UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	10 CR. 0096 (DLC)
	ECF Case
v.	
SERGEY ALEYNIKOV,	
Defendant.	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF POST-TRIAL MOTIONS OF DEFENDANT SERGEY ALEYNIKOV FOR A JUDGMENT OF ACQUITTAL PURSUANT TO FED. R. CRIM. P. 29 OR, IN THE ALTERNATIVE, A NEW TRIAL PURSUANT TO FED. R. CRIM. P. 33

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PRELIMINARY STATEMENT

Defendant, Sergey Aleynikov ("Aleynikov"), respectfully submits this reply memorandum of law in further support of his post-trial motions for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 or, in the alternative, for a new trial pursuant to Federal Rule of Criminal Procedure 33. In his opening memorandum of law (the "Moving Brief"), Aleynikov demonstrated that he is entitled to a judgment of acquittal because (1) the conduct charged in the Indictment and of which he was convicted does not constitute a violation of either the Economic Espionage Act (the "EEA") or the Interstate Transportation of Stolen Property Act (the "ITSPA"); and (2) the Government failed to present any evidence of several of the elements of those crimes. The Moving Brief further established that numerous evidentiary and procedural errors prior to and during the trial, as well as certain prosecutorial misconduct, constitute injustices warranting a new trial.

The Government's opposition memorandum (the "Opposition") offers nothing to contradict those undeniable conclusions. In its Opposition, the Government correctly notes that several but not all of the grounds on which Aleynikov moves for a judgment of acquittal or a new trial were the subject of prior rulings by this Court (whether brought on Aleynikov's or the Government's motion). (Opp. 19 n. 1.) The Government attempts to miscast those grounds as motions for reconsideration of the Court's prior rulings, which it argues should be denied because Aleynikov does not cite to any law or facts overlooked by the Court — the standard applicable to a motion for reconsideration. But Aleynikov is not seeking reconsideration of the Court's prior rulings. Rather, he is seeking a judgment of acquittal under Rule 29 or, alternatively, a new trial under Rule 33. Accordingly, the standard applicable to a motion for

reconsideration does not apply here. Rather, the relevant inquiry on his Rule 29 motion is whether, after viewing the evidence in the light most favorable to the Government and construing all possible inferences in its favor, "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" United States v. Amato, 15 F.3d 230, 235 (2d Cir. 1994) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). This Court must grant a judgment of acquittal if "'the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.'" United States v. MacPherson, 424 F.3d 183, 187 (2d Cir. 2005) (quoting United States v. Guadagna, 183 F.3d 122, 130 (2d Cir. 1999)). The relevant inquiry on Aleynikov's Rule 33 motion is "whether it would be a manifest injustice to let the guilty verdict stand." United States v. Bell, 584 F.3d 478, 483 (2d Cir. 2009) (quoting United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992)). In applying this test, the court must examine the totality of the circumstances, taking into account all the facts and circumstances. Id.

As made clear in Aleynikov's Moving Brief, given the evidence presented at trial and the Court's erroneous rulings in this case, Aleynikov is entitled to a judgment of acquittal or a new trial. As explained below, nothing in the Government's Opposition refutes the showing made in the Moving Brief. Accordingly, the Court should grant a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 or, in the alternative, a new trial pursuant to Federal Rule of Criminal Procedure 33.

LEGAL ARGUMENT

I. THE GOVERNMENT HAS FAILED TO REFUTE THAT THE GOLDMAN TRADING SYSTEM WAS NOT A PRODUCT PRODUCED FOR OR PLACED IN INTERSTATE OR FOREIGN COMMERCE AND THAT THERE WAS NO EVIDENCE PRESENTED THAT IT WAS.

As set forth in the Moving Brief, which incorporates the extensive argument set forth in Aleynikov's opening and reply briefs in support of his motion to dismiss the Indictment, for the Goldman Sachs high-frequency trading system to constitute a "product that is produced for or placed in interstate or foreign commerce" under the EEA, it must have been intended to move, or in fact have moved, in interstate or foreign commerce. (Moving Br. at 3-6.) Ruling without the benefit of oral argument, the Court denied Aleynikov's pretrial motion to dismiss Count One of the Indictment based on its conclusion that Goldman's trading system has a "strong and substantial connection" to interstate commerce, United States v. Aleynikov, No. 10 Cr. 96 (DLC), 2010 U.S. Dist. LEXIS 92101, at *32-33 (S.D.N.Y. Sept. 3, 2010) — a conclusion based, in turn, on the Court's determination that "the sole purpose for which Goldman purchased, developed, and modified the computer programs that comprise the Trading System was to engage in interstate and foreign commerce" in the form of trading activity, id. at *15.

But the EEA does not proscribe the theft of any trade secret having a "strong and substantial connection to interstate commerce," or the theft of any trade secret intended for the purpose of engaging in interstate or foreign commerce. Rather, it proscribes the theft of a trade secret included in or related to a product produced for or placed in interstate commerce. To state that an internal system designed to enable an American corporation to place its products in the stream of commerce is a product produced for or placed in interstate or foreign commerce is simply to rewrite the statute. Neither the executive branch of government, here represented by

the United States Attorney, nor the judicial branch, here represented by this Court, has the power to do so. Thus, the only rational basis for the Government's decision to charge Aleynikov with an EEA violation and the Court's pretrial ruling upholding that charge is that both the United States Attorney and this Court trusted that the evidence adduced at trial would somehow reveal that Goldman's trading system was, as the statute requires, actually "produced for or placed in interstate or foreign commerce" — in other words, produced with the intention that it would enter the stream of commerce. But that is not what the evidence revealed. To the contrary, there was no evidence whatsoever that Goldman's trading system was intended to move, or did in fact move, in interstate commerce. Count One must therefore be dismissed under Rule 29.

