UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
                                               Docket No.
 UNITED STATES OF AMERICAS   :

                    Plaintiff,   :

  – against –   :

 SERGEY ALEYNIKOV,   : New York, New York
                                             July 4, 2009
                    Defendant.   :

--------------------------------------- :

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

APPEARANCES:

For the United States   U.S. ATTORNEY'S OFFICE,
     of America: SOUTHERN DISTRICT OF NEW YORK
                         BY: JOSEPH FACCIPONTE, ESQ.
                         One St. Andrew's Plaza
                         New York, New York 10007
                         (212) 637–2492

For the Plaintiff: FEDERAL DEFENDERS OF NEW YORK
                         BY: SABRINA SHROFF, ESQ.
                         52 Duane St., 10th floor
                         New York, New York
                         (212) 417–8700

Transcription Service: Carole Ludwig, *Transcription Services*
                        141 East Third Street #3E
                        New York, New York 10009
                        Phone: (212) 420–0771
                        Fax: (212) 420–6007

Proceedings recorded by electronic sound recording;
Transcript produced by transcription service

INDEX

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

Witness	Direct	Cross	Re-Direct	Re-Cross
None				

E X H I B I T S

Exhibit Number	Description	ID	In	Voir Dire
None				

THE CLERK: All rise.

THE COURT: Please be seated.

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

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

THE COURT: Good afternoon.

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

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

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

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

(Witness is Sworn)

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

understand, sir?

MR. ALEYNIKOV: I do.

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

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

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

MR. ALEYNIKOV: Yes, Your Honor.

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

MR. ALEYNIKOV: It is.

THE COURT: The information that you provided in

the affidavit suggests to me that you can retain counsel.

So I will appoint counsel to appear with you only for this

proceeding and you will have to make efforts to retain

counsel.

If you're not able to retain counsel you should

advise the court and the issue of whether counsel will

appointed for you will be revisited.

Ms. Shroff, have you received a copy of the

complaint?

MS. SHROFF: I have received the complaint, Your

Honor. I have provided my client with a copy. He has read

the complaint and he waives its public reading at this time.

THE COURT: Very well. Sir, you have a right to

have a preliminary hearing held in connection with the

charge that is outlying in the complaint. At the hearing,

the government would have the burden of establishing that

there's probable cause to believe that a crime was being

committed as set forth in the complaint and that you

committed it.

If probable cause is not established, you will be

released from the charge. If it is established, the

government will have the right to proceed to trial against

you. If you are in custody, the hearing will be held within

ten days. If you at liberty, the hearing will be held

within 20 days. No hearing will be held before the date in

which it is scheduled. You're either indicted by a grand

jury or information is filed against you by the government.

I'll fix the hearing date in just a moment, after we address

the issue of bail.

          Have both parties received a copy of the pre-trial

services report?

          MR. FACCIPONTE: Yes, your government has, Your

Honor.

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

          THE COURT: What is the government's position on

the bail?

          MR. FACCIPONTE: We seek detention at this time,

Your Honor.

          THE COURT: Under what theory or theories?

          MR. FACCIPONTE: On theory of danger to community

and risk of fight.

          THE COURT: What is the defendant's position on

bail?

          MS. SHROFF: Your Honor, the defendant maintains

that he should be released according to the recommendation

of the pre-trial services officer.

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

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

          THE COURT: I'll hear the government in

connection with its application.

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

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

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

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

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

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

I'll explain why in a minute -- by the other competit

activity. In addition, because of the way this software

interfaces with the various markets and exchanges, the bank

has raised a possibility that there is a danger that

somebody who knew how to use this program could use it to

manipulate markets in unfair ways.

What this program does is connect and draw

information from stock exchanges around the country, and it

draws them in very small increments of time. One of the

bank officers described it as milliseconds of time. And it

is very efficient at processing that stock information and

sending to the bank's programs that conduct trades based

upon algorithms that are developed by mathematicians and

physicists.

As we stand right now, according to the

defendant's post-arrest statements to the government, he

transferred his view -- unwittingly, but nevertheless amidst

to having transferred --

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

unwittingly?

