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Defendant

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) Criminal No. 21-10104-PBS
) Pages 9-1 - 9-157
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BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts 02210
February 9, 2023, 9:01 p.m.

LEE A. MARZILLI and KATHLEEN SILVA
OFFICIAL COURT REPORTERS
United States District Court
1 Courthouse Way, Room 7200
Boston, MA 02210
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4 Attorney, 1 Courthouse Way, Room 9200, Boston, Massachusetts,
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1		<u>I N D E X</u>			
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	J-MICHAEL ROBERTS				
4	By Mr. Nemtsev:	12			
5	By Mr. Kosto:		43		
6	By Mr. Nemtsev:			60	
7	DAVID TAWIL				
8	By Mr. Nemtsev:	61			
9	By Mr. Frank:		76		
10	<u>EXHIBITS</u>	<u>RECEIVED IN EVIDENCE</u>			
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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good morning to everyone:

MR. FRANK: Good morning, your Honor.

NEMTSEV: Good morning, your Honor.

THE COURT: I'm late for you all because I keep getting paper. The last juror just arrived, so this needs to be quick with respect to the exhibits today, and I also want to quickly address venue because it may affect how today goes, so -- you can be seated. It doesn't matter. I'm sorry.

I've been reading a lot of the same cases you've been citing to us. My law clerks and I were here figuring it out, trying to. It's very complicated. I'm not committing myself to anything now, but I'm starting to form an opinion, and I haven't seen the last thing that I've heard that defendant is filing. Isn't there something else coming in the door?

MR. NEMTSEV: Going to come.

THE COURT: What?

MR. NEMTSEV: Going to come.

THE COURT: Okay. So I'm not going to rule on it. Unfortunately for you all, we'll have to spend some time probably this afternoon talking about it again, but at least primarily, my view is the following: I have to consider this count by count. I also have to consider essential conduct. I'm actually blending that back into the jury instructions.

1 That's the way the Supreme Court says: Where's the essential
2 conduct? Where did the crime happen, the address?

3 With respect to three of the four charged crimes, it's
4 quite clear that the crime happened, essential conduct, in the
5 United States and not abroad, securities fraud hacking and wire
6 fraud; and for that, I don't think that the statute applies,
7 the new statute. What is it, 3728?

8 MR. FERNICH: 38.

9 THE COURT: What?

09:03 10 MR. FERNICH: 38.

11 THE COURT: Yes, 38, that just doesn't apply. I am
12 persuaded by the *Miller* case, which the government cites, as
13 well as the *Mallory* case, which the defense relies upon, that
14 you have to look at where did the essential conduct happen?
15 The hackings or the computer hack happened in the United
16 States; the securities fraud happened mostly in the United
17 States; and the wire fraud happened mostly in the United
18 States.

19 But what I'm stuck on and thinking about is the
09:03 20 conspiracy charge, and since I have to do this -- and, by the
21 way, I agree with the government that it's not either/or; it
22 can be both. That's the *Miller* case, and it makes sense.

23 I don't know what to do about the conspiracy. I need
24 to think about that. It's possible I will be charging the
25 alternative theory on the conspiracy count. That wouldn't be a

1 prejudice to you all for mentioning it because it applies to
2 three of the four counts.

3 The reason I'm stuck, and I just have to make a
4 decision, and I wanted to focus you on it, what's stopping me
5 is, it's an unusual situation. About half of the overt acts
6 happened in the United States and about half happened in
7 Russia.

8 So in addition, the objects of the conspiracy were all
9 in the United States, and it presents a closer question than in
09:04 10 most of the cases you all cited to me. It potentially -- the
11 law is quite clear that if I give an alternative theory of
12 venue and I'm wrong, it will deep six this verdict; and I could
13 easily see a circuit coming out either way on that issue. So
14 I'm worried about it, I'm just saying.

15 Now, I'm thinking about it. I haven't seen your last
16 memo. That's how I'm currently thinking. But since conspiracy
17 is still in play for the application of that venue provision, I
18 thought we could do this by stipulation, or I could quickly
19 reopen the evidence just as to the fact he was transported from
09:05 20 Switzerland to Massachusetts. How do you want to do it? I'll
21 just have a record on it. I don't even know if it's true. I
22 haven't thought it --

23 MR. FERNICH: I think that I'd like to obviously --
24 this is a quick piece of work and it's very short -- I'd like
25 your Honor to reserve pending the receipt of this.

1 THE COURT: I know, but by the time I discuss it, the
2 case will be closed. So I don't want to bring him back sort of
3 as a rebuttal. It isn't technically a rebuttal.

4 MR. FERNICH: I would say, if we lose, I'd rather do
5 it by stip, obviously.

6 THE COURT: Well, I can't do it in a iffy way. If in
7 fact I say that on conspiracy we can apply the alternative
8 theory, or at least the jury, not me, the jury can apply the
9 alternative theory, will you stipulate --

09:06 10 MR. FERNICH: Let me kick it over to --

11 THE COURT: Absolutely. That's why I'm doing it now
12 because we have to decide it by the end of the day. You'll
13 just all have to think about that.

14 MR. FRANK: And, your Honor, we may want to take one
15 last stab at briefing this briefly.

16 THE COURT: Can I also say, there's a really solid
17 argument you've waived it by not submitting jury instructions
18 on it. So I'm trying to do what's fair and consistent with the
19 law. The case that you cited to me yesterday is not on point.
09:06 20 It was treason. It was wholly abroad in *Chandler*. This is
21 primarily designed to deal with crimes committed against the
22 United States that were abroad, like treason or piracy or high
23 seas. It wasn't primarily designed for this, and yet you're
24 right, that has the word "begun" in it, which the Second
25 Circuit has said, and other circuits have said, is cryptic as

1 to what they were trying to get at, and there's not much
2 description in the legislative history. But you're raising it
3 so late, I take your good faith that you just thought about it.
4 I'm doing catch-up, as we all are. So that's how I'm currently
5 thinking.

6 I don't think it's a crazy way to approach this. It
7 eliminates any prejudice from the opening statement on point,
8 since three of the four are there, and it might leave it with
9 the jury. But I just want to make sure, after you've discussed
09:07 10 with your client, whether you want to reopen the case or
11 whether you do it by stip, stipulation.

12 Okay. Now, next thing, what's the problem with their
13 chalk? I'm sorry. I'm jumping to today's --

14 MR. FRANK: This chalk was handed to me 15 minutes
15 ago, your Honor. There's no sourcing on it. We've had no
16 opportunity to do anything with it. It completely lacks --

17 THE COURT: Well, we'll see what the foundation is.
18 It's a chalk; it's not an exhibit. It's just, like, as if the
19 guy was writing on a chalkboard.

09:08 20 MR. NEMTSEV: Yes, it's what the government did
21 yesterday with Mr. Clarke.

22 THE COURT: I agree. It just depends on what he says.
23 Okay, I'll allow it.

24 All right, secondly, I'm not sure why I am being
25 prepped on Exhibit 413 to introduce it. I don't know what I'm

1 going to hear, but this is a -- just like you protested
2 MaxMind, I don't know that I'll be --

3 MR. NEMTSEV: But this isn't MaxMind-related. This
4 is --

5 THE COURT: I understand. This is just another one,
6 but it's some random software program. Maybe I'll allow the
7 expert to say that there's no evidence on the Internet that it
8 was in Boston at that time, but that's different than
9 introducing this exhibit.

09:08 10 MR. NEMTSEV: Your Honor, that exhibit is just the
11 advertisement page from StackPath.

12 THE COURT: But no one is verifying that and the
13 timing of it.

14 MR. NEMTSEV: Our expert, who we also noticed as a
15 summary witness, will say, "I went to the Wayback Machine,
16 which is an Internet archiver, and this is what the website
17 that was available on this day."

18 THE COURT: I will certainly allow him to give an
19 opinion on it. I don't know that I'll allow the exhibit in.

09:09 20 MR. NEMTSEV: Okay.

21 THE COURT: I said that yesterday basically.

22 MR. KOSTO: What your Honor said yesterday, that if it
23 wasn't in the disclosure that he'd be talking about the Wayback
24 Machine, that you wouldn't allow him to issue an opinion.

25 MR. NEMTSEV: Your Honor, he's not opining. He was

1 also listed as a summary witness. He can be a summary witness
2 for records. He doesn't have to opine on this. He's not
3 opining on anything. This is what is in the records on the
4 Internet, what StackPath advertises. This isn't even
5 technical. This is an advertisement. This is something you
6 would see in the newspaper.

7 THE COURT: I know, but you can't put this in the
8 record.

9 MR. NEMTSEV: That's fine, but can I ask him whether
09:09 10 he checked it back then, whether StackPath had a status page,
11 and what it said?

12 MR. KOSTO: It would require him to say what the
13 Wayback Machine is and how it works, which is the same
14 objection he raised with respect to MaxMind.

15 THE COURT: I'll decide as we go. I don't know. As
16 far as I'm concerned, they need to be able to put on their
17 case, but I am worried it wasn't in the report. On the other
18 hand, it's --

19 MR. NEMTSEV: It's not opinion at all.

09:10 20 THE COURT: Well, it is because it's opinion about
21 whether or not that's a reliable methodology for figuring out
22 what happened in history on these Web pages.

23 MR. NEMTSEV: But it's the equivalent of the
24 newspaper, except it's digital, Judge.

25 THE COURT: What?

1 MR. NEMTSEV: You know, it's the equivalent of the
2 advertisement section of a newspaper. You go back to the
3 library. You see what the New York City Times published in
4 2019, for example. This is exactly what this service does for
5 the Internet. It's uncontested. It's been used widely by
6 everyone.

7 THE COURT: I know, but the question is, we have
8 Rule 16 for a reason. On the other hand, it is your defense,
9 and we've known about it now for several days. And I've
09:10 10 allowed them to put in people, like that woman from North
11 Carolina, so I may allow the question but not the exhibit.

12 MR. NEMTSEV: Thank you, Judge.

13 THE COURT: Let's bring everyone in. Is the sketch
14 artist here?

15 THE CLERK: No.

16 THE COURT: Do you need these back again?

17 THE CLERK: Do you need the exhibits back?

18 MR. NEMTSEV: Sure. I'll take them just in case he
19 needs to refresh his recollection.

09:11 20 THE COURT: Are you all available to finish the charge
21 at 2:00 o'clock, a charge conference?

22 MR. FERNICH: Yes, your Honor, sure.

23 (Discussion off the record.)

24 THE CLERK: All rise for the jury.

25 (Jury enters the courtroom.)

1 THE COURT: Hello.

2 THE JURY: Hello.

3 THE COURT: Thank you again. You're just amazing.

4 Anybody speak to anyone, see anything in social media, see
5 anything in the press? Anyone try and contact you? All right.

6 We're going to continue with this witness. Thank you
7 very much. Remember, speak loud right into that mic.

8 THE WITNESS: Yes, your Honor.

9 THE COURT: Soccer field voice, okay?

09:12 10 THE CLERK: Sir, you're still under oath.

11 THE WITNESS: Understood. Thank you.

12 MR. NEMTSEV: May I proceed, your Honor?

13 THE COURT: Yes.

14 J. MICHAEL ROBERTS

15 having been previously duly sworn, was examined and testified
16 further as follows:

17 CONTINUED DIRECT EXAMINATION BY MR. NEMTSEV:

18 Q. Good morning, Mr. Roberts.

19 A. Good morning.

09:13 20 Q. So we left off, I believe you testified about the number
21 of IP addresses that are available, the IP 4 addresses, but
22 there's just not enough to go around for all the electronic
23 devices and all the people in the world?

24 A. Correct.

25 Q. So what's an Internet service provider?

1 A. So Internet service providers essentially act as the
2 on-ramp for most people --

3 Q. Can you move a little bit closer.

4 A. Yeah, a little bit louder. Sorry. Internet service
5 providers essentially act as the on-ramp for the Internet for
6 most people. Verizon is an example. If you order home
7 Internet service, they are the Internet service provider --

8 THE COURT: Can you just pull the mic right in? So
9 what is the ISP? You hear me?

10 THE WITNESS: Internet service provider.

11 THE COURT: Beautiful, all right.

12 THE WITNESS: I apologize. I can hear myself. The
13 acoustics in this room are very --

14 THE COURT: You can hear it catch.

15 THE WITNESS: YES.

16 A. So Internet service providers, as an example, they're the
17 on-ramp for the Internet. So if you have service through
18 Verizon or Comcast -- pick your provider -- they are
19 responsible for getting your home or your business access to
09:14 20 the Internet, and that's that first hop on. That's where you
21 plug in your home router, and then you get access to the
22 Internet at large, and they're responsible for routing up into
23 the greater Internet.

24 Q. And when they provide Internet service to your home, to
25 your office, what IPs do they use typically?

1 A. It depends what kind of service you have. For a typical
2 residential service, because there aren't enough IP addresses
3 for everyone to have a static IP address, they provide a
4 dynamic IP address that is assigned typically to a larger block
5 of homes or residences or neighborhoods. So the address that
6 is given to a home router is part of a larger subset. They
7 basically do the greater private network that is not routable
8 to the general Internet, and that goes up to a router that has
9 the public IP address that is reachable from the Internet. So
09:15 10 it's something called NATing, or network address translation.
11 You can't run a server because the general Internet can't reach
12 your computer at home, but that's how you get around having an
13 IP before exhaustion --

14 THE COURT: Can I just -- you're talking to them.

15 THE WITNESS: Yes.

16 THE COURT: Okay, so please explain. All right, so
17 for those of us, we have Comcast, we have Verizon; that's our
18 Internet provider. Now, what are you describing now?

19 THE WITNESS: Well, you have that service, but out of
09:15 20 your home you don't have a static IP address like, say, a
21 business would, where you can run email servers, Web servers,
22 other things that are reachable via the Internet. So because
23 there is this NATing, you can't run a server --

24 THE COURT: Because there is this --

25 THE WITNESS: NATing. N-A-T is short for network

1 address translation.

2 THE COURT: See, we don't know that. Okay, so for a
3 business, what happens?

4 THE WITNESS: So a business, they have a static IP
5 address, but everything inside of that business, it is possible
6 to have enough IP addresses for the business every -- sorry.
7 Too loud? Too quiet?

8 (Discussion off the record.)

9 THE COURT: So, all right, a business has a static IP
09:16 10 address?

11 THE WITNESS: Static IP address.

12 THE COURT: And in that static IP address, you do
13 something called NATing?

14 THE WITNESS: Yes, network address translation.

15 THE COURT: All right, and what's a NAT, other than
16 what's annoying during the summer?

17 THE WITNESS: That is just an acronym for network
18 address translation, and it acts as a translation protocol
19 between the public IP address and the private IP addresses
09:16 20 inside of the network of the home neighborhood or with inside
21 the business.

22 THE COURT: We're talking about a business in this
23 case at this point?

24 THE WITNESS: As an example, yes. So inside of your
25 business, each of the systems can talk to each other easily

1 because they know each other's addresses; but if they need to
2 go out to the Internet, they have to go back up to the router,
3 and then go out to the Internet to communicate.

4 Q. So just to quickly summarize, in the case of a home, all
5 of the neighborhoods potentially are grouped, and then they
6 have one access to the Internet from one IP address; is that
7 correct?

8 A. Correct.

9 Q. In the case of a business, the business may have one IP,
09:17 10 but then within the business, there could be many, many users,
11 many servers, computers, et cetera, and they would also have
12 one IP?

13 A. Assuming in this example, if a business has one IP address
14 assigned to it, everything behind that, the only way it can get
15 on the Internet and for then it working to work inside, it
16 needs to have separate IPs that are part of its network, the
17 private network. It's the same example for a residence with a
18 bunch of neighborhoods and a business with many users inside of
19 it.

09:18 20 Q. But the exit point to the Internet would only be one IP?

21 A. It could be more, but for this example, yes.

22 Q. So what's unfortunately complicated a little more, what is
23 a VPN?

24 A. So a VPN is short for virtual private network, and that is
25 something that's become rather ubiquitous lately. I feel like

1 everyone is providing it as a service. That is a tunnel from
2 one place to another, is the best way I can describe it, where
3 it creates a virtual IP address on the client machine that
4 tunnels through the Internet to another server where it ends up
5 to route the traffic, basically routing the traffic and routing
6 that traffic directly to the VPN server.

7 Q. And am I correct that many people could be connected to
8 that VPN server from various parts of the world?

9 MR. KOSTO: Objection.

09:19 10 THE COURT: Overruled.

11 A. Yes.

12 Q. And at the exit point, you would only see the one IP
13 address?

14 MR. KOSTO: The same objection, your Honor.

15 THE COURT: Is it just leading?

16 MR. KOSTO: Yes.

17 THE COURT: Yes, sustained.

18 Q. Okay. After users connect to the VPN server, what would
19 you see if -- would they exit from one IP?

09:19 20 A. So you can have more than one IP on a server, just to be
21 clear. But typically the way the routing would work is, you
22 connect to the VPN, you connect to the server, and your traffic
23 is routed to that server. That new VPN server is now acting as
24 your on-ramp to the Internet. So everywhere that that
25 connection goes to from that point are going to appear to be

1 coming from that server.

2 Q. And what are the reasons that you can't accurately say
3 whether a --

4 MR. NEMTSEV: Yes, Mr. Kosto?

5 MR. KOSTO: Objection.

6 THE COURT: I haven't heard the question.

7 Q. What are the reasons why you can't associate one IP
8 address with one computer or one person?

9 MR. KOSTO: Foundation, your Honor.

09:20 10 THE COURT: Overruled.

11 A. So we've run out of IP addresses, and we need to obviously
12 share them and have people sharing devices to get onto the
13 Internet with IPV4. That's what we're talking about in this
14 case.

15 THE COURT: What are we talking about?

16 THE WITNESS: IPV4. I discussed yesterday the two
17 different Internet protocols. IVP4 is the --

18 THE COURT: So it's I-P V as in Victor 4?

19 THE WITNESS: Yeah. V is short for version, and IPV6,
09:21 20 which fortunately has not exhausted yet.

21 A. So to answer your question about why you can't associate a
22 person, because there aren't enough IPs and we have multiple
23 people sharing IPs and sharing services, and potentially
24 multiple people connecting through a business address or
25 through a VPN in the same example, you can only say "There's

1 the server," but we don't necessarily know how many different
2 people are all routed through it unless we go to that server
3 and see who's connecting to it at that time from the inbound
4 side essentially.

5 Q. And are there a lot of VPN providers available, commercial
6 VPN providers?

7 A. Now there are, yes.

8 Q. It's a popular service these days?

9 A. It seems to be.

09:22 10 Q. StackPath is, for example, a VPN service provider?

11 A. Yes. StackPath, AirVPN. Even antivirus companies like
12 Norton provide a service, a VPN service packaged with their
13 software.

14 Q. And what are the reasons that people or businesses use
15 VPNs?

16 A. I mean, businesses have always made use of them very
17 frequently to connect two offices together so that it's a
18 seamless connection between two endpoints, or between multiple
19 endpoints. Recently the VPN has made a huge impact in letting
09:23 20 us all make it through the pandemic, in that we're all able to
21 connect remotely to our offices and work from our homes
22 flawlessly, or with minimal hiccups. So that was a very
23 important feature to have, and it also secured all of that
24 traffic between all of our homes and our businesses so that we
25 could all conduct our business securely. At the same time, you

1 have other reasons. People may want to make sure their
2 communications are secured, if you're on an unfamiliar network
3 staying in a hotel perhaps, and you don't want anyone
4 potentially getting your traffic. Or there's even the example
5 of if you want to watch -- this happens all the time -- a
6 sporting event that's in another country, in another area that
7 you can't access locally, or if that content is blocked unless
8 you're in a particular country, that is a way to get around a
9 network restriction.

09:24 10 Q. And the content would be blocked because of something
11 called "geolocation blocking"?

12 A. That is --

13 MR. KOSTO: Objection.

14 THE COURT: Sustained, leading, and I'm not sure what
15 the relevance is.

16 (Discussion off the record.)

17 THE COURT: It's a perfect science getting it so Lee
18 can hear and the rest of us can.

19 THE WITNESS: How about here? I moved it over a
09:25 20 little. Is this good? Just let me know.

21 MR. NEMTSEV: Pretend I'm deaf and you've got to
22 really scream to me because I'm pretty close to being deaf at
23 this point.

24 THE COURT: An interesting comment for the record.

25 (Laughter.)

1 Q. So let's say you end up on one of these VPN servers and
2 you want to check where you're projecting your location out of,
3 how would you do that?

4 MR. KOSTO: Objection, relevance.

5 THE COURT: Overruled.

6 A. So a lot of VPN pages actually will show you what your IP
7 is when you first go there and connect, but if I wanted to
8 verify what my public IP address is when I get there, the
9 public IP address being is how my IP would appear to all the
09:26 10 services I'm connecting to, and one way I would do that is --
11 sort of the simple way is people open up their Web browser and
12 type in the search "What is my IP address?" And most of the
13 time the first response is going to be the website
14 whatismyipaddress.com, which will show you very prominently at
15 the top what your IP address is.

16 Q. And these types of websites, they are IP geolocation
17 services; is that right?

18 A. They're not IP geolocation services. They are services
19 that make use of IP geolocation, if they are telling you where
09:26 20 the IP is reporting to be geographically, but all they're
21 telling you is "This is your IP address."

