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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SERGEY ALEYNIKOV, Plaintiff, v. MICHAEL McSWAIN, EUGENE CASEY, and JOHN DOES 1-10, all agents of the Federal Bureau of Investigation, Defendants.	**Civil Action No.:** ECF Case **COMPLAINT AND DEMAND FOR TRIAL BY JURY**

Plaintiff, Sergey Aleynikov ("Aleynikov"), through his undersigned attorneys, by way of Complaint against Defendants, Michael McSwain ("Agent McSwain") and Eugene Casey ("Agent Casey"), Special Agents of the Federal Bureau of Investigation (the "FBI"), and John Does 1 through 10, fictitiously named agents and employees of the FBI (the "John Doe Defendants"), all of whom are sued in their individual and personal capacities, alleges as follows:

NATURE AND OVERVIEW OF THE ACTION

1. This is an action pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), for compensatory and punitive damages to redress violations of Plaintiff's constitutional rights by Defendants, all agents of the United States who acted individually and in concert, in their personal capacities, and at all times under color of federal law, to (a) institute and pursue a malicious prosecution of Plaintiff on federal charges; and (b)

unlawfully retain and transfer property seized from Plaintiff in New Jersey to the New York County District Attorney's Office (the "DANY") for use in a state prosecution based on the identical conduct underlying his failed federal prosecution, all in violation of the Fourth Amendment.

2. Much of the factual and legal background of this action is set forth in a Decision and Order of the Supreme Court of New York County issued on June 20, 2014 (the "Decision") in The People of the State of New York v. Sergey Aleynikov, Indictment Number 4447/12, a state prosecution of Aleynikov brought by the DANY. In the Decision, which the People did not appeal, the Honorable Ronald A. Zweibel, J.S.C., granted Aleynikov's motion to suppress all of the physical evidence against him based on three findings Justice Zweibel made as a matter of law. A true and exact copy of the Decision is annexed to this Complaint as Exhibit A.

3. First, Justice Zweibel ruled that Agent McSwain violated Aleynikov's Fourth Amendment right to be free from unreasonable searches and seizures by effectuating his arrest on July 3, 2009 (the "Arrest") without probable cause to believe he had violated the National Stolen Property Act (the "NSPA"), 18 U.S.C. § 2314, by allegedly stealing computer source code for Goldman Sachs's high frequency trading ("HFT") platform, and seizing personal property from him at the time of his Arrest. That clear violation of Aleynikov's constitutional rights led to his unlawful indictment and conviction in federal court and his imprisonment on that conviction until his appeal was argued on February 16, 2012, by which date he had already spent 51 weeks in federal prison. That evening, the United States Court of Appeals for the Second Circuit ordered Aleynikov acquitted and released immediately, *see* United States v. Aleynikov, 676 F.3d 71 (2d Cir. 2012), because the conduct charged in the Indictment did not constitute a violation of the NSPA, for which Aleynikov was arrested, or the Economic Espionage Act of 1996 (the "EEA"),

18 U.S.C. § 1832, under which he was also convicted. Second, Justice Zweibel ruled that there was no probable cause to support the EEA charge—which the Government only chose to bring after arresting Aleynikov for violating the NSPA—because, as the Second Circuit also held, the alleged theft of Goldman Sachs's computer source code did not violate the EEA either. Third, Justice Zweibel ruled that the Government violated Aleynikov's Fourth Amendment right to be free from unreasonable searches and seizures by retaining and transferring his property to the DANY after his acquittal, where it was then used to justify his re-arrest on August 2, 2012 (the "Re-Arrest") on the state charges now pending against him. Aleynikov is presently scheduled to stand trial on the state charges on April 1, 2015.

4. Defendants' constitutional violations as found by Justice Zweibel began shortly after Goldman Sachs reported Aleynikov's alleged theft of its intellectual property. Specifically, Agent McSwain, assisted by Agent Casey and one or more of the John Doe Defendants, arrested Aleynikov for an alleged violation of the NSPA on July 3, 2009, in response to accusations made just two days earlier, on July 1, 2009, by employees of Goldman Sachs, including the patently false allegations that: (a) Aleynikov had stolen "the entire platform" of confidential, trade secret computer source code Goldman Sachs used to conduct HFT; (b) the allegedly stolen source code was worth "a billion dollars;" (c) Goldman Sachs could suffer immediate and irreparable harm as a result of the alleged theft; and (d) there was a danger that the allegedly stolen source code could be used to "manipulate markets in unfair ways"—a claim that should have raised concerns about Goldman Sachs's own use of that code—unless Aleynikov was arrested and detained immediately.

5. Agent McSwain and those who assisted him accepted Goldman Sachs's allegations as true without hesitation, without conducting a meaningful investigation, without securing or attempting to secure a warrant for Aleynikov's arrest, and—as Justice Zweibel has now determined

as a matter of law—without probable cause to believe he had violated any federal law. The following day, July 4, 2009, while Aleynikov was under arrest and in federal custody, Agent McSwain—acting knowingly, recklessly and/or with gross negligence, and with the improper purpose of serving the interests of Goldman Sachs rather than the interests of justice—swore out a criminal complaint charging Aleynikov with violating both the NSPA and the EEA, thus initiating his federal prosecution without probable cause and with actual malice.

6. Defendants' reprehensible and relentless campaign to violate Aleynikov's constitutional rights—which began in response to Goldman Sachs's false representations regarding his conduct and continued unabated throughout his ensuing federal trial, conviction, sentencing, and incarceration for a total of 51 weeks while his appeal was pending—not only persisted but escalated following the Second Circuit's unanimous decision acquitting him of all crimes and ordering him released from prison immediately on the day his appeal was argued. At that time, Defendants succumbed to pressure exerted by Goldman Sachs and, as Justice Zweibel has also determined as a matter of law: (a) improperly retained property owned by and seized from Aleynikov in conjunction with his Arrest despite his post-acquittal request for the return of that property; and (b) improperly transferred his property to the DANY, where Agent McSwain swore out a warrant for Aleynikov's Re-Arrest as a fugitive from justice although, as Agent McSwain well knew, Aleynikov was a free man who had no way of knowing fresh charges were being pursued against him.

7. At the same time, Defendants led Aleynikov to believe that the Government intended to honor his request for the return of his Russian and United States passports—which were at that point unlawfully in the Government's possession—so that he could travel to Russia to visit his mother, who was receiving cancer treatments, although Defendants had no intention of

allowing him to make that journey. Defendants' individual and collective mistreatment of Aleynikov in the teeth of the Second Circuit's order acquitting him of all charges resulted in his re-detention for one week in Newark, New Jersey before he was extradited to New York and arraigned on the new charges against him. That brought to exactly one full year the time Aleynikov has spent in custody at Goldman Sachs's behest—all because Defendants chose to credit the false allegations of that powerful multi-national corporation rather than honoring their sworn duty as federal law enforcement officers to familiarize themselves with well-settled law and diligently investigate the facts before instituting federal criminal charges against a United States citizen.

8. It has now been established as a matter of law that the unlawful retention and transfer of Aleynikov's property—like the malicious prosecution that preceded it, which was initiated while he was under arrest and in custody without probable cause—was a violation of his Fourth Amendment rights. The unconstitutional malicious prosecution of Aleynikov was designed not to serve the interests of justice but to curry favor with an influential corporation intent on punishing one of its most talented officers who chose to leave the firm and, in the process, sending a message to other employees and prospective employees that Goldman Sachs is willing and able to use the American criminal justice system as its own private enforcement arm. Defendants' unlawful retention and transfer of Aleynikov's property to New York state authorities at the DANY was designed, equally improperly, to escape the consequences of their malicious prosecution of him in federal court without probable cause. This Complaint follows.

THE PARTIES

9. Aleynikov is a resident of the State of New Jersey, County of Passaic and City of Clifton. Until June 5, 2009, he was a Vice President in the Equities Division of Goldman Sachs.

10. At all times relevant hereto, Agent McSwain was an FBI Agent who was intimately involved in the initiation and continuation of both the federal and state prosecutions of Aleynikov

and the unlawful retention and transfer of his property described in this Complaint. He is sued in his individual and personal capacity for his intentional violation of Aleynikov's clearly established rights as alleged in this Complaint.

11. At all times relevant hereto, Agent Casey was an FBI Agent assigned to the FBI's New York Office who approved Aleynikov's malicious federal prosecution. He is sued in his individual and personal capacity for his intentional violation of Aleynikov's clearly established rights as alleged in this Complaint.

12. John Does 1 through 10 are fictitiously-named agents or employees of the FBI who participated, by their own individual acts and in concert with one another and the other Defendants, in the violation of Aleynikov's clearly established constitutional rights as alleged in this Complaint. They are sued in their individual and personal capacities for those constitutional violations.

JURISDICTION AND VENUE

13. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331 and the Supreme Court's decision in Bivens because it is an action alleging the violation of Aleynikov's constitutional rights by Defendants, all agents of the United States of America acting individually and in concert and at all times under color of federal law, and all of whom are sued in their individual and personal capacities.

14. Venue is appropriate in this judicial district under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims in this case occurred in this District—in particular, Aleynikov's unlawful Arrest without probable cause at Newark Liberty International Airport on July 3, 2009, and the seizure of his personal property at that time—and Aleynikov is, and at all times relevant to this Complaint has been, a resident of this judicial district.

FACTUAL ALLEGATIONS

A. Goldman Sachs Provokes The Federal Prosecution Without Probable Cause.

15. Aleynikov was a highly skilled and respected computer programmer who worked in the New York office of Goldman Sachs's Equities Division from May 2007 through June 2009.

16. On April 21, 2009, Aleynikov signed an offer letter to work at Teza Group LLC ("Teza"), a startup HFT company. In late April 2009, Aleynikov gave Goldman Sachs notice that he would be leaving the firm to pursue an opportunity at an HFT startup company that would pay him annual compensation in excess of $1 million. At Goldman Sachs's request, Aleynikov continued working at the firm to complete various Goldman Sachs projects until June 5, 2009, which was his last day in the office.

17. On June 29, 2009, technology officers at Goldman Sachs discovered what they believed was evidence that, between June 1 and June 5, 2009, Aleynikov had transferred outside the firm a relatively small portion of the computer data contained in Goldman Sachs's HFT platform. At the time of that discovery, Goldman Sachs did not know the function of the allegedly transferred data and had no basis for alleging that its transfer—which Goldman Sachs knew had occurred nearly a month earlier—posed an imminent threat to Goldman Sachs, its HFT platform, or the world's financial markets at large. Goldman Sachs nonetheless used the enormous influence it enjoys over federal law enforcement officers—and, in particular, Defendants—to immediately instigate Aleynikov's unlawful prosecution on federal criminal charges to achieve its own commercial goals.

18. Specifically, on July 1, 2009, representatives of Goldman Sachs contacted the FBI and urged it to arrest Aleynikov immediately. To instigate Aleynikov's malicious prosecution, Goldman Sachs falsely represented to the FBI, and to Agent McSwain in particular, that Aleynikov

had stolen Goldman Sachs's entire HFT infrastructure. In further support of its request that Aleynikov be arrested immediately, Goldman Sachs's representatives falsely told Agent McSwain that (i) "the cornerstone of Goldman's electronic trading platform for equity products was uploaded to a server in London, England by Aleynikov;" (ii) "[t]he files that were uploaded . . . were owned wholly by Goldman and were obtained through in-house software developers and acquisitions of other companies;" and (iii) "it would take 40 software programmers more than 10 years to build the programs that were taken from Goldman." A Goldman Sachs representative also falsely reported to Agent McSwain that Goldman Sachs "profits more than $100,000,000 a year directly related to the programs taken" by Aleynikov and that although the representative could not put an exact dollar figure on the value of the software allegedly taken by Aleynikov, Goldman Sachs "would not license the software for anything less than $1 billion." Another Goldman Sachs representative shared with Agent McSwain her erroneous belief that "the high salary that Aleynikov demanded [from his new employer] was because he was bringing Goldman's software with him."

19. That same day, July 1, 2009, Agent McSwain requested authorization to initiate a full investigation of Aleynikov, who was subsequently dubbed "McSwain's Goldman guy" by Agent Casey. That authorization was granted the same day. The following day, July 2, 2009, Agent McSwain performed a search of airline reporting and reported to Goldman Sachs that Aleynikov had traveled to Chicago and was expected to return the following evening, July 3, 2009. On July 2 and July 3, 2009, Goldman Sachs representatives continued to supply Agent McSwain and the John Doe FBI Defendants with misinformation regarding Aleynikov's alleged theft. In providing that misinformation, Goldman Sachs intended that the FBI would rely upon it in instituting a malicious prosecution of Aleynikov.

20. It worked. Defendants substituted blind reliance on Goldman Sachs, an interested party, for any meaningful investigation of the facts; ignored long-settled law holding that the NSPA does not apply to intangible property such as computer source code; and forewent the critical step of presenting the law and facts as they understood them to a neutral and detached magistrate. In so doing—as Justice Zweibel concluded based on his assessment of the evidence, including the testimony adduced at a suppression hearing over which he presided in May 2013 (the "Suppression Hearing")—Agent McSwain arrested Aleynikov without probable cause, in violation of his Fourth Amendment rights. That was the seminal step in the failed federal prosecution of Aleynikov for theft of computer source code, and led directly to Defendants' subsequent ill-advised attempt to escape the consequences of their misconduct through the unconstitutional retention and transfer of his property to the DANY following his acquittal by the Second Circuit for use in a state prosecution of the identical alleged theft.