MR. FACCIPONTE: In the defendant's view in his

post-arrest statement. Nevertheless --

THE COURT: Share the statement with defendant's

counsel.

MR. FACCIPONTE: I have provided the copy of the

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

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

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

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

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

information if it is not already out there.

THE COURT: But my point is if you've made the financial institution aware, that is date of the compromise, and resides in the server in Germany, prudence dictates the financial institution now has to take steps, if it hasn't already, to address the loss of that information. It can't guess that no one has access to it. It has to operate as if someone does have access to it and can use it and can affect the financial institution adversely.

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

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

In other words, they can take steps, they can start building a new program, they can -- I'm not exactly sure what steps they can take. But even if they could take steps, my understanding from them is that any dissemination of this program would be a substantial loss to them, a very substantial loss to them.

And so if has, by some miracle, it has not been disseminated already, the government requests that the

defendant be remanded so that there is no possibility that

he can affect any transfer of the software that is in

Germany.

THE COURT: Well, whether he is detained is

irrelevant. The financial institution cannot gamble, if I'm

to believe your presentation that markets will be affected

and so forth, they can't gamble that no one else is going to

get access. It has to operate as if someone's got access

and has got to take steps to insulate or reduce any damage

it could possibly reduce, not only to itself but to the

financial markets.

MR. FACCIPONTE: May I have one moment, Your

Honor?

(Pause in proceedings)

MR. FACCIPONTE: I believe, Your Honor, that the

financial institution, I think the position here is that

whatever steps the financial institution can take, the

financial institution essentially has no way to effectively

protect itself against the loss of this program. Once it is

out there, anybody will be able to use this. And fair

market share would be adversely affected. They would've

lost the substantial investment of millions upon millions of

dollars that they've placed into this software.

Even if they take the most prudent steps available

to them we should not run the risk that something which has

not been let out of the box yet, could be let out of the box

if the defendant is released. And if he's released, he

doesn't need necessarily access to his home computer. A

smart phone, a black berry, or an Iphone, something that

gives him access to the Internet is all he needs, and maybe

ten minutes.

So until we can say that this information is

secure to the best of your knowledge, the government

maintains the defendant is danger to the community.

In addition, Your Honor, he poses a risk of flight

and I believe the risk of flight in connection to a

substantial amount of money that could be made in selling

this software ought to be noted by the court.

He is a dual citizen with the Russian federation.

He has ties to Russia in the sense that his parents are

there and he visits Russia about every other year or so. He

is facing, if the court were to find a maximum amount of

loss possible here, in the worst-case scenario, a very

substantial sentence in this case.

And considering that he's already partially

allocuted to some of the elements of the offense in his

post-arrest statement and the other evidence that we're

developing and the evidence presented in the complaint, the

proof against him is strong at this point.

And so therefore, there's just a possibility of

substantial sentence combined with the profit to be made by

selling this software, combined with the fact that he can

flee to Russia, the government believes that the defendant

be detained at this time.

THE COURT: If as you say, the material is on the

server in Germany, if anyone can access the material through

that server, that is to say it is not only the defendant who

can access it; he might be able to provide other persons

with information that would allow them to access it, if

that's so, then what difference does it make whether he's

detained or not if he can communicate that information?

MR. FACCIPONTE: Right now our understanding is

that the server can only be accessed by someone who has his

user name and password.

THE COURT: Who has what, sir?

MR. FACCIPONTE: His user name and password.

THE COURT: Okay. So if he gives that to you,

you can access that, isn't that correct?

MR. FACCIPONTE: That is correct, Your Honor.

THE COURT: So whether he's detained or not

doesn't him from communicating that information to you or

anyone else. And therefore the server could be accessed and

the financial institutions and the markets compromised as

you have described.

MR. FACCIPONTE: It would certainly be more

difficult, Your Honor. And I don't believe the public ought

to bear the burden or the risk of that coming to past. In

addition --

THE COURT: But if he's detained, what prevents

him from communicating the information? That's what I don't

understand.

MR. FACCIPONTE: It would be a lot harder. He

would have to at the very least enlist and accomplice.

THE COURT: Okay.

MR. FACCIPONTE: Which people may not want to be

accomplices.

THE COURT: That's true whether he's detained or

at liberty.

