SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

THE PEOPLE OF THE STATE OF NEW YORK,

Indictment Number 4447/12

-against-

SERGEY ALEYNIKOV,

Decision & Order

Defendant.

ZWEIBEL, J.:

Defendant moves to dismiss the instant indictment on the ground of facial insufficiency, double jeopardy, collateral estoppel, vindictive prosecution and in the interest of justice.

Background[1]

Goldman Sachs & Co. ("Goldman") is an international financial services firm which engages in high frequency trading ("HFT") on securities and commodities markets, such as the New York Stock Exchange ("NYSE") and NASDAQ Stock Market ("NASDAQ"), as part of its business. From May 2007 through June 2009, defendant was employed by Goldman as a computer programmer in its Equities Division, developing and maintaining certain computer programs for the company's proprietary HFT system. A HFT system is a mechanism for making large volumes of trades in securities

[1] The Court has adopted or adapted the relevant portions of United States Court of Appeals for the Second Circuit's description of the background of this case through the Court's dismissal of the federal action and has added or deleted from it where relevant (see United States v. Aleynikov, 676 F.3d 71, 73-75 [2d Cir. 2012]).

and commodities based on trading decisions effected in fractions of a second through algorithms that incorporate rapid market developments and data from past trades. The computer programs used to operate Goldman's HFT system are of three kinds: [1] market connectivity programs that process real-time market data and execute trades; [2] programs that use algorithms to determine which trades to make; and [3] infrastructure programs that facilitate the flow of information throughout the trading system and monitor the system's performance. Aleynikov's work focused on developing source codes for this last category of infrastructure programs in Goldman's HFT system. HFT is a competitive business that depends in large part on the speed with which information can be processed to seize fleeting market opportunities. Goldman closely guards the secrecy of each component of the system, and does not license the system to anyone. Goldman's confidentiality policies bound defendant to keep in strict confidence all the firm's proprietary information, including any intellectual property created by defendant.[2] He was barred as well from taking

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[2]Defendant, as a condition of his employment, was required to sign a global information security policy, which provided in relevant part that he would "hold all confidential and proprietary information and materials in strict confidence and, except for the above authorized uses, will not, nor permit any agent to give, disclose, copy, reproduce, sell, assign, license, market or transfer confidential and proprietary information and materials to any person, firm or corporation..." The security

it or using it when his employment ended.

By 2009, Aleynikov was earning $400,000, the highest-paid of the twenty-five programmers in his group. In April 2009, he accepted an offer to become an Executive Vice President at Teza Technologies LLC, a Chicago-based startup firm, that was looking to develop its own HFT system. Aleynikov was hired, at approximately $1 million a year, to develop the market connectivity and infrastructure components of Teza's HFT system. Teza's founder (a former head of HFT at Chicago-based hedge fund Citadel Investment Group) emailed Aleynikov (and several other employees) in late May, conveying his expectation that they would develop a functional trading system within six months. It usually takes years for a team of programmers to develop a HFT system from scratch.

After defendant resigned from Goldman in April of 2009, he was allowed to remain at the firm for five weeks more. Aleynikov's last day at Goldman was June 5, 2009.

From March 30, 2009 until May 2009, defendant uploaded data

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policy also provided that defendant "irrevocably assign" to Goldman and that Goldman would have "exclusive ownership rights, including, without limitation, all patents, copyright and trade secret rights with respect to any work, including, but not limited to, any invention, discoveries, concepts, ideas or information, conceived" by defendant during the course of his employment with Goldman.99

from Goldman to a "subversion" website, with an address of svn.xp-dev.com. At approximately 5:20 p.m., just before his going-away party, defendant encrypted and uploaded to the subversion server in Germany more than 500,000 lines of source code for Goldman's HFT system, including code for a substantial part of the infrastructure, and some of the algorithms and market data connectivity programs. Some of the code pertained to programs that could operate independently of the rest of the Goldman system and could be integrated into a competitor's system. In addition to proprietary source code, Aleynikov also transferred some open source software licensed for use by the public that was mixed in with Goldman's proprietary code. However, he uploaded a greater number of files that contained proprietary code than open source code[3].

After uploading the source code, Aleynikov deleted the encryption program as well as the "bash" history of his computer commands. When he returned to his home in New Jersey, Aleynikov downloaded the source code and other material he had stored on the server in Germany to his home computer, and copied some of the files to other computer devices he owned.

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[3]"Open source" code is available to the public on-line at no cost. For instance, part of Goldman's HFT system runs on the Linux operating system which is completely composed of open source code.

Defendant's uploads to the subversion website attracted the attention of Goldman's computer security team on June 29, 2009. Goldman then alerted the authorities. On July 2, 2009, Aleynikov flew from New Jersey to Chicago to attend meetings at Teza. He brought with him a flash/thumb drive and a laptop containing portions of the Goldman source code. When Aleynikov flew back the following day, he was arrested by the Federal Bureau of Investigation ("FBI") agents at Newark Liberty International Airport. The source code was also found on defendant's home computer.

In a statement to FBI agent Michael McSwain, defendant admitted to intentionally collecting both open and proprietary source code, with the idea of separating out the open source code once he had downloaded it to his home computer.

Defendant was initially charged in a federal indictment that accused him of violating the Economic Espionage Act of 1996 ("EEA"), 18 USC § 1832, by downloading a trade secret "that is related to or included in a product that is produced for or placed in interstate or foreign commerce," with the intent to convert such trade secret and to injure its owner, to the economic benefit of anyone other than the owner (see 18 U.S.C. § 1832(a)[Count One]); and with violating the National Stolen Property Act ("NSPA"), 18 U.S.C. § 2314, which makes it a crime

to "transport[ ], transmit[ ], or transfer[ ] in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud" (18 U.S.C. § 2314 [Count Two]). A third count charged him with unauthorized computer access and exceeding authorized access in violation of the Computer Fraud and Abuse Act ("CFAA"), (18 U.S.C. § 1030).