B. Defendants Institute The Malicious Federal Prosecution of Aleynikov.

21. On July 4, 2009, while Aleynikov was under arrest and in federal custody, Agent McSwain signed a criminal complaint charging him with one count of violating the NSPA and one count of violating the EEA. As alleged above, Agent McSwain leveled those charges in almost complete reliance on Goldman Sachs and in the interest of accomplishing its objectives, without performing any meaningful independent investigation of those alleged crimes or making any effort to determine whether the NSPA and the EEA even applied to the conduct of which Goldman Sachs had accused Aleynikov.

22. At the Suppression Hearing, Agent McSwain admitted—and Justice Zweibel found—that at the time he signed that criminal complaint in the federal criminal action, he erroneously believed that the NSPA applied to intangible property such as computer source code

despite long-settled case law to the contrary in both the Second Circuit Court of Appeals and the Supreme Court of the United States, and that he had not even read the EEA or familiarized himself with its meaning.

23. At the Suppression Hearing, Agent McSwain further testified—and Justice Zweibel found—that he knew Aleynikov was alleged to have stolen intangible property but nonetheless charged him with violating the NSPA, which does not apply to such property, and that he did nothing "whatsoever" to satisfy himself that Aleynikov had taken from Goldman Sachs "a trade secret related to or included in a product produced for or placed in interstate or foreign commerce," as required to state a crime under the EEA. By those admissions, Agent McSwain acknowledged that he disregarded his sworn duty to familiarize himself with the laws he is entrusted with enforcing and to faithfully investigate alleged violations of those laws, and instead relied entirely on Goldman Sachs's representations to support his sworn allegation that Aleynikov had committed federal crimes against Goldman Sachs. Following his federal Arrest, as Justice Zweibel found, Aleynikov was indicted in the United States District Court for the Southern District of New York for violations of the NSPA and the EEA as well as the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, all based on his alleged theft of computer source code for Goldman Sachs's HFT system.

24. Agent McSwain was integrally involved in all stages of the investigation and prosecution of Aleynikov, taking steps that included (i) interviewing and re-interviewing representatives of Goldman Sachs; (ii) parroting representations made to him by Goldman Sachs representatives before a grand jury on February 11, 2010, without meaningfully investigating or testing the veracity of those representations and for the wholly improper purpose of achieving Goldman Sachs's goal of procuring an indictment against Aleynikov and sending a message to its

present and future employees about its ability to influence federal law enforcement authorities to bring criminal charges to further its private interests; and (iii) attending every day of Aleynikov's criminal trial, meeting with and advising prosecutors, and himself testifying at that trial.

25. In addition to accepting Goldman Sachs's representations about the nature and value of the files allegedly taken by Aleynikov without any investigation much less verification, Defendants acted knowingly and/or recklessly in disregarding information demonstrating the baselessness and falsity of those representations. On July 4, 2009, for example, Magistrate Judge Fox stated on the record that the concerns raised by the prosecutor were based largely on "speculation" and observed that "there is no evidence that has been proffered that the material was taken, or alleged to have been taken, from [Goldman Sachs] has been used to harm it or anyone else."

26. Ten days later, on July 14, 2009, Goldman Sachs CFO David Viniar directly contradicted the representations made by Defendants concerning the value and nature of the code allegedly taken by Aleynikov, confirming that (i) Goldman Sachs "still has the code. It's not like the code had been lost to Goldman Sachs. And even if it had been, it's a small piece of our business"; and (ii) any losses sustained by the firm as a result of the alleged theft would be "very, very immaterial."

27. Despite Magistrate Judge Fox's skepticism about Goldman Sachs's allegations and David Viniar's statements undercutting those allegations, Defendants pressed forward with the malicious prosecution of Aleynikov. Following his Arrest without probable cause, Defendants instituted a malicious prosecution of Aleynikov for violations of the EEA, the NSPA, and the CFAA based on his alleged theft of trade secret computer source code from Goldman Sachs.

C. Aleynikov's False Conviction, Unlawful Detention, Sentencing and Incarceration; His Acquittal on Appeal; and the Illegal Retention and Transfer of His Property.

28. Shortly after he was indicted, Aleynikov filed a pretrial motion to dismiss the Indictment for failure to state a crime under any of those three federal statutes. That motion was premised on the precise legal theory that ultimately formed the basis of the Second Circuit's unanimous decision to acquit him of all crimes. But the Honorable Denise L. Cote, U.S.D.J., the United States District Judge who would later preside over Aleynikov's trial and sentence him to 97 months in prison, only granted that motion as to the CFAA charge, denying it as to the EEA and the NSPA charges. Soon thereafter Aleynikov was tried, convicted, and sentenced to 97 months in prison. He would spend 51 weeks in federal custody before his acquittal by the Second Circuit on February 16, 2012.

29. Shortly after Aleynikov's acquittal by the Second Circuit, Agent McSwain and one or more of the John Doe Defendants assisted the DANY in instituting a second prosecution of Aleynikov for his alleged source code theft, this time on state law charges. To facilitate the New York state grand jury's investigation of Aleynikov after his federal court acquittal, Agent McSwain and one or more of the John Doe Defendants retained and transferred his property to the DANY, in violation of his Fourth Amendment right to be free from unreasonable searches and seizures, where that property was used to effectuate his Re-Arrest and institute his pending New York state court prosecution.

30. Agent McSwain and the John Doe Defendants failed to advise the DANY that Aleynikov had specifically requested the return of his property; indeed, in unsuccessfully attempting to resist Aleynikov's motion, which Justice Zweibel granted, to suppress and prevent the People from using as evidence the property unlawfully withheld from him and transferred to the DANY, Assistant District Attorney Tracy Conn inaccurately advised Justice Zweibel that

although Aleynikov had requested the return of his passports, he had not requested the return of the property seized from him.

31. In ruling that the retention and transfer of Aleynikov's property to the DANY following his acquittal and request for the return of that property violated his right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment, Justice Zweibel expressly found that the federal agents who retained Aleynikov's property after he requested its return had "no legal basis" to do so, and that their transfer of that property to the DANY was improper.

32. Defendants' malice in pursuing and continuing the unlawful prosecution of Aleynikov without probable cause for federal crimes he did not commit and that no rational juror could have found he committed is amply reflected in the acts they took as alleged in this Complaint, individually and collectively, acting in their individual and personal capacities and under color of federal law, in an attempt to escape the consequences of the Second Circuit's reversal of his conviction, including the unlawful retention and transfer of Aleynikov's property as alleged herein. No federal agent acting appropriately to enforce the law would have arrested Aleynikov without probable cause, and no such federal agent would have reacted to Aleynikov's wrongful federal prosecution and all of the harm it imposed on him, including but not limited to his wrongful imprisonment for 51 weeks, by clandestinely procuring his re-prosecution in a manner that so clearly violated his Fourth Amendment rights, as alleged herein.

FIRST COUNT
MALICIOUS PROSECUTION UNDER THE NSPA IN VIOLATION OF ALEYNIKOV'S FOURTH AMENDMENT RIGHTS

33. Aleynikov repeats and realleges the allegations contained in Paragraphs 1 through 32 of this Complaint as though fully set forth herein.

34. Defendants, acting in concert and individually, in their personal capacities and by their own individual acts, and under color of federal law, instituted and continued Aleynikov's federal prosecution for violating the NSPA without probable cause, in violation of his Fourth Amendment rights.

35. Defendants, acting in concert and individually, in their personal capacities and by their own individual acts, and under color of federal law, instituted and continued Aleynikov's NSPA prosecution with actual malice, acting knowingly, recklessly and/or with gross negligence, and with the patently improper motive of furthering Goldman Sachs's interests rather than the interests of justice.

36. Aleynikov's federal prosecution for violating the NSPA was terminated in his favor when the Second Circuit reversed his conviction on appeal and directed that a Judgment of Acquittal on that charge be entered in his favor. The Second Circuit's ruling was issued on February 16, 2012, the day Aleynikov's appeal was argued; its opinion memorializing that ruling was issued on April 11, 2012; and its corrected mandate finalizing that ruling was issued on June 6, 2012.

37. In effectuating Aleynikov's malicious prosecution for violating the NSPA, Defendants, acting in concert and individually, in their personal capacities and by their own individual acts, and under color of federal law, violated (a) Aleynikov's clearly established constitutional right not to be prosecuted, including the right not to be seized or detained, without probable cause; and (b) the clearly established law that the NSPA does not proscribe the interstate transportation of intangible property, the conduct underlying that prosecution.

38. As a direct and proximate result of the violation of his constitutional rights as alleged in this First Count of the Complaint, Aleynikov has suffered and will continue to suffer

severe and permanent damages, including but not limited to the loss of his liberty during the 51 weeks he spent in federal custody on his wrongful conviction; the restriction of his ability to travel freely throughout the world during that time and during the months between his conviction and his incarceration, when he was in home confinement; the complete depletion of his life savings and all of his assets; the termination of his employment with Teza and the cancellation of his employment contract, which was worth more than one million dollars per annum; the sudden derailment of his career; the total devaluation of his advanced degree and proven talent in computer programming; the destruction of his ability to secure alternative employment in his chosen field; the impairment of his ability to support his family and the resulting disintegration of his family unit; and the assassination of his character and destruction of his reputation.

WHEREFORE, Plaintiff, Sergey Aleynikov, demands judgment against Defendants on the First Count of this Complaint for compensatory and punitive damages in an amount to be determined at trial plus interest, attorneys' fees, costs of suit and such other and further relief as the Court deems equitable and just.

SECOND COUNT
MALICIOUS PROSECUTION UNDER THE EEA IN VIOLATION OF ALEYNIKOV'S FOURTH AMENDMENT RIGHTS

39. Aleynikov repeats and realleges the allegations contained in Paragraphs 1 through 38 of this Complaint as though fully set forth herein.

40. Defendants, acting in concert and individually, in their personal capacities and by their own individual acts, and under color of federal law, instituted and continued Aleynikov's federal prosecution for violating the EEA without probable cause, in violation of his Fourth Amendment rights.

41. Defendants, acting in concert and individually, in their personal capacities and by their own individual acts, and under color of federal law, instituted and continued Aleynikov's

EEA prosecution with actual malice, acting knowingly, recklessly and/or with gross negligence, and with the patently improper motive of furthering Goldman Sachs's interests rather than the interests of justice.

42. Aleynikov's federal prosecution for violating the EEA was terminated in his favor when the Second Circuit reversed his conviction on appeal and directed that a Judgment of Acquittal on that charge be entered in his favor. The Second Circuit's ruling was issued on February 16, 2012, the day Aleynikov's appeal was argued; its opinion memorializing that ruling was issued on April 11, 2012; and its corrected mandate finalizing that ruling was issued on June 6, 2012.

43. In effectuating Aleynikov's malicious prosecution for violating the EEA, Defendants violated (a) Aleynikov's clearly established constitutional right not to be prosecuted, including the right not to be seized or detained, without probable cause; and (b) the clearly established law that the EEA does not proscribe the theft of trade secrets that are not "included in or related to a product produced for or placed in interstate or foreign commerce," the conduct underlying that prosecution.

44. As a direct and proximate result of the violation of his constitutional rights as alleged in this Second Count of the Complaint, Aleynikov has suffered and will continue to suffer severe and permanent damages, including but not limited to the loss of his liberty during the 51 weeks he spent in federal custody on his wrongful conviction; the restriction of his ability to travel freely throughout the world during that time and during the months between his conviction and his incarceration, when he was in home confinement; the complete depletion of his life savings and all of his assets; the termination of his employment with Teza and the cancellation of his employment contract, which was worth more than one million dollars per annum; the sudden

derailment of his career; the total devaluation of his advanced degree and proven talent in computer programming; the destruction of his ability to secure alternative employment in his chosen field; the impairment of his ability to support his family and the resulting disintegration of his family unit; and the assassination of his character and destruction of his reputation.

WHEREFORE, Plaintiff, Sergey Aleynikov, demands judgment against Defendants on the Second Count of this Complaint for compensatory and punitive damages in an amount to be determined at trial plus interest, attorneys' fees, costs of suit and such other and further relief as the Court deems equitable and just.

THIRD COUNT
UNREASONABLE RETENTION AND TRANSFER OF PROPERTY IN VIOLATION OF THE FOURTH AMENDMENT

45. Aleynikov repeats and realleges the allegations contained in Paragraph 1 through 44 of this Complaint as though fully set forth herein.

46. Defendants, acting in concert and individually, in their personal capacities and by their own individual acts, and under color of federal law, unlawfully retained and transferred property seized from Aleynikov at the time of his Arrest following his acquittal by the Second Circuit and despite his request for the return of that property.

47. In unlawfully retaining and transferring Aleynikov's property, Defendants violated his Fourth Amendment right to be free from unreasonable searches and seizures.

48. In retaining and transferring Aleynikov's property following his acquittal and despite his request for its return, Defendants acted with actual malice, knowingly, recklessly and/or with gross negligence, and with the patently improper motive of furthering Goldman Sachs's interests rather than the interests of justice.

49. Defendants engaged in the acts alleged in this Count maliciously, with full knowledge and intent that their actions would violate Aleynikov's Fourth Amendment right to be

free from unreasonable searches and seizures, in retaliation for and to relieve the Government's embarrassment resulting from Aleynikov's successful appeal of his unlawful conviction, in an attempt to placate Goldman Sachs, and in the hope of escaping the consequences of their malicious prosecution of Aleynikov, thus justifying an award of punitive damages.

