No. 21-

IN THE

Supreme Court of the United States

VITALY KORCHEVSKY,

Petitioner,

v.

UNITED STATES OF AMERICA *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Grand Jury Clause of the United States Constitution states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V, cl. 1. The Superseding Indictment charging Mr. Korchevsky specifically alleged illegal trades in ninety-one "Target Companies" but at trial the Government largely ignored the Target Companies and instead focused its proof on hundreds of trades in other stocks, thus making it impossible to determine whether Mr. Korchevsky had been convicted of the crimes specified in the Superseding Indictment. The question presented is whether the evidence at trial so dramatically changed the type, number, and scope of the specifically alleged trades that Mr. Korchevsky was denied his rights under the Grand Jury Clause.

2. In *United States v. O'Hagan*, 541 U.S. 642 (1997), this Court determined that there is no general duty under Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), for a market participant to forgo trading based on material, nonpublic information that he or she might possess, regardless of how it was obtained. *O'Hagan*, 541 U.S. at 661. The question presented is whether conduct can constitute securities violations under Section 10(b) even when a defendant has no relationship with any of the alleged victims beyond that of a counterparty to a stock transaction.

PARTIES INVOLVED

The parties involved in this case are Respondent the United States of America, which was the appellee below, Respondent Vladislav Khalupsky, who was an appellant below, and Petitioner Vitaly Korchevsky, who was an appellant below.

RELATED PROCEEDINGS

United States v. Korchevsky, No. 1:15-cr-00381-RJD-RER-1, U.S. District Court for the Eastern district of New York. Judgment entered June 21, 2019.

United States v. Khalupsky, No. 1:15-cr-00381-RJD-RER-2, U.S. District Court for the Eastern district of New York. Judgment entered May 21, 2019.

United States v. Momotok, No. 1:15-cr-00381-RJD-RER-3, U.S. District Court for the Eastern district of New York. Judgment entered June 21, 2019.

United States v. Garkusha, No. 1:15-cr-00381-RJD-RER-4, U.S. District Court for the Eastern district of New York. Judgment entered June 17, 2019.

United States v. Korchevsky (Khalupsky), No. 19-197, U.S. Court of Appeals for the Second Circuit. Judgment entered July 19, 2021.

United States v. Korchevsky, No. 19-780, U.S. Court of Appeals for the Second Circuit. Judgment entered July 19, 2021.

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JURISDICTION

The Second Circuit entered its judgment on July 19, 2021. 28 U.S.C. § 1254(1) confers jurisdiction.

PROVISIONS INVOLVED

The relevant constitutional (U.S. Const. amend. V cl. 1), statutory (15 U.S.C. § 78j(b)), and regulatory (17 CFR § 240.10b-5) provisions are reproduced in the appendix. *See* App.52a–53a.

STATEMENT

Vitaly Korchevsky ("Mr. Korchevsky") was born in the former Soviet Union and immigrated to the United States as a religious refugee seeking political asylum in 1989. After being imprisoned in Russia for smuggling Bibles, expelled from university for his baptism as a Christian, and witnessing religious persecution firsthand, Mr. Korchevsky settled in Pennsylvania, where he started a family and devoted his time to pastoring a local Slavic church.

Instead of accepting a salary for his work as a pastor, Mr. Korchevsky pursued a Master of Finance to support himself as a financial trader. Over the many years since,

his success as a trader has allowed his family to serve their Slavic community by, among other things, providing thirty-eight refugee families with housing and resources in the Korchevsky home while they settled in the United States. However, Mr. Korchevsky's trading success during four years of that period would later become subject to a federal indictment.

At its core, the Government contends that Mr. Korchevsky, beginning in 2011 and continuing through 2015, participated in a conspiracy where he illegally received pre-release copies of quarterly earnings reports. App.97a–98a. Arkadiy and Igor Dubovoy, the masterminds of the alleged conspiracy, recruited multiple computer hackers in various overseas locations to hack into newswire computers and obtain those reports before their public release. App.97a–98a. The Dubovoys also recruited traders, allegedly including Mr. Korchevsky, to make stock purchases based on that pre-release information. App.97a–98a.

Mr. Korchevsky was an "earnings trader," meaning that he would attempt to discern, based on available data, whether a company would be reporting positive or negative earnings news and trade accordingly, often immediately prior to the release of those reports. App.3a. Mr. Korchevsky's success as an earnings trader predated the Government's alleged conspiracy. App.91a, *see also* E.D.N.Y. No. 1:15-cr-00381, Dkt. 464 at 265–66. For example, in the year 2009, Mr. Korchevsky earned returns of over 100%. E.D.N.Y. No. 1:15-cr-00381, Dkt. 359 at 40–41. Even Igor Dubovoy, who cut a deal to testify for the Government, admitted that profits predating the alleged conspiracy were "very good…there were profits

generated on a daily basis." E.D.N.Y. No. 1:15-cr-00381, Dkt. 465 at 11.

When asked whether Mr. Korchevsky's subsequent profits were based on illegally-obtained earnings reports, Arkadiy Dubovoy, prior to cutting his own deal with the Government, "categorically denied it," stating that Mr. Korchevsky "would have stopped doing business with me" had he known "that information was illegally obtained." E.D.N.Y. No. 1:15-cr-00381, Dkt. 402 at 123–25.

The Government filed a Superseding Indictment more than a year after their initial raid on Mr. Korchevky's home. App.90a–117a. Although the Government confiscated all of Mr. Korchevsky's electronic devices in that raid, there were no stolen press releases found on them. The indictment contained five counts against Mr. Korchevsky: Conspiracy to Commit Wire Fraud (Count 1), Conspiracy to Commit Securities Fraud and Computer Intrusions (Count 2), Securities Fraud with regard to the PR Newswire hack (Count 3), Securities Fraud with regard to the Marketwired Hack (Count 4), and Conspiracy to commit Money Laundering (Count 5). App.106a–117a.

The Counts in the Superseding Indictment contained two different categories of victims. In Count One, the alleged victims were the "Victim Newswires and the Target Companies." App.106a. Counts Two, Three, and Four, however, named "investors or potential investors in the [same] Target Companies" as the claimed victims. App.108a, 111a–112a. There were no allegations in the Superseding Indictment, nor was any evidence presented at trial, that a single investor or potential investor in the Target Companies lost money as a result of Mr. Korchevsky's trading activity. Moreover, no evidence

was presented regarding any detrimental changes to the market as a result of the alleged illegal activities.

Relying on the integrity of the Superseding Indictment, defense counsel reviewed more than a million documents to prepare for a case focused on the ninety-one Target Companies that released earnings reports on PR Newswire and Marketwired, primarily between 2011 and 2014. App.93a–94a. However, as the trial date approached and the Government exchanged its expert's report, stocks reflected in that report varied substantially from the companies listed in the Superseding Indictment. Faced with this moving target, defense counsel filed a Motion for a Bill of Particulars requesting, among other things, that the Government provide "a complete listing of the particular stocks and trades the Government contends were made based on inside information." E.D.N.Y. No. 1:15-cr-00381, Dkt. 174. Following a status conference discussing the bill of particulars, the parties agreed to try to work through defense counsel's request. E.D.N.Y. No. 1:15-cr-00381, Dkt. 179 at 31–32.

As trial approached, defense counsel's concerns intensified. After two years and ten months of pre-trial preparation, the Government still had not confirmed which specific trades it would claim were actually illegal. Instead of focusing on just the ninety-one Target Companies listed in the Superseding Indictment, the Government produced a list of nearly two thousand trades. App.40a–41a, *see also* E.D.N.Y. No. 1:15-cr-00381, Dkt. 252. Many of these trades occurred outside the time frame of the alleged conspiracy and were not even "inside the window," i.e., trades that took place between the time the newswires received the press releases and the public release of that

same information. App.40a. Accordingly, defense counsel renewed their request for a list of the specific trades that the Government claimed were illegal at a hearing just *two weeks* prior to trial: "[E]ssentially what the Government has disclosed to us is we're not going to tell you what the specific trades are." App.44a. The Court agreed it was "not an unreasonable question" and reminded the Government that "[y]ou don't convict on smoke." App.44a–45a.

Recognizing that time was short, the Court ruled on the day of the hearing. "I do not want this to linger. . . If you have specific trades that you are going to attempt to prove were illegal, not suspicious but manifestation of the conspiracy itself, give them a list of those trades and let's have it done with." App.47a–48a. The Government protested, claiming that it was an "enormous burden" and "unfair" to make the Government "try our case for counsel a week before we begin." App.51a. Besides, the Government argued, only the statistical pattern mattered, and it did not intend "to take the position at trial that each and every one of those thousands of trades was, in fact, based on material non-public information." App.49a.

In response, the Court stated the obvious: "[Y]ou've accused him of making illegal trades. At a minimum, he should know what trades you are accusing him of making." App.51a. The Government was instructed to provide a list—a subset of the "suspicious trades"—that the Government claimed were founded on illegally-obtained sources. App.47a–51a.

The resulting list provided by the Government, *seven days* before trial, contained 221 "Highlighted Stocks," only 26 of which overlapped with the Target Companies

in the Superseding Indictment. E.D.N.Y. No. 1:15-cr-00381, Dkt. 272. In addition, a majority of the Highlighted Stocks had been traded in a different timeframe and reported earnings on a different newswire than the Target Companies listed in the Superseding Indictment. *Id.*

But, despite the court's admonition seven days earlier, the Government did not constrain itself to that list at trial. Instead, through an expert witness, the Government broadened the list of companies and stocks even more, alleging that hundreds of other trades showed a suspicious "pattern of trading."[1] E.D.N.Y. No. 1:15-cr-00381, Dkt. 400 at 171–72. Its trial list of "suspicious trades" was geared heavily toward trades that occurred in 2015 even though the Superseding Indictment had primarily focused on earlier years. *Id.* A portion of the Target Companies were contained on the trial list, but so were hundreds of other stocks that had never been named or hinted at in the Superseding Indictment. The jury instructions did not inform the jury that it could only convict if it found illegal trades in the stocks specifically listed in the Superseding Indictment, as opposed to the hundreds of other stocks contained on the Government's trial list. After a day of deliberation, the jury found Mr. Korchevsky guilty on all counts.

Mr. Korchevsky appealed. The Second Circuit affirmed his securities fraud convictions. Moreover, while acknowledging that the trades of the other target companies listed at trial were "not specifically pleaded in the indictment," the Second Circuit nevertheless affirmed

1. Because there were no stolen press releases found on Mr. Korchevsky's electronic devices, the Government's case hinged on this "pattern."

the convictions, holding that the hundreds of additional stocks were within the "core of criminality" alleged in the Superseding Indictment and "simply served as additional examples of the same conduct. . ." App.22a–23a.

REASONS FOR GRANTING THE PETITION

Despite its importance as a cornerstone of a fair and impartial criminal justice system, the Grand Jury Clause has not been substantively visited by this Court for more than thirty years and this Court's seminal case on constructive amendment dates back sixty years. *See Stirone v. United States*, 361 U.S. 212 (1960). Since *Stirone*, Circuit Courts have largely followed the principles articulated there, constructing a body of case law that allows the Grand Jury Clause to serve its dual purpose as a bulwark against charges unfiltered by ordinary citizens and as a safeguard against trial by ambush. If the Second Circuit opinion is allowed to stand, all of that may change.

The Second Circuit's test, as applied in this case, sounds benign enough, but in practice it creates an enormous guessing game for defendants and virtually unbridled discretion for prosecutors. This Court need look no further than the record of the instant case to see how the doctrine can be abused. Prosecutors can indict on a specific list of ninety-one stocks, discard that list one week before trial, and produce a vastly different list of stocks (with as little as ten percent overlap), and then ignore even that list at trial and use an entirely different list of hundreds of "suspicious trades" that have little or no relationship to the original ninety-one stocks from the Superseding Indictment. *See* App.93a–94a., E.D.N.Y. No. 1:15-cr-00381, Dkt. 272, E.D.N.Y. No. 1:15-cr-00381, Dkt. 400 at 171–72.

The trial court, at a hearing just two weeks before trial where defense counsel requested a final list of illegal trades, warned the Government that "you don't convict on smoke." App.45a.

At trial, the Government proved the court wrong. The "fire" of the Targeted Companies listed in the Superseding Indictment was replaced by the thick smoke of hundreds of other "suspicious" stock trades, and the resulting conviction was affirmed both in the district court and at the Second Circuit on the theory that those new stocks were just window dressing, additional "examples" that did not implicate the Grand Jury Clause. This Court should grant this Petition, resolve the circuit split caused by the Second Circuit's opinion, and preserve the sanctity and purpose of the Grand Jury Clause.

This Court should also grant the Petition to provide additional guidance on what duties qualify as a predicate to Rule 10(b)5 violations and whether they existed in this case. Fifty years ago, this Court reversed the Second Circuit in the case of *Chiarella v. United States*, 445 U.S. 222 (1980). The issue was whether, under Section 10(b) of the Securities Exchange Act of 1934, and Rule 10(b)5 promulgated thereunder, anyone in possession of material non-public information had a duty to disclose that information to the other side of a transaction or refrain from trading. The Second Circuit said "yes." This Court said "no."

The lesson of *Chiarella* is that "[b]efore liability, civil or criminal, may be imposed for a Rule 10b-5 violation, it is necessary to identify the duty that the defendant has breached." *Chiarella*, 445 U.S. at 238 (Stevens J. concurring). That lesson was not lost on multiple circuit

courts, even though considerable variation has evolved in what types of duties will suffice as a predicate.

But in the instant case, the Second Circuit has created a corporate "outsider" exception that will swallow the *Chiarella* rule whole. Ignoring the fact that the defendant in *Chiarella,* like Mr. Korchevsky, was not a corporate insider in any sense, the Second Circuit nonetheless has proclaimed that while discussions of fiduciary duty may be relevant to insider trading, it has no relevance to "the securities fraud charged here: fraudulent trading in securities by an outsider." App.14a–15a. Without even mentioning this Court's opinion and discussion of fiduciary duty in *Chiarella*, much less distinguishing it, the Second Circuit created a split with other circuits by virtue of its novel duty-less fraud theory which ironically applies only to those outside corporate leadership. By granting this Petition, this Court now has the opportunity to address this issue and resolve the circuit split.

I. THE SECOND CIRCUIT'S RULING ON CONSTRUCTIVE AMENDMENT, IF ALLOWED TO STAND, WOULD UNDERMINE THE GRAND JURY CLAUSE AND CREATE A CIRCUIT SPLIT ON HOW THIS COURT'S OPINION IN *STIRONE* SHOULD BE APPLIED.

A. The Grand Jury Clause is intended to restrain Government overreach and prevent trial by ambush, both of which happened here.

The Grand Jury Clause provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" U.S. Const. amend. V, cl. 1. When the proof at trial

so varies from the facts alleged in the indictment that "the defendant's substantial right to be tried *only on* charges presented in an indictment returned by a grand jury" is destroyed, a constructive amendment has occurred. *Stirone v. United States*, 361 U.S. 212, 217 (1960) (emphasis added); *see also United States v. Spoor*, 904 F.3d 141, 152 (2d Cir. 2018).

"The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law." *United States v. Mandujano*, 425 U.S. 564, 571 (1976). "Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgement of a representative body of citizens acting under oath and under judicial instruction and guidance." *Id.*

The grand jury thus serves both to restrain prosecutors from overreach in charging defendants and provides those same defendants with concrete notice of the crimes for which they are charged and on which they will be tried. It is our greatest safeguard against trial by ambush. This case presents a perfect opportunity for the Court to affirm the importance of the Grand Jury Clause and its intended purpose of allowing defendants to effectively prepare for trial. *See Schmuck v. United States*, 489 U.S. 705, 718 (1989).