MR. FACCIPONTE: Okay. But if he's at liberty he

would not necessarily -- he would not need an accomplice.

He could just pass it on to another server somewhere.

THE COURT: He may already have accomplices who

may have the information that can access the server in

Germany. Whether he's detained or not, I still don't

understand why being detained means the information can't be

disseminated to access the server.

MR. FACCIPONTE: Because the server -- if the

server had been in the United States, Your Honor, we would

already be preparing process to free --

THE COURT: But it's not.

1

2   MR. FACCIPONTE: The government needs a few days,

3   given the holiday weekend, it would be difficult to do that.

4   But the government needs a few days to consult with German

5   authorities to take the steps to freeze that server.

6   So if the court is not prepared to detain the

7   defendant on a general showing, the government would at

8   least ask that the defendant be detained until such time as

9   they can secure the server, which we are moving to do even

10 as we speak now.

11   THE COURT: I still don't understand why

12 detaining him prevents him from communicating information so

13 that someone can access the server. If you make that clear

14 to me, then I understand more acutely why you're arguing

15 that he should be detained.

16   MR. FACCIPONTE: Well, he would --

17   THE COURT: If it just makes it difficult, lots

18 of things are difficult, but not impossible.

19   MR. FACCIPONTE: If he were detained now, for

20 example, I don't believe he would have immediate access to

21 telephone privileges at the NCC or MDC. I believe it takes

22 days to set those accounts up. He would have to tell

23 somebody physically. I don't believe anybody would -- he

24 would have to enlist a co-conspirator right now.

25   And I think when you weigh the probability of him

26 engaging in that behavior and being able to pull that

together, first is the potential risk of just letting him

go, I believe he ought to be detained. Because he still has

more burdens in prison to disseminate his information than

he does if he's out in the street.

So if he's out in the street, he just needs access

to a cell phone. In prison, he needs to get access to a

phone which is not a right if he is detained. He would need

to write a letter. A letter takes several days to get to

where it needs to go.

In the meantime, we would have -- we would very

likely have the server locked down at that point in time.

THE COURT: All right. Ms. Shroff?

MR. FACCIPONTE: Actually, Your Honor, if I may,

earlier I represented that there had been no breaches before

for the bank. I should put that there's never been any

breaches in anywhere of this magnitude before of the bank

where the entire platform has gone out.

I can't represent that there have been absolutely

in the past no breaches whatsoever. But I do want to use

that segue into one thing I overlooked, which is when we

talk about this platform having been sent out, we're talking

about what he did on the last day of his job, on June 5th,

2009.

We have access of substantial file transfers that

are listed in the complaint from June 4th and June 1st

because the banks have not been able to recover the command

history for what he did at those times. He have no idea of

what he took from the bank on those occasions.

He admits in his post-arrest statement that he has

taken other information from the bank. So I do want to say

that this is the most substantial theft that the bank can

remember ever happening to it, in the sense that the entire

platform has been stolen.

In addition, the defendant has, on other

occasions, taken information from the bank and we don't know

what that information is or what use he's made of it or

where it is even. I mean, it also -- some of that was also

sent to the server in Germany but we haven't had access to

that server yet.

THE COURT: Ms. Shroff?

MS. SHROFF: Your Honor, let me just pick up with

the issue the court sort of raised and that occurred to me

while I was listening to Mr. Facciponte. Mr. Facciponte is

assuming, sitting here today, that nobody else has the

password or nobody else can access the server in Germany.

For all he knows, my client was at liberty to give

it to me and may have given it to several other people

before today. So I don't think detention necessarily has

impact on what -- and I'm not referring to my client here;

I'm referring to any generic defendant who would be accused

of this kind of crime.

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

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

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

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

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

I've done it before during the course of my employment and

Goldman Sachs has had nothing to say about it. I have no

intention of ever selling this information nor did I have

any intention of ever using the information in a way

contrary to my employment agreement with Goldman Sachs.

I have not sold this information to anybody. I

have not offered to sell it to anybody. In fact, I'm fully

cooperating with your entity because I did not think I was

doing anything wrong.