22 Q. And you don't know whether those services are accurate or
23 what information they're based on and whether they're --
24 whatever --

25 THE COURT: It's all leading. Excuse me. Ask him the

1 question.

2 A. So --

3 THE COURT: No. There's no question in front of you.

4 Q. Do you know whether the information that was provided by
5 whatismyIP.com is accurate?

6 MR. KOSTO: Objection, relevance.

7 THE COURT: Sustained.

8 Q. Do you know what these IP geolocation services said about
9 the 104.238 IP address?

09:27 10 MR. KOSTO: The same objection, your Honor.

11 THE COURT: Yes or no, during the relevant time
12 period.

13 A. Can you repeat?

14 Q. Do you know what these IP geolocation services said about
15 the 140.238 IP address during the relevant time?

16 MR. KOSTO: Objection.

17 THE COURT: Overruled.

18 MR. KOSTO: Rule 16.

19 THE COURT: Do you know?

09:27 20 THE WITNESS: For the relevant time period?

21 THE COURT: Yes.

22 THE WITNESS: I do not know what it was at the
23 relevant time period.

24 Q. Do you remember Microsoft --

25 THE COURT: By which I mean the charged period in the

1 indictment that you've been hearing about, 2018 to 2020.

2 Q. Do you remember seeing Microsoft --

3 THE COURT: By the way, do I have that time right? I
4 think I do. The charged indictment period, 2018 to 2020.

5 MR. KOSTO: September 30, 2020, yes.

6 THE COURT: Yes. September 20 is when it stopped.
7 All right.

8 Q. Do you remember seeing Microsoft ISS logs from DFIN's
9 server?

09:28 10 MR. KOSTO: Objection, foundation. The witness said
11 he didn't know.

12 THE COURT: Excuse me. It's a separate question.
13 Do you remember seeing those?

14 THE WITNESS: Yes, I do.

15 Q. Do you remember there was a column there with IP
16 geolocation data?

17 MR. KOSTO: Objection, leading.

18 THE COURT: Overruled.

19 A. Yes, I do.

09:28 20 Q. Do you remember what that column said about the 104.238
21 server?

22 THE COURT: Yes or no.

23 A. I want to say "yes," but may I ask a clarifying question
24 to --

25 THE COURT: He doesn't know. Why don't you re-ask it.

1 Q. That's the one from October to November, if you remember.

2 MR. KOSTO: Objection.

3 A. Yes.

4 Q. Do you remember?

5 A. Yes.

6 Q. What did it say?

7 MR. KOSTO: Objection, your Honor.

8 THE COURT: Sustained.

9 A. As I recall --

09:29 10 THE COURT: No. That's called "sustained," that you
11 don't answer.

12 THE WITNESS: Oh, I'm sorry.

13 MR. NEMTSEV: May I ask if he recalls if it was Boston
14 or not.

15 MR. KOSTO: Objection, your Honor.

16 THE COURT: I couldn't even hear what you said, so ask
17 another question.

18 Q. Do you know whether it said Boston or not?

19 MR. KOSTO: Objection.

09:29 20 THE COURT: Sustained. He doesn't remember.

21 Q. Do you remember what it said?

22 MR. KOSTO: Objection.

23 THE COURT: Excuse me. Do you remember what it said?

24 THE WITNESS: I'm sorry. With yes or no?

25 THE COURT: Yes. Or no.

1 THE WITNESS: Not specifically, no.

2 MR. NEMTSEV: Can I refresh his recollection?

3 THE COURT: You cannot put it in unless he says that
4 it is reliable.

5 Q. You don't know whether that is reliable, correct?

6 A. The geolocation reliability?

7 Q. From the Microsoft ISS logs, Do you?

8 A. The problem I have with --

9 THE COURT: Yes or no, do you know whether it's
09:30 10 reliable or not?

11 MR. KOSTO: Objection.

12 THE WITNESS: I'll go with "yes."

13 THE COURT: So is it reliable?

14 THE WITNESS: In my experience, using geo-IP location
15 services, they are not one hundred percent reliable.

16 THE COURT: All right, that's the answer. What's the
17 next one?

18 Q. Knowing that they're not a hundred percent reliable and
19 that they may not necessarily match the actual server location,
09:30 20 you do recall, do you not, sir, the geolocation that was
21 featured in the Microsoft ISS logs from October to November
22 with the 104.238 IP addresses?

23 MR. KOSTO: Objection, leading. Objection,
24 foundation.

25 THE COURT: Sustained. Asked and answered.

1 Q. Sir, you received a lot of discovery from this case; is
2 that right?

3 A. Yes.

4 Q. I think you testified yesterday it was about 6 terabytes'
5 worth?

6 A. Over 6.

7 Q. Over 6. You reviewed a lot of that discovery?

8 A. Yes.

9 Q. Did you review Mr. Klyushin's iCloud account?

09:31 10 A. I believe so, yes.

11 Q. And how was it produced?

12 A. That was produced as the result of a subpoena sent to
13 Apple requesting his data.

14 Q. Do you know if it was a subpoena or a search warrant?

15 A. I believe it was sent as a search warrant.

16 Q. And how was it produced to the defense and produced to you
17 subsequently?

18 A. It was produced in a -- I believe the original container
19 they sent it in was a zip file, which contained the contents of
09:32 20 the iCloud as produced by Apple.

21 Q. Did you take a look at the contents of the iCloud?

22 A. So everything that was loaded and was received was
23 indexed, and being --

24 THE COURT: Can you hear?

25 THE WITNESS: Can you hear?

1 THE JURY: Yes.

2 THE COURT: Yes, they can.

3 A. Being human, I can't really go through 6.6 terabytes of
4 data on my own, so there's a lot of indexing and technical help
5 that goes into it. So if something is relevant or comes up as
6 a search, or something I need to review in depth, that is
7 reviewed, but did I review every single document in there?
8 Likely not.

9 Q. Did you review document counts and approximate dates from
09:33 10 when to when documents were produced?

11 THE COURT: Why don't you just ask him the question?

12 MR. NEMTSEV: I'm sorry. Can I pull up Exhibit 367,
13 and I move to admit it.

14 THE CLERK: What number?

15 MR. NEMTSEV: 367?

16 THE COURT: It's in evidence?

17 MR. NEMTSEV: I move to admit it, your Honor. It's
18 uncontested.

19 THE COURT: Okay, fine.

09:33 20 (Exhibit 367 received in evidence.)

21 Q. Is this what you saw when you reviewed Mr. Klyushin's
22 iCloud account?

23 A. Yes.

24 Q. And these are the date ranges that were available for
25 messages, pictures, location records, calendar entries, call

1 logs, WiFi connection records, audio records, videos, emails,
2 documents?

3 MR. KOSTO: I'm sorry, Ms. Molloy. We don't have it
4 yet. I'm not sure Mr. Klyushin does either.

5 THE CLERK: Does the witness have it?

6 THE WITNESS: I see it.

7 THE COURT: I see it. Do you all see it?

8 (Discussion off the record.)

9 MR. KOSTO: Your Honor, if the jury has it, we know
09:34 10 the document. We can go ahead.

11 THE COURT: Okay, I just wanted to make sure
12 Mr. Klyushin and Mr. Fernich can see it.

13 (Discussion off the record.)

14 THE COURT: Okay. I'm sorry to the public here, but
15 it's necessary, and then maybe we can call IT to figure out
16 what's going on.

17 Why don't you keep asking questions, as long as
18 Mr. Klyushin can see it.

19 Q. This is an accurate description of what you located in
09:35 20 terms of dates and quantities for --

21 A. Yes.

22 Q. And do you recall that the iCloud was produced in
23 Cellebrite?

24 A. It was run through Cellebrite as part of their processing,
25 yes.

1 Q. And what is Cellebrite?

2 A. Cellebrite is software produced by Cellebrite. It's a
3 company that handles -- their origins are really in imaging --
4 phone forensic preservation software, so they produce, among
5 other things, phone preservation software to pull data out of
6 phones. Be it Apple, Android, Motorola, name your phone, they
7 probably do it, and also the software to analyze it. They
8 also, through their physical analyzer software, when it comes
9 to iCloud and other things, handle -- can process search
09:36 10 warrant returns that come back from Apple and other providers
11 to review them in the same manner you would content from the
12 phone.

13 Q. And it allows you to run searches?

14 A. Yes.

15 Q. And did you run some searches as part of reviewing the
16 iCloud account?

17 A. I did.

18 MR. NEMTSEV: Can we have Exhibit 351, please, and I'd
19 move to admit it.

09:36 20 (Exhibit 351 received in evidence.)

21 Q. Did you run a search for Mr. Sladkov and Mr. Irzak's
22 telephone numbers in Mr. Klyushin's iCloud account?

23 A. Yes.

24 Q. Did you get any hits?

25 A. No.

1 MR. NEMTSEV: Can we have Exhibit 352, and I'd move to
2 admit it.

3 (Exhibit 352 received in evidence.)

4 MR. NEMTSEV: Your Honor, we seem to be having a lot
5 of tech issues today.

6 THE COURT: Did we pull it up?

7 (Discussion off the record.)

8 THE CLERK: So I just switched it over to document
9 camera, so let's see if that works.

09:38 10 MR. NEMTSEV: And this is Exhibit 353, and I'd move to
11 admit it, your Honor.

12 (Exhibit 353 received in evidence.)

13 Q. Did you run searches for Mr. Irzak by name in Mr. Klyushin's
14 iCloud?

15 A. Yes.

16 Q. Did you get any hits?

17 A. No.

18 Q. And it's the same with Mr. Sladkov, correct?

19 A. Correct.

09:38 20 THE COURT: You're all getting that, right? I have
21 that. Do you still not have it on the attorneys' screen?

22 MR. KOSTO: It's still not on these, no.

23 THE COURT: All right.

24 THE CLERK: I'll email IT right now.

25 MR. NEMTSEV: And this is 359, and I move to admit

1 this.

2 THE CLERK: I'm sorry. 3 what?

3 MR. NEMTSEV: 59.

4 (Exhibit 359 received in evidence.)

5 Q. Did you run a search for Toppan?

6 A. Yes.

7 Q. Did you locate anything?

8 A. No.

9 MR. NEMTSEV: And this is 360, and I move to admit

09:39 10 this.

11 (Exhibit 360 received in evidence.)

12 Q. Did you run a search for DFIN Solutions?

13 A. Yes.

14 Q. And did you find any results?

15 A. No.

16 Q. Sir, did you find a contact card associated with Ivan
17 Ermakov?

18 A. I want to say "yes."

19 MR. NEMTSEV: This is 363, and I'd move to admit this.

09:40 20 (Exhibit 363 received in evidence.)

21 Q. And can you tell us when it was created?

22 A. According to the date displayed, it is -- those numbers
23 are a little odd on the year. It's not a clear number. I
24 would -- it's a printed copy and --

25 Q. I understand. Does 2018 seem correct?

1 A. It appears to me that it says March 17, 2018.

2 Q. Thank you. Did you also review Mr. Sladkov's iCloud
3 account?

4 A. Yes.

5 Q. Did you review any metadata associated with the M-13 chat
6 application?

7 A. Yes.

8 NEMTSEV: And, your Honor, this is 352, and I would
9 move to admit this.

09:41 10 THE COURT: All right.

11 (Exhibit 352 received in evidence.)

12 Q. And this is the metadata file that's associated with that
13 application?

14 A. Yes.

15 Q. Moving to Page 2, there's metadata time stamp information
16 that you located?

17 A. Yes.

18 Q. And what is that number?

19 A. So that number is a Unix timestamp. Computers use a
09:42 20 sequence of numeric numbers. A Unix time stamp begins on --
21 starting from zero on January 1, 1970, at midnight, and then
22 increments every second forward thereafter, so it's constantly
23 increasing and adding. That particular number I believe is
24 microseconds since January 1, 1970, at midnight.

25 So if you do some math, you can figure out what day

1 that it actually represents, and helpfully on this exhibit that
2 has been done by looking it up in the Unix time stamp
3 conversion tool, that time displayed is Tuesday, November 26,
4 2019, 8:19:50 a.m. GMT or UTC, or Zulu time, depending on what
5 you like to call it.

6 Q. Thank you. And, sir, are you familiar with the Wayback
7 Machine?

8 A. I am.

9 Q. And what is it?

09:43 10 MR. KOSTO: Objection, Rule 16.

11 THE COURT: Overruled.

12 A. So the Wayback Machine is an Internet archiving solution
13 that was established by archive.org, which is a nonprofit that
14 was established to preserve a lot of digital content from all
15 around the Internet. I've actually been fortunate to --

16 THE COURT: Period. What's the next one?

17 Q. What did you do with the Wayback Machine?

18 THE COURT: In this case.

19 A. In this case?

09:43 20 Q. Or your experience, in general, with the Wayback Machine.

21 MR. KOSTO: Objection.

22 THE COURT: Sustained.

23 Q. What did you do with the Wayback Machine in this case?

24 A. In this case, the Wayback Machine was used to view --

25 THE COURT: When you say "was used," you used it?

1 THE WITNESS: I used the Wayback Machine in this
2 matter to go and view preserved copies of specific Internet
3 pages as they existed at the time they were preserved by
4 archive.org.

5 Q. Did you review a Web page strongVPN.com/locations?

6 MR. KOSTO: Objection.

7 THE COURT: Overruled.

8 A. Yes.

9 Q. And you reviewed it during two times in history. One was
09:44 10 in March 8, 2019?

11 MR. KOSTO: Objection, your Honor.

12 THE COURT: Rule 16?

13 MR. KOSTO: Yes.

14 THE COURT: Overruled.

15 A. Yes.

16 Q. And another time you viewed it was on September 9, 2018?

17 A. Yes, as in the date of the capture, yes.

18 Q. And that Web page showed what servers were available for
19 StrongVPN at the time?

09:44 20 MR. KOSTO: Objection, hearsay.

21 THE COURT: Sustained.

22 Q. Was that an advertisement that StrongVPN projected to the
23 rest of the world about what servers were available, to your
24 understanding?

25 A. My understanding is, that was what they were telling the

1 world that was available as far as their servers.

2 Q. And was Boston listed on there?

3 MR. KOSTO: Objection.

4 THE COURT: Overruled, overruled.

5 A. Yes.

6 Q. Boston was listed on there?

7 MR. KOSTO: Objection, asked and answered.

8 THE COURT: So the answer is "yes."

9 THE WITNESS: May I restate?

09:45 10 THE COURT: If you were wrong, you can restate. Do
11 you remember?

12 THE WITNESS: I am completely at the mercy of the
13 evidence that I believe would show exactly what was there.

14 THE COURT: All right, next question.

15 Q. Did StrongVPN advertise that it had a Boston server on its
16 Web page?

17 MR. KOSTO: Objection, asked and answered.

18 THE COURT: Sustained.

19 MR. NEMTSEV: Your Honor, may I approach the witness?

09:46 20 THE COURT: Yes.

21 MR. NEMTSEV: Thank you.

22 Q. So does that refresh your recollection regarding --

23 A. Yes. Thank you.

24 Q. It's a list alphabetically, correct?

25 MR. KOSTO: Objection, leading.

1 THE COURT: Overruled.

2 A. Yes.

3 Q. It goes from A to C on that list?

4 A. It does.

5 Q. Is there Boston listed under B?

6 THE COURT: Do you recognize it?

7 THE WITNESS: Do I recognize this document? Yes.

8 THE COURT: Have you ever seen it before?

9 THE WITNESS: No, I've seen this. My confusion was

09:47 10 which of the pages I was looking at specifically. There are a
11 number of VPN pages.

12 THE COURT: All right, so that refreshes his
13 recollection, so what's the next question?

14 MR. NEMTSEV: Thank you.

15 Q. Did StrongVPN advertise to the world that it offers a
16 Boston server at the time that you reviewed those Web pages?

17 MR. KOSTO: Objection, 802.

18 THE COURT: Sustained. You need to establish the
19 reliability of that.

09:47 20 Q. Sir, have you had any reliability issues with the Wayback
21 Machine?

22 A. I have not.

23 Q. And you testified that it archives Internet Web pages?

24 A. Yes.

25 Q. And that is an archive, one you looked at for March of

1 2019, the other one you looked at from September of 2018?

2 A. Yes.

3 MR. KOSTO: Objection.

4 Q. And you believe the Wayback Machine is reliable?

5 A. Yes, and I haven't seen otherwise yet.

6 Q. And according to what you saw when you reviewed the
7 StrongVPN status page for its servers, was Boston listed on
8 there?

9 A. It is not, and was not.

09:48 10 Q. It was not either in September of 2018 and both March of
11 2019?

12 A. Correct.

13 Q. Sir, did you review pen register data in this case?

14 A. I did.

15 MR. NEMTSEV: Your Honor, could we check if the screen
16 is working?

17 THE CLERK: I emailed IT, and they're coming up, and I
18 want to make sure that the blue light's on because if the blue
19 lights are on -- this has no connection.

09:48 20 (Discussion off the record.)

21 THE CLERK: It has no signal, Judge.

22 THE COURT: Well, all right, we'll just have to keep
23 going. Is it on any of these computers?

24 THE CLERK: Anyone else have the white screen?

25 THE COURT: They all have it. It's not on mine.

1 THE CLERK: All right. There's no signal. On these
2 two, it says "no signal."

3 THE COURT: How about the government? Do you have it?

4 MR. KOSTO: We do not, your Honor.

5 THE COURT: Do you have anything in paper? Do you
6 have it on paper? I'm ready to go back to paper.

7 (Discussion off the record.)

8 Q. Sir, I'm showing you what is Government Exhibit 218. Do
9 you see it?

09:50 10 THE COURT: I've got it again. Does everyone? Well,
11 it's up on the screen there.

12 Q. And this is a summary chart of connections between
13 89.107.124.42 IP and the IP address 185.228.19.147?

14 A. Correct.

15 Q. And did you look at the underlying data that this chart is
16 based on?

17 A. I did.

18 Q. And where does that data come from?

19 A. So as part of the pen register that was ordered by the
09:51 20 investigators and sent to the company that hosted the
21 destination IP, the company was ordered to perform a limited
22 capture of the traffic transiting between that .147 IP and
23 everyone communicating with it on the Internet. It doesn't
24 capture the content. It only captures the header of the data.
25 So it will catch the time stamps, the inbound, the outbound.

1 It can tell you directionality. It can tell you what IP
2 addresses are communicating with, but you don't have any
3 context as to what's being discussed, what kind of traffic is
4 there.

5 Q. And do you recall what the 89.107.124.42 IP is?

6 A. That is associated with M-13's Juniper hardware switch on
7 the Internet.

8 THE COURT: Wait. I can't hear, and I don't
9 understand. So -- so --

09:52 10 THE WITNESS: The .42 address is associated with M-13.

11 THE COURT: The 89 address is what? We probably don't
12 remember because there have been so many IP addresses. So
13 which one? Why don't you give us foundation for it.

14 Q. The 89 IP on top --

15 A. Yes.

16 Q. -- that is associated with M-13?

17 A. Yes.

18 Q. And you said it's associated with a Juniper switch? What
19 is that?

09:52 20 A. Specifically it's a -- the P-caps, or the network captures
21 that were part of the pen register data contained hardware
22 information about what was communicating, it was communicating
23 to; and I found that that device it was actually communicating
24 with was a Juniper switch. Juniper is a company that makes
25 network fire walls, networking switches, and other network

1 appliances.

2 Q. And do you remember --

3 THE COURT: The IP address for M-13 was communicating
4 with something called a Juniper switch? Is that what you're
5 saying?

6 THE WITNESS: The IP address that is associated with
7 M-13 that starts with .89 on this chart --

8 THE COURT: Yes, yes.

9 THE WITNESS: -- is assigned to a piece of hardware or
09:53 10 a computer. That computer that it's ultimately connecting to,
11 the endpoint is a switch made by Juniper.

12 THE COURT: Okay.

13 THE WITNESS: That's the name of the company that
14 manufacturers --

15 THE COURT: Okay. Next question.

16 Q. Do you remember what the 185.228.19.147 address is
17 associated with?

18 A. That's associated with a Supermicro brand computer which
19 was hosted by the AirVPN provider.

09:54 20 MR. NEMTSEV: And this is Exhibit 450, your Honor, and
21 I move to admit it.

22 (Exhibit 450 received in evidence.)

23 THE CLERK: Just touch the wheel. Don't touch the
24 other button because you'll lose the focus.

25 MR. NEMTSEV: So far, so good.

1 THE CLERK: 450, did you say, 450?

2 MR. NEMTSEV: 450.

3 THE CLERK: Thank you.

4 Q. And once you went into the actual pen register data that
5 the government produced to us, what did you see?

6 A. So the data that ultimately created the -- contained all
7 of the connections between those two IP addresses were in six
8 packet captures in total.

9 Q. And what is a packet capture?

09:54 10 A. So as part of the pen register, they set up a packet
11 capture. Typically what happens is, they will tell the switch
12 to send traffic both to the server it needs to go to, and also
13 to send a copy off, of the same data, off to another system
14 that will preserve that data. In the packet captures I
15 reviewed, each one was about 80 megabytes in size, so it just
16 kept rolling and filling up 80 megabytes and rolls to the next
17 one, keeps going, until the -- you know, for the duration of
18 their pen register authorization.