The following procedural facts are not in dispute: (1) The Superseding Indictment was a specific indictment (not a general charge) alleging illegal trades in ninety-one "Target Companies," listed by name, with trades occurring primarily between 2011 through 2014, App.93a–

94a; (2) As late as *two weeks* before trial, after years of discovery and a production by the Government of more than a million documents, the Government still had not informed defense counsel of the specific trades it would claim at trial were illegal; App.47a–48a; (3) At a hearing *two weeks* before trial, the Court correctly ruled that the defense was entitled to know the "specific trades that [the Government was] going to attempt to prove were illegal," and ordered the Government to produce such a list. App.48a. The Government argued that it should instead merely be required to show general patterns of trading and did not need to specify particular trades, App.48a–51a, but the trial court disagreed, correctly stating that "you don't convict on smoke;" App.45a; (4) The resulting list provided by the Government *seven days* before trial contained 221 "Highlighted Stocks," only 26 of which overlapped with the Target Companies in the Superseding Indictment. *Compare* App.93a–94a, *with* E.D.N.Y. No. 1:15-cr-00381, Dkt. 272. In addition, a majority of the Highlighted Stocks had been traded in a different timeframe and reported earnings on a different newswire than the Target Companies listed in the Superseding Indictment, *Id.*; and (5) At trial, the Government broadened the list of companies and stocks even more, alleging that hundreds of trades in other stocks showed a suspicious "pattern of trading," while focusing its proof on trades in 2015 even though the Superseding Indictment was focused on earlier years. E.D.N.Y. No. 1:15-cr-00381, Dkt. 400 at 171–72.

The Second Circuit found that these wholesale changes "simply served as additional examples of the same conduct constituting the charged scheme." App.22a. Unbothered by the fact that these new trades were "not

specifically pleaded in the indictment," the panel held that they were "plainly within the charged core of criminality" and therefore no constructive amendment or variance occurred. App.22a–23a.

The Second Circuit's conclusion ignores both the language and function of the Superseding Indictment. That indictment does not allege conspiracies and merely give "examples" of illegal trades. Instead, it specifically identifies ninety-one Target Companies as the only ones that had their confidential press releases stolen from certain newswires before they were publicly released. App.93a–94a, 99a. Thus, the Target Companies became an essential element of every count. Count 1 of the Superseding Indictment, Conspiracy to Commit Wire Fraud, was based solely on an attempt to defraud "the Victim Newswires and the Target Companies by means of materially false and fraudulent pretenses…" App.106a–107a. Count 2, Conspiracy to Commit Securities Fraud and Computer Intrusions, alleged that the defendants "engag[ed] in acts, practices and courses of business which would and did operate as a fraud and deceit upon investors and potential investors in the Target Companies, in connection with the purchase and sale of investments in the Target Companies . . . ." App.108a. Counts 3 and 4, alleging Securities Fraud, based those charges on "fraud and deceit upon one or more investors or potential investors in the Target Companies. . . ." App.111a–112a. And Count 5, a derivative money laundering count, incorporated this same language alleging fraud only with regard to the Target Companies. App.113a. Nowhere did the Superseding Indictment mention, or even imply, that the Target Companies were mere examples of illegal trades or a subset of a larger pattern of such trades.

Nowhere did the Superseding Indictment refer to illegal trades that occurred outside the Target Companies.

But a week prior to trial the Government's already fluid case morphed once more, and the Government claimed that there were now 221 "Highlighted Stocks," only 26 of which were mentioned in the Superseding Indictment. And then at trial, the Government's case evolved again, eschewing both the alleged Target Companies and the Highlighted Stocks in favor of an entirely new collection of "Suspicious Stocks." The stocks presented at trial were from a few Target Companies, but the vast majority were from companies not even mentioned in the Superseding Indictment. The Court's jury instructions made no effort to limit the jury's consideration of illegal trades to only the stocks listed in the Superseding Indictment. It is therefore impossible to know whether Mr. Korchevsky was convicted based on the stocks listed in the Superseding Indictment, stocks not listed in the Superseding Indictment, or some combination of both. Taken as a whole, this all amounts to a constructive amendment.

B. The Second Circuit's opinion is at odds with this Court's jurisprudence and settled precedence from at least three other circuits.

In *Stirone v. United States*, this Court's seminal case on constructive amendment, a grand jury returned an indictment against a union leader who allegedly interfered with the importation of sand into the state of Pennsylvania to be used by a manufacturer of ready-mix concrete. 361 U.S. 212, 214 (1960). But during the trial, the Government also offered evidence that the union leader had interfered with steel shipments from a plant in Pennsylvania headed

to other states. *Id.* Because one of the elements of the Hobbs Act violation at issue was whether the interference had an effect on interstate commerce, the trial court instructed the jury that Stirone's guilt could be based on either a finding that "(1) sand used to make the concrete had been shipped from another state into Pennsylvania," or (2) the resulting concrete was ultimately used for constructing a mill "which would manufacture [ ] steel to be shipped" outside Pennsylvania. *Id*. (internal quotation marks omitted).

This Court noted that the presented evidence at trial, combined with the jury instructions, added "a new basis for conviction" and that doing so was "neither trivial, useless nor innocuous." *Id*. at 217. "Deprivation of such a basic right [as the Grand Jury Clause] is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id.*

Allowing an additional basis for conviction, as happened in *Stirone*, puts the defendant at the mercy of the whims of the prosecuting attorney or trial court. Such conduct requires reversal:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer,' may be frittered away until its value is almost

> destroyed. . .Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney.

Stirone, at 216–17 (internal citations omitted). These principles were restated by this Court in *United States v. Miller*, 471 U.S. 130 (1985), a case in which the defendant attempted to claim the inverse, that a narrowing of an indictment at trial was also grounds for reversal. *Id.* at 138. The Court rejected this argument, but wholly affirmed the holding in *Stirone* regarding impermissible "broadening" of a specific indictment. *Id.* at 138–40.

Moreover, no less than three circuits have applied the principles articulated in *Stirone* to find constructive amendments in cases similar to the one at bar. The Second Circuit stands alone in holding that a conviction may be based either on crimes articulated in the grand jury indictment or on alleged crimes introduced at trial but not found in the indictment. App.22a–23a (quoting *United States v. Salmonese*, 352 F.3d 608, 621 (2d Cir. 2003)).

The Ninth Circuit has applied *Stirone's* principles twice to find a constructive amendment on similar facts. In *Howard v. Daggett*, 526 F.2d 1388 (9th Cir. 1975), Howard appealed the denial of his 28 U.S.C. § 2255 petition. The petition challenged the jury instructions at Howard's trial, claiming that they constructively amended the charges from the indictment. Howard had been charged with traveling in interstate commerce with the intent or purpose to promote prostitution. *Id.* at 1389. The grand jury indictment specifically identified two women as the

alleged victims of the scheme. *Id.* "The grand jury might have indicted appellant in a general allegation, without specifying the women to whom his alleged illegal acts or purposes related. But it did not do so." *Id.* at 1390. Yet at trial the prosecution presented evidence that the defendant had relationships with several other women, allowing "the jury to convict appellant on the basis of evidence produced at trial regarding women other than the two named in the indictment." *Id.* The court found this to be "an impermissible amendment of the indictment that destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Id.* (internal quotation marks omitted). Accordingly, the denial of Howard's 28 U.S.C. § 2255 petition was reversed. *Id.*

More recently, the Ninth Circuit considered a case involving identity theft with the same issue presented. *United States v. Ward*, 747 F.3d 1184, 1186 (9th Cir. 2014). The defendant in *Ward* was indicted for aggravated identity theft pertaining to two named victims. *Id.* at 1186–87. The identity of the victims was a necessary element of the offense because the prosecution had to prove that the victim was a "real person." *Id.* at 1192. But at trial, the jury heard testimony that the defendant victimized three other people. *Id.* The prosecution compounded the error by referencing those additional persons during both its opening statement and closing argument. *Id.* The jury was instructed that it could convict the defendant if he stole the identity of "a real person" without stating that it had to be one of the persons named in the indictment. *Id.* Thus, a constructive amendment had occurred:

> On those facts, we simply cannot know the basis for the jury's [] convictions. The convictions might have been based on the conduct charged in the indictment, involving [the named victims]. But they could just have easily been based on uncharged conduct involving the [three additional victims]. In light of that uncertainty, Ward may have been "convicted on a charge the Grand Jury never made against him," so a constructive amendment necessarily occurred here.

Id. (internal citations omitted).[2]

The Tenth Circuit confronted a similar scenario in the context of a former doctor who was convicted of making false statements to the Drug Enforcement Administration (DEA). *United States v. Miller*, 891 F.3d 1220, 1225 (10th Cir. 2018). At trial, the Government not only introduced evidence of the false statement alleged in the indictment, but also of another false statement allegedly made on the same application. *Id.* at 1232. Even under a plain error review, the court found a constructive amendment because "the evidence presented at trial, together with the jury instructions, *raises the possibility* that the defendant was convicted of an offense other than that charged in the indictment." *Id.* at 1231 (emphasis in original) (internal quotation marks omitted). As was the case in Mr. Korchevsky's trial, the proof at trial in *Miller*

2. The government argued that the jury had a copy of the indictment while deliberating so there was no risk it might have convicted the defendant on uncharged conduct, but the Ninth Circuit rejected that rationale. *Id.*

had broadened the basis on which the defendant could be found guilty:

> "In assessing a claim of an impermissible constructive amendment, our ultimate inquiry is whether the crime for which the defendant was convicted at trial was charged in the indictment; to decide that question, we therefore compared the indictment with the district court proceedings to discern if those proceedings broadened the possible basis for conviction beyond those found in the operative charging document."

Id. at 1231–32 (quoting *United States v. Farr*, 536 F.3d 1174, 1180 (10th Cir. 2008)).

The district court could have corrected the issue using jury instructions to narrow the basis of the false statement back to the one specified in the indictment, but did not do so. *Id.* at 1232. As in the present case, at no time was the jury told it could only find the defendant guilty of the specific illegal conduct charged in the indictment. *Id.* The trial court's failure to do so, coupled with the evidence presented at trial, required vacating Miller's false-statement conviction. *Id.* at 1238.

Similarly, in the instant case the trial court did not narrow the alleged illegal conduct, instead instructing the jury it could find Mr. Korchevsky guilty if he committed fraud upon "a purchaser or seller" with no limitations regarding which stocks they must be trading in. E.D.N.Y. No. 1:15-cr-00381, Dkt. 361 at 32. "[A] constructive amendment occurs when the indictment

alleges a violation of the law based on a specific set of facts, but the evidence and instructions then suggest that the jury may find the defendant guilty based on a different, even if related, set of facts." *United States v. Miller*, 891 F.3d at 1234; *see also United States v. Bishop*, 469 F.3d 896, 901–03 (10th Cir. 2006) (overruled in part on other grounds by *Gall v. United States*, 552 U.S. 38 (2007) (holding that constructive amendment occurred when the indictment charged defendant with unlawfully possessing "any ammunition and firearm . . . shipped in interstate commerce" and identified the firearm at issue but then presented evidence of an additional firearm at trial)); *United States v. Farr*, 536 F.3d 1174, 1180–86 (10th Cir. 2008) (finding a constructive amendment occurred when the Government opted to include in its indictment particulars about the nature of a tax evasion charge but introduced other tax evasion evidence at trial).

Likewise, the Seventh Circuit has drawn the same line when evidence introduced at trial on an essential element of a charge goes beyond specific charges set forth in an indictment. In *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991), the defendant was indicted for using and carrying "a firearm, to wit: a Mossberg rifle" in relation to a drug trafficking offense, *id.* at 374. At trial, the Government introduced evidence of two handguns and the jury was instructed that it could convict on proof that the defendant "intentionally used or carried *a* firearm." *Id.* at 374–75 (emphasis in original). The court held that when the specific language in the indictment provided details beyond the general elements of a crime, the specific details became an essential element of the charged crime and must be proven beyond a reasonable doubt. *Id.* at 379 ("By the way the government chose to frame Leichtnam's indictment, it made the Mossberg an essential part of the

charge and limited the basis for possible conviction to the Mossberg.").[3]

These cases all fit the same mold. A specific indictment "'becomes an essential and delimiting part of the charge itself, such that if an indictment charges particulars, the jury instructions and evidence introduced at trial must comport with those particulars.'" *Miller*, 891 F.3d at 1235 (quoting *Farr*, 536 F.3d at 1181). When additional evidence is introduced at trial without a limiting jury instruction, such that it becomes impossible to know whether the defendant was convicted on the specific instances cited in the indictment or the additional instances introduced at trial, a constructive amendment has occurred and the conviction on that evidence must be vacated.

In contrast to this Court's opinion in *Stirone* and the rulings of at least three other circuits, the Second Circuit crafted an entirely different rule for Mr. Korchevsky.

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3. Other cases in the Seventh Circuit have relied on *Leichtnam* in holding that a constructive amendment had occurred. For example, in *United States v. Pierson*, 925 F.3d 913 (7th Cir. 2019), *United States v. Pierson*, 925 F.3d 913 (7th Cir. 2019) (overruled in part on other grounds by *Pierson v. United States*, 140 S. Ct. 1291 (2020)), the court found a constructive amendment when the indictment specified one gun but testimony about an additional gun was introduced at trial. *Id.* at 920. However, in *Pierson*, unlike the case at bar, the defendant had not objected below and therefore the court analyzed the constructive amendment issue under a plain error standard. While stating that additional guidance from this Court would have been helpful, the Seventh Circuit panel found that the constructive amendment was not plain error. *Id*. at 923–24 ("[N]o Supreme Court decision provides direct guidance for this analysis. Cases from this circuit and others have, at times, given weight to such factors but do not provide a clear rule.").

When an indictment lists the specific Target Companies at issue, and only those Target Companies, and then goes on to incorporate those Target Companies and only those Target Companies into each count of the Superseding Indictment, such language can now be dismissed in the Second Circuit as mere surplusage. Instead of looking at the particulars of the crime as set forth in the indictment, the panel looked at "the core of criminality of an offense . . . in general terms; the particulars of how a defendant effected the crime falls outside that purview." App.22a. The panel therefore concluded that the illegal trades introduced at trial were merely "additional examples of the same conduct" and "although 'not specifically pleaded in the indictment, [these trades] are plainly within the charged core of criminality.'" *Id.* at 22a–23a (quoting *Salmonese*, 352 F.3d at 621).