I'm going to go ahead, Mr. FBI agent and AUSA and

sign a consent form so you can go to my home which has my

three little children in it, my wife in it, and I'm going to

tell my wife to let you come on into my home and take all

the computers that are over there.

I'm happy to sit down and talk to you and let you

know what other electronic equipment I have, and you can go

right ahead and seize it.

All of this the government has. So the government

has all of his personal computers. The government is also

fully knowledgeable about the fact that this employer was in

the past aware that this is how his common work practices

were and Goldman Sachs never took any steps to stop those

work practices.

So I'm somewhat confused by how the government can

say that there have been numerous breaches but none of the

breaches were addressed by Goldman Sachs that should've

resulted in an earlier arrest.

The other thing that the prosecutor just referred

to, and I'm going to ask you just to take a look at page

seven of paragraph seven of the complaint itself. It says

that there are transfers from between June 1 to June 5th of

32 megabytes. I'm told that the entire platform would

consist of 1,224 megabytes at the very least.

So out of 1,224, the government is alleging 32

were transferred. I don't understand how the government can

say my client has allocuted to any part of this crime

because his statement is replete with his saying, I never

had any intention of using this in any non-proprietary way.

I have violated no non-compete agreement. He says that very

clearly in what I have received to be his statement.

So I don't think detaining Mr. Aleynikov has any

relation to danger to the community. And the one side point

I do want to make is that the server happens to be in

Germany is not known to anybody, nor was it a deliberate

attempt. Because when you see a URL you don't know where

the server is.

So I'm really not sure what difference that makes.

And finally, if the government wants to take steps with

Germany, I'm pretty confident that nobody in Germany is

celebrating the 4th of July. I don't think they got

independence the same year we did and I think the government

is well equipped to deal with whatever they want without

requesting that the time they need to necessarily result in

my client not being at liberty where he's otherwise fully

qualified for bail.

This brings me to risk of flight. It is absurd to

say that he's had risk of flight. He had three young girls

who are under the age of five, the last on being eleven

months old. His wife is a United States citizen; she is in

court today. His father lives in the United States.

Although they are not close, he is here.

My client's entire married into family. His

father and mother are in the courtroom today. His mother-

in-law is not here because she's watching the three girls,

but both of them would be willing to sign the bond.

So the only person he has in a country other than

this country is his mother and step-father. His mother is

certainly not a draw enough to my client to have not bought

a home in this country, not once but twice, and is certainly

not a draw enough for him to even visit her more than, maybe

once year.

I am told, and I asked the agent to show me the

passport, but the passport was not available to me, but in

the last 19 years that my client has lived in the United

States he has visited his home country or his mother's home

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

My client's post-arrest statement belies guilt

here. My client's actions certainly belie guilt. He gave

them the entire computer. As I understand it, they have

seized every equipment that was in their home, this morning.

And my client's wife let them in through the door and handed

it over.

I'm also told that my client's passport, both of

them, one which was in his home. I think his Russian

passport, which I'm not even sure if valid now, but whatever

it is, it's with the agent. The United States passport is

also with the agent, so my client is certainly not at risk

for flight.

And I think probation recommendation is proper

give the fact that my client is almost 40 years old, has no

prior arrest, no prior contact with the criminal justice

system, and detention is wholly improper given the facts of

this case.

If I've left out anything, Your Honor, I'm happy

to answer it here but I think the court is correct. There

seems to be no logical relationship between the relief being

sought and the harm that they seek to curtail. That there

is absolutely no way to say that a person should be detained

because they think that he may not have already passed on

access devices to some proprietary code.

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

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

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

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

enough, we are happy to have, come Monday, confessed

judgment in the home. We're happy by any conditions that

the court imposes, including that my client not have access

to any electronics, including a telephone or including a

cell phone. I have no objection to that.

And I have two people who are ready to sign the

bond in court. His father-in-law works for ADP and I'm told

his yearly income is about $100,000. His mother-in-law

would be the second co-signer. She's a piano teacher. And

my client's wife would be the third co-signer if the court

would need a person that does not make money but has moral

estuation over Mr. Aleynikov.

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

THE COURT: Thank you. Anything else on behalf

of the government?

MR. FACCIPONTE: Yes, Your Honor, if I may

respond to a few points?