19 Q. And you listed packet 1 through packet 20. Some are noted
09:55 20 as retransmissions?

21 A. Yes.

22 Q. What is a retransmission?

23 A. So when -- the important thing to explain going into this
24 is, there are two protocols at hand that we're working with,
25 UDP, user datagram protocol, if I'm remembering right, and TCP,

1 traffic control protocol. The names aren't really important.
2 The important thing to understand is, UDP packets are sent and
3 there's no reply expected or necessary to come back. TCP, in
4 order for it to work, there must be a transaction that has to
5 go back and forth, and they have to talk to each other. So the
6 UDP packets go off, and if they're lost in transit, it's not a
7 problem; more data will come. It's typically used in streaming
8 services, Zoom calls, streaming audio data, because it's just
9 more efficient and faster. TCP needs to establish that
09:56 10 communication, and the reason for the retransmission is,
11 packets were sent --

12 MR. KOSTO: Objection, your Honor. Lost the question.

13 THE COURT: Excuse me?

14 MR. KOSTO: There's no question pending.

15 THE COURT: Why don't you finish the sentence.

16 A. They have to have the reply come back. Because a reply
17 did not come back, the system then automatically retransmits
18 the TCP packet, trying to determine if there can be a response
19 that comes back from the other side.

09:57 20 THE COURT: Stop. It can't be a narrative.

21 What's the next question.

22 Q. Packets 1 through 19, that was AirVPN attempting to
23 communicate with the M-13 server?

24 MR. KOSTO: Objection, leading.

25 THE COURT: Yes, but at least I understand it. So is

1 that correct?

2 THE WITNESS: That is correct.

3 Q. And the time stamps are from 12:11 to 12:21:55 seconds in
4 milliseconds?

5 A. Microseconds.

6 Q. Microseconds. I'm sorry. And then there was one response
7 from the M-13 server to the server of AirVPN?

8 A. I don't know if it's a response or not, and I say that
9 because there's a significant amount of time between the

09:58 10 last -- packet 19 and packet 20.

11 Q. And packet 20, do you remember what size it was?

12 A. No. All the packets are truncated as part of the packet
13 capture, so you don't have the content, but packet size is --
14 there are ways they can be larger, but typically they do not
15 exceed 64 kilobytes.

16 Q. Is that a lot of information?

17 A. Not really.

18 Q. Not for a picture?

19 A. No. Well, a small picture, a very small icon.

09:58 20 MR. NEMTSEV: Nothing further, your Honor.

21 MR. KOSTO: May I proceed, your Honor.

22 THE COURT: Yes.

23 CROSS-EXAMINATION BY MR. KOSTO:

24 Q. Good morning, Mr. Roberts.

25 A. Good morning.

1 Q. My name is Seth Kosto. I'm one of the prosecutors in the
2 case. You give a list of reasons that people would subscribe
3 to a VPN in your testimony. Do you remember that?

4 A. Yes.

5 Q. And specifically we're talking about private VPNs here,
6 commercially available, but not the ones that businesses
7 provide for their employees to get online, okay?

8 A. Well, commercial services do provide company VPN access as
9 an alternative.

09:59 10 Q. And they also provide access to subscribers for long-
11 distance purposes, correct?

12 A. Yes.

13 Q. Kind of a retail ability to get onto the Internet through
14 that on-ramp you describe?

15 A. Correct.

16 Q. And one of the reasons that people use that on-ramp is to
17 maintain a degree of anonymity on the Internet, correct?

18 A. That is what they advertise.

19 Q. And in your experience, that's one of the things that
10:00 20 people use private VPNs for, correct?

21 A. That is the reason for wanting to use it, yes.

22 Q. Yes. And you can hide behind a VPN in order to avoid
23 being detected, right?

24 A. It depends.

25 Q. It depends on the efforts of the investigators and

1 Internet response professionals, right?

2 A. Correct.

3 Q. And before you started your own firm, you worked at Stroz
4 Friedberg, correct?

5 A. Yes.

6 Q. For about six years?

7 A. Yes.

8 Q. And you were an incident response specialist, right?

9 A. A response examiner, yes.

10:00 10 Q. And you led several incident responses involving large
11 suspected data breaches, right?

12 A. Correct.

13 Q. One of them was a network breach at an international
14 financial and research analysis company. Do you remember that?

15 A. Yes.

16 Q. Okay. And one was at an international nonprofit that got
17 hacked, right?

18 A. Yes.

19 Q. And one was at a large government contractor's network?

10:01 20 A. Yes.

21 Q. And part of your work was trying to secure your client's
22 networks at the time, right?

23 A. I was not tasked with securing the network. I was tasked
24 with investigating a data breach.

25 Q. And in those investigations, you gave regular briefings to

1 U.S. federal law enforcement who were also responding to the
2 incident, right?

3 A. My team did, yes.

4 Q. The team that you ran?

5 A. Well, it depends on the case you're talking about, but,
6 yes.

7 Q. But in those engagements, you describe yourself in your
8 resume as the leader of those engagements, right?

9 A. Yes, but it depends on which one you're talking about.

10:01 10 Q. Well, let's say the government contractor network.

11 A. Okay.

12 Q. Did you provide briefings to the federal government about
13 your findings?

14 A. My supervisor did.

15 Q. And in the activist attack, in the hack attack on the
16 nonprofit, was that you briefing the government?

17 A. Yes.

18 Q. And you'd agree with me, based on your experience,
19 Mr. Roberts, that an IP address is actually a very important
10:01 20 part of addressing a suspected intrusion, isn't it?

21 A. Well, it's important in understanding the intrusion.

22 Q. That's because what happens over a particular IP address
23 can tell you a lot about your adversary, right?

24 A. So you're getting into attribution?

25 Q. Yes.

1 A. This is where we get into VPN's anonymity obviously.

2 Q. Well, let's start with the IP address itself, sir. If you
3 saw the same IP address doing the same thing to different
4 victims, that would tell you something about your attacker,
5 wouldn't it?

6 A. It would tell me it's an attack source, yes.

7 Q. And if you saw different IP addresses, a hundred of them,
8 doing the same thing to the company that you responded to, that
9 would tell you something about your attacker, wouldn't it?

10:02 10 A. Yes.

11 Q. And if you saw different IP addresses doing the same thing
12 on different companies' networks, that would tell you something
13 about the attacker?

14 A. Correct.

15 Q. Even if someone was going through a private VPN, right?

16 A. Well, if you're talking about the activity that you're
17 seeing as the bad activity that you know about originating from
18 that same point, yes, it's potentially associated with the same
19 attacker.

10:03 20 Q. And it's a data point that you would use in your
21 investigations, right?

22 A. One of many.

23 Q. It's one of many data points that you'd pass along in your
24 law enforcement briefings, right?

25 A. Correct.

1 Q. Now, there's more than 3 billion IPV4 addresses, you
2 testified yesterday, right?

3 A. I think it comes out to 3.7 billion if you take what could
4 actually be routable.

5 Q. So seeing a number of IP addresses in a single attack out
6 of those 3.7 billion is a data point that you'd use in your
7 investigation?

8 A. Yes.

9 Q. And that's even before you set out to specifically try to
10:03 10 figure out who your adversary was, right?

11 A. Well, I don't necessarily -- we never really put a lot of
12 weight into attribution. So we understand where are the IPs,
13 where are they coming from, what kind of sources are these; but
14 ultimately attribution as to who it is, can we put a name on
15 it, can we put even a country on it, that's where we understand
16 there's more than one way on the Internet, and that is
17 something that ultimately goes back to law enforcement to make
18 that determination because --

19 Q. So you pass those data points on to law enforcement?

10:04 20 A. That respond, but we don't do the attribution.

21 Q. Correct, because law enforcement has tools that in your
22 capacity at Stroz, for example, or in your current employer,
23 you wouldn't have access to those tools?

24 A. Correct.

25 Q. You wouldn't have access to getting search warrants from

1 judges, right?

2 A. Correct.

3 Q. Or getting subpoenas issued by the grand jury?

4 A. Typically not.

5 Q. Or you wouldn't have access to being able to apply for and
6 receive the contents of a pen register like the one you were
7 talking about, right?

8 A. Right.

9 Q. Now, you would agree with me also, Mr. Roberts, that the
10:04 10 use of a private VPN itself as part of an attack is an
11 important piece of information that an incident response
12 professional would want to know?

13 A. Yes.

14 Q. And you testified a little bit about the challenges of
15 getting behind a VPN and figuring out who it is, right?

16 A. Right.

17 Q. So that's because private VPNs don't always attribute to a
18 single user, right?

19 A. They attribute to the company hosting them.

10:05 20 Q. And those private VPN services aren't always known for
21 keeping the best records of who their subscribers are?

22 MR. NEMTSEV: Objection.

23 THE COURT: Sustained.

24 Q. You're familiar with AirVPN, correct?

25 A. Yes.

1 Q. Are you familiar with Atlas VPN?

2 A. It's a name I know.

3 Q. How about AVG Secure?

4 A. Also sounds like one I've heard of.

5 Q. I think you testified early on your direct that everyone
6 is providing these private VPN services these days; is that
7 right?

8 A. Right.

9 Q. So you'd be familiar with Bitdefender out of Romania?

10:05 10 A. Bitdefender is an AV company, but, yes, that's another
11 thing that I --

12 Q. And they offer private VPN, don't they?

13 A. I'll take your word for it.

14 Q. How about CyberGhost?

15 A. I believe so.

16 Q. And Easy-Hide-IP?

17 A. Is that the company name for it?

18 Q. Do you know that VPN service out of the Seychelles?

19 A. Yes.

10:06 20 Q. How about ExpressVPN?

21 A. Uh-huh.

22 Q. Out of the British Virgin Islands?

23 A. Yes.

24 Q. How about F-Secure Freedome VPN out of Finland?

25 A. I believe, yes.

1 Q. How about GOOSE VPN out of the Netherlands?

2 A. I don't know that one.

3 Q. How about hide.me out of Malaysia?

4 A. Yes.

5 Q. How about hidemyass.com out of the United Kingdom?

6 MR. NEMTSEV: Objection, your Honor.

7 THE COURT: I don't know. I'll remember that name.
8 It sorta blends, right?

9 THE WITNESS: I thought that was related to one you
10:06 10 mentioned earlier.

11 MR. KOSTO: Forgive my language.

12 Q. How about Hotspot Shield?

13 A. Yes.

14 Q. Another VPN product?

15 A. Yes.

16 Q. IPVanish, of course?

17 A. Yes.

18 Q. And Ivacy out of Singapore?

19 A. Ivacy?

10:07 20 Q. Not that one?

21 A. Don't know it offhand.

22 Q. Does Mozilla offer a private VPN service?

23 A. Do they still?

24 THE COURT: Do you know?

25 THE WITNESS: I don't know.

1 Q. Perfect Privacy out of Sweden?

2 A. I don't know that one.

3 Q. Proton VPN out of Switzerland?

4 A. That one I know.

5 Q. You know that one?

6 A. Uh-huh.

7 Q. TorGuard VPN out of the United States?

8 A. Yes.

9 Q. Trust.Zone out of the Seychelles?

10:07 10 A. Yes.

11 Q. Tunnel Bear out of Canada? That's a colorful one.

12 A. Oh, yes, yes.

13 Q. VPN Book out of Switzerland?

14 A. I don't know that one.

15 Q. VPN Unlimited from the United States?

16 A. Yes.

17 Q. And VPN.AC?

18 A. Don't know that one.

19 Q. Viper VPN out of Switzerland?

10:07 20 A. Yes.

21 Q. Windscribe out of Canada?

22 A. I did not know they did that.

23 THE COURT: Are you objecting?

24 MR. NEMTSEV: Yes. I'm objecting to the relevance of
25 every single VPN on the list.

1 THE COURT: You've made the point. What's the next
2 issue?

3 Q. Some of those are actually what are called "no-log VPNs,"
4 right?

5 A. I don't know which ones, but, yes.

6 Q. And what's a no-log VPN?

7 A. So most -- I feel like almost every VPN provider out there
8 these days will advertise that they do not maintain logs,
9 meaning they do not keep copies of what users are doing on
10:08 10 their system, where they're going to, what accesses they're
11 making.

12 Q. And it's for those reasons that hackers sometimes like to
13 use private VPNs, right?

14 MR. NEMTSEV: Objection.

15 THE COURT: Overruled.

16 A. I can't talk about what hackers might be doing with them,
17 but anyone that does not want their activities tracked would
18 try to select a no-log VPN server.

19 Q. Okay. And if the hacker were outside the United States,
10:08 20 would a private VPN allow them to appear as if they were inside
21 the United States in making a computer connection?

22 A. Yes.

23 Q. And if you saw the same private VPN, as an incident
24 response professional, if you saw the same private VPN hitting
25 your client from different IP addresses, that would be a data

1 point for your investigation, wouldn't it?

2 A. If I was able to determine what VPN provider was hosting
3 it and that all of those source VPNs were from -- the source IP
4 addresses were from the same VPN provider, that would be a data
5 point.

6 Q. And you could look those kind of things up on domain
7 tools, for example?

8 A. You can try. One thing I've found in my experience is,
9 there's often a lot of overlap between VPN providers. So some
10:09 10 of the list that you gave is there may be more than one VPN
11 provider or more than one brand associated with a particular IP
12 address.

13 Q. So that's another reason that --

14 A. It's not always clear.

15 Q. So that's another reason that hackers like to get behind
16 private VPNs; they're complicated to trace through, right?

17 A. VPNs in general can be complicated because it's just an
18 endpoint.

19 Q. But if you saw several from, say, AirVPN hitting your
10:10 20 network from different IP addresses, that would be a data point
21 you'd pass along to investigators, right?

22 A. Yes.

23 Q. I assume when you ran into a private VPN at your incident
24 response, you didn't pack up and end the engagement?

25 A. No.

1 Q. You didn't say, "Sorry, guys. It's a private VPN. We
2 can't help you anymore"?

3 A. No. I would never do that.

4 Q. Okay. You followed up on that and passed it along to law
5 enforcement?

6 A. Yes.

7 Q. Because law enforcement had tools that might be able to
8 address the identification issues that you were describing as
9 challenges?

10:10 10 A. Yes.

11 Q. And you'd agree with me that if a user of a private VPN
12 used the private VPN to log into, say, their Apple account
13 several times over a week, that would tell you something about
14 the user of the private VPN, even though there's no record of
15 their name?

16 MR. NEMTSEV: Objection.

17 THE COURT: Overruled.

18 A. So you have many people potentially on that VPN. How do I
19 know the attacker and the iCloud log-in are the same person?

10:11 20 Q. You'd agree with me that if Apple accepts the subscriber
21 information in someone's true name -- let's start with that
22 premise, okay -- and that the private VPN over the course of a
23 month is used to log into that particular account at Apple,
24 that would tell you something about the user of the private VPN
25 customer, right?

1 A. Tell me something about a user of the private VPN.

2 Q. And that user, in particular, would be someone with access
3 to the Apple account?

4 A. Yes.

5 Q. And if one of the IP addresses that hit your private VPN
6 came back to a company that advertised to emulate hacking
7 services, that would be a data point that you'd pass on --

8 Mr. NEMTSEV: Objection.

9 THE COURT: Sustained.

10:11 10 Q. Were you here yesterday for the testimony of Mr. Wall?

11 A. No.

12 Q. You don't have any idea what his testimony was about the
13 Strong VPN Web page, do you?

14 A. No.

15 Q. And are you aware that Strong VPN operates with other
16 subsidiaries along with StackPath and IPVanish, for example?

17 A. Yes.

18 Q. Okay. And so IPVanish is their flagship brand?

19 A. Uh-huh.

10:12 20 Q. And did you use the Wayback Machine to look up IPVanish?

21 A. I did.

22 Q. Did you use the Wayback Machine to look up StackPath?

23 A. Uhm, StackPath, yes.

24 MR. KOSTO: Could we have Exhibit 250, please,

25 Ms. Lewis.

1 THE CLERK: It should be working now.

2 THE COURT: Are you all getting it now on your screen?
3 You all are?

4 MR. KOSTO: 450. I'm so sorry. I was only 200 off.

5 THE CLERK: What did you say?

6 MR. KOSTO: 450. This is in evidence.

7 Q. So this is your table of communications between the M-13
8 IP and the AirVPN, I believe you said Juniper router, right?

9 A. No. The M-13 has the Juniper router.

10:13 10 Q. I'm sorry, between M-13 and the AirVPN --

11 A. Supermicro server.

12 Q. Yes. And so what your chart here shows is communications
13 in both directions, right?

14 A. Yes.

15 Q. And you testified that we can't know the content of the
16 communications, right?

17 A. Correct.

18 Q. Those are secure. That's not something the pen register
19 actually shows?

10:13 20 A. It's what the pen register did not capture.

21 Q. And the packets are all fairly small, right?

22 A. Yes.

23 Q. And that's not something that's atypical for the
24 transmission of data over the Internet, right?

25 A. Yeah, I mean, packets typically aren't exceeding 64K, as I

1 said earlier, so they're typically very small.

2 THE COURT: I couldn't hear a word of that.

3 THE WITNESS: Sorry. Packets are typically 64
4 kilobytes or less, so they're very small.

5 Q. So the Internet has to break up even something like an
6 email into a large number of packets for it to be able to go
7 across the cloud, across the network?

8 A. Correct.

9 Q. And what you've shown here is that there were communications
10:14 10 between the AirVPN computer and M-13, not on one instance but
11 twenty, correct?

12 A. It shows it between the AirVPN server.

13 Q. Yes.

14 A. Yes, and M-13, yes.

15 Q. And date and timewise, is the very first one of those on
16 January 29, 2020, at 12:11 Zulu?

17 A. Yes.

18 Q. Would you agree that's about 50, 5-0 minutes before the
19 communication in row 20 at 12:59 Zulu?

10:15 20 A. I'll go with that's close, sure. It would be 48 minutes
21 between?

22 Q. Sounds fair. You testified on direct that you reviewed
23 the contents of Mr. Klyushin's iCloud account and of
24 Mr. Sladkov's iCloud account, correct?

25 A. Yes.

1 Q. On both of them, did you find files related to an M-13
2 chat app?

3 A. Yes.

4 Q. And with respect to the contents or the M-13 chat
5 application data on Mr. Klyushin's account, you didn't find any
6 content related to the use of that app, correct?

7 A. Correct.

8 Q. That was an encrypted app?

9 A. Yes.

10:15 10 Q. There was no data about what was being said over that app
11 on Mr. Klyushin's iCloud, correct?

12 A. Yes.

13 Q. And similarly, when you looked at Mr. Sladkov's account,
14 you found the same M-13 chat app, correct?

15 A. Yes.

16 Q. And that application on Mr. Sladkov's computer was also
17 encrypted, correct?

18 A. Right.

19 Q. And you were not able to see what the content of
10:16 20 communications over that chat app was either?

21 MR. NEMTSEV: Objection.

22 THE COURT: Overruled.

23 MR. KOSTO: No further questions, your Honor.

24 THE COURT: He didn't answer.

25 THE WITNESS: I said "correct."

1 THE COURT: Oh, all right.

2 REDIRECT EXAMINATION BY MR. NEMTSEV:

3 Q. Just very quickly, the AirVPN in your chart, 450, was
4 connecting to the M-13 IP; is that right?

5 A. Yes.

6 MR. KOSTO: Objection, misstates.

7 THE COURT: So go back to that exhibit.

8 Q. Packet number 1, the source is AirVPN; the destination is
9 M-13?

10:17 10 A. Correct.

11 Q. And that's the same from packets 1 through 19?

12 A. Yes.

13 Q. Only packet 20 is M-13 to AirVPN?

14 A. Correct.

15 MR. NEMTSEV: Nothing further.

16 THE COURT: Anything else?

17 MR. KOSTO: No. Thank you, your Honor.

18 THE COURT: Thank you very much. You may step down.

19 (Witness excused.)

10:18 20 THE COURT: Your next witness?

21 MR. NEMTSEV: Mr. Tawil, your Honor. We call
22 Mr. David Tawil.

23 DAVID TAWIL

24 having been first duly sworn, was examined and testified as
25 follows:

1 THE CLERK: You can be seated. Could you please state
2 and spell your last name.

3 THE WITNESS: Sure. My name is David Tawil. Last
4 name is spelled T as in Tom, a-w-i-l.

5 THE COURT: All right, so I do this with everyone. We
6 can't hear you.

7 THE WITNESS: Oh, I'm sorry.

8 THE COURT: It's a big room.

9 THE WITNESS: Oh, I'm sorry.

10:18 10 THE COURT: It's a big room.

11 THE WITNESS: My name is David Tawil, the last name
12 spelled T as in Tom, a-w-i-l.

13 THE CLERK: Thank you.

14 THE WITNESS: Is that better, Judge?

15 THE COURT: Much.

16 THE WITNESS: Okay.

17 MR. NEMTSEV: May I proceed, your Honor?

18 THE COURT: Yes.

19 DIRECT EXAMINATION BY NEMTSEV:

10:18 20 Q. Good morning, Mr. Tawil.

21 A. Good morning.

22 Q. Could you tell us about your educational background.

23 A. Certainly. I studied business management as an
24 undergraduate at Yeshiva University in New York City, and then
25 I spent three years at the University of Michigan Law School.

1 Q. And where did you work after law school?

2 A. At first, I interned for a Second Circuit judge. I worked
3 at Skadden Arps, a large firm in New York, and thereafter I
4 worked for a number of years at Davis Polk & Wardwell, another
5 large New York City firm.