50. As a direct and proximate result of Defendants' unlawful and malicious retention and transfer of Aleynikov's property in violation of his Fourth Amendment right to be free from unreasonable searches and seizures as alleged in this Complaint, Aleynikov has suffered and will continue to suffer severe and permanent damages, including but not limited to the loss of his liberty during the additional week he spent in state custody; the restriction of his ability to travel freely throughout the world; his increased indebtedness for legal fees and expenses; the sudden derailment of his career; the devaluation of his advanced degree and proven talent in computer programming; the destruction of his ability to secure alternative employment in his chosen field; the impairment of his ability to support his family and the continuing disintegration of his family unit; and the assassination of his character and destruction of his reputation.

WHEREFORE, Plaintiff, Sergey Aleynikov, demands judgment against Defendants for compensatory and punitive damages in an amount to be determined at trial plus interest, attorneys' fees, costs of suit and such other and further relief as the Court deems equitable and just.

Dated: February 12, 2015
Chatham, New Jersey

Respectfully submitted,

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DEMAND FOR TRIAL BY JURY

Plaintiff, Sergey Aleynikov, hereby demands a trial by jury as to all issues so triable in this case.

Dated: February 12, 2015
Chatham, New Jersey

Respectfully submitted,

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EXHIBIT A

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

THE PEOPLE OF THE STATE OF NEW YORK,

Indictment Number 447/12

-against-

SERGEY ALEYNIKOV,

Decision & Order

Defendant.

ZWEIBEL, J.:

On May 21, 2013 and May 22, 2013, a Mapp-Huntley-Dunaway hearing was held before me. Federal Bureau of Investigation ("FBI") Special Agent Michael McSwain, FBI Supervisory Special Agent Eugene Casey[1] and Brian Keith Hatfield, Supervisory Information Technology Specialist for the United States Attorney's Office for the Southern District of New York, testified for the People. Defendant did not present any testimony. Despite some minor inconsistencies in their testimony, I found the People's witnesses to be credible on a whole.

Based on the testimony and exhibits admitted into evidence at the hearing as well as the written submissions and oral arguments after the hearing, the following is the Court's Findings of Fact and Conclusions of Law.

[1]Agent Casey is also Assistant Legal Attaché in the United States Embassy in Paris, France.

Findings of Fact

Computer code or source code is made up of data (H. 194).[2] Computer code can be written or recorded in a program on a computer (H.194-195). It can be written by hand but it is not useable in computer form (H. 194-195). When computer code is stored in a computer it takes up space in the computer's memory (H.195). In order for the code to do something, the computer has to read the code (H.195). Computer code can be stored on different types of electronic devices, including a hard drive and a thumb drive (H.195).

In late June/early July of 2009, defendant was employed by Goldman Sachs in their Broad Street office in New York City's Financial District (H:8). On June 29, 2009, Goldman Sachs discovered defendant's downloads that happened nearly a month earlier (H. 74). On July 1, 2009, Arthur Grubert, Vice President of Security and the Business Intelligence Group at Goldman Sachs, contacted the FBI regarding defendant (H. 33-34). Based on information received from Goldman Sachs Managing Director Paul Walker, Director Adam Schlesinger and Joe

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[2] "H." refers to the minutes of the hearing.

Yanagisawa, Vice President of Security, the FBI launched an investigation into an allegedly unauthorized transfer of a large amount (32 megabytes) of Goldman Sachs computer code[3] from defendant's desktop to a server in Germany and from that German server to defendant's home (H.7-8, 73-74, 95-97). The code was for Goldman Sachs' High Frequency Trading ("HFT") software which is a program that takes the human element out of trading and allows for fast trading (H.7).

Supervisory Special Agent Eugene Casey, an over 17 year veteran of the FBI, who had made over a 100 arrests, was the agent in charge of the "C-43" Corporate and Security Fraud Squad in New York and the investigation into the theft of the source code from Goldman Sachs (H. 246-248). In July of 2009, Agent Casey assigned FBI Special Agent Michael McSwain, Credential Number 2192 of the New York County "C-43" squad, to the investigation into the alleged unauthorized upload of Goldman Sachs computer codes (H.3, 5-6, 33, 73, 249).

As part of the FBI's team assigned to this case, Agent McSwain confirmed the information supplied by members of Goldman Sachs, such as defendant had been at work when the upload

[3]Computer code is human readable computer commands (H.7).

occurred, through security logs and witness interviews (H.5-6, 10). When Agent McSwain spoke with Joe Yangisawa of Goldman Sachs, Yangisawa told Agent McSwain that Goldman Sachs had discovered that approximately 32 megabytes of data were going outside Goldman Sachs, which was a large amount to be uploaded, when Goldman Sachs began to monitor their "HTTPS socket", which is how one accesses the internet (H.11, 96).[4] Arthur Grubert told Agent McSwain that the "cornerstone of Goldman [Sachs'] creating the platform for equity products was uploaded to a server in London, England by" defendant, that a search of defendant's work history by Goldman Sachs' information technology division revealed that thousands of files had been uploaded to designation domain SCN.XP-DEV.com and that defendant had circumvented several Goldman Sachs' security systems designed to prevent such uploads (H.34-36).[5] According to members of Goldman Sachs, defendant did not have permission to copy the source code or to upload the code to the German server (H.8). The FBI also believed that Goldman Sachs did not intend

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[4]The "S" on the end means source and it is basically a secured internet socket (H.11-12).

[5]Upon further investigation, Agent McSwain learned that the server was registered in London, England but the servers were physically in Germany (H.191-192).

to share this code with the public as they kept it a "secret" to maintain their competitive edge and that the transferred code reflected a scientific or technical process that was performed at Goldman Sachs (H.8-9, 94) and was part of a system worth approximately five hundred million dollars (H.10, 94).[6] According to Goldman Sachs, while employed by them, defendant did not have permission to copy, download, upload, replicate, e-mail or use the transferred code for anything other than work for Goldman Sachs (H.11). According to information supplied to the FBI by Goldman Sachs, defendant had been informed of what he could not do by Goldman Sachs (H.11). Defendant was only allowed to copy the source code for work purposes and not his personal use (H.200).

Agent McSwain was also informed by Goldman Sachs that defendant had created a program that grabbed a bunch of files and combined them into one "Tarball," encrypted with a password file, which was used to hide the data in the file before it was sent out over the internet (H. 12). Agent McSwain also learned

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[6]According to Agent McSwain, part of what defendant transferred out was an "acquisition of Hull Trading," which Goldman Sachs had purchased for five hundred million dollars in 1999 and included an "option theoretical values" (H.9-10, 96-97). He further understood from Goldman Sachs that from 1999 until defendant's arrest in 2009, Goldman Sachs' programmers spent their time improving the code (H. 197).

that the files that had been uploaded to a server in Germany had also been downloaded to some devices in defendant's home. He did this by extracting the logs from the server that showed a download from a German server to an IP address assigned to a Cablevision subscriber in New Jersey (H.12-13). Based on this information, Agent McSwain subpoenaed the subscriber's name and address and determined that the material was sent to defendant's home address (H.13).

Agent McSwain did not have an expert assign a value to the source code allegedly stolen by defendant before going to arrest him, but relied on information supplied to him by employees of Goldman Sachs (H. 110). He knew from people at Goldman Sachs that the value of the profit they made from the HFT system was in the hundreds of millions (H.200).

At 9:20 p.m., on July 3, 2009, Agent McSwain, accompanied by five to seven FBI agents, including Agent Casey, arrested defendant at Newark Airport in New Jersey as defendant exited a plane from Chicago (H.6, 13, 25, 74-76, 249, 261, 265-266).[7]

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[7]Agent McSwain identified defendant as the target of the investigation and as the person he arrested (H.6).

Agent McSwain stated that he can make an arrest for a state crime that takes place in his presence and if a state crime is a felony (H.39). However, AUSA Yelan corrected Agent McSwain as he can only make an arrest for a State crime when it is

Believing he had probable cause, Agent McSwain initially arrested defendant without a warrant for violations of the National Interstate Transportation of Stolen Goods ("NSPA") based on defendant's alleged interstate transportation of stolen goods although he later learned that he also had probable cause to arrest defendant for a violation of the Theft of Trade Secrets section of the Economic Espionage Act ("EEA") (H.39-40, 193-194).[8] Agent McSwain believed he had probable cause to arrest defendant for these crimes based on the agent's belief that defendant had uploaded the software by tarballing it, sending it to a server in Germany in a secretive way, and that defendant did so in order to use it for development of similar HFT platform at his next job (H.43, 75). Agent McSwain also believed that he had probable cause to believe that defendant had committed a federal crime because trading was related to commerce as the financial sector drives the economy. According to Agent McSwain, Goldman Sachs, which was in the business of trading stocks and securities, had bases in different states and therefore, its HFT system, which included foreign trading,

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committed in his presence (H.65).

[8]The complaint executed by Agent McSwain on July 4, 2009 was admitted into evidence as Defendant's Exhibit A (H. 41).

foreign companies or bases, was related to commerce and that the 32 megabytes of source code in electronic digital form stolen by defendant was sent over interstate lines and was part of a system worth in excess of $5,000 dollars (H.192-193).

According to Agent McSwain, he believed he had probable cause to arrest defendant for a violation of the EEA, although he did not read the Economic Espionage Act or otherwise familiarize himself with the requirements of the statute, nor did he "satisfy" himself that defendant was alleged to have taken a trade secret related to or included in a product produced or placed in interstate or foreign commerce from Goldman Sachs (H.43). Agent McSwain also knew from Goldman Sachs that the HTF platform was not a product that they offered for sale and that they maintained it as confidentially as possible because Goldman Sachs used it for their trading (H.54-55).

On the other hand, Agent McSwain testified that he was familiar with the National Interstate Transportation of Stolen Goods Act and felt that defendant's conduct fell into that category (H.56, 82).[9]

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[9]Defendant's Exhibits D and E are copies of the National Stolen Property Act ("NSPA") and the Economic Espionage Act of 1996 respectively (H.83-85).

At the time of his arrest, defendant was no longer employed by Goldman Sachs. He was employed by TEZA Technology, a start-up HFT company, which did not yet have the code for a HFT system (H.10-11).

Upon being arrested, defendant was taken into a private area where defendant was informed of the charges against him and handcuffed (H.13, 189-190, 261). None of the agents had their guns drawn (H.13). At that point, however, there was nothing in defendant's circumstances that would cause him to believe that he was free to leave (H.190). Defendant, who spoke English, consented to Agent McSwain searching him (H.14-15, 76, 93, 191, 201, 261, 288).[10] Agent McSwain did not have a search warrant (H.76). Because Agent McSwain believed that he had probable cause to arrest defendant, he further believed that the arrest was lawful and that he had a right to search defendant incident to a lawful arrest even if defendant did not consent to the search (186-189).

Pursuant to the search of defendant, Agent McSwain recovered, among other things, a thumb drive in defendant's

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[10]Agent McSwain admitted that even if defendant had not consented to the search, he would have searched him incident to arrest for weapons to ensure his safety and the safety of the other officers (H.14, 201).

front pocket and a laptop computer in his backpack (H.14).[11] Agent McSwain asked defendant if he could search the thumb drive and the laptop and defendant said "yes" (H.15, 186).[12]

Prior to transporting defendant to FBI headquarters in New York, which is located at 26 Federal Plaza in New York County, Agent McSwain asked defendant if he would consent to a search of his house for the Goldman Sachs code (H.16, 93).[13] Defendant said "yes," and signed a standard FBI "FD29" form giving the FBI consent to search his home (H.16-17, 252-253, 264).[14] At some

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[11]The thumb drive recovered from defendant was put in an evidence bag and subsequently entered into evidence at FBI headquarters (H.223).

[12]Apparently when Agent McSwain testified under oath at defendant's federal trial on December 7, 2010, he said that he conducted a "search incident to an arrest" and that is when Agent McSwain recovered the thumb drive from defendant's front pocket (H.186-187). Agent McSwain attempted to correct himself by saying he considered the search consensual as well as incident to a valid arrest (H.188-189).

[13]Agent Casey does not specifically remember speaking to AUSA Facciponti that night but believes he must have spoken to him about whether they needed to obtain a search warrant if defendant did not consent to a search of his home (H.278-279).

[14]The FBI "FD29" "Consent to Search" form signed by defendant was admitted into evidence as People's Exhibit 1 (H.17). According to Agent Casey, the form is a standard form, called a "Consent to Search" form, that the FBI uses to ask a person who has access or ownership of a facility that the FBI wants to search to sign, granting the FBI permission to search (H.249, 260).

point, Agent McSwain sent an email saying that defendant had a laptop and five computers at home (H. 205-206).[15] According to Agent McSwain, this interaction with defendant was conversational and defendant did not appear to have any problem understanding the questions Agent McSwain asked (H.15, 16-17, 19). No threats or promises were made nor force used during that conversation (H.15-16). Defendant was not given his *Miranda* warnings at the airport (H.201-203).

Agent McSwain then transported defendant to the FBI's New York headquarters while another team went to search defendant's house with the signed consent form (H.16, 19). At FBI headquarters, during the standard booking procedure and interview of defendant, defendant was given an opportunity to use the restroom and offered food and water (H.19-20).