THE COURT: Sure.

MR. FACCIPONTE: Okay. First of all, in the

government's discussions with the investment bank, we have

heard nothing to indicate that the investment bank at any

time has ever sanctioned the defendant taking any software

out of the bank and doing anything else with it.

The bank officers were quite clear that they

consider whatever software is being worked on my Goldman

Sachs employees that that software is proprietary and stays

within the bank. In fact, one bank officer recollected that

there was a time when defendant himself had asked permission

to take what could be considered open soft source software

which in the programming community is software which

programmers consider anyone can use in that intellectual

property rights don't strictly attach to and place it back

onto the market, and he was told no.

And the fact that he asked shows that he is aware

that he cannot just take software and put it out into the

market. And the defendant signed a confidentiality

agreement that is quite clear that nothing that has anything

to do with Goldman Sachs goes outside of Goldman Sachs

without their permission.

So the notion that they would have to be something

we have not heard as the government from the bank. Because

everything that we have heard is that this was not

sanctioned conduct whatsoever from him.

Second, I do want to address a few small points.

When the agents were interviewing the defendant last night,

he had signed a written consent to be interviewed and a

waiver of his Miranda rights. He did not have counsel

appointed at that time. He did not request counsel to be

appointed during that time.

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

not been appointed yet by this court. The U.S. Attorney's

Office position was that the defendant is not asking for

counsel at that point in time and he has no appointed

counsel, that Ms. Shroff could unilaterally instruct the

government to terminate the interview, and that's why we did

not terminate the interview.

In any event, I personally did not receive Ms.

Shroff's communication until just about the time when the

interview was being terminated anyway, although she did

attempt to communicate with another assistant in the office

last night.

The second point is the contention that I said

that the defendant had gone to Russia every year. I believe

I said every other year. And if Ms. Shroff says he's been

in this country nearly 20 years and he's been to Russia 10

times, that would be correct.

Third, the notion that the software, the

proprietary platform is much bigger than a 32 megabytes.

Our understanding from the bank is that what he took was

essential software to the platform that puts them in extreme

jeopardy of having their software out there in the market.

I also know for the one instance where we do have

logs of what he did, he ran a program that compressed the

files that were a resident on Goldman Sachs' servers, and

compressed it down to a smaller size. So whether the total

size of this software -- it could be much bigger - it's also

true that he has run a compression program on at least on

the software that went out on that Friday.

Ms. Shroff made some representations about the

defendant's motivations and consenting to searches. You

know, it's often true that defense attorneys look for

evidence of innocence in a defendant's consent to search.

Another way to look at that is how did they arrest the

defendant might figure that we already know about certain

activities of his and we're going to get a search warrant

anyway, so perhaps he should start cooperating.

We have no indication, however -- well, let me put

it to you this way: Again, his main contention is that, in

his post-arrest statement, that he took this unwittingly; he

had meant to take something else. Now the script that he

ran to take this information was very specific as to which

files would be taken and copied and uploaded into his

server.

So I don't know how there could've been a mistake

there, but even assuming there was a mistake, when he

discovered the mistake, which he says he discovered, why not

give it back immediately? Why hold on to it for a month.

And leave in mind it should be said that he is now working

in a start-up company that is developing the same kind of

software and his salary increased three fold just by joining

that start-up company.

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

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

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

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

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

already had in place when I first took your money. That's

preposterous. I mean, essentially what Mr. Facciponte is

telling us is this financial institution that takes millions

and millions of dollars of the American public should not

bear the risk of making sure that their millions and

millions of dollars are safe, and that burden in fact should

rest on one of maybe two hundred employees at Goldman Sachs

that has access to their software code. And gee whiz,

because Goldman Sachs didn't bother to do it, could you just

detain him for a couple of days so that Goldman Sachs can

get his act together? That's an absurd argument to make.

It's just as absurd as saying that this guy who

you want to say in the next four days might use the code,

and it's such a big feat, would not have put things in place

to make sure what he took over a month ago was not already

stolen or already put to malfeasance use.

So essentially what the government is saying to

you is this: Listen, a month ago this guy went and stole

something that Goldman Sachs values so much that they didn't

bother to properly protect. For a month they did nothing.