In its Opposition, the Government offers no new argument with respect to this issue and points to no evidence suggesting that Goldman's trading system was intended to or actually did move in interstate or foreign commerce. (Opp. at 17-19.) Instead, the Government argues that it "offered evidence supporting all of the allegations in the Indictment concerning the trading system at issue here, namely, that the trading system is comprised of different computer programs, some of which were acquired from Hull for $500 million and all of which have been further developed or modified by Goldman's computer programmers and that the trading system trades on exchanges in the United States and around the world." (Opp. at 18-19.) Stated differently, the Government's position is that the interpretation of the phrase "product that is produced for or placed in interstate or foreign commerce" adopted by the Court in denying Aleynikov's motion to dismiss — that (1) there need only be a "strong and substantial connection" between the purported product and interstate or foreign commerce; and (2) that such a connection exists where a trading system engages in trading on national and international exchanges — is correct and that it presented evidence of that interpretation. For the reasons set

forth in the Moving Brief, that position is simply wrong.

In so arguing, the Government implicitly acknowledges that it presented no evidence whatsoever that the trading system actually was or was intended to be distributed commercially or did or was intended to move in interstate or foreign commerce. Certainly, the fact that in or about 1999, Goldman purchased Hull Trading Company and its trading system does not establish or suggest as much. This is particularly so given the unequivocal statements by the Government in the Indictment and Goldman witnesses at trial that Goldman does not license or distribute the trading system, and indeed takes great efforts to prevent dissemination of that system or any portion thereof. Moreover, contrary to the Government's suggestion, Hull did not sell the programs that constitute its trading system to Goldman as if they were a commercial product. Rather, the testimony makes clear that Goldman purchased the entirety of Hull Trading Company, which owned a proprietary trading system. (12/1/10 Tr. at 339:20-25, 402:19-22, 403:1-19, 445:18-446:2, 449:9-14.) Goldman's purchase of a company that possessed a trading system does not transform Goldman's trading system, which it disclaims having ever licensed or disseminated, into a product that actually is or is intended to be commercially distributed.

In sum, for the reasons set forth in the Moving Brief, because the Government has not presented any evidence that Goldman Sachs's trading system was intended to or did move in interstate or foreign commerce, it has not established that the system is a "product that is produced for or placed in interstate or foreign commerce." Accordingly, Aleynikov is entitled to a Judgment of Acquittal on Count One of the Indictment pursuant to Federal Rule of Criminal Procedure 29.

II. THE GOVERNMENT HAS FAILED TO ESTABLISH THAT IT INTRODUCED ANY EVIDENCE OF A MARKET FOR THE SOURCE CODE ALEYNIKOV WAS CHARGED WITH HAVING STOLEN.

In his Moving Brief, Aleynikov demonstrated that he is entitled to a Judgment of Acquittal on the Second Count of the Indictment because the Government failed to introduce evidence of a market for the computer source code Aleynikov was charged with having stolen, as required by the ITSPA. (Moving Br. at 9-13.) Specifically, Aleynikov demonstrated that the Government introduced evidence not of a market for source code for integrated components of a proprietary, custom-designed trading system — what Aleynikov was charged with stealing — but of (1) Goldman's acquisition of Hull Trading Company; and (2) the availability of off-the-shelf components created by third-party vendors for inclusion in a wide array of trading systems. (Id.)

The Government's arguments to the contrary are unavailing. First, as support for its contention that Goldman's acquisition of Hull Trading Company is relevant evidence of a market for the code allegedly stolen by Aleynikov, the Government notes simply that the Court previously denied Aleynikov's motion in limine to preclude introduction of evidence of a market for entire high-frequency trading systems. But, as demonstrated in the Moving Brief, the Court's denial of that motion was clearly erroneous. Second, the Government characterizes as "preposterous" Aleynikov's argument that the availability of generic, interchangeable, off-the-shelf components is irrelevant to whether there is a market for source code for the integrated and system-specific components of a proprietary system such as Goldman's. (Opp. at 31.) The Government provides no explanation or analysis as to the purported relevance of such evidence, which it asserts is self evident: "Of course the existence of a market for commercially-made computer software that performs a function similar to computer software stolen by the defendant

is *relevant* to determine whether a market exists for the stolen property." (Id.)

As demonstrated in the Moving Brief, there is a significant difference between mass-produced, off-the-shelf components and custom source code for the integrated components of a proprietary trading system. Off-the-shelf components are designed and built by third-party vendors to be easily inserted into a broad array of trading systems with little or no modification. As with other commercially available computer components, they are sold or licensed with warranties and representations and with service and technical support from the vendor. By contrast, source code for the integrated components of a specific proprietary system are designed to fit and operate efficiently and effectively within that system; they are not created to be easily inserted and operated in a variety of different systems. Moreover, such custom source code will almost certainly not have the same warranties, representations and technical support as off-the-shelf components. Thus, contrary to the Government's assertion, the fact that commercial products are available is irrelevant to whether there is a market for code to the *sui generis* components of a proprietary, confidential trading system.

The Government contends that Aleynikov's argument fails because some of the components he is charged with having stolen "had little or no dependencies, which means that they could, similar to commercially-available products, be easily integrated into another system." (Opp. at 32 .5.) The Government, however, mischaracterizes the record as to the meaning of the term "dependencies." As Goldman employee Nuveen Kumar explained, "[a] dependency in the software context is when one piece of software requires another piece of software to function." (12/7/10 Tr. at 1040:5-12.) Although Kumar testified that it would be easier for a competitor to use a component that had no dependencies than one with several dependencies, (id.), he most certainly did not testify that a component with no dependencies could "be easily integrated into

another system" or that such a component would have the same broad application as an off-the-shelf product. Indeed, even proprietary components with few or no dependencies have nonetheless been designed to perform in a specific manner and to provide specific results within a specific system.

The Government further argues that Aleynikov "deliberately misapprehends the facts of this case" in contending that "'trading firms build the components of their trading systems in one of two ways: (1) they design and build custom, integrated components from scratch . . . or (2) they purchase off-the-shelf, stand alone components from third-party vendors." (Opp. at 31 (quoting Moving Br. at 13-14)). The Government argues that Aleynikov's argument ignores Goldman's purchase of Hull Trading Company and the extraordinary Benjamin Van Vliet's testimony that he "has been hired by trading firms to develop custom-made components for those company's high-frequency trading systems." (Id.) As explained above, however, Goldman's acquisition of Hull does not suggest the existence of a market for the type of source code Aleynikov is alleged to have stolen. Further, that firms may hire outside programmers to design custom components (rather than have their employees perform those tasks) has no bearing on whether there is a market for the source code for those custom components.

