States***, and when the action … [p]roceeds to the trial stage and a jury has been impaneled and sworn." Id. (emphasis supplied); see also United States v. Dionisio, 503 F.3d 78, 82 (2d Cir. 2007) (quotation marks and alterations omitted). CPL § 1.20(16) provides:

> A "Criminal action" (a) commences with the filing of an accusatory instrument against a defendant in a criminal court, as specified in subdivision seventeen; (b) includes the filing of all further accusatory instruments directly derived from the initial one, and all proceedings, orders and motions conducted or made by a criminal court in the course of disposing of any such accusatory instrument, or which, regardless of the court in which they occurred or were made, could properly be considered as a part of the record of the case by an appellate court upon an appeal from a judgment of conviction; and (c) terminates with the imposition of sentence or some other final disposition in a criminal court of the last accusatory instrument filed in the case.

Id.

Aleynikov was thus "prosecuted" under the CFAA within the meaning of CPL § 40.20 — and is entitled to its double jeopardy bar of this prosecution for Unlawful Use and Unlawful Duplication — because (a) he was charged with that CFAA offense, and with violating the EEA and the NSPA, in the Federal Indictment ("an accusatory instrument filed in a court … of any jurisdiction within the United States"); and (b) the "action" in which that indictment was filed — United States v. Aleynikov, 10 Cr 96 — "proceed[ed] to the trial stage and a jury [was] impaneled and sworn" on November 29, 2010. By the express language of CPL § 1.20(16), that

"action" (a) commenced with the filing of the Federal Indictment in the United States District Court for the Southern District of New York; (b) included Judge Cote's Order granting Aleynikov's motion to dismiss the CFAA count (which she made in the course of disposing of that count of the "accusatory instrument" and which "could properly be [and in fact was] considered as a part of the record of the case by an appellate court upon [Aleynikov's] appeal from a judgment of conviction" entered by Judge Cote [specifically, the Second Circuit, which noted that "Aleynikov appealed his conviction and sentence, arguing, among other things, that the district court erred in denying his motion to dismiss the indictment in its entirety" and that "[t]he Government did not appeal the dismissal of Count Three of the indictment," Aleynikov, 676 F. 3d at 76, n.3 (2d Cir. 2012)]); and (c) terminated "with the imposition of sentence or some other final disposition in a criminal court of the last accusatory instrument filed in the case" — specifically, the District Court's Judgment of Acquittal, entered on remand following issuance of the Second Circuit's mandate on its decision reversing Aleynikov's conviction.

Moreover, even if his federal case had not proceeded to trial, Aleynikov would have been prosecuted for the same criminal transaction that gave rise to the present state prosecution within the meaning of New York's double jeopardy statute because Judge Cote's pretrial dismissal with prejudice of the CFAA count for failure to state an offense involved an adjudication of facts going to the merits of the charge against Aleynikov, i.e., a finding based on evidence in the form of a stipulated or judicially noticed fact:[9] that Goldman, in fact, authorized his access to its

[9] Stipulated and judicially noticed facts are forms of evidence. See 1-5 Modern Federal Jury Instructions – Criminal § 5.02, Instruction No. 5-4 (evidence consists of witnesses, exhibits received in evidence and "stipulations and judicially noticed facts"); see Fed. R. Evid. 201(b) (the court may take judicial notice of a fact that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

Trading System. See Dionisio, 503 F.3d at 83-84; People v. Key, 45 N.Y.2d 111, 408 N.Y.S.2d 16, 20 (1978) (recognizing that under New York law "re-prosecution is permitted whenever a dismissal has been granted on motion by defendant***, so long as the dismissal does not constitute an adjudication on the facts going to guilt or innocence***") (emphasis supplied); Hill, 473 F.2d at 760-61, 63 (defendants were put in jeopardy where the court considered stipulated evidence and other evidence on a motion to dismiss an indictment and determined that the materials that formed the basis of indictments alleging violations of a federal obscenity statute were not obscene as a matter of law and thus dismissed the indictments because the court's ruling was, "in substance," a holding that "the defendants before it were not guilty" and that "[i]n substance, though not in form, [it] was an acquittal"); Aleynikov, 737 F. Supp. 2d at 191 (finding that, as the Government conceded, "Aleynikov was authorized to access the source code for the Trading System that he allegedly stole"); id. at 194 (finding that Aleynikov, as the Government conceded, "was authorized to access the Trading System's source code").

In adopting a definition of "is prosecuted" that expressly applies to prosecutions in "any jurisdiction within the United States," New York's state legislature rejected the doctrine of "dual sovereignty." See Hill, 196 Misc. 2d at 622, 766 N.Y.S.2d at 514. That doctrine permits one sovereign to prosecute an offense first prosecuted by a separate sovereign. United States v. Lanza, 260 U.S. 377, 382 (1922); United States v. Russotti, 717 F.2d 27, 30-31 (2d Cir. 1983). Thus, where applicable, dual sovereignty allows a state to prosecute a person who has already been prosecuted federally and vice versa, which CPL § 40.20(2) expressly forbids. But here, applying the broad definition of "is prosecuted" contained in CPL § 40.30(1)(b), Aleynikov's successful motion to dismiss the CFAA count of his federal prosecution bars this re-prosecution

for state law offenses underlying the same criminal transaction, unauthorized copying of Goldman's computer source code, pursuant to CPL § 40.20(2).

2. The Exceptions Permitting A Second Prosecution For An Offense Based Upon The Same Criminal Transaction Do Not Save The Indictment.

As noted above, while CPL § 40.20(b) provides that generally "[a] person may not be separately prosecuted for two offenses based upon the same act or criminal transaction," it sets forth nine narrow exceptions to that broad rule under which a second prosecution based on the same criminal transaction is permitted. None of those exceptions, however, applies here. Indeed, the first two exceptions — set forth in subsections (a) and (b) — are so clearly inapplicable to this case as to demonstrate precisely why a subsequent state prosecution of Aleynikov would violate the core principles underlying the double-jeopardy guaranties of the state and federal constitutions and the state statute.

Subparagraph (a) of CPL § 40.20(2) provides that a subsequent prosecution based on the same act or criminal transaction will not be barred where "[t]he offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other[.]" CPL § 40.20(2)(a). Subparagraph (b) of CPL § 40.20(2) provides that a second prosecution will not be barred where "[e]ach of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil[.]" CPL § 40.20(2)(b). Neither of these two exceptions is applicable here.

Exception (a) of § 40.20(2) does not apply because, even if the Court were convinced that the federal offenses have elements that are "substantially different" from those of the state offenses — which is certainly not the case with respect to the CFAA offense — the acts

establishing the federal offenses are clearly not "in the main clearly distinguishable" from those establishing the state offenses. Rather, Aleynikov's acts of uploading the source code from Goldman's computer to a server in Germany, purportedly without Goldman's authorization, and then downloading the source code to computer devices outside of Goldman constitute precisely the same acts giving rise to the EEA, the NSPA, and the CFAA offenses, as well as the Unlawful Use and Unlawful Duplication charges. Exception (b) likewise does not apply because, although the People might be able to point to an element of the EEA and the NSPA federal offenses that is not an element of one of the state offenses and *vice versa*, all three federal statutes with which Aleynikov was charged and the state statutes underlying the current charges were not "designed to prevent very different kinds of harm or evil." The EEA and § 165.07 of the New York Penal Law were both designed to prevent the theft of secret, proprietary information. The CFAA and § 156.30 and § 165.07 of the New York Penal Law were all designed to prevent persons from obtaining information from a computer without authorization.

People v. Claud, 76 N.Y.2d 951, 563 N.Y.S.2d 720 (1990), supports this conclusion. In Claud, a defendant was charged in the Second District Court in Babylon with violations of the Babylon Town Code following an incident in which he operated his vessel in a manner causing serious physical injuries. 76 N.Y.2d at 952, 563 N.Y.S.2d at 721. The defendant was also charged by an information filed in the First District Court in Hauppauge with operating a vessel while intoxicated in violation of § 49(4)(a) of the Navigation Law, which was dismissed. Id. The Suffolk County Grand Jury thereafter returned a two-count indictment, charging him with operating a vehicle while in an intoxicated condition and assault by operation of a vessel under Navigation Law § 49(4)(b)(2) in relation to the same incident. Id.

The defendant pleaded guilty to the Town Code violations. The defendant thereafter successfully moved the County Court to dismiss the second count of the indictment charging him with assault by operating a vessel in the second degree on the ground that the prosecution was barred by CPL § 40.20(2). The People appealed from the County Court order and the Appellate Division reversed, holding that the second prosecution was not barred because it fell within the exception in CPL § 40.20(2)(a) in that the elements of the Navigation Law and the Babylon Town Code were substantially different. Id. The Appellate Division also concluded that because two different geographical areas were involved and the two laws were materially different in scope and purpose, they were not designed to prevent the "same kinds of harm or evil" and thus the second prosecution also fell within the exception of CPL § 40.20(2)(b). The Court of Appeals reversed, finding as follows:

> Although the relevant elements of Navigation Law § 49(4)(b)(2) arguably are "substantially" different from the elements of the relevant Babylon Town Code provisions, defendant's careless operation of the boat constitutes the same act giving rise to both offenses . . . . Thus, the exception of CPL 40.20 (2)(a) does not apply.
>
> The exception under CPL 40.20(2)(b) is similarly inapplicable. Paragraph (b) permits separate prosecutions for two offenses based upon the same act or criminal transaction only where "[e]ach of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are *designed to prevent very different kinds of harm or evil*" (emphasis supplied). Although Navigation Law § 49(4)(b)(2) requires a finding of intoxication — a finding unnecessary under the Babylon Town Code's "careful operation" subdivision — the two statutory provisions were not designed to prevent "very different kinds of harm or evil." Notwithstanding that the Navigation Law refers to the prevention of serious physical injury and the Town Code commands the operation of a boat in a careful and prudent manner, both provisions are designed to assure the safe operation of boats so as to protect human life and avoid injury. Finally, contrary to the Appellate Division's conclusion, that two different

geographical areas are involved is not determinative.

Id. at 952-53.

As in Claud, the same acts and criminal transaction that gave rise to the federal offenses of which Aleynikov was acquitted give rise to the state offenses, and the federal statutes and the state statutes were not designed to prevent "very different kinds of harm or evil." As a result, neither subsection (a) or (b) of CPL § 40.20(2) can save the Indictment from dismissal.

Likewise, the exceptions to statutory double jeopardy set forth in subsections (c) through (e) and (g) through (i) do not apply here. Each of those exceptions applies under very narrow and specific circumstances that do not exist here. For example, subsection (c) applies to offenses involving possession and use of contraband, while subsections (d) and (e) apply to certain offenses involving physical injury and/or death. CPL § 40.20(2)(c)-(e). Subsection (g) applies to "consummated result offenses" resulting from a conspiracy, facilitation or solicitation in another state, while subsection (h) applies to certain RICO offenses and subsection (i) applies to certain tax offenses.

That leaves only the double jeopardy exception found in CPL § 40.10(2)(f), to which the People have referred in defending the Indictment. That exception removes the double jeopardy bar to the re-prosecution of an offense first prosecuted in another jurisdiction if that earlier prosecution "has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the of the other offence, defined by the laws of this state." CPL § 40.10(2)(f). The Second Circuit found that the Federal Indictment was insufficient as a matter of law with respect to the EEA because the source code at issue was not "related to or included in a product produced for or placed in

interstate or foreign commerce" within the meaning of the statute, 676 F.3d at 79-82, and insufficient as a matter of law with respect to the NSPA because the source code did not constitute tangible "goods, wares or merchandise" within the meaning of that statute. Id. at 75-79. As neither an EEA product requirement nor an NSPA tangibility requirement is an element of either Unlawful Use or Unlawful Duplication, the People will argue that the Second Circuit's reversal of Aleynikov's conviction due to the legal insufficiency of the Federal Indictment with respect to the EEA and the NSPA triggers application of CPL § 40.10(2)(f). Thus, the People will contend, the fact that Goldman's Trading System was neither "a product produced for or placed in interstate or foreign commerce" nor constitutes "goods, wares or merchandise" within the meaning of the EEA and the NSPA, respectively, does not — at least under CPL § 40.20(2) — bar this prosecution for Unlawful Use or Unlawful Duplication, which do not contain such elements.

That argument apparently proceeds from the District Attorney's mistaken belief that Aleynikov's double jeopardy argument is based entirely on his acquittal in the Second Circuit on charges that he violated the EEA and the NSPA. While Aleynikov has an excellent double jeopardy argument based on the Second Circuit's reversal of his conviction (which expressly overturned the District Court's erroneous refusal to dismiss those counts as legally insufficient),[10] Aleynikov, 676 F.3d 71, it is his acquittal as a matter of law on the CFAA charge,

[10] That refusal and the ensuing trial were particularly unfortunate: Aleynikov served 51 weeks of a 97-month prison sentence before the Second Circuit reversed his unlawful conviction based on the precise arguments Judge Cote rejected in denying his motion to dismiss them. In moving to dismiss Count One, Aleynikov had argued that his conduct did not transgress the EEA "because 'proprietary computer source code for Goldman's high-frequency trading business' is not 'a trade secret related to or included in a product that was produced for or placed in interstate or foreign commerce.'" (Marino Aff., Ex. 10, Motion to Dismiss at 2.) "To the contrary," he

reported at Aleynikov, 737 F. Supp. 2d at 191, and referred to in the Second Circuit's opinion at 676 F.3d at 75, that unequivocally bars this prosecution. Thus, even were the People correct as to the applicability of the § 40.10(2)(f) exception to the acquittal of Aleynikov on the EEA and NSPA charges, which does not appear to be the case,[11] Aleynikov's argument for dismissal

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argued, "as the Indictment makes clear, the purported 'product' that source code is 'related to or included in' is a proprietary system of computer programs and trading algorithms that Goldman has not licensed and has not otherwise made available to the public. By its very terms, the Indictment confirms that the 'product' the trade secret 'is related to or included in' was neither 'produced for' nor 'placed in' either 'interstate or foreign commerce.' Thus," Aleynikov argued, "whatever else might be said of it, what the Indictment alleges is a 'product' — a proprietary system of computer programs and trading algorithms that Goldman was and is determined to keep secret — is certainly not, as the statute requires, a 'product that was produced for or placed in interstate or foreign commerce.' Count One must therefore be dismissed." (Id.) In moving to dismiss Count Two, the NSPA or ITSPA, he argued, "Nor did Aleynikov's alleged transportation of Goldman's proprietary computer source code across state lines violate the ITSPA, as Count Two alleges. Just as a secret system of computer programs and trading algorithms is not 'a product that was produced for or placed in interstate or foreign commerce,' proprietary computer source code does not constitute 'goods, wares, merchandise, securities, or money' as the ITSPA requires. To the contrary, such computer source code is classic intellectual property, excluded by its very nature from the reach of a statute proscribing the theft of five specifically-identified categories of personal property. Count Two must therefore be dismissed." (Id. at 3.) The Second Circuit's reasons for adopting Aleynikov's dismissal arguments in all respects and reversing his conviction are set forth at 676 F. 3d at 75-79.