But the Grand Jury Clause does not allow the prosecution to indict on certain specifically alleged trades and then try the case on a vastly different set of trades. It is the mere *possibility* that the defendant was convicted on conduct not specified in the indictment that triggers the constructive amendment analysis. Moreover, the Government sprung its two hundred plus new companies not named in the indictment on Mr. Korchevsky and his lawyers a week or so before trial, leaving inadequate time to prepare a defense. This is trial by prosecutorial ambush, the very thing the Grand Jury Clause is designed to prevent. *See Schmuck*, 489 U.S. at 718 (highlighting "the right of the defendant to notice of the charge brought against him").[4]

4. Even if this Court were to conclude that the changes in the allegedly illegal stock trades do not constitute a constructive amendment, those vast changes would at least constitute a

Allowing the Second Circuit's decision to stand would undermine "the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer.'" *Stirone,* 361 U.S. at 216. It would also, as this Court stated in *Stirone*, "fritter[] away [the Grand Jury Clause] until its value is almost destroyed." *Id.*

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variance. "A variance . . . occurs when the charging terms remain unaltered but the facts proven at trial differ from those alleged in the indictment." *United States v. Kaplan*, 490 F.3d 110, 129 (2d Cir. 2007). Such a variance requires reversal of the district court's judgment if the defendant was prejudiced. *Id.* There can be no doubt that Mr. Korchevsky was prejudiced when the government changed its list of allegedly illegal trades at trial. First, the changes prejudiced Mr. Korchevsky's right to know the actual charges against him and prepare his defense—the very purpose of an indictment. Second, the changes prejudiced Mr. Korchevsky's ability to cross-examine witnesses at trial. Unlike the specific allegations in the Superseding Indictment that contained the list of Target Companies and, by extension, a list of supposedly illegal trades, by the time of trial the government took the nebulous position that individual trades did not matter, only the pattern mattered. E.D.N.Y. No. 1:15-cr-00381, Dkt. 400 at 171. Thus, attempts to defend Mr. Korchevsky by showing how individual trades could not have been based on inside information were met with the response from the government's main expert that only the pattern mattered. *See* E.D.N.Y. No. 1:15-cr-00381, Dkt. 400 at 176. That drastic change alone is enough to constitute a constructive amendment, but at the very least it is a prejudicial variance that should have the same effect.

II. THE SECOND CIRCUIT'S RULING ON THE SECURITIES FRAUD COUNTS CONFLICTS WITH THOSE OF OTHER CIRCUITS AND IGNORES THIS COURT'S RULINGS IN *CHIARELLA* AND *O'HAGAN*.

Counts Three and Four of the Superseding Indictment allege violations of securities laws (Rule 10b-5 of the Rules and Regulations of the SEC and violations of Title 17, CFR Sec. 240.10b-5) for trading in stocks whose earnings were reported on PR Newswire (Count Three) and Marketwired (Count Four). App.110a–112a. Count Two alleges a Conspiracy to Commit Securities Fraud and Computer Intrusions and is premised on the same conduct. App.107a–110a. In each count the Government identifies the victims of the allegedly fraudulent behavior as one or more "investors or potential investors" on the other side of securities transactions from Mr. Korchevsky. App.108a, 111a, 112a. That theory—that Mr. Korchevsky had a duty to potential purchasers to disclose information he had obtained illegally—belies this Court's precedent and creates a conflict between the Second Circuit and other circuits that have considered the issue.

The Second Circuit's opinion decouples the fraud and deception required for securities law violations from any duty that gives rise to the fraud except an esoteric duty to the general market. That theory contradicts this Court's opinion in *United States v. O'Hagan*, 521 U.S. 642 (1997), which held that there was no general duty to disclose non-public material information to parties on the other side of transactions, *id. at* 661, and renders *Chiarella*, *O'Hagan*, and all of their progeny moot. Why even discuss the concept of duty for fraudulent trading

(whether classical insider trading or misappropriation trading) if you can just infer a duty to the other side of the transaction when anyone buys or sells a stock? In that respect, the Second Circuit opinion not only creates a split in the circuits, it creates a leviathan that swallows whole the rules painstakingly developed in the wake of this Court's *Chiarella* and *O'Hagan* opinions about the duties that can or cannot form the basis of a securities fraud claim.

A. The Second Circuit opinion fails to follow this Court's holdings in *O'Hagan* and *Chiarella* with regard to corporate "outsiders."

Section 10(b) of the Securities Exchange Act of 1934 states that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

Pursuant to its rulemaking authorization under the Statute, "the [Securities and Exchange] Commission has adopted Rule 10b-5, which . . . provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, [or] . . .(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . . in connection with the purchase or sale of any security.

O'Hagan, 521 U.S. at 651 (quoting 17 CFR § 240.10b–5).

This Court has recognized two general types of fraudulent or deceptive trading cases. First is the "traditional" or "classical theory" of insider trading, in which a corporate insider trades in the securities of his or her corporation on the basis of material nonpublic information that he or she has obtained by virtue of his or her position in the corporation. *United States v. O'Hagan*, 521 U.S. 642, 651–52 (1997). Second is a "misappropriation theory" where a person who is not an insider to the company nevertheless comes into possession of material non-public information through breach of a fiduciary duty to a third party. *Id.* At the heart of both of these theories is a breach of fiduciary duty.

A corporate insider (or his tipee) who trades on his own company's stock using inside information has employed "a 'deceptive device' under §10(b)" because "a relationship of

trust and confidence" exists and that relationship "gives rise to a duty to disclose [or to abstain from trading] because of the 'necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of . . . uninformed . . . stockholders.'" *Id.* at 652. This is the "classical theory."

The misappropriation theory, on the other hand, applies when a fiduciary obtains confidential information from his employer (or principal) about another company and trades on that information, thereby "converting the principal's information for personal gain." *Id.* Such actions constitute a "fraud akin to embezzlement." *Id.* at 654.

As this Court explained in *O'Hagan:*

> The two theories are complementary. . . The classical theory targets a corporate insider's breach of duty to shareholders with whom the insider transacts; the misappropriation theory outlaws trading on the basis of nonpublic information by a corporate "outsider" in breach of a duty owed not to the trading party, but to the source of the information.

Id. at 652–53.

But this Court has never sanctioned, and on the contrary, has specifically rejected, a theory that *all traders* have a duty to disclose material, nonpublic information to the general market. "There is under § 10(b). . . no 'general duty between all participants in market transactions to forgo actions based on material, nonpublic information.'" *Id.* at 661.

The facts before this Court in *Chiarella* make it clear that even company "outsiders" must violate a specific duty to trigger 10(b)5 criminality. The defendant in *Chiarella* was an employee of a financial printing press who was able to deduce the names of companies who were the targets of takeover bids. *Chiarella*, 445 U.S. at 224. He traded on that knowledge and was convicted of violating the same securities laws at issue here. The Second Circuit Court of Appeals "affirmed the conviction by holding that '*[a]nyone*—corporate insider or not—who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose'." *Id.* at 231 (emphasis in original) (quoting *United States v. Chiarella*, 588 F.2d 1358, 1365 (2d Cir. 1978). But this Court reversed.

This Court's opinion first recognized that the defendant was a quintessential outsider to the company whose stock was being sold. "In this case, the petitioner was convicted of violating § 10(b) although he was not a corporate insider and he received no confidential information from the target company." *Id.* at 231. Next, this Court recognized that Chiarella had no special relationship with the sellers of the target companies' securities.

> [P]etitioner had no prior dealings with them. He was not their agent, he was not a fiduciary, he was not a person in whom the sellers had placed their trust and confidence. He was, in fact, a complete stranger who dealt with the sellers only through impersonal market transactions.

Id. at 232–33.

That left only the theory that a company outsider had "a general duty between all participants in market transactions to forgo actions based on material, nonpublic information." *Id.* at 233. But this Court explicitly rejected "such a broad duty, which departs radically from *the established doctrine* that duty arises from a specific relationship between two parties." *Id.* (emphasis added).

Now, fifty years later, with *Chiarella* still serving as the law of this Court and its principles applied in most circuits, the Second Circuit is back to proposing the same "general duty" couched in slightly different verbiage. According to the Second Circuit's opinion this time, a fiduciary duty may be relevant to insider trading allegations, but "it need not be shown to prove the securities fraud charged here: fraudulent trading in securities by an outsider." App.14a–15a. But this analysis ignores both this Court's *Chiarella* and *O'Hagan* opinions, analyzing the fiduciary duties of an "outsider," and the explicit language of the Superseding Indictment which alleges, in no uncertain terms, that Mr. Korchevsky defrauded "investors and potential investors in the Target Companies." App.108a, 111a, 112a.

As was true of the defendant in *Chiarella*, Mr. Korchevsky had no prior dealings with the investors. He was neither their agent, their fiduciary, nor a person in whom they had placed their trust and confidence. He was, in fact, a complete stranger who dealt with the investors only through impersonal and arms-length market transactions.

That relationship was insufficient to establish a violation of securities law in *Chiarella* and, for the same reasons, is not enough here.

B. The Second Circuit's Opinion clashes with opinions of other circuits that follow the principles articulated by this Court in *Chiarella* and *O'Hagan*.

In contrast to the Second Circuit, other circuits have not brushed aside the duty analysis of a securities fraud claim but have instead applied the principles articulated in *Chiarella* and *O'Hagan*, occasionally expanding the scope of liability, but always mindful of the parameters established by this Court.

The Third Circuit, for example, confronted a matter of first impression in the case of *United States v. McGee*, 763 F.3d 304 (3d Cir. 2014). McGee was a financial advisor with more than twenty years of experience who met a man named Christopher Maguire, an insider of a publicly traded Philadelphia company, through Alcoholics Anonymous ("AA"). *Id.* at 308. For nearly ten years, McGee mentored Maguire and "they shared intimate details about their lives to alleviate stress and prevent relapses." *Id.* at 309. Under the principles of AA, they always kept those communications confidential. *Id.* However, when McGuire shared details about negotiations for the sale of his company, McGee took advantage of the situation and purchased a substantial amount of the company's stock on borrowed money. *Id.* The issue before the Third Circuit was whether this constituted securities fraud under the principles articulated by this Court given the confidential nature of the relationship between the two men.[5]

5. In *O'Hagan,* this Court suggested that only a specific relationship between two parties would trigger a duty to disclose or risk misappropriation. 521 U.S. at 661. Defining the contours of such relationships fell to the lower courts and led to inconsistent results. Accordingly, the SEC promulgated rules under 10b5-2 to

While recognizing that some type of duty had to exist in order to trigger the misappropriation theory, the Third Circuit "join[ed] our sister circuits in recognizing that the Supreme Court 'did not set the contours of a relationship of trust and confidence giving rise to the duty to disclose or abstain and misappropriation liability.'" *Id.* at 314 (quoting *SEC v. Cuban*, 620 F.3d 551, 555 (5th Cir. 2010)) The Third Circuit found that the expectation of privacy and confidentiality inherent in this mentor/mentee relationship triggered the duty to disclose or refrain from trading. *Id.* at 317–18. But unlike the Second Circuit, at no point did the Third Circuit simply sweep aside the entire duty analysis and conclude that since McGee was an "outsider" to the company, that no such relationship need be shown. On this point, the Second Circuit's expansive opinion stands alone, creating a circuit split that this Court ought to address.

C. The Second Circuit's Opinion is based on a fraud-on-the-market theory even though it does not follow this Court's guidance for such cases or cite any evidence to support such a claim.

In essence, the Second Circuit applied a "fraud-on-the-market" theory against Mr. Korchevsky, even though there was no evidence that his trading had any impact on the market price of the stocks in question. The Superseding Indictment left no other choice, claiming that the only victims were "investors and potential investors

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"clarify and enhance" the parameters of the types of relationships that would trigger the misappropriation theory. One of those categories included "[w]henever a person agrees to maintain information in confidence…" 17 C.F.R. § 240.10b5-2(b)(1) (2002).

in the Target Companies," App.108a, 111a, 112a, as opposed to someone else with whom Mr. Korchevsky had a confidential relationship.

But a "fraud on the market theory" cannot work under these circumstances and, in any event, no evidence was introduced to show that investors or potential investors lost even a dime. The trades were made blindly and the sellers involved in the transactions wanted to sell, irrespective of whether Mr. Korchevsky was going to buy, or vice versa.

This Court addressed a fraud-on-the-market theory in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Though *Basic* involved a private right of action under § 10(b) and Rule 10b-5, one of the issues addressed was whether the lower courts could presume a fraud on the market when the defendant made false statements about a potential merger even if the plaintiff had not shown an impact on any individual investor. This Court answered in the affirmative, permitting a fraud-on-the-market presumption, but only if (1) defendants "made public, material misrepresentations and (2) [the victims] sold Basic stock in an impersonal, efficient market." *Id.* at 248. There is sound policy underlying that test for modern markets:

> An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

Id. at 247.

But unlike the defendants in *Basic*, Mr. Korchevsky made no public representations whatsoever. Nor did the Government allege or attempt to prove that his small number of trades had any impact on the market or that any individual investor received less on a stock sale than they would have received absent any of his alleged actions.

In that respect, the instant case parallels the Fifth Circuit case of *Regents of the University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007). The defendants in that case were banks for Enron that allegedly allowed Enron to temporarily take liabilities off its books and book revenue from transactions that actually should have been logged as debt. *Id.* at 377. But the banks made no public statements and this was fatal to a fraud-on-the-market theory:

> To qualify for the presumption, however, a plaintiff must not only indicate that a market is efficient, but also must allege that the defendant made public and material misrepresentations; i.e., the type of fraud on which an efficient market may be presumed to rely. These plaintiffs have not alleged such fraud.

Id. at 385–86.

In the instant case, the Government's Superseding Indictment claims that the victims for the wire fraud count (Count 1) were the hacked newswires and target companies. App.106a. But on the securities fraud counts (Counts 3 and 4), including the Conspiracy to Commit

Securities Fraud (Count 2), the Government intentionally and specifically changed its theory and alleged that the sole victims were "investors and potential investors of the Target Companies." App.108a, 111a, 112a. Having demonstrated no impact on such purchasers and potential purchasers, and having not shown any public misrepresentations by Mr. Korchevsky that would impact the market generally, this fraud-on-the-market theory must fail. Accordingly, Mr. Korchevsky's convictions on those counts present this Court with an ideal opportunity to clarify the necessity of analyzing duty in this context while also defining the scope of what types of relationships do (or do not) give rise to potential criminal or civil exposure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JULY 19, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM, 2019

Nos. 19-197-cr, 19-780-cr

UNITED STATES OF AMERICA,

Appellee,

v.

VLADISLAV KHALUPSKY,
VITALY KORCHEVSKY,

Defendants-Appellants.[*]

February 11, 2020, Argued;
July 19, 2021, Decided

Appeal from the United States District Court
for the Eastern District of New York.

Before: WALKER, PARKER, and CARNEY, *Circuit Judges.*

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[*] The Clerk of Court is respectfully directed to amend the caption as set forth above.

Appendix A

For years, defendants-appellants Vladislav Khalupsky and Vitaly Korchevsky used information from stolen, pre-publication press releases to execute advantageous securities trades. Their trading was facilitated by intermediaries who paid hackers for the stolen press releases, provided the releases to Khalupsky and Korchevsky, and funded brokerage accounts for them to use in trades. Ultimately, the defendants' illicit trades netted profits in excess of $18 million.

Following a jury trial in the United States District Court for the Eastern District of New York (Raymond J. Dearie, J.), Khalupsky and Korchevsky were convicted of conspiracy to commit wire fraud, conspiracy to commit securities fraud and computer intrusions, securities fraud, and conspiracy to commit money laundering. They now appeal, contending that the evidence was insufficient to support conviction, venue was improper on the securities fraud counts, the government's proof at trial constructively amended the indictment, the district court erred by instructing the jury on conscious avoidance, and the district court erred in how it responded to a jury note. Finding no merit in these arguments, we **AFFIRM** the judgments of conviction.

JOHN M. WALKER, JR., *Circuit Judge*:

For years, defendants-appellants Vladislav Khalupsky and Vitaly Korchevsky used information from stolen, pre-publication press releases to execute advantageous securities trades. Their trading was facilitated by intermediaries who paid hackers for the stolen press

releases, provided the releases to Khalupsky and Korchevsky, and funded brokerage accounts for them to use in trades. Ultimately, the defendants' illicit trades netted profits in excess of $18 million.