Aleynikov moved to dismiss the federal indictment for failure to state an offense. On September 3, 2010, the district court dismissed Count Three of the indictment after finding that defendant's conduct did not fall within the federal anti-hacking statute but otherwise denied Aleynikov's motion (see United States v. Aleynikov, 737 F.Supp.2d 173 [SDNY 2010]).

After a jury trial, defendant was convicted on both remaining counts and sentenced to 97 months of imprisonment followed by a three-year term of supervised release, and was ordered to pay a $12,500 fine. Bail pending appeal was denied because Aleynikov, a dual citizen of the United States and Russia, was feared to be a flight risk.

On February 17, 2012, Aleynikov appealed his conviction and sentence, arguing that his conduct did not constitute an offense under either the NSPA or EEA. The Second Circuit reversed Aleynikov's convictions on both counts, concluding, as the People

point out, that defendant's conduct did not fit within the narrow confines of the two federal statutes under which he was charged. (see United States v. Aleynikov, 676 F.3d 71, 73- 75 [2d Cir. 2012]; see Affirmation of ADA Joanne Li, dated November 29, 2012, p. 3).

Thereafter, in April 2012, the Office of the New York County District Attorney ("DANY") became aware of the Second Circuit's decision reversing defendant's federal conviction (see Affirmation of ADA Joanne Li, dated November 29, 2012, p.1-2, ¶ 3). In reversing defendant's conviction, the Second Circuit observed:

> The conduct found by the jury is conduct that [defendant] should have known was in breach of his confidentiality obligations to Goldman, and was dishonest in ways that would subject him to sanctions; but he could not have known that it would offend this criminal law or this particular sovereign,

referring to the federal statutes under which he was prosecuted(United States v. Aleynikov, 676 F.3d, at 82).

The People took this as an "invitation" (see Affirmation of ADA Joanne Li, dated November 29, 2012, p.4). After reviewing the Second Circuit's decision, DANY contacted the federal prosecutor's office to express interest in pursuing a state prosecution of defendant and on July 31, 2012, charged defendant, by arrest warrant, with one count of Unlawful Duplication of

Computer Related Material in the First Degree (Penal Law § 156.30[1]) and one count of Unlawful Use of Secret Scientific Material (Penal Law § 165.07). A New York County Grand Jury then indicted defendant on each of the counts in the arrest warrant.

The motion for inspection and/or dismissal of the Grand Jury minutes is granted to the extent that the Court has examined the Grand Jury minutes in camera and found both the testimonial and documentary non-hearsay evidence before the Grand Jury to be legally sufficient, the instructions to be proper and the proceeding to be otherwise unimpaired. The issues in the defendant's motion, while numerous, are straightforward, and disclosure of the Grand Jury minutes is not necessary to their resolution (see CPL § 210.30[3]). Accordingly, the motion to dismiss the indictment on these grounds is denied.

The Court specifically notes that the indictment satisfies the CPL 200.50(7) requirement that the indictment contain a "plain and concise factual statement in each count which, without allegations of an evidentiary nature [and it]...asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation" (see People v

Iannone, 45 N.Y.2d 589 [1978]). "[T]he charges use the language of the statutes involved, unless the language is too broad" (People v. Perez, 93 AD3d 1032, 1034 [3rd Dept.], lv. den. 19 NY3d 1000 [2012], citing Iannone, 45 N.Y.2d, at 599). In this case, the indictment not only tracked the statutory language, it provided additional information as to the location, date and time of the offenses, thus alleging "where, when and what" defendant purportedly did (Perez, 93 AD3d, at 1034, quoting Iannone, 45 N.Y.2d at 598).

With respect to the legal sufficiency of the indictment, an indictment is legally sufficient when "it possesses competent evidence that establishes every element of an offense by legally sufficient evidence and provides reasonable cause to believe that a person has committed such offense" (People v. Williams, 20 AD3d 72 [1st Dept.], lv. denied 5 NY3d 811 [2005]; see CPL 190.65[1] People v. Swamp, 84 N.Y.2d 725, 729-730 [1995]). "[A] reviewing court must consider '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. Grant, 17 NY3d 613, 616, quoting People v. Bello, 92 N.Y.2d 523, 525 [1998], quoting People v. Jennings, 69 N.Y.2d 103, 114 [1986]). Legally sufficient evidence is "competent evidence which, if accepted as true, would establish every element of an offense

charged" (Grant, 17 NY3d, at 616, quoting CPL 70.10 [1]; see also People v. Swamp, 84 N.Y.2d, at 730; People v. Mayo, 36 N.Y.2d 1002, 1004 [1975]). "In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (id., quoting Bello, 92 N.Y.2d, at 526). Thus, a reviewing court must determine "whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes," and whether "the Grand Jury could rationally have drawn the guilty inference" (id., quoting People v. Deegan, 69 N.Y.2d 976, 979 [1987]) and defer all questions as to whether the weight or quality of the evidence would warrant conviction (Swamp, 84 N.Y., at 730; see People v. Williams, 20 AD3d 72).

The Court notes that the Grand Jury presentation was comprised of non-hearsay testimonial and documentary evidence. With respect to the Unlawful Duplication of Computer Related Material in the First Degree count, Penal Law § 156.30(1) states:

> A person is guilty of unlawful duplication of computer related material in the first degree when having no right to do so, he ... copies, reproduces or duplicates in any manner:
>
> 1. any computer data or computer program and thereby intentionally and wrongfully deprives or appropriates from an owner thereof an economic value or benefit in excess of two thousand five hundred dollars; ...