[11] The People's reliance on that exception certainly suffers from at least one infirmity: the Second Circuit's reversal was not "expressly founded upon insufficiency of evidence to establish some element of [the EEA or the NSPA]," CPL § 40.10(2)(f) (emphasis supplied), as is required to trigger application of the exception. To the contrary, the Second Circuit took pains to make clear that (a) it was couching its ruling in terms of the legal sufficiency of the indictment, not sufficiency of evidence, because that is how the parties framed the issue; and (b) it had not decided whether it was doctrinally more sound to state that ruling in terms of the legal sufficiency of the indictment or the sufficiency of the evidence because that difference did not affect its analysis or the outcome of the appeal. Aleynikov, 676 F. 3d at 76 n.3 ("On appeal, both the Government and Aleynikov frame their arguments in terms of the sufficiency of the indictment rather than the sufficiency of the evidence. Because the result and analysis would be the same under either formulation, for the purposes of this opinion we adopt the one used by the parties, and do not decide which is doctrinally more sound.") Whatever can be said about the court's identification of the distinction between the two formulations or its decision to adopt "sufficiency of the indictment" rather than "sufficiency of the evidence" as its approach, one thing is clear: Aleynikov's federal prosecution for violating the EEA and the NSPA was not

under the New York double jeopardy statute is not, as the People apparently expect, premised principally on the Second Circuit's reversal of his conviction under the EEA and NSPA. The EEA proscribes misappropriation and the NSPA trafficking in stolen goods, 18 U.S.C. §§ 1832(a) and 2314, both of which do share much in common with the People's charges of Unlawful Use and Unlawful Duplication, and neither of which would appear directly applicable to the conduct of a person, such as Aleynikov, who is undoubtedly authorized to be in possession of the goods in question. As a result, it is certainly difficult to argue that the People's prosecution of Aleynikov represents anything other than a second — and hard to comprehend — bite at the apple.

But contrary to the People's apparent understanding, Aleynikov's principal basis for invoking CPL § 40.20(2) is not the Second Circuit's post-trial ruling that Judge Cote erred in failing to dismiss the Federal Indictment with respect to the EEA and the NSPA. Rather, it is Judge Cote's pre-trial ruling — that the Federal Indictment was legally insufficient to state an offense under the CFAA — that forms the basis for his motion to dismiss the Indictment under § 40.20(2). That painstaking, merits-based pretrial decision to terminate the Government's prosecution of Aleynikov on that count as a matter of law undeniably bars this prosecution under, *inter alia*, CPL §§ 210.20(e) and 40.20(2). That is because Judge Cote's ruling was based expressly on her finding that — as the Government conceded and the Federal Indictment expressly charged — Aleynikov did not act without authorization when he copied the computer source code to Goldman's Trading System in June 2009. Aleynikov, 737 F. Supp. 2d at 191

"terminated by a court order expressly founded upon insufficiency of evidence to establish some element of [those offenses]." On its face, therefore, the double jeopardy exception found in § 40.10(2)(f) would appear not to apply to the EEA and NSPA charges.

(finding that, as the Government conceded, "Aleynikov was authorized to access the source code for the Trading System that he allegedly stole"); id. at 194 (finding that Aleynikov, as the Government conceded, "was authorized to access the Trading System's source code").

But acting without authorization is also an essential element of each of the statutes under which Aleynikov is charged in this case. The language of those statutes — Unlawful Use and Unlawful Duplication — brings into sharp relief the dispositive nature of Judge Cote's authorization-based dismissal of the CFAA charge against Aleynikov as a matter of law. The Unlawful Use statute expressly proscribes "writing, photographing, drawing, mechanically or electronically reproducing or recording" secret scientific material by a person ***"having no right to do so and no reasonable ground to believe he has such a right."*** Penal Law § 165.07 (emphasis supplied). Similarly, the Unlawful Duplication law states that "[a] person is guilty of unlawful duplication of computer related material … "when ***having no right to do so,*** he or she copies, reproduces or duplicates … [it]." Penal Law § 156.30 (emphasis supplied). That Aleynikov at no time acted "without authorization" — as the District Court held in dismissing the CFAA count pretrial, Aleynikov, 737 F. Supp. 2d at 191, 194 — bars his prosecution here just as it did in the federal case. Having won a ruling on the merits that his alleged appropriation of computer source code for Goldman's Trading System did not and could not violate the CFAA based on a pivotal fact, authorization, that was conceded and indeed charged by the Government — a ruling which, as the Second Circuit noted, the Government did not appeal, 676 F. 3d at 75 — Aleynikov is entitled not to be charged for the same conduct under statutes that, too, exempt those who acted under a claim of right. The Indictment must therefore be dismissed as a matter

of law pursuant to CPL § 210.20(e) because this prosecution is "barred by reason of a previous prosecution" within the meaning of CPL § 40.20(2).

B. The Double Jeopardy Clause Of The Fifth Amendment To The United States Constitution Bars Aleynikov's Prosecution For The Offenses Charged In The State Indictment.

As discussed above, New York CPL § 40.20 — having abolished dual sovereignty — grants far greater protection than the Fifth Amendment's Double Jeopardy clause, which has been interpreted to permit the successive prosecutions by separate sovereigns that are forbidden in New York. But the unique circumstances of this re-prosecution make clear that it also fails to pass muster under the Fifth Amendment. Specifically, the overwhelming federal involvement in this state prosecution confirms that this is not so much a separate prosecution by a separate sovereign as a second bite at the apple by the federal Government, acting through the Manhattan DA.

The Fifth Amendment's prohibition against double jeopardy proceeds from the notion "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green, 355 U.S. at 187-88). The double jeopardy bar applies "where two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test[.]" United States v. Dixon, 509 U.S. 688, 696 (1993). This test, sometimes referred to as the "Blockburger test, "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successful prosecution." Id.

That test is clearly satisfied as between the CFAA offense dismissed as legally insufficient by Judge Cote and the Unlawful Use and Unlawful Duplication offenses charged in this proceeding. As noted above, the CFAA imposes criminal liability on any person who "intentionally accesses a computer ***without authorization or exceeds authorized access***, and thereby obtains . . . information from any protected computer." 18 U.S.C. § 1030(a)(2)(C) (emphasis added). With respect to the state offenses charged in this proceeding, Penal Law § 165.07 provides that the offense of Unlawful Use consists of "writing, photographing, drawing, mechanically or electronically reproducing or recording" secret scientific material by a person ***"having no right to do so and no reasonable ground to believe he has such a right."*** Id. (emphasis supplied). Likewise, a person commits Unlawful Duplication in violation of Penal Law § 156.30 "when ***having no right to do so,*** he or she copies, reproduces or duplicates" computer related material. Id. (emphasis supplied). The language of these three provisions (the federal offense of which Aleynikov has been acquitted and the two state offenses with which he is now charged) make clear that they all criminalize essentially the same conduct: accessing, copying and using secret scientific/computer related material without authorization to do so. The CFAA and the Unlawful Use and Unlawful Duplication statutes do not each have an element not found in the other. They thus constitute the same offense for double-jeopardy purposes.

The double jeopardy clause of the Fifth Amendment does not typically bar successive prosecutions for the same offense by different sovereigns. United States v. Lanza, 260 U.S. 377 (1922); Russotti, 717 F.2d at 30-31. This "dual sovereignty doctrine," however "'is subject to the qualification . . . that a state prosecution cannot be used merely as a cover and a tool of federal authorities." Russotti, 717 F.2d at 31 (quoting United States v. Aleman, 609

F.2d 298, 309 (7th Cir. 1979)). This exception to the dual sovereignty doctrine is commonly referred to as the "Bartkus exception" because it was derived from the Supreme Court decision in Bartkus v. Illinois, 359 U.S. 121 (1959). In Bartkus, the Court upheld a prosecution by the State of Illinois after a federal prosecution for the same offense; in doing so, the Court indicated that the defendant could not reasonably claim that the state "was merely a tool of the federal authorities" or that "the state prosecution was a sham and a cover for a federal prosecution." Bartkus, 359 U.S. at 123-34.

The Second Circuit has stated that the Bartkus exception "applies only in an extraordinary type of case . . . perhaps only when one sovereign has essentially manipulated another sovereign into prosecuting." United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 495 (2d Cir. 1995) (citation and quotation marks omitted); see also United States v. Burden, 600 F.3d 204, 229 (2d Cir. 2010) (recognizing that, in order for the exception to be triggered, "'[one] government must have effectively manipulated the actions of the [other] government, so that [the other government's] officials retained little or no independent volition.'") (quoting United States v. 38 Whalers Cove Drive, 954 F.2d 29, 38 (2d Cir. 1992)). In G.P.S., Judge Calabresi noted in the majority portion of his opinion that the Second Circuit has "repeatedly held that even significant cooperation between state and federal authorities does not provide a basis for applying the Bartkus exception." G.P.S., 66 F.3d at 495 (citing cases). But, in a separate concurrence, Judge Calabresi questioned the continued vitality of broad application of the dual-sovereign doctrine given, among other things, the significant expansion of federal criminal law:

> Though we remand for a consideration of whether this case is one of those rare cases in which the Bartkus exception might apply,

> this writer believes that the exception's narrowness combines with significant developments both in substantive federal criminal law and in criminal law enforcement to indicate that the entire dual sovereignty doctrine is in need of serious reconsideration.

Id. at 496-97.

Judge Calabresi began his discussion by noting that the dual sovereignty doctrine has been "strongly criticized" from the moment it was first applied in Lanza in 1922 as, inter alia, "unfaithful to the Fifth Amendment's historical roots." Id. at 497. After discussing long-standing theoretical considerations against the dual sovereignty doctrine, Judge Calabresi opined that more strongly counseling in favor of limiting or abolishing the doctrine "are the dramatic changes that have occurred in the relationship between the federal government and the states since the time of Bartkus and [Abbate v. United States, 359 U.S. 187 (1959)], changes that have made what was then perhaps acceptable, or at least tolerable, far more dangerous today." Id. at 498. Judge Calabresi elaborated as follows:

> When Bartkus and Abbate were decided in 1959, the scope of federal criminal law was still very narrow, and the overlap of federal and state criminal jurisdiction was quite small. The risk to individual rights posed by successive prosecutions by state and federal officials was therefore necessarily limited. Under such circumstances, it was not implausible to believe that these risks could be contained through prosecutorial rules, see Petite v. United States, 361 U.S. 529, 4 L. Ed. 2d 490, 80 S. Ct. 450 (1960) (discussing the policy, adopted by the Attorney General for the United States after Bartkus and Abbate, that limited federal prosecutions following state prosecutions), and by the development of a significant and dynamic "sham or cover" exception such as that which Bartkus, by negative implication, could be read to countenance.
>
> In recent years, however, the scope of federal criminal law has expanded enormously. And the number of crimes for which a defendant may be made subject to both a state and a federal prosecution has become very large. . . . At the same time, the

> Bartkus exception has been defined extremely narrowly. It follows that today defendants in an enormous number of cases can be subjected to dual prosecutions. And this can happen even when state and federal officials, in practice, join together to take a second bite at the apple.

Id. Judge Calabresi concluded, "'the recent expansion of federal criminal . . . jurisdiction magnifies the impact of Bartkus and Abbate, thus rendering a reassessment of those decisions timely from a practical standpoint as well,' since 'permitting successive state-federal prosecutions for the same act [appears] inconsistent with what is a most ancient principle in western jurisprudence — that the government may not twice place a person in jeopardy for the same offense.'" Id. (quoting United States v. Grimes, 641 F.2d 96, 100-01 (3d Cir. 1981)).

Another development that Judge Calabresi believed favored limiting the scope of the dual sovereignty doctrine is that "[t]he degree of cooperation between state and federal officials in criminal law enforcement has . . . reached unparalleled levels in the last few years." Id. at 499. The judge believed such "cooperation should cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other." Id. In the end, Judge Calabresi stated that these developments warrant a new review and possible limitation on the dual sovereignty doctrine by the Supreme Court. Id.

In United States v. Mardis, 600 F.3d 693, 697 (6th Cir. 2010), the Sixth Circuit recognized, as did Judge Calabresi in the majority in G.P.S., that no court has found that mere cooperation between sovereigns in the investigation and the timing and planning of successive prosecutions of an individual for related offenses violates the dual sovereignty doctrine. But,

much as Judge Calabresi did in his G.P.S. concurrence, the Mardis court did recognize the following:

> [I]t is not impossible that it could occur. One can imagine a situation in which Sovereign A failed to secure a conviction and therefore takes its evidence and charges to Sovereign B for another bite at the apple in a way that does constitute a sham prosecution. Such circumstances, in which Sovereign A pulls the strings of Sovereign B's prosecution, may indeed violate the Fifth Amendment's ban on double jeopardy.

600 F.3d at 697.

The situation envisioned by Mardis is precisely the one presented here. Having failed to defend its invalid conviction of Aleynikov on appeal, the federal Government took its evidence to the Manhattan DA, where it is undeniably "pulling the strings" of the DA's sham prosecution of Aleynikov in an attempt to save face after being defeated in a highly visible case. This is not a case of the state pursuing its own interests in prosecuting a violation of state law. Rather, it is a case of the state stepping in to enable the federal authorities to do by indirection that which they could not do directly — re-prosecute an exonerated defendant after an embarrassing defeat. If the DA's prosecution was motivated by a sincere desire to pursue the state's interest in prosecuting cybercrime, rather than in helping the federal authorities save face, it would not have waited three years to begin investigating this case. It would not have relied on a federal agent to secure its arrest warrant. It would not be devoting the state's resources to pursuing a conviction in a case it acknowledges does not warrant incarceration. On the extraordinary facts of this case, which is clearly a federal prosecution in a state courthouse, the doctrine of dual sovereignty does not prevent dismissal of the Indictment on double jeopardy grounds.