6 Q. Did you transition to the investment industry?

7 A. I did.

8 Q. And when was that transition?

9 A. In 2005 I departed from Davis Polk and went to Credit
10:19 10 Suisse.

11 Q. And what did you do at Credit Suisse? I'm sorry. What is
12 Credit Suisse?

13 A. Credit Suisse is a worldwide investment bank, and I went
14 there in order to found and build a credit-trading business for
15 them specifically focused on bankruptcy and distressed debt.
16 Bankruptcy and restructuring was my specialty as a lawyer.

17 Q. And for Credit Suisse, did you have the opportunity to
18 trade equities?

19 A. Yes.

10:20 20 Q. And are you familiar with various analyses and trading
21 strategies for equities?

22 A. Very much so. My time at Credit Suisse, I traded all cash
23 instruments, stocks, bonds, secured debt, derivatives as well;
24 and since my time at Credit Suisse, over the past fifteen
25 years, I've traded as a investment manager.

1 Q. And following Credit Suisse, where did you go, sir?

2 A. I founded my own firm by the name of Maglan Capital.

3 Q. And what is Maglan Capital?

4 A. It is a hedge fund.

5 Q. And is it still active today?

6 A. It is in wind-down. It is almost closed.

7 Q. And when was Maglan Capital first founded?

8 A. 2009.

9 Q. And for those fourteen years at Maglan, what did you do?

10:21 10 A. Generated investment ideas, structured investment
11 strategies, executed on those investment strategies. And
12 oftentimes we were active in our investments, meaning we would
13 talk to the board of directors or the company management, and
14 sometimes we were a little bit forceful with our views on what
15 we thought the company should do.

16 Q. And as part of Maglan Capital, you had the opportunity to
17 trade equities and --

18 A. Largely, largely equities.

19 Q. And you know the various strategies that brokers and
10:21 20 traders employ?

21 A. Quite well.

22 Q. And where are you employed currently?

23 A. I'm employed at my own firm by the name of ProChain
24 Capital, which is a cryptocurrency-focused hedge fund. And I
25 am also the CEO of a public oil and gas company by the name of

1 Centaurus Energy. The stock is listed both in Canada and in
2 the United States, and the company, up until two days ago,
3 operated exclusively in Argentina. Two days ago we announced
4 the sale of our Argentine operations.

5 MR. NEMTSEV: Your Honor, I'd move to qualify
6 Mr. Tawil as an expert under 702.

7 THE COURT: On what, crypto?

8 MR. NEMTSEV: On -- no, trading and --

9 THE COURT: All right, that's fine.

10:22 10 MR. NEMTSEV: Thank you, your Honor.

11 Q. Mr. Tawil, did you review the trading records in this
12 case?

13 A. Yes, I did.

14 Q. And when was Mr. Klyushin trading, approximately, the
15 months and year? From when until when?

16 A. I think from about 2018 to 2020.

17 Q. Does 2021 sound right?

18 A. Yes.

19 Q. And as part of your engagement, did you review certain
10:23 20 stock transactions? Did you focus on certain ones?

21 A. I did.

22 Q. Do you remember focusing on a transaction in Tesla stock
23 around October 24th of 2018?

24 A. I did.

25 Q. Did you review the surrounding news and circumstances

1 regarding Tesla at that point in time?

2 A. Yes.

3 Q. And do you remember what was happening approximately in
4 October of 2018?

5 A. Yes. To say it succinctly, there was euphoria surrounding
6 the company, and it was principally initiated by the CEO and
7 founder of Tesla. A gentleman by the name of Elon Musk, who is
8 a very public figure, made his thoughts on the company and his
9 expectations and predictions for the company's growth very well
10:24 10 known.

11 Q. Do you remember Tesla had positive news early in October
12 of 2018?

13 A. Yes.

14 Q. What was that news?

15 A. The company was going to go ahead, if I recall correctly,
16 exceed their expectations in terms of number of automobiles
17 produced and sold, and therefore their earnings were going to
18 be quite strong.

19 Q. And did they do something with their earnings release
10:24 20 date?

21 A. They did, and it wasn't the first time that they did that.
22 They moved up their earnings date so -- excuse me. Let me step
23 back. Earnings come out quarterly. Public companies are
24 required to go ahead and, on a quarterly basis, update the
25 public regarding their financial results for the prior three

1 months, and those earnings are published very often on a very
2 set timeline, set by the company, but nevertheless they don't
3 deviate much from the dates from year to year; and Tesla was
4 expected to go ahead and report results on a date a couple
5 weeks out.

6 And then all of a sudden -- and, again, this was not
7 the first time -- they pushed up or released their earnings
8 earlier. They told the market that they were going to release
9 it earlier, and in fact they only, if I recall correctly, they
10:25 10 only gave the market two days' notice before releasing those
11 earnings, and that's very abnormal.

12 Q. And as an investment professional, what did that signal to
13 you, sir?

14 A. Well, since they had done it before and they had done it
15 to go ahead and release good news, it was widely anticipated
16 that it was going to be another similarly positive
17 announcement, especially since Elon Musk, the founder and CEO
18 of the company, had previously made predictions about how good
19 the quarter would be.

10:26 20 MR. NEMTSEV: Is there an objection?

21 THE COURT: What's the next question? I haven't heard
22 anything.

23 Q. Did you review communications of the defendant and his
24 trades?

25 A. I did.

1 Q. And did you review communications between Mr. Ermakov and
2 Mr. Rumiantcev regarding their analysis of Tesla?

3 A. I did.

4 Q. And do you remember if their analysis was consistent with
5 what you just testified to?

6 MR. FRANK: Objection.

7 THE COURT: Sustained. I think you'd have to show a
8 communication, or at least reference them specifically.

9 (Pause.)

10:27 10 Q. There's a July 13, 2019 communication that is part of
11 Exhibit 46, a much longer --

12 MR. FRANK: Your Honor, July 13, 2019, is nine months
13 or eight months after this trade. Relevance.

14 (Pause.)

15 THE COURT: Are we waiting for something?

16 Mr. NEMTSEV: Mr. Frank objected.

17 MR. FRANK: I objected, your Honor.

18 THE COURT: I don't know what you're objecting to.
19 He's looking at some communications.

10:28 20 MR. FRANK: Yes, but he was referencing communication
21 with respect to this trade, and those communications were nine
22 months later, so my objection is relevance.

23 THE COURT: I haven't heard a question about these
24 communications.

25 Q. Did you review communications between Mr. Ermakov and

1 Mr. Rumiantcev concerning their analysis of Tesla stock in July
2 of 2019 that is consistent with your analysis of the Tesla
3 stock in October 24, 2018?

4 MR. FRANK: Objection.

5 THE COURT: Sustained because of the timing.

6 MR. NEMTSEV: Can we have Exhibit 350, and I would
7 move to admit this, your Honor.

8 THE CLERK: 350?

9 MR. NEMTSEV: Yes, 350.

10:29 10 (Exhibit 350 received in evidence.)

11 Q. Sir, do you remember this is trading in Tesla stock
12 from -- in all of the accounts of Mr. Klyushin, M-13, and the
13 investors? Is that correct?

14 A. Yes.

15 Q. Do you remember, in all of the Tesla trading, how much
16 money the investors lost, or gained?

17 A. I think there's a total on the final page.

18 Q. Can we go to the final page. What's that total?

19 A. A loss of \$3.6 million.

10:30 20 Q. And can we put up --

21 THE COURT: And what's the time span?

22 MR. NEMTSEV: This is a time span from July of 2018 to
23 September of 2020.

24 THE COURT: Is that what you're saying was the loss of
25 \$3.6 million?

1 THE WITNESS: That is correct.

2 THE COURT: Okay.

3 MR. NEMTSEV: And can we pull up Exhibit 191.

4 Q. Sir, you've seen this chart before?

5 A. I have.

6 Q. This is a chart of downloads from the Julie Soma account
7 from the IP block 104.238.37 from October of 2018 until
8 November of 2018, correct?

9 A. That is correct.

10:31 10 Q. Did you review transactions in Mr. Klyushin's accounts
11 during that time period?

12 A. I did.

13 Q. Do you recall -- well, let me ask you this: Did
14 Mr. Klyushin have more or less transactions than the ones on
15 this list, or did he transact in more or less stocks?

16 A. He transacted in a smaller set of stocks than is on this
17 list.

18 Q. And do you remember --

19 THE COURT: I want to understand. A smaller set of
10:31 20 stocks, but stocks on this list?

21 THE WITNESS: Yes, they're on this list, but a much
22 smaller number than the --

23 THE COURT: Not all of them?

24 THE WITNESS: Correct.

25 Q. And you remember that there's a longer list of stocks that

1 were viewed but not downloaded?

2 A. Correct.

3 Q. And do you remember how many stocks Mr. Klyushin's
4 accounts transacted during this time period?

5 A. Somewhere in the 20s.

6 Q. And do you remember how many stocks he did not transact
7 that were viewed or accessed during this time period?

8 A. The total number of companies that were either downloaded
9 or viewed I think is somewhere in the 150s.

10:32 10 Q. So Mr. Klyushin's accounts only traded in 22 out of the
11 150 or so?

12 A. Correct.

13 Q. Do you remember his profit or loss from those transactions,
14 sir?

15 A. I don't recall offhand. Would you be able to pull up the
16 exhibit?

17 MR. NEMTSEV: Your Honor, may I approach the witness?

18 THE COURT: Yes.

19 (Discussion off the record between attorneys.)

10:33 20 (Witness examining document.)

21 A. Roughly \$28,000 in total was gained.

22 Q. Thank you. Sir, I'm going to put up a --

23 MR. NEMTSEV: Can we also put up Exhibit 375, and I
24 would move to admit this.

25 (Exhibit 375 received in evidence.)

1 Q. And this is just a summary of the stocks that were not
2 traded by Mr. Klyushin during this time period?

3 A. That's correct.

4 MR. NEMTSEV: Madam Clerk, may I have the document
5 camera, please.

6 THE CLERK: Sure.

7 MR. NEMTSEV: Thank you. Actually, I don't think I
8 need it. Can you pull up a chalk that's listed as 450, or 451?
9 Thank you. And we're not moving to admit this.

10:34 10 Q. Sir, did you look at certain trading metrics related to
11 Mr. Klyushin, M-13, and the investor-related accounts?

12 A. Yes.

13 Q. And this is metrics before -- trades before August 20th of
14 2020 and trades between August 2020 and Mr. Klyushin's March
15 2021 arrest date, right?

16 A. Correct.

17 Q. And in the first period, there's 26 months' worth of
18 trading?

19 A. Yes.

10:35 20 Q. In the second period, there's seven months' worth of
21 trading?

22 A. Yes.

23 Q. The traded volume, meaning not the amount of money that
24 was managed but the amount of money that was traded, meaning
25 you put in a million, you take out a million, was --

1 MR. FRANK: Object to the leading.

2 THE COURT: I couldn't hear you now, Mr. Frank.

3 MR. FRANK: Oh, I'm sorry. That's rare. I object to
4 the leading, your Honor.

5 THE COURT: All right, sustained.

6 Don't forget, this isn't an exhibit. It's like what
7 happened in the government's case. It's the experts are
8 summing things up, but it's not an expert document. It's just
9 a chalk about the expert's testimony.

10:35 10 MR. NEMTSEV: Thank you, your Honor.

11 Q. How much did Mr. Klyushin make in terms of profit or loss
12 on trade transactions before August 20, 2020?

13 A. Roughly \$41 million.

14 Q. And those transactions took place over the course of how
15 many months?

16 A. Uhm...26 months.

17 Q. And the next column over, how much did he make in
18 transactions between August 21, 2020, and his March 2021 arrest
19 date?

10:36 20 A. Roughly \$4.9 million.

21 Q. And that's over the course of how many months?

22 A. Seven months.

23 Q. And what's the calculated win rate for both?

24 A. The win rate is almost dead even.

25 MR. NEMTSEV: We can take that down. Thank you.

1 Q. Sir, you've been an industry professional for many years?

2 A. Yes.

3 Q. How does a 63 or mid-60s win rate percentage compare to
4 what you've seen in the industry?

5 A. It's a decent hedge fund win rate. You have to be right
6 more than 50 percent of the time in order to make money,
7 assuming that all the, you know, the size of the bets are even,
8 and in the 60s is -- it's okay. It's not great.

9 Q. It's okay but not great?

10:37 10 A. (The witness nodded negatively.)

11 Q. Sir, assume you had, during the January 2018 to the
12 September 2020 time period, access to three and a half thousand
13 earnings reports prior to their release, how difficult is it to
14 analyze an earnings report and determine whether the stock is
15 likely to go up or to go down?

16 A. If I had access to reports like this and I wasn't under
17 any pressure to go ahead and invest in a particular name or a
18 particular number of investments, and I could pick and choose
19 which ones I would go ahead and deploy capital in, and how
10:38 20 large those deployments would be, I think I'd be able to bat
21 probably around 90 to 95 percent.

22 MR. FRANK: Objection. He's totally speculating now.

23 THE COURT: Sustained.

24 MR. FRANK: I move to strike as well.

25 Q. Sir, are you familiar with the companies DFIN Solution and

1 Toppan Merrill?

2 A. Donnelly and Toppan Merrill, yes, very familiar.

3 Q. So what are they?

4 MR. FRANK: Beyond the expert report, your Honor.

5 THE COURT: Overruled.

6 A. They provide a lot of business services, very wide-
7 ranging. Amongst the services that they both provide is
8 services surrounding public companies' dissemination of
9 information and shareholder services. And in particular, with
10:39 10 respect to this matter, they handle the publication of
11 companies' press releases and quarterly earnings and other
12 types of public disseminations of information.

13 Q. Is it fair to say that they're fairly large companies?
14 Are they publicly traded companies?

15 A. They are very large companies. They are the result of
16 numerous mergers of smaller companies into those companies,
17 and, in my experience, they handle the overwhelming --

18 MR. FRANK: Objection. Objection. This is well
19 beyond the expert report.

10:39 20 THE COURT: What's the next question? What's the
21 question?

22 Q. How does Donnelly's and Toppan's, in your observations,
23 how does their market size -- what is their market size
24 compared to other --

25 THE COURT: Evidence, are you familiar with their

1 shared market share of the earnings report publications?

2 THE WITNESS: I know that they command north of
3 75 percent of the S&P 500.

4 MR. FRANK: I object. This is not the subject of his
5 testimony.

6 THE COURT: Overruled.

7 Q. And what is the S&P 500?

8 A. It is an index of 500 companies, very large companies.

9 Q. The biggest companies in the --

10:40 10 A. In the S&P.

11 Q. In the S&P?

12 A. In the Standard & Poor's index, yes.

13 Q. Some of the biggest companies that are publicly traded
14 anywhere?

15 A. That's correct.

16 Q. Sir, have you researched or heard of strategies relating
17 to analyzing market sentiment?

18 A. Absolutely.

19 Q. And what is that? What is market sentiment analysis?

10:40 20 A. So I think with the advent of social media, this has taken
21 on a higher profile and more meaningful --

22 MR. FRANK: I object. He's not an expert on market
23 sentiments.

24 THE COURT: Is that in the expert report?

25 MR. FRANK: No.

1 THE COURT: All right, sustained.

2 Q. Sir, did you review a website called Estimize?

3 A. I did.

4 MR. NEMTSEV: Could we have Exhibit 14, and I'd move
5 to admit it.

6 MR. FRANK: I -- actually, I don't care. I'll move
7 on.

8 (Exhibit 14 received in evidence.)

9 Q. Is this one of these types of services that analyzes news,
10:41 10 analysts' reports, market sentiments?

11 A. It does.

12 Q. Can we go down one page. This one advertises a 70 percent
13 win rate?

14 MR. FRANK: Could we ask the witness if he has a
15 foundation for Estimize?

16 THE COURT: Do you know anything about it? Have you
17 ever used it?

18 THE WITNESS: I have not used it.

19 THE COURT: All right, sustained.

10:41 20 MR. NEMTSEV: Nothing further.

21 CROSS-EXAMINATION BY MR. FRANK:

22 Q. Good morning, Mr. Tawil.

23 A. Good morning.

24 Q. You came up from New Jersey where you live?

25 A. I did.

1 Q. Did you come up yesterday or today?

2 A. Last night.

3 Q. Welcome.

4 A. Thank you.

5 Q. Would you agree that earnings news is important to
6 investors?

7 A. It is.

8 Q. Quarterly earnings are catalysts for companies' stock
9 prices?

10:42 10 A. Amongst other things.

11 Q. Would you agree that quarterly earnings events are an
12 almost certain catalyst for a company's stock price?

13 A. No.

14 Q. Are you aware that that quote is from your signed expert
15 report?

16 A. Yes.

17 Q. But you disagree with it?

18 A. I -- I -- I can't say that it's always a catalyst.

19 Q. Did you make that statement in your expert report?

10:42 20 A. Can you pull up the expert report for me, please?

21 Q. Sure.

22 A. Thank you.

23 MR. FRANK: Mr. Kosto, can you help me track down the
24 expert report?

25 Q. Did you prepare the expert report, Mr. Tawil?

1 A. I did, yes.

2 Q. Did you review it?

3 A. Certainly.

4 Q. Did you sign it?

5 A. I did.

6 Q. Were you being truthful when you signed it?

7 A. Yes, I was.

8 Q. So if that statement, "Quarterly earnings events are an
9 almost certain catalyst for a company's stock price," if that
10:43 10 statement is in your expert report, was it incorrect when you
11 signed it?

12 A. No. It was correct.

13 Q. So you do stand by that statement?

14 A. I'm sorry. I didn't hear the word "almost."

15 Q. "An almost certain catalyst for a company's stock price.

16 A. Yes.

17 Q. So that's true?

18 A. Yes.

19 MR. FRANK: Mr. Kosto, you can stand down. Thank you.

10:43 20 Q. And would you agree with me that traders care about
21 earnings?

22 A. They do.

23 Q. Would you agree with me that having earnings information,
24 actual earnings information, before anybody else in the stock
25 market does would be a huge advantage for an investor?

1 MR. NEMTSEV: Objection.

2 THE COURT: Overruled.

3 A. It could be.

4 Q. Well, you trade stocks, correct?

5 A. I do.

6 Q. Would it be helpful to you to know what a company is going
7 to report before anybody else?

8 A. It could be.

9 Q. And there's other information in earnings releases as well
10:44 10 besides bottom-line earnings, correct?

11 A. There could be other information.

12 Q. Is there other information in earnings releases?

13 A. There could be other information.

14 Q. Well, is there sales information in earnings releases
15 typically? Revenues?

16 A. That is part of the financial information that's included
17 in the earnings report.

18 Q. So it's in there?

19 A. Yes, but that's all part of --

10:44 20 Q. Profit margins?

21 A. Those are all part of earnings.

22 Q. Yes.

23 A. Yes.

24 Q. Not just the bottom-line number, but all sorts of other
25 information about how a company is performing, correct?

1 A. Correct, all the details of what yields the earnings of
2 the company for the quarter.

3 Q. Sometimes there's guidance about future quarters?

4 A. That is correct.

5 Q. And you would agree that that would give you important
6 information, if you had it, before the rest of the market
7 correct?

8 A. Not necessarily.

9 Q. You don't agree that it would be important?

10:45 10 A. If it does not in any way exceed expectations or
11 underperform or come short of expectations in a meaningful way,
12 I don't think it would provide an advantage.

13 Q. So you would agree that if a company exceeds the market's
14 expectations in a meaningful way, its stock is likely to react
15 to that news?

16 A. It could.

17 Q. And if a company is going to fall short of expectations in
18 a meaningful way, its stock could react to that news?

19 A. It could.

10:46 20 Q. And having information about whether a company is doing
21 either of those things would be important to you as an
22 investor?

23 A. It could be.

24 Q. It's like having tomorrow's news today, right?

25 MR. NEMTSEV: Objection.

1 THE COURT: Sustained.

2 Q. And you worked at Credit Suisse, correct?

3 A. I did work there.

4 Q. And at Credit Suisse, there is a compliance department,
5 correct?

6 A. Yes.

7 Q. And the reason there's a compliance department --

8 MR. NEMTSEV: Objection.

9 Q. -- is to make sure that everyone follows the rules,
10:46 10 correct?

11 MR. NEMTSEV: Objection.

12 THE COURT: Overruled.

13 A. Yes, many rules.

14 Q. And one of those rules is to make sure --

15 MR. NEMTSEV: Objection.

16 THE COURT: Sustained as to what the compliance rules
17 at Credit Suisse is.

18 Q. When you were at Credit Suisse, did you trade on material
19 nonpublic information?

10:47 20 MR. NEMTSEV: Objection.

21 THE COURT: Sustained.

22 Q. Were you allowed to trade on an MNPI?

23 MR. NEMTSEV: Objection.

24 THE COURT: Sustained.

25 Q. You were subject to rules, correct?

1 A. Yes.

2 Q. Which precluded you from doing it, correct?

3 MR. NEMTSEV: Objection.

4 THE COURT: I will allow you to explain what the rules
5 are for the industry with respect to material nonpublic
6 information. What practice did the industry follow?

7 MR. NEMTSEV: Your Honor, I don't -- that sounds like
8 he's going to give an opinion about the law.

9 MR. FRANK: I'm not asking about the law.

10:47 10 MR. NEMTSEV: The rules?