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BACKGROUND

In 2010, brothers Arkadiy and Pavel Dubovoy approached Korchevsky, a hedge fund manager and investment advisor, to seek his help implementing a scheme to use nonpublic information to trade on the stock market. The nonpublic information was coming from hackers in

1. The resolution of this appeal was held pending resolution of the appeal to this court in *United States v. Chow*, No. 19-325, which in part concerned a related legal issue. *See infra* Part II. *Chow* was decided on April 6, 2021. *United States v. Chow*, 993 F.3d 125 (2d Cir. 2021).

Ukraine, who hacked into three newswires (PR Newswire, Marketwired, and Business Wire) that disseminate press releases from publicly traded companies. The hackers obtained the press releases containing crucial financial information before the releases were published. Then, they saved the stolen releases onto a web-based server to which the Dubovoys also had access.

The Dubovoys provided Korchevsky with login credentials to review some of the stolen releases in order to convince him of the nascent scheme's potential. Korchevsky looked at the releases and agreed that advance information of the sort could be traded upon profitably. Accordingly, Arkadiy Dubovoy opened and funded brokerage accounts, in which Korchevsky would trade. Arkadiy's son, Igor Dubovoy, equipped Korchevsky with computers, phones, and a software program enabling easy access to the server hosting the stolen releases.

From January 2011 until February 2015, Korchevsky executed advantageous trades using the information in the stolen press releases. In return for trading on Arkadiy's behalf, he received a percentage of the profits. Korchevsky did most of the trading in the window of time after the press release was uploaded to a newswire's internal computer system but before it was publicly disseminated (i.e., trading "in-window"). He then closed on his trading position after the release became public and the market had reacted to its contents. During the scheme, Korchevsky ultimately amassed roughly $15 million in net profits—a 1,660% return on investment—in Arkadiy's brokerage accounts.

The Dubovoys eventually decided to bring in another trader, Khalupsky. Khalupsky owned a trading company in Ukraine and used its employees to conduct trading as part of the charged scheme. As with Korchevsky, the Dubovoys shared the stolen releases with Khalupsky, funded brokerage accounts in Arkadiy's name, and paid Khalupsky a piece of the profits. These trades, too, were generally initiated in-window. The Khalupsky trades yielded roughly $3.1 million in net profits during the scheme.

The scheme faltered for a time after the relationship with the hackers soured. Arkadiy had opened additional brokerage accounts unknown to the hackers in order to exclude them from some of the profits. The hackers grew suspicious and, in early 2014, stopped sending stolen press releases to the Dubovoys. Without access to the nonpublic information, Korchevsky's trading volume and profits plummeted.

By late 2014, the Dubovoys found another Ukrainian hacker who could steal pre-publication press releases. This new hacker charged more for the service, however, so the Dubovoys questioned whether the arrangement would still be worthwhile. Korchevsky insisted that the Dubovoys secure this new source of press releases. They did, and the scheme continued, albeit in modified form. Rather than trading directly out of Arkadiy's brokerage accounts, Korchevsky now received the stolen press releases from Igor, reviewed them, and sent him a coded text message telling him how much of which stocks he should purchase. The scheme continued into 2015.

Appendix A

On August 15, 2015, a grand jury returned the first indictment in this case, charging Khalupsky and Korchevsky with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349 (Count One); conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371 (Count Two); securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff (Counts Three and Four); and money laundering conspiracy, in violation of 18 U.S.C. § 1956(h) (Count Five). On September 13, 2016, a second grand jury returned a superseding indictment, replicating the first one but adding computer intrusions as an object of the conspiracy to commit securities fraud charge in Count Two.

Following a three-week jury trial that concluded in July 2018, Khalupsky and Korchevsky were convicted on all counts. The district court sentenced Khalupsky to four years' imprisonment to be followed by two years' supervised release, and ordered him to forfeit $397,281.12 and pay $339,062.99 in restitution. It sentenced Korchevsky to five years' imprisonment to be followed by three years' supervised release, and ordered him to forfeit $14,452,245 and pay $339,062.99 in restitution. This appeal followed.

DISCUSSION

Korchevsky's principal argument on appeal is that the evidence was insufficient to establish his participation in the single charged conspiracy with Khalupsky. Korchevsky also argues that: the evidence was insufficient to support the securities fraud convictions; venue was improper in the Eastern District of New York (EDNY) for the securities

fraud counts (an argument Khalupsky joins); the proof at trial constituted either a constructive amendment of the superseding indictment or prejudicial variance from it; and the district court erred by giving a particular exhibit to the jury in response to a note during deliberations. Khalupsky additionally asserts that the district court erred in charging the jury on conscious avoidance (an argument Korchevsky joins in his reply brief). Each of the defendants also adopted the arguments of the other pursuant to Federal Rule of Appellate Procedure 28(i). None of the arguments of either defendant, however, is persuasive.

I. Sufficiency of the Evidence

Korchevsky challenges the sufficiency of evidence in support of both his conspiracy convictions and his substantive securities fraud convictions. In challenging the sufficiency of the evidence, Korchevsky "face[s] a heavy burden, as the standard of review is exceedingly deferential to the jury's apparent determinations."[2] "[W]e view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor."[3] When the sufficiency challenge is to a conspiracy conviction, "deference to the jury's findings is especially important because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a

2. *United States v. Flores*, 945 F.3d 687, 710 (2d Cir. 2019) (internal quotation marks omitted).

3. *Id.* (internal quotation marks omitted).

conspiracy can be laid bare in court."[4] We will uphold the challenged convictions if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[5] Here, we find no basis to disturb the convictions.

A. Conspiracy

To challenge his conspiracy convictions, Korchevsky makes the following argument: co-conspirators must know one another, but the evidence established that he did not know Khalupsky, so the evidence cannot support his participation in one conspiracy with Khalupsky.[6] This argument fails because its premise is incorrect. Korchevsky and Khalupsky need not have known one another to be co-conspirators. The evidence was sufficient to support the defendants' knowing participation in a single conspiracy.

"Whether the government has proved a single or multiple . . . conspiracies is a question of fact for a properly instructed jury."[7] To prove conspiracy, "the government

4. *Id.* (internal quotation marks and alteration omitted).

5. *Id.*

6. Korchevsky also argues that, because he could not have been Khalupsky's co-conspirator, he suffered spillover prejudice by being tried jointly with Khalupsky. Because we find that the defendants were co-conspirators, we have no occasion to address this argument.

7. *United States v. Sureff*, 15 F.3d 225, 229 (2d Cir. 1994) (internal quotation marks omitted). The jury in this case was instructed only on the possibility of a single conspiracy, not on

must show that two or more persons entered into a joint enterprise for an unlawful purpose, with awareness of its general nature and extent."[8] It must "show that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal."[9] But "[t]he government need not show that the defendant knew all of the details of the conspiracy," "[n]or must the government prove that the defendant knew the identities of all of the other conspirators."[10] That is "especially [true] where the activity of a single person was central to the involvement of all" conspirators.[11] "Indeed, a defendant may be a co-conspirator if he knows only one other member of the conspiracy . . . ."[12]

Korchevsky contends that he was a member of one conspiracy with the Dubovoys, while Khalupsky was a member of an entirely separate conspiracy with the

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multiple conspiracies. Korchevsky does not challenge that decision on appeal.

8. *United States v. Torres*, 604 F.3d 58, 65 (2d Cir. 2010) (collecting cases).

9. *United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990) (internal quotation marks omitted).

10. *United States v. Huezo*, 546 F.3d 174, 180 (2d Cir. 2008); *see also Sureff*, 15 F.3d at 230 ("A single conspiracy may encompass members who neither know one another's identities nor specifically know of one another's involvement." (citations omitted)).

11. *Maldonado-Rivera*, 922 F.2d at 963 (internal quotation marks omitted).

12. *Huezo*, 546 F.3d at 180.

Dubovoys. To suggest that his view of the evidence is the only reasonable one, Korchevsky relies on the following brief passage of Arkadiy's direct testimony:

> Q: You were intentionally trying to keep [Khalupsky and Korchevsky] away from each other?
>
> A: Yes. . . . We wanted to see who was better at trading.[13]

But this exchange does not compel the conclusion Korchevsky seeks. To the contrary, the testimony indicates that Arkadiy kept Khalupsky and Korchevsky apart precisely because doing so furthered the common goal of the conspiracy: to maximize profits by successfully trading on information from the stolen press releases. That Khalupsky's and Korchevsky's individual goals were limited in scope to their own trading activity is irrelevant. Co-conspirators' goals "need not be congruent for a single conspiracy to exist, so long as their goals are not at cross-purposes."[14]

Upon review of the full record, we have no doubt that the evidence was sufficient to support the conspiracy convictions. It is clear that Korchevsky not only "agreed to participate in what he knew to be a collective venture

13. App. at 351-52.

14. *Maldonado-Rivera*, 922 F.2d at 963.

directed toward a common goal,"[15] but also "had reason to know that in dealing with" the Dubovoys he "w[as] involved with a larger organization."[16] For example, the first time Arkadiy and Korchevsky met, Arkadiy told him that he would be trading on information originally coming from an unnamed group of Ukrainian hackers, with everybody doing their part in return for a percentage of the profits. Separately, Igor and Korchevsky discussed what portion of earnings was paid to the hackers and the fact that there was an additional intermediary between the hackers and the Dubovoys also taking a cut.

Faced with this evidence, Korchevsky argues that the record at most shows his awareness of other upstream co-conspirators, but fails to support his awareness of a co-conspirator similarly situated to Khalupsky. His argument is unavailing because our precedent does not require that level of specific awareness. In *United States v. Sureff*, we affirmed the defendant's conviction for a single drug dealing conspiracy even though there was no evidence that her two retailer partners—participants in the charged single conspiracy—were aware of one another's existence.[17] The retailers nevertheless had the required awareness that "they were involved with a larger organization" because each knew that the defendant was working with "the bank" upstream from the retail

15. *Id.* (internal quotation marks omitted).

16. *Sureff*, 15 F.3d at 230.

17. 15 F.3d at 229-30.

operations.[18] There is no relevant distinction between the awareness the retailers in *Sureff* each had of the defendant and her upstream co-conspirators and the awareness Khalupsky and Korchevsky each had about the Dubovoys and the hackers.

Korchevsky instead attempts to analogize this case to *United States v. McDermott*,[19] but *McDermott* is inapposite. In that case, the defendant (McDermott) gave non-public stock information to a woman (Gannon) with whom he was having an affair.[20] Unbeknownst to McDermott, Gannon was simultaneously having an affair with another man (Pomponio) and conveying McDermott's stock recommendations to him.[21] Pomponio traded on McDermott's information, sharing the profits with Gannon.[22] McDermott was ultimately tried with Pomponio and convicted as his co-conspirator on the theory that, at least from the perspective of two members of the love triangle, the three of them were working toward "a unitary purpose to commit insider trading."[23] On appeal, we vacated the conviction because there was "no record evidence suggesting that McDermott's agreement with Gannon encompassed a broader scope than the two of them."[24] Unlike

18. *Id.* at 230.

19. 245 F.3d 133 (2d Cir. 2001).

20. *Id.* at 136.

21. *Id.*

22. *Id.*

23. *Id.* at 137.

24. *Id.* at 138. To the extent language in *McDermott* suggests that McDermott would have needed to be aware that "there existed

Korchevsky or the retailers in *Sureff*, McDermott was not aware he was "involved with a larger organization."[25] He had not agreed that Gannon could "pass [his] insider information to . . . another person, even if unknown."[26] Korchevsky, by contrast, knew that he depended on a large network of people to facilitate his illicit trading, and he agreed that the profits he generated would be shared with them.

B. Securities Fraud

Counts Three and Four charged Khalupsky and Korchevsky with fraudulent trading in securities as corporate outsiders, in violation of Section 10(b) of the Securities and Exchange Act and Rule 10b-5, promulgated thereunder. Section 10(b) prohibits the "use or employ, in connection with the purchase or sale of any security . . . [, of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." [27] Rule 10b-5 prohibits "employ[ing] any device, scheme, or artifice to defraud . . . in connection with the purchase or sale of any security."[28]

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others *similarly situated*" to him in the scheme, it is dicta; we vacated his conviction because he was unaware there was *anybody* other than Gannon involved, regardless of the other person's relationship to Gannon. *Id.* (emphasis added).

25. *Sureff*, 15 F.3d at 230.

26. *McDermott*, 245 F.3d at 138.

27. 15 U.S.C. § 78j(b).

28. 17 C.F.R. § 240.10b-5.

To challenge his convictions on these substantive securities fraud counts, Korchevsky first argues that the government could not prove he engaged in a "scheme or artifice to defraud" within the meaning of Rule 10b-5. Specifically, he claims the proof necessarily failed because he did not owe a fiduciary duty to investors or potential investors in the companies whose press releases were stolen, and because any deception employed to obtain the releases did not target the investors. Second, Korchevsky argues that the type of computer hacking used to access Marketwired's systems—the conduct charged in Count Four—did not constitute a "deceptive device or contrivance" within the meaning of Section 10(b).[29] We are unpersuaded.

First, we dispatch Korchevsky's contention that he did not engage in a "scheme or artifice to defraud." Although a fiduciary duty is relevant to other securities violations—e.g., insider trading—it need not be shown to prove the securities fraud charged here: fraudulent trading

29. Korchevsky initially challenged his convictions on both Counts Three and Four on the basis that computer hacking was not "deceptive" within the meaning of Section 10(b). In reply, he abandoned his challenge to his conviction on Count Three, which charged securities fraud in connection with the "spear phishing" hack of PR Newswire's systems. Spear phishing occurs when a hacker sends a misleading email to an account user in order to deceive that user into providing the hacker with his login credentials, often by inducing the user to click on a link that in turn prompts them to enter the credentials. As Korchevsky concedes in reply, spear phishing to obtain credentials and then using the ill-gotten credentials to log in is "deceptive" under Section 10(b). Def.-Appellant Korchevsky's Reply at 21 (citing *S.E.C. v. Dorozhko*, 574 F.3d 42, 44-49 (2d Cir. 2009)).

in securities by an outsider.[30] Further, Korchevsky's assertion that the deception must have targeted investors contradicts the plain language of Rule 10b-5. The deception need only be "*in connection with* the purchase or sale of any security,"[31] and here it was. The newswire hacking directly prompted and enabled the charged securities trading.[32] Indeed, the ensuing trades needed to occur soon after a press release was illicitly obtained from a newswire's servers, but before the newswire could publish the release, in order to maximize the hacked information's value.

Second, we find that the hack of Marketwired's systems qualified as a "deceptive device or contrivance" under Section 10(b). The hackers initially accessed Marketwired's systems using a technique known as SQL injection. This enabled them to glean the architecture of the hacked computer system, identify vulnerabilities, and extract data. Then, having gained initial access, the hackers extracted employee login credentials and used those credentials to intrude into the system's more secure areas. Regardless of how one might characterize the initial SQL injection technique, the subsequent use of stolen employee login credentials to gain further system access was deceptive. Every time the hackers attempted to access parts of the system by entering stolen credentials,

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30. *See Dorozhko*, 574 F.3d at 46-49.

31. 17 C.F.R. § 240.10b-5 (emphasis added).

32. *See S.E.C. v. Zandford*, 535 U.S. 813, 822, 122 S. Ct. 1899, 153 L. Ed. 2d 1 (2002) ("It is enough that the scheme to defraud and the sale of securities coincide.").

they misrepresented themselves to be authorized users. "[M]isrepresenting one's identity in order to gain access to information that is otherwise off limits, and then stealing that information is plainly 'deceptive' within the ordinary meaning of the word."[33]

Korchevsky cannot carry his heavy burden to overcome the jury's findings and demonstrate that the evidence was insufficient to support conviction on any count.