C. The Court Should Dismiss The Indictment Pursuant To The Collateral Estoppel Doctrine.

As the Second Circuit has explained, the Supreme Court in Ashe v. Swenson, 397 U.S. 436 (1970), "held that the Double Jeopardy Clause of the Fifth Amendment embodies the doctrine of collateral estoppel and applies it to criminal prosecutions, precluding prosecution of an offense when an issue of ultimate fact or an element essential to conviction has necessarily been determined in favor of the defendant by a valid and final judgment in a prior proceeding between the same parties." United States v. Cala, 521 F.2d 605 (2d Cir. 1975). In so ruling, the Ashe Court explained that "[a]lthough first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 [now more than 90] years ago in United States v. Oppenheimer, 242 U.S. 85 [(1916)]." See Ashe, 397 U.S. at 443. Further, the Ashe Court found that the collateral estoppel doctrine is embodied in the Fifth Amendment guarantee against double jeopardy, reasoning that "whatever else that constitutional guarantee may embrace, . . . it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." Id. at 445-46 (quoting Green, 355 U.S. at 190; see also People v. Felton, 95 Misc. 2d 960, 480 N.Y.S.2d 646 (Sup. Ct. N.Y. Cty. 1978). The New York Court of Appeals has explained that while "[t]he doctrine acquired constitutional dimension when the Supreme Court held in [Ashe] that it is embodied in the Fifth Amendment guarantee against double jeopardy and is applicable to the States," the doctrine's application is actually more expansive than double jeopardy:

> [C]onstitutional double jeopardy normally relates only to subsequent prosecutions involving the same offense (see, Brown v Ohio, 432 U.S. 161; Blockburger v United States, 284 U.S. 299; Kepner v United States, 195 U.S. 100; but see, CPL 40.10 et seq.),

> whereas the expansion of collateral estoppel principles to criminal cases was intended to overcome that narrow view of double jeopardy and prevent the harassment of defendants by serial prosecutions for multiple offenses arising from a single act or group of acts . . . .

People v. Goodman, 69 N.Y.2d 32, 37, 511 N.Y.S.2d 565, 569 (1986). Thus, "[e]stoppel is asserted customarily in situations involving an acquittal followed by subsequent charges arising from the same incident." Id. at 38.

Under New York law, the doctrine of collateral estoppel bars a party from relitigating an issue if the following prerequisites are met: (1) "the identical issue was necessarily decided in the prior action and is decisive in the present action;" and (2) "the party to be precluded from relitigating an issue . . . had a full and fair opportunity to contest the prior determination." D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659, 563 N.Y.S.2d 24, 26 (1990) (citing Kaufman v. Lilly & Co., 65 N.Y.2d 449, 492 N.Y.S.2d 584, 588 (1985)). With respect to the first issue, under New York law, for an issue to have been necessarily decided, it "must have been essential to the judgment and necessarily determined in the first action. Owens v. Treder, 873 F.2d 604, 606 (2d Cir. 1989) (citing Ryan v. N.Y. Tel. Co., 62 N.Y.2d 494, 478 N.Y.S.2d 823 (1984); O'Connor v. G & R Packing Co., 53 N.Y.2d 278, 440 N.Y.S.2d 920 (1981)).

Here, the first element of the doctrine of collateral estoppel is satisfied because an issue decisive to both statutes charged in the State Indictment — Unlawful Use and Unlawful Duplication — was decided conclusively and essentially in Aleynikov's federal criminal proceeding. Specifically, Judge Cote, in granting Aleynikov's pretrial motion to dismiss under Federal Rule of Criminal Procedure 12, acquitted him of the third count of the Federal Indictment charging a violation of the CFAA because (1) as the federal government conceded, he

"was authorized to access the Trading System's source code;" and (2) the CFAA is not violated where an individual uses his authorized access to misappropriate information. Aleynikov, 737 F. Supp. 2d at 192. In its subsequent opinion acquitting Aleynikov of the EEA and NSPA charges, the Second Circuit confirmed that the finding that Aleynikov was authorized to access and use the source code to the Trading System was the basis for the district court's dismissal of the CFAA charge: "Count Three was dismissed on the ground that Aleynikov was authorized to access the Goldman computer and did not exceed the scope of his authorization, and that ***authorized use of a computer in a manner that misappropriates information is not an offense under the Computer Fraud and Abuse Act.***" Aleynikov, 676 F.3d at 75 (emphasis supplied). Thus, the issue of whether Aleynikov had the right to access, use and copy the source code for the Trading System was necessarily decided by Judge Cote in dismissing the CFAA count in the federal prosecution.

That previously-resolved issue is also critical to the present charges against Aleynikov. Unlawful Use (charged in the Indictment's first two counts) consists of "writing, photographing, drawing, mechanically or electronically reproducing or recording" secret scientific material by a person ***"having no right to do so and no reasonable ground to believe he has such a right."*** Penal Law § 165.07, Id. (emphasis supplied). Thus, Unlawful Use of secret scientific material can only be committed by a person who is not authorized to copy such material by the means defined in that statute. Likewise, a person is guilty of Unlawful Duplication (charged in the third count) "when ***having no right to do so,*** he or she copies, reproduces or duplicates" computer related material. Penal Law § 156.30 (emphasis supplied). Thus, Unlawful Duplication, like

Unlawful Use, can only be committed by a person who is not authorized to copy, reproduce or duplicate such material.

As the Court of Appeals has explained, the Supreme Court in Ashe held that (1) "estoppel applie[s] to ultimate facts;" and (2) "[a]n ultimate fact is an issue which is the sine qua non of a conviction in the second trial." Goodman, 69 N.Y.2d at 38, 511 N.Y.S.2d at 570. Thus, the Goodman Court continued, "[i]f the first jury has resolved the issue in defendant's favor, the effect of that prior determination is to bar prosecution in a second criminal action though the second indictment may charge a different crime." Id. Here, in dismissing the CFAA count of the Federal Indictment on Aleynikov's motion to dismiss, Judge Cote undeniably held that Aleynikov, by the Government's own allegation, was authorized to access, use and copy the Trading System's computer source code; that is the ultimate fact on which the Unlawful Duplication and Unlawful Use charges in this proceeding turn.

Of course, Judge Cote's CFAA authorization finding is only preclusive in this proceeding if the second element of the collateral estoppel doctrine — that the party to be precluded from relitigating an issue had a full and fair opportunity to contest the prior determination, D'Arata, 76 N.Y.2d at 664, 563 N.Y.S.2d at 26 — is satisfied. As the Supreme Court noted in Taylor v. Sturgell, 553 U.S. 880 (2008), "[a] person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." Id. at 892. The Court went on to note, however, that "the rule against nonparty preclusion is subject to exceptions," which "can be grouped into six categories." Id. The third exception to the rule against nonparty preclusion, the Supreme Court explained, is that "a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who

[wa]s a party to the suit." Id. at 894 (quoting Richards v. Jefferson County, 517 U.S. 793, 798 (1996)).

As the Court elaborated, "[a] party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) [t]he interests of the nonparty and her representative are aligned . . . ; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty."[12] Here, the interests of the federal prosecutors in Aleynikov's CFAA prosecution in the Southern District of New York and the state prosecutors in this proceeding based on alleged violations of the Unlawful Use and Unlawful Duplication statutes are precisely aligned, and are factually identical: the overriding interest of both prosecuting authorities is the aggressive prosecution of the alleged theft of computer related property. That the interests of the state and federal prosecutors are aligned is confirmed by the federal authorities' significant involvement in the State's efforts to prosecute Aleynikov, as detailed above. Further, given the diligence and effort expended by the United States Attorney's Office in prosecuting Aleynikov's federal case, there is no doubt that the State's interests were adequately represented in that proceeding. In addition, as to the second element of the adequate-representation exception, the district court undoubtedly took care to protect the interests of the state; because the interests and goals of the state and federal prosecuting authorities are identical, the court necessarily protected the state's interests as it was protecting those of the federal government.

[12] The Ashe court also noted that "adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented." Id. The Court explained that the notice requirement is typically imposed only in cases such as class actions seeking monetary relief, which are markedly different than this case. In any event, given the extensive press coverage Aleynikov's federal prosecution received, the People were undoubtedly on notice of it.

Finally, the fact that New York has abolished the doctrine of dual sovereignty in the context of double jeopardy — a constitutional guaranty that encompasses collateral estoppel in criminal cases, see Goodman, 69 N.Y.2d at 37, 511 N.Y.S.2d at 569 — supports a finding that the federal prosecutors in Aleynikov's CFAA proceeding in the District Court and the state prosecutors in this case are the same party for purposes of the collateral estoppel doctrine. See Polito, 8 N.Y.3d at 690, 840 N.Y.S.2d at 5 ("New York . . . statutory law does reject, in large part, the dual sovereignty doctrine."). New York abolished the doctrine so that "'[a] person may not be separately prosecuted for two offenses based upon the same act or criminal transaction,'" regardless of whether two different prosecuting authorities are involved. Abbamonte, 43 N.Y.2d at 81-82, N.Y.S.2d at 769 (quoting CPL § 40.20(2)). Collateral estoppel is similarly applied in the criminal context, based on double jeopardy principles, to "protect[ ] a man who has been acquitted from having to 'run the gantlet' a second time." Ashe, 397 U.S. at 443. Thus, the abolishment of dual sovereignty in New York strongly supports treating the state and federal prosecutors in Aleynikov's two cases as one entity for collateral estoppel purposes.

As a result, the Court should apply the doctrine of collateral estoppel in this case and thus hold that the People (1) are bound by Judge Cote's ruling in the federal CFAA prosecution that Aleynikov did not, as a matter of law, misappropriate Goldman's computer source code because he had a right to access and obtain that source code; and (2) are precluded from relitigating that issue here. Because Aleynikov's indisputable authority to access, copy and use the Trading System source code is the "the sine qua non of a conviction" for the two offenses charged in the State Indictment (Unlawful Use and Unlawful Duplication), Judge Cote's CFAA ruling bars prosecution of Aleynikov for those crimes. See Goodman, 69 N.Y.2d at 38, 511 N.Y.S.2d at

569. Accordingly, pursuant to the doctrine of collateral estoppel, the Court should dismiss the Indictment in its entirety.

D. The Indictment Must Be Dismissed Because This Is A Vindictive Prosecution.

Aleynikov also moves to dismiss the Indictment because it is the result of a vindictive prosecution. The core principle protected by the vindictive prosecution doctrine is that due process forbids a state from enhancing the punishment of a defendant in a subsequent case — either by seeking an enhanced sentence or by bringing additional charges — for exercising his post-conviction right to appeal a conviction in a prior case. North Carolina v. Pearce, 395 U.S. 711, 724 (1969) (holding that a defendant's due process guarantees were violated where he was penalized for successfully seeking a statutory right of appeal); Blackledge v. Perry, 417 U.S. 21 (1974) (prohibiting use of the prosecutor's power to punish the exercise of procedural rights); United States v. Goodwin, 457 U.S. 368, 372-73 (1982). Although the concept of vindictive prosecution has its roots in the due process clause of the United States Constitution and United States Supreme Court decisional law, New York State courts properly consider claims of vindictive prosecution in the context of omnibus pretrial motions. See, e.g., People v. Bell, 11 Misc. 3d 1070A, 816 N.Y.S.2d 698 (Sup. Ct. Monroe Cty. 2006). Federal and state authorities alike recognize that "to punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" Goodwin, 457 U.S. at 372 (1982) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)).

To establish a claim of vindictive prosecution, a defendant must show either: (1) a reasonable likelihood of vindictiveness, which then raises a presumption of vindictiveness or (2) actual vindictiveness. Goodwin, 457 U.S. at 374, 376, 380-81, 384 & n.19 (1982); United States

v. White, 972 F.2d 16, 19 (2d Cir. 1992) (holding that a vindictive motive for a prosecution "will be found where there is direct evidence of actual vindictiveness, or a rebuttable presumption of a vindictive motive may arise under certain circumstances."). In this case, the totality of the circumstances warrants a presumption of vindictiveness, or a finding that the prosecution was the product of actual vindictiveness.

1. Aleynikov Is Entitled To A Presumption Of Vindictiveness.

The presumption of vindictiveness arises where "the circumstances of the case create a 'realistic likelihood' of prosecutorial vindictiveness." United States v. Johnson, 171 F.3d 139, 141 (2d Cir. 1999) Although a subsequent action brought by a separate sovereign generally will not be presumed vindictive, id. at 141 n.1 (2d Cir. 1999), that principle does not hold where the second sovereign can be said to have acted as a tool of the first. United States v. Ng, 699 F.2d 63, 68 (2d Cir. 1983) (noting that although the concept of vindictive prosecution normally does not apply in the case of separate sovereigns, it would apply where a state acted as the tool of the federal government).

The presumption of vindictiveness serves to prevent the appearance that the state "may unconstitutionally deter a defendant's exercise of his rights." United States v. King, 126 F.3d 394, 397 (2d Cir. 1997) (quoting Pearce, 395 U.S. at 725); United States v. Ward, 757 F.2d 616, 619-20 (5th Cir. 1985) ("[T]he appropriate inquiry is whether . . . for example, where, after the defendant's prior exercise of a procedural or substantive legal right, or his having succeeded in reversing a conviction on appeal, the prosecution acts arguably to punish the exercise of such rights, by increasing the measure of jeopardy by bringing additional or more severe charges."). A court called upon to determine whether a reasonable likelihood of vindictiveness exists must look to the totality of the objective circumstances surrounding the prosecutorial decision. United

States v. Contreras, 108 F.3d 1255 (10th Cir. 1997). When the presumption of vindictiveness is applied, it can be rebutted "by objective evidence justifying the prosecutor's action." Goodwin, 457 U.S. at 376 n.8. If it cannot be rebutted with a showing of "legitimate, articulable, objective reasons," the tainted action must be thrown out. King, 126 F.3d at 397, 399.

In this case, the totality of the circumstances surrounding the re-arrest and re-prosecution of Aleynikov following his successful appeal of federal criminal charges demonstrate that he is entitled to a presumption of vindictiveness. Aleynikov is clearly being punished not for any crime he may have committed, but for having the audacity to exercise his constitutional right to appeal his federal sentence and conviction and to prevail on that appeal. As the facts demonstrate, Aleynikov's Second Circuit victory was deeply embarrassing to the United States Attorney's Office and the Federal Bureau of Investigation, and particularly to the prosecutors and agents involved in the case. The animus engendered by his victory is not a proper justification for instituting new charges against Aleynikov.

The press coverage of the Second Circuit's summary order directing that Aleynikov be immediately released was greeted by extensive press coverage, which undoubtedly embarrassed Goldman and those involved in the federal prosecution. As noted above, a New York Times article dated February 17, 2012, reported that the reversal dealt "a major blow to the Justice Department, which has made the prosecution of high-tech crime and intellectual property theft a top priority." (Marino Aff., Ex. 15, 2/17/2012 N.Y. Times article.) The article also noted that the Second Circuit's decision was a loss for Goldman, which had reported Aleynikov to federal authorities and "had portrayed itself as the victim of a brazen crime." (Id.) No doubt particularly galling to the federal prosecutors and FBI was a New York Post article dated

February 18, 2012, which reported that the Second Circuit's ruling was "a black eye for US Attorney Preet Bharara" and showed a re-touched photograph of him with a black eye and a band-aid on his forehead. (Id., Ex. 15, 2/18/2012 NY Post article.) That sentiment was echoed in a Forbes article on February 21, 2012, which stated that the Second Circuit's decision "may prove a bit of an embarrassment and black eye for federal prosecutors." (Id., Ex. 15, 2/21/2012 Forbes article.)