Penal Law § 156.00(1) defines "Computer" as

> a device or group of devices which, by manipulation of electronic, magnetic, optical or electrochemical impulses, pursuant to a computer program, can automatically perform arithmetic, logical, storage or retrieval operations with or on computer data, and includes any connected or directly related device, equipment or facility which enables such computer to store, retrieve or communicate to or from a person, another computer or another device the results of computer operations, computer programs or computer data.

Penal Law § 156.00(2) defines "Computer program" as

> property and means an ordered set of data representing coded instructions or statements that, when executed by computer, cause the computer to process data or direct the computer to perform one or more computer operations or both and may be in any form, including magnetic storage media, punched cards, or stored internally in the memory of the computer.

Penal Law § 156.00(3) defines "Computer data" as

> property and means a representation of information, knowledge, facts, concepts or instructions which are being processed, or have been processed in a computer and may be in any form, including magnetic storage media, punched cards, or stored internally in the memory of the computer.

Penal Law § 156.00(4) defines "Computer service" as

> any and all services provided by or through the facilities of any computer communication system allowing the input, output, examination, or transfer, of computer data or computer programs from one computer to another.

Penal Law § 156.00(6) defines "Computer network" as

> the interconnection of hardwire or wireless communication lines with a computer through remote terminals, or a complex consisting of two or more interconnected computers.

Penal Law § 156.00(7) defines "Access" as

> to instruct, communicate with, store data in, retrieve from, or otherwise make use of any resources of a computer, physically, directly or by electronic means.

Penal Law § 156.00(8) defines "Without authorization" as

> to use or to access a computer, computer service or computer network without the permission of the owner or lessor or someone licensed or privileged by the owner or lessor where such person knew that his or her use or access was without permission or after actual notice to such person that such use or access was without permission. It shall also mean the access of a computer service by a person without permission where such person knew that such access was without permission or after actual notice to such person, that such access was without permission.
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> Proof that such person used or accessed a computer, computer service or computer network through the knowing use of a set of instructions, code or computer program that bypasses, defrauds or otherwise circumvents a security measure installed or used with the user's authorization on the computer, computer service or computer network shall be presumptive evidence that such person used or accessed such computer, computer service or computer network without authorization.

Here, there was sufficient evidence that while defendant may have had a limited right to copy or reproduce some of the material for work-related reasons, he had no right to install and use "subversive" software on Goldman Sachs' computer for the purpose of copying, reproducing or duplicating in any manner the

copyrighted source codes or any other copyrighted computer data or computer program to intentionally and wrongfully deprive or appropriate from Goldman Sachs, as the materials' "owner," an economic value or benefit in excess of two thousand five hundred dollars. The evidence includes testimony and exhibits that establish that on two or more occasions, defendant, without permission or authority from Goldman Sachs, copied and transferred Goldman Sachs' source code for its high frequency trading platform from Goldman Sachs' computers to a foreign server in Germany using subversive software, and then downloaded this material onto his personal computers and thumb drives, thus making a tangible electronic reproduction of confidential and proprietary materials related to Goldman's source code. Indeed, defendant does not contest that he actually did reproduce the relevant materials. Additionally, the Grand Jury could infer from the confidentiality/employment agreement signed by defendant when he was hired by Goldman Sachs as well as the employee handbook setting forth the firm's policies forbidding the disclosure of information concerning or contained in the programs on the firm's computers that defendant's actions "were motivated either by an intention to sell them, use them in his new position in order to advance himself or to save himself labor, or at the very least, to study and learn from them" (People v. Katakam, 172

Misc.2d 943, 947 [Sup. Ct. N.Y.Co. 1997]). This is further supported by evidence that as part of his new job, for which defendant was being paid a million dollars, his new employer wanted a program, which had taken years to develop at Goldman Sachs, up and running in six months. There is also evidence that the material copied and reproduced by defendant was worth millions to Goldman Sachs. Thus, the evidence is clearly sufficient to show that defendant's actions deprived Goldman Sachs of and appropriated from Goldman Sachs an economic benefit in excess of $2500.

Likewise, Penal Law § 165.07 states:

> A person is guilty of unlawful use of secret scientific material when, with intent to appropriate to himself or 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 a tangible reproduction or representation of such secret scientific material by means of writing, photographing, drawing, mechanically or electronically reproducing or recording such secret scientific material.

Penal Law §165.00(6) defines "Secret scientific material" as:

> a sample, culture, micro-organism, specimen, record, recording, document, drawing or any other article, material, device or substance which constitutes, represents, evidences, reflects, or records a scientific or technical process, invention or formula or any part or phase thereof, and which is not, and is not intended to be, available to anyone other than the person or persons rightfully in possession thereof or

> selected persons having access thereto with his or their consent, and when it accords or may accord such rightful possessors an advantage over competitors or other persons who do not have knowledge or the benefit thereof.

In People v. Russo, 131 Misc.2d 677 (Cty Ct. Suffolk Co. 1986), found that computer programs qualifies as "secret scientific material" whose unlawful use was prohibited by Penal Law §165.07. As the Russo Court notes:

> ...a computer program does not just exist. It is the result of time spent and effort exerted on the part of a trained individual or individuals. Because such training requires study and the learning associated with such study results in a specialized knowledge, the resulting program—in accordance with the above definitions—can therefore be described as both "scientific" and "technical." Because the "computer program" directs a computer to perform steps in a prescribed procedure and operations on data to produce a desired result, it is a "process." Further, because a "computer program" does not exist until it is written or created as a result of an individual's study or experimentation, or, if the computer program already exists, and is modified in some way to make it different or new, it is, an "invention. "Finally, because a "computer program" represents a method of doing something that relies on "an established model or approach," a "computer program" is a "formula" in accordance with the definition above. Therefore, based on the above, a "computer program" qualifies as "a scientific or technical process, invention, or formula" as envisioned by Penal Law § 155.00(6).

(id., at 681).