II. Venue

Khalupsky and Korchevsky both argue that there was insufficient evidence to establish venue in the EDNY for the securities fraud counts. We disagree. It was foreseeable to the defendants that acts constituting the securities fraud violations would take place in the EDNY.

The Securities and Exchange Act provides that, for securities fraud, the "criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred."[34] That test is satisfied in any district where "the defendant intentionally or knowingly causes an act in furtherance of the charged offense to occur," or where "it is foreseeable to the defendant that such an act would occur . . . and that act does in fact

33. *Dorozhko*, 574 F.3d at 51.

34. 15 U.S.C. § 78aa(a).

occur."[35] "To be in furtherance of the charged offense, acts or transactions must *constitute* the securities fraud violation—mere preparatory acts are insufficient."[36] "Venue may also be established if the defendant aids and abets another's crime of securities fraud in the district."[37]

The government bears the burden of proving appropriate venue on each count, as to each defendant, by a preponderance of the evidence.[38] Our review is de novo, but we view the evidence "in the light most favorable to the government, crediting every inference that could have been drawn in its favor."[39] In this case, the government presented an assortment of evidence to establish venue in the EDNY. Viewing this evidence collectively, we agree that venue was proper in the EDNY.

First, evidence suggested the defendants foresaw that some of their trades would be consummated with counterparties in the EDNY. The government's expert

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35. *United States v. Lange*, 834 F.3d 58, 69 (2d Cir. 2016) (alteration and internal quotation marks omitted) (quoting *United States v. Royer*, 549 F.3d 886, 894 (2d Cir. 2008), and *United States v. Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003)).

36. *Id.* (internal quotation marks omitted).

37. *Id.*

38. *Chow*, 993 F.3d at 143 (noting that proof is only by a preponderance of the evidence because venue is not an element of a crime); *Lange*, 834 F.3d at 71.

39. *United States v. Tzolov*, 642 F.3d 314, 318 (2d Cir. 2011) (internal quotation marks omitted).

confirmed that 175 of the defendants' trades were in fact consummated with counterparties in the EDNY, and that 300 more may have been.[40] This evidence, along with the vast scope of the trading scheme[41] and the defendants' expertise as traders,[42] cumulatively supports the inference that the defendants foresaw the existence of counterparties in the EDNY.

Second, the government introduced evidence that one of Korchevsky's brokerage accounts used J.P. Morgan Clearing Corporation, located in the EDNY, as its clearing agent. The account-opening forms Korchevsky signed listed the J.P. Morgan Clearing Corporation's address. So did the account's monthly statements. The jury was thus entitled to infer that Korchevsky knowingly used an EDNY-based clearing agent for the illicit trades from that account.[43] This evidence also established venue as to

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40. The expert was unable to identify a single precise counterparty for each of these 300 trades, but narrowed down the universe of possible counterparties for each trade to a small number, at least one of which was located in the EDNY. A jury could therefore reasonably infer that, more likely than not, at least some of these 300 counterparties were in fact in the EDNY.

41. *See Royer*, 549 F.3d at 894 (reasonable for jury to infer that at least one of 300 recipients of the disseminated information would trade on it in the EDNY).

42. *See Chow*, 993 F.3d at 143-44 (jury could infer from defendant's college and graduate business degrees that he would have been aware shares were listed on the Nasdaq in Manhattan); *Svoboda*, 347 F.3d at 483 (jury could infer that a "savvy investor" would foresee what exchanges his trades would be executed on).

43. *Cf. United States v. Geibel*, 369 F.3d 682, 697 (2d Cir. 2004)

Khalupsky by virtue of the aiding and abetting charges. Once proper venue is established in the EDNY for the scheme through Korchevsky, it is enough that Khalupsky "aided and abetted the scheme of securities fraud" writ large; we "do[] not require that a defendant aid and abet the specific criminal activity occurring within the district of venue."[44]

Finally, all of this evidence concerns acts or transactions "constituting" the securities fraud violation, as they must to establish venue, rather than "mere preparatory acts."[45] Counterparties and clearing agents are both "crucial to the success of the scheme."[46] Without them, there would be no completed sale of a security. Accordingly, venue was proper in the EDNY.[47]

("The government failed to establish that defendants' trades . . . utilized the facilities of any . . . securities exchange or brokerage firm" in the venue district, in a case where "the only connection" to the district was that the initial misappropriation of information occurred there.).

44. *Lange*, 834 F.3d at 73-74.

45. *Id.* at 69; *see also Chow*, 993 F.3d at 143 (affirming venue in the district where, among other things, the counterparties' brokers were located and "purchases of [the] shares were executed, cleared, and recorded").

46. *Royer*, 549 F.3d at 895.

47. Additionally, the government presented evidence about how trades executed on the New York Stock Exchange and the Nasdaq are often processed and settled through a Depository Trust and Clearing Corporation (DTCC) data center located in the EDNY. The government identified at least two of Khalupsky's trades that were

III. Constructive Amendment and Prejudicial Variance

Korchevsky argues that the government's proof at trial either (a) constructively amended the superseding indictment, or (b) prejudicially varied from it. Specifically, he objects to the presentation of three categories of evidence: (1) trades involving target companies that were not identified in the superseding indictment, (2) trades involving press releases hacked from Business Wire, which were not charged in their own securities fraud count, and (3) trades taking place in 2015, even though much of the activity alleged in the indictment took place in 2011-2014. For the reasons below, none of this evidence constructively amended or prejudicially varied from the superseding indictment.[48]

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in fact cleared through the DTCC. Despite a lack of direct evidence that either Khalupsky or Korchevsky was aware of the DTCC's existence or location, the government urged the jury to infer that traders of their experience would have been. We need not address this proffered basis for venue in this case, however, because the other evidence in support of venue was sufficient.

48. The parties dispute whether Korchevsky adequately objected to the government's proof before the district court, and thus dispute the applicable standard of review. Because the standard is irrelevant to our conclusion, we review de novo. *See United States v. Dove*, 884 F.3d 138, 146 (2d Cir. 2018).

Appendix A

A. Constructive Amendment

To satisfy the Fifth Amendment's Grand Jury Clause, "an indictment must contain the elements of the offense charged and fairly inform the defendant of the charge against which he must defend."[49] This clause is violated, and reversal is required, if the indictment has been constructively amended.[50] "A constructive amendment occurs when the charge upon which the defendant is tried differs significantly from the charge upon which the grand jury voted."[51] A defendant claiming constructive amendment "must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment."[52] The charge has been so altered "either where (1) an additional element, sufficient for conviction, is added, or (2) an element essential to the crime charged is altered."[53]

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49. *Id.* at 146 (internal quotation marks and alteration omitted); *see* U.S. CONST. amend. V, cl. 1 ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

50. *Dove*, 884 F.3d at 149.

51. *Id.* at 146.

52. *United States v. Salmonese*, 352 F.3d 608, 620 (2d Cir. 2003).

53. *Dove*, 884 F.3d at 146 (citations omitted) (first citing *United States v. Miller*, 471 U.S. 130, 138-39, 105 S. Ct. 1811, 85 L. Ed. 2d 99 (1985), and then citing *United States v. Agrawal*, 726 F.3d 235, 259 (2d Cir. 2013)).

We undertake this inquiry mindful that "courts have constantly permitted significant flexibility in proof, provided that the defendant was given notice of the core of criminality to be proven at trial."[54] "The core of criminality of an offense involves the essence of a crime, in general terms; the particulars of how a defendant effected the crime falls outside that purview."[55]

We do not find a constructive amendment resulting from any of the evidence to which Korchevsky objects. The trades involving stocks of other target companies simply served as additional examples of the same conduct constituting the charged scheme.[56] So, too, did proof of the trades in 2015, particularly given that the superseding indictment alleged the scheme persisted into 2015. Korchevsky's argument about the trades resulting from the Business Wire hack is similarly weak. Even though the Business Wire hack was not charged as a standalone securities fraud count, Business Wire was identified as one of the victim newswires in the superseding indictment's introductory section, which was incorporated by reference into all charged counts. In sum, although "not specifically

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54. *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 310 (2d Cir. 2009) (per curiam) (internal quotation marks and emphasis omitted).

55. *United States v. D'Amelio*, 683 F.3d 412, 418 (2d Cir. 2012) (internal quotation marks omitted).

56. *See Salmonese*, 352 F.3d at 621 (no constructive amendment where indictment alleged twenty-five occasions on which conspirators sold inflated stripped warrants as part of fraud conspiracy, and at trial government proved additional, unalleged sales of stripped warrants).

pleaded in the indictment, [these trades] are plainly within the charged core of criminality."[57] None of it was proof of a different kind, setting forth "an additional basis . . . not considered by the grand jury" for conviction.[58]

B. Prejudicial Variance

We also do not find that the evidence at trial prejudicially varied from the superseding indictment. "A variance occurs when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment."[59] To warrant reversal, the defendant must show "that substantial prejudice occurred at trial as a result" of the variance.[60] "A defendant cannot demonstrate

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57. *Id.* at 621; *see also United States v. Dupre*, 462 F.3d 131, 140-41 (2d Cir. 2006) ("[T]he evidence at trial concerned the same elaborate scheme to defraud investors as was described in the indictment.").

58. *Dove*, 884 F.3d at 146. Korchevsky's reliance on *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960), is misplaced for this reason. In *Stirone*, the defendant was charged with violating the Hobbs Act by obstructing interstate *importation* of *sand* destined for use in construction of a steel mill. *Id.* at 217. At trial, the government argued that the defendant had also interfered with commerce (an element of the Hobbs Act violation) by obstructing the interstate *exportation* of the yet-to-be manufactured *steel* from that mill. *Id.* The Court found that to be a constructive amendment, noting that "when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another." *Id.* at 218.

59. *Dove*, 884 F.3d at 149 (internal quotation marks omitted).

60. *Id.* (internal quotation marks omitted).

that he has been prejudiced by a variance where the pleading and the proof substantially correspond, where the variance is not of a character that could have misled the defendant at the trial, and where the variance is not such as to deprive the accused of his right to be protected against another prosecution for the same offense."[61]

For the reasons discussed in the context of constructive amendment, we do not think that the evidence Korchevsky points to "materially differe[d]" from what was alleged in the superseding indictment.[62] And in any event, Korchevsky cannot demonstrate "substantial prejudice."[63] The superseding indictment itself put Korchevsky on notice of much of the evidence about which he complains. To the extent he had not been on notice of every piece of trade data, he was notified by the government's pretrial disclosures of exhibits about the trades it intended to rely upon and of the vast data set underlying its statistical analysis of his trading activity.

IV. Response to Jury Note

Korchevsky argues that the district court's response to a jury note during deliberations caused the jury to resolve a disputed factual question against him. We review a trial court's response to a jury request during

61. *Salmonese*, 352 F.3d at 621-22 (internal quotation marks omitted).

62. *Dove*, 884 F.3d at 149.

63. *Id.*

deliberations only for abuse of discretion,[64] and we find none here.

The fact in dispute was whether Korchevsky had traded on any stolen press releases from the Dubovoys. Korchevsky contended he had never received them. To prove that he had, the government introduced forensic reports for a number of electronic devices seized from Korchevsky's home, including a 221-page report on the contents of an iPad. The forensic report indicated that the iPad had been used to access the "stargate11@e-mail.ua" email account (Stargate Account). On July 30, 2012, the Stargate Account sent four emails to itself, each containing the one-word message "Updates" along with an attachment. Forensics could not recover the attached files. Other evidence at trial, however, established that the conspirators shared login credentials for communal email accounts in order to disseminate the press releases amongst themselves.

The government urged the jury to infer that the July 30 Stargate Account emails attached stolen press releases, that Korchevsky had read the emails on the iPad, and that he had relied upon these attachments in his stock trades. Korchevsky, on the other hand, claimed that somebody else had accessed the Stargate Account from the iPad. He suggested it was Igor, pointing to evidence that Igor's Skype account had been used on that iPad in December 2012.

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64. *See United States v. Rommy*, 506 F.3d 108, 126 (2d Cir. 2007) ("[R]esponse to jury request 'is a matter committed to the sound exercise of a trial court's discretion.'" (quoting *United States v. Young*, 140 F.3d 453, 456 (2d Cir. 1998))).

During deliberations, the jury sent out a note requesting "Any and ALL Texts[,] Phone calls[,] Emails[,] Bank records To and/or From Korchevsky on or in any devices found in his residence, or offices possession past or at time of arrest."[65] While the parties and the court were discussing whether the iPad evidence would be responsive to that request, the jury sent out a second note, this time asking for "Korchevsky — Stargate — dubavoy correspondence."[66] The defense argued that there was no such correspondence. Further, it argued that if the district court sent the iPad report back to the jury, the district court would be endorsing the government's argument that Korchevsky had used the iPad to access the Stargate Account. The district court decided to send the iPad report to the jury. It also permitted the government place a flag on the page concerning the July 30 Stargate Account emails.

We do not find an abuse of discretion in the district court's response to the jury's request. The jury's "Korchevsky — Stargate — dubavoy correspondence" note was not entirely clear, and we think the district court "gave it a reasonable interpretation"[67] by inferring

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65. App. at 820.

66. *Id.* at 821.

67. *See United States v. McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990) ("[T]here plainly was no abuse of discretion here. The jury's written response to the court's query was ambiguous, and the trial judge gave it a reasonable interpretation in rereading the cross-examination by the government and asking if that was what the jury wished to hear.").

from the "Stargate" mention that the jury hoped to receive the Stargate Account emails in the iPad report. District courts are significantly better situated than we are to interpret cryptic jury notes, and they accordingly "enjoy[] considerable discretion in construing the scope of a jury inquiry and in framing a response tailored to the inquiry."[68] We find no reason to upset that exercise of discretion here.

V. Conscious Avoidance

The defendants challenge the district court's decision to charge the jury that conscious avoidance can satisfy the knowledge requirement. They also challenge the particular instruction given. We find no merit in these challenges.

"Instructions are erroneous if they mislead the jury as to the correct legal standard or do not adequately inform the jury of the law."[69] "Objectionable instructions are considered in the context of the entire jury charge, and reversal is required where, based on a review of the record as a whole, the error was prejudicial or the charge was highly confusing."[70]

A conscious avoidance charge is appropriate: "(i) when a defendant asserts the lack of some specific aspect

68. *Rommy*, 506 F.3d at 126.

69. *United States v. Kopstein*, 759 F.3d 168, 172 (2d Cir. 2014) (internal quotation marks omitted).

70. *Id.* (internal quotation marks omitted).

of knowledge required for conviction[,] and (ii) the appropriate factual predicate for the charge exists, *i.e.*, the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact."[71] Even where the government's primary theory is that the defendant has actual knowledge, a conscious avoidance charge can be properly given in the alternative "because ordinarily the same evidentiary facts that support the government's theory of actual knowledge also raise the inference that he was subjectively aware of a high probability of the existence of illegal conduct and thus properly serve as the factual predicate for the conscious avoidance charge."[72]

The district court in this case gave the following conscious avoidance instruction to the jury, over Khalupsky's objection:

> [T]he government is required to prove that the defendants acted knowingly. To determine whether the defendant acted knowingly[,] you may consider whether the defendant deliberately closed his eyes as to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that the defendant acted or that the defendant's ignorance was solely and entirely the result of a conscious purpose to avoid learning the truth, then

71. *Lange*, 834 F.3d at 76 (internal quotation marks omitted).