In response to Aleynikov's request for his passports following his acquittal, the FBI advised the Manhattan District Attorney to take steps to prevent him from traveling abroad. That resulted in Aleynikov being illegally declared a "fugitive from justice" although he had no reason to know that the District Attorney had charged or was about to charge him with crimes. As noted above, the affidavit underlying that arrest warrant was executed by Michael McSwain, the federal agent from whom Aleynikov's counsel requested the return of his passports in June 2012; Aleynikov's arrest on that warrant led to his spending an entire week in jail awaiting extradition.

In this case, there was nothing to justify the filing of additional charges against Aleynikov, such as discovery of new evidence, cf., United States v. Lanoue, 137 F.3d 656, 665 (1st Cir. 1998), or a legally significant change in the facts, cf. Wasman v. United States, 468 U.S. 559, 569-70 (1984) (allowing such evidence to rebut a presumption of judicial vindictiveness). Because the totality of the circumstances in this case raises a realistic likelihood of vindictiveness, the presumption of such vindictiveness applies. United States v. Jenkins, 504 F.3d 694, 700 (9th Cir. 2007). Accordingly, absent competent objective evidence to rebut the presumption of vindictiveness, the Indictment must be dismissed.

2. Aleynikov Has Made A Prima Facie Showing Of Actual Vindictiveness.

Where a defendant cannot establish a presumption of vindictiveness, he must show both that (1) the prosecutor harbored genuine animus toward him, or was prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a "stalking horse;" and (2) the defendant would not have been prosecuted but for the animus. United States v. Koh, 199 F.3d 632, 640 (2d Cir. 1999) (quoting United States v. Aviv, 923 F. Supp. 35, 36 (S.D.N.Y. 1996)). Animus can be imputed to a state prosecutor from an investigatory agency if a defendant can establish "that the agency in some way prevailed upon the prosecutor in making the decision to seek an indictment." United States v. Monsoor, 77 F.3d 1031, 1035 (7th Cir. 1996). To obtain discovery to support a claim of actual vindictiveness, a defendant "must provide some evidence tending to show the existence" of the essential elements of the defense. United States v. Sanders, 211 F.3d 711, 717 (2d Cir. 2000); United States v. Romano, 11 Cr. 939, 2012 U.S. App. LEXIS 13539, at *3 (2d Cir. July 3, 2012).

Aleynikov has provided strong evidence that both elements of the actual vindictiveness test are met. That the District Attorney's office was a stalking horse for the FBI in this case is a conclusion manifestly supported by the facts described above. First, Aleynikov's counsel was in direct contact with SA McSwain regarding the return of Aleynikov's passport in June 2012. At Aleynikov's initial appearance, the ADA admitted that it was concern over the return of his travel documents, which it was feared he might use to leave the jurisdiction, that motivated the State to seek an arrest warrant. (Marino Aff., Ex. 18, 8/9/12 Tr. at 9: 7-12.)

Second, at the time the charges were brought, the State had no serious investigation of its own; as a result, it had to rely upon SA McSwain himself to swear out the criminal complaint against Aleynikov.

Third, the DA's Office apparently represented to the court that issued the arrest warrant that Aleynikov was not likely to voluntarily appear if summoned, despite knowledge that Aleynikov was represented and that his counsel was in continuing contact with SA McSwain. As a result, Aleynikov was arrested as a fugitive from justice and unnecessarily spent a week in the Essex County Jail before being extradited. These circumstances betray extreme and actual vindictiveness against Aleynikov sufficient to justify dismissal of the Indictment on that ground.

In addition, it is clear that Aleynikov would not have been prosecuted but for such animus. This is not a case in which the state had an active investigation into Aleynikov's conduct and deferred to the federal prosecution. There is no evidence that the People were in any way interested in the case of Sergey Aleynikov until the federal authorities brought the case to their attention and swore out a criminal complaint. The evidence is abundantly clear that but for the encouragement of the FBI and federal prosecutors, the DA's Office would not have brought charges against Aleynikov. Indeed, if the state prosecuting authorities were staying their hand to see how the federal prosecution fared, they surely would not have waited from February 17th, when Aleynikov was released from prison, to August 1st, nearly six months later, to swear out a Criminal Complaint against him.

At the very least, Aleynikov has made a prima facie showing of actual vindictiveness sufficient to warrant discovery regarding the manner in which the State made its decision to prosecute him. Given that prima facie showing, if the Court is not prepared to dismiss this prosecution for any of the many reasons set forth in this motion, it should permit Aleynikov discovery into the circumstances under which the DA's office decided to indict him. See C. Peter Erlinder and David C. Thomas, Prohibiting Prosecutorial Vindictiveness While Protecting

Prosecutorial Discretion, 76 J. Crim. L. & Criminology, 341, 395 (Summer 1985) ("A defendant who can make out a colorable claim of actual vindictiveness must be permitted to examine the prosecution's decision-making process in detail to have any realistic opportunity of prevailing on a vindictiveness motion. Such a process certainly would have to include the power to subpoena both prosecutors and their files and could logically extend to depositions of prosecutors and their staff as well as full evidentiary hearings regarding the justifications for increased penalties following the exercise of rights by defendants.")

For the foregoing reasons, Aleynikov respectfully submits that a presumption of vindictiveness applies to this prosecution. Alternatively, he submits that a prima facie showing of vindictiveness has been made and that he is entitled to discovery regarding the circumstances under which his Indictment was sought.

III. THE COURT MUST EXERCISE ITS DISCRETION TO DISMISS THE INDICTMENT IN THE INTEREST OF JUSTICE AFTER HOLDING A CLAYTON HEARING.

For the reasons set forth above, the Court should dismiss the Indictment with prejudice because (i) the People failed to present sufficient evidence of the crimes to the grand jury; (ii) it is barred by CPL § 40.20 and the double jeopardy clauses of the United States and New York Constitutions; and (iii) it is barred by the doctrines of collateral estoppel and vindictive prosecution. Even if the Court does not dismiss the case on all or any of those grounds, the Indictment should be dismissed in the interests of justice in accordance with CPL § 210.40. And as the Court of Appeals has recognized, nothing prohibits the court "from basing such a dismissal in part upon interest-of-justice factors and in part upon the weakness of the case on the merits." People v. Tyler, 46 N.Y.2d 264, 266, 413 N.Y.S.2d 302 (1978). Such a dismissal is particularly appropriate in this case.

A long line of New York cases recognize a Court's discretion to dismiss an action where a compelling factor, consideration or circumstance clearly demonstrates that prosecution of the defendant would result in injustice. No case cries out more strongly than this one for a jurist to exercise his discretion to terminate a misguided prosecution.

A. The Interest of Justice: History and Requirements of CPL § 210.40

Prosecutors traditionally enjoyed a common-law power known as *nolle prosequi* to decline prosecution, at their sole discretion, even after indictment. People v. Shanis, 84 Misc. 2d 690, 374 N.Y.S.2d 912, 915-16 (Sup. Ct. Queens Cty. 1975); People v. Davis, 55 Misc. 2d 656, 286 N.Y.S.2d 396, 399 (Sup. Ct. N.Y. Cty. 1967); People v. Quill, 11 Misc. 2d 512, 177 N.Y.S.2d 380, 381 (Cty. Ct. Kings Cty. 1958). Former section 671 of the Code of Criminal Procedure, enacted in 1881, codified that power by enabling a Court to dismiss an indictment on its own motion or the motion of the District Attorney "in furtherance of justice." Id.; People v. Clayton, 41 A.D.2d 204, 342 N.Y.S.2d 106, 108-09 (2d Dep't 1973).

As the Clayton court explained, CPL § 210.40 is the successor to section 671. But unlike its predecessor, CPL § 210.40 also permits a defendant to seek dismissal of an indictment. Clayton, 342 N.Y.S.2d at 109; People v. Graydon, 69 Misc. 2d 574, 330 N.Y.S.2d 259, 262 (Cty. Ct. 1972).[13] Following a 1979 amendment, which was made at the suggestion of the Court of Appeals in People v. Belge, 41 N.Y.2d 60, 62-63, 390 N.Y.S.2d 867 (1976), CPL § 210.40 now enumerates the specific criteria a court must consider to determine whether the interests of justice warrant dismissal. People v. Rickert, 58 N.Y.2d 122, 126-27, 459 N.Y.S.2d 734, 735-36

[13] Whereas CPL § 210.40 sets forth the criteria a court must consider when exercising its discretion, CPL § 210.45 requires the court to conduct a hearing on the motion under most circumstances. Id. Those hearings are commonly referred to as Clayton hearings.

(1983). Thus, the legal framework established by CPL § 210.40 merely embodies in statutory form the long-recognized principle that even where dismissal of an indictment is not compelled as a matter of law, it may be required as a matter of judicial discretion. People v. Belkota, 50 A.D.2d 118, 377 N.Y.S.2d 321, 323 (4th Dep't 1975).

Courts considering motions under CPL § 210.40 uniformly recognize that the discretionary authority to dismiss an indictment in the interest of justice must be "exercised sparingly." People v. Quadrozzi, 55 A.D.3d 93, 863 N.Y.S.2d 455, 463 (2d Dep't 2008) (quoting People v. Martinez, 304 A.D. 2d 675, 757 N.Y.S.2d 489 (2d Dep't 2003) (affirming dismissal of three counts of an indictment based on a sensitive balancing of the 210.40 factors)). Although such circumstances are rare, dismissal is nevertheless warranted in a case where a "compelling factor" demonstrates that continued prosecution would be unjust. People v. Insignares, 109 A.D.2d 221, 491 N.Y.S.2d 166, 175 (1st Dep't 1985); People v. Algarin, 294 A.D.2d 589, 742 N.Y.S.2d 899, 900 (2d Dep't 2002).

Although the weight of the People's evidence is one of ten statutory factors the court must consider, the interest-of-justice analysis does not turn on guilt or innocence. As the Quill court succinctly stated:

> The power to discontinue prosecution of a crime vested by that section in the court has little or nothing to do with the legal or factual merits of the charge. Nor is it concerned with the guilt or innocence of the defendant. Such a dismissal is concerned, as the statute states, solely with principles of justice.

Quill, 177 N.Y.S.2d at 381; see also People v. Spolasco, 33 Misc. 530, 68 N.Y.S. 924 (Cty. Ct. N.Y. Cty. 1900) (holding that under Section 671, "the sole question to be considered is, upon the facts and law involved, 'What is for the best interests of the cause of justice?'"); Davis, 286

N.Y.S.2d at 400 ("The purpose of section 671 is to give a court power in appropriate but rare circumstances to allow the letter of the law gracefully and charitably to succumb to the spirit of justice."); People v. Pesola, 950 N.Y.S.2d 260, 2012 N.Y. Misc. LEXIS 3928, at *13 (N.Y. City Crim. Ct. 2012) ("A court has the discretion to dismiss in the interest of justice even when there is no basis for such dismissal as a matter of law.") As the Court of Appeals noted, "it may not be too much to say that, in a broad sense, the idea was to introduce into the criminal law a flexibility somewhat akin to that equity essayed on the civil side." Rickert, 58 N.Y.2d at 126; see also Shanis, 374 N.Y.S.2d at 917.

The animating principle behind CPL § 210.40 is that certain cases "cr[y] out for fundamental justice beyond the confines of conventional considerations." Belge, 41 N.Y.2d at 62-63 (Fuchsberg, J., concurring). This is such a case.

B. Statutory Factors

In order to dismiss an indictment based on the interests of justice, the Court "must engage in a sensitive balancing process and conclude that there exist compelling factors clearly demonstrating that prosecution upon the indictment would constitute an injustice." People v. Hudson, 217 A.D.2d 53, 634 N.Y.S.2d 752, 754 (2nd Dep't 1995) (internal quotations omitted). CPL § 210.40 sets forth ten factors that a court must consider, individually and collectively, to determine whether such a compelling factor, consideration or circumstance exists. People v. Jenkins, 11 N.Y.3d 282, 287, 869 N.Y.S. 2d 370 (2008). Those factors are:

> (a) the seriousness and circumstances of the offense;
>
> (b) the extent of harm caused by the offense;
>
> (c) the evidence of guilt, whether admissible or inadmissible at

> trial;
>
> (d) the history, character and condition of the defendant;
>
> (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
>
> (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
>
> (g) the impact of a dismissal upon the confidence of the public in the criminal justice system;
>
> (h) the impact of a dismissal on the safety or welfare of the community;
>
> (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
>
> (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

CPL § 210.40(1). Although the statute does not require a trial court to analyze each statutory criteria on the record, such an examination is useful to show that the ultimate reasons for dismissal are real and compelling. Rickert, 58 N.Y.2d at 128. A ruling on a motion for dismissal under CPL § 210.40 should be based on the totality of the circumstances. Tyler, 46 N.Y.2d at 266-67. Applying the statutory criteria to the facts of this case demonstrates that dismissal of the Indictment is warranted.

1. The Seriousness And Circumstances Of The Offense.

While the crimes with which Aleynikov is charged are undoubtedly serious, the circumstances under which he is alleged to have committed them demonstrate that he did not intend to cause any harm to the alleged victim. This is not a case in which the defendant stole a trade secret and attempted to profit from it directly — either by attempting to sell it to a

competitor or by negotiating a higher salary based on a promise of bringing the trade secret with him to a new employer. Rather, this is a case in which the federal prosecutor's argument at his previous trial was, and presumably the District Attorney's argument in this case will be, that Aleynikov took Goldman's trade secrets because he was afraid that he otherwise would not be able to meet the aggressive development deadlines imposed by his new employer.

First, the evidence will show that Aleynikov downloaded only a portion of Goldman's system — a few hundred thousand lines out of a system comprising millions of lines. (Marino Aff., Ex. 4, 12/1/10 Tr. at 374:20-25 (Walker); Ex. 4 12/2/10 Tr. at 606:19-607:18 (Schlesinger).) The federal trial testimony of Aleynikov's supervisor at Goldman, Adam Schlesinger, established beyond dispute that Aleynikov had the technical ability and administrative access rights to Goldman's computer system to simply download the entire trading platform if he so desired. (Id., Ex. 4, 12/2/10 Tr. at 564:3-17 (Schlesinger).) The fact that Aleynikov could have very easily have copied Goldman's entire Trading System but did not do so belies any suggestion that he intended to use Goldman's system to enable Teza to take trading profits away from Goldman and thus cause it pecuniary loss. Had Aleynikov intended to harm Goldman in that way, he surely would have taken the entire system — which Adam Schlesinger confirmed he could have quickly and inexpensively done — and enabled Teza to use that system to compete immediately and directly with Goldman.