He just kept on going on, using the source code, or whatever

code it is, and for a month and a half, a month at the very

minimum, Goldman Sachs did nothing.

Now suddenly Goldman Sachs has realized that they

want this code that they shouldn't be wherever they think it

is out there. So now they want to come to you and say, hey,

detain him because for a month we did nothing. Even though

all the other factors show that this guy might actually be

innocent. Because were he not innocent, in a month that it

took for him to keep this code, he didn't sell it to

anybody. They don't have any proof of any selling to

anybody. He hasn't disseminated to anybody that the

government can pass it to you.

In fact, in all the -- the 20 minutes he's been

talking, he has never once told you what he did with the

code. It seems the code is encrypted, safe, not spent, and

out there just sitting. Because surely he started the

start-up way before this weekend, right? In fact, they've

known about this by their own admission since June 4th.

So whatever start-up he has, if he was going to

use it, he would've used it already. It would already be

over there and obviously they know it's not over there. So

it's a very strange argument to say, especially when they're

arguing for detention. And they're basically saying to you,

the only reason we want to now detain him is we're scared

Goldman Sachs can't get its act together. That's not a

reason in the Bail Reform Act format to detain somebody.

Okay?

And there is no indication here that his actions

could or would prevent any harm to the general public.

That's the first argument.

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

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

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

to them, is at harm. And Goldman Sachs has known about this

since June 1. We are now on July 4th.

Finally, Your Honor, I just want to make sure that

the little anecdote that the government just said was

actually factually incorrect as far as I can tell. The

question posed to Goldman Sachs was not about accessing

software. The question was whether a particular thing could

be revealed into open source.

This material that they're claiming is so highly

sensitive is not accessible. It's encrypted and again, I

cannot make this point more strongly, for a month he has not

sold it. Every single time he's talked about this code, the

word he's used is Mr. Aleynikov took it. Taking. He took

it and he did nothing with it. They still haven't showed

any sell, anything that is done with it to put Goldman Sachs

or the American public at risk, so he should be released.

THE COURT: Anything else we have from the

government?

MR. FACCIPONTE: Just briefly, Your Honor.

Goldman Sachs has not known about this since June 1st.

Goldman Sachs has known about this for a matter of days.

THE COURT: For how long?

MR. FACCIPONTE: For a matter of days, Your

Honor.

THE COURT: But the complaint says differently.

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

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

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

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

1

2 this was such an innocent

activity on his part?

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

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

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

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

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

month later.

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

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

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

So essentially basically what they're saying to

you is, why don't you detain him until we've figured out

exactly what we can or cannot do? And that is something

that the bail reform act asks you to weigh within a

conglomerate of other factors, including the inferences that

we draw from misconduct. And the conduct that the court

should focus on is his lack of having done anything improper

with the proprietary information.

And, Your Honor, every single personal fact behind

this defendant supports release. There is no prior criminal

history, there's not bench warrant history, there's nothing

to indicate he's a risk of flight, there's nothing to

indicate he doesn't have family here. There's absolutely

nothing to indicate that he would do or take any wrong steps

here.

And I think the government is sort of cavaliering

throwing out hypotheticals. Maybe he would compound his

criminal behavior. Well, the equal inference is maybe he

wouldn't. As he said in his statement he took this

unwittingly. If he took this unwittingly, it is certainly

must greater an inference that he wouldn't do anything

improper with the information.

And again, to just go back to the point you

raised, there is no correlation between him being detained

and him releasing the proprietary code. In fact, I could

throw out another hypothetical. Maybe he'll think, oh, I'm

detained. I might as well have this sold to the highest

bidder so that my three children and my wife can be taken

care of. I'll just rot in jail. That's an equally

plausible inference or an equally plausible thought that a

person may have.

　　　　There has to be some correlation, as you said,

between the remedy they seek and the harm they seek to

prevail. Detention is not appropriate here. What might be

appropriate is extremely stringent circumstances, and that

should more than suffice given the facts of this case.

　　　　THE COURT: Can you be heard further on behalf of

the government?