Here, the Grand Jury minutes again established through

testimony and exhibits that defendant, at the very least, with intent to appropriate to himself "secret scientific material," and knowing he no right to do so because the copy was not made for his work at Goldman, made a copy of certain Goldman computer programs and source code, which were "secret scientific material" (see People v. Russo, supra). Thus, the evidence in support of these counts were also legally sufficient.

Defendant also claims that the instant prosecution is barred by State and Federal double jeopardy as well as statutory double jeopardy. Here, defendant was prosecuted in federal court for violating the EEA and NSPA. A jury convicted him of these crimes. On appeal, the Circuit Court of Appeals for the Second Circuit reversed the conviction and dismissed the charge, "reasoning that while defendant breached his confidentiality obligations to Goldman, his conduct did not fall within the scope of the charged federal offenses" (Aleynikov v. The Goldman Sachs Group, Inc., 2012 WL 6603397, *3 [NDNJ 2012]). Upon the dismissal of the federal charges against defendant, the New York County District Attorney presented the case to a New York County Grand Jury, which indicted defendant of violating Penal Law §§ 156.30(1) and 165.07.

The Double Jeopardy clause of the Fifth Amendment provides that an individual may not be tried twice for the same offense

except in limited circumstances. However, under the "dual sovereignty" doctrine, successive State and federal prosecutions for the same conduct are not prohibited by the United States Constitution's Double Jeopardy Clause (see Matter of Polito v. Walsh, 8 NY3d 683, 686 [2007], rearg. denied 9 NY3d 918 [2007], citing Bartkus v. Illinois, 359 U.S. 121 [1959]). Thus, the Blockburger "same-elements" test does not apply here (see Blockburger v. United States, 284 U.S. 299, 304 [1932]; Matter of Polito v. Walsh, 8 NY3d, 689-690).

In New York, double jeopardy is both constitutional and statutory (Matter of Polito v. Walsh, 8 NY3d, at 686). Statutory double jeopardy is governed by CPL 40.20, which "generally prohibits successive prosecutions for two offenses based on a single act or criminal transaction" (People v. Bryant, 92 N.Y.2d 216, 226 [1998][citations omitted]; see Matter of Polito v. Walsh, 8 NY3d, at 686). Despite this statutory bar, pursuant to CPL 40.20(2)(f), sequential prosecutions are permitted for offenses arising from the same criminal transaction where:

> One of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and 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 other offense, defined by the laws of this state

(see Matter of Polito v. Walsh, 8 NY3d, at 686-687).

In this case, the first prosecution of defendant was for violations of statutory provisions of another jurisdiction, namely, the federal EEA and NSPA statutes. Defendant was prosecuted for it in "such other jurisdiction," namely, the federal court. The federal prosecution was terminated by the Second Circuit. The Second Circuit's order was "expressly founded on insufficiency of the evidence" to establish that Goldman's HFT system was intended for interstate or foreign commerce as required by the EEA and that the intangible property stolen by defendant, such as the source codes, constituted stolen "goods," "wares" or "merchandise" under the NSPA. There is no corresponding requirement under either Penal Law 156.30(1) or 165.07, which are the New York State statutes that the defendant is accused of violating, that the property in question be intended for interstate commerce. Similarly, there is no requirement under either Penal Law 156.30(1) or 165.07 that the property stolen by defendant, be tangible "good," "wares" or "merchandise" as required by the NSPA. Thus, "CPL 40.20(2)(f) was evidently written for the purpose of preventing people in the exact situation of [this defendant] from relying on the protection given by CPL 40.20(2)" (Matter of Polito v. Walsh, 8 NY3d, at 687).

The Court notes that CPL 40.20(1), which states that:

> A person may not be twice prosecuted for the same offense, ...

does not assist defendant. As the Court of Appeals has held, the same offense "means the same in both fact and law...At bar, the prosecutions are not the same in law because they are based upon separate and distinct statutes...." (Matter of Polito v. Walsh, 8 NY3d, at 688, quoting Matter of Klein v. Murtagh, 34 N.Y.2d 988 [1974], aff'g on op below 44 A.D.2d 465, 467 [2d Dept. 1974]).

Defendant tries to argue that CPL 40.20(2)(f) does not apply because the federal case was not dismissed for insufficiency of evidence, as required by CPL 40.20(2)(f), but rather, for facial insufficiency of the indictment (Defense Motion:37n.11). The Court disagrees. As the People point out, the Second Circuit specifically noted that although it was "odd" that the parties on appeal had framed their arguments in terms of facial insufficiency of the indictment since the case had gone to trial, their decision was the same under either analysis (see People's Response:17; United States v. Aleynikov, 676 F.3d, at 76, n. 3). Thus, CPL 40.20 (2)(f)'s requirement that the federal case be dismissed for insufficiency of a federal element is satisfied.

As to defendant's claim that the instant prosecution is barred because Judge Denise Cote of the Southern District of New

York dismissed the count based on a violation of the CFAA charge prior to trial, that claim is meritless. Because that count was dismissed prior to trial, defendant was never placed in jeopardy for it (see CPL 40.30) and defendant is not charged with the equivalent cyber-crime statute, namely, Penal Law § 156.10. Specifically, the CFAA count was dismissed from the federal indictment during motion practice because the federal anti-hacking statute required proof that the defendant had gained access to Goldman's computers without permission or authorization. However, neither of the crimes defendant is charged with in his State indictment requires that his access to Goldman's computers be unauthorized.

Accordingly, the instant prosecution is not barred under double jeopardy grounds and is expressly permitted under CPL 40.20(2)(f).