In short, the Government has failed to refute Aleynikov's showing that there was no evidence introduced at trial of a market for the allegedly stolen source code. Accordingly, Aleynikov is entitled to a judgment of acquittal as to the Second Count of the Indictment.

III. THE GOVERNMENT HAS FAILED TO POINT TO ANY EVIDENCE THAT ALEYNIKOV INTENDED TO CONVERT GOLDMAN'S SOURCE CODE TO HIS OR ANOTHER'S ECONOMIC BENEFIT OR THAT HE INTENDED TO OR COULD INJURE GOLDMAN.

In his Moving Brief, Aleynikov demonstrated that, with respect to the EEA count, the

Government was required to prove two intent elements: (a) that he intended to convert the source code to the economic benefit of himself or another; and (b) that he intended to or knew that his actions would injure Goldman. (Moving Br. at 13 (citing 18 U.S.C. § 1832(a)(2).) Aleynikov further demonstrated that the Government did not introduce any evidence of either intent element, as (1) the undisputed evidence was that, although Aleynikov downloaded both proprietary and open source code, he intended to use only the open source code; and (2) there was no evidence that Aleynikov intended to or could harm Goldman by taking its proprietary code.[1] (Id. at 13-17.)

The Government's arguments to the contrary are unavailing. First, the Government argues that Aleynikov benefitted economically from his purported theft because his total

[1] The Government contends that Aleynikov's reliance on United States v. Shiah, No. CR 06-92, 2008 U.S. Dist. LEXIS 11973 (C.D. Cal. Feb. 19, 2008), with respect to his lack of intent argument is misplaced because there was no evidence in that case that Shiah (1) "took steps to clear evidence" from his employer's laptop that he had accessed thousands of company files; or (2) had distributed trade secret information while working at his new employer. (Opp. at 28.) This case differs, according to the Government, because Aleynikov hid his conduct by encrypting his uploads and deleting his bash history and then cosmetically changed and uploaded two files to Teza's code repository. (Id.) But, as the record demonstrated (directly contrary to the Government's trial theory) had Aleynikov wanted to conceal his copying of code from Goldman's system, he could simply have used a USB drive, as he had administrative access rights to the computer system. (12/2/10 Tr. at 562:10-18 (Schlesinger).) By copying the files to a USB drive, Aleynikov would have completely avoided the file uploads, the records of which led to the discovery of his conduct in the first place. (11/30/10 Tr. at 91:6-94:2 (Yanagisawa).) Further, the two files the Government focuses on that Aleynikov uploaded to Teza's system were generic and contained open source code or did not otherwise constitute trade secrets. (12/2/10 Tr. at 603:21-605:10 (Schlesinger) (stating that the atomic program looks similar to boost open source programs and is not specific to high frequency trading); 12/6/10 Tr. at 884:1-11 (Kosofsky) (the files uploaded by Aleynikov were generic); 12/7/10 Tr. at 1062:3-8 (Kumar) (stating that atomic was based on open source). Thus, the case is not factually distinct. The Government also argues that Shiah is inapplicable because that case was a bench trial, which involves a different standard of review than is presented on this Rule 29 motion. (Opp. at 29 n.4.) Aleynikov does not cite Shiah to suggest that the Court can consider the record evidence de novo, but to illuminate the issue of intent at the heart of this case.

compensation at Teza was going to be three times that which he had made the previous year at Goldman. (Opp. at 20-21.) The record evidence, however, demonstrates indisputably that the total compensation Teza agreed to pay Aleynikov had absolutely nothing to do with his possession of the source code he downloaded from Goldman Sachs. In fact, Teza's CEO, Misha Malyshev, testified that he had no knowledge that Aleynikov had copied and downloaded code from Goldman's system and that he would have fired Aleynikov immediately if he had suggested using Goldman's code. (12/6/10 Tr. at 848:25-849:10 (Malyshev).) Rather, Malyshev explained, Aleynikov's compensation package was the result of his unique skill set and his readily evident expertise; Aleynikov's ability to drive a hard bargain; and Malyshev's own poor negotiating. (Id. at 799:17-22.)

Second, the Government argues that Aleynikov would have benefitted economically from his alleged theft because his Teza profit sharing units were contingent on the company being successful and his continued employment was contingent on his performance. (Opp. at 21.) As an initial matter, the possible future value of Teza profit sharing units and the length of Aleynikov's tenure at Teza (as well as the effect his possession of Goldman code might have had on both of those issues) are far too speculative to support a finding of economic benefit. See S. Rep. No. 104-359 at 14 (noting that the purported "benefit" cannot be abstract). More importantly, Malyshev made abundantly clear that old, second-hand source code from Goldman's preexisting system would have been of absolutely no use to him, as he was attempting to build from scratch the fastest and most successful trading system possible based on the most cutting-edge technology available. (12/6/10 Tr. at 845:1-5 (Malyshev).) Thus, there was no evidence that Aleynikov would have been able to utilize Goldman's proprietary code to make Teza more profitable and himself more successful.

Third, the Government argues that Teza would have benefited economically from Aleynikov's purported theft of Goldman's code because that code contained a "substantial part of the infrastructure" for Goldman's trading system and Teza did not have a trading system infrastructure when Aleynikov was hired. (Opp. at 22-23.) Thus, the Government reasons, Aleynikov would have been able to save Teza "months, if not years, of cost development" by using Goldman's code to develop Teza's infrastructure. But the evidence at trial was that Teza and Malyshev had no interest in using Goldman's code and would not have taken it even if Goldman was giving it away. (12/6/10 Tr. at 845:1-5 (Malyshev).) Malyshev explained that his goal was and is to build the fastest, most efficient and most profitable trading system in the world, a goal that he cannot accomplish using old code from another company's system. (Id.) Viewed in that context, the Government misses the mark in arguing that Teza would have benefited from Aleynikov's use of Goldman's code because doing so would have reduced development time. Even if use of Goldman's code could have reduced the time necessary to build a trading system, it would not have furthered Teza's goal — to build the best and most profitable system in the world — in any way whatsoever. Teza was not interested in getting to the market as quickly as possible with whatever system it could cobble together, but rather with getting to the market with the best system ever created. Put differently, Teza would not have benefited in the least from cutting development time by a few months because that saved time would have resulted from using old code that, by definition, would not serve its goal of creating the best system possible.