Second, the evidence at the federal trial showed that Aleynikov's new employer, Teza's Misha Malyshev, made it clear that Teza did not hire Aleynikov to bring Goldman's code to Teza; that Teza did not even have its trading strategy developed at the time of Aleynikov's arrest; that Teza had no need or desire for Goldman's code and did not even regard Goldman as a

competitor; and that Teza would not have taken Goldman's code if it had been offered to Teza free of charge. (Id., Ex. 4, 12/6/2010 Tr. at 791:22-792:6, 807:19-21, 827:16-828:1, 831:23-834:4, 836:4-12, 844:8-845:13, 845:23-846:5, 848:25-849:10, 850:4-7.)

Finally, Aleynikov has always contended that any files he downloaded from Goldman were for the purpose of reviewing modified open source code within them. Although he had the files in his possession for almost a month before Goldman Sachs reported the file transfer to the Government, there was no evidence that Aleynikov attempted to sell or deploy proprietary computer code. Dr. Benjamin Goldberg, a computer science professor at New York University, testified at the federal trial that Aleynikov was a well-known contributor to open-source projects, and that "given the fact that I had seen files that were clearly open source, that had had the header stripped away, I concluded that just because the open source header wasn't there doesn't mean that the file itself was not open source." (Id., Ex. 4, 12/8/10 Tr. at 1357.) Regardless of whether a state jury would credit Aleynikov's explanation for his downloads or determine that he took Goldman source code to make his job at Teza easier, as the federal prosecutors argued, the nature and circumstance of his offense are simply not as venal as other conduct that might be charged under the same statutes. The nature of Aleynikov's offense separates his case from the typical one.

2. The Extent Of Harm Caused By The Offense.

Just as there is no evidence that Aleynikov downloaded Goldman's source code for personal gain, there is also no evidence that he harmed or intended to harm Goldman. Indeed, the evidence is decidedly to the contrary. In fact, Goldman itself made clear that the alleged source code copying did not and could not have harmed the company. Eleven days after

Aleynikov's July 2009 arrest, Goldman CFO Viniar was asked about the case during an earnings call with reporters. As reported by Reuters on July 14, 2009, Viniar stated, "We still have all the code. It's not like the code had been lost to Goldman Sachs. And even if it had been, it's a small piece of our business." Reuters also reported Viniar as stating that even if the code had been taken, any losses sustained by the firm would be "very, very immaterial." (Marino Aff., Ex. 9, http://blogs.reuters.com/reuters-dealzone/2009/07/14/goldman-sachs-breaks-silence-on-alleged-code-theft.)

Beyond the evidence that Goldman was not harmed, there was further evidence that Goldman Sachs could not have been harmed by Aleynikov's alleged crime. Dr. Jeffrey Harris, former Chief Economist for the Commodity Futures Trading Commission and an expert in high frequency trading, opined in the attached report that Goldman could not have been harmed even if Aleynikov had taken all the source code for the Trading System because the materials Aleynikov downloaded could not have been used to compete with Goldman. Dr. Harris opined to a reasonable degree of professional certainty, after reviewing Aleynikov's downloads, that he could not have used the computer code in his possession to injure Goldman in any way. (Marino Aff., Ex. 3, Harris Expert Report, ¶ 7.) Despite the initial assertion of AUSA Joseph Facciponti (which was later retracted) that the downloaded material could have been used to roil world financial markets, there is no evidence that any member of the public suffered or could have suffered because of Aleynikov's conduct. In Davis, the court considered it of "determinative significance" that no member of the public had suffered because of the defendant's conduct. Davis, 286 N.Y.S.2d at 399. This factor supports dismissal of the Indictment.

3. The Evidence Of Guilt, Whether Admissible Or Inadmissible At Trial.

As explained in detail above in sections I and II.C, there can be no showing that Aleynikov was guilty of Unlawful Duplication of computer related materials or Unlawful Use of secret scientific material because he had the right to copy the computer materials at issue. Aleynikov's direct supervisor, Adam Schlesinger, testified that Aleynikov had full access to the source code relating to Goldman's high-frequency trading business. Paul Walker of Goldman testified that as part of his job, Aleynikov was not only granted access to the source code, but was required to make copies of the code in performing his daily functions. Given this testimony, the People simply cannot prove all the elements of the Unlawful Use and Unlawful Duplication statutes. See People v. Phillips, 14 Misc.2d 565, 177 N.Y.S.2d 804, 815 (Sup. Ct. Suffolk Cty. 1958) (dismissing an indictment because it was founded on insufficient evidence and in the interests of justice). This factor, too, counsels in favor of dismissing the Indictment.

4. The History, Character And Condition Of The Defendant.

Aside from the conduct at issue, Aleynikov has led an exemplary life, and is a man of extraordinary honor, compassion and professional promise. During the course of sentencing proceedings following Aleynikov's federal conviction, facts regarding his history and characteristics were developed in detail. Attached to the Marino Affirmation as Exhibit 12 is a copy of Aleynikov's Sentencing Memorandum, together with the letters of support submitted to Judge Cote on his behalf. A review of that sentencing submission, particularly the character letters attached to the memorandum, demonstrate vividly that Aleynikov's extraordinary history, character and condition weigh in favor of an interest of justice dismissal in this case. Indeed, the letters describing Aleynikov paint a picture of a loving and caring father, son and nephew, a

genial and valued friend, and an ethical and intelligent professional. These letters indicate that, before the unfortunate events that led to his prosecution, Aleynikov had built a solid and commendable reputation and was widely respected and admired by those who know him.

Indeed, Aleynikov was born in Moscow, Russia in 1970 to a father who was a chemical engineer and a mother who was a business analyst and computer programmer. He was born during the Communist era and was raised under modest economic circumstances in a government-assigned two-bedroom apartment in Moscow. He came to this country and persevered through hard work and determination to build a successful life. Despite arriving in America with just $300 to his name, he built a successful life by long days and nights of work doing menial jobs to pay expenses while going to school, excelling at his academic pursuits despite getting little sleep, and paying his dues through hard work and determination.

Aside from the federal and state charges, which are both based on the same course of conduct, Aleynikov has never had any criminal problems. His federal presentence investigation report stated that "according to the FBI and the New York State Division of Criminal Justice Services, Bureau of Identification, the defendant has no prior criminal convictions." Aleynikov is a highly skilled programmer who was poised to put his prodigious skills back to use following the entry of a judgment of acquittal on the federal charges. The institution of State charges based upon the same alleged conduct has turned those plans upside down. Although he prevailed on appeal, the federal criminal prosecution has had a devastating impact on Aleynikov's life. He was deprived of his liberty for one year for offenses he did not commit; his reputation has been irreparably damaged; his marriage disintegrated; he lost his career and is without sufficient funds to pay his debts; and he lost his home and must rely on the charity of friends for shelter.

Aleynikov's extraordinary personal characteristics, and the indignities he has suffered as a result of the failed federal prosecution, constitute a compelling factor that justifies dismissal of the present charges in the interests of justice.

5. Any Exceptionally Serious Misconduct Of Law Enforcement Personnel In The Investigation, Arrest And Prosecution Of The Defendant.

As described in detail above, the federal and state prosecutions have been plagued by a pattern of serious misconduct of law enforcement from the start, which provides another factor that strongly supports an interest-of-justice dismissal of the state charges. The FBI originally arrested Aleynikov on July 3, 2009 without having performed any independent investigation into Goldman's allegations. That arrest was made without a warrant and, as was later revealed, without probable cause. Having arrested Aleynikov without probable cause, federal agents proceeded to extract a statement from him, even though the Federal Defender's Office advised the U.S. Attorney that Aleynikov was represented and requested that the questioning cease. At his detention hearing, the federal prosecutor falsely informed the Court that Aleynikov had taken the entirety of Goldman's Trading System and that if he was not detained he would be able to manipulate world financial markets.

After the Second Circuit Court of Appeals ordered the federal district court to acquit Aleynikov of the federal charges, the Government failed to return Aleynikov's travel documents to him. Shortly after Aleynikov's counsel pressed SA Michael McSwain for return of the travel documents, the agent swore out a criminal complaint in New York State court. Even though SA McSwain was in direct contact with Aleynikov's counsel at the time, knew he had no travel documents, and knew he had no knowledge of the imminent New York State charges, the arrest

warrant issued based on SA McSwain's complaint stated that the Court was "satisfied that the defendant will not respond to a summons." (Marino Aff., ¶ 46 & Ex. 17, 8/1/12 Arrest Warrant) Due to his arrest on the fugitive warrant, Aleynikov spent an additional week in jail in New Jersey before he could be extradited to New York.

The serious government misconduct that has pervaded the federal and state criminal proceedings against Aleynikov is a further compelling factor that counsels dismissing the present charges in the interests of justice.

6. The Purpose And Effect Of Imposing Upon The Defendant A Sentence Authorized For The Offense.

Aleynikov was sentenced to a 97-month term of incarceration in the federal case, and served nearly 12 months in prison before his sentence was overturned and a judgment of acquittal entered. The present Indictment charges Aleynikov with three Class E felonies, which carry a maximum penalty of 1 to 4 years. Given that (a) Aleynikov is a first time felony offender who would come before the court with an otherwise unblemished criminal history; (b) he has already served a nearly 12-month sentence for the same offense conduct; and (c) there was no harm to the victim, it is difficult to believe that the Court would impose a further term of incarceration even if the People convicted him here. Indeed, the People have represented on the record that they offered Aleynikov a plea deal that would not have required him to serve a further sentence. (Marino Aff., Ex. 22, 9/27/12 Tr. at 16.) Although the ADA made clear that the non-custodial offer would not remain open if the case went forward, a first-time felony offender such as Aleynikov convicted of a Class E felony would face a minimum of 1 1/3 years. CPL § 70.00(3)(b). Additionally, any state sentences would be concurrent, CPL § 70.25(2), and

Aleynikov would receive credit for the year he served in federal prison. CPL §§ 70.30(5), 70.30(3)(a). Thus, even if he were convicted and sentenced, because his minimum sentence would have already been fully served or almost fully served, he would be eligible for parole immediately or almost immediately. CPL § 70.40(1)(a)(i). Accordingly, Aleynikov is unlikely to be sentenced to an additional term of incarceration if convicted, regardless of whether the People seek such a punishment.

Other cases have held that unusual circumstances may exist to justify dismissal where the authorized term of incarceration will serve no useful purpose. People v. Sales, 169 A.D.2d 411, 563 N.Y.S.2d 825, 826 (1st Dep't 1991) ("The authorized sentence urged by the People will serve virtually no useful purpose.") In this case, Aleynikov has already served a year in prison for the same offense conduct, and a further term of incarceration would serve no useful purpose. Under these circumstances, the People's desire to win a conviction that would not warrant further incarceration does not warrant permitting this prosecution to proceed. Accordingly, a dismissal in the interest of justice is warranted.

7. The Impact Of A Dismissal Upon The Confidence Of The Public In The Criminal Justice System.

Dismissing this case in the interest of justice would promote, rather than diminish, public confidence in the criminal justice system. When the District Attorney's Office announced that Aleynikov was being prosecuted by New York for the same conduct of which he had been recently acquitted, the announcement led to widespread speculation that the prosecution was being pursued for an improper purpose. One commentator wrote:

> It's a little difficult to figure out why someone who maybe stole code from Goldman years ago, and who already spent more than a year in prison for it on an invalid conviction, should be a priority for Manhattan prosecutors. The timing is perhaps suggestive. This week New York's Department of Financial Services launched a pretty aggressive attack on Standard Chartered for federal law violations that federal authorities were more or less okay with, and instantly catapulted himself from obscurity to relevance. (Now he gets to, like, meet Tim Geithner!) New York state regulators and prosecutors have long had a model of prestige that involves out-enforcing the feds, and winning a conviction that the feds couldn't manage would I guess be a feather in Cyrus Vance's perhaps underfeathered cap.

Marino Aff., Ex. 19, Matt Levine, "Prosecutors Not Done Ruining Sergey Aleynikov's Life," Wall Street Insider (August 9, 2012).) A CNN reporter saw the irony in the announcement of the second Aleynikov prosecution on the same day the Justice Department announced that it would not bring charges against Goldman for its role in the financial crisis. The report noted sarcastically: "So now we have the district attorney dumping resources into a fresh attempt at convicting this small fish. But that makes sense, because Aleynikov allegedly hurt a very special victim." (Id., Ex. 19, Susan Antilla, "Is there justice for Goldman Sachs?" CNN.com (August 16, 2012).)

In the normal case, even where the totality of the circumstances militate in favor of an interest-of-justice dismissal, the public might be left to ask whether justice was served where a criminal defendant is released without punishment. This case, by contrast, presents the rare circumstance in which the defendant has already been punished for federal crimes he did not commit, and the public questions why the defendant is being persecuted a second time. Were this Court to terminate this prosecution in the interests of justice, such a decision would promote the public's confidence in the criminal justice system.

8. The Impact Of A Dismissal On The Safety Or Welfare Of The Community.

Dismissing the case against Aleynikov in the interests of justice would have no adverse impact on the safety or welfare of the community. Aleynikov's offense was non-violent, and he has no history of violence. Therefore, the safety of the community would not be implicated by such a decision. Moreover, the welfare of the community would be promoted if the Court exercised its discretion to dismiss the charges against Aleynikov. As explained is section III.B.5, above, Aleynikov has never been anything but a productive member of society, and the welfare of the community would be served if he were permitted to apply his talents productively.

9. Where The Court Deems It Appropriate, The Attitude Of The Complainant Or Victim With Respect To The Motion.

No doubt Goldman would take a dim view of Aleynikov's present motion, given the firm's active role in procuring the federal prosecution and assisting in this state prosecution. But Goldman is hardly a reliable source on the subject. Goldman could easily have sought injunctive relief against Aleynikov in a civil court if it truly believed he had taken — and planned to use — proprietary source code to the firm's detriment. Instead, it provoked Aleynikov's arrest, without any law enforcement investigation, based on the now disproven allegation that he had downloaded the source code to Goldman's entire high-frequency Trading System. To the extent Goldman has a legitimate interest in making an example out of Aleynikov, that purpose has been served. Assuming Goldman would oppose Aleynikov's motion, its position ought not to weigh heavily in the Court's analysis.