Meanwhile, armed with defendant's consent to search, Agent Casey, left the airport within 15 minutes to half an hour after defendant's arrest for defendant's home to search for electronic media (H.250, 261-263, 275). Having participated in over 50 searches of homes, Agent Casey participated in the search of defendant's house in North Caldwell, New Jersey, along with four

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[15]The email sent by Agent McSwain on July 3, 2009 at 9:35 p.m., was admitted into evidence as Defendant's Exhibit J (H.205).

other members of the arrest team (H.248-250, 255). In addition to his team, the local New Jersey office of the FBI and the North Caldwell Police Department were notified of and assisted in the search of defendant's home, which was a "rather large house, stand-alone home in a nice residential neighborhood" (H.249, 251, 255).

Prior to Agent McSwain interviewing defendant in the presence of Special Agent Paul Roberts, at approximately 10:00 p.m., defendant called his wife, Elina Aleynikov and told her what was going on, that the FBI would be searching the house and that there was a team outside (H.23, 251, 263, 266-267). At approximately 10:47 p.m., after receiving that call, defendant's wife opened the door (H.251-252, 263). Agent Casey and two North Caldwell Police Officers approached the door to discuss defendant's consent to search the house with her (H.251).

Just inside the front door and speaking in a normal tone of voice, Agent Casey told defendant's wife that he was with the FBI, that her husband had been arrested and that he had granted the FBI consent to search their residence (H. 253, 290). Agent Casey explained the "Consent to Search" form to defendant's wife and then asked Mrs. Aleynikov to sign it after she stated that she understood the form (H.253-255, 264, 290).

Defendant's wife spoke English and responded to Agent Casey's statements and questions (H.253). At no time did either Agent Casey or the officers with him threaten defendant's wife, use force against her, draw a weapon or make her any promises except that his team would be as quiet as possible because of the sleeping children in the house (H.253-254). Agent Casey also promised to provide defendant's wife with an inventory of the items they were seizing (H.253-254).

Agent Casey then split up the FBI team with him to look in various rooms after going over what evidence they were looking for and after asking defendant's wife where the computers were kept inside the home (H.255). Agent Casey remained with defendant's wife while the agents searched her house (H.256). Except for being worried about her sleeping children, defendant's wife was extremely cooperative (H.256, 267). While in the house, no weapons were drawn nor was defendant's wife handcuffed (H.256, 259). At no point did defendant's wife ask the FBI to leave or withdraw her consent (H.256).

The FBI agents recovered four black Dell desktop computers, one Compaq desktop computer, one Compaq Armada laptop, and one Western Digital External hard drive from inside the house

(H.257-259, 275).[16] The search took less than an hour and one-half (H.258-259). Agent Casey provided defendant's wife with a copy of the invoice as promised (H.259).

Meanwhile, back at FBI Headquarters, Agent McSwain read defendant his *Miranda* warnings from a standard form used by the FBI (H.20).[17] The agent read each of the warnings to defendant, who said he understood each warning and that he was willing to speak to the agents (H.22-23). Defendant waived his *Miranda* rights, signed the form and indicated that he was willing to speak with Agent McSwain (H.22). During the interview, which was in English, defendant did not appear to have any problem understanding Agent McSwain (H.22).

At approximately 11:40 p.m., Agent McSwain interviewed defendant (H.23). During the interview, the agents and defendant went "back and forth" about defendant's employment, his education and the facts of the code transferred from Goldman Sachs (H.24, 196). Defendant stated that "he had created a tarball that copied several thousand files and sent them to

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[16]People's Exhibit 6 in evidence was the standard "Receipt for Property" form that the FBI used when they seized property pursuant to a search (H.257-258).

[17]The FBI "*Miranda* Warnings" form was admitted into evidence as People's Exhibit 2 (H.20-21).

SCN.XPDEV, a server that was located in Germany" (H.24).[18] Defendant admitted that he had downloaded those files to his home computer (H.24). Defendant stated that on his last day at Goldman Sachs, he was working with a co-worker named Oleg Alexandrovich on a program called "LOGGER" when he transferred approximately five megabytes (H.24). Defendant further stated that he had transferred data from the C directory of his Dell desktop at Goldman Sachs to his home computer on approximately five occasions (H.24-25). Defendant also admitted that the data was on the laptop seized from him at the airport in both defendant's Windows based operating system and his UNIX based operating system (H.25-27). Finally, defendant stated that the files were possibly on his wife's home computer and an external hard drive (H.28).

With respect to the laptop, defendant intended to download the program on the Windows side, transfer it to a "thumb drive," change his operating system on the laptop to UNIX and "import the files from there" (H.27). Defendant stated that he was trying to collect 10 open source files from Goldman Sachs

[18]Defendant did not know that the server was located in Germany (H.24). He had Google searched and chose it because it was free (H.26).

(H.27).[19] The files defendant transferred were "not blocked by Goldman Sachs" and this was one of the reasons he chose the German server (H.26). Defendant claimed that he "wanted to review [the files] much like a person in college would want to review their papers" (H.28). Defendant also conceded that he knew his actions violated Goldman Sachs' security policies (H.28).

Agent McSwain also questioned defendant about the "BASH" history which is comprised of the last 300 commands the programmer writes (H.26). Defendant was "perplexed" when Agent McSwain asked him about several commands that the agent had found on defendant's desktop as defendant "thought he had erased his last commands" (H.26-27).

Defendant also discussed his current employment at Teza Technology, a start-up company out of Chicago and that he would be making $1.2 million dollars a year (H.25). Agent McSwain knew that defendant had been making $500,000 dollars at Goldman Sachs (H.25). At approximately 1 a.m., Agent McSwain wrote out defendant's oral statement, defendant signed each page and

[19]Defendant later admitted that he saw that there were more than just 10 open source files (H.27).

signed the last page (H.28-29).[20]

At no time during the interview were any guns drawn (H.30). No promises or threats were made to defendant before he made either his oral or his written statements (H.30). No force was used to elicit any of the statements (H.30). Defendant was awake during the interview and he spoke in a conversational manner (H.30). At no time did defendant ask for an attorney (H.30). At no time during the interview did Agent McSwain learn that an attorney had contacted the US attorney's office to state that he or she represented defendant (H. 30-31). Defendant stopped the interview when it was over at approximately 1:45 a.m. (H.31). Soon thereafter, defendant was transported to the Manhattan Detention Center ("MDC") for holding overnight (H.32). Late on July 3, 2009/early on July 4, 2009, Agent McSwain sent Assistant United States Attorney ("AUSA") Joseph Facciponti an email stating in substance, "holy crap, he's confessed?" (H.60).

Agent McSwain was informed that the case was set down for arraignment on July 4, 2009 (H.32). The charging instrument was drawn up by the United States Attorney's Office (H.56). Agent

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[20]Defendant's written signed statement was admitted into evidence without objection as People's Exhibit 3 (H.29-30). The statement is incorrectly dated June 4, 2009 rather than July 4, 2009 (H.29). The 1 a.m. time on the statement is when Agent McSwain and defendant commenced writing the statement (H.30).

McSwain talked to AUSA Joseph Facciponti, who told him that a federal crime had been committed (H.57-58). The United States Attorney's Office notified the Federal Public Defender about the arraignment (H.32). The Federal Public Defender appointed for defendant's arraignment was Sabrina Shroff (H.32). Agent McSwain was not aware of any prior relationship between defendant and Ms. Shroff before she was assigned defendant's case for arraignment (H. 32-33). Agent McSwain believed that when he signed the accusatory instrument on July 4, 2009 that there was probable cause to believe that defendant had violated the Economic Espionage Act and that there was federal jurisdiction over this matter (H.217). He also believed that the stolen source code was a trade secret related to or included in a product produced for commerce (H.217, 219-220).

On July 3, 2009, Sabrina Shroff, who was assigned to represent defendant with respect to his federal case if he did not have a private attorney, attempted to send an e-mail[21] to Jason Massimore at "United States Department of Justice.gov,"

[21]Brian Hatfield, a Supervisory Information Technology Specialist for the United States Attorney's Office for the Southern District of New York, testified that every e-mail sent or received from 2009 by any active employee is kept on the archiving system for the United States Attorney's Office for the Southern District of New York (H.309-310).

which reads:

> Please make sure THT, there are no more conversations with the defendant. Let me know WHT time you expect to have him in SDNY. Make sure that you notify us if you think he is retained. Some times the attorney calls, does not show up, and judge should not be kept waiting. Thanks (312-313).[22]

AUSA Massimore is an attorney at the United States Attorney's Office for the Southern District of New York (H.313). Apparently, the e-mail was returned to Ms. Shroff as a delivery failure notice because she spelled the AUSA Massimore's name wrong in the address (H.313-314, 317). At 11:36:51 p.m., Ms. Shroff corrected the spelling in the address and sent the above e-mail to AUSA Massimore (H.313-314, 316). On July 4, 2009, at 1:29:24 a.m., AUSA Massimore forwarded the e-mail to AUSA Joseph Facciponti (H.314, 316, 323).

Additionally, on July 3, 2009, at 11:55 p.m., Ms. Shroff e-mailed AUSA Joseph Facciponti directly:

> Hey, Facciponti, how goes it. I'm told by Ed your going to HNDLE the case tomorrow. May I remind you that this is the day of freedom. Let me know if the guy is retained, I have to get the interview started (H.314,

[22]People's Exhibit 4 in evidence are e-mails from Sabrina Shroff to Jason Massimore and forwarded to AUSA Joseph Facciponti (H.312).

318, 320). [23]

On July 4, 2009, at 2:03 a.m., AUSA Facciponti responded:

> Sabrina, I just received an e-mail that I believed you sent earlier to Jason Massimore, but which had been bounced by the computer system. In your e-mail you asked us not to have anymore discussions with the defendant. After speaking with my supervisor it is our position that at the present time it is unclear whether he would qualify for representation by your office. And in any event you have not yet been appointed as counsel for him. If you are appointed tomorrow we will follow your instructions. To answer the earlier question we have planned to bring him to Court by 9 a.m. (H.315, 232). [24]

Defendant was subsequently indicted and accused of committing the crimes of "violating the EEA 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

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[23]People's Exhibit 5 in evidence are e-mails from Sabrina Shroff to AUSA Joseph Facciponti and his response to the e-mail (H.312).

[24]Although Ms. Shroff was defendant's original attorney in this matter, there was no testimony as to when she was officially appointed vis-à-vis defendant's statements at FBI Headquarters.

NSPA, 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]), … [and a] third count [of] … unauthorized computer access and exceeding authorized access in violation of the Computer Fraud and Abuse Act (18 U.S.C. § 1030)" (United States v. Aleynikov, 676 F.3d 71, 74 [2d Cir. 2012]). Prior to trial, Judge Denise Cote of the United States District Court for the Southern District of New York dismissed, as legally insufficient, the third count charging defendant with violating the Computer Fraud and Abuse Act (United States v. Aleynikov, 737 F.Supp.2d 173 [SDNY 2010]), a decision that the Government chose not to appeal.

Defendant went to trial, was convicted on the two remaining counts and sentenced to 97 months of imprisonment followed by three years of supervised release, and a fine of $12,000 (see United States v. Aleynikov, 676 F.3d, 74-75). Because defendant was a dual citizen of the United States and Russia, the Court feared he was a flight risk and denied him bail pending appeal (id.).

On February 17, 2012, after being incarcerated for

approximately one year, defendant's conviction and sentence were reversed by the United States Court of Appeal for the Second Circuit ("Second Circuit") which entered an order of acquittal in favor of defendant (see Exhibit 25: Order of Acquittal annexed to defendant's Supplemental Affirmation of Kevin H. Marino on Further Support of Defendant's Motion to Suppress Evidence; United States v. Aleynikov, supra). The Second Circuit found with respect to defendant's EEA conviction, that Goldman Sachs' confidential HFT trading program system was not "a product that is produced for or placed in interstate or foreign commerce," as required by the EEA because Goldman Sachs went to great lengths to maintain its secrecy and never intended to sell or license the system to anyone else (United States v. Aleynikov, 676 F.3d, 82). With respect to defendant's conviction under the NSPA, the Second Circuit held that because the source code that was stolen was intangible, rather than tangible property, as required by 18 U.S.C. § 2314, the source code did not qualify as "goods, wares, [or] merchandise," so defendant could not have violated this Act (id. at 76-79).[25]

[25]The Court notes that Congress passed "The Theft of Trade Secrets Clarification Act of 2012" (see 18 USC § 1832) in response to the Second Circuit's decision in United States v. Aleynikov, supra). As the People note, the amendment seeks to close "a dangerous loophole" and to ensure that the EEA is

At some unspecified time after the Second Circuit Court of Appeals entered the order of acquittal in defendant's federal case, Agent McSwain was contacted by a David Szuchman from the New York County District Attorney's Office with respect to this case (H.115).[26] They had several phone conversations during which they went over Agent McSwain's 2009 investigation (H. (H.133, 162, 167). Agent McSwain believed that there was probable cause to believe that defendant had "made a tangible reproduction of 'secret scientific material'" based on the fact that defendant had copied the material and sent it out (H. 167). Also, Agent McSwain's believed that there was probable cause to arrest defendant based on Goldman Sachs' representations that there were trade secrets in the information uploaded outside their servers and that defendant did not have authorization to copy the computer source code (H.168-169, 172).

On June 27, 2012, defense counsel for defendant and AUSA Michael Bosworth had a phone conversation in which defense counsel requested the return of certain property to defendant

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appropriately adapted to the demand of the digital age (see People's Memorandum in Opposition to the Defendant's Motion for Suppression of Physical Evidence and Statements:8 n.7).