11 Q. Were you allowed to do it?

12 THE COURT: By whom?

13 Q. By Credit Suisse?

14 MR. NEMTSEV: I'll object, your Honor.

15 THE COURT: Sustained.

16 Q. Well, you have your own trading firm, correct?

17 A. I do.

18 Q. Do you trade on MNPI?

19 MR. NEMTSEV: I object.

10:47 20 THE COURT: Overruled.

21 A. I don't.

22 Q. Why not?

23 MR. NEMTSEV: Object.

24 THE COURT: I'll allow you to talk about industry
25 practice with respect to material nonpublic information. What

1 is your understanding?

2 THE WITNESS: It is avoided.

3 THE COURT: It's what?

4 THE WITNESS: Avoided.

5 Q. And earnings releases are MNPI, correct?

6 THE COURT: Don't use the abbreviations.

7 Q. Earnings releases can have material nonpublic information
8 in them, correct?

9 MR. NEMTSEV: Objection, the time span.

10:48 10 THE COURT: Overruled.

11 MR. NEMTSEV: No earnings release -- I'm sorry.

12 THE COURT: Earnings releases?

13 Q. Before they are released, earnings releases can contain
14 material nonpublic information; isn't that true?

15 A. It could be argued.

16 Q. It could be argued?

17 A. Yes, if it's material.

18 Q. But stocks react to them when they're announced, correct?

19 A. Not always.

10:49 20 Q. They're an almost certain catalyst; wouldn't you agree?

21 A. That is correct.

22 Q. Thank you. You testified about trading in Tesla in
23 October of 2018. Do you recall that testimony?

24 A. I do.

25 Q. And you testified that there was euphoria in the market

1 for Tesla's shares because of statements that Elon Musk made.
2 Do you recall that testimony?

3 A. I do.

4 Q. And one of those statements was his statement that the
5 stock price would go to 420. Isn't that true?

6 MR. NEMTSEV: Objection.

7 THE COURT: Do you know?

8 THE WITNESS: Not offhand, but I didn't testify to
9 that.

10:49 10 Q. Wasn't one of the statements that caused euphoria
11 Mr. Musk's reference to 420?

12 Mr. NEMTSEV: Objection.

13 THE COURT: Do you know?

14 THE WITNESS: I don't know offhand. If you'd like to
15 pull up an exhibit --

16 THE COURT: He doesn't know. What's the next
17 question?

18 Q. Well, what was the basis for your testimony about euphoria
19 in Tesla's stock relating to statements?

10:49 20 A. That Musk spoke about the production numbers and the
21 deliveries of automobiles that were going to exceed
22 expectations.

23 Q. When?

24 A. In that time frame.

25 Q. When?

1 A. July of 2019, I think.

2 Q. You're talking about statements in July 2019 that caused
3 euphoria in October 2018?

4 A. I'm sorry. Could I trouble you to pull up my --

5 Q. Mr. Tawil, it's your testimony, sir.

6 A. Yes, sir.

7 Q. I'm asking you what your basis is for testifying that
8 there were statements by Elon Musk that caused euphoria in
9 Tesla's stock price in October of 2018. What is your basis,
10:50 10 sir?

11 A. Excuse me. It was my recollection that it was around that
12 time frame that he had spoken about the deliveries and
13 production numbers.

14 Q. Do you recall what statement he made and when?

15 A. I don't recall offhand.

16 Q. Would you agree with me then that you do not have a basis?

17 MR. NEMTSEV: Objection.

18 THE COURT: Sustained.

19 Q. Did you come up with those statements now or in October of
10:51 20 2018? Were you aware of them back then?

21 MR. NEMTSEV: Objection.

22 THE COURT: Overruled.

23 A. In October of 2018, was I aware of them? The same way I
24 guess anybody may have been aware of them: listening and
25 watching the popular press.

1 Q. Were you aware of them?

2 A. Yes.

3 Q. Did you trade on them?

4 A. I don't --

5 MR. NEMTSEV: Objection.

6 A. I don't trade Tesla.

7 Q. So you didn't trade on them?

8 MR. NEMTSEV: Objection.

9 THE COURT: Sustained.

10:51 10 Q. And you testified that Tesla moved up its earnings date.
11 Do you recall that testimony?

12 A. I do.

13 Q. And that was a bullish thing for investors?

14 A. Correct.

15 Q. And that happened two days before the earnings
16 announcement. Would you agree?

17 MR. NEMTSEV: Objection.

18 Q. Wasn't that your testimony?

19 THE COURT: Overruled. Is that your testimony?

10:51 20 A. My testimony was that the earnings date was moved up, and
21 it was -- there was only two days of notice given to the market
22 between the announcement of when the earnings date would be,
23 when the earnings would be released, and when they were
24 actually released.

25 Q. So would you agree with me that the earnings were

1 announced on October 24, 2018?

2 MR. NEMTSEV: Objection.

3 THE COURT: Do you know?

4 THE WITNESS: I think that's what I testified to.

5 Q. So the earnings release date was moved up two days earlier
6 on October 22, 2018? Is that your testimony?

7 A. If I recall correctly.

8 MR. NEMTSEV: Objection.

9 MR. FRANK: Could we have 201B in evidence, please.

10:52 10 Q. Have you taken a look at 201B before today, sir?

11 A. I have not.

12 Q. This is in evidence. Do you see that the buying among
13 these traders began pre-market at 5:47 a.m. that day?

14 A. Yes.

15 Q. Do you see that there was a download --

16 MR. NEMTSEV: Your Honor, I object. He testified he's
17 never seen this document.

18 MR. FRANK: It's in evidence, your Honor.

19 THE COURT: Overruled.

10:53 20 MR. FRANK: Thank you.

21 Q. Do you see there was a download of Tesla's files from the
22 DFIN database half an hour earlier at 5:18 a.m.?

23 A. Yes.

24 Q. Do you see that Mr. Klyushin started trading shortly
25 thereafter along with Mr. Sladkov and Mr. Irzak?

1 A. Yes, that's what it seems to show.

2 Q. And that the earnings release was not announced until
3 after the market closed that same day? Do you see that?

4 A. Yes.

5 Q. Could we look at 191 in evidence, please. You testified
6 about this download chart, correct?

7 A. Yes.

8 Q. And you testified that Mr. Klyushin didn't trade on every
9 stock that was downloaded over the 104 IP. Do you recall that?

10:53 10 A. Yes.

11 Q. Could we look at Page 2, please. Would you agree with me,
12 sir, that there was a download of Tesla reflected in this chart
13 over the 104 IP at 2:18 Pacific Time on the morning of
14 October 24?

15 A. That's what it indicates.

16 Q. 5:18 Eastern Time, before the market opened?

17 MR. NEMTSEV: I object.

18 THE COURT: Overruled.

19 A. Yes.

10:54 20 Q. So he did trade on Tesla after a download over the 104 IP,
21 correct?

22 MR. NEMTSEV: Object. He doesn't know.

23 THE COURT: The documents speak for themselves.
24 They're in evidence.

25 Q. This is one he did trade on, correct?

1 MR. NEMTSEV: I object.

2 A. Did trade on --

3 Q. You testified there were many he didn't trade on. This
4 was one he did, correct?

5 A. Oh, no, no. This is one of the names which he did trade
6 where there was a download.

7 Q. Thank you. Could we look at 201A, please. Do you see
8 what happened to Tesla's stock price after that news was
9 released on October 24?

10:55 10 A. I do.

11 Q. Now, you testified that the company moved up its earnings
12 announcements two days earlier on October 22?

13 A. Correct.

14 MR. NEMTSEV: Objection.

15 Q. Do you recall that?

16 MR. NEMTSEV: That's not what he testified to.

17 THE COURT: Was that your testimony?

18 MR. NEMTSEV: He said two days earlier from the
19 previous date, not two days --

10:55 20 THE COURT: I can't understand what you're saying.

21 MR. FRANK: Is he testifying, or is the witness
22 testifying?

23 MR. FERNICH: Are you testifying?

24 THE COURT: All right, start again.

25 THE WITNESS: It is my understanding or it is my

1 recollection that the company, on the 22nd, announced that they
2 would be moving up their earnings to 10/24, and only gave the
3 market, therefore, between that announcement and that in fact
4 earnings release, only two days' time, which is a truncated
5 period of time between the announcement of the earnings date
6 and the actual earnings release.

7 Q. And you see that after that announcement on the 22nd,
8 Tesla's stock moved up?

9 A. Yes, correct. After the announcement that they would go
10:56 10 ahead and release early, it moved up.

11 Q. Right. And then it went back down?

12 A. Slightly.

13 Q. Yes. And then your client bought shares?

14 MR. NEMTSEV: Object.

15 (Laughter.)

16 THE COURT: Sustained as worded.

17 MR. FERNICH: Oh, my God.

18 THE COURT: Sustained as worded. Ask it differently.

19 Q. Then Mr. Klyushin bought shares?

10:56 20 A. He bought there, but I think he bought in a lot of other
21 places too.

22 Q. We're talking about this trade, Mr. Tawil. Are you with
23 me?

24 A. I am.

25 Q. He bought on the 24th, not after the news announcement,

1 the preannounce on the 22nd, correct?

2 A. I don't know if he didn't buy before the 22nd, but, yes.

3 Q. Do you want to go back to 201B?

4 A. Yeah. Let's go through all the Tesla trades.

5 Q. Right, let's go back to 201B. You see that he bought 30
6 minutes after the download on the 24th?

7 A. No, I don't want to see 201B. I want to see all the Tesla
8 trades.

9 Q. Well, you'll have your opportunity --

10:57 10 THE COURT: Never mind. We're not having this
11 discussion. What's the next question?

12 Q. He didn't buy after the announcement on the 22nd, correct?

13 A. I don't recall.

14 MR. FRANK: You can take this down, Ms. Lewis.

15 THE COURT: How much longer do you have?

16 MR. FRANK: I have a bit, your Honor, probably 10, 15
17 minutes.

18 THE COURT: When you hit a good place to stop --

19 MR. FRANK: We can stop right now.

10:57 20 THE COURT: Okay. Thank you.

21 (Jury excused.)

22 SIDEBAR CONFERENCE:

23 THE COURT: So you have about 15 minutes? Say quarter
24 of 12:00 you're done. How much on redirect?

25 MR. NEMTSEV: Ten minutes maybe.

1 THE COURT: And then you'd be ready to rest?

2 MR. NEMTSEV: Well, the only thing is, your Honor, we
3 want potentially a paralegal to just read in some of
4 conversations for the record.

5 THE COURT: Fine. All right, so you'll read in some
6 of the conversations.

7 MR. FRANK: He wants to read in from a document that's
8 in evidence already, so I'm not sure --

9 MR. FERNICH: Just like you did with your witness.

10:59 10 MR. FRANK: When we put it in.

11 MR. FERNICH: And this is our case.

12 THE COURT: They're allowed to do that.

13 So 20 minutes?

14 MR. NEMTSEV: I don't think much longer than that, and
15 then --

16 THE COURT: And then?

17 MR. NEMTSEV: It's either Mr. Klyushin or not, and I'd
18 just ask to talk to him for maybe five minutes so he can make
19 an intelligent decision.

10:59 20 THE COURT: Well, what I'd like you to do is do that
21 right now during the break, and then you can talk to him again
22 for a few minutes.

23 MR. NEMTSEV: Just to confirm essentially.

24 THE COURT: No, absolutely, absolutely. And I think
25 by then we will have a charge, which does not include this

1 alternative venue theory. I'm not there yet. I haven't
2 even -- every time I tried to read the new memo, someone
3 objected, so I just gave up.

4 MR. FERNICH: It's not that complicated. It's not
5 like what we were doing yesterday. It's much, much more
6 straightforward.

7 MR. FRANK: We're likely to have something short as
8 well.

9 THE COURT: Well, that may be, and I am simply saying,
11:00 10 what you got is what we discussed yesterday without this
11 alternative venue theory. Okay, that's what you got.

12 And then the other thing you need to discuss with your
13 client is whether or not I allow him to reopen his case with
14 respect to that he was brought to Boston or whether or not that
15 will be done by stipulation.

16 MR. NEMTSEV: And if the case is reopened, what would
17 the testimony be?

18 THE COURT: "Where were you arrested? Switzerland.
19 Where were you brought to? Boston."

11:00 20 MR. KOSTO: "Did you stop anywhere in between?"

21 THE COURT: Oh, good. All right, three questions.
22 I'll give you that. I'll give you that. So do you have the
23 stipulation written?

24 MR. KOSTO: It wouldn't be Mr. Klyushin saying that.
25 It would be Agent Hitchcock.

1 THE COURT: Of course. Do you have a stipulation
2 written?

3 MR. KOSTO: We're happy to propose one over the break
4 if --

5 THE COURT: Just you have to talk about it with your
6 client, so do that over the break.

7 MR. KOSTO: Whichever they prefer.

8 THE COURT: And then I will send the jury home,
9 assuming that that's somewhere around noon-ish, and I'm
11:01 10 assuming he decides not to testify when all is said and done,
11 and then we'll do closings, et cetera. But I'm hoping, if we
12 finish around noon, that we will finish up the debate about
13 venue. And, also, I didn't like the way the instruction read
14 on material nonpublic information because it was cobbled
15 together from the omission piece of the instruction. I've
16 redone it, and it just didn't read right. So I know that's not
17 what's in the heart of everyone right now, but I just want to
18 make sure at least what I've got is what you were intending and
19 thinking about yesterday, okay?

11:02 20 MR. KOSTO: Thank you, your Honor.

21 THE COURT: And I don't think anything else is of huge
22 significance, except I did reject it. But in rereading a lot
23 of the venue cases, I think you have to talk about the
24 essential conduct. I think that comes from -- that was the
25 defendant's request, and it's gleaned from Supreme Court case

1 law, as well as every circuit discussing this issue, so I
2 referenced it back in. So, anyway, those are the two things I
3 think you should look for, and then of course we'll talk about
4 venue. Okay? Thank you.

5 (End of sidebar conference.)

6 (A recess was taken, 11:02 a.m.)

7 THE CLERK: All rise.

8 (Court enters.)

9 THE COURT: Can I please have -- my law clerk
11:39 10 delivered to you a red-lined version? Do you both have it?

11 MR. FRANK: Yes.

12 MR. NEMTSEV: Yes.

13 THE COURT: Perfect. And you should also have a
14 verdict form. So I don't expect you to read it now. I know
15 you're busy with other things. What we'll do is we'll finish
16 up the trial this morning, and then, ideally speaking, have the
17 remainder of the charge conference this morning just so you can
18 go back and practice your closings in front of the mirror.

19 But I do need to understand the story about whether
11:40 20 there will be a stipulation or reopening.

21 MR. NEMTSEV: We'll stipulate.

22 THE COURT: Have you handed him the stipulation?

23 MR. KOSTO: We drafted one, and I think Mr. Nemtsev is
24 holding it in his hand.

25 THE COURT: Is that acceptable?

1 MR. NEMTSEV: If you want, you can put the date of
2 when he arrived.

3 MR. KOSTO: Sure.

4 MR. FRANK: All right. We'll submit it to the Court.
5 Actually, if we're closing right now, then we don't have time
6 to revise it.

7 MR. KOSTO: I don't think we're closing. Oh, if
8 they're resting. Mr. Nemtsev asked that we add the date that
9 he arrived here to the stipulation. We can have that done
11:41 10 right now.

11 THE COURT: You can handwrite it in. After this
12 trial, I think I'm going to use paper forever.

13 MR. NEMTSEV: You what?

14 THE COURT: I think I should only use paper forever.

15 MR. NEMTSEV: When the systems work, they work really
16 well and I actually enjoy using them.

17 THE COURT: I meant more broadly.

18 MR. NEMTSEV: Yeah. But when they don't, it's
19 impossible.

11:41 20 THE CLERK: The government just filed that. I just
21 handed back to the judge what you filed.

22 MR. FRANK: Thank you.

23 THE COURT: I should add, I've not had a chance to
24 read all the corrections. My judicial assistant was doing it
25 while we were down here. I think she captured everything we

1 wanted.

2 Okay. What do you want to do with that?

3 MR. KOSTO: My handwriting is pretty bad. I'll fix it
4 on the computer and email it to Ms. Molloy.

5 THE COURT: Then what? Are you going to introduce it
6 and read it in front of the jury? I want to understand it.

7 MR. FRANK: Yes, Your Honor, if Ms. Molloy would be so
8 kind as to print it.

9 THE CLERK: I will as soon as I get it.

11:42 10 THE COURT: And I deem the stipulation as part of the
11 government's case. Let's just finish with this expert, and
12 let's call the jury in. Thank you.

13 THE CLERK: All rise for the jury.

14 (Jury enters.)

15 THE COURT: You may be seated.

16 MR. FRANK: May I proceed, Your Honor?

17 THE COURT: Thank you.

18 We're going to keep going on the cross.

19 MR. FRANK: Thank you, Your Honor.

11:43 20 Could we have, Ms. Lewis, Exhibit 350.

21 BY MR. FRANK:

22 Q. Mr. Tawil, this is Exhibit 350. Do you recall this
23 exhibit?

24 A. I do.

25 Q. Did you prepare this exhibit?

1 A. I did not.

2 Q. Who prepared it?

3 A. I don't know.

4 Q. Did you review it for accuracy?

5 A. I reviewed it for summary purposes.

6 Q. To ensure that it was accurate?

7 A. I did not cross-check it against any other documentation.

8 Q. Do you recall that you introduced this exhibit with

9 Mr. Nemtsev moments ago?

11:44 10 A. Mr. Nemtsev introduced this exhibit. I did not prepare
11 this exhibit.

12 Q. But you don't know who prepared it, and you don't know if
13 it's accurate?

14 A. I don't know if Mr. Nemtsev or one of his colleagues
15 prepared it. It was furnished to me by Mr. Nemtsev as a
16 summary of the trading in Tesla.

17 Q. You asked to know whether there were trades in advance of
18 that October 24th earnings announcement.

19 Do you recall that?

11:45 20 A. I do.

21 Q. Do you see any other trades in October prior to October
22 24th?

23 MR. FRANK: And, Ms. Lewis, perhaps you can make that
24 a little larger.

25 A. There are trades on October 23rd and October 28th in the

1 month of October.

2 Q. You see a trade there on October 23rd of 2018?

3 A. Oh, I'm sorry, of 2018. Apologies. Yes, correct, October
4 24th, 2018.

5 Q. Just the trade on October 24th, 2018?

6 A. Yes.

7 Q. Correct?

8 A. Yes.

9 Q. That's the trade that we looked at earlier, correct?

11:45 10 A. Correct.

11 Q. So there was no trade after Tesla moved up the date of its
12 earnings announcement, correct?

13 A. Correct.

14 Q. And there was no trade after any statement by Elon Musk,
15 correct?

16 MR. NEMTSEV: Objection, Your Honor, asked and
17 answered.

18 THE COURT: Overruled.

19 A. Correct.

11:45 20 Q. It was just the trade on October 24th after the download
21 from the DFIN system, correct?

22 MR. NEMTSEV: Objection, Your Honor.

23 THE COURT: Overruled.

24 A. There's one trade on October 24th.

25 Q. And that was the one we looked at after the download,

1 correct?

2 A. Correct.

3 Q. Now, did you compare this to any underlying brokerage
4 records for accuracy?

5 A. I did not.

6 Q. I'd like to direct your attention to January 29th of 2020.

7 MR. FRANK: And, Ms. Lewis, could you expand all of
8 the January 29th trades.

9 Q. Do you see the trading on January 29th, 2020?

11:46 10 A. I do.

11 Q. Do you see any trades in the BCSKV288 account reflected in
12 this chart?

13 A. I do not.

14 Q. Are you aware that Mr. Klyushin bought 10,500 shares of
15 Tesla on January 29th, 2020, in the BCSKV288 account?

16 A. I'm not aware.

17 Q. Are you aware that those purchases were before Tesla's
18 earnings announcement?

19 A. I'm not aware.

11:47 20 Q. Are you aware that Mr. Sladkov bought Tesla's shares that
21 same day?

22 MR. NEMTSEV: Objection.

23 THE COURT: Overruled.

24 A. I am not aware.

25 MR. FRANK: Could we look at Exhibit 255, please, in

1 evidence. Could we go to page 6. Could we go to -- is this
2 page 6? Could we go to the next page.

3 Just a moment, Mr. Tawil.

4 Q. Do you see the trade in Tesla?

5 MR. FRANK: Ms. Lewis, could you blow that up, with
6 the part at the top as well, please.

7 Q. Do you see the trade in Tesla on January 29th, 2020, right
8 there?

9 A. I see the data.

11:48 10 Q. Well, you don't dispute that this is accurate, do you?

11 MR. NEMTSEV: Objection. He doesn't know anything
12 about it.

13 THE COURT: Do you know one way or another?

14 THE WITNESS: I don't.

15 Q. I'll represent to you that this document is in evidence.

16 MR. NEMTSEV: Objection.

17 THE COURT: Overruled.

18 Q. Do you see that Mr. Klyushin, according to this chart,
19 traded on January 29th, 2020, in Tesla?

11:49 20 A. That's what --

21 MR. NEMTSEV: Objection, Your Honor.

22 Q. Do you see it, sir?

23 A. I see the data on the page.

24 Q. So is the answer "yes"?

25 MR. NEMTSEV: Objection, Your Honor.

1 THE COURT: What are you asking him? That's what the
2 document says. So what's the next question?

3 Q. And do you see that Mr. Sladkov and Mr. Irzak also traded
4 in shares of Tesla on that same day?

5 MR. NEMTSEV: Objection.

6 THE COURT: Overruled. You know, not every question.
7 He's just reading the document.

8 MR. NEMTSEV: I know.

9 A. But I can't answer as to the evidence of whether there was
10 a trade.
11:49

11 Q. I'm asking you what you see, Mr. Tawil.

12 THE COURT: You don't have to verify the information.
13 What are you seeing on the chart?

14 THE WITNESS: I see that it says that Klyushin was
15 long. Sladkov, Irzak were long.

16 Q. Rumiantcev was also long, correct?

17 A. That's what it says.

18 Q. Borodaev was also long, correct?

19 A. That is what it says, correct.

11:50 20 Q. Uryadov was also long, correct?