10. Any Other Relevant Fact Indicating That A Judgment Of Conviction Would Serve No Useful Purpose.

As a result of his prior federal trial and sentence on these charges, Aleynikov lost his job, his reputation, his wife and his home. His life was left in ruins. At this juncture, his interest in being permitted to rebuild his life, and resume contributing to society, without fear that he will again be prosecuted, is compelling. As these motion papers make clear, the federal prosecution of this matter placed an enormous burden on the parties and the judicial system. The state prosecution will undoubtedly involve a similar expenditure of time and resources. And to what end? The People have already indicated on the record their belief that a further term of incarceration is not necessary. To the extent the People later assert the need to create a deterrent effect, such an argument would have no force. No programmer could read the story of Sergey Aleynikov and take away the message that copying an employer's source code is an action without the most dire consequences.

In Shanis, the Court recognized that the punishment already suffered by a defendant could be a powerful factor weighing in favor of dismissal. In that case, the defendant was charged and convicted of first-degree manslaughter after a physical altercation with his neighbor led to the neighbor's death. Shanis's first trial ended in a mistrial because the jury was unable to reach a unanimous verdict. The second trial ended in a conviction, which was affirmed by the Appellate Division. The Court of Appeals reversed, however, based on a finding that various errors deprived Shanis of a fair trial. As a result, almost five years after the case began, the defendant was facing a third trial. In considering the CPL § 210.40 factors, the court remarked that "more than 50 appearances in many courtrooms have resulted in a crushing financial burden as a result of which the defendant was forced to file a petition in bankruptcy . . ., despite the fact

that defendant has been steadily and gainfully employed for the last 20 years. . . . Defendant has already suffered through two trials and has exercised his appeal rights to the limit, yet he remains in the same status now as he was more than five years ago when these most unfortunate events first began." Shanis, 374 N.Y.S.2d at 920-21. In Shanis, unlike this case, there was little or no physical incarceration. Nevertheless, the court recognized that "the overwhelming mental and emotional strains suffered by the defendant have operated as a far more crushing imprisonment than could any bare restriction of his physical person." Id. at 921. The court asked rhetorically, "Would it be 'in furtherance of justice' to subject the defendant and his family to the psychological pressured of still a third trial." Id. Here, as there, the answer to that question is decidedly, "no."

A "sensitive balance between the individual and the State" in this case counsels in favor of dismissing the Indictment in the interest of justice. Jenkins, 11 N.Y.3d at 287 (quoting Clayton, 342 N.Y.S.2d at 110); People v. Harmon, 181 A.D.2d 34, 586 N.Y.S.2d 922, 924 (1st Dep't 1992) (same); Martinez, 304 A.D.2d 675, 757 N.Y.S.2d 489 (affirming trial court's finding that compelling factors justified dismissal in the interest of justice). As the Davis court noted, "the instant case involving as it does a defendant of exceptional background and promising future and charged with a crime, conviction of which would sully the one and stifle the other, is a case crying out for the application of this most humane statutory provision." Davis, 286 N.Y.S.2d at 659-60.

For all of the foregoing reasons, dismissal of the Indictment in this case would clearly be in the interests of justice.

IV. OTHER RELIEF

A. If The Court Declines To Immediately Dismiss The Indictment Pursuant To CPL § 210.20(1)(B), Aleynikov Is Entitled To Examine The Grand Jury Minutes, Or To An In Camera Inspection Of Those Minutes, Pursuant To CPL § 210.30(2).

As detailed above in section I, Aleynikov has moved for and is entitled to dismissal of the Indictment pursuant to CPL § 210.20(1)(b) because "[t]he evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense." In the event the Court declines to dismiss the Indictment immediately on that basis (or on any of the other grounds detailed above), Aleynikov respectfully requests that the Court grant his motion, pursuant to CPL § 210.30(2), for an examination by the Court and his counsel of the stenographic minutes of the Grand Jury proceeding that resulted in the Indictment against him for the purpose of determining whether the People presented legally sufficient evidence to support the charges in the Indictment.

As CPL § 210.30 explains, "[a] motion to inspect grand jury minutes is a motion by a defendant requesting an examination by the court and the defendant of the stenographic minutes of a grand jury proceeding resulting in an indictment for the purpose of determining whether the evidence before the grand jury was legally sufficient to support the charges or a charge contained in such indictment." CPL § 210.20(2). Pursuant to subsection (3) of that provision, "[u]nless good cause exists to deny the motion to inspect the grand jury minutes, the court must grant the motion." CPL § 210.30(3). Here, the People cannot demonstrate the existence of good cause warranting the denial of the motion and the Court therefore "must grant it" pursuant to CPL § 210.30(3). Moreover, because (for the reasons set forth above) there is more than reasonable cause to believe that the People presented legally insufficient evidence to the Grand Jury to

establish that Aleynikov lacked the right to copy Goldman's computer source code, which is a critical element of both statutes he is charged with violating, there is no basis for the Court to deny, and a compelling reason for it to grant, the motion to inspect pursuant to CPL § 210.30(4). Indeed, because of the factual complications in this case, the deficiencies in the People's presentation to the grand jury may not be apparent without a full airing of that presentation. Release of the minutes to Aleynikov is necessary "to assist the court in making its determination on the motion" to dismiss for legally insufficient evidence. Id. Thus the Court should, pursuant to CPL § 210.30(4), grant the motion to inspect and examine the minutes.

For the same reason, the Court should permit Aleynikov to examine the legal instructions given by the Court and the District Attorney. See CPL § 190.25(6) ("Where necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it, and such instructions must be recorded in the minutes."); People v. Doe, 178 Misc. 2d 908, 680 N.Y.S.2d 920, 922 (Sup. Ct. N.Y. County 1998) ("While a Grand Jury need not be instructed regarding elements of a crime with the same precision required for a petit jury, the prosecutor must nonetheless provide that body with enough information to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime.") (quotation markes omitted). When the People fail to inform the Grand Jury of a critical element of an offense; give insufficient guidance as to the substance of the crime that the Grand Jury is being asked to consider; or provide the Grand Jury with insufficient information to evaluate whether the defendant had engaged in a crime, these failures impair the integrity of the

Grand Jury proceeds and renders them defective. Doe, 680 N.Y.S.2d at 922 (dismissing indictment for such failures).

In light of the apparently flawed legal theory urged by the People, Aleynikov should be permitted to inspect the legal instructions given to the Grand Jury to better assist the Court in determining whether the Grand Jury proceedings were defective, thereby warranting dismissal of the Indictment. See CPL § 210.20(1)(c) (the court may dismiss an indictment on the ground that "[t]he grand jury proceeding was defective, within the meaning of section 210.35"); CPL § 210.35(5)(a grand jury proceeding is defective within the meaning of CPL § 210.20(1)(c) when it "fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result"); People v. Rivera, 161 Misc. 2d 237, 612 N.Y.S.2d 782 (Sup. Ct. N.Y. County 1994) (granting defendant's motion to dismiss the indictment pursuant to CPL §§ 210.20(1)(c) and 210.35(5) where the Assistant District Attorney gave a confusing legal instruction in response to a question from the Grand Jury).

B. The Statement And Other Evidence The FBI Obtained From Aleynikov Should Be Suppressed At Trial As Fruit Of The Poisonous Tree Because The FBI Arrested Aleynikov Without Probable Cause.

1. Aleynikov's Arrest Was Without Probable Cause And Thus Violated The Federal And State Constitutional Prohibitions Against Unreasonable Seizures.

As mentioned above, the FBI arrested Aleynikov without a warrant. The FBI described the arrest as "a probable cause arrest authorized by the United States Attorney's Office of the Southern District of New York." (Marino Aff., Ex. 6, 7/6/2009 FBI 302 at 1 (3513-2)).

The Fourth Amendment to the United States Constitution (made applicable to the states through the Fourteenth Amendment) and Article I, § 12 of the New York Constitution both require probable cause to justify an arrest. People v. Mothersell, 14 N.Y.3d 358, 900 N.Y.S.2d 715 (2010) (recognizing that the Fourth Amendment to the Federal Constitution is made applicable to the states by the Fourteenth Amendment); People v. Howard, 50 N.Y.2d 583, 590, 430 N.Y.S.2d 578 (1980) (recognizing that "the Fourth Amendment and its State counterpart (art I, § 12) protect [the defendant] from detention amounting to seizure unless there is probable cause"); People v. Keogh, 0493/2009, 2010 N.Y. Misc. LEXIS 6308, at *8 (Sup. Ct., Bronx Cty. Dec. 23, 2010) ("Both the Federal and New York State Constitutions require the police to have probable cause to make an arrest.") (citing U.S. Const. amend. IV; N.Y. Const. article 1,§ 12); United States v. Valentine, 539 U.S. 88, 93 (2d Cir. 2008) (a warrantless arrest must be supported by probable cause or it violates the Fourth Amendment).

Aleynikov's federal arrest was based on two separate mistakes of law: that his conduct violated the EEA and that his conduct violated the NSPA. (Marino Aff., Ex. 1, Criminal Complaint).[14] More specifically, with respect to the EEA, the FBI and the USAO believed that the source code Aleynikov allegedly stole was "related to or included in a product that is produced for or placed in interstate or foreign commerce" within the meaning of the EEA because it was related to or included in Goldman's Trading System, notwithstanding that the System itself was not, nor was it intended to be, licensed, sold or otherwise distributed in commerce. As the Second Circuit held, the Trading System was neither "produced for" nor

[14] The Criminal Complaint did not include a CFAA charge. The CFAA charge was added to the Indictment, but like the other charges, was based on a mistaken view of the law (as detailed above). Aleynikov, 737 F. Supp. 2d at 176.

"placed in" interstate or foreign commerce because Goldman had no intention of selling or licensing that system to anyone. Aleynikov, 676 F.3d at 82.

With respect to the NSPA, the FBI and the USAO erroneously claimed that Goldman's computer source code constituted "goods, wares or merchandise" within the meaning of the NSPA notwithstanding that (a) it was intangible and (b) every court to consider the question had determined that the theft and subsequent interstate transmission of purely intangible property is not conduct proscribed by the NSPA. The Second Circuit reversed Aleynikov's conviction on the NSPA offense because he took "purely intangible property embodied in a purely intangible format" and such a taking is beyond the scope of the NSPA. Aleynikov, 676 F.3d at 77-79.

A mistake of law cannot establish probable cause necessary to effect a lawful arrest under either the federal or the New York Constitution.[15] In Johnson v. Campbell, 332 F.3d 199 (3d Cir. 2003), the plaintiff brought an action under 42 U.S.C. § 1983 against the arresting officer, asserting that the officer had violated his constitutional rights by detaining and arresting him without cause and due to his race. 332 F.3d at 201. The officer argued that even if the plaintiff's action did not actually constitute disorderly conduct under the Delaware disorderly conduct statute, he reasonably believed that the plaintiff was committing a crime under Delaware law when he uttered profane words in public. Id. at 214. The officer asked the court to find that

[15] Although Aleynikov's arrest was executed by federal agents, because he is being prosecuted for violations of New York law, he is entitled to the search and seizure protections provided by New York law. People v. Grimminger, 71 N.Y.2d 635, 641, 529 N.Y.S.2d 55 (1988) (rejecting the People's assertion that federal law should apply because the warrant was issued by a federal magistrate and executed and stating, "Since defendant has been tried for crimes defined by the State's Penal Law, we can discern no reason why he should not also be afforded the benefit of our State's search and seizure protections").

probable cause may exist even if predicated on a flawed view of what is prohibited by the disorderly conduct statute. The Third Circuit disagreed, stating:

> This cannot be. While it is true that the standard for probable cause is less than the standard for conviction . . . we must still ask the question as to whether a reasonable officer would have had cause to believe that *a crime* was being committed. Campbell [the officer] believed that the simple act of speaking a profane epithet in public amounted to a criminal breach of the peace. He did not believe that the words needed to cause anyone to fight or become angry. Campbell was simply wrong about what Delaware law prohibits. He cannot now justify Johnson's arrest by arguing that, under his own erroneous understanding, *he* had probable cause to believe Johnson [the plaintiff] was committing a crime. Probable cause is objective, not subjective; essential to probable cause is that an officer would be justified in believing that an *actual offense* was being committed.
>
> Here, what Campbell believed Johnson had done — speak profane words in public — is not a crime, therefore Campbell could not have had probable cause to believe a crime was being committed. It is the same as if an officer, believing that a statute that prohibited crossing the street on a red light actually prohibited crossing the street at all times, arrested someone who crossed the street on a green light. No matter the strength of the evidence that the person arrested did in fact cross the street, the officer could not have had probable cause to believe that a crime was being committed, because crossing the street on a green light is simply not a crime.

Id. at 214-15 (emphasis in original); see also United States v. McDonald, 453 F.3d 958, 961-62 (7th Cir. 2006) (holding that a police officer's mistake of law could not support a reasonable suspicion or probable cause and stating that it makes no difference whether the officer holds an understandable or good faith belief that a law has been broken; "[a]n officer cannot have a reasonable belief that a violation of the law occurred when the acts to which an officer points as supporting probable cause are not prohibited by law");[16] United States v. Tibbetts, 396 F.3d

[16] Reasonable suspicion is a less exacting standard than probable cause. United States v. Sokolow, 490 U.S. 1, 7 (1989).

1132, 1138 (10th Cir. 2005) ("We have consistently held that an officer's mistake of fact, as distinguished from a mistake of law, may support probable cause or reasonable suspicion necessary to justify a traffic stop. [Citations omitted.] But we have also held that failure to understand the law by the very person charged with enforcing it is not objectively reasonable."); United States v. Chanthasouxat, 342 F.3d 1271, 1279 (11th Cir. 2003) ("holding that a mistake of law cannot provide reasonable suspicion or probable cause to justify a traffic stop" even where the statutes might be ambiguous); United States v. Twilley, 222 F.3d 1092, 1096 (9th Cir. 2000) ("[A] belief based on a mistaken understanding of the law cannot constitute the reasonable suspicion required for a constitutional traffic stop."); Harapat v. Vigil, 676 F. Supp. 2d 1250, 1263 n.6 (D.N.M. 2009) ("Only reasonable mistakes of fact, not reasonable mistakes of law, will leave a finding of probable cause intact.").