Fourth, the Government maintains that evidence introduced at trial established that Aleynikov intended to and knew that his actions would harm Goldman, as several witnesses "testified that companies engaged in high-frequency trading protect the confidentiality of their

systems for fear of losing any competitive advantage they may have over other firms." (Opp. at 23.) But, as the testimony cited by the Government makes clear, a trading firm's abstract concern that it could somehow be disadvantaged by disclosure of any aspect of its trading system does not establish that Aleynikov could have harmed Goldman unless his new firm intended to use the exact same trading strategies as Goldman. For example, the Government cites the following testimony of Paul Walker as evidence that Goldman could be harmed by the use of its code by another firm:

> I believe that company could have several forms of advantage. They would have the intellectual property that we have placed into that system available to them so they could skip decades of work. They could see what our intent and our algorithms were, and our business logic, so they can understand how we would make prices or generate trades. And they would have access to the infrastructure parts of our software, which have years of experience of making it work, and they would have to skip developing that experience themselves.

(Opp. at 24 (quoting 12/1/10 Tr. at 347:12-20 (Walker).) But Walker's opinion as to the possible benefits some hypothetical competitor might gain from having Goldman's code — which would not, as explained above, include Teza — does not speak to any corresponding harm to Goldman. As the Government notes, Walker later speculated that Goldman "would at least have the possibility of losing market share," but he admitted that that would be the case only if the company using Goldman's code was "generating the same prices and trades as we were." (Id. quoting 12/1/10 Tr. at 347:24-348:5 (Walker).) There was obviously no evidence whatsoever that Teza intended to do so.

The Government cites to similar testimony by Adam Schlesinger in which he speculated about possible harm Goldman could suffer from another company's use of its code. (Opp. at

24.) Schlesinger's testimony makes clear that the theoretical harms of which he speaks could only possibly be suffered if the other company was an actual competitor of Goldman Sachs — i.e., a firm competing for the same investment opportunities.[2] (Id. (quoting 12/1/10 Tr. at 479:21-480:9 (Schlesinger).) As demonstrated in the Moving Brief, however, there was no evidence introduced at trial as to Goldman's strategies and the evidence established that Teza had no strategies at the time of Aleynikov's alleged theft.[3] (Moving Br. at 16-17.) As a result, there was no evidentiary basis on which the jury could have concluded that Aleynikov intended or even had the ability to harm Goldman by taking and using its code.

Finally, the Government contends that Aleynikov bases his argument that Goldman could have been harmed by the alleged theft of its source code only if Teza used the same trading strategies on "a single statement by Benjamin Van Vliet having to do with options trading." (Opp. at 26.) As an initial matter, the statement of Van Vliet to which Aleynikov cites — "if you are implementing the exact same strategy as I am, you're going to be there every time I am reaching for the cookie jar" (12/2/10 Tr. at 699:22-24 (Van Vliet)) — expressly relates to non-options trading. Further, because Van Vliet was the Government's expert on high-frequency trading, his statements on the issue of harm to Goldman's high-frequency trading business are particularly relevant. Finally, Van Vliet was not the only Government witness to support

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2 The Government cites to testimony by Malyshev and Teza employee Damien Kosofsky regarding the reasons trading firms keep their systems and strategies secret. (Opp. at 25.) Those vague statements about the possibility of giving competitors an advantage do not constitute any evidence that Goldman could have been harmed by Aleynikov's conduct.

3 As another example of testimony evidencing potential harm to Goldman, the Government cites to Konstantin Shakhovich's testimony about the theoretical value ("TV") library. But, because the TV library is a component used in trading options and Maylshev testified that Teza does not trade options, Shakhovich's testimony about the TV library is entirely irrelevant. (12/6/2010 (Malyshev) Tr. at 787:22-25.)

Aleynikov's no harm argument, as noted above; the testimony of various Goldman employees illustrates that Goldman could only have been harmed if another firm used its code to engage in the same trading strategies.

IV. THE GOVERNMENT HAS FAILED TO REFUTE THAT THE EVIDENCE ADMITTED AT TRIAL MADE IT IMPOSSIBLE FOR ANY RATIONAL JURY TO FIND ALEYNIKOV GUILTY ON ITS CORE THEORY.

In his Moving Brief, Aleynikov demonstrated that the evidence presented at trial completely vitiated the Government's core theory that Aleynikov stole Goldman's proprietary code to assist him in developing a trading system for Teza. (Moving Brief at 17-21.) Specifically, Aleynikov demonstrated that the Government's theory had been wholly discredited by evidence establishing that: (1) open source code was embedded in the code taken by Aleynikov; (2) Teza did not want or need Goldman's code; (3) although Aleynikov brought Goldman code with him to a meeting at Teza's offices on July 2, 2009, he did not at that meeting, or any time thereafter, suggest that he intended to bring Goldman code to Teza or discuss the Goldman code; and (4) although Aleynikov received a handsome compensation package from Teza, Malyshev made clear that he agreed to Aleynikov's salary demand not because he expected Aleynikov to bring Goldman's unwanted code to Teza, but rather because Aleynikov was a very talented candidate and Malyshev did not do a very good job of negotiating. (Id.)

Although the Government counters in its Opposition that the trial proof "is more than sufficient to support the jury verdict," (Opp. at 32), the evidence to which it points does not support that argument. First, the Government argues that there is no dispute that the files copied by Aleynikov contained proprietary code belonging to Goldman. (Id.) But, as Aleynikov argued

in his Moving Brief, the critical fact — which the Government does not dispute — is that the download did not consist entirely of Goldman's proprietary code, but instead included open source code. As Aleynikov's initial papers explained, the very existence of that open source code makes it impossible to conclude beyond a reasonable doubt that Aleynikov intended to steal proprietary code.