72. *Id.* at 78 (internal quotation marks and alterations omitted).

> this element may be satisfied. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish, or mistaken . . . .
>
> If you find that the defendant was aware of the high probability that the press releases were stolen, and that defendant acted with deliberate disregard of that fact, you may find the defendant acted knowingly. However, if you find that the defendant believed that the information was lawfully obtained, he must be found not guilty.
>
> It is entirely up to you whether you find the defendant deliberately closed his eyes[,] and any inferences to be drawn from the evidence on this issue.[73]

In challenging this instruction on appeal, Khalupsky argues both that there was no factual predicate warranting a conscious avoidance instruction, and that the instruction led the jury to believe that conscious avoidance could satisfy the intent needed to convict on conspiracy or aiding and abetting. Korchevsky joins these arguments in reply, and also argues that the language of the conscious avoidance instruction was prejudicial.

We first reject the argument that there was no factual predicate for the conscious avoidance instruction. The

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73. App. at 680-81.

inclusion of the charge was properly objected to before the district court, so we review de novo.[74] We find that the record contained ample evidence from which a jury could reasonably infer that "the defendant[s] w[ere] aware of a high probability of the fact in dispute and consciously avoided confirming that fact."[75] As to Khalupsky, the government presented evidence that he had received passwords to access the press releases on which his employees were trading. The jury would have been entitled to infer that the need for password-protection signaled to Khalupsky that the press releases—documents usually publicly disseminated without need for security—had been illicitly obtained, and that he chose not to confirm that suspicion. Similar reasoning prevails as to Korchevsky, because there was evidence that Arkadiy had shown Korchevsky printouts of the press releases and provided him with login credentials to access the information.

Second, we reject the argument that the conscious avoidance instruction confused the jury into thinking that it could convict on conspiracy or on aiding and abetting without finding the necessary intent. As the defendants concede, because they did not object before the district court to any particular language in the charge, we review

74. *United States v. Applins*, 637 F.3d 59, 72 (2d Cir. 2011).

75. *Lange*, 834 F.3d at 76 (internal quotation marks omitted). It is undisputed that the first condition necessary for a conscious avoidance charge—that the "defendant asserts the lack of some specific aspect of knowledge required for conviction"—was satisfied. *Id.*

this issue only for plain error.[76] It is not "clear or obvious" to us, as it must be on plain error review, that the charge confused the jury in the way defendants claim.[77]

As to conspiracy, we do not think the jury could have convicted the defendants by finding only conscious avoidance of the fact of participation in the conspiracy. Conscious avoidance may satisfy the defendant's "knowledge of the conspiracy's unlawful goals," but it may not be used to support the defendant's prerequisite "knowing participation or membership in the scheme charged."[78] The jury instructions made clear that proof of membership in the conspiracy required a showing of actual knowledge. In describing what the government needed to prove to show that the defendants joined the conspiracy, the district court charged that it had to prove a defendant "knowingly *and willfully* was or became a member of the conspiracy," and that he became a member "with knowledge of its criminal goal, *willfully and intending* by his actions to help it succeed."[79] Further, the district court defined "willfully" as something "done knowingly and purposefully with intent to do something the law forbids."[80]

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76. *See United States v. Vilar*, 729 F.3d 62, 88 (2d Cir. 2013).

77. *See id.* at 70 (defining plain error).

78. *Lange*, 834 F.3d at 76 (internal quotation marks omitted).

79. App. at 646-47 (emphases added).

80. *Id.* at 647.

Nor do we think there was any risk that the jury convicted on the aiding and abetting theory of securities fraud—a specific intent crime[81]—by finding only conscious avoidance. The district court charged the jury that, "in order to aid and abet someone to commit a crime, it is necessary that the defendant knowingly aid[] another person in committing a crime with the intent to facilitate the crime and make it succeed."[82] It went on to explain that "[t]o establish that the defendants knowingly aided another person with the intent to facilitate a crime, the [g]overnment must prove the defendants of course acted knowingly *and intentionally*."[83] Nowhere in the discussion of aiding and abetting liability did the court reference conscious avoidance as a relevant form of that intent.

Third, we reject Korchevsky's argument that the conscious avoidance charge given in this case was prejudicial. Korchevsky asserts that the district court's instruction to the jury presupposed that Korchevsky had seen the stolen press releases, and therefore prejudiced the jury in disposing of a disputed fact. Korchevsky did not make this objection to the district court, however, and we do not think any potential for confusion in this respect rises to the level of plain error. Indeed, we think it clear that the district court was referencing the stolen press releases by way of example in order to demonstrate to the jury how conscious avoidance operates. Lest the jurors

81. *United States v. Rosemond*, 572 U.S. 65, 70-77, 134 S. Ct. 1240, 188 L. Ed. 2d 248 (2014).

82. App. at 661-62.

83. *Id.* at 662 (emphasis added).

be confused, the district court reiterated Korchevsky's theory in defense—that "he did not knowingly and intentionally access stolen press releases or trade on non-public information"[84]—immediately after charging on conscious avoidance.

Finally, we note that even if we had found any error in the issuance or form of this conscious avoidance instruction, we would have found the error harmless. The "overwhelming evidence" of actual knowledge in support of the jury's verdict, coupled with the fact that the government did not at all rely on conscious avoidance in its summation, renders this dispute over conscious avoidance beside the point.[85]

CONCLUSION

We have considered all of the defendants' arguments and found them without merit. For the foregoing reasons, we **AFFIRM** the judgments of conviction.

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84. *Id.* at 681.

85. *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 1993) ("[A]n erroneously given conscious avoidance instruction constitutes harmless error if the jury was charged on actual knowledge and there was overwhelming evidence to support a finding that the defendant instead possessed actual knowledge of the fact at issue." (internal quotation marks and emphasis omitted)).

APPENDIX B — ORDER OF THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED JUNE 5, 2018

United States v. Korchevsky,
Case No. 1:15-cr-00381-RJD-RER, (June 5, 2018)

ELECTRONIC ORDER as to Vitaly Korchevsky and Vladislav Khalupsky re: 272, 273, 274. ORDER: Since the beginning of this case, it was clear to all that the focus of the government's proof at trial would be the "inside-the-window" trades. The government advised the Court and counsel at the May 31, 2018 status conference that the trades essentially fell into two groups - the so-called "suspicious" trades or circumstantial evidence of the conspirators' criminal activity, and a smaller universe of trades about which the government intends to offer specific direct proof that such trades were based on hacked financial information. At the conference, the Court directed the government to identify that smaller universe of trades. As the government now explains, it has complied with the Court's mandate in identifying this subset, which consists of 270 trades. The Court simply does not understand the claim of unfairness. Enough letter writing. Prepare for trial. So ordered by Judge Raymond J. Dearie on 6/5/2018. (Metz-Dworkin, Abra) (Entered: 06/05/2018)

APPENDIX C — TRANSCRIPT EXCERPTS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED MAY 31, 2018

[1]UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

15-CR-381 (RJD)

UNITED STATES OF AMERICA,

Plaintiff,

-against-

VITALY KORCHEVSKY AND VLADISLAV KHALUPSKY,

Defendants.

United States Courthouse
Brooklyn, New York

May 31, 2018
2:30 p.m.

TRANSCRIPT OF STATUS CONFERENCE BEFORE THE HONORABLE RAYMOND J. DEARIE SENIOR UNITED STATES DISTRICT JUDGE.

***

[26]characterizations and the summaries. They do not appear to give enough by way of opinions and methodology, specific opinions. They are not going to discuss the reasonableness of trades and so forth and so on. That is a different matter. I do not know that we will need any expert to opine on the reasonableness of trades and I am not sure it's relevant but I am not making a ruling there. That is an open matter as far as I am concerned.

I would urge you, both sides, to go back to your expert disclosures and amplify where you think appropriate because I have a rule to enforce and I will enforce it. I don't want to cut your legs out from under you.

MR. BRILL: Judge, if I may on that point, you are being very diplomatic with respect to that. I'm not really sure who, who you're referring to. I'll certainly assume that -- I mean, we're certainly going to take Your Honor's words under advisement and do what you're saying with respect to our exchange, but --

THE COURT: Well, Dr. Mayer or Mr. Mayer, he is one such character. They are pretty nondescript. There's no meat to it. There's no specifics. And Katz gives no opinions.

I mean, as long as you stick your chin out, I will -- you are not a loan. I don't mean to suggest it is only you.

MR. BRILL: Understood. And just with respect, at [27]least with respect to Mr. Mayer who's, who deals with the securities and trading aspect of the case, you know, I think a lot of his work which is, continues to evolve and he

continues to consider, has to do with the information that we get from the government and that we give him in order to meet this rule and to provide a sufficient conclusion and opinion.

One of our objections is the somewhat moving target of the crux of this case which is the trades that the government claims were illegal or accused or however you want to identify them. It's very hard for anyone, especially an expert, to come to a conclusion when the database -- I say that with a small "D" -- the database keeps changing in terms of, well, now we're going to add ten more accused trades, we might take that one way, we didn't need that one, here's an additional, here's additional trades that we as a government are going to allege are accused. So that has, in significant part, a lot to do with our expert's ability to draw a conclusion because of this, because of this moving target.

To be more specific, if we get evidence from the government's expert that draws a conclusion and we get a slide from them which is somewhat of a PowerPoint drawing a conclusion and that slide or that conclusion is based on a subset of stocks or of trades, and then we give that to our expert and our expert looks at that and discusses it, maybe talks about how we can rebut that, you know, advises us and [28]educates us, and then in a month, we get additional slides and maybe even a modification of that slide that we presented to the expert which now changes the subset of stocks and changes, to some extent, the government's expert's opinion, then it's almost impossible and unfair.

I mean, really, the ultimate thing here is that it's completely unfair, but it's almost impossible for our expert to be able to have a set target in order to give his proper conclusion.

THE COURT: So the monkey's on your back.

MS. NESTOR: Sure, Your Honor.

The government has provided defense counsel a spreadsheet of all trades that it is considering in this case. The expert's actual exhibits that he's using, to the extent that they've changed over time, have been mostly us taking away an exhibit or providing an extra example from that database that we've provided to defense counsel. They have the information. They requested the information. We provided them the information.

So to the extent that they're concerned that we're highlighting certain things for the jury as opposed to other things, that's really the government's prerogative in how to prove their case, but the database itself hasn't changed, Your Honor.

THE COURT: Well, is the body of information that [29]the expert has available to him, in your perspective, is that changing?

MS. NESTOR: No.

MR. BRILL: Okay. All right then.

THE COURT: Well, somebody asked for a final list of trades.

MR. BRILL: Well, you know what, Judge, I respectfully disagree with what the government is saying. We tried to present the court with a chronology here that early on, last year, February and specifically of 2017, we asked for this very question, a list of the accused trades because as I presented to the court, it's, it is the crux of the case.

You know, we are being charged with insider trading or trading on nonpublic information. Certainly we must have the trades that make up that crime allegedly. So we asked for that. We did receive a spreadsheet which included approximately 750 trades, approximately, and to be frank, we were told that that is the universe, that is the universe of accused trades. Frankly, we have, subsequent to that, have received additional exchanges where, you know, some have been added to that, some have been taken away, some were never included in that original spreadsheet but now are and so I don't -- I'm not sure what the government --

THE COURT: Excuse me. When you say "some," you mean some trades?

[30]MR. BRILL: Yes. Some trades that were not a part of that original spreadsheet that we were told were the accused trades. Now, as we stand here today, we're dealing with other allegedly accused trades that were not part of that original exchange back in February of 2017.

THE COURT: You know what really confounds me here? I don't know if the word is "unprecedented." There was a considerable exchange of information early on which you certainly didn't object to understandably. The government has an ongoing obligation to update the information. You certainly don't have any quarrel with that. To the extent that it has disabled your expert because the body of information has changed in a material way, assuming that has happened, I understand what you are saying.

Somebody has asked for the final list of trades. Do we have the final list of trades?

MR. TUCKER: Yes, Your Honor. It was among the exhibits disclosed on May 11th.

THE COURT: There is your final list of trades.

MR. HEALY: If I might, Your Honor, and I think that people aren't saying things that are exactly in opposition but I think that there's a point that's missed. The government did give us a spreadsheet that had every trade that Mr. Korchevsky made, not even just during the course of the conspiracy, but going back even a year or so before that. It [31]is well over a thousand, many over a thousand.

The expert has given us slides that focus in on January '11 to May of '15 and in that, there's a number, there are often, 592 trades, 670. A slide will say -- and those are the numbers that are change changing, 670 short-term round-trip trades.

Appendix C

What we are asking for, frankly, again there's 600, don't hold me to it, what are those out of the thousand or more trades that you've told us exist which we know exist, which 670 are you referring to and there's two reasons we're asking. One is so we can give a more precise disclosure to our expert because once he knows, okay, this is what their expert is saying are these 600 trades, he can do that and, secondly, Mr. Korchevsky has a right to know what he's accused of. Yes, they gave us on May 11th a huge spreadsheet but they're not accusing all of those trades.

THE COURT: So I see you shaking your head yes and shaking your head no.

MR. TUCKER: So that we're all operating from the same body of vocabulary, I want to sort of lay out a few key points.

Our expert, Dr. Canjels produced what we call a deck. It's a PowerPoint presentation. We provided the first version of that deck to defense counsel last summer which is well in advance of trial with the idea that we can help [32]counsel focus on the body of trades that was relevant. Each slide of the deck includes a footnote which defines the relevant universe that would allow someone to work with the spreadsheets to reproduce the numbers.

Rather than wasting the Court's time, I would propose that we work with counsel. We can explain to them perhaps more precisely how to use the data we provided so they can back into some of the decks. But the point here at the end of the day, right, Judge is that there is an a enormous, an

enormous body of trades that the government will take the position at trial are suspicious and have indicia to suggest they're based on the stolen press releases.

MR. BRILL: I'm sorry. So if that is the adjective "enormous," then how --

MR. TUCKER: I wasn't done.

MR. BRILL: -- do I go to my expert and say here's -- there's going to be an enormous amount of illegal trades that look suspicious. Give me your expert opinion on why they're not suspicious.

THE COURT: The case is about trades made in a specific, fairly confined period of time relative to a certain release of public information. Why is it so difficult then to focus it in on those trades?

MR. BRILL: Well, for one is, Your Honor, that are we to assume that every trade that is made within that [33] particular period of time is a suspicious trade? I mean, is that what the government is saying?

THE COURT: I assume that question was asked a long time ago.

MR. BRILL: I mean, it may have been. I didn't know -- I didn't think the answer is yes.

THE COURT: I think the answer is no.

MR. TUCKER: You are correct, Your Honor. Your Honor did this a few years ago when we were first before you.

The point is simply this. Trades that were made during a particular period of time between 2010 and 2015 where the initial position was taken by the defendant and his co-conspirators during the period between press release upload and press release distribution, that is the universe we're talking about. We slice and dice it and focus on particular trades mostly to aid the jury, but that's the universe and that's not difficult to get to with the data we provided.

And just to put a fine point on it, Judge, what we have provided defense counsel with, because in order to run that analysis, you need the upload data from the press release -- sorry, from the Newswire companies and you need the trading data from the different defendants and their co-conspirators and all of that came from different databases.

THE COURT: Good.

[34]MR. TUCKER: So what the government did, working with other regulatory authorities, was create a single database where all of that information was put together in a readily modifiable and manipulatable format and that information was provided to the defense and early iterations and final version of that document was disclosed on May 11th.