Similarly, a mistake of law, as opposed to a mistake of fact, will not support a reasonable suspicion or probable cause under New York law. See People v. Gonzalez, 88 N.Y.2d 289, 295, 644 N.Y.S.2d 673 (1996) ("the apparent authority of a third party to consent to a search of a suspect's personal effects must rest upon the police officer's reasonably held *factual* interpretation of the circumstances; it cannot be based on a mistaken view of the law") (emphasis in original); People v. Rose, 67 A.D.3d 1447, 889 N.Y.S.2d 789, 791 (4th Dep't 2009) (reversing judgment, vacating defendant's guilty plea, granting that part of the omnibus motion seeking to suppress all evidence obtained as the result of the stop of the defendant's vehicle, dismissing the indictment and remitting the matter to the county court for further proceedings where police officer stopped the defendant based on a mistaken belief that the mere flashing of lights violated the Vehicle and Traffic Law); Byer v. Jackson, 241 A.D.2d 943, 661 N.Y.S.2d

336, 338 (4th Dep't 1997) ("Where the officer's belief is based on an erroneous interpretation of law, the stop is illegal at the outset and any further actions by the police as a direct result of the stop are illegal"); 1-1 New York Search & Seizure § 1.02[1][a] (recognizing that while reasonable mistakes of fact are generally tolerated, an officer's mistake of law, no matter how reasonable, will not be excused).[17]

Accordingly, because Aleynikov's arrest was undeniably based on a mistake of law, his arrest was without probable cause and thus violated both the United States and the New York Constitution's prohibitions against unreasonable searches.

2. The Court Must Suppress Aleynikov's Post-Arrest Statements And The Evidence Obtained From Aleynikov's Person And His Home As Fruit Of His Unlawful Arrest And Detention.

As discussed more fully below, because Aleynikov's post-arrest statements, the seizure of a laptop and flash drive from his person and the seizure of a laptop and five computers from his home all flowed from his illegal arrest and detention, that evidence must be suppressed as fruit of the poisonous tree.

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[17] See also People v. Cole, 874 N.E.2d 81, 88 (Ill. App. Ct. 2007) (agreeing "with the majority of federal courts of appeal that a traffic stop based on a mistake of law is generally unconstitutional, even if the mistake is reasonable and made in good faith" and recognizing that "a police officer who mistakenly believes a violation occurred when the acts in question are not prohibited by law is not acting reasonably"); State v. Lacasella, 80 P.3d 975, 981 (Mont. 2002) (concluding that the observations made by an officer were not objectively grounded in Montana law because they were based on a misunderstanding of the law and therefore the investigatory stop was illegal and the evidence obtained subsequent to the stop should have been suppressed); State v. Anderson, 683 N.W.2d 818, 823-24 (Minn. 2004) (holding that "an officer's mistaken interpretation of a statute may not form the particularized and objective basis for suspecting criminal activity necessary to justify a traffic stop" and emphasizing that "whether made in good faith or not, the officer was mistaken in his interpretation of [Minnesota law], and therefore he lacked a particularized and objective basis for stopping [the defendant]" and the evidence obtained pursuant to that stop was properly excluded).

a. The Silver Platter Doctrine/The Exclusionary Rule – Background

Before the United States Supreme Court's landmark decision in Elkins v. United States, 364 U.S. 206 (1960), "federal officials routinely circumvented the exclusionary rule by accepting evidence illegally obtained by state officials and served up on a 'silver platter' to federal prosecutors." State v. Christensen, 244 Mont. 312, 317 (Mont. Sup. Ct. 1990). The Elkins Court abolished this practice, (known as the "silver platter doctrine"), holding that evidence obtained by state officers as the result of an unreasonable search and seizure, even without the involvement of federal officers, could not be introduced against the defendant over his timely objection in a federal trial. 364 U.S. at 208, 223.

One year after Elkins, the Supreme Court in Mapp v. Ohio, 367 U.S. 643, 655 (1961), extended the exclusionary rule to the states, holding that ***all*** evidence obtained by searches and seizures in violation of the United States Constitution was inadmissible in state court. As one court explained:

> It is now axiomatic that the Fourth Amendment exclusionary rule applies in all courts, regardless of who conducted the underlying investigation, as long as federal constitutional law governs. However, it is also fundamental that on adequate and independent grounds, state courts are free to interpret their own laws and constitutions in order to impose more restrictive Fourth Amendment requirements than are federally mandated.

United States v. Miller, 382 F. Supp. 2d 350, 363 (N.D.N.Y. 2005) (citing, inter alia, Arkansas v. Sullivan, 532 U.S. 769, 772 (2001), and People v. Scott, 79 N.Y.2d 474, 495-97, 583 N.Y.S.2d 920 (1992)); see also People v. Weaver, 12 N.Y.3d 433, 445, 882 N.Y.S.2d 357 (2009)).

b. The Illegally Obtained Evidence Must Be Suppressed Under The Fruit Of The Poisonous Tree Doctrine.

As an extension of the exclusionary rule, the "fruit of the poisonous tree" doctrine generally requires suppression of evidence that has been obtained as the direct or indirect result of an unlawful arrest or seizure. See People v. Gethers, 86 N.Y.2d 159, 161-62, 630 N.Y.S.2d 281 (1995) ("Generally, when the police have acted illegally, evidence which 'has been come at by exploitation of that illegality' should be suppressed" (quoting Wong Sun v United States, 371 US 471, 488 (1963)); People v. Martinez, 37 N.Y.2d 662, 669-70, 376 N.Y.S.2d 469 (1975) (recognizing that the "fruit of the poisonous tree" is an extension of the "fruit of the poisonous tree" doctrine"); 1-1 New York Search & Seizure § 1.01[5][a] ("Evidence obtained as an indirect result of a *Fourth Amendment* violation is inadmissible under the 'fruit of the poisonous tree' doctrine. The doctrine, first enunciated by Justice Frankfurter in *Nardone v. United States*, [footnote omitted] precludes the use of evidence that would not have been obtained had the illegal search or seizure not occurred."); United States v. Valentine, 591 F. Supp. 2d 238 (E.D.N.Y. 2008) ("It is well-settled that evidence obtained pursuant to an unlawful seizure or search must be suppressed as the fruit of the poisonous tree." (citing Wong Sun, 371 U.S. at 484-85); United States v. Graham, 08 Crim-6295L, 2009 U.S. Dist. LEXIS 109655, at *15 (W.D.N.Y. Nov. 23, 2009) ("As an extension of the exclusionary rule, the court also must suppress all 'fruit of the poisonous tree,' that is, evidence acquired directly or indirectly as the result of an illegal search or arrest." (citing Wong Sun, 371 U.S. at 484).

New York recognizes three doctrinal exceptions to this general rule: (1) independent source; (2) inevitable discovery; and (3) attenuation. Gethers, 86 N.Y.2d at 162; see also 1-1 New York Search & Seizure § 1.01[5][a] ("In New York, courts have adopted the following

three exceptions: (1) inevitable discovery; (2) attenuation; and (3) independent source.").[18] None of the three exceptions is applicable here.

Under the attenuation doctrine, evidence may be admitted at trial if it was acquired by means "'sufficiently distinguishable to be purged of the primary taint.'" Martinez, 37 N.Y.2d at 666 (quoting Wong, 371 U.S. at 488). Although voluntariness is an important factor considered in the attenuation determination, it is by no means dispositive. People v. Borges, 69 N.Y.2d 1031, 1033, 517 N.Y.S.2d 914 (1987). Rather, the court must consider "a variety of factors, including but not limited to the temporal proximity of the consent to the arrest, the presence or absence of intervening circumstances, whether the police purpose underlying the illegality was to obtain the consent or the fruits of the search, whether the consent was volunteered or requested, whether the defendant was aware he could decline to consent, and particularly, the purpose and flagrancy of the official misconduct." Id. The relevancy of the factors vary from case to case and "each case must be individually considered on the particular facts and circumstances presented and the determination made with due regard for the purposes sought to be served by the exclusionary rule." Id.[19]

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[18] New York has rejected the "good faith" exception established by the Supreme Court in United States v. Leon, 468 U.S. 897 (1984). See People v. Bigelow, 66 N.Y.2d 417, 426-27, 497 N.Y.S.2d 630 (1985) (declining on State constitutional grounds to apply the Leon good faith exception).

[19] The attenuation analysis under federal law is similar. The Supreme Court in Brown v. Illinois, 422 U.S. 590 (1975), set forth four factors for determining whether sufficient attenuation exists between an unlawful arrest and the subsequent discovery of evidence: (1) whether a *Miranda* warning was given; (2) the temporal proximity of the illegal stop and the alleged consent; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the illegal stop. 422 U.S. at 603-04.

Considering these factors in this case, it cannot be said that Aleynikov's consent to search his person and his home and his post-arrest statements were sufficiently attenuated from his illegal arrest and detention to purge the taint of that illegality.

1. Voluntariness

With respect to the voluntariness factor, there is no evidence that upon his arrest, Aleynikov was advised of his rights to remain silent or to counsel. Approximately one hour after Aleynikov's unlawful arrest, he was advised of his Miranda rights. (Marino Aff., Ex. 6, 7/6/2009 FBI 302 at 1 (3513-2).) Aleynikov was advised of his rights to counsel again before the official interrogation began and, according to SA McSwain, Aleynikov wanted to be interviewed. (Marino Aff., Ex. 4, 12/7/2010 Trial Tr. (McSwain) at 1124:9-22.) However, approximately 20 minutes into the interrogation and before he signed a written statement, Aleynikov's then counsel, Sabrina Shroff, AFD, contacted the Government, provided notice that she represented Aleynikov and asked that any questioning of him be terminated. (Id., Ex. 5, 7/4/09 Tr. at 18:13-19.) AUSA Facciponti informed her that, despite her communication with him, the Government did not consider Aleynikov to be represented. (Id. at 18:20-22.) As a result, AUSA Facciponti refused Ms. Shroff's request to terminate questioning and permitted the questioning to continue. There is no evidence that, during the interrogation, Aleynikov was advised that Ms. Shroff was appointed to represent him or that he was permitted to speak with Ms. Shroff. Nor is there evidence that Aleynikov was advised that Ms. Shroff had asked the Government to terminate the interrogation.

With respect to the search of Aleynikov's person, SA McSwain's testimony is contradictory: at one point he testified consent was requested, but at another point he suggested

that the search was done without consent because the FBI (mistakenly) believed that consent was unnecessary because it was a "search incident to a lawful arrest." (Marino Aff., Ex. 7, 2/11/2010 Grand Jury Tr. (McSwain) at 51:13-19)(3513-18); Ex. 4, 12/7/2010 Tr. (McSwain) at 1120:13-24.) Additionally, there is no evidence in the present record that Aleynikov was made aware of his right to refuse consent to search his person.

With respect to the search of Aleynikov's home, consent was not volunteered, but requested. (Marino Aff., Ex. 4, 12/7/2010 Trial Tr. (McSwain) at 1118:18-19.) Although the consent to search form signed by Aleynikov states that he was advised of his right to refuse consent (Marino Aff., ¶ 18.), there is no evidence in the record that Aleynikov was verbally made aware of his right to refuse consent. Overall, the voluntariness factor weighs in Aleynikov's factor.

2. Temporal Proximity and Intervening Circumstances

The temporal proximity and intervening circumstances factors weigh heavily in Aleynikov's favor. Within minutes after his flight from Chicago landed, (1) Aleynikov was confronted by 3 of the 5 FBI agents who participated in the arrest; (2) he was arrested; and (3) consent to search his person (depending on which version of SA McSwain's testimony is accepted) was either given at that time or was not given.[20] (Marino Aff., Ex. 6, 7/6/2009 FBI 302 at 1 (3513-2); Ex. 7, 2/11/2010 Grand Jury Tr. (McSwain) at 51:13-19); Ex. 6, 7/3/2009 e-

[20] During trial, SA McSwain contradicted his grand jury testimony by claiming that he conducted a "search incident to arrest" and not pursuant to Aleynikov's consent. (12/7/2010 Trial Tr. (McSwain) at 1120:13-24; (2/11/2010 Grand Jury Tr. (McSwain) at 51:13-19)) Although "a search incident to a ***lawful*** arrest" where there exist exigent circumstances constitutes an exception to the warrant requirement, People v. Hernandez, 40 A.D.3d 777, 836 N.Y.S.2d 219, 220 (2d Dep't 2007), the search of Aleynikov at the airport was a search incident to an ***unlawful*** arrest (as discussed above).

mail from SA McSwain (3513-5); Ex. 6, 7/3/2009 e-mail from SA McSwain (3513-6); Ex. 4, 12/7/2010 Trial Tr. (McSwain) at 1118:1-14). Consent to search Aleynikov's home was given a mere 11 minutes or so later. (Id., Ex. 6, 7/3/2009 e-mail from SA McSwain (3513-7); Ex. 4, 12/7/2010 Trial Tr. (McSwain) at 1151:22-24).) Aleynikov's admission that he had a laptop and five computers at home was made approximately 15 minutes after his arrest. (Id., Ex. 6, 7/3/2009 e-mail from SA McSwain (3513-8).) Aleynikov was surprised to be arrested (Id., Ex. 4, 12/7/2010 Trial Tr. (McSwain) at 1155:11-20) and undoubtedly was intimidated by the presence of 5 FBI agents.

There were no intervening events between the time of Aleynikov's illegal arrest and the time he gave consent at the airport to search and to speak that purged the illegal taint of his arrest. Indeed, the consents and statements all occurred within a matter of minutes of Aleynikov's unlawful arrest. See Valentine, 591 F. Supp. 2d at 247 (finding that the two factors — that (a) his wife's consent occurred immediately after the unlawful arrest and (b) there were no intervening events — weighed so heavily in the defendant's favor that the lack of a flagrant violation of the law did little to change the court's opinion that suppression was required); United States v. Delgado, 797 F. Supp. 213, 220-21 (W.D.N.Y. 1991) (suppressing evidence obtained by a consent search where consent was given not more than 30 minutes after an unlawful detention and not more than 45 minutes after initial encounter with federal agent; no intervening events occurred; and the defendant was not advised of his Miranda rights); United States v. Karogozian, 715 F. Supp. 1160, 1166 (D. Conn. 1989) (although after the illegal arrest, the defendant was informed of his rights and was advised as to the meaning of his consent to

search, the consent was given within, at most, a few minutes of the illegal arrest and nothing intervened to purge the taint of the illegal arrest).

Similarly, there were no intervening events between Aleynikov's unlawful arrest and detention and his admissions during interrogation at the FBI office. While still under an illegal arrest, Aleynikov was transported to the FBI office (Marino Aff., Ex. 6, 7/6/2009 FBI 302 at 1 (3513-2) and presumably remained in the custody of one or more FBI agents the entire time he was detained (with the possible exception of bathroom breaks) and interrogated at the FBI field office. Although Aleynikov was permitted to briefly speak with his wife over the phone, the permission was given for the sole purpose of alerting her to the arrival of the FBI agents at their home to conduct a search. (Marino Aff., Ex. 4, 12/7/2010 Trial Tr. (McSwain) at 1123:2-9)) The Government did not provide Aleynikov with the opportunity to speak with his appointed counsel. See United States v. Ceballos, 812 F.2d 42, 50 (2d Cir. 1987) (finding that consents to search and statements were too closely connected in context and time to the illegal arrest to break the chain of illegality where the consents to search were given within a few minutes of the illegal arrest; immediately following the searches, the agents took the defendant to their field office for prolonged interrogation, which eventually led to his confession; and at no time during the interrogation at the field office did the defendant speak with anyone other than the agents).