[26]Agent McSwain had a conversation with defendant's attorney Kevin Marino in the summer of 2012 about returning defendant's computers, but the computers were not returned (H.135-136).

(see Marino January 13, 2014 letter: Exhibit 2). That same day, AUSA Bosworth invited defense counsel to send him a list of the items defendant wanted returned (see id.).

On July 2, 2012, defense counsel sent AUSA Michael Bosworth a list of items that defendant wanted returned to him, which included the items currently sought to be suppressed (see Marino January 13, 2014 letter: Exhibit 2). At no time did defendant file a Federal Rule of Criminal Procedure 41(g) motion for the return of the property (see Conn December 13, 2013 letter).

On July 12, 2012, in response to a request from the New York County District Attorney's Office, AUSA Thomas Brown, in an *ex parte* application, asked United States District Court Judge Denise Cote, who had presided over defendant's federal trial in the Southern District of New York, to unseal portions of the Federal transcript and sealed federal trial exhibits, and for permission to release unredacted versions of redacted federal trial exhibits and any other material covered by previously issued protective orders during the pendency of defendant's trial in Federal Court (Conn December 13, 2013 letter). That same day, Judge Cote granted the request (Conn December 13, 2013 letter).

On August 1, 2012, Agent McSwain was sent an affidavit in

support of an arrest warrant for his signature in an email from ADA Joanne Li (H.134-35, 115; see Supplemental Affirmation of Kevin H. Marino in Further Support of Defendant's Motion to Suppress Evidence: Exhibit 11).[27] The District Attorney's office believed that the source code that was transferred from Goldman Sachs by defendant qualified as scientific material under State law (H.118, 121, 130). Agent McSwain knew that defendant had administrative access at Goldman Sachs which was the broadest possible access he could have as a programmer there (H.122-123). Agent McSwain also knew that defendant had authority to download the code as part of his employment as a computer programmer with Goldman Sachs but did not know whether or not he had authority to copy the code (H.123).[28] Defendant was authorized to view the source code (H.124). In defendant's file was a signed nondisclosure waiver wherein he acknowledged that he could not take the code outside of Goldman Sachs (H.124).

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[27]The August 1, 2012 email from ADA Joanne Li to Agent McSwain was marked as Defendant's Exhibit F (H.134). The warrant itself was marked as Defendant's Exhibit H.

[28]Agent McSwain knew defendant had authorization to check out the source code but did not know if "checking out" was the same as copying. Agent McSwain agreed with defense counsel that if checking out and copying were synonymous, defendant had authorization to copy Goldman Sachs' computer source code (H. 174).

Agent McSwain also knew that Adam Schlesinger, who was defendant's boss at Goldman Sachs, believed defendant had stolen part of the HFT platform software, parts of Hull Trading and other proprietary software and that the material which was stolen was "expensive" (H. 125-126). Mr. Schlesinger was one of the first people to notice the upload going outside of Goldman Sachs (H.127). In 2009, there was no dollar value attached to the 32 megabytes that defendant downloaded (H.128).

The warrant for defendant's arrest was signed in New York, and on August 9, 2012, defendant was arrested in New Jersey on the instant charges. Defendant waived extradition (H.232-233).[29]

On September 5, 2012, FBI Special Agent Thomas McDonald then provided the digital devices recovered from defendant and his home to Senior Investigator Jason Malone of the New York County District Attorney's Office (see Conn December 13, 2013 letter; October 2, 2013 Appearance: 3).[30] It is unclear whether

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[29]Defendant's Exhibit K was a 2012 Waiver of Extradition and Order for Surrender, signed by Judge Cassini of the Superior Court of New Jersey (H. 232). Defendant's Exhibit L is the People's Voluntary Disclosure Form ("VDF") (H.240). Defendant's Exhibits A-L were marked as Court Exhibits for possible appellate review (H.243). There is also a list of the defense exhibits that were made part of the record with a brief description (H.243-245).

[30]According to the People, all the physical evidence in this

the AUSA ever advised Judge Cote that defendant had requested the return of his property. According to defense counsel, the AUSA did not notify defense counsel that they were making the above motions on behalf of the New York County District Attorney's Office.

Conclusions of Law

Defendant is seeking to suppress the physical evidence seized from him, and his statements as a result of his arrest without probable cause on July 3, 2009. With respect to the Mapp-Dunaway aspect of the hearing, although defendant "bears the ultimate burden of proving that the evidence should not be used against him, ... the People are nevertheless put to the burden of going forward to show the legality of the police conduct in the first instance" (People v. Collier, 14 Misc.3d 1235(A) [Sup. Ct. Richmond Co. 2007], quoting People v. Berrios, 28 N.Y.2d 361, 367 [1971] [internal citations and quotation marks omitted], citing People v. Malinsky, 15 N.Y.2d 86, 91, n 2 [1965]; see People v. Whitehurst, 25 N.Y.2d 389, 391 [1969]; People v. Quinones, 61 A.D.2d 765 [1st Dept. 1978], citing People

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case was recovered by the FBI in 2009 and that is the evidence that is currently in the People's possession. There was no evidence recovered when defendant was arrested in 2012 (October 2, 2013 Appearance: 3).

v. Berrios, supra).

The People argue that they have satisfied their burden as the information known to Agent McSwain was sufficient for probable cause to arrest and search defendant. Defendant disagrees.

The Fourth Amendment states that "[t]he right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (U.S. Const. amend. IV; see United States v. Ganias, _ F.3d _, 2014 WL 2722618 [June 17, 2014]). Accordingly, "[a]ll warrantless searches are presumptively unreasonable per se, and thus, where a warrant has not been obtained, it is the People who have the burden of overcoming this presumption of unreasonableness" (People v. Jimenez, 22 NY3d 717, 721 [2014][internal quotations and citations omitted]; see United States v. Ganias, supra). In the instant case, no warrant was obtained in 2009 to arrest or search defendant or his home, so the warrantless arrest and search in this case are presumptively unreasonable (see People v. Jimenez, 22 NY3d, at 721; see United

States v. Ganias, 2014 WL 2722618).

As the Second Circuit noted in United States v. Ganias, _ F.3d _, 2014 WL 2722618, decided on June 17, 2014, the Fourth Amendment must be construed "in light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens" (id. [internal citations and quotation marks omitted]). In dealing with searches and seizures in the "computer age," the Ganias Court stated that the Court must "measure Government actions taken in the 'computer age' against Fourth Amendment frameworks crafted long before this technology existed, ... keep[ing] in mind that the ultimate touchstone of the Fourth Amendment is reasonableness" (id. [internal citations and quotation marks omitted]). "Because the degree of privacy secured to citizens by the Fourth Amendment has been impacted by the advance of technology, the challenge is to adapt traditional Fourth Amendment concepts to the Government's modern, more sophisticated investigative tools" (id.).

As the Second Circuit in Ganias further noted, "[t]he chief evil that prompted the framing and adoption of the Fourth Amendment was the indiscriminate searches and seizures conducted

by the British under the authority of general warrants. General warrants were ones not grounded upon a sworn oath of a specific infraction by a particular individual, and thus not limited in scope and application. The British Crown used these questionable instruments to enter a political opponent's home and seize all his books and papers, hoping to find among them evidence of criminal activity. The Framers abhorred this practice, believing that papers are often the dearest property a man can have and that permitting the Government to sweep away all papers whatsoever, without any legal justification, would destroy all the comforts of society" (id. [internal quotation marks and citations omitted]).

According to the Second Circuit, these "Fourth Amendment protections apply to modern computer files. Like 18th Century "papers," computer files may contain intimate details regarding an individual's thoughts, beliefs, and lifestyle, and they should be similarly guarded against unwarranted Government intrusion. If anything, even greater protection is warranted" (id. [internal quotation marks and citations omitted]).

As the Second Circuit further observed, "[n]ot surprisingly, the ability of computers to store massive volumes of information presents logistical problems ... It is

comparatively commonplace for files on a computer hard drive to be so intermingled that they cannot feasibly be sorted on site.… It would be impractical for agents to occupy an individual's home or office, or seize an individual's computer, for such long periods of time. It is now also unnecessary. Today, advancements in technology enable the Government to create a mirror image of an individual's hard drive, which can be searched as if it were the actual hard drive but without interfering with the individual's use of his home, computer, or files" (id. [internal quotation marks and citations omitted]). "[T]he creation of mirror images for offsite review is constitutionally permissible in most instances, even if wholesale removal of tangible papers would not be" (id. [internal quotation marks and citations omitted]).

In this case, the Government did not obtain either an arrest or a search warrant. In order to overcome the presumption that the search and seizure of defendant's property was improper, the People must establish that Agent McSwain had probable cause to arrest defendant because a "police officer may arrest a person without a warrant when he has probable cause to believe that such person has committed a crime" (People v. Johnson, 66 N.Y.2d 398, 403 [1985]; see People v. Shulman, 6

NY3d 1, 25 [2005], cert. denied 547 U.S. 1043 [2006]; People v. Maldonado, 86 N.Y.2d 631, 635 [1995]; People v. Bigelow, 66 N.Y.2d 417, 423 [1985]; People v. Bell, 5 AD3d 858, 859 [3rd Dept. 2004]; Fernandez v. California, _ U.S. _, 134 S.Ct. 1126 [2014]). "Probable cause exists when an officer has knowledge of facts and circumstances 'sufficient to support a reasonable belief that an offense has been or is being committed'" (People v. Bell, 5 AD3d, at 859 quoting People v. Maldonado, 86 N.Y.2d, at 635, quoting People v. Bigelow, 66 N.Y.2d, at 423; see also People v. Shulman, 6 NY3d, at 25; Maryland V. Pringle, 540 U.S. 366 [2003]). Probable cause exists even if the crime does not occur in the officer's presence as an officer is entitled to rely on information "supplied, in whole or part, through hearsay" so long as the informant has a "basis of knowledge for the information" and the "information is reliable" (People v. Johnson, 66 N.Y.2d, at 403; see People v. Bigelow, 66 N.Y.2d, at 423; People v. Bell, 5 AD3d, at 859).

"When determining whether the police had probable cause to arrest, the inquiry is not as to defendant's guilt but as to the sufficiency for arrest purposes of the grounds for the arresting officer's belief that [the defendant] was guilty" (People v. Shulman, 6 NY3d, at 25-26, quoting People v. Coffey, 12 N.Y.2d

443, 452 [1963], cert. denied 376 U.S. 916 [1964]). "The legal conclusion [as to whether probable cause existed] is to be made after considering all of the facts and circumstances together" (id., at 26, quoting People v. Bigelow, 66 N.Y.2d, at 423).

The People argue that based on the facts known to Agent McSwain on July 3, 2009, he had probable cause to arrest defendant for violating the Federal NSPA and the EEA as well as the State crimes of Unlawful Use of Secret Scientific Material and Unlawful Duplication of Computer Related Material, and even if Agent McSwain made a mistake, it was a mistake of fact, not of law. Defendant argues that the People are wrong because Agent McSwain made a mistake of law, not fact, and Agent McSwain had no authority to arrest defendant for State Crimes that did not occur in his presence (see Marino September 10, 2013 letter).

In this case, as defendant argues, Agent McSwain was acting as a federal FBI agent. He effected a warrantless arrest for Federal crimesbased on allegations by employees of Goldman Sachs that defendant had stolen, and transported interstate, computer source code for its HFT system (see Sept. 10, 2013 Marino letter:2; H.56). As defendant further points out, when Agent McSwain arrested defendant, Agent McSwain believed or knew that

the computer source code was intangible property, but mistakenly believed that the interstate transportation of stolen intangible property was a federal crime (Sept. 10, 2013 Marino letter:2; see H.89). However, according to the Second Circuit, the interstate transportation of stolen intangible property is not a federal crime because intangible property does not constitute "goods, wares, merchandise, securities or money" within the meaning of the NSPA (see United States v. Aleynikov, 676 F3d, at 76-79, discussing Dowling v. United States, 473 U.S. 207 [1985] and United States v. Bottone, 365 F.2d 389 [2d Cir.], cert. denied 385 U.S. 974 [1966]; Sept. 10, 2013 Marino letter: 2). It is also clear, as defendant points out, that Agent McSwain did not arrest defendant for violating the EEA, but rather, after consulting with the United States Attorney's Office for the Southern District of New York, defendant was also charged with violating the EEA (Sept. 10, 2013 Marino letter:2, H.42, 56, 83). Finally, as defendant points out, the Federal Criminal Complaint and the subsequent indictment charged that Goldman Sachs' HFT system was a confidential trading platform that was never to be licensed or sold in interstate commerce (Sept. 10, 2013 Marino letter: 2; Defendant Exhibit 4), but was nevertheless alleged to be a "product produced for or placed in

interstate commerce" within the meaning of the NSPA.