MS. NESTOR: In addition to that, Your Honor, all the underlying trades are also available to defense and were disclosed as an exhibit on May 11th so they have all the information that they need.

MR. BRILL: Your Honor, what we're left with then is -- essentially what the government has disclosed to us is we're not going to tell you what the specific trades are. We're going to tell you -- I mean, I guess I'm just trying to make clear as to what they're saying.

Are they saying that all of the trades that were done within 2010 and 2015, during the time of what they call the window which is the upload time and submission of that press release time, is the government saying that their position is that those are all suspicious trades?

THE COURT: I cannot believe I am being asked this question, A, and I can't believe I'm being asked this question today. The answer to the question is?

MR. TUCKER: Suspicious? Yes.

MR. BRILL: Well, come on. Your Honor, I mean, are [35]they accused -- are those trades going to be, in the government's case, the ones that they accuse Mr. Korchevsky trading on nonpublic information? I mean, that's the charge.

THE COURT: Not an unreasonable question.

MR. TUCKER: Well, Judge, just two points.

THE COURT: You don't convict on smoke. I don't have to tell that you.

MR. TUCKER: Absolutely not, Judge, and that's really the problem. That's the nub here. Right? The first is the defendant is charged not only with substantive securities fraud but multiple conspiracies. So we wouldn't actually need to flag a single trade in order to convict him of those crimes. That said, we have identified numerous trades, many trades, because the defendant was a prolific trader, that have those indicia of suspiciousness. The government has other evidence bearing on particularized trades in that body, in that universe. So the government will take the position that those trades are suspicious and we will highlight specific trades from that body with additional evidence.

THE COURT: To prove that those specific trades were, in fact --

MR. TUCKER: Correct, Your Honor.

THE COURT: -- the execution of the conspiracy?

MR. TUCKER: Yes, Your Honor.

[36]THE COURT: And have you identified these trades?

MR. TUCKER: Your Honor, they can be identified using the spreadsheet. The defendant was a prolific trader. He traded an enormous amount.

THE COURT: I understand.

MR. TUCKER: So in view of the fact that a lot of the trades he made were criminal trades doesn't place an additional burden on the government. The spreadsheet is very simple to use. If you filter based on trades made in the window during this period, you'll get your list. It's one click, Judge.

THE COURT: Trades in the window. So the trades in the window --

MR. TUCKER: During the time frame.

THE COURT: -- are the trades that you are going to prove?

MR. TUCKER: We will allege, Your Honor.

MR. HEALY: Your Honor, if I might.

THE COURT: You have alleged. You will try to prove. Go ahead.

MR. HEALY: They've talked about the deck that their expert, the spreadsheet that their experts provided. There have been, I think, three different iterations on it and that's not objectionable in and of itself, but the footnotes -- and I was once told by a learned judge always [37]know that the bad stuff are in the footnotes -- the footnotes changed.

So, for example, one slide might say the universe here is not just in the window and not just a three-day turnaround time, but now it has to be on the same day the trade was made, on the same day as the upload because sometimes the uploads are outside the same day. Some of the trades were made on earnings reports in the footnote. You haven't heard a thing about that in the government's representation that all in-the-window trades are now going to be accused or allegedly suspicious trades.

This whole conversation started with why hasn't the expert, your expert given more meat to his opinion because he's calling and saying, hey, I just noticed, for example, in 2015, they gave us a spreadsheet in February that the government put ID numbers on the trade, 633, some of those trades were in two different accounts so they occupy one ID number. In 2015, there was a subset of numbers that has now increased. Now, they've had this information all along. The indicia, whatever their expert has been using, suddenly has included trades that weren't included earlier. So our expert is, like, well, I guess I have to rethink what I was thinking they were thinking in advising you and that's not fair.

THE COURT: You have a list of trades that you are going to prove are criminal.

[38]MR. TUCKER: Yes, Your Honor. We will help defense counsel.

THE COURT: I do not want this to linger. I want to you get together. Today is Thursday. I want to hear from

you by Monday because part of this discussion sounds like ships passing in the night and then part of it is a little troubling to me. If you have specific trades that you are going to attempt to prove were illegal, not suspicious, but manifestation of the conspiracy itself, give them a list of those trades and let's have it done with.

MR. BRILL: I appreciate what Your Honor is saying and I don't want to belabor it either but I just need to, because I hear what Your Honor is saying and I think there are two categories here. There are the wide universe of what the government calls suspicious trades, but then there are the subset of that --

THE COURT: I am talking about the subset.

MR. BRILL: Okay. That's why I wanted to make that clear. So Your Honor is asking that the government provide the subset that they're going to --

THE COURT: Illegal trades, not suspicious trades. The illegal trades. All right?

MR. BILL: Yes.

THE COURT: and if there are any rough spots, I am available. I won't be in the building but I will be [39]available, we can talk, but I need you to get on this because I cannot be taking shots at his experts if the information is in any way, whether it is materially changing or not. If it is changing, I cannot study the expert opinion to decide whether or not it satisfies the rule unless this is put to bed. Okay?

MR. TUCKER: I hear everything Your Honor is saying. This is putting the government in a little bit of an unusual spot here and I just want to set something out.

The universe of suspicious trades is the universe that I described. We are, I hope everyone feels relieved, to know not going to walk through the literally hundreds of examples with the jury. We're going to talk --

THE COURT: I am not relieved. We were not going to do that in any event.

MR. TUCKER: So there is a universe of trades that are potentially criminal trades. The statistical analysis that the government's expert runs shows that there is not an innocent explanation for that universe of potentially suspicious trades. Then there are subsets of those trades that the government has other evidence pertaining to.

THE COURT: Okay.

MR. TUCKER: What the government will provide defense counsel with which it has already provided for the record is the list of that larger universe which, again, are [40]the trades that were made during the period of conspiracy where the positions were taken inside the window. The government will not take the position at trial that it has other extrinsic evidence that each and every one of those thousands of trades was, in fact, based on material nonpublic information, however, the trades taken together statistically are significant and that's what's important.

So, I'm happy to help defense counsel through this, but a bit of a straw man argument is being advanced here. The government is not under an obligation to prove that each and every one of the trades that were made in the window were, in fact, based on material nonpublic information in order to prove the charges in this case --

THE COURT: Agreed.

MR. TUCKER: -- and Your Honor knows that.

THE COURT: Agreed.

MR. BRILL: But, Your Honor --

THE COURT: Relax

We have to take it a step further. You can prove it circumstantially. You can satisfy the fact finder that all of these trades in the window are not only suspicious but were so suspicious, that they were likely the product of the criminal conspiracy. You can do that circumstantially, whether the jury finds it or not, but you told me beyond that you had specific identifiable trades that you are going to prove with [41]other evidence that indeed were the illegal trades. Did I --

MR. TUCKER: So Your Honor is asking us to flag for counsel the other trades for which we have other evidence in a way beyond having disclosed our trial exhibits.

THE COURT: He's accused of it. Let's do it. They have the window of trades. If they don't have the window of trades, they haven't been paying attention, and I know they have been paying attention. It is, for lack of a better word, a subset within the subset. I want you to identify that to the defendants.

You know what they are. Why the sigh?

MR. TUCKER: Your Honor, the government went above and beyond here and made disclosures.

THE COURT: I have no quarrel with that.

MR. TUCKER: And it's just an enormous burden and totally prejudicial and unfair to the government to require us to try our case for counsel a week before we begin. If that's Your Honor's ruling, we, of course, respect it, but that's not required and not appropriate and it binds the government's hands in a way that's not fair.

THE COURT: But you've accused him of making illegal trades. At a minimum, he should know what trades are you accusing him of making that are the product of nonpublic material information. What am I missing?

MR. TUCKER: I understand Your Honor's ruling.

****

APPENDIX D — CONSTITUTIONAL AND STATUTORY PROVISIONS

- "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. cl. 1.

- "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b).

- "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not

misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR § 240.10b–5.

APPENDIX E — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK, FILED JUNE 21, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

V.

VITALY KORCHEVSKY

Date of Original Judgment: 3/21/2019

Reason for Amendment:

☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: CR 15-381(S-1)-01(RJD)

Appendix E

USM Number: 72318-066

STEVEN G. BRILL. ESQ.
Defendant's Attorney

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court Pursuant [☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C.§ 3559(c)(7)

☒ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) one(1), two(2), three(3), four(4) & five(5) of a five count superseding indictment (S-1). after a plea of not guilty.

Appendix E

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. 1343 & 1349	Conspiracy to commit wire fraud.	8/31/2015	1(S-1)
18 U.S.C. 371	Conspiracy to commit securities fraud & computer intrusions.	8/31/2015	2(S-1)

The defendant is sentenced as provided in pages 2 through 11 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) underlying indictment ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until ail fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Appendix E

3/21/2019

s/ Raymond J. Dearie
Signature of Judge

RAYMOND J. DEARLE U.S.D.J.
Name and Title of Judge

6/21/2019
Date

Appendix E

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
15 U.S.C. 78j(b), 15 U.S.C. 78ff	Securities fraud-PR newswire hack.	8/31/2015	3(8-1)
15 U.S.C. 78j(b), 15 U.S.C. 78ff	Securities fraud-market-wired hack.	8/31/2015	4(S-1)
18 U.S.C. 1956(h)	Money laundering conspiracy.	8/31/2015	5(S-1)

Appendix E

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

SIXTY (60) MONTHS ON EACH COUNT TO RUN CONCURRENTLY WITH EACH OTHER.

☒ The court makes the following recommendations to the Bureau of Prisons:

If consistent with the Bureau of Prisons policies, practices and guidelines, the Court recommends designation to a minimum security institution and further invites consideration of Otisville, McKean or Schuylkill.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on 7/29/2019.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

Appendix E

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

THREE(3) YEARS ON EACH COUNT TO RUN CONCURRENTLY.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution, (*check if applicable*)

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)

7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

Appendix E

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

Appendix E

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: *www.uscourts.gov.*

Defendant's Signature _____ Date _____

Appendix E

SPECIAL CONDITIONS OF SUPERVISION

1) Upon request, the defendant shall provide the U.S. Probation Department with full disclosure of his financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the financial accounts reported and noted within the presentence report, the defendant is prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Department. The defendant shall cooperate with the Probation Officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income and expenses. The defendant shall cooperate in the signing of any necessary authorization to release information forms permitting the U.S. Probation Department access to his financial information and records;

2) Defendant shall comply with the Restitution Order.

Appendix E

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 500.00	$	$250,000.00	$339,062.99

☐ The determination of restitution is deferred until. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
PR Newswire/ Cision US Inc.	$283,123.06	$283,123.06	
Business Wire, Inc.	$55,939.93	$55,939.93	
TOTALS	$ 339,062.99	$ 339,062.99	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Appendix E

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

* ORDER OF RESTITUTION JOINTLY AND SEVERALLY. AS TO VITALY KORCHEVSKY AND CO-DEFENDANTS, VLADISLAV KHALUPSKY, LEONID MOMOTOK AND ALEXANDER GARKUSHA, DATED 6/17/2019, ATTACHED TO AMENDED JUDGMENT.

FINE: $250,000.00 PAYABLE WITHIN 90 DAYS.

Appendix E

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ Lump sum payment of $ 500.00 immediately, balance due

☐ not later than, _____ or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with DC, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., 30 or 60 days), after release from imprisionment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

FINE OF $250,000.00 PAYABLE WITHIN 90 DAYS.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due, during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution

interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Appendix E

ADDITIONAL DEFENDANTS AND CO-DEFENDANTS HELD JOINT AND SEVERAL

Case Number Defendant and Co-Defendant Names (including defendant numbers)	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**
CR 15-381-02 (RJD) Vladislav Khalupsky	$283,123.06	$283,123.06	PR Newswire/ Cision US Inc.
CR 15-381-02(RJD) Vladislav Khalupsky	$55,939.93	$55,939.93	Business Wire, Inc.
CR 15-381-03(RJD) Leonid Momotok	$283,123.06	$283,123.06	PR Newswire/ Cision US Inc.
CR 15-381-03(RJD) Leonid Momotok	$55,939.93	$55,939.93	Business Wire, Inc.

Appendix E

CR 15-381-04(RJD) Alexander Garkusha	$283,123.06	$283,123.06	PR Newswire/ Cision US Inc.
CR 15-381-04(RJD) Alexander Garkusha	$55,939.93	$55,939.93	Business Wire, Inc.

Appendix E

ADDITIONAL FORFEITED PROPERTY

AMENDED FINAL ORDER OF FORFEITURE DATED 5/8/2019 ATTACHED TO AMENDED JUDGMENT.

APPENDIX F — TRANSCRIPT EXCERPTS OF THE UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED JUNE 28, 2018

[2588]UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

15-CR-00381(RJD)

UNITED STATES OF AMERICA,

Plaintiff,

-against-

VITALY KORCHEVSKY AND
VLADISLAV KHALUPSKY,

Defendants.

United States Courthouse
Brooklyn, New York

June 28, 2018
9:00 a.m.

TRANSCRIPT OF CRIMINAL CAUSE FOR TRIAL BEFORE THE HONORABLE RAYMOND J. DEARIE UNITED STATES SENIOR DISTRICT JUDGE BEFORE A JURY

***

[2699]with you.

Who is next?

MS. BRILL: I suppose I'm next.

Yesterday you told me I needn't, but I feel I should at this time let the record reflect that Mr. Korchevsky joins in the motions as to Counts Three and Four, and in the argument just made by Ms. Felder particularly with respect to Count Two.

And then moving on, we also, on behalf of Mr. Korchevsky, move for a judgment of acquittal as to Counts One, Two, and Five. Your Honor, as to Count One, we cite -- we -- the request for a judgment of acquittal is based on the insufficiency of the evidence and we cite the Court to the Santos case, a Supreme Court case from 2008 -- actually, Your Honor, that's as to Count Five.

So as to Count Five, the money laundering count, we cite the Court to a Santos case, which is from 2008. And essentially, the holding in that case is that there is a -- that that -- the commission of the offense, paying expenses sustaining the operation of the actual criminal endeavor itself, is not sufficient to prove -- to constitute proceeds in connection with the money laundering conviction.

So as I understand it, and this has been evidence that's come in over the last two days, so forgive me for being less than precise about all of the evidence that's come in [2700] over the last two days, but essentially, it's the money that

has gone overseas to pay the hackers, that it constitutes the money laundering being crime -- the money laundering crime that's charged in the indictment. And, again, that would -- the Santos case is about a gambling operation --

THE COURT: Why do you limit it to the payment to the hackers?

MS. BRILL: Well, because the charge is money laundering under subsection A2, which is money flowing nationally and internationally.

THE COURT: I'm sure.

MS. BRILL: So -- I -- and I confess, I may be, is there some other money that I should be addressing the Court's attention to?

THE COURT: Well, I don't recall the details, but I recall a lot of money flowing in a lot of places, some of which outside the United States. Now, if that was specifically to the hackers, okay, that was for the hackers, but I thought there was money into accounts -- different accounts.

Am I wrong in that?

MR. TUCKER: You are absolutely right, Your Honor. A variety of accounts, including accounts that the Government contends were conduits to the computer hackers, also payments to Khalupsky. These were all theories for promotion. There's [2701]also concealment allegation.

MS. BRILL: Yeah, I'm getting to the concealment, Your Honor, but I guess the -- so the -- well, we cite the Court to Santos for the issue of those international payments.