21 A. That's what it states.

22 Q. And M-13 was also long, correct?

23 A. Correct.

24 Q. And you don't know whether this chart is accurate because
25 you didn't review it, correct?

1 A. Correct.

2 Q. But you also don't know whether Exhibit 350 is accurate
3 because you didn't check that either, did you, sir?

4 MR. NEMTSEV: Objection.

5 THE COURT: Overruled.

6 A. I did not look at the underlying trade documentation
7 confirmations.

8 Q. Have you ever reviewed the underlying trade documents in
9 this case, Mr. Tawil, before coming to court?

11:50 10 A. No, I did not.

11 MR. FRANK: Could we have Exhibits 281 and 282, the
12 BCS trading records, and I'd offer them.

13 **(Exhibits Nos. 281-282 received into evidence.)**

14 Q. Do you see that this is a BCS statement for Vladislav
15 Klyushin for the month of January 2020?

16 A. I do.

17 MR. FRANK: Could we go to the tab marked
18 "Securities." Could you go to the left, please.

19 Q. Do you see that there are ten and a half thousand shares
11:51 20 of Tesla in the account in the month of January?

21 A. That is what it indicates.

22 MR. FRANK: Could we look at 282, please. Could we
23 look at --

24 Q. Do you see that there's trading in the KV288 account
25 reflected here in Column E?

1 A. Yes.

2 Q. Do you see that there's purchasing of securities reflected
3 in Column F?

4 A. Yes.

5 Q. Do you see that the trade date is January 29, 2020, in
6 Column H?

7 A. That is what it says.

8 Q. Do you see that the security is Tesla in Column G?

9 A. I do.

11:52 10 Q. Do you see there's a whole bunch of purchases?

11 A. Yes.

12 Q. And if you look down Column H, the trade date, if we
13 proceed down, do you see there are purchases all the way
14 through January 29th, and then the following day there are
15 sales of Tesla?

16 Do you see that?

17 A. Yes.

18 Q. And we can agree, sir, that these are not reflected in
19 Exhibit 350?

11:52 20 THE COURT: What's 350?

21 MR. NEMTSEV: Objection, asked and answered.

22 THE COURT: What's 350?

23 MR. FRANK: The exhibit the defense put in.

24 Could we call up Exhibit 350, Ms. Lewis.

25 THE COURT: I -- is this the chalk?

1 MR. FRANK: No, this is in evidence.

2 Q. You see those aren't reflected there, correct, Mr. Tawil?

3 A. It doesn't seem to be so.

4 Q. Would you agree with me that this chart is inaccurate?

5 MR. FERNICH: Objection. It's been asked and answered
6 about seven times that he didn't check the chart for accuracy.

7 MR. FRANK: I'm asking a different question.

8 THE COURT: Now that you've seen all of this, do you
9 have an opinion as to whether it's accurate?

11:53 10 THE WITNESS: The previous exhibit showed numerous
11 transactions of small lots, hundred shares or so. I don't know
12 if this is a representation of aggregation of that.

13 Q. Well, do you see the account numbers on the left, sir?

14 A. I do, sir.

15 Q. Do you see KV288?

16 A. I do not.

17 Q. Would you agree that the trading in KV288 is not reflected
18 in Exhibit 350?

19 MR. NEMTSEV: Objection, asked and answered.

11:53 20 THE COURT: No. Do you need more time to look at the
21 two charts?

22 THE WITNESS: I do not. It doesn't say KV288 here,
23 but I don't --

24 Q. The chart --

25 A. I'm sorry?

1 THE COURT: Let him finish the answer.

2 MR. FRANK: Yes, Your Honor.

3 A. It doesn't say KV288 here, but I don't know if these
4 numbers are indicative of maybe the same account or a different
5 account.

6 Q. Would you agree that the account naming convention is
7 totally different for the accounts that are named?

8 A. Correct.

9 Q. Would you agree that this chart, 350, is inaccurate?

11:54 10 A. Under the assumption that K- --

11 Q. Yes or no, Mr. Tawil, is it inaccurate?

12 MR. FERNICH: Objection, Your Honor.

13 THE COURT: No. Let him answer it.

14 A. I did not prepare these exhibits. I do not -- these
15 accounts are not under my dominion. I don't know the
16 underlying ownership of these accounts. I don't know if these
17 accounts go by multiple names. So I can't opine.

18 THE COURT: He has no opinion. What's the next one?

19 MR. FRANK: Could we go to the bottom of this exhibit.

11:55 20 Q. You had no problem on direct examination --

21 MR. FERNICH: Objection, argumentative.

22 THE COURT: Sustained.

23 Q. You testified on direct examination that this chart
24 reflected Mr. Klyushin's trading and his loss of 3.6 million
25 dollars in trading Tesla; isn't that true?

1 A. That is correct. That is what this chart reflects.

2 Q. But you didn't bother checking whether it was accurate
3 before --

4 MR. FERNICH: Objection. Time number 7.

5 THE COURT: Excuse me. Let him finish the question.

6 A. It is quite accurate as to the summary of this log.

7 Q. But if there was anything not on the log, it's not
8 reflected here, correct, in your numbers?

9 A. I will say it again. The point that I made regarding the
11:55 10 total loss was the sum total of this log of trades.

11 THE COURT: All you did was add them up.

12 THE WITNESS: That's correct.

13 THE COURT: Like, with an adding machine or whatever
14 you use now.

15 THE WITNESS: I did not add it. I trusted that the
16 Excel was accurate.

17 THE COURT: All right. So you didn't personally
18 compile all the trades?

19 THE WITNESS: That is correct.

11:56 20 THE COURT: Next question.

21 Q. If I understand you correctly, sir, you didn't even check
22 the addition. You just trust that it was accurate?

23 A. That is correct, yes.

24 Q. And if Mr. Klyushin made \$620,000 overnight on January
25 29th, 2020, that's not in that minus 3.6-million-dollar number?

1 MR. NEMTSEV: Objection. Asked and answered.

2 THE COURT: Overruled.

3 A. Assuming those trades are not reflected here, I guess the
4 answer is yes, you're correct.

5 Q. Did you study which of these trades were earnings trades
6 and which of these trades were non-earnings trades?

7 A. I did not.

8 Q. So you don't know that of this amount, 3.6 -- on this
9 chart -- 3.6 million dollars of profit comes from earnings
11:57 10 trades?

11 MR. NEMTSEV: Objection. He testified he doesn't
12 know.

13 THE COURT: Overruled.

14 A. Could you restate the question?

15 Q. The total on this chart is a loss of 3.6 million dollars.
16 Do you see that?

17 A. I do.

18 Q. You don't know whether there was a profit on the trades
19 reflected in this chart, a profit of 3.6 million dollars on
11:57 20 earnings trades?

21 A. I do not.

22 Q. And you don't know if there was a loss on the trades
23 reflected in this chart of 7.3 million dollars on non-earnings
24 trades?

25 A. I do not.

1 Q. Because this chart just lumps everything together,
2 correct?

3 A. This chart has many trades. Some of them must be not on
4 earnings announcements, because there are trades, seemingly,
5 almost every month, and earnings are quarterly.

6 Q. So if the defendant was trading on material non-public
7 information about earnings, this chart would not be
8 particularly helpful in distinguishing his results on that
9 trading from his non-earnings trading; isn't that true?

11:58 10 MR. NEMTSEV: Objection, Your Honor.

11 THE COURT: Overruled.

12 A. This chart would be incredibly helpful to prove --

13 Q. Can you answer my question?

14 A. I'm going to answer my question.

15 THE COURT: No.

16 MR. FRANK: No, sir. That's not how it works.

17 THE COURT: That would be a very different kind of
18 trial. Please listen to his question again.

19 A. So if we were looking to isolate only earnings trades,
11:59 20 which this chart does not, and which, seemingly, the trader in
21 this did not isolate their trading to just earnings
22 information, this log does not summarize only earnings-related
23 trading -- or earnings-timeline-related information -- or --
24 excuse me. Let me restate that.

25 This chart does not only reflect trades around earnings

1 releases.

2 Q. Well, you're aware that Mr. Klyushin is charged with
3 trading improperly around earnings releases?

4 A. Yes, I understand that's the charge.

5 Q. Not around other forms of trades?

6 MR. FERNICH: Objection. Objection.

7 THE COURT: Overruled.

8 Q. Are you aware of that?

9 A. I am.

12:00 10 MR. FRANK: You can take that down, Ms. Lewis. Thank
11 you.

12 Q. You testified --

13 THE COURT: How much more time do you have?

14 MR. FRANK: Ten more minutes, Judge. I'm trying to
15 move it along.

16 Q. You testified that there were many stocks downloaded over
17 the 104 IP addresses that Mr. Klyushin did not trade?

18 A. Correct.

19 Q. Can we agree that he did trade numerous stocks that were
12:00 20 reflected on that download chart?

21 A. Roughly -- yeah, during a certain period of time --

22 Q. Is the answer "yes"?

23 A. -- 20.

24 Q. He did?

25 A. Roughly 20 during the period of time we analyzed.

1 Q. Have you done an analysis of all of the earnings
2 announcements around which he did not trade that were reflected
3 on that chart?

4 A. No.

5 Q. Do you know how many of the ones he did not trade simply
6 met expectations?

7 A. I do not.

8 Q. Do you know how many of the ones he did not trade reported
9 mixed results like an earnings loss but better-than-expected
10 guidance or an earnings beat and worse-than-expected guidance?

11 A. I did not perform that analysis.

12 Q. Would you agree that it's harder to predict how a stock
13 will move if it just meets expectations or if the results are
14 mixed?

15 A. I would.

16 MR. FRANK: Could we have the chalk -- is it 451?

17 Mr. Nemtsev, I might need -- oh, actually, do we have
18 a copy?

19 Ms. Molloy, could I have the --

12:02 20 THE CLERK: Doc camera?

21 MR. FRANK: -- ELMO? Thank you.

22 THE CLERK: Yeah, hold on.

23 MR. FRANK: I'm not referring to a stuffed animal.

24 It's actually called an ELMO.

25 THE CLERK: Is it up?

1 MR. FRANK: I think it is, yes.

2 MR. KOSTO: Yes.

3 Q. Did you prepare this chalk, sir?

4 A. I did not.

5 Q. Did you check it for accuracy?

6 A. I did not.

7 Q. Do you know what records were used in preparing it?

8 A. I trust that the trading records --

9 THE COURT: Well --

12:02 10 THE WITNESS: I'm sorry?

11 Q. Do you know?

12 A. It says at the top what it is reflective of.

13 Q. Do you know if it's accurate?

14 A. I did not check the accuracy.

15 Q. Do you know what records it's based on?

16 A. Again, other than what's written at the top and what's
17 been represented to me by the attorneys --

18 Q. So you just sat there and testified about this chart on
19 direct examination, and you have no idea if the numbers here
12:02 20 are correct or not; is that correct?

21 A. I have not done the calculations myself.

22 Q. You don't know whether the chart reflects trades that were
23 opened before August 21st and closed afterwards, do you?

24 A. Opened before, closed afterwards. Assuming that most of
25 the trades --

1 Q. I'm not asking you to assume anything. I'm asking you
2 about the chalk that you testified about. Do you know?

3 MR. FERNICH: He's badgering the witness.

4 THE COURT: No. This is fair cross-examination.

5 Do you personally know whether this chalk is accurate
6 or not?

7 MR. FERNICH: That's asked and answered.

8 A. I trust that it was done -- it was prepared properly.

9 Q. The answer is you don't know, correct?

12:03 10 A. I know in the sense --

11 Q. Do you know whether it is accurate, sir?

12 A. I did not prepare the summary.

13 Q. Can you answer --

14 THE COURT: Enough. We've gone through it. Move on.

15 Q. Now, there was another chalk, an exhibit, that you were
16 prepared to testify about today; isn't that true?

17 MR. NEMTSEV: I object.

18 A. Another --

19 Q. There was another exhibit of post-September 2020 trading
12:04 20 that you were prepared to testify about today?

21 MR. NEMTSEV: I object, Your Honor. In his
22 preparation to testify?

23 MR. FRANK: No, it was an exhibit that was marked by
24 the defense --

25 THE COURT: Excuse me. Sustained.

1 Q. Are you aware that the defense marked as an exhibit and
2 disclosed --

3 MR. NEMTSEV: Objection.

4 MR. FERNICH: It's the same question.

5 THE COURT: Sustained. Sustained. Move on.

6 MR. FRANK: Could we call up Exhibit 309, and I'd
7 offer it.

8 MR. NEMTSEV: Then I object.

9 MR. FRANK: It's a defense exhibit that was disclosed
10 to us as one they were going to put in today.

11 MR. NEMTSEV: No, it's that he disputed.

12 THE COURT: Sustained.

13 MR. FERNICH: Ask a question.

14 THE COURT: Sustained. What's the next question?

15 Q. You have no idea whether Mr. Klyushin made money or lost
16 money on earnings trades after the charged conspiracy period;
17 isn't that true?

18 A. I know it --

19 MR. NEMTSEV: Object.

12:05 20 Q. Can you answer my question, sir?

21 THE COURT: Overruled. Do you know -- give him the
22 date. 9/30, right?

23 Q. After 9/30, do you know whether Mr. Klyushin made money or
24 lost money on earnings trades?

25 A. I know it to the extent of the information that was

1 provided to me and that I reviewed.

2 Q. Do you know --

3 THE COURT: Right. So the answer is "yes"? We need
4 to finish this. So you say you do know after 9 --

5 THE WITNESS: I'm sorry, Judge, excuse me. With due
6 respect, I don't know what the word "know" means, k-n-o-w. I
7 know to the extent that the data was provided to me. I'm not
8 Mr. Klyushin, so I certainly don't know his trading records.
9 As I've said --

12:05 10 THE COURT: All right. He doesn't know his trading
11 records. What's the next question?

12 Q. You don't know what the word "know" means?

13 A. We're playing a semantic game.

14 Q. What does the word "know" mean, sir?

15 MR. FERNICH: Objection. Come on.

16 THE COURT: Sustained. What's the next question?

17 A. Do I know it to be unavoidable truth from God?

18 MR. NEMTSEV: Object, Your Honor.

19 Q. Are you aware that after September 30th of 2020,
12:06 20 Mr. Klyushin lost \$441,000 on earnings trades?

21 MR. NEMTSEV: I object. He said he didn't know.

22 THE COURT: Overruled.

23 A. If you're saying so, that is what I now know.

24 Q. Are you aware that after September 2020, Mr. Klyushin's
25 win rate on earnings trades dropped to approximately 41

1 percent?

2 A. I do not know that.

3 Q. You testified that DFIN and Toppan Merrill represent about
4 75 percent of the companies in the S&P 500.

5 Was that your testimony?

6 A. That is correct.

7 Q. Do you know which of the earnings releases filed between
8 January 1, 2018, and September 30, 2020, were actually handled
9 by DFIN or Toppan Merrill?

12:07 10 A. Except for what I've read in the pleadings, I do not know.

11 Q. And you're aware that the S&P 500 represents 500 companies
12 with large market capitalizations, right?

13 A. I am aware of that.

14 Q. You're aware that Mr. Klyushin traded companies of all
15 different sizes, correct?

16 A. He traded many large-cap companies, and yes, he did trade
17 some other companies.

18 Q. Small companies as well, correct?

19 A. I don't know what the definition of small is.

12:07 20 Q. Not S&P 500.

21 A. No, not in the S&P 500 doesn't necessarily mean that it's
22 not large.

23 Q. Did he trade companies that were not in the S&P 500?

24 A. He did.

25 Q. Did he trade companies across sectors?

1 A. He did.

2 Q. You testified that earnings information could be useful if
3 you had it ahead of time, correct?

4 A. Correct.

5 Q. You testified that if you had it, you'd be right 90 to 95
6 percent of the time, correct?

7 MR. FERNICH: That was stricken.

8 THE COURT: Yes, I think I did. Sustained.

9 Q. Are you aware that a paper published by Professor William
10 Kinney at the University of Texas at Austin found that if a
11 trader had advance knowledge of the earnings of an individual
12 stock --

13 MR. NEMTSEV: I object, Your Honor.

14 THE COURT: Sustained.

15 MR. FRANK: He's an expert, Your Honor.

16 THE COURT: Sustained.

17 MR. NEMTSEV: Give him the paper.

18 MR. FRANK: I'm happy to.

19 MR. NEMTSEV: We'll be here all day.

12:08 20 MR. FRANK: May I approach?

21 Q. Are you familiar with this paper, sir?

22 THE COURT: No, don't put it up there, if you're using
23 a learned treatise. Show it to him and see if he agrees with
24 the statement. Show him a statement and ask him if he agrees
25 with it.

1 Q. Do you see that?

2 A. Yes. Could I hold on to this for a second?

3 Q. Are you familiar with this paper, sir?

4 A. I know of it.

5 Q. Thank you.

6 Are you aware that Professor Kinney found that for an
7 individual firm, the maximum probability of a gain from trading
8 on prior knowledge of any surprise is 62 percent?

9 A. That is what it says in the paper.

12:10 10 Q. And you testified that Mr. Klyushin had it right about 63
11 percent of the time during the charged conspiracy period,
12 correct?

13 A. That is correct.

14 Q. That's about right on target with what the academic
15 research would suggest --

16 MR. FERNICH: Objection.

17 THE COURT: No. Do you agree with his statement? Do
18 you agree with Professor Kinney's statement?

19 THE WITNESS: Professor Kinney's statement is being
12:10 20 presented in a very limited manner.

21 My statement was --

22 THE COURT: All right. So -- no. You know, you're
23 not allowed to do your thing.

24 THE WITNESS: No, no, no, I'm sorry. Judge, in other
25 words, he asked me what did I say prior --

1 THE COURT: Excuse me. I'm the judge.

2 THE WITNESS: Sorry.

3 THE COURT: Do you agree with Professor Kinney, yes or
4 no?

5 THE WITNESS: I agree with the data.

6 THE COURT: Okay. So now what's the question?

7 Q. You testified that your client's results --

8 MR. FERNICH: Objection.

9 MR. NEMTSEV: Objection.

12:11 10 MR. FRANK: I'm sorry. Withdrawn.

11 Q. You testified that Mr. Klyushin's results of a win rate of
12 approximately 63 percent was okay, but not great.

13 A. Correct.

14 Q. Do you recall that?

15 A. Yes, I do.

16 Q. Had you reviewed the Threema chats when you made that
17 statement?

18 MR. FERNICH: Objection, foundation.

19 MR. NEMTSEV: Objection.

12:11 20 THE COURT: Overruled.

21 Q. Well, did you testify on direct --

22 THE COURT: Did you see those Threema chats?

23 THE WITNESS: Yeah, I saw some chats.

24 Q. Had you reviewed them when you made the statement that his
25 results were okay, but not great?

1 A. Yes.

2 MR. FRANK: Ms. Lewis, could we have Exhibit 46 in
3 evidence, please.

4 MR. NEMTSEV: I object, Your Honor. He didn't
5 review -- that's 4,000 chats.

6 MR. FRANK: He testified that he reviewed them, Your
7 Honor.

8 THE COURT: No. Excuse me. It was like -- show it to
9 him first, ask him if he's reviewed it.

12:12 10 MR. FRANK: Okay. I will do that.

11 Ms. Lewis, could we have 46 in evidence at line 456.

12 I think we're still on the document camera, Ms.
13 Molloy. Sorry.

14 THE CLERK: Hold on, I can switch it. Just give me
15 one second.

16 Okay. It should be okay.

17 Q. Were you aware of this statement in the chat at line 456,
18 "We implement poor trading ideas due to low-level competencies
19 as traders. Do not know some tricks, do not know how to use
12:12 20 bots, we suck in placing stops and take profits," and then the
21 next -- at Section 3, "We analyze poorly the data we have. We
22 generate poor trading ideas because of that."

23 Were you aware of that statement?

24 A. I was not.

25 MR. FRANK: Could we look at line 1407, please.

1 Q. Were you aware of this statement at line 1472, "This was
2 an erroneous trade"? Were you aware of that?

3 A. No.

4 Q. Were you aware that they complained about making erroneous
5 trades?

6 A. No.

7 Q. Were you aware --

8 THE COURT: Is this leading up to a question?

9 MR. FRANK: Yes.

12:13 10 Q. Were you aware that they discussed whether the brokerage
11 firms they used cooperated with the SEC?

12 MR. NEMTSEV: Objection.

13 THE COURT: Sustained. Lead up to something.

14 MR. FRANK: Could we look at 3584, please.

15 Q. Were you aware, when you opined that 63 percent was not
16 great, that Mr. Ermakov wrote at line 3587, "I already told
17 Vlad need to think about reducing accounts, such a number of
18 accounts with the same securities with the same broker is a bad
19 idea." And at line 35 --

12:14 20 MR. NEMTSEV: Objection.