The consent by Aleynikov's wife was likewise not sufficiently attenuated from his illegal arrest to purge the taint of the illegal arrest.[21] Approximately one hour after his unlawful arrest and while he was being unlawfully detained at the FBI field office (at some point after 10:15

[21] The attenuation analysis is appropriately applied to a consent given by one spouse following the arrest of the other spouse. See United States v. Maez, 872 F.2d 1444, 1453 (10th Cir. 1989); Valentine, 591 F. Supp. 2d at 244-45.

pm), Aleynikov called his wife and informed her that FBI agents would be coming to their home to conduct a search (Marino Aff., Ex. 4, 12/7/2010 Trial Tr. (McSwain) at 1123:2-9; Ex. 6, 7/6/2009 FBI 302 at 1 (3513-2); Ex. 6, Gov. Ex. 102.) The search team was immediately sent to the home; arrived at approximately 10:45 pm; did not knock; entered the home; and requested Mrs. Aleynikov to sign the consent to search form, which she did. (Id., Ex. 4, 12/7/2010 Trial Tr. (McSwain) at 1120:10-12; 1123:2-9.) Mrs. Aleynikov signed the consent form approximately 1 hour and 20 minutes after Aleynikov's unlawful arrest and with the knowledge that her husband was in the custody of the FBI. Although the consent to search form signed by Mrs. Aleynikov states that she had been advised of her right to refuse consent, there is no evidence in the present record that anyone verbally advised her of this right. Undoubtedly, Mrs. Aleynikov was shocked to learn that her husband (who had no criminal record) had been arrested and felt intimidated when the FBI search team entered her home late at night without knocking while she was home alone with the couple's three young daughters and asked her to sign a consent to search form. Under these circumstances, it cannot be said that the taint of Aleynikov's unlawful arrest was purged when Mrs. Aleynikov signed the consent to search form. See United States v. Maez, 872 F.2d 1444 (10th Cir. 1989) (holding that a wife's consent following the unlawful arrest of her husband was not sufficiently attenuated to purge the taint of the unlawful arrest where there were no intervening circumstances of any significance; the manner of arrest created a frightening scene; and she was holding her three month old baby at the time she signed the consent to search forms); see also Valentine, 591 F. Supp. 2d at 245-47.

3. The Purpose And Flagrancy Of The Official Misconduct.

The final factor — the purpose and flagrancy of the official misconduct — also weighs heavily in Aleynikov's favor. It is abundantly clear that the FBI/USAO's purpose underlying the illegal arrest and detention of Aleynikov was twofold: *first*, to immediately retrieve the source code for Goldman and *second*, to obtain a confession from Aleynikov. See Borges, 69 N.Y.2d at 1033 (recognizing as a relevant factor "whether the police purpose underlying he illegality was to obtain the consent or the fruits of the search"); People v. Biggs, 88 A.D.2d 960, 451 N.Y.S.2d 196, 199 (2d Dep't 1982) (finding that "since the confession was obtained during the course of an illegal detention by detectives, whose sole purpose was to obtain a confession, there was no attenuation and the confession must be suppressed"). In carrying out the illegal arrest and detention, the FBI and the USAO acted in flagrant disregard of Aleynikov's constitutional rights.

Goldman contacted the Government on July 1, 2009. (Marino Aff., Ex. 5, 7/4/2009 Detention Hearing Tr. at 33:8-9). Although it was incumbent upon the FBI and the USAO, as it is upon all law enforcement officials, "to make a thorough investigation and exercise reasonable judgment before invoking the awesome power of arrest and detention[,]" they failed to do so in this case. See Moore v. The Marketplace Restaurant, Inc., 754 F.2d 1336, 1346 (7th Cir. 1985). Instead, a mere two days later, the FBI arrested Aleynikov, without a warrant and pursuant to the USAO's authorization. Had the FBI and the USAO conducted a more thorough investigation before depriving Aleynikov of his liberty interest and his interest in being free from unreasonable searches, they would have realized that the exigency Goldman claimed to seize the computer code was a complete fabrication. See Bevier v. Hucal, 806 F.2d 123, 128 (7th Cir. 1986) ("A police officer may not close her or his eyes to facts that would help clarify the circumstances of

an arrest. Reasonable avenues of investigation must be pursued especially when, as here, it is unclear whether a crime had even taken place.").

Moreover, had the FBI and the Government taken the time to learn about the EEA and the NSPA before arresting Aleynikov for allegedly violating those statutes, they would have realized (as Aleynikov did after reviewing the charges in the Indictment and the Second Circuit ultimately found) that his conduct was not proscribed by either statute. In its haste to make an arrest, not only did the FBI/USAO not bother to obtain arrest or search warrants; they also did not bother to attempt to interview Aleynikov prior to his arrest. (Marino Aff., Ex. 6, 7/3/2009 e-mail from SA McSwain (3513-5); Ex. 6, 7/3/2009 e-mail from SA McSwain (3513-6); Ex. 4, 12/7/2010 Trial Tr. (McSwain) at 1118:7-8) Immediately after his arrest, the FBI seized the laptop and flash drive that Aleynikov had on his person and obtained his consent to search his home for any computers. (Id., Ex. 7, 2/11/2010 Grand Jury Tr. (McSwain) at 51:13-19) (3513-18); 7/3/2009 e-mail from SA McSwain (3513-7); Ex. 4, 12/7/2010 Trial Tr. (McSwain) at 1118:9-25, 1151:22-24).) A search team was then immediately sent to Aleynikov's residence to seize any and all computers. (Id., Ex. 4, 12/7/2010 Trial Tr. (McSwain) at 1123:2-8.) After the seizure, SA McSwain informed (presumably) AUSA Facciponti that the business license for Teza had issued on July 2, 2009 — just one day prior to Aleynikov's arrest — and that, according to Aleynikov, Teza did not even have computers yet. (Id., Ex. 6, 7/5/2009 McSwain e-mail (3513-15)). McSwain then stated that with a startup date of July 2, 2009, "we might have contained it." (Id.) Thus, it is clear that the FBI and the USAO were acting at the behest of Goldman to immediately retrieve the source code so that Aleynikov would not use it at his new employer, whom Goldman perceived as a competitor.

It is also clear that the FBI continued its illegal detention of Aleynikov for the sole purpose of obtaining a confession. During the interrogation, SA McSwain reported (presumably) to AUSA Facciponti: "Still getting confession now. He now admits to work on propriety [sic] data from goldman uploaded to svn." (Id., Ex. 6, 7/4/2009 e-mail from SA McSwain (3513-9).) In its quest to obtain a confession, the Government refused to honor the request of Aleynikov's then-counsel to stop questioning him. (Id., Ex. 6, 7/4/09 Tr. at 18:13-23.) This refusal amounted to a clear violation of Rule 4.2(a) of the New York Rules of Professional Conduct ("RPC"), which provides:

> a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

RPC 4.2(a). This rule is applicable in criminal cases to government attorneys and to non-attorney government law enforcement officers acting as a prosecutor's alter ego. United States v. Jamil, 707 F.2d 638, 645 (2d Cir. 1983). Indeed, this violation, in and of itself, serves as a basis for excluding the oral and written admissions made by Aleynikov during the course of the illegal detention. See United States v. Hammad, 858 F.2d 834, 840 (2d Cir. 1988) (holding that "in light of the underlying purposes of the Professional Responsibility Code and the exclusionary rule, suppression may be ordered in the district court's discretion").

When a "confession" from Aleynikov was ultimately obtained during the course of the illegal detention, SA McSwain stated: "Holy crap he signed a confession." (Id., Ex. 6, 7/4/2009 e-mail (3513-13)). In sum, the record clearly indicates that the purpose of the official

misconduct was to obtain the fruits of the searches for Goldman and that the Government and the FBI acted in a flagrant disregard of Aleynikov's constitutional rights and its ethical obligations.

Accordingly, because the totality of the circumstances demonstrate that there was not a sufficient attenuation between the consents to search and the admissions and the illegal arrest and detention, the attenuation doctrine cannot be relied upon to avoid suppression of the computer evidence and Aleynikov's admissions.[22]

c. Suppression Of The Illegally-Obtained Evidence Will Further All Three Purposes Of The Exclusionary Rule.

The primary purpose of the exclusionary rule is to deter future unlawful police misconduct. As the Court of Appeals stated:

> Application of the exclusionary rule – the price paid by society in particular cases for the greater value of deterring future police wrongdoing – is exacted when, in the particular criminal trial, the prosecution has somehow exploited or benefited from its illegal conduct, when there is a connection between the violation of a constitutional right and the derivative evidence.

People v. Burr, 70 N.Y.2d 354, 362, 520 N.Y.S.2d 739 (1987). Another purpose of the rule is to "preserve the integrity of the judicial process from investigatory methods which violate constitutional limitations, State and Federal." Martinez, 37 N.Y.2d at 670. A third purpose of

[22] The inevitable discovery and independent source doctrines are likewise inapplicable. It is simply illogical to argue that Aleynikov would have inevitably confessed or inevitably would have voluntarily produced his computers. See State v. Davis, CA-93-06-007, 1994 Ohio App. LEXIS 324, at *16 (Ohio Ct. App. 1994) (recognizing that it was "illogical to argue that the state could ever show within a reasonable probability that a defendant would have inevitably confessed" and thus holding that the inevitable discovery rule was inapplicable to the confession). Similarly, it would be illogical to argue that the federal officials could ever show an independent source(s) of the verbal and written admissions that Aleynikov made during the course of his illegal arrest and detention and/or of the data contained on his own computers. See id. (recognizing that it was "illogical to argue that the state could ever show within a reasonable probability . . . . that a confession would have arisen independently of an illegal arrest" and thus holding that the independent source exception was inapplicable to the defendant's confession).

the rule is to ensure that "the State itself, and not just its police officers, respect the constitutional rights of the accused." People v. Payton, 51 N.Y.2d 169, 175, 433 N.Y.S.2d 61 (1980).

All three purposes would be furthered by the suppression of the evidence. First, there is no question that the federal officials benefitted from their illegal conduct because they were able to obtain critical evidence that was used against Aleynikov in securing a conviction and a harsh sentence, of which he served a year before winning a judgment of acquittal. Now, the People seek to introduce the illegally-obtained evidence at Aleynikov's state criminal trial and thereby exploit the violations of the United States and New York Constitutions perpetrated by their federal colleagues. Under these circumstances, application of the fruit of the poisonous tree doctrine would undoubtedly deter similar "silver platter" practices by state and federal officials in the future — practices the United States Supreme Court abolished in Elkins.

Second, suppressing the illegally-obtained evidence would "preserve the integrity of the judicial process" from hasty investigatory methods and the "silver platter" doctrine that violates both the United States and the New York Constitutions. See Martinez, 37 N.Y.2d at 670.

Third, application of the fruit of the poisonous tree doctrine under these circumstances would ensure that the State itself respects the constitutional rights of defendants such as Aleynikov. See Payton, 51 N.Y.2d at 175.

In conclusion, because the federal officials obtained Aleynikov's admissions and his computers in violation of his rights under both the United States and New York Constitutions to be free from unreasonable searches and seizures, that illegally-obtained evidence must be suppressed at any criminal trial of Aleynikov in this Court.

C. The Court Should Permit Aleynikov To Inspect And Test Goldman Sach's Trading System.

Aleynikov moves to inspect Goldman Sachs's Trading System and to make such tests and inspections as necessary to aid Aleynikov's expert witness who will be called in his defense at trial. Evidence may be made available to a criminal defendant in the discretion of the court prior to trial provided that it is "relevant, competent and outside any exclusionary rule." People v. Martinez, 15 Misc. 2d 821, 183 N.Y.S.2d 588, 591 (Cty. Ct. Sullivan Cty. 1959).

In order to counter the allegation that he unlawfully duplicated source code relating to the Trading System, the defense must have access to the Trading System itself. Because Aleynikov is charged with unlawful use of secret scientific material, he is "entitled to all materials comprising the trade secrets identified in the indictment in preparing [his] defense." United States v. Lee, No. 5:06 CR 0424, 2009 U.S. Dist. LEXIS 24972, at *7 (N.D. Cal. Mar. 18, 2009). Indeed, there could hardly be data more material and critical to the defense than the very "trade secret" at the heart of the prosecution. Only by comparing the Trading System to the files actually downloaded by Aleynikov will his defense expert be able to distinguish the non-proprietary materials Aleynikov downloaded from the arguably proprietary materials that may compose other portions of the Trading System. In addition, the defense needs access to the Trading System to analyze and explain how any code Aleynikov downloaded functioned within Goldman's system. Further, access to the entire Trading System is critically material to issues of intent because an analysis of the entire Trading System will enable the defense expert to testify that any discrete portions of the Trading System Aleynikov copied were of little value as compared to other components that he could have, but did not, copy.

Given the complexity of the Trading System, the defense requires access to it now to ensure that Aleynikov's expert has sufficient time to inspect and perform any tests and analysis prior to trial. As the Trading System is both relevant and material to the charges against Aleynikov and to his defense, Aleynikov respectfully requests that the Court grant him access to Goldman Sachs's Trading System at such date and time to be agreed upon by Aleynikov's defense counsel, the People, and Goldman. To the extent Goldman has concerns relating to "secret scientific material" contained in the Trading System, Aleynikov's counsel and expert can sign a confidentiality agreement and the Court may issue a protective order limiting access to the Trading System to Aleynikov's counsel and expert, and including any other provisions necessary to preserve the secrecy of the material. Cf. 18 U.S.C. § 1834 (providing that in a prosecution under the EEA, "the court shall enter such orders and take such other action as may be necessary and appropriate to preserve the confidentiality of trade secrets, consistent with the requirements of the Federal Rules of Criminal and Civil Procedure, the Federal Rules of Evidence, and all other applicable laws").

CONCLUSION

For the reasons set forth above, defendant Sergey Aleynikov respectfully requests that the Court dismiss the Indictment in its entirety. If the Court declines to dismiss the Indictment in the first instance, Aleynikov is entitled to examine the grand jury minutes, or to an in camera inspection of those minutes, pursuant to CPL § 210.30(2); to suppression of his post-arrest statement and evidence seized during several searches; and to discovery of Goldman's entire Trading System.

Dated: October 11, 2012
Chatham, New Jersey

Respectfully submitted,

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