Defendant further argues the doctrine of collateral estoppel mandates that the indictment be dismissed. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit" (People v. Sommerville, 3 Misc3d 593, 598 [Sup. Ct Kings Cop. 2004], quoting Ashe v. Swenson, 397 U.S. 436, 443 [1970]). If "the 'ultimate fact' issue, i.e., that which is essential to

conviction in the later trial is resolved in defendant's favor, the subsequent prosecution is foreclosed" (People v. Sommerville, 3 Misc.3d, 598, citing People v. Goodman, 69 N.Y.2d 32, 38 [1986]). "However, if the resolved issue concerns an 'evidentiary' fact tending to establish guilt at the second trial, the subsequent prosecution is not precluded, only 'further litigation' of this 'evidentiary' fact is prohibited" (id., citing People v. Acevedo, 69 N.Y.2d 478 [1987]).

It is well settled that the doctrine of collateral estoppel applies to criminal proceedings as well as civil ones (People v. Goodman, 69 N.Y.2d 32, 37 [1986] [citations omitted]; see also People v. Hilton, 95 N.Y.2d 950, 952 [2000]; Sommerville, 3 Misc3d, at 598), and operates to "bar relitigation of issues necessarily resolved in defendant's favor at an earlier trial" (People v. Acevedo, 69 N.Y.2d 478, 485 [1987]; see also People v. Evans, 94 N.Y.2d 499, 502 [1999]; see also Sommerville, 3 Misc3d, at 598).

Although part of the constitutional guarantee against double jeopardy (Goodman, 69 N.Y.2d at 37, citing Ashe v. Swenson, 397 U.S. 436; People v. Moore, 220 A.D.2d 621, 622, appeal denied 87 N.Y.2d 923), double jeopardy differs from collateral estoppel in that double jeopardy applies to subsequent prosecutions involving the same offense and "may

attach long before the jury has rendered a verdict, whereas collateral estoppel applies only when there has been a final judgment" followed by new or different charges arising from the same incident (Goodman, 69 N.Y.2d at 37-38).

However, "[b]efore collateral estoppel may be applied in a subsequent criminal case, there must be an identity of parties and issues and a prior proceeding resulting in a final and valid judgment in which the party opposing the estoppel had a 'full and fair opportunity' to litigate" (People v. Suarez, 40 AD3d 143, 152 [1st Dept.], lv. denied 8 NY3d 991 [2007], quoting Goodman, 69 N.Y.2d at 38 [citations omitted]). The defendant must also establish that the issue was necessarily decided in the first proceeding (Acevedo, 69 N.Y.2d at 484-485; Goodman, 69 N.Y.2d at 40)" (Sommerville, 3 Misc3d, 598-599). "The [collateral estoppel] rule is not to be applied with a hypertechnical approach but with realism and rationality" (Acevedo, at 69 N.Y.2d at 487, quoting People v. Goodman, 69 N.Y.2d at 40; see also People v. Roselle, 84 N.Y.2d 350, 357 [1994]). Applying these principles to the instant case, it is evident that collateral estoppel is inapplicable.

Here, the jury's findings lost their preclusive effect as defendant's federal judgment of conviction was reversed on appeal, and therefore, "does not constitute 'a final and valid

judgment,' the jury's factual findings lose their preclusive effect" (id., citing People v. Brown, 59 A.D.2d 928 [2d Dept. 1977]; see also People v. Plevy, 52 N.Y.2d 58, 69 [1980] [Fuchsberg, J. concurring]; Matter of McGrath v. Gold, 36 N.Y.2d 406, 412 [1975]). Moreover, there is no identity of parties and issues as the New York County prosecutor did not have a "full and fair opportunity" to litigate in defendant's federal matter. Accordingly, defendant's motion for an order dismissing the instant indictment on collateral estoppel grounds is denied.

Defendant attempts to get around the problem in his arguments by suggesting that the "dual sovereignty" exception to the Fifth Amendment does not apply because the State prosecutors are acting as a "tool" for the Federal prosecutors and the State prosecution is merely a "sham and a cover" masking a second prosecution by the same sovereign as the first. However, there is no evidence, apart from defendant's speculation, to support this claim. Indeed, according to the People, they, upon reading the decision of the Second Circuit reversing and dismissing defendant's case, decided on their own to see if there was a viable State criminal prosecution before approaching the feds. Hence, the State prosecution cannot be considered a sham or cover for masking a second federal prosecution given the differences in the conduct prohibit by the respective statutes.

As to defendant's claim that the indictment must be dismissed as it is a "vindictive prosecution," the Court finds this claim also to be without merit. Defendant claims that he is entitled to a presumption of vindictiveness as he speculates "that he is 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" (DML:54). According to defendant, the Second Circuit's reversal of his federal conviction was "deeply embarrassing to the United States Attorney's Office and the Federal Bureau of Investigations, and particularly to the prosecutors and agents involved in the case" (DML:54).[4] Accordingly, defendant posits, their animus to defendant is the reason for the State prosecution.

In this case, the State of New York is a separate and distinct sovereign than the federal government. Neither stands in the shoes of the other. Therefore, the fact that the State indicted defendant for violating New York State criminal statutes after the Circuit Court of Appeals for the Second Circuit overturned defendant's federal conviction and dismissed

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[4]Defendant seems to believe that the embarrassment caused by the extensive press coverage in this case relating to the reversal of defendant's federal conviction (DML:55).

the underlying indictment, does not amount to a vindictive prosecution as defendant is being prosecuted "by two different sovereigns, each acting independently under its own laws and in its own interest without any control of or by the other, [thus,] render[ing] inapplicable the concept of prosecutorial vindictiveness" (United States v. Ng, 699 F.2d 63, 68 [2d Cir. 1983]). Here, DANY, in deciding whether to pursue a subsequent prosecution, took into consideration what it deemed to be an "inadequate result" obtained in defendant's federal case (id.). The fact that DANY did not originally pursue criminal charges against defendant in light of the federal proceedings, in no way prevents the state government, as represented by DANY, from protecting a legitimate New York State interest if it believes that defendant's federal proceeding has failed to adequately protect its interests.