The Court agrees with defendant that Agent McSwain made a mistake of law, not fact, and that an officer cannot rely on an erroneous interpretation of law to establish probable cause. The People argue that "an officer's mistaken, but reasonable belief that an object constitutes seizable contraband will not invalidate an otherwise lawful arrest" (People v. David, 223 A.D.2d 551, 553 [2d Dept. 1996][internal citations omitted]). However, "there is insufficient evidence in the record to support such a reasonable belief here" (id., at 553). Where, as here, "the officer's belief is based on an erroneous interpretation of law, the [detention of defendant] is illegal at the outset and any further actions by the police as a direct result of the stop are illegal" (People v. Rose, 67 AD3d 1447, 1449 [4th Dept. 2009], quoting Matter of Byer v. Jackson, 241 A.D.2d 943, 944-945 [4th Dept. 1997]; see also People v. Gonzalez, 88 N.Y.2d 289, 296 [1996]; People v. Reid, 104 AD3d 58, 62 [1st Dept.], lv. granted 21 NY3d 1008 [2013]). This is because it is not Agent McSwain's subjective belief that he had probable cause that is determinative of this case but rather this Court's review of the objective facts known to Agent McSwain to see if it was "reasonable" for a person to believe

that he or she had probable cause based on these facts (see Florida v. Royer, 460 U.S. 491, 507 [1983]; People v. PJ Video, 68 N.Y.2d 296, 306 [1986], cert. denied 479 US 1091 [1987]).

In this case, the defendant was arrested by FBI agents and subsequently indicted for allegedly violating: (1) 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]); (2) the National Stolen Property Act ("NSPA"), 18 U.S.C. § 2314, by transporting, transmitting or transferring 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) and (3) the Computer Fraud and Abuse Act ("CFAA")(18 U.S.C. § 1030) as a result of his unauthorized computer access based on exceeding his authorized access into Goldman Sachs computer source code for the HFT trading system. Therefore, Agent McSwain had to have knowledge of sufficient facts and circumstances to support a reasonable belief that defendant had committed these offenses.

However, the problem the People have is that the Second Circuit determined that defendant's alleged conduct, namely, the theft of Goldman Sachs' source code and the interstate transportation of stolen computer source code, did not violate federal law, and therefore, it was impossible for defendant to have committed the alleged crimes. With respect to the NSPA, Agent McSwain could not have had a reasonable belief that defendant had violated this act because what defendant is alleged to have stolen, namely 32 megabytes of data including source code, is intangible property and the NSPA only refers to tangible property. Thus, the Second Circuit determined that defendant's alleged conduct, namely the theft of the Goldman Sachs' source code and the interstate transportation of the computer source code, did not and could not have violated federal law because it remained in a purely electronic intangible state. Because it was a legal impossibility for defendant to violate this crime, Agent McSwain could not have a reasonable belief based on the facts known to him that defendant had committed it. In other words, Agent McSwain made a mistake of law and therefore, Agent McSwain's belief that the source code could be tangible as well as intangible for purposes of probable cause is irrelevant (United States v. Aleynikov, supra;

Dowling v. United States, supra).

Similarly, the Second Circuit found that defendant could not have violated the EEA as 18 U.S.C. § 1832 requires that defendant, "with intent to convert a trade secret, that is related to or included in a product that is produced for or placed in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly … without authorization … download[], upload[], … transmit[], … or convey[] such information …" Since "Goldman's HFT system was neither 'produced for' nor 'placed in' interstate or foreign commerce [or made something that does and] … Goldman had no intention of selling its HFT system or licensing it to anyone, … [defendant's] theft of source code relating to that system was not an offense under the EEA (id.). Indeed, it makes no sense that if the HTF system was meant to be kept a trade secret, that Goldman Sachs would be placing it into interstate commerce. In other word, Agent McSwain made another mistake of law rather than fact.

Finally, as the United Stated District Court for the Southern District of New York found, there could be no violation of the Computer Fraud and Abuse Act (CFAA) (18 U.S.C. §

1030[a][2][c]) since even the Government acknowledged that defendant was authorized to access Goldman Sachs' HTF system source code and computers, even when he was exceeding his authorization (United States v. Aleynikov, 737 F.Supp.2d 173, 194 [SDNY 2010][Cote, J.]). As the Southern District found, there could be no violation of the Computer Fraud and Abuse Act (CFAA) as it only applied to unauthorized procurement or alteration of information, which the Federal government conceded was not the case here (United States v. Aleynikov, 737 F.Supp.2d, at 193-194). Hence, it is clear that these were errors of law, not fact.

As a result of Agent McSwain's mistakes of law, defendant's arrest and the seizure of his property was without probable cause. "An officer's good faith alone does not make his suspicion reasonable" (United States v. Williams, 2011 WL 5843475, *5 [SDNY 2011] [Sweet, J.]). "[R]easonable suspicion must be based on articulable facts of unlawful, not lawful, conduct" (id.; see United States v. Scopo, 19 F.3d 777, 781 [2d Cir.], cert. denied 513 U.S. 877 [1994]). "A mistake of law cannot provide objectively reasonable grounds for suspicion" (id., quoting United States v. Jenkins, 324 F.Supp.2d 504, 509 [SDNY 2004], aff'd 452 F3d 207, cert. denied 549 U.S. 1008

[2006]["Mistakes of law ... will render a stop invalid"]). Since Agent McSwain did not have reasonable suspicion based on articulable facts of unlawful, not lawful, conduct (see United States v. Williams, 2011 WL 5843475, *5 [SDNY 2011][Sweet, J.]), he did not have probable cause to arrest defendant, let alone search him or his home. Thus, defendant's Fourth Amendment rights were violated as a result of a mistake of law on Agent McSwain's part.

According to the People, Agent McSwain still had probable cause despite the Second Circuit's decision acquitting him because Agent McSwain, as an FBI agent, had federal jurisdiction and therefore, he had a reasonable basis for believing that defendant had committed the Federal crimeshe was acquitted of based on varying interpretations of the challenged statutes in other Circuits besides the Second Circuit. The problem this Court has with that argument is that defendant was accused of committing the crimes in New York and therefore, his case was controlled by the Second Circuit's interpretation. The Second Circuit's decision made it clear that they had previously decided this issue.

Indeed, the Second Circuit's interpretation in *Aleynikov*, that in order to violate the NSPA, defendant needed to steal,

tangible, as opposed to intangible property, such as the purely digital, electronically transmitted files in defendant's federal case, seems to be supported by the decisions of the United States Supreme Court in Dowling v. United States, 473 U.S. 207, 214 (1985), and the decisions of various Circuit Court of Appeals, including the First Circuit in United States v. Martin, 228 F.3d 1, 14-15 (1st Cir. 2000); Second Circuit in United States v. Bottone, 365 F.2d, at 393, Third Circuit in United States v. Hsu, 155 F.3d 189, 195 n.6 (3rd Cir. 1998), Seventh Circuit in United States v. Stafford, 136 F.3d 1109, 1115 (7th Cir.), cert. denied 525 US 849 (1998) and the Tenth Circuit in United States v. Brown, 925 F.2d 1301, 1308 (10th Cir. 1991) (see United States v. Zhang, _ F..Supp.2d _, 2014 WL 199855 [EDPa 2014]). Similarly, Congress's speed to repair the "loophole" in the EEA pointed out by the Second Circuit in *Aleynikov*, supra (see People's Memorandum in Opposition to the Defendant's Motion for Suppression of Physical Evidence and Statements: 8 n.7; Exhibit A), seems to support the conclusion that Agent McSwain made a mistake of law in this case. As defendant argues, there can be no probable cause based on a mistake of law.

The Court further notes that the People do not claim that the United States Attorney's Office for the Southern District of

New York attempted to seek a writ of certiorari to appeal the acquittal by the Second Circuit to the United States Supreme Court. If the Government believed the Second Circuit's decision constituted error, they could have sought to appeal it. Defendant was not acquitted by a jury based on an application of the law to the facts elicited at trial, but rather it was based on the fact that none of the crimes he was accused of committing actually turned out to be a crime based on the facts known to Agent McSwain.

The People also argue that even if Agent McSwain did not have probable cause for the crimes he, in conjunction with the Government, accused defendant of, the People should not be prejudiced because Agent McSwain had probable cause to arrest defendant under other theories than the ones he was acquitted of or for other crimes of which he was never accused. In other words, so long as the facts known to Agent McSwain made out any crime, he had probable cause to arrest and search defendant. However, based on United States v. Ganias, supra, it seems that any search, to be reasonable, had to be related to the crime that the property was seized for rather than for some future crime not considered at that point in time. Therefore, while other theories may have existed, this Court will not speculate

about them.

The People point to United States v. Agrawal, 726 F3d 235 (2d Cir. 2013), cert. denied _ U.S. _, 134 S.Ct. 1527 (2014), in support of their claim that Agent McSwain had probable cause based on some other theory than the one defendant's federal case proceeded (see People's Memorandum in Opposition to the Defendant's Motion for Suppression of Physical Evidence and Statements: 11; Conn September 30, 2013 letter). In *Agrawal*, which was decided after Aleynikov and Congress's amendment to the EEA in response to the Second Circuit's decision in Aleynikov, the Second Circuit found that where the defendant printed the computer source code, it became tangible property within the meaning of the NSPA and that where the computer source code related to the securities it was used to trade as opposed to the HFT system that utilized the source code, the EEA was violated. The Second Circuit then upheld Agrawal's conviction for violating the EEA and NSPA on what was otherwise a similar set of facts to those in *Aleynikov*.

The Second Circuit, in *Agrawal*, noted that this case differed from *Aleynikov* in that in *Aleynikov*, the "product" alleged to be "produced for or placed in interstate or foreign commerce" was the HFT system which was not designed to enter or

be placed in commerce", or to make something that does, and therefore, defendant's theft of source code relating to that system was not an offense under the EEA (Aleynikov, 676 F3d, at 82). In *Agrawal*, however, the government did not limit the product "produced for or placed in interstate or foreign commerce" to just the HFT system, but rather included the publicly traded stocks bought and sold by SoGen using the HFT system which were bought and sold in interstate commerce.

Similarly, the People argue, despite the Government's failure to argue any other theory for defendant's arrest in *Aleynikov*, Agent McSwain was in possession of sufficient facts to allow for probable cause to arrest for a violation of the EEA on a different theory, namely, that the "product" referred to in the EEA "related" to the publicly traded stocks bought and sold by Goldman Sachs using the HFT system which were bought and sold in interstate commerce rather than the product being the HFT system itself which was not related to interstate commerce. However, there was no evidence in this case that would have supported this theory as the product, even in the instant hearing, was the HFT platform not the securities that could be related to it.

As the dissent in *Agrawal* makes clear, the alternative EEA

theory appears only because Congress amended the statute after of *Aleynikov*, supra, was decided and because the amendment did not apply as the EEA was amended after Agrawal's trial, so that the Second Circuit was straining to find a way to fit the facts of *Agrawal* to give force to the amendment (United States v. Agrawal, 726 F3d, at 264).[31] Moreover, as defendant points out, the Second Circuit and Congress made it clear that at the time of defendant's arrest in 2009, based on the articulable facts known to the FBI, namely, that defendant was alleged to have stolen computer source code that was related to Goldman Sachs' confidential HFT system, those facts did not violate the EEA (Marino October 31, 2013 letter: 6).

Moreover, the fact that Congress felt the need to amend the statute under which defendant was charged to take into account situations like defendant's with respect to trade secrets, like Goldman Sachs' computer source code, further shows that Agent McSwain made a mistake of law, otherwise why would Congress have felt the need to amend the law to avoid a similar situation in

[31] The Court notes that United States v. Agrawal differs from *Aleynikov*, supra, in that the defendant in *Agrawal* had printed the source code so it was now tangible as opposed to *Aleynikov*, where the source code remained in an intangible digital form the entire time.

the future? In fact, when Congress passed the Theft of Trade Secrets Clarification Act of 2012, Pub.L. 112-236, 126 Stat. 1627 (2012)(codified at 18 U.S.C. § 1832), Congress noted that it was to correct *Aleynikov*'s "narrow reading to ensure that our criminal laws adequately address the theft of trade secrets related to a product or service used in interstate commerce" (158 Cong. Rec. § 6978-03 [daily ed. Nov. 27, 2012 [statement of Rep. Leahy] as quoted in United States v. Yihao Pu, _ F.Supp. _, 2014 WL 1621964 [N.D.Ill. 2014][discussing amendment in light of *Aleynikov*, supra]). As the Amendment to the EEA makes clear, the HFT system was not a product produced for or placed in interstate or foreign commerce under the EEA as it existed in 2009. There is no evidence that in 2009, Agent McSwain believed that the source code for Goldman Sachs' HFT system was somehow related to securities traded using that system (Marino October 13, 2013 letter: 7).

As to the State crimes, the Court agrees with the People that Agent McSwain had sufficient facts to conclude that defendant had violated the laws of New York State (Conn September 30, 2013 letter). However, as defendant points out, a federal agent, such as Agent McSwain, is not authorized to effectuate an arrest for a State crime unless the crime is

committed in his or her presence (see September 10, 2013 Marino letter: 3; H.65; CPL 2.15[1]; 18 USC 3052). The crime clearly did not take place in Agent McSwain's presence. There is no evidence that Agent McSwain was a State actor or was acting in conjunction with a State actor who could effectuate an arrest for State crimes or that he intended to act in conjunction with such a State actor. This Court will not speculate as to possible alternative scenarios to justify what was done in 2009. Accordingly, Agent McSwain could not have arrested or searched defendant based on probable cause to believe that defendant had committed either of the two State crimes with which he is currently charged (United States ex. rel. Coffey v. Fay, 344 F.2d 625, 634 n.1 [2d Cir. 1965]).

The Court notes that there was no reason given why the FBI, before arresting defendant, and searching him and his home, did not attempt to obtain either an arrest or search warrant. Indeed, even if Agent McSwain had probable cause to arrest defendant and consent to search his home, it is still preferable that he obtain a warrant to properly limit the parameters of the search. As the Court of Appeals noted in People v. Gonzalez, 39 N.Y.2d 122, 127 [1976], "[a] bad seizure under the Federal Constitution in the Federal Courts is also a bad seizure under

both the Federal and State Constitutions in the courts of this State" (id., at 129; see also United States v. Ganias, supra).