Second, the Government argues that "the overwhelmingly suspicious manner in which the defendant uploaded the code from Goldman Sachs" supports a finding of intent to steal. (Opp. at 34.) In that regard, the Government claims that Aleynikov found a website that was not blocked by Goldman; ran a script to copy and encrypt certain files; and then deleted his encryption program, password and bash history after uploading the files, all in an effort to cover his tracks. (Id.) But that argument is refuted by the undisputed fact (as noted above) that Aleynikov, a sophisticated computer programmer, could have simply used a USB drive, rather than his chosen method, to obtain the subject files. (12/2/10 Tr. at 564:3-17 (Schlesinger).) Had he done so, Aleynikov would not have had to upload the files and thus would not have generated the upload records that resulted in Goldman's discovery of his actions. (11/30/11 Tr. at 91:6-94:2 (Yanagisawa).) That Aleynikov declined to use an easier copying method that was undoubtedly known to him and that, more importantly, would have avoided the upload records evidencing his conduct undercuts the Government's suggestion that his half-hearted efforts at concealment were evidence of criminal intent. That is particularly so given the trial evidence as to Aleynikov's immediate explanation to the arresting officers that he attempted to conceal his downloads because he knew they ran afoul of Goldman's expansive confidentiality policies.

Third, the Government argues that the jury could have inferred intent to steal from the evidence that Aleynikov made "cosmetic" changes to two files before uploading them to Teza's

repository. (Opp. at 35.) As demonstrated above, the two files at issue were fairly mundane programs and/or contained open source material, and certainly could not be characterized as trade secrets. (12/2/10 Tr. at 603:21-605:10 (Schlesinger) (stating that the atomic program looks similar to boost open source programs and is not specific to high frequency trading); 12/6/10 Tr. at 884:1-11 (Kosofsky) (the files uploaded by Aleynikov were generic); 12/7/10 Tr. at 1062:3-8 (Kumar) (stating that atomic was based on open source)). Thus, the fact that Aleynikov put them in Teza's repository actually supports his contention that his intent was to use only the open source material contained in his downloads.

Fourth, the Government argues that if Aleynikov was really only interested in obtaining open source code, the "most logical way" for him to obtain such programs would have been to go back to the internet to get them. (Opp. at 35-36.) This contention is directly contrary to the testimony of Aleynikov's expert, Dr. Benjamin Goldberg. Specifically, Dr. Goldberg explicitly testified that Aleynikov's intended course of action — downloading entire directories from Goldman's system so that he could later separate out the open source code from the proprietary code — was a logical and efficient manner in which to collect the open source code at issue. (12/8/10 Tr. at 1333:2-7 (Goldberg).) In fact, as Dr. Goldberg opined, proceeding in that fashion was the only way to obtain modifications to the open source code. (Id. at 1359:17-1360:21 (Goldberg).)

Fifth, the Government claims that Aleynikov was going to be under "intense pressure" at his new job, citing as support a June 1, 2009 email from Malyshev to various Teza employees, including Aleynikov. (Opp. at 36.) But Malyshev testified that the email was intended as nothing more than a pep talk designed to excite Teza's staff about their new venture. (12/8/10 Tr. at 824:5-827:6 (Malyshev).) As a result, the fact that Aleynikov conducted the subject

downloads shortly after he received the email is of no moment.

Sixth, the Government argues that the jury could have considered the permanent injunction that was entered against Aleynikov in the "Fortune Wheel" case as evidence of intent. (Opp. at 36-37.) As explained in the Moving Brief, the Court erred in admitting that evidence in the first place. That Aleynikov voluntarily entered into a stipulated injunctive order (a) on dramatically different facts; (b) in a civil infringement case; (c) years before the conduct at issue has no bearing whatsoever on his intent in this case.

In sum, the Government has failed to contradict that the evidence presented at trial vitiated its core theory, thus making it impossible for any rational jury to find Aleynikov guilty beyond a reasonable doubt.

V. THE GOVERNMENT HAS FAILED TO COUNTER ALEYNIKOV'S SHOWING THAT THE COURT ERRED BY CLOSING THE COURTROOM AND IN THE MANNER IN WHICH IT CARRIED OUT THOSE CLOSINGS.

The Moving Brief demonstrated that each instance in which the Court closed the courtroom during trial at the Government's behest was erroneous and constituted a fundamental violation of Aleynikov's First and Sixth Amendment rights to a public trial. (Moving Br. at 31-35.) Specifically, the Moving Brief established that the closures were constitutional violations because the Government did not make a sufficiently specific and substantive showing to meet the exacting standard set forth in well-settled case law and thus there was not a sufficient basis for the Court to determine that closing the courtroom was warranted and appropriate. (Id.)

In its Opposition, the Government's only response is to dismissively characterize Aleynikov's arguments as to the inadequacy of the Government's proffers as "conclusory." (Opp. at 40.) Aleynikov's brief, however, devotes four pages to explaining the deficiencies of

the Government's presentations. The reasons set forth in the Moving Brief as to why the closure of the courtroom violated Aleynikov's fundamental rights are detailed and accurate, and are completely unaddressed in the Opposition.

Finally, in the Moving Brief, Aleynikov demonstrated that the courtroom closures drastically affected the conduct of the cross-examination of key witnesses because defense counsel was forced to artificially structure questioning in an illogical manner designed solely to protect the purported "trade secrets." (Moving Br. at 35.) The Government responds that Aleynikov "does not point to a specific instance [ ] in which the courtroom closure prevented him from effectively examining a witnesses." (Opp. at 40.) Every instance in which the courtroom was closed compromised Aleynikov's right to cross examination. The Court's ruling compelling defense counsel to participate in a thinly-veiled plan to conceal purported trade secrets — suggesting it was "time for an application" whenever a sensitive area arose, and structuring every cross examination to minimize the number of times the jury had to retire to the jury room — also sent a damning message to the jury that Aleynikov was in fact guilty of stealing Goldman trade secrets.