Moreover, defendant has presented no evidence that the State of New York was acting at the behest of the federal government in bringing the state charges against him, or that the federal government acted as an agent of the State in prosecuting him for violation of either the EEA or the NSPA. Though defendant makes conclusory accusations of conspiracy and collusion between the state and federal prosecutors, the record indicates simply that, after defendant's federal conviction was

vacated and the underlying indictment dismissed, DANY undertook an independent analysis and concluded that "significant" New York State interests "had been left unvindicated by the federal proceeding." While defendant complains that the State prosecution was motivated by the dissatisfaction of the United States Attorney with the outcome of the federal proceeding against him as a result of the Second Circuit's decision, even assuming *arguendo* that was a factor in the State's decision to prosecute defendant, it was plainly a permissible consideration in the assessment of whether the State's interests have been vindicated (see United States v. Arena 180 F.3d 380, 389-400 [2d Cir. 1999], cert denied 531 US 811 [2000]).

Even assuming, as defendant does, that the timing of this indictment, coupled with the defendant's successful appeal of his federal court conviction, raises an inference that the prosecution may have been motivated for vindictive reasons, these factors alone do not create a presumption of vindictiveness (People v. Bell, 11 Misc3d 1070(A)[Cty. Ct. Monroe Co. 2006], aff'd on opinion below 46 AD3d 1465 [4th Dept. 2007], citing United States v. Koh, 199 F3d 632, 639-640 [2d Cir. 1999]). Defendant has failed to present any direct evidence, such as a statements by a prosecutor that evinces a vindictive motive or that the district attorney's office, is, in

fact, prosecuting defendant for vindictive reasons (id.). Therefore, this portion of the defendant's motion must also fail.

Turning to defendant's next claim, namely, that the instant indictment should be dismissed in the interests of justice pursuant to CPL 210.40, defendant claims that "from July 3, 2009 to the present date has really been a living hell" for him (January 18, 2013 oral argument minutes ["OR"]:4). Defendant complains that he has been "punished enough" because, as a result of his federal prosecution, he has lost his home, his family, his savings and his reputation (OR:5-6). However, as the People noted, "the defendant's conduct [was], in fact, criminal conduct. The act of duplicating or re-reproducing (sic)computer data or computer program[s] is criminal behavior." Accordingly, defendant's motion is denied.

A Court has the discretion to dismiss a criminal action in the interests of justice and fairness so that justice may prevail over the strict letter of the law and to prevent a miscarriage of justice (see People v. Clayton, 41 A.D.2d 204 [2d Dept. 1973]; People v. Andrew, 78 A.D.2d 683 [2d Dept. 1980]; CPL 210.40[1]). However, the Courts have made it clear that the discretionary power to dismiss an indictment in the interest of justice is to be used sparingly and should only be granted when

the facts and circumstances are such that to deny the motion would shock the conscience of the Court (see People v. Rickert, 58 N.Y.2d 122 [1983]; People v. Quadrozzi, 55 AD3d 93, 103 [2d Dept. 2008]; People v. Harmon, 181 A.D.2d 34, 36 [1st Dept. 1992]; People v. Debiasi, 160 A.D.2d 952 [2d Dept. 1990];). Therefore, the Court must scrutinize the merits of the defendant's application and weigh the respective interests of the defendant, the complainant and the general public to see if compelling factors must exist that "clearly demonstrat[e] that...prosecution upon such indictment or count would constitute or result in an injustice" (CPL § 210.40[1]; see CPL § 210.20; see also People v. Jenkins, 11 NY3d 282, 287 [2008]; People v. Belkota, 50 A.D.2d 118 [4th Dept. 1975]; People v. Clayton, 41 A.D.2d, at 208).

In deciding a motion to dismiss in the interest of justice, the ten factors that the Court must, to the extent applicable, examine and consider are:

(1) seriousness and circumstances of the offense;

(2) the extent of harm caused by the offense;

(3) the evidence of guilt, whether admissible at trial or not;

(4) the history, character and condition of the defendant;

(5) any exceptionally serious misconduct of law

> enforcement personnel in the investigation, arrest and prosecution of the defendant;
>
> (6) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
>
> (7) impact of dismissal on the safety or welfare of the community;
>
> (8) impact of dismissal upon the confidence of the public in the criminal justice system;
>
> (9) where the Court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and
>
> (10) any other relevant factors indicating that a judgment of conviction would serve no useful purpose

(CPL 210.40; see People v. Jenkins, 11 NY3d, at 287). Considering these factors, both individually and collectively, set forth in CPL 210.40(1)(a-j), this Court is not convinced that this is the type of extraordinary circumstances contemplated by the statute requiring dismissal in the interest of justice.

Turning to these factors, with respect to the seriousness and circumstances of the offense, the instant case is neither rare nor unusual. Defendant was indicted and accused of committing the "E" felony offenses of Unlawful Duplication of Computer Material in the First Degree (Penal Law § 156.30[1]) and Unlawful Use of Scientific Material (Penal Law § 165.07)(two counts). The counts arise from defendant's alleged scheme to

steal Goldman Sachs' source code and computer programs by copying and reproducing them. As the Court of Appeals has recognized, in 1986, the New York State Legislature enacted these statutes in an effort to combat the increase in computer crime and abuse (see People v. Versaggi, 83 N.Y.2d 123, 128 [1994]; see also People v. Katakam, 172 Misc.2d 943, 945 [Sup. Ct. N.Y. Co. 1997]). Clearly, these are serious crimes.

As to the extent of harm caused by the offense, this is not a victimless crime. Clearly, Goldman Sachs and their clients are victims of defendant's actions. As the Court in a similar case noted, "[t]he harm suffered by Goldman Sachs ... can be measured by the cost of their investigation and the disruptions they may have suffered" (People v. Katakam, 172 Misc.2d, at 949-950).