The Court also notes that any presumption of probable cause raised by the indictment in defendant's federal case was dissipated when the Second Circuit reversed defendant's conviction and issued an order of acquittal (see Broughton v. State, 37 N.Y.2d 451, 458, cert. denied 423 U.S. 929 [1975], [1975]; Cox v. County of Suffolk, 827 F.Supp. 935, 939 [EDNY 1993]).

However, the Court's inquiry does not end here. In Wong Sun v. United States, 371 U.S. 471, 484-85 (1963), the United States Supreme Court noted that a violation of a defendant's Fourth Amendment rights may be cured (id., at 486). In this case, since neither defendant's arrest nor the search of his person or home were based on a warrant or even probable cause, the People need to prove that defendant's consent to search himself and his home was voluntary and attenuated from the Fourth Amendment violation. Indeed, "[e]ven if [defendant had] been lawfully arrested, the police are not thereby free to conduct a full-blown, rummaging search of the arrested person's home without a warrant" (People v. Gonzalez, 39 N.Y.2d 122, 127 [1976][internal citations omitted]; see United States v. Ganias,

supra; Chimel v. California, 395 U.S. 752, 764-765, rehg denied 396 U.S. 869 [1969]).

However, if a defendant is not lawfully arrested, one way to cure a Fourth Amendment violation is to show that defendant voluntarily consented to the search (People v. Gonzalez, 39 N.Y.2d, at 127; see Schneckloth v. Bustamonte, 412 U.S. 218, 219 [1973]; People v. Hodge, 44 N.Y.2d 553, 559 [1978]["Consent is a valid substitute fpr probable cause"]; People v. Martin, 9 Misc3d 1111(A)[Cty Ct Yates Cty 2005]).

In People v. Gonzalez, 39 N.Y.2d, at 128, the New York Court of Appeals stated that, "[c]onsent to search is voluntary when it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle. As the Supreme Court stated in Bumper v North Carolina (391 US 543, 550, supra), 'Where there is coercion there cannot be consent'" (People v. Gonzalez, 39 N.Y.2d, at 128 [internal quotation marks and citations omitted]; see Bumper v North Carolina, 391 US 543[1968]). However, upon obtaining valid consent, there is no requirement for a warrant or for probable cause to arrest or to search (see People v. Martin, supra, citing People v. Hodge, 44 N.Y.2d, at 559, see also

Fernandez v. California, 134 S.Ct., at 1137). However, the "heavy burden" of proving voluntariness is on the People (see Bumper V. North Carolina, 391 U.S., at 548; People v. Gonzalez, 39 N.Y.2d, at 128; People v. Jakubowski, 100 A.D.2d 112 [4th Dept. 1984]; People v. Martin, supra).

"The question of voluntariness is one of fact to be determined from the totality of the circumstances" (People v. Jakubowski, 100 A.D.2d, at 115-116; see Schneckloth v. Bustamonte, 412 U.S., at 227; People v. Gonzalez, 39 N.Y.2d, at 128). Various factors are to be considered in determining voluntariness: whether defendant was in custody at the time consent was given (see People v. Jakubowski, 100 A.D.2d, at 116; People v. Gonzalez, 39 N.Y.2d, at 128); whether defendant knew he had a right to refuse consent (People v. Jakubowski, 100 A.D.2d, at 116; Schneckloth v. Bustamonte, 412 U.S., at 227); whether the police employed any type of threat or any other type of coercive technique (see People v. Jakubowski, 100 A.D.2d, at 116; Bumper V. North Carolina, 391 U.S., at 548; whether defendant had any prior contact with the police (see People v. Gonzalez, 39 N.Y.2d, at 129; People v. Jakubowski, 100 A.D.2d, at 116; United States v. Watson, 423 U.S. 411, 424-425, rehg denied 424 U.S. 9979 [1976] [1976]); and whether defendant had

been evasive or uncooperative with the police prior to giving his consent (People v. Jakubowski, 100 A.D.2d, at 116; People v. Gonzalez, 39 N.Y.2d, at 129). Balancing these factors, the Court finds that defendant's consent at the airport to allow Agent McSwain and the FBI to search him and his home was involuntarily given.

In this case, defendant was clearly in custody. While a defendant may consent to a search even after he is placed in custody (see People v. Gonzalez, 39 N.Y.2d, at 128; People v. Nichols, 113 AD3d 1122 [4th Dept. 2014], citing People v. May, 100 AD3d 1411, 1412 [4th Dept. 2012], lv. denied 20 NY3d 1063 [2013]), in the instant case it is clear that defendant was just submitting to authority. Although defendant consented to the search both orally and in writing, defendant was only told of his right to refuse consent in the written "Consent to Search" form he signed. Moreover, while no "threats or other coercive techniques" were used, defendant's consent was obtained after being arrested upon exiting a plane from Chicago and handcuffed, surrounded by several FBI agents, without being advised of his *Miranda* rights (People v. Nichols, 113 AD3d 1122, quoting People v. Shaw, 8 AD3d 3d 1106, 1107 [4th Dept.], lv. denied 3 NY3d 681 [2004]; see People v. Jakubowski, 100 A.D.2d, at 116). There is

no evidence that defendant was accustomed to dealing with the FBI. Accordingly, the Court finds that defendant's consent to search was both unknowing and involuntary and suppression of the property recovered from defendant at the airport is granted.

However, the Court finds that the search of defendant's home was attenuated from defendant's illegal arrest based on the consent obtained from defendant's wife, Elina Aleynikov. Ms. Aleynikov's consent to search the house she shared with defendant was valid (see People v. Nichols, 113 AD3d, at 1123). As the United States Supreme Court recently noted in Fernandez v. California, 134 S.Ct., at 1137, "Consent searches are part of the standard investigatory techniques of law enforcement agencies" and are "a constitutionally permissible and wholly legitimate aspect of effective police activity. It would be unreasonable—indeed, absurd—to require police officers to obtain a warrant when the sole owner or occupant of a house or apartment voluntarily consents to a search. The owner of a home has a right to allow others to enter and examine the premises, and there is no reason why the owner should not be permitted to extend this same privilege to police officers if that is the owner's choice ... An owner may want the police to search even where they lack probable cause, and if a warrant were always

required, this could not be done. And even where the police could establish probable cause, requiring a warrant despite the owner's consent would needlessly inconvenience everyone involved—not only the officers and the magistrate but also the occupant of the premises, who would generally either be compelled or would feel a need to stay until the search was completed" (id., at 1132 [internal citations and quotation marks omitted]).

It is well established that where a defendant shares a "common authority" with others over a premises or property, "he has no right to prevent a search in the face of the knowing and voluntary consent of a co-occupant with equal authority" (People v. Martin, 9 Misc3d 1111(A), quoting People v. Cosme, 48 N.Y.2d 286 [1979]; Fernandez v. California, 134 S.Ct., 1137). There is no claim that defendant's wife, Elina Aleynikov, did not share a "common authority" with defendant in their New Jersey home, in other words, "a co-occupant with equal authority" (id., citing People v. Carter, 30 N.Y.2d 279, 282 [1972]). Accordingly, since Elina Aleynikov, as defendant's wife, shared a "common authority" with defendant in their home, she clearly had the ability to consent to search the shared premises (People v. Nichols, 113 AD3d 1122; People v. Carter, 30 N.Y.2d, at 282).

Moreover, there was no evidence that Mrs. Aleynikov's consent was anything but voluntary. Prior to Agent Casey and the other FBI agents accompanying him entering defendant's home to search for the computers and related property, defendant was allowed to call and speak to his wife to explain what was happening to her. The FBI agents knocked on her door and identified themselves only after she had an opportunity to speak to defendant. Agent Casey spoke in a conversational tone with defendant's wife. He went over the "Consent to Search" form defendant had signed with Mrs. Aleynikov, which included notice of the right to refuse consent to search. Agent Casey promised that his agents would be as quiet as possible so as not to awaken or alarm her young children and to provide her with a list for any items that they took which appeared to be Mrs. Aleynikov's only concerns. No weapons were drawn. Before the FBI agents searched defendant's house, defendant's wife signed the "Consent to Search" form. At no time did she revoke her consent or ask the FBI agents to leave.

Since Mrs. Aleynikov had the authority to consent to a search of her home, and there is nothing to suggest that her consent was not voluntary, suppression of the property recovered from defendant's home is not warranted especially as the scope

of the search itself was reasonable. The People have satisfied their "heavy burden of proving the voluntariness of the purported consents" (People v. Gonzalez, 39 N.Y.2d, at 127-128).

In any event, "[e]ven where a search or seizure violates the Fourth Amendment, the Government is not automatically precluded from using the unlawfully obtained evidence in a criminal prosecution (see United States v. Ganias, supra [internal citation omitted]). "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system" (United States v. Ganias, supra, quoting Herring v. United States, 555 U.S. 135, 144 [2009]). Suppression is required "only when [agents] (1) ... effect a widespread seizure of items that were not within the scope of the warrant, and (2) do not act in good faith" (United States v. Ganias, supra, quoting United States v. Shi Yan Liu, 239 F.3d 138, 140 [2d Cir.2000][internal quotation marks and citations omitted]).

In the instant case, the Government's seizure of defendant's property pursuant to consent 'resembled a general search'" (United States v. Ganias, supra, quoting United States v. Shi Yan Liu, 239 F.3d, at 140-141). In *Aleynikov*, the

Government did not bother with a warrant but obtained Mrs. Aleynikov's consent to search her home, the computer and other media. Accordingly, the Court finds that defendant's wife's consent related to the search and seizure with respect to defendant's federal case. "Government agents act in good faith when they perform 'searches conducted in objectively reasonable reliance on binding appellate precedent'" (id., quoting Davis v. United States, 131 S.Ct. 2419, 2423-24 [2011]). "When Government agents act on 'good-faith reliance [o]n the law at the time of the search,' the exclusionary rule will not apply" (id., citing United States v. Aguiar, 737 F.3d 251, 259 [2d Cir.2013]). "The burden is on the government to demonstrate the objective reasonableness of the officers' good faith reliance" (id., quoting United States v. Voustianiouk, 685 F.3d 206, 215 [2d Cir.2012][internal quotation marks omitted]). In the instant case, the Court has already decided that the Government did not act on good faith reliance on the law at the time of the search because of a mistake of law.

However, "evidence will be suppressed only where the benefits of deterring the Government's unlawful actions appreciably outweigh the costs of suppressing the evidence—a high obstacle for those urging application of the rule. The

principal cost of applying the exclusionary rule is, of course, letting guilty and possibly dangerous defendants go free-something that 'offends basic concepts of the criminal justice system." (id. [internal citation and quotation marks omitted]).

In this case, the Court sees the Government's retention of defendant's property as improper in light of his acquittal of all federal charges in this case, especially after defendant inquired about getting his property back. Arguing that Agent McSwain properly seized the property in 2009, the People claim that they properly obtained the property seized by the FBI in defendant's Federal case from the US Attorney's Office. Defendant again disagrees (Marino February 25, 2014 letter). Both defendant and the People agree that there is no federal statute comparable to CPL 160.50 that requires the sealing of the record or evidence after a Federal prosecution terminates in favor of a defendant (See Conn December 13, 2013 letter citing Colian v. United States, 128 S.Ct. 377 [2007] and United States v. Schnitzer, 567 F.2d 536, 539 [2d Cir. 1977], cert. denied 435 U.S. 907 [1978]). The People further argue that the transfer of the property was proper even under CPL 160.50(1)(d)(ii), which states that evidence and records that are sealed upon the termination of a criminal case favorable to a defendant shall be

made available to a law enforcement agency upon an ex parte motion if that agency demonstrates to the satisfaction of a superior court that justice requires that the records be available to the agency (See Conn December 13, 2013 letter). According to the People, they in fact had judicial permission from Judge Cote of the United States District Court for the Southern District of New York to unseal those records and exhibits and to permit evidence and unredacted copies of exhibits and evidence to be transferred to them.[32]

Defendant acknowledges that while there is no equivalent federal statute with respect to sealing a case upon an acquittal, he was entitled to the return of the property upon his acquittal, and therefore, the transfer of property from the

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[32] Defendant apparently requested the evidence that was transferred to the New York County District Attorney's Office at shortly before the New York County District Attorney's Office apparently requested access to it from the United States Attorney's Office for the Southern District of New York. It is unclear to this Court whether the United States Attorney's Office for the Southern District of New York disclosed to Judge Cote that defendant had requested defendant's property be returned to him when they requested that the evidence be transferred to the New York County District Attorney's Office. Because the email exchange between defense counsel and the United States Attorney's Office made it seem like there was no need for a formal motion to obtain the return of the items taken from defendant, this failure foreclosed defendant from knowing that he needed to make the appropriate motions for the property's return in Federal court.

United States Attorney's Office to the New York County District Attorney's Office was improper (Marino February 25, 2014 letter:2). Defendant asked for the property's return upon his acquittal by the Second Circuit and was told to supply the United States Attorney's Office with a list, which he did. Defendant did not know about the *ex parte* motion to transfer the property to the New York County District Attorney's Office. Therefore, defendant did not file a Federal Rules of Criminal Procedure 41(g) motion. Defendant further argues that any "contraband" on the devices he sought return of could have been "purged of any confidential material belonging to Goldman Sachs" (Marino February 25, 2014 letter: 3).