21 MR. FERNICH: Objection.

22 THE COURT: Sustained as to all of this at this point.
23 Ask him a question.

24 Q. Were you aware of this?

25 MR. FERNICH: Objection. It's a complete non

1 sequitur.

2 THE COURT: Sustained. Sustained.

3 Q. Were you aware that they wanted to diversify brokerage
4 accounts to avoid arising suspicion?

5 MR. FERNICH: Objection. It has nothing to do with
6 the win rate, nothing.

7 THE COURT: Sustained.

8 Q. Were you aware that Mr. Klyushin --

9 MR. FERNICH: Objection.

12:14 10 MR. FRANK: I haven't even asked a question.

11 THE COURT: Sustained as to this line of questioning,
12 so --

13 MR. FERNICH: It's more of the same.

14 MR. FRANK: I'm moving on.

15 THE COURT: Thank you.

16 MR. FRANK: You can take that down, Ms. Lewis.

17 THE COURT: Thank you.

18 Q. Were you aware that Mr. Klyushin did not even open a
19 brokerage account before July of 2018?

12:14 20 A. No.

21 Q. Were you aware that none of the traders, other than
22 Mr. Sladkov, ever had a brokerage account before 2018?

23 A. No.

24 Q. Were you aware that Mr. Klyushin made 21 million dollars
25 in the two years after July of 2018 --

1 MR. FERNICH: Objection. Is he giving a mini
2 summation now?

3 THE COURT: Is that an objection?

4 MR. FERNICH: Yes.

5 THE COURT: Overruled.

6 Q. Were you aware that Mr. Klyushin made over 21 million
7 dollars after opening his first brokerage account in July of
8 2018 on an investment of about 2.1 million dollars?

9 MR. FERNICH: Objection, form.

12:15 10 THE COURT: Overruled.

11 A. I was aware.

12 Q. You were?

13 A. I was told that he started with a small amount of money
14 and made a considerable amount of money.

15 Q. Were you aware that he also turned 4.2 million dollars
16 into about 23 million dollars for his investors over an even
17 shorter period of time?

18 A. I don't know the exact numbers, but, again, it was my
19 understanding that he started with a small amount of money and
12:15 20 made a considerable amount of money.

21 Q. Were you aware that he all but stopped trading on earnings
22 after September of 2020?

23 A. No.

24 Q. You're being paid \$750 an hour for your testimony today,
25 sir?

1 A. Yes.

2 Q. How much have you billed so far?

3 A. \$12,000.

4 Q. That was as of December, correct?

5 A. Correct.

6 Q. You haven't billed since December?

7 A. Correct.

8 Q. You've done work since December?

9 A. That is correct.

12:16 10 Q. How much work have you done -- how many hours have you
11 spent on this case since December?

12 A. Roughly 20.

13 Q. Roughly 20.

14 So that's another \$15,000?

15 A. That's correct.

16 Q. Does that include your travel yesterday?

17 A. Yes.

18 Q. Does that include your time today?

19 A. Yes.

12:16 20 Q. So all told, you stand to make close to \$30,000 for your
21 testimony today, correct?

22 MR. FRANK: No further questions.

23 MR. NEMTSEV: Nothing further from the defense.

24 THE COURT: Thank you.

25 Should we --

1 MR. NEMTSEV: Take the --

2 THE COURT: -- take, like, a three-minute break or
3 something? Five-minute break?

4 MR. NEMTSEV: Yes.

5 THE COURT: Okay. We'll take a five-minute break.

6 THE CLERK: All rise.

7 (Jury exits.)

8 THE COURT: Do you need a few minutes?

9 MR. NEMTSEV: Yes, if I can.

12:18 10 THE COURT: Five minutes, maybe?

11 MR. NEMTSEV: That's fine. Five minutes is good, Your
12 Honor.

13 THE COURT: Okay. And then if you and your client
14 agree, at that point, you'll decide whether to rest in front of
15 the jury, and I then will let the government read the
16 stipulation, and then I'd send them home.

17 MR. NEMTSEV: Okay. Can we just double-check the
18 exhibits before we rest?

19 THE COURT: Well, no, because I'm not going to have
12:18 20 them sit there.

21 MR. NEMTSEV: Okay. Fine.

22 MR. FRANK: Your Honor, in light of this testimony,
23 we'd move to strike any reference to Exhibit 451 in closing,
24 the chalk that was marked for identification, that this witness
25 did not know whether it was accurate or not.

1 THE COURT: It was just a chalk, right?

2 MR. FRANK: Right, but I'm concerned about testimony
3 about it.

4 THE COURT: I think it was an effective cross. No.

5 MR. FRANK: I appreciate that.

6 THE COURT: Okay. Five minutes. And then my theory
7 is, if things go as we sort of expected yesterday, you'll say
8 what you need to say. You will read the stipulation. You may
9 need to remove, do you know what I mean?

12:19 10 MR. FERNICH: After they -- after we rest. Yeah, I
11 know.

12 THE COURT: Five minutes.

13 (A recess was taken.)

14 (Court entered.)

15 THE CLERK: All rise.

16 MR. NEMTSEV: He will not be testifying.

17 THE CLERK: Hold on. The door's open. You can shut
18 the door.

19 THE COURT: That's okay.

12:27 20 Have you had a chance to talk to him over the break?

21 MR. NEMTSEV: Yes.

22 THE COURT: All right.

23 Okay. Bring them in.

24 THE CLERK: All rise for the jury.

25 (Jury enters.)

1 THE COURT: Please be seated.

2 MR. NEMTSEV: Your Honor, the defense rests.

3 THE COURT: The defense rests?

4 MR. NEMTSEV: Yes.

5 THE COURT: All right.

6 MR. KOSTO: May I proceed, Your Honor?

7 THE COURT: Yes.

8 MR. KOSTO: I'd like to read a stipulation between the
9 parties. This is stipulation number 3. "The parties hereby
10 stipulate and agree that Defendant Vladislav Klyushin,
11 following his arrest in Seon, Switzerland on March 21, 2021,
12 was flown directly on December 18th, 2021, from Zurich,
13 Switzerland to Logan International Airport in Boston,
14 Massachusetts," signed by both parties, and, Your Honor, I
15 would offer it as Exhibit 283. We'll make sure it gets a
16 sticker.

17 THE COURT: Okay. Thank you.

18 All right. The evidence is now closed. Tomorrow we
19 will hear closing arguments and the instructions of law. I
20 have to confer with counsel about the instructions and the
21 closing arguments. But if we finish, we're going to stay until
22 4:00. So let's assume for a minute there's some extra time.
23 You'd go back and deliberate, and then you'll come back on
24 Monday and every day subsequent until you reach a verdict, and
25 we'll be sitting from 9:00 until 4:00. We will, I remind you,

1 be providing lunch tomorrow. I will also say that it's almost
2 hard not to talk about this case with anyone or look at
3 anything, but you can't, because it would ruin the whole case.
4 So please refrain from talking about the case. I guarantee
5 you, you'll be talking about it all you want and then some when
6 I send you back to deliberate. So it's a little bit of an
7 early day today. We'll be working on the charge right now, and
8 we'll see you tomorrow morning. Thank you.

9 THE CLERK: All rise.

12:29 10 (Jury exits.)

11 THE COURT: I know that you've only briefly had the
12 charge, but I've read --

13 MR. FERNICH: Judge, should I renew the motion?

14 THE COURT: Yes, please do.

15 MR. FERNICH: At the close of all evidence, I renew
16 our motion for a judgment of acquittal on the same grounds that
17 I argued earlier.

18 THE COURT: And can I also say that I view the
19 stipulation as reopening the government's case. So do you want
12:30 20 to renew that motion for directed verdict that you --

21 MR. FERNICH: Well, yeah, then also after the
22 government's rebuttal case.

23 THE COURT: Yes. Okay. I just want to make sure
24 everything's done, because I viewed the reading of the
25 stipulation not as part of your case, but as part of their

1 case.

2 MR. FERNICH: Fine. Yes, doubly renewed.

3 THE COURT: All right. Have you -- I think we've --
4 Maya's done a great job here, and I think everything at this
5 point is redlined and lined so that we don't have some of the
6 problems finding the passages that we did before. But I would
7 like to try and finish this before you -- and then you can just
8 leave. Do you need a few minutes, or do you want to go through
9 them as we go through it?

12:31 10 MR. FRANK: Is this with the exception of the venue
11 issue?

12 THE COURT: Yes. Yes.

13 MR. KOSTO: Could we take two minutes and look at the
14 redline?

15 THE COURT: Yeah. I've just given it to you. That's
16 fair enough. Do you want to take a quick break now?

17 MR. FRANK: Yes, Your Honor.

18 THE COURT: So I'll come back in ten minutes.

19 MR. KOSTO: Thank you.

12:31 20 THE COURT: And ideally speaking, at that point,
21 you'll agree to what I did, but then we can talk about the
22 venue issue.

23 MR. FERNICH: Thank you, Your Honor.

24 MR. FRANK: Thank you, Your Honor.

25 THE CLERK: All rise.

1 (A recess was taken.)

2 THE CLERK: All rise.

3 (Court enters.)

4 THE COURT: Let's start with the verdict form. You
5 can be seated for this. You've had a hard morning.

6 MR. KOSTO: Thank you.

7 THE COURT: The verdict form, is there a problem? I
8 took out the a/k/a. I think I added the disjunctive. Anyone
9 see a problem with that?

12:50 10 MR. FRANK: No.

11 MR. FERNICH: No.

12 THE COURT: Okay. Along the easy lines, anyone see a
13 problem -- did you all -- and I know you're really, really
14 busy, but we do have to at this point do it -- make any edits
15 to the indictment?

16 MR. FERNICH: Yeah, we just talked about it. I think
17 we're just going to send back -- I think everybody's in
18 agreement that we're just going to send back Counts One through
19 Four, not the whole speaking part of it.

12:51 20 THE COURT: The only issue I have with that is we have
21 to list the overt acts.

22 MR. FRANK: I don't believe we have to prove any of
23 the specific overt acts that we've alleged. We can prove any
24 overt act.

25 THE COURT: I don't know that that's true.

1 MR. FERNICH: I agree with him.

2 THE COURT: What?

3 MR. FERNICH: I agree with him.

4 MR. KOSTO: He agrees with us, I think.

5 MR. FERNICH: Yeah, I agree with the government.

6 MR. KOSTO: A rare moment of agreement.

7 MR. FERNICH: No, they don't have to prove any -- they
8 can prove any overt act, including one that's not listed in the
9 indictment.

12:51 10 MR. KOSTO: Our preference would be all or none, but
11 not just the substantive counts.

12 THE COURT: Okay. I mean, I'm -- if you agree, I
13 agree, but I'm less -- I've never hit that issue. Let me put
14 it that way.

15 MR. FERNICH: I think I've just done what we call --
16 we used to call a true waiver. So it's not going to come back
17 to bite me.

18 THE COURT: I guess that's right.

19 All right. Did you have a chance to look through
12:52 20 the --

21 MR. FERNICH: I'm sorry?

22 THE COURT: Before we get to the venue issue, have you
23 had a chance to look at the drop-and-add, the underlined
24 version of the jury instructions?

25 MR. FERNICH: Yeah, it looked good to me. I didn't

1 see anything wrong.

2 MR. FRANK: With the exception of venue, we have no
3 issues.

4 THE COURT: Same with you, Mr. Fernich?

5 MR. FERNICH: Same thing.

6 THE COURT: Oh, my gosh.

7 Okay. Let's get to venue. To recap, the question is
8 the government's requested jury instruction for an alternative
9 venue instruction 3238, which was raised for the first time
10 after the defense rested.

11 MR. KOSTO: After the government rested, Your Honor.

12 THE COURT: Excuse me. After the government rested.
13 And there were no submitted jury instructions until last night
14 on them. That said, I think we all did a flurry of research in
15 the area. So I gave you a quick indication of what I was
16 thinking, but I didn't allow you all to argue, and you've now
17 submitted miscellaneous briefs on the subject. So does the
18 government want to start?

19 MR. FRANK: Well, Your Honor, we think the statute is
12:53 20 clear on its face and the case law that we've cited supports
21 the reading of the statute that there are two possibilities:
22 That the conduct began outside the United States, or that the
23 conduct was committed inside the United States -- outside the
24 United States. And so whereas here, the government's argument
25 is the conduct began outside the United States. We think the

1 inquiry begins and ends there. We don't think that the
2 essential element inquiry applies to that prong of the statute,
3 and that's -- we've cited case law for that proposition.

4 That only comes in where --

5 THE COURT: Excuse me. What case are you referring
6 to? Because *Miller* doesn't say that. *Miller* uses that, as
7 does *Mallory*. So I'm just trying to figure out what case says
8 that -- if it was begun there, but it was trivial or
9 insignificant, that you get to get the alternative theory.

12:54 10 *Miller*, which was an incredibly good opinion, very well
11 researched and erudite --

12 MR. KOSTO: Did you notice it was --

13 THE COURT: I've seen the Fourth Circuit. I've seen
14 the Second Circuit. I've seen *Mallory*. The First Circuit
15 case, as it turns out, is quite off the point. It's -- but --

16 MR. FERNICH: Well, it may not be off point. I mean,
17 the First Circuit --

18 THE COURT: All right. Fair enough. But it's not
19 what I view this case as, where there is substantial conduct
12:55 20 abroad and substantial conduct in the United States.

21 MR. FRANK: We believe *Miller* stands for the
22 proposition that the use of the word "begun," in addition to
23 the word "committed," suggests that the statute encompasses
24 offenses begun outside the borders of the United States, but
25 ending within our country's borders. And that is clear on the

1 face of the statute, and we believe no further inquiry is
2 required. That statement would have no meaning if we then had
3 to --

4 THE COURT: Excuse me. Did you read the question
5 presented by Judge Carney? The question it was answering was,
6 on page 609 -- excuse me -- "In this appeal, we consider
7 whether venue for a criminal prosecution may lie pursuant to 18
8 U.S.C. 3238, the 'high seas' venue statute, when certain
9 essential offense conduct is committed outside of the
10 jurisdiction of the United States, but other offense conduct is
11 committed within."

12 In addition, the jury instruction that was affirmed
13 refers to something like that, essential conduct. I would be
14 committing error if I simply said any trivial act beginning an
15 offense would trigger that alternative theory. And I'm not
16 giving it.

17 So *Mallory* was very helpful. Some judge in EDVA, I
18 think, was a helpful opinion. But essentially -- even if I
19 disregard all of that, because to a person, the judges are
20 saying this is a difficult question. Even if I were to -- I
21 have the constitutional background to the whole thing in
22 Article III. So if the bulk of the crime or the essential part
23 of the crime was committed here in the United States, I'm not
24 sure that that statute, if I construed it otherwise, would
25 comply with the Constitution.

1 So I'm understanding that this is late arising, but
2 *Miller* is not as bare bones as you make it out to be.

3 MR. FRANK: Our position, Judge, is that -- and I
4 don't have the decision right in front of me, but --

5 THE COURT: Do you want it?

6 MR. FRANK: Sure.

7 THE COURT: I've underlined question, that's how I use
8 Q.

9 MR. FRANK: Our position is that that's really talking
12:57 10 about preparatory acts as opposed to anything more than that.

11 THE COURT: Do you want this case reversed on appeal?

12 MR. FRANK: Well, I'd like to get there first, Judge.

13 THE COURT: I understand that. But I'm going to do,
14 given the short tether that you have given me, the best that I
15 can do on the law, on a subject that two circuits have already
16 said was extremely difficult.

17 MR. FRANK: So --

18 MR. FERNICH: I'm sorry. Go ahead.

19 THE COURT: Do you want to take a look at that too?

12:57 20 MR. FERNICH: I remember having read it the first
21 time, and --

22 MR. FRANK: Could I have --

23 MR. FERNICH: -- when it came out, the slip opinion.
24 And then looking at it last night, my skin started to crawl
25 reading it last night. So I remembered it, yeah.

1 MR. FRANK: Okay. May I have three minutes, Your
2 Honor?

3 THE COURT: No, because we need to get out of here.

4 MR. FRANK: I believe what this decision, in that
5 portion, is talking about is not the "begun" prong. It's the
6 "committed" prong.

7 THE COURT: All right.

8 MR. FRANK: And that's why it says -- and in this
9 case -- in the case -- in this particular case, the case
10 involved a child being taken from the United States outside the
11 United States.

12 THE COURT: That's why they said the essential offense
13 conduct was outside of the United States.

14 MR. FRANK: But it's not a begun case, is my point,
15 Your Honor. The conduct began inside the United States.

16 THE COURT: I'm going to rule against you on that
17 legal theory under both the Constitution and the case law, but
18 I will -- but assuming that I need some essential offense
19 conduct, the issue that I'm having a problem with is that three
12:58 20 of the four counts, the essential offense conduct happened in
21 the United States of America. We can debate which district
22 it's in, where was the server, where was the hack. We can have
23 that debate. But with securities fraud, computer fraud, and
24 wire fraud, it wasn't even, in my opinion, a close question
25 about where the essential offense conduct was, and that is the

1 analysis Judge Carney went through -- and I think it was a
2 unanimous opinion -- and so -- as well as the other circuits,
3 is where is the essential offense conduct, and that's what the
4 Supreme Court started talking about, albeit under the other
5 venue statute.

6 So that's where I want to understand it. Let's assume
7 for a minute that I say only 3237 for the three underlying
8 ones --

9 MR. FERNICH: Well, Judge, technically, there's a
12:59 10 separate venue statute for the stock fraud count.

11 THE COURT: You know, I saw that. I hadn't even
12 noticed that, and no one mentioned that to me. No one
13 submitted a jury instruction on that.

14 MR. FERNICH: Yeah. I'm aware of that.

15 MR. FRANK: It's a civil standard, Your Honor. I
16 don't believe that applies here.

17 THE COURT: Is that so?

18 MR. FRANK: Yes, that is my belief.

19 THE COURT: I haven't had a chance to even look at it.

01:00 20 MR. FRANK: The 3237 supplies the definition --

21 THE COURT: Would you just check it out with the --

22 MR. FRANK: I believe I have, but I will do it again.

23 THE COURT: I didn't -- I hadn't been aware of it or
24 alerted to that, so I didn't know.

25 MR. FRANK: I checked it when I was submitting the

1 jury instructions, but we'll do it again. We'll double-check.

2 THE COURT: Thank you.

3 MR. FERNICH: It comes up in *Royer*, a criminal case,
4 where they say that.

5 MR. FRANK: But 3237 supplies the applicable
6 definition of essential element, and we believe that that
7 should be provided to the jury as well. It says, "Any offense
8 involving the use of the mails, transportation in interstate or
9 foreign commerce, or the importation of" -- that section is not
01:00 10 applicable -- "may be inquired of and prosecuted in any
11 district from, through or into which such commerce, mail
12 matter, or imported object or person moves."

13 THE COURT: So you would want that statutory language
14 added into the 3237 instruction?

15 MR. FRANK: If Your Honor is going to use this
16 essential conduct language in the charge, we believe the jury
17 needs a definition of what that means.

18 MR. FERNICH: No, that's not the definition of
19 essential conduct. The cases are very clear that you have to
01:01 20 analyze it by the nature of the crime alleged and where the
21 essential --

22 MR. FRANK: And that where --

23 MR. NEMTSEV: Wait.

24 MR. FERNICH: Wait, wait.

25 MR. FRANK: -- through the use of the mail --

1 THE COURT: Let him finish his sentence.

2 MR. FRANK: He interrupted me constantly, Your Honor.

3 THE COURT: That may be true, but I'm trying to stop
4 that.

5 MR. FERNICH: It comes from *Cabrales* and *Anderson* and
6 *Rodriguez-Moreno*. It's very clear. Each crime committed has
7 to be analyzed individually to ascertain the nature of the
8 alleged offense and where the essential offense conduct
9 particular to that offense occurred.

01:01 10 The continuing offense doctrine doesn't supply any
11 definition of what --

12 THE COURT: I'll look at 3237, but since I received no
13 brief and no objections to the charge under 3237, at this point
14 I'm not going to change it. I'm on 3238 right now, the
15 alternative theory. And this is why I'm looking at you,
16 because, to some extent, this is late arising, and if I get
17 this alternative instruction wrong, you lose conspiracy,
18 because they will reverse it on appeal and it will be, most
19 likely, double jeopardy.

01:02 20 MR. KOSTO: Your opinion, just reading from --

21 THE COURT: No. I'm --

22 MR. KOSTO: I hear you.

23 THE COURT: And --

24 MR. KOSTO: Let me offer that both Judge Sorokin and
25 Judge Stearns have spoken to this question with respect to the

1 wire fraud statute. And Judge Sorokin, as recently as last
2 year in the *Abbas* case, said, quote, "In a wire fraud case,
3 venue is established 'where the wire transmission at issue
4 originated, passed through or was received, or from which it
5 was orchestrated.'" We're obviously in a pass-through
6 jurisdiction here in Massachusetts on the evidence in the case.
7 Judge Stearns -- that was the *Abbas* decision --

8 THE COURT: I'm confused. I thought you were
9 satisfied with the instructions except with respect to 3238.

01:03 10 MR. KOSTO: We simply don't want the Court to define
11 essential conduct and then leave that to the jurors'
12 imagination, lest there be argument that the only place the
13 essential conduct --

14 THE COURT: I'm sorry, I'm not an ATM machine. I
15 can't make -- you haven't submitted an instruction on 3237,
16 other than what I've got. And so I'm now focused on 3238. And
17 so the question, really, is: Do you -- is there any argument,
18 other than the use of the word "begun," very broadly, that
19 pulls those three into the -- that alternative theory?