As to the evidence of guilt, whether admissible at trial or not, it appears to be overwhelming based on the Grand Jury presentation. At the Grand Jury presentation, the People presented testimony by eyewitnesses, documents and e-mails that showed how defendant violated the Unlawful Duplication of Computer Material in the First Degree (Penal Law § 156.30[1]) and Unlawful Use of Scientific Material (Penal Law § 165.07) statutes. The Court notes that while the Second Circuit reversed defendant's conviction based on a technicality in the federal

statute, defendant was convicted of similar acts by a federal jury. Further, while at defendant's federal trial, defendant's supervisor Adam Schlesinger, may have testified that defendant had full access to the source code relating to Goldman's HFT business and Paul Walker of Goldman, may have testified that as part of his job, defendant not only had access to the source code and was required to make copies of the code in performing his daily functions, defendant was limited to using his access to that material within the confines of his employment and not free to copy it for any reason unrelated to Goldman's business (see DML:66).[5]

As to the history, character and condition of the defendant, defendant states that he was born in Moscow, Russia and he came to the United States determined "to build a successful life" (DML:67). He further states that he is a father and has had no other contact with the law apart from this case. Defendant is a "highly skilled programmer who was poised to put his prodigious skills back to use" (DML:67) without any criminal history. However, without disputing the defendant's accomplishments, or rejecting their significance, his contributions do not justify dismissal of charges (see People v. Kelley, 141 A.D.2d 764 [2d

[5]"DML" refers to Defendant's Memorandum of Law.

Dept.1988]["The mere fact that the defendant may be a police officer ... or has an exemplary background ... is insufficient to justify the exercise of the court's discretion" to dismiss an indictment charging the defendant with DUI][citations omitted]; People v. Varela, 106 A.D.2d 339, 340 [1st Dept.1984][dismissal in interest of justice not warranted based on defendant's "'exemplary' background at work, in the Air Force, as a father and as a civic affairs volunteer"]; see also People v. Norman, 5 Misc3d 1016[A]).

Specifically, defendant's argument that the case should be dismissed because defendant has already served a year in jail as well as "suffered economic [and reputation] loss and humiliation as a result of these events is not compelling" (People v. Katakam, 172 Misc.2d, at 950). Unfortunately for defendant, his character does not warrant a dismissal in the furtherance of justice. Indeed, a lack of a prior criminal conviction and defendant's good standing in the community do not constitute compelling reasons for dismissal (see People v. Riccelli, 149 A.D.2d 941, 942 [4th Dept. 1989]; People v. Varela, 106 A.D.2d, at 340; People v. Litman, 99 A.D.2d 573 [3rd Dept. 1984]). As other courts have observed, "[t]he same argument[s] can be made by anyone in defendant's position, and ignores the fact that the Legislature intended to criminalize the type of behavior of which

he is accused in order to deter it. Society is ever more dependent on the computer and the potential harm by those who are in a position to abuse their expertise is considerable. It is unfortunate that there may be collateral consequences to defendant should he be convicted, but these do not warrant dismissal of the indictment" (People v. Katakam, 172 Misc.2d, at 950).

As to any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant this Court finds that there has been none of which the Court is aware. Defendant's complaint of misconduct is based on his view that the FBI misled the Court to issue an arrest warrant and that the instant prosecution by the People is just an extension of the failed federal prosecution is meritless. While it is true that the People only chose to proceed once the federal courts stated that they did not have jurisdiction, there is no evidence that the FBI or the United States Attorney for the Southern District of New York in any way influenced the People's choice to proceed.

As to the purpose and effect of imposing upon the defendant a sentence authorized for the offense, the purpose of every sentence passed on a criminal offender is directed towards achieving one or more of four basic ends: deterrence, separation,

rehabilitation and retribution. The major underlying theory behind these sentencing ends is that the fear of possible death, incarceratory punishment or suffering will operate in some way in the minds of the lawbreakers to deter them from committing future criminal acts, thus, resulting in a determinant effect on offender recidivism (Burns, Philosophy of Sentencing [U.S. District Court, Portland, Oregon]; The National Judicial College, "Sentencing", ABA at University of Nevada, Ch. 1, at 1-5 [September 1978] as cited in People v. Vecchio, 139 Misc.2d 165, 169 [1987]).

Considering, individually and collectively, the "four basic ends" to sentencing, defendant faces a potential sentence of up to four years imprisonment. The deterrent value in the possible maximum sentence is obvious. The retribution end is also obvious in the loss of defendant's reputation and his economic loss.

The Court does not believe rehabilitation is relevant under the facts of this case.

Additionally, in considering the purpose and effect of imposing a sentence upon defendant, the State's general interest in imposing the authorized sentence is obvious; the citizens of New York have an interest in having a guilty defendant sentenced for computer related offenses which are serious offenses. Deterrence is a legitimate State's purpose. That the People

offered defendant a plea to a non-jail sentence is of no moment as to whether the indictment should be dismissed. It is the Court, and not the People, who decides what the appropriate sentence is in any given case, and it will be this Court that decides whether a period of incarceration is merited under the facts of this case (see People v. Farrer, 52 N.Y.2d 302, 305-306 [1981]). Moreover, while defendant focuses on an incarceratory sentence, he forgets that there are alternative sentences that this Court can also impose such as probation, where defendant's conduct would be monitored by the Department of Probation.

As to the impact of dismissal on the safety or welfare of the community, this Court does not believe that a dismissal in this case will have any impact one way or the other.

As to the impact of dismissal upon the confidence of the public in the criminal justice system, the Court believes that dismissal will have a negative impact. Given the continuing and growing reliance on computers, prosecution for these crimes can serve to remind the Public that no one is above the law and dismissal of the indictment under these circumstances would seriously undermine "the confidence of the public in the criminal justice system."

Finally, the defendant has failed to present "any other relevant fact indicating that a judgment of conviction would

serve no useful purpose."