VI. ALEYNIKOV IS ENTITLED TO A NEW TRIAL BECAUSE THE COURT ERRED IN PRECLUDING HIM FROM QUESTIONING SPECIAL AGENT MICHAEL MCSWAIN REGARDING STATEMENTS MADE TO HIM BY GOLDMAN EMPLOYEES DURING HIS INVESTIGATION.

As set forth in the Moving Brief, the Court erred in precluding Aleynikov from questioning Special Agent Michael McSwain regarding statements made to him by Goldman Sachs employees during the course of the Government's investigation. (Moving Br. at 40-43.) Specifically, the Moving Brief demonstrated that, because the subject statements were incorporated into the Criminal Complaint to which SA McSwain swore under penalty of perjury,

they are adoptive admissions of the Government pursuant to Fed. R. Evid. 801(d)(2)(E) and are non-hearsay. (Id.) The Moving Brief further demonstrated that the Court erred in ruling that the statements of Goldman employees to SA McSwain could not be used for impeachment purposes because Aleynikov was not contending that SA McSwain lied in the Criminal Complaint. (Id.) With respect to that finding, the Moving Brief established that McSwain's credibility could have been impeached not just by a showing that he lied in the Complaint, but also by a showing that he engaged in no investigation to verify the statements made to him by Goldman Sachs employees before attesting to their truth in the Complaint. (Id.) Such impeachment, the Moving Brief elaborated, would have been particularly relevant because two Goldman witnesses disclaimed any recollection of statements attributed to them by SA McSwain. (Id. at 43.)

As its only new response to that argument, the Government discounts the "instances in which the victim's representatives disclaim[ed] having made certain statements" on the ground that defense counsel did not seek to establish during trial and does not contend now that McSwain lied about the disclaimed statements. (Opp. at 41.) The Government once again misses the point of Aleynikov's argument. As set forth in the Moving Brief, the fact that two witnesses disavowed statements attributed to them in the Criminal Complaint was relevant for impeachment purposes not to demonstrate that SA McSwain lied in the Complaint, but to demonstrate that he conducted little or no investigation to verify the truth of the statements made to him before attesting under penalty of perjury in the Complaint that those statements were true and accurate. Aleynikov did not question SA McSwain on the adequacy of his factual investigation, even though it was highly relevant to his credibility, because the Court had previously held that he could not do so. That ruling by the Court was erroneous and warrants a new trial under Rule 33.

VII. THE GOVERNMENT HAS NOT CONTRADICTED THE SHOWING THAT THE COURT ERRED BY DENYING ALEYNIKOV ACCESS TO THE ENTIRE TRADING SYSTEM AND THEN PERMITTING THE GOVERNMENT TO INTRODUCE EVIDENCE REGARDING PORTIONS OF THE SYSTEM TO WHICH ACCESS WAS DENIED.

The Moving Brief demonstrated that the Court (1) erred by precluding Aleynikov from subpoenaing from Goldman Sachs the source code and files constituting its entire trading system; and (2) compounded that error by subsequently permitting the Government to present general testimony and evidence regarding the mechanics of the entire trading system and portions of the system Aleynikov was precluded from obtaining by way of subpoena, thereby depriving him of his Sixth Amendment right to effectively cross-examine the Government's witnesses. (Moving Br. 44-46.) The Government's only response is to argue that the two specific examples highlighted by Aleynikov of prejudice resulting from the Court's rulings are "frivolous." (Opp. at 48-49.) But, as to one of those examples — Van Vliet's inaccurate suggestion that Aleynikov had taken everything one would need to begin a high-frequency trading system — the Government offers no explanation as to its frivolity characterization. (Id.)

As to the second — that Dr. Benjamin Goldberg was unable to adequately respond to the Government's questions about how a specific file (DenseMap) worked within the larger trading system — the Government argues that Aleynikov ignores (1) "the Court's determination that all that was necessary to understand the function of DenseMap was the OBB suite of programs;" and (2) "the Court's subsequent finding, at the conclusion of trial, that '[t]here has been no particularized showing of need for [for the entire platform] at any time since June 29, not in any pretrial proceeding, not during this trial." (Opp. at 41-42.)

What the Government fails to understand is that both of those determinations were infected by the very error at issue here. The Court's findings that nothing more than the OBB

files were needed to understand DenseMap and that there had been no showing of a need for the whole system were based entirely on the testimony of Government witnesses at trial. But, because Aleynikov was denied access to the entire system and was thus unable to effectively cross examine those witnesses about the mechanics and functionality of the entire trading system, the Court was not in possession of information sufficient to make the very holdings on which the Government relies to counter Aleynikov's argument. For example, having been denied access to the entire system, defense counsel was unable to explore with Naveen Kumar whether the functionality and value of DenseMap and OBB could in fact be determined outside of the context of the entire trading system. The Court was thus left to accept Kumar's testimony on those subjects, as was the jury.

In short, the Government has failed to refute that the Court erred in refusing to permit Aleynikov access to the entire Goldman trading system and then compounded that error by allowing the Government to introduce evidence on aspects of the system to which Aleynikov did not have access. Those errors warrant a new trial under Federal Rule of Criminal Procedure 33.

VIII. THE GOVERNMENT HAS FAILED TO REFUTE THAT A NEW TRIAL IS WARRANTED BECAUSE IT IMPROPERLY ASSERTED DURING SUMMATION THAT ALEYNIKOV LIED ABOUT HIS SALARY.

The Moving Brief demonstrated that the Government engaged in prosecutorial misconduct when it inappropriately accused Aleynikov of having lied to Misha Malyshev during salary negotiations by stating that he (Aleynikov) expected to make $600,000 to $700,000 in total compensation in 2009 if he stayed at Goldman. (Moving Br. at 46-50.) Because there was absolutely no evidence suggesting that Aleynikov had lied to Malshev, the Government's assertion to that effect was entirely inappropriate and warrants a new trial. (Id.)