　　　　MR. FACCIPONTE: Not necessarily, Your Honor. I

just don't know where Ms. Shroff sees in the complaint that

Goldman Sachs is aware as of June 1st. Goldman Sachs began

running programs within the past few weeks, recently

identified and issue. There was no contention in the

complaints.

　　　　And even if the complaints are ambiguous or

inartfully worded someplace, I can represent to you that my

understanding from Goldman Sachs is they did not know of

this as of June 1st. They learned of this much more

recently and --

　　　　MS. SHROFF: Your Honor, I think page eight, I

mean, paragraph eight, as of June 5th, 2009 the financial

institution has recovered a record of series of commands

entered in Aleynikov's desktop which is also known as a

batch history. So what were they aware of as of June 5th?

MR. FACCIPONTE: It's not as -- it's as to June

5th. And what we were trying to say there is as of the June

5th transfer the government has -- the financial institution

has recovered a series of commands that are related to that

transfer on June 5th. It's not when Goldman Sachs

discovered the transfer. They didn't discover the transfer

the day it happened.

MS. SHROFF: And paragraph seven says as a result

of the review the financial institution learned that the

worktop desk and the review is noted in the first line of

paragraph seven. According to representatives of the

financial institution within the past few weeks I have

learned that the financial institution has begun monitoring.

So they start monitoring in June but they don't

really pay any attention to what they're monitoring. Is

that what the government wants us to think? So they stop

monitoring in early June, they start noticing something in

June 1st, but they say, hey, we'll just wait until the 4th

of July and then bring it up?

MR. FACCIPONTE: I really think Ms. Shroff is

misconstruing the allegations in the complaint.

MS. SHROFF: It's clear --

MR. FACCIPONTE: In any event --

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

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

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

MR. FACCIPONTE: -- in June.

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

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

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

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

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

MR. FACCIPONTE: It could be disseminated.

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

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

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

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

(Pause in proceeding)

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

THE COURT: Yes.

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

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

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

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

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

addressed issues with respect to flight only.

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

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

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

      MS. SHROFF: But then --

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

      MS. SHROFF: Right.

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

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

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

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

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

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

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

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

MS. SHROFF: Thank you, Judge.

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

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

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

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

month since the accused severed his ties with this prior

employer, a financial institution, whose proprietary

information is at the heart of the complaint. And there is

no evidence that has been proffered that the material was

taken, or alleged to have been taken, from the financial

institution has been used to harm it or anyone else.

Much during the course of this proceeding is based

on speculation. But we don't deal with speculation when we

come to court; we deal with facts.

Given all of the information that has been

presented to me in support of and against the application

that the accused be held without bail, on the issue of

danger, the court has to find that there is clear and

convincing evidence that the defendant would present as a

danger. I don't think that clear and convince evidence has

been presented to me, so I do not find that he should be

detained under the theory of danger.

With respect to flight, I also am not persuaded

that the quantum of information that's been presented to me

permits a conclusion that the defendant could not be at

liberty under conditions that would insure that he be in

court whenever he is directed to do so. So I'm going to

deny the application that the defendant be detained without

bail.

(Pause in proceeding)

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

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

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

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

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

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

your arrest, and you may expose yourself to a new charge in

connection with your failure to appear in court, which would

have a penalty that is independent of any penalty that might

be imposed upon you should you be found guilty of the

offense that is outlined in the complaint. Do you

understand, sir?

MR. ALEYNIKOV: I do.

THE COURT: What date would you like for a

preliminary hearing date?

MS. SHROFF: Your Honor, first may I just request

that the United States Attorney's Office order my client to

be produced on Monday so that all conditions can be met.

I'm told that those conditions will be met by Monday. So

I'm going to ask Mr. Facciponte to please produce my client.

And assuming that he does, then I would like the

30th day.

MR. FACCIPONTE: Your Honor, I --

THE COURT: Please have the defendant available

so that, if the conditions are satisfied, he may be released

on Monday.

MR. FACCIPONTE: Your Honor, we'll put in a

prison production order with the Marshals immediately after

this conference.

THE COURT: August 3 will be the preliminary

hearing day. Is there anything else that we need to

address?

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

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

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

C E R T I F I C A T E

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

Signature_____

Date: July 6, 2009