The court has evaluated the merits of defendant's arguments, as well as the applicable factors enumerated in PL 210.40 and found them to be insufficient to rise to the level required for the granting of a motion to dismiss in the interest of justice (see CPL 210.40; People v. Clayton, 41 A.D.2d, at 204). What has been clearly demonstrated is that the offense with which defendant is charged is a serious and harmful one and that the criteria prescribed in CPL 210.40(1) indicates that dismissal in furtherance of justice is inappropriate. Accordingly, the motion to dismiss in the interest of justice is denied.

Defendant's motion for a Huntley-Mapp-Dunaway hearing is granted.

Defendant's motion for discovery, including with respect to how the People came to initiate the instant prosecution and the entire Goldman Trading System, is granted to the extent supplied by the People. However, if defendant believes that any response to his demand for Discovery or his request for a Bill of Particulars is inadequate, he may move to reargue within 10 days of the service of a copy of this Pretrial Decision and Order. The People are directed to preserve all evidence including electronically recorded matter and physical exhibits seized by law enforcement officials or their agents, and all notes, records

memoranda and reports prepared by law enforcement officials or their agents, including all recorded police communications.

Specifically, the Court notes that discovery matters are "regulated by statute", i.e. CPL Article 240 (Matter of Miller v. Schwartz, 72 N.Y.2d 869, 870 [1988]; see People v. Colavito, 87 N.Y.2d 423, 427 [1996]; Constantine v. Leto, 157 A.D.2d 376, 378 [3d Dept. 1990], aff'd 77 N.Y.2d 975 [1991]) and may not be circumvented by the use of a subpoena. A subpoena may also not be used merely to ascertain the existence of evidence (see Matter of Terry D., 81 N.Y.2d 1042, 1044 [1993]; People v. Gissendanner, 48 N.Y.2d 543, 551 [1979]; People v. Wallace, 239 A.D.2d 272, 273 [1st Dept. 1997]; (Matter of Office of Attorney Gen. of State of N.Y., 269 A.D.2d 1, 13 [1st Dept. 2000]; Law Firm of Ravi Batra, P.C. v. Rabinowich, 77 AD3d 532, 533 [1st Dept. 2010]). Indeed, a defendant may not use a subpoena to conduct a "fishing expedition" (United States v. Nixon, 418 U.S. 683, 700 [1974]), in the hope of "unearthing [ ] some unspecified information" that he is not entitled to under the discovery statutes or otherwise (Gissendanner, 48 N.Y.2d at 549; see People v. Villacorte, 76 AD3d 911 [1st Dept.], lv. denied 15 NY3d 956 [2010]). Rather, a subpoena must seek "to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding." Matter of Terry D., 81 N.Y.2d, at

1044 (internal quotations omitted).

Indeed, defendant must put forth "some factual predicate" that would make it "reasonably likely that the documentary information will bear relevant and exculpatory evidence" and not just potentially relevant evidence (Constantine v. Leto, 157 A.D.2d 376, 378 [3d Dept. 1990], aff'd 77 N.Y.2d 975 [1991]; Gissendanner, 48 N.Y.2d at 548-550; see Villacorte, 76 AD3d 911 [1st Dept. 2010]). The showing may not be based on speculation (People v. Baldwin, 211 A.D.2d 638 [2nd Dept. 1995]). Additionally, a subpoena may not be overbroad nor unreasonably burdensome as a "witness is not required to cull the good from the bad" (People v. Doe, 39 A.D.2d 869, 870 [1st Dept. 1972]; see Matter of Grand Jury Subpoenas, 72 N.Y.2d 307, 315-16 [1988]; Hynes v. Moskowitz, 44 N.Y.2d 383, 394 [1978]; People v. Zilberman, 297 A.D.2d 517 [1st Dept. 2002]).

With this in mind, the People argue that defendant, having been provided with all the discovery to which he is entitled in the People's Voluntary Disclosure Form ("VDF"), is attempting to obtain more than that which he is entitled (People's MOL: 56). They accuse him, in effect, of being on a fishing expedition. The Court agrees.

With respect to defendant's specific request for discovery into the circumstances under which the New York County District

Attorney's Office ("DANY") decided to indict him, including but not limited to leave to subpoena the DANY and its files and communications regarding defendant and to take depositions of DANY attorneys and staff, the People in their response to defendant's motion have disclosed all the facts about how the instant prosecution was initiated to which defendant is entitled under CPL 240.20.

With respect to defendant's application to "inspect" Goldman's Trading System and "to make such tests and inspections to aid his expert witnesses who will be called at trial (Defense MOL:96). Goldman's computer system is not discoverable nor is the "entire Trading System" (Defense MOL: 96) within the People's possession, custody or control nor do they intend to introduce the entire system into evidence at trial (see CPL 240.20; People v. Robinson, 53 AD3d 63, 73-74 [2d Dept. 2008]; People v. Villacorte, 76 AD3d 911 [1st Dept.]), lv. denied 15 NY3d 956 [2010]). Indeed, the People state that they will only introduce the specific materials defendant is charged with copying and transferring (People's MOL: 57). Therefore, all defendant is entitled to receive is those materials defendant is charged with misappropriating, material to which both the Court and the People believe that defendant and his experts already have access (see United States v. Lee, U.S. dist Lexis 24972, at

*7 (ND Cal 2009).

The Court also finds that defendant's request for access to the entire Goldman Trading System to be overbroad and based on little or no factual predicate. A subpoena is not meant to be used as a general investigative tool, but rather as a means of targeting specific documents (see Constantine, 157 A.D.2d at 378).

Based on the submissions before the Court, it is clear that the contents of Goldman's "entire Trading System" are not at issue nor is it necessary for defendant to inspect any of Goldman's confidential and proprietary material that is unrelated to the charges in this case. Accordingly, the request for discovery and inspection of the entire Goldman Trading System is denied.

ENTER:

Hon. Ronald A. Zweibel, JSC

Dated: April 5, 2013