The Government responds by stating first that there was, in fact, evidence at trial supporting its assertion. (Opp. at 42-44.) For that proposition, the Government cites to evidence that Aleynikov's salaries in 2007 and 2008 were $270,000 and $400,000, respectively; that Aleynikov was the highest paid programmer in the group; and that Goldman did not make a counteroffer when Aleynikov announced his resignation. (Id.) But none of that contradicts Aleynikov's statement to Malyshev on which the Government's "lie" allegation is based: "Given the last year's UBS offer that I rejected after discussing it with our partner as well as my contribution this year, I am expecting my total comp at the end of the year to be between 600 to $700,000." (Opp. at 43 (quoting 12/6/10 Tr. at 798:6-9.) In that statement, Aleynikov was expressly relaying what he thought he would be paid in the future and providing reasons supporting that belief. That he had been paid less the previous year and was the highest paid person in his position does not convert his well-reasoned speculation into a lie. Neither does the fact that Goldman did not make a counteroffer when he provided notice. That Goldman declined to offer a larger salary to an employee who had twice indicated an inclination to leave does not mean that it would not have paid him significantly more if he had remained a Goldman employee. Simply put, there is absolutely no evidence that Aleynikov lied about his salary to Malyshev.

The Government also argues that the cases cited by Aleynikov do not support his argument. The Government addresses only two of the six cases that Aleynikov cites for the proposition that it is improper for the prosecution to state that the defendant lied when there is no supporting evidence, and it fails to meaningfully distinguish them. First, the Government suggests that United States v. Bossinger, 311 Fed. Appx. 512 (2d Cir. 2009), is inapposite because the prosecutorial conduct there was far more egregious, as the Government used the

word "lies" more than 30 times and used other derogatory statements. (Opp. at 44.) Here, while the Government stated just once that Aleynikov lied about his salary, it made the salary increase a key piece of evidence and a central theme of its entire case and summation, as detailed in the Moving Brief (pgs. 49-50). By placing such repeated significance on the increase in salary, the Government greatly magnified the prejudice resulting from the statement that Aleynikov lied in order to get it. Accordingly, it is immaterial that the Government said just once that Aleynikov lied. Further, the Government notes that in United States v. White, 486 F.2d 204 (2d Cir. 1973), the court affirmed the conviction despite the prosecutor's claim during summation that the defendant had lied. (Opp. 44-45.) The Government ignores, however, that the Second Circuit, because it was addressing a "simple case" involving overwhelmingly strong evidence, issued an "admonition" to the Government while noting the possibility that the court could "face a charge of greater prosecutorial impropriety in a difficult case." Id. at 206. The Court went on to instruct the Government as to its obligations to act with dignity and propriety:

> Although we are affirming the conviction, we seek by our admonition to remind the federal prosecutor once again of the delicate role he plays. When an Assistant United States Attorney appears in court, and especially in a trial before a jury, he represents and personifies the government. He must prosecute cases diligently and vigorously. The public expects no less. But, he must also perform his task with dignity and self-discipline. The public deserves no less.

Id. at 207 (quoting Viereck v. United States, 318 U.S. 236, 253 (1943) (Black, J., dissenting)). Stated simply, that strong admonition by the Second Circuit as to the impropriety of the prosecutor's conduct in White strongly supports the conclusion that the Government's misconduct in this far more complex case warrants a new trial despite the affirmance in White.

Finally, the Government argues that, even if the Government "inadvertently

misinterpreted the facts in delivering the rebuttal, the Court gave an appropriate curative instruction." (Opp. at 45.) The Court's statement — "Ladies and gentleman, your recollection of the evidence will control" (12/9/10 Tr. at 1527:12-13) — does not constitute an instruction sufficient to cure the Government's blatant mischaracterization of the record.

IX. THE GOVERNMENT HAS FAILED TO REFUTE THAT THE COURT ERRED BY PREVENTING DEFENSE COUNSEL FROM TALKING ABOUT CIVIL REMEDIES DURING HIS OPENING AND FROM EXPLORING THE ISSUE AT TRIAL.

The Moving Brief demonstrated that the Court erred in precluding the defense from informing the jury during opening argument as to the availability of civil remedies and from exploring the issue on cross examination. (Moving Br. at 51-53.) As Aleynikov noted in his initial brief, the Court's error was particular troublesome given that Goldman employee William Whalen expressly discussed on direct examination the availability of civil injunctive relief for violations of, inter alia, Goldman's confidentiality policies and agreements. (Id.)

In its Opposition, the Government contends that "[t]he defendant cites no authority in support of his assertion that he should have been allowed to explore the victim's civil remedies at trial." But Federal Rule of Evidence 402 makes clear that "[a]ll relevant evidence is admissible." The jury is entitled to know that a finding of guilt is not the only way to afford relief in a given case. For that reason, evidence of civil remedies is properly admitted in evidence in federal and state criminal trials throughout the country. Indeed, by eliciting testimony from William Whalen regarding the availability of civil remedies for the breach of Goldman's confidentiality policies and agreements, the Government recognized that such remedies are relevant. Further, the Government offers no explanation for its assertion that the admission of evidence of the availability of civil remedies, despite its clear relevance, would somehow be "improper." (Opp.

at 47.) Simply put, the Government has failed to contradict Aleynikov's argument that a new trial is warranted in light of the Court's erroneous decision to preclude Aleynikov from discussing and exploring the civil remedies available to Goldman.

X. THE COURT WENT BEYOND THE BOUNDS OF JUDICIAL PROPRIETY WHEN (I) IT SUSTAINED WITHOUT EXPLANATION GOVERNMENT OBJECTIONS UNACCOMPANIED BY A SPECIFIC GROUND; (II) REFUSED TO GRANT ANY DEFENSE SIDEBAR REQUESTS WHILE GRANTING THOSE OF THE GOVERNMENT; AND (III) REFUSED TO PERMIT ALEYNIKOV TO DISPLAY DURING SUMMATION TRANSCRIPT PAGES DEPICTING OVERRULED OBJECTIONS.