In response, the People cite United States v. David, 131 F.3 55, 59 (2d Cir. 1997), which recognizes a defendant's right to the return of seized property to its rightful owner upon the termination of criminal proceedings except where the government retains a "continuing interest" in the property (see also United States v, Bein, 214 F.3d 408, 411 [3rd Cir. 2000], cert. denied 534 U.S. 943 [2001]; United States v. Pinson, 88 Fed.Appx. 939, 940 [7th Cir. 2004]). According to the People the source code on the computer is contraband and their intent to prosecute defendant for State crimes constitutes such a "continuing

interest." Therefore, Judge Cote properly authorized its transfer from federal to state custody.

The People are wrong when they state that there is no new Fourth Amendment issue as a result of the instant transfer of the property from Federal to State custody pursuant to Judge Cote's order because the transfer did not cause a new intrusion on defendant's privacy rights (see e.g. People v. DeProspero, 20 NY3d 527, 530 [2013]["the illegal retention of property by the state subsequent to an initial lawful seizure is redressable as a Fourth Amendment violation, that is to say as a continuing "seizure" which at some point subsequent to its inception lost its justifying predicate"]; see also Conn December 13, 2013 letter; see also People v. Natal, 75 N.Y.2d 379, cert. denied 498 U.S. 862 [1990]; People v. Adler, 50 N.Y.2d 730, 738-739, cert. denied 449 U.S. 1014 [1980]; People v. Nordahl, 46 AD3d 579, 580 [2d Dept. 2007], lv. denied 10 NY3d 842 [2008]). In United States v. Ganias, supra, the Second Circuit observed that any search of a computer is subject to the rule of reasonableness. According to the Second Circuit in Ganias, supra, the Fourth Amendment does not permit officials to seize a computer and the data on it and indefinitely retain every file on that computer for use in future criminal investigations.

The Court of Appeals seems to agree with the Second Circuit's view to a certain extent. In People v. DeProspero, 20 NY3d, at 532-533, the Court of Appeals observed that it "would not be compatible with due process for the state to retain property under color of a search warrant [or consent] beyond the exhaustion of any law enforcement purpose adequate to justify the withholding." The Court goes on to note that it was not excluding the possibility that such a withholding would be redressable as well as an unreasonable seizure, just not upon the facts before them. Similarly, in Matter of DeBellis v Property Clerk of City of New York, 79 N.Y.2d 49 (1992), the Court held that a "former defendant was entitled to release of seized property ... [as] property clerk was on notice that [the] defendant was interested in recovering [his] property as soon as possible, all criminal proceedings related to property had terminated, and no valid reason for continued retention of property was shown". As the Court of Appeals observed, the Second Circuit has previously held that "although the government may seize and hold a citizen's property for a variety of reasons in connection with a criminal or related proceeding, once those proceedings have terminated or it is determined that the property is not related to or is otherwise not needed for those

proceedings, due process requires that the property be returned upon demand unless the government can establish a new basis for its detention" (id., at 57). However, "[o]nce all criminal proceedings related to the property have terminated, however, as was the case here, the [G]overnment's presumptive right to detain the property no longer exists. In such cases, ... any further detention [must be] justified by a new predicate, ... such as the initiation of further criminal proceedings" (id., at 58).

The Fourth Amendment does not authorize the Federal Government to retain all the data on defendant's computers, as well as the computers themselves, "on the off-chance the information would become relevant to a subsequent State criminal investigation" (see United States v. Ganias, supra). The Government's retention of defendant's personal computers and property for three years, especially after he was acquitted by the Second Circuit, the indictment dismissed and he attempted to obtain the return of that property to him apparently prior to any request from the New York County District Attorney for its transfer to them with respect to a possible State case, "deprived him of exclusive control over those files for an unreasonable amount of time" (see United States v. Ganias,

supra). This constituted an unauthorized seizure and retention of defendant's property that was unreasonable under the circumstances. Once defendant's federal case was terminated in defendant's favor, the computer could have been purged of any alleged proprietary source code or files belonging to Goldman Sachs and returned to defendant. The Government continued to retain possession of defendant's property until the District Attorney of New York County requested the evidence, having determined that probable cause existed to prosecute defendant for State crimes. There was no "independent basis" for the Government's retention of defendant's property after defendant was acquitted in his federal case and turning them over, even pursuant to an order of the District Court, to the New York County District Attorney for future criminal investigations (United States v. Ganias, supra). The property should have been returned to defendant.

Again, the Court notes that neither the Federal nor State Government sought a warrant for the property or for a forensic copy of the evidence (id). Clearly, if the property had been returned, the New York County District Attorney's Office would have been free to seek a search warrant for the property. Moreover, under the facts of this case, defendant's failure to

make a Fed. R. Crim. P. 41(g) motion is of no moment (see United States v. Ganias, supra).

The problem this Court has is that there appears to be no legal basis for the Federal Government's retention of defendant's property after defendant requested its return. The Court does not know exactly when the People requested the property from the Federal Government, but the Federal Government's *ex parte* application to Judge Cote was clearly after the defendant made his request for the return of his property. As the Second Circuit observed, "[t]he Fourth Amendment was intended to prevent the Government from entering individuals' homes and indiscriminately seizing all their papers in the hopes of discovering evidence about previously unknown crimes (see United States v. Ganias, supra). This is exactly what the People claim that the Government may do when it seizes evidence based on consent relevant to a different crime (see United States v. Ganias, supra). In light of United States v. Ganias, this Court believes the People are wrong and that the transfer of the property from the Federal Government to the State, even though authorized by Judge Cote, was improper under the circumstances.

The Court acknowledges that these facts were not brought

out at the Mapp-Dunaway hearing by the People as the People believed that so long as the FBI had probable cause or consent to seize the property in 2009, they had satisfied their burden of proof with respect to their possession of the same property in 2012. As a result, the People did not provide any evidence at the hearing beyond the facts that led up to the FBI's initial seizure of the property in 2009. Therefore, the Court finds that the People have not satisfied their burden that the property was lawfully seized or transferred to them in 2012 or that no violation of the Fourth Amendment has occurred.

Accordingly, defendant's motion to suppress physical property is granted.

Turning to the Huntley-Dunaway portion of the hearing, defendant's motion to suppress his statements to the FBI at the airport while under arrest without being advised of his *Miranda* warnings is granted.

"It is the People's burden to prove beyond a reasonable doubt that statements of a defendant they intend to rely upon at trial are voluntary ... To do that, they must show that the statements were not products of coercion, either physical or psychological ..., or, in other words, that they were given as a result of a free and unconstrained choice by [their] maker ...

The choice to speak where speech may incriminate is constitutionally that of the individual, not the government, and the government may not effectively eliminate it by any coercive device" (People v. Thomas, 22 NY3d 629, 641-642 [2014][internal citations and quotation marks are omitted]; see also People v. Guilford, 21 NY3d 205, 208-209 [2013]).

Additionally, the Court notes that "[a]s a general rule, a person who is in custody cannot be questioned without first receiving *Miranda* warnings or after the right to counsel attaches" (People v. Doll, 21 NY3d 665, 670 [2013], cert. denied _ U.S. _, 134 S.Ct. 1552 [2014]).

As to defendant's statements at the airport, defendant was clearly in custody at the time he made the statements as defendant was under arrest and handcuffed surrounded by FBI agents (see People v. Yukl, 25 N.Y.2d 585, 589 [1969], rearg. 26 N.Y.2d 883, 845, cert. denied 400 U.S. 851 [1970]; see People v. Vaughn, 275 A.D.2d 484, 487 [3r Dept. 2000], lv. denied 96 N.Y.2d 788 [2001]). "Miranda v. Arizona, 384 U.S. 436 [1966], requires that at the time a person is taken into custody or otherwise deprived of his freedom, he must be advised of his constitutional rights (id., at 588). Here, defendant was not advised of his *Miranda* rights before Agent McSwain sought his

consent to search his home and asked defendant where in his home to search. Agent McSwain should have realized that his words and actions were "reasonably likely to elicit an incriminating response" from defendant (People v. Paulson, 5 NY3d 122, 128 [2005], quoting People v. Ferro, 63 N.Y.2d 316, 322 [1984], cert. denied 472 U.S. 1007 [1985], quoting Rhode Island V. Innis, 446 U.S. 291, 301 [1980]). Accordingly, regardless of whether or not there was probable cause for his arrest, defendant's first unMirandized statements at the airport must be suppressed as the People are unable to prove that they were voluntarily made beyond a reasonable doubt (see Kaupp v. Texas, 538 U.S. 626, 632-633 [2003]); People v. Yukl, supra).

In any event, there is no doubt that these statements must also be suppressed as the fruit of the poisonous tree as a result of defendant's illegal arrest in 2009 based on Agent McSwain's mistake of law (see People v. McCree, 113 AD3d 557 [1st Dept. 2014]). The statements directly flow from defendant's illegal arrest and there were no facts to attenuate the statements from the initial illegality.

However, with respect to defendant's later Mirandized statements at FBI headquarters, it has long been held that a confession obtained through an illegal arrest without probable

cause must be excluded as the fruit of the poisonous tree unless sufficiently attenuated (see People v. Turner, 107 AD3d 1543 [4th Dept.], lv. granted 21 NY3d 1047 [2013]; People v. Vaughn, 275 A.D.2d, at 487-488; People v. Kocik, 63 A.D.2d 230, 234 [4th Dept. 1978] [internal citations omitted]; see Brown v. Illinois, 422 U.S. 590). In Brown v. Illinois, supra, the United States Supreme Court observed with respect to an oral statement made following an illegal arrest, that *Miranda* warnings, "[a]lone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession" (People v. Kocik, 63 A.D.2d, at 236-237, quoting Brown v. Illinois, 422 U.S., at 603). In other words, defendant's illegal arrest does not confer upon him "unlimited immunity from questioning" (see People v. Vaughn, 275 A.D.2d, at 488).

In addition to the *Miranda* warnings, there are three factors deemed "to be relevant in determining whether the confession was obtained by exploitation of an illegal arrest, to wit, (1) '(t)he temporal proximity of the arrest and the confession'; (2) 'the presence of intervening circumstances'; and (3) 'particularly, the purpose and flagrancy of the official misconduct'" (id., quoting Brown v. Illinois, 422 U.S., at 603-

604; see People v. Turner, supra; People v. Vaughn, 275 A.D.2d, at 488). Similarly, in People v. Martinez, 37 N.Y.2d 662 (1975), the Court of Appeals held "that in addition to the dictates of *Miranda* and the standard of voluntariness, the controlling consideration for determining the admissibility of 'verbal' evidence obtained pursuant to claimed illegal police conduct is whether law enforcement officers acted in good faith and with a fair basis for belief that probable cause existed for an arrest" (People v. Kocik, 63 A.D.2d, at 236-237, quoting People v. Martinez, 37 N.Y.2d, at 668). Thus, whether defendant was arrested illegally "is only one of the factors to be considered on the issue of voluntariness" (People v. Kocik, 63 A.D.2d, at 236-237, quoting People v. Johnson, 40 N.Y.2d 882, 883 [1976]; People v. Martinez, 37 N.Y.2d 662, 667 [1975]). Therefore, the question for this Court is "whether there were sufficient circumstances intervening between the illegal arrest and the confession to attenuate the confession and remove the tainted effect of the arrest" (id., at 237).

Clearly, defendant was properly read his *Miranda* warnings at FBI Headquarters. However, it is equally clear that the confession was made as a result of the FBI's exploitation of defendant's illegal arrest. Defendant was arrested on July 3,

2009, at 9:20 p.m., at JFK Airport after disembarking from a plane, was questioned at the airport without *Miranda* warnings and "confessed" approximately two to two and one-half hours later at FBI Manhattan Headquarters.

Nevertheless, between the questioning at the airport and FBI Headquarters, defendant was transported to FBI Headquarters, allowed to call and speak to his wife as well as offered food and drink before the questioning began. While at no point from the time of his arrest to the completion of his "confession" was defendant not in FBI custody, there was a definite break in the questioning. Defendant was properly read and waived his *Miranda* warnings at FBI Headquarters from a standard FBI form. After waiving his *Miranda* rights, defendant made his statement. No threats or promises were made by Agent McSwain. No force was used. While defendant was illegally arrested because of a mistake of law, Agent McSwain did not deliberately act in bad faith. This is not a case where Agent McSwain resorted to mental, physical or emotional coercion to obtain defendant's confession (compare People v. Guilford, 21 NY3d, at 212). Defendant appeared to be willing to freely speak to Agent McSwain. Hence, objectively balancing all the facts, defendant's Mirandized statements were sufficiently attenuated

from the FBI's original illegal conduct (People v. Kocik, 63 A.D.2d, at 237, quoting People v. Burley, 60 A.D.2d 973, 974 [4th Dept. 1978]; see People v. Turner, supra). Accordingly, the People have proven the voluntariness of defendant's Mirandized statements beyond a reasonable doubt and the motion to suppress defendant's Mirandized statements is denied (see People v. Thomas, 22 NY3d 629 [2014]; People v. Huntley, 15 N.Y.2d 72, 78 [1965]).

Defendant's motion to suppress his statements to the FBI at the airport is granted and his motion to suppress his statements at FBI headquarters is denied.

This constitutes the decision and order of this Court.

ENTER:

Hon. Ronald A. Zweibel, JSC

Dated: June 20, 2014