01:04 20 MR. FRANK: The law is clear that the essential
21 element of any statute that -- where the statute provides for
22 the use of the wires or the mails or a facility of interstate
23 commerce, is that.

24 THE COURT: All right. I overrule that. I think that
25 that is inconsistent with the case law and the Constitution.

1 Because that would mean any trivial use of the wires abroad
2 into the United States would be enough to trigger that.

3 MR. FRANK: If it's in furtherance of the scheme,
4 that's what --

5 THE COURT: Of course, in furtherance of the scheme.
6 But I don't think that that's what the law is if the essential
7 conduct, i.e. the hacking, the actual hacking, happens either
8 on a server or on a company here.

9 So on conspiracy, which is sort of where I'm heading
01:04 10 to, the issue that I have is when I looked at the overt acts
11 alleged, the majority of them were in Russia, which supports
12 your theory. The minority of them were in the United States,
13 and some scattered amount because you -- I don't know why you
14 did it this way, with sub a, sub b, sub c, sub d, have Denmark
15 in them. So I think that supports your position that you could
16 say the essential conduct came out of Russia.

17 But then what's confusing me is the objects of the
18 conspiracy -- the securities fraud, the computer and the
19 wire -- are in the United States. This is the closest case we
01:05 20 were able to find, in a conspiracy context, where it was so --
21 there was such strong connection to both locations, for one.
22 Such a meaningful connection to both locations. That was not
23 the case in the Fourth Circuit case. It was not the case in
24 the ED case, and Judge Carney felt that there wasn't -- that
25 the essential conduct was outside the U.S. in the child

1 kidnapping case.

2 So I'm just trying to figure out, and maybe it's just
3 for an appellate court to answer, do you compare the essential
4 conduct in both locations? Do you say if the essential conduct
5 was mostly in Russia -- I'm trying to figure out how to word
6 it. It can't just be any trivial conduct. I think that's
7 unconstitutional.

8 MR. FRANK: Well, the crime of conspiracy is the
9 agreement, Your Honor. So we believe it should be the
01:06 10 formation of the agreement.

11 THE COURT: That may be right. I've been thinking
12 that way.

13 MR. FERNICH: That's half the crime of conspiracy.
14 The other element is an overt act.

15 THE COURT: Yes.

16 MR. FERNICH: The overt act principally contemplated
17 by the agreement is the one that Your Honor charged under
18 *Dorozhko* and *Khalupsky*. That's the gist of the whole case, is
19 that they were hacking into these servers and deceiving not the
01:07 20 market, but deceiving the holders of the confidential
21 information, the targets.

22 THE COURT: This is what's been holding me up, trying
23 to think about it, is the --

24 MR. FERNICH: Right.

25 THE COURT: -- just sort of -- I think I took it down.

1 The overt acts are multiple and in subparts. They go from
2 Count 15 to Count 41 -- excuse me, paragraph 15 to paragraph
3 41, and the majority of them are in Russia. But, as you point
4 out, there are at least three that are in Boston and multiple
5 others that are in the United States.

6 MR. FERNICH: I think that --

7 THE COURT: So I'm trying to figure out what to tell
8 the jury.

9 MR. FERNICH: Well, I wouldn't instruct on this
01:07 10 theory, and here's why I wouldn't instruct on it: For all the
11 reasons that I've articulated in the papers, but let's just --
12 let's just get down to the simplest, Occam's razor. There's no
13 First Circuit case that says anything other than *Chandler*, and
14 *Chandler* interprets the statute. The purpose of the statute is
15 to implement Article III of the Constitution. And Article III
16 is crystal clear. It says that "It shall be tried in the state
17 and district where the crime shall have occurred unless" --
18 unless it hasn't occurred in any district. And that's when you
19 go to 3238. And that's exactly what *Chandler* says.

01:08 20 And what the Second Circuit case says is -- and to
21 some extent, I agree with what Mr. Frank is saying about the
22 Second Circuit case -- I think the Second Circuit case is all
23 wet, which is why I said --

24 THE COURT: It's all --

25 MR. FERNICH: All wet, that it gave me hives when it

1 came out. Especially because they say right in there that this
2 is ambiguous, that the word "began" crept into the legislative
3 history in 1940 -- in the '40s, and we don't know what it
4 means. It's cryptic. It's not clear. And that Second Circuit
5 case is not the law in the First Circuit, and typically, when
6 there's ambiguity, it goes to us, it goes in our favor under
7 the rule of lenity, and, also, under The doctrine of
8 constitutional avoidance. To me, none of the cases that the
9 government cites, none of the cases that I've found, nobody
01:09 10 tackles and tries to reconcile this insertion of the "began"
11 word and harmonize it with Article III of the Constitution.
12 And if you think about it, they are completely opposite.
13 They're irreconcilable, and the --

14 THE COURT: Well, I agree that a very broad reading of
15 the word "begun" would be unconstitutional.

16 MR. FERNICH: Yeah.

17 THE COURT: On the other hand, since much conduct is
18 continuing, if the bulk of the conduct was somewhere else, but
19 only trivial or small portions were somewhere else or -- at
01:10 20 least that far, I'll go -- then it's quite clear that it would
21 not be violating the Constitution. In other words, a
22 conspiracy is complete upon the agreement and the commitment of
23 one overt act. So --

24 MR. FERNICH: Well, I think that's right. But I think
25 that you look at it holistically. If you look at these cases,

1 you look at it holistically. If your Honor is going to get
2 into this -- and I think it's a thicket, candidly, that they
3 don't need. I agree with the Court's assessment of it. They
4 have a lot of evidence under 3237. I don't know why we're
5 getting into this can of worms. It's dangerous. It's not the
6 law in the First Circuit. They don't need this.

7 THE COURT: Well, the First Circuit really hasn't
8 jumped in other than that trader case.

9 MR. FERNICH: But they said yesterday that *Chandler*
01:10 10 remains controlling the law here.

11 THE COURT: That was based on 30 minutes of research
12 at lunch. So I'm giving them a little --

13 MR. FERNICH: But I don't know how it can be squared
14 with Article III. I mean, it says --

15 THE COURT: Well, I've got to make sure it is. What
16 I'm struggling right now -- as I said, I'm leaning towards
17 giving it with respect to the agreement, which really was
18 completed upon the -- upon the -- essentially, the use of the
19 agreement being made and one overt act, so -- but if all of
01:11 20 that took place in Russia, then I don't think that would
21 violate the Constitution.

22 MR. FRANK: May I just add to this, Your Honor?

23 MR. FERNICH: Go ahead.

24 THE COURT: Okay.

25 MR. FRANK: In the *Miller* case -- I'm looking at it --

1 it says, "The use of the word 'begun,' in addition to the word
2 'committed,' suggests that the statute encompasses offenses
3 begun outside the borders of the United States, but ending
4 within our country's borders." And then it says, "We, thus,
5 agree with the *Pendleton* court that the word 'committed' in
6 3238 encompasses crimes like Lisa's" -- at issue in this
7 case -- "that begin inside the United States but that in their
8 essence are committed abroad."

9 THE COURT: Yeah, yeah, in their essence.

01:12 10 MR. FRANK: Right. For crimes that begin here, but
11 are then committed, in their essence, abroad.

12 In our case, we have the reverse scenario.

13 THE COURT: Sure.

14 MR. FRANK: Which is a crime that began there, but
15 that touched this venue and other venues.

16 THE COURT: But if you look at the jury instructions
17 given in that case which were affirmed and the question posed,
18 you have to do something with essential conduct. It can't be a
19 trivial beginning in Russia.

01:12 20 MR. FRANK: We agree that it can't be mere
21 preparation, but --

22 THE COURT: Anyway, I'm going to just -- I haven't --
23 you've given me 24 hours. The best I'm going to do -- I don't
24 want to say something that's legally incorrect, and I think I
25 have to accommodate for --

1 MR. FRANK: We think that the way to approach that, in
2 that case, would be to say -- and there's a quote in here that
3 I'm not now finding -- that "begun" has to be more than mere
4 preparation, but not to get into the essential conduct analysis
5 when we're under the "begun" prong. Because this case is a
6 different fact pattern. This case is -- under *Miller*, the
7 "begun" prong was not at issue because the conduct began here
8 and was --

9 THE COURT: I agree. It wasn't an issue. I'm just
01:13 10 saying, as far as I'm concerned, they do affirm -- I'm going to
11 do something along the lines of essential conduct, and it's
12 more than just preparatory. I think you're going to have to
13 prove that in the alternative -- as an alternative theory. And
14 that's -- unfortunately, I don't have the exact language, and
15 I'll be working on it this afternoon.

16 I don't find there's any prejudice to the defendant on
17 it because they did open with it, but that's going to be
18 applicable to three of the four, and the jury's understanding
19 would not be that nuanced at that phase. I also don't think
01:14 20 that there's any new evidence necessary. I don't think this is
21 a variance issue, although I may be stand to be corrected on
22 that. The case cited was one where there was a fatal variance
23 between the elements and the indictment. Here there was no
24 charged venue provision. There were essentially something
25 like --

1 MR. FERNICH: That's why, Judge, I'm not arguing -- I
2 thought about it, and I'm not arguing that it's a constructive
3 amendment, because venue is such an odd duck --

4 THE COURT: Yes.

5 MR. FERNICH: -- where it's an essential element of
6 their burden of proof, but not, at this point, an essential
7 offense element. So if they materially broadened an essential
8 offense element, then it would be a constructive amendment
9 arguably, and a per se reversible error. So Your Honor has
01:14 10 made a finding that there's no prejudice from the variance,
11 which is not helpful to me in the event that the case is
12 appealed, but they listed three specific overt acts that are
13 plainly, as I wrote in the papers, trying to lay a
14 conduct-based venue charge here, and they didn't give us a hint
15 as to 3238 coming in, which I think is another big factor
16 weighing against giving this very dicey charge in the
17 circumstances of this case.

18 And I will say that with respect to the qualitative
19 analysis of what the offense -- essential offense conduct is, I
01:15 20 think you have to look at the whole conspiracy and its objects.

21 And *Miller* is a good example of that, because the objective
22 there was to take a kid and move the kid across international
23 borders. That was what they called the gist of the crime. So
24 by definition, the object of that conspiracy was multinational.

25 Here, the object of the offense, you know, they're

1 parroted the *Dorozhko* and *Khalupsky* theory. The object of the
2 offense here, the principal object, was to hack into those
3 computers and steal -- well, fraudulently obtain their
4 confidential information.

5 In the Second Circuit, you know, they also incorporate
6 the substantial contacts test under *Reed*, which is sort of like
7 a minimum contacts test in the due process --

8 THE COURT: Well, I sort of capture that -- I'm not
9 sure the First has done that by using "a meaningful
01:16 10 connection." I used the words "meaningful connection."

11 MR. FERNICH: I like that charge, the meaningful
12 connection charge, but -- so if you're -- you know, the Second
13 Circuit is -- it's weird. *Miller* is not a good decision for
14 us. But on the other hand, the way that the Second Circuit
15 generally approaches venue is much more favorable to us because
16 it uses the foreseeability requirement and incorporates a
17 minimum or substantial contacts with the forum test. So
18 they're targeting the United States forum. The effects of
19 their conduct are here, and the object of the scheme is here.
01:16 20 So while the agreement, undoubtedly, is formed
21 extraterritorially, that would be the case of any agreement
22 formed overseas.

23 THE COURT: That might be, but take the case of
24 someone who's selling fentanyl. I know that's very different
25 from here, but if you make the fentanyl somewhere else and then

1 you -- and then you sell it here --

2 MR. FERNICH: Well, certainly, I've had clients who
3 have done stuff like that, but --

4 THE COURT: Didn't you have that big case?

5 MR. FRANK: And, frankly, Your Honor, in terms of the
6 conspiracy, because an overt -- a single overt act is enough to
7 complete the crime, the crime was complete before anything
8 touched the United States. There were numerous overt acts that
9 they took overseas.

01:17 10 MR. FERNICH: But this is not what the case --

11 MR. FRANK: The rental of the domains, the typing at
12 their keyboards, all of those things are overt acts.

13 THE COURT: That supports your claim.

14 MR. FERNICH: If Your Honor looks at the Third Circuit
15 case, which I keep harping on because it's a good analysis,
16 under *Rodriguez-Moreno*, which is the Supreme Court's last
17 pronouncement on this, the case makes very clear that you have
18 to take care not to conflate the elements of the offense with
19 essential offense conduct. Mr. Frank is right, it could be any
01:18 20 overt act just for purposes of proving the elements of the
21 offense, but that's not the venue inquiry. The venue inquiry
22 is it has to be essential offense conduct. And Your Honor is
23 right, every court that's considered this says that. And they
24 can't say otherwise because of *Rodriguez-Moreno*. So it's a
25 more holistic, a more qualitative analysis, and it's

1 case-by-case. It makes some sense, if the object of the scheme
2 is to cross state lines with a child, that's a borderless
3 crime, quintessentially international in nature. That is not
4 this. They targeted the forum. They targeted protected
5 American computers and they stole, on the government's theory,
6 through fraudulent means --

7 THE COURT: On the other hand, I was persuaded by some
8 of it. Once you have hacked --

9 MR. FERNICH: Once what? I'm sorry?

01:18 10 THE COURT: If a hacker from somewhere outside the
11 United States targets our computers or servers or companies
12 here, I don't see that there's any difference in a venue or any
13 additional hardship --

14 MR. FRANK: Agreed, Your Honor.

15 THE COURT: -- as between Massachusetts or -- where
16 are they from? Minnesota, Chicago.

17 MR. FRANK: Agreed, Your Honor.

18 THE COURT: There's no hardship. There's no
19 unfairness.

01:19 20 MR. FRANK: Agreed, Your Honor. And the other
21 point --

22 THE COURT: But I still have the basic Constitution,
23 and I know you're trying -- it shows up twice in the
24 Constitution and once in the rules. And so it's not such an
25 unimportant right, so --

1 MR. FRANK: But --

2 THE COURT: I am going to do the best I can. I'm
3 telling you what I'm likely to do. I'll get you -- I'm not
4 going to change my instructions that I've already given you at
5 this point, but I am going to -- unless I catch a typo or
6 something. I read it to them, and then I have the court
7 reporter -- and I'll have a copy of the final charge for both
8 the interpreters and the court reporter when it I do it
9 tomorrow -- I don't do it exactly like I do it. I do --

01:20 10 MR. FERNICH: I understand.

11 THE COURT: I have my way of doing it, but the middle
12 portion will be exact, of the elements of the crime, and --

13 MR. FRANK: Does Your Honor --

14 THE COURT: -- eventually, I'll have to give you the
15 language of the alternative theory of conspiracy.

16 MR. FERNICH: Well, basically, whatever the language
17 is going to be, the Court's ruling at this point is that the
18 Court will instruct on 3238 as an alternative venue basis for
19 Count One, but not as to Counts Two through Four. Do I have
01:20 20 that right?

21 THE COURT: You do.

22 MR. FERNICH: Okay.

23 MR. KOSTO: Your Honor, if we understand you
24 correctly, you're not going to change your 3237 instruction to
25 include essential conduct language in that one?

1 THE COURT: I think it's already in there.

2 MR. FERNICH: Essential conduct applies to both --

3 THE COURT: I think it's in there. I mean, that's
4 what you just got.

5 MR. KOSTO: I don't believe we have -- do we have --

6 THE COURT: I haven't double-checked it, but --

7 MR. FRANK: It's undefined, is the problem, and the
8 statute itself supplies a definition.

9 THE COURT: Well, I'm saying I'm -- I think it's in
01:21 10 there.

11 MR. FERNICH: You know, I'll poke around and see if I
12 can find a definition of essential conduct.

13 THE COURT: Maybe, but I'm not an ATM machine, as I
14 keep saying, and so I'm not going to be up at 3:00 in the
15 morning getting language.

16 MR. FERNICH: I know. I've been there, done that.

17 THE COURT: So at least at this point, I believe I
18 used the words "essential conduct" somewhere in there.

19 MR. FERNICH: No, you did. I was going to see if I
01:21 20 could poke around and find a definition of essential conduct.

21 THE COURT: And then you can object, if you want, or
22 if somebody has an agreed-upon definition from a case, I'd
23 consider it.

24 But at this point, I think we're all tired.
25 Congratulations, you finished the evidence. Let me ask the

1 government, how much time do you think you'll need?

2 MR. KOSTO: I'm going to try to make it shorter, but
3 90 minutes.

4 THE COURT: Okay. It's a big case. Okay.

5 Let's assume people come on time. 90 minutes. We
6 will take a break at that point, because it's too much to then
7 start listening to the defense.

8 How long does the defense think it will be?

9 MR. FERNICH: Max is going to do it. We switched. So
01:22 10 I'll have to ask him.

11 What did he say yesterday, an hour, hour and a half?

12 MR. KOSTO: I don't remember, Your Honor.

13 MR. FERNICH: I think it will be an hour. That's my
14 guess.

15 MR. KOSTO: Does the Court give preliminary
16 instructions first?

17 THE COURT: No. Well, I say to them, this is the
18 closing arguments, and it's not evidence, but I don't do
19 anything else.

01:22 20 And then let's say we take a break -- an hour and a
21 half, let's say we take a 15-, 20-minute break -- I'm just
22 trying to script it. Let's then say we're roughly at noon.
23 Let's say we finish the charge at --

24 MR. FRANK: Rebuttal.

25 THE COURT: Oh, yeah. You're absolutely right.

1 MR. FRANK: 30 minutes.

2 THE COURT: 30?

3 MR. FRANK: No more than that.

4 THE COURT: All right. So let's say we finish in the
5 vicinity -- in the closings, in the vicinity of 12:30, break
6 for lunch. I'm giving them lunch, so bring your lunch in a
7 little paper bag because I don't even know what the line will
8 be like downstairs. But it won't be a full hour, because my
9 charge is massive. I mean, I think the charge will take an
01:23 10 hour and a half. So I think it will bring them into maybe an
11 hour's worth of deliberation where they can set up, get a
12 foreperson, I can eliminate the alternates, and they'll just
13 start getting organized. How are we doing the document
14 delivery? Have you reviewed them yet? Are you satisfied with
15 the form that they're in?

16 MR. KOSTO: I think Ms. Lewis was going to have a look
17 with us. We were talking about a laptop going back to the jury
18 with all the evidence in it, and nothing else, obviously.

19 THE COURT: I think we have paper.

01:24 20 THE CLERK: Both. We send back both, even when we do
21 electronic.

22 THE COURT: We're going to do paper and JERS, which is
23 --

24 THE CLERK: Not JERS. We can't use it because it
25 won't recognize Excel. We're doing a laptop, which they agreed

1 to, both sides, because it has all the Excel and all the
2 exhibits on it, plus paper.

3 THE COURT: Plus paper?

4 THE CLERK: Yes.

5 THE COURT: Have you looked through to make sure you
6 have everything you're supposed to?

7 MR. FERNICH: We're going to take a look afterwards,
8 right now.

9 THE COURT: Because at the end, I ask, Is the
01:24 10 government satisfied with the form of the exhibits? Is the
11 defense satisfied with the form of the exhibits?

12 MR. FERNICH: Tim, are you listening to this, buddy?

13 THE COURT: And then I will let you -- and then --
14 we'll send them home at about 4:00. My anticipation is that
15 there's so much here that they will be coming back Monday
16 morning just -- I'm just hoping no one gets sick. We've been
17 very lucky so far. But assuming we have everybody, my guess is
18 it will take at least a day or two to deliberate based on the
19 volume of the documents.

01:25 20 So unless something else comes up, that's what we're
21 going to do. Anything else at this point, other than practice?

22 MR. FRANK: Does Your Honor anticipate that we'll get
23 the revised instructions --

24 THE COURT: No. I'm just going to work on it this
25 afternoon. I mean, you'll get it, but you'll probably get it

1 tomorrow morning. If I can get it this afternoon, I'll just
2 send you out the brief little supplemental one, just on venue
3 kind of thing. Okay. Thank you very much. Have a lunch.
4 Thank you.

5 THE CLERK: All rise.

6 THE COURT: I do have one more question. I'm sorry.
7 I have one more thing. This is an unusual case because you all
8 ordered daily copy. It's my practice not to just pile the
9 transcripts in the jury room. But if requested, I will give it
01:27 10 to them. But we would have to go through them to make sure
11 that sidebars, et cetera were deleted. I didn't know what you
12 thought about that, but just something to chew over because we
13 usually don't have it -- we actually don't have it, but we do
14 this case. So I'm planning on not giving them -- I think it's
15 very thick, but if they ask for a particular witness, I would
16 give it to them.

17 MR. FERNICH: Yeah. I like the old-fashion way where
18 they send a note and we can --

19 THE COURT: Yeah, they ask for it. I agree. Okay.
01:27 20 Thank you.

21 (Proceedings adjourned at 1:27 p.m.)
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24
25

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

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Klyushin, and thereafter reduced by us to typewriting and is a
true and accurate record of the proceedings.

Dated this 9th day of February, 2023.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER

/s/ Kathleen Silva

KATHLEEN SILVA, RPR, CRR
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