In the Moving Brief, Aleynikov demonstrated that the Court exceeded the bounds of judicial propriety and thus significantly prejudiced Aleynikov in three ways: (1) by permitting the Government to object to defense questions without providing any ground for the objection and then sustaining those vague objections without comment or explanation; (2) by refusing all defense requests for sidebars, while granting those of the Government; and (3) by refusing to permit Aleynikov to display during summation transcript pages that depicted overruled Government objections. (Moving Br. at 54-57.) As the Moving Brief explained, this created the misleading impression that defense counsel was attempting to engage in improper conduct.

As to the unexplained objections and evidentiary rulings, the Government argues that Aleynikov suffered no prejudice because (1) the Court explained prior to trial that it was not its practice to allow speaking objections; and (2) made clear that the parties could raise evidentiary rulings during breaks. As an initial matter, to object with a simple, terse qualification such as "hearsay," "relevance," or "foundation," does not constitute a speaking objection. Further, the Court cannot render its improper manner of addressing objections acceptable simply by advising the parties of how it intends to proceed before trial. Moreover, permitting counsel to seek an

explanation as to a sustained objection at a break that might not occur for an hour or more does not cure the prejudice incurred by having multiple non-specific objections sustained without explanation in the jury's presence. Learning the reason for evidentiary rulings during a subsequent break does not permit defense counsel to contemporaneously remedy the purported error during the examination and does not erase the prejudicial impression left with the jury.

On the issue of sidebars, the Government relies on the fact that the Court advised the parties of its practice of discouraging sidebars before trial. (Opp. at 49-50.) That pre-trial admonition, however, does not cure the prejudice Aleynikov suffered by having each of his sidebar requests denied out-of-hand while the Court conversely granted a similar request by the Government. The Government also notes that the Court questioned the Government before granting its sidebar request. (Id.) That is precisely the point: the Court gave appropriate consideration to (and then granted) the Government's request, but summarily dismissed Aleynikov's request, leaving the impression that the Government's requests merited serious consideration while the Defendant's did not.

As to the display of overruled objections during summation, the Government argues that those objections were not properly before the jury. Those overruled objections, however, happened during the trial before the jury, and were thus undeniably part of the trial. There was simply no basis to prevent Aleynikov from displaying testimony given following an overruled objection. The Government also contends that, in the middle of summation, defense counsel could have used a computer program to redact the objections from the transcript pages, or could have simply read the relevant testimony. As practical matter, it is silly to suggest that defense counsel could have electronically redacted numerous pages of testimony on-the-fly during summation while simultaneously coordinating a PowerPoint presentation that took hours to craft.

Moreover, defense counsel displayed transcript pages in his summation to preclude any challenge to his recollection of the record by either the Government or the Court. Preventing him from doing so hampered his summation for no credible reason whatsoever: there is nothing remotely improper about displaying a page of transcript displaying an overruled objection. The argument that counsel's statements are not evidence misses the point entirely. Transcript pages showing counsel's questions to witnesses are routinely displayed to the jury to provide context for the answer.

In sum, the Government has failed to refute that the Court exceeded the bounds of judicial propriety as detailed in the Moving Brief, thus requiring a new trial.

XI. THE GOVERNMENT OFFERS NO NEW ARGUMENT AS TO SEVERAL OF ALEYNIKOV'S GROUNDS FOR A JUDGMENT OF ACQUITTAL OR A NEW TRIAL, ALL OF WHICH SHOULD BE GRANTED.

As set forth in the Moving Brief, several of the arguments propounded by Aleynikov for a Judgment of Acquittal under Rule 29 or a new trial under Rule 33 are based upon motions made either before or during trial. As to those arguments, Aleynikov incorporated by reference the arguments set forth in his prior briefs. With respect to several of those grounds for acquittal or a new trial, the Government offers no new argument. Those issues on which the Government presents no new argument beyond that in its prior papers are as follows:

- As a matter of law, Goldman Sachs's trading system does not constitute a "product produced for or placed in interstate or foreign commerce" under the EEA. (Moving Br. at 3-6; Opp. at 18-19.)
- As a matter of law, the allegedly stolen source code was not a "good, ware or merchandise" under the ITSPA and there was no evidence at trial that it was. (Moving Br. at 7-9; Opp. at 29-30.)
- The Court erred in admitting Aleynikov's post-arrest statements. (Moving Br. at 21-22; Opp. at 37-38.)

- The Court erred in precluding the defense from introducing the Government's statements at the bail hearing and thereby informing the jury about the Government's change in position regarding what Aleynikov took from Goldman. (Moving Br. at 22-23; Opp. at 38.)

- The Court erred in refusing to strike from the record Government Exhibits 108-A, 108-B, 108-D, 108-E, 108-F, 108-G, 108-H, 108-I, 108-J, 108-K and 108-L (the "108 Exhibits") and any testimony about those exhibits.[4] (Moving Br. at 24-27; Opp. at 38.)

- The Court erred in admitting the "Wheel of Fortune" evidence because it was not relevant evidence and its probative value was substantially outweighed by unfair prejudice. (Moving Br. at 27-29; Opp. at 39.)

- The Court erred in qualifying the Government's experts and refusing to strike the testimony of Benjamin Van Vliet. (Moving Br. at 29-31; Opp. at 39.)

- The Court erred in precluding the defense from introducing testimony by Goldman's Chief Financial Officer concerning his statements: "We still have all of the code. It's not like the code has been lost to Goldman Sachs. And even if it had been, it is a small piece of our business." (Moving Br. at 36-40; Opp. at 40-41.)

As to each of those arguments, Aleynikov is entitled to a judgment of acquittal or a new trial for the reasons set forth in his Moving Brief and the prior briefs incorporated therein.

[4] In the Opposition, the Government contends that Aleynikov "does not take issue with the Court's reasoning" regarding its refusal to strike the 108 Exhibits from the record. (Opp. at 38.) That is simply incorrect. As set forth in Aleynikov's initial motion on this subject and the Moving Brief, Aleynikov strongly disagrees with the Court's ruling and its underlying reasoning and believes that they require the award of a new trial.

CONCLUSION

For the reasons set forth above and in the Moving Brief, defendant Sergey Aleynikov respectfully requests that the Court grant his post-trial motion for a judgment of acquittal or, alternatively, for a new trial.

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Respectfully submitted,

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