And with respect to concealment, Your Honor, the nexus -- the insufficiency claim stated simply is that the nexus to Mr. Korchevsky is not there. So I would submit that with respect to all of those transfers -- I don't know if you said the numerous or several or a plethora of transfers -- there's no indication that Mr. Korchevsky has a nexus for knowledge -- or knowledge to any of those transfers or transactions, which is essential to the money laundering count.

And, again, I cite Santos because that case stands for the proposition that it's one thing to talk about the offense and it's another thing to talk -- and what takes place in the course of the offense, and another thing about what constitutes the proceeds of that offense, and so I draw the Court's attention to that.

I also -- with respect to Count Two, it's a -- and in addition to what Ms. Felder said, it's a similar claim with respect to the computer intrusion claim and the lack of a nexus of Mr. Korchevsky to the actual computer intrusion.

We've heard testimony about him seeing papers, we've [2702]heard testimony about him seeing a legitimate website, and we heard testimony about him seeing press releases, and that's that evidence is there, but that is not the same thing as what is alleged in Count Two, which is an actual computer intrusion and obtaining those press

releases from a computer intrusion, so we -- so that's the allegation as to Count Two.

We also renew our multiplicity argument in our motion to dismiss as to Count Two, and -- and -- I apologize for the way I'm about to do this, but address the issue of multiplicity with respect to Count One, in particular, and Count Five as well. Particularly, in light of all these e-mails that just came in, it seems -- and I can't be more precise than just to refer to all these e-mails that just came in, we have a number of -- we have a number of relationships, but with respect to this essential relationship, we -- well, it -- because of the number of relationships that have been put together or lined up by the admission of these e-mails, the -- it would amount to the existence of more than one conspiracy. That's what I was trying to get at yesterday with respect to those e-mails from warninggp to complete strangers, or the money transfers from warninggp to addresses that don't bear a connection to this case. So going from that, Your Honor, is the multiplicity argument that I'm raising at this time, as sufficiency arguing in connection with the Rule 29.

THE COURT: All right. Thank you.

I'm constrained, given my understanding of the [2703] evidence, this rather extended record to deny the motions, perhaps to be revisited at another time.

All right. I have one half hour before I have to attend a meeting at 12:45, so let's get started.

Do you have a witness handy?

MR. BRILL: Yeah. Can I put him on the stand?

THE COURTROOM DEPUTY: Yes, and your first witness is?

MR. BRILL: Yes, Yaroslav Zayats.

THE COURTROOM DEPUTY: Okay. I'm going to ask one of my Russian interpreters and I will be back with the panel.

(Short pause.)

MR. BRILL: Your Honor, can the witness take the witness seat?

THE COURT: Sure. Sorry.

Right here, sir.

THE COURTROOM DEPUTY: All rise.

(Jury enters.)

THE COURT: All right. Please be seated, folks. We turn now to the defense case. Mr. Brill.

MR. BRILL: Thank you, Your Honor, at this time Mr. Korchevsky calls Mr. Yaroslav Zayats to the stand.

THE COURTROOM DEPUTY: Mr. Zayats, I'm going to ask you, please, to stand and raise your right hand.

****

APPENDIX G — TRANSCRIPT OF THE PROCEEDING, DATED JUNE 25, 2018

[1839]UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

15-CR-00381(RJD)

United States Courthouse
Brooklyn, New York

Monday, June 25, 2018
9:30 a.m.

UNITED STATES OF AMERICA,

- v -

VITALY KORCHEVSKY
AND VLADISLAV KHALUPSKY,

Defendants.

TRANSCRIPT OF CRIMINAL CAUSE FOR JURY TRIAL BEFORE THE HONORABLE RAYMOND J. DEARIE, UNITED STATES SENIOR DISTRICT JUDGE

* * *

[2008]this case, yes.

Q Okay. And, by the way, you were told -- strike that. You didn't go out and do your own investigation into to the newswire services; correct?

A That's a fairly general statement but yes, I have never investigated any newswire services for anything.

Q Someone else made you aware of the allegations as to the idea that the newswires had been hacked; correct?

A That's correct.

Q So just as an example, if we assume, you assume, that three weeks ago Microsoft made an announcement that on June 25th, today, at the end of the day they were going to announce earnings, okay, and 15 minutes ago they uploaded their press release to a newswire service and I took out my phone right now and made a trade in Microsoft, that trade would be in the window, yes?

A Yes.

Q And it would be based on the earnings that had been previously discussed; correct?

A Correct.

Q And if I sold it tomorrow that would be three days or less as a round trip; correct?

A Yes.

Q But you would agree with me that since I've been sitting here or standing here for this time there's no indication that [2009]I have any access to any hacked information or any nonpublic information?

Appendix G

MS. NESTOR: Objection, Your Honor.

THE COURT: I'll permit it. Go ahead.

A So this is a statistical analysis so it doesn't look at any particular one trade at a time. The evidence comes from a pattern of trading over time. So the fact that the evidence that's relevant here in my analysis is that over a large set of trades that I see a correlation between upload time and trade time and that's interesting evidence. I see shifting from one newswire service to the next. That's interesting. So statistics doesn't look at one trade at a time. It looks at a pattern of trading and that's what my analysis is about.

Q Sure. Except that you told the jury about one trade at a time in a lot of instances a few minutes ago. You told them about CA Technologies, one trade. You told them about DNDN, one trade. You told them about Panera Bread, one time and you were making certain assumptions when you told them about those trades; correct?

A I don't think I made any assumptions. Which assumptions would I have made?

Q Well, I remember you used the phrase if it were normal trading.

A I don't recall using the phrase "normal trading" ever in

* * *

APPENDIX H — TRANSCRIPT OF THE PROCEEDING, DATED JUNE 14, 2018

[777]UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

15-CR-00381(RJD)

United States Courthouse
Brooklyn, New York

Thursday, June 14, 2018
9:30 a.m.

UNITED STATES OF AMERICA,

- v -

VITALY KORCHEVSKY
AND VLADISLAV KHALUPSKY,

Defendants.

TRANSCRIPT OF CRIMINAL CAUSE
ON TRIAL BEFORE THE HONORABLE
RAYMOND J. DEARIE, UNITED STATES
SENIOR DISTRICT JUDGE, AND A JURY

* * *

[1065]A There was evidence of what are called "pen testing tools." So, there's a variety -- when we talk about hacking, it's also referred to as penetration testing. For instance, if you're working -- if you're a company and you

want somebody to test your network, instead of hiring a hacker, which is a somewhat less desirable term to use, the corporate term is "penetration tester." So, you'll hire a penetration testing company to come out and try to get into your network. The trick is that the same tools that are referred to as pen testing tools are also very useful to hackers themselves.

So, in this case, I found a variety of tools, of penetration testing tools or hacking tools that were stored on the computer.

Q Did you find indications that the user of that computer 4A had used a program SQLMap or Sequel Map?

A I did.

Q Is SQLMap an example of one of those penetration testing tools you just mentioned?

A It is.

Q Please tell the jury what SQLMap does.

A Sure. So, SQLMap -- this is going to get a little weird. I'm sorry, it will get a little complex.

Lots of things on the internet are run based on databases. And one of the most common database languages is called SQL. The SQL stands for Structured Query Language.

Appendix H

[1066]There's a variety of different flavors of SQL out there. You can think of them kind of like dialects. Everybody in the United -- well, lots of people in the United States speak English; some people speak it with certain accents. Same kind of thing with the different varieties of SQL out there. There are also different databases that are completely different language that don't talk to each other or you have to have an interpreter between them.

So, because so many different web sites and so many different systems use SQL --

Forgive me, I'm going to just refer to it as "sequel," spelled S-E-Q-U-E-L, just like that. It will be a lot simpler for everybody.

So, SQL, or Sequel, is very popular and runs a lot of sites. And what you can do is if you haven't configured your Sequel database correctly or even if you have configured it correctly, there are certain ways you can use tools like SQLMap to figure out how a database is laid out and inject commands it to it; basically, make the database do things that the legitimate owner of the database wouldn't want you to be able to do.

You can think of it like somebody coming to a house and trying the door and checking the windows, seeing if they can find a way in. And if you use some of these tools and there are vulnerabilities, then you can find a way to get in [1067]in; open a door, get in a window, and then get things out of the wind database that you shouldn't be able to get or that the owner of the database wouldn't want you to be able to access.

Appendix H

THE COURT: All right. We're going to have to break for the day and for the week, ladies and gentlemen. Thank you for your attention.

You have the schedule. You'll note particularly that on Monday we start at 10 a.m., so you get an extra half hour to enjoy the morning, hopefully.

We're not going to see each other now for three days, so it really warrants my emphasizing to you of the need to be cautions about any news accounts, do not discuss this case in any way, and do not be tempted, Heaven forbid, to do any independent research of your own.

And get some rest and we will see you bright and early, sharp, 10 o'clock Monday morning. Safe home.

(Jury exits.)

THE COURT: Have a seat, folks. So let's talk about Monday.

MR. TUCKER: Yes, your Honor. Monday seems like a long way away.

We are expecting, obviously, Agent Shahrani to finish his testimony. We'll send out a more formally formatted list either tonight or tomorrow, but I think the

* * *

APPENDIX I — SUPERSEDING INDICTMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED SEPTEMBER 13, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. 15-381 (S-1) (RJD)

UNITED STATES OF AMERICA

-against-

VITALY KORCHEVSKY AND
VLADISLAV KHALUPSKY,

Defendants.

(T. 15, U.S.C., §§ 78j(b) and 78ff; T. 18, U.S.C., §§ 371, 981(a)(1)(C), 982(a)(l), 1349, 1956(h), 2 and 3551 *et seq.*; T. 21, U.S.C., § 853(p); T. 28, U.S.C., § 2461(c))

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

INTRODUCTION

At all times relevant to this Superseding Indictment, unless otherwise indicated:

Appendix I

I. The Defendants and Relevant Co-conspirators

1. The defendant VITALY KORCHEVSKY was a resident of Glen Mills, Pennsylvania, and controlled brokerage accounts at, *inter alia*, E*Trade, Jefferies, JP Morgan, Scottrade, Fidelity and TD Ameritrade. KORCHEVSKY was formerly a hedge fund manager and investment adviser who was registered with the Securities and Exchange Commission ("SEC") from 2005 through 2009.

2. The defendant VLADISLAV KHALUPSKY was a resident of Brooklyn, New York and Odessa, Ukraine, and controlled brokerage accounts at, *inter alia*, Merrill Lynch. KHALUPSKY was formerly a broker-dealer registered with the SEC from 2000 through 2008.

3. Leonid Momotok was a resident of Suwanee, Georgia, and controlled brokerage accounts at, *inter alia* TD Ameritrade.

4. Alexander Garkusha was a resident of Alpharetta and Cumming, Georgia. Garkusha was the Executive Vice President of APD Developers, Inc., a company based in Alpharetta, Georgia, that designed and built residential communities and condominiums.

5. Arkadiy Dubovoy was a resident of Alpharetta, Georgia, and controlled brokerage accounts at, *inter alia*, Charles Schwab, E*Trade, Fidelity, Merrill Lynch and TD Ameritrade. Arkadiy Dubovoy was the owner of APD Developers, Inc.

6. Igor Dubovoy was a resident of Alpharetta, Georgia, and controlled brokerage accounts at, *inter alia*, Charles Schwab, E*Trade, Fidelity, Merrill Lynch and TD Ameritrade. Igor Dubovoy was the son of Arkadiy Dubovoy.

7. Pavel Dubovoy was a resident of Alpharetta, Georgia and Kiev, Ukraine. Pavel Dubovoy was related to Arkadiy Dubovoy and Igor Dubovoy.

8. Ivan Turchynov was a resident of Kiev, Ukraine.

9. Oleksandr Ieremenko was a resident of Kiev, Ukraine.

II. The Targeted Entities

10. PR Newswire Association LLC ("PR Newswire"), a wholly-owned subsidiary of UBM plc, was a global company with its headquarters in New York, New York. PR Newswire was in the business of, *inter alia*, publishing and disseminating press releases for corporate clients.

11. Marketwired L.P. ("Marketwired") was a privately-held company with its global headquarters in Toronto, Canada and its U.S. headquarters in El Segundo, California. Marketwired was in the business of, *inter alia*, publishing and disseminating press releases for corporate clients.

12. Business Wire, a wholly-owned subsidiary of Berkshire Hathaway, was a global company with its

headquarters in San Francisco, California. Business Wire was in the business of, *inter alia*, publishing and disseminating press releases for corporate clients.

13. PR Newswire, Marketwired and Business Wire (collectively, the "Victim Newswires") were authorized by the SEC to issue press releases for, *inter alia*, the following publicly-traded companies: Acme Packet, Inc. ("APKT"); Advanced Micro Devices Inc. ("AMD"); Aéropostale, Inc. ("ARO"); Albemarle Corp. ("ALB"); Align Technology, Inc. ("ALGN"); AllianceBernstein Holding ("AB"); Allscripts Healthcare Solutions ("MDRX"); Allstate Corp. ("ALL"); Altera Corp. ("ALTR"); ANN INC. ("ANN"); Arkansas Best Corp. ("ABFS"); ARRIS Group ("ARRS"); Atmel ("ATML"); AutoNation, Inc. ("AN"); Avista Corp. ("AVA"); Avon Products, Inc. ("AVP"); Bob Evans Farms, Inc. ("BOBE"); The Boeing Company ("BA"); Borg Warner, Inc. ("BWA"); CA, Inc. ("CA"); Calumet Specialty Products Partners ("CLMT"); Caterpillar Inc. ("CAT"); Cepheid ("CPHD"); Chubb Ltd. ("CB"); Clorox Co. ("CL"); Corrections Corp. of America ("CXW"); Covanta Energy Co. ("CV A"); Cyberonics, Inc. ("CYBX"); Cynosure, Inc. ("CYNO"); Darden Restaurants, Inc. ("DRI"); Darling Ingredients, Inc. ("DAR"); DealerTrack Technologies, Inc. ("TRAK"); Dean Foods ("DF"); Deere & Company ("DE"); Dendreon Corp. ("DNDN"); Dick's Sporting Goods, Inc. ("DKS"); Digital Globe, Inc. ("DGI"); Domino's Pizza ("DPZ"); Dream Works Animation ("DWA"); E. I. Du Pont De Nemours and Company ("DD"); Dycom Industries, Inc. ("DY"); Edwards Lifesciences Corporation ("EW"); Extra Space Storage ("EXR"); Foot Locker, Inc. ("FL"); Gentex Corp. ("GNTX"); GeoEye,

Inc. ("GEOY"); GNC Holdings, Inc. ("GNC"); Guess?, Inc. ("GES"); The Hain Celestial Group, Inc. ("HAIN"); Hertz Global Holdings, Inc. ("HTZ"); Hewlett-Packard Company ("HPQ"); HNI Corp. ("HNI"); The Home Depot, Inc. ("HD"); Hospira, Inc. ("HSP"); InterOil Corp. ("IOC"); Juniper Networks, Inc. ("JNPR"); La-Z-Boy ("LZB"); LDK Solar Co., Ltd. ("LDK"); Legg Mason, Inc. ("LM"); Leggett & Platt, Inc. ("LEG"); MasTec, Inc. ("MTZ"); Lincoln Electric Holdings, Inc. ("LECO"); Lions Gate Entertainment ("LGF"); Marriott International ("MAR"); Micrel Inc. ("MCRL"); MICROS Systems, Inc. ("MCRS"); NetApp, Inc. ("NTAP"); NuVasive, Inc. ("NUVA"); OmniVision Technologies, Inc. ("OVTI"); OMNOVA Solutions Inc. ("OMN"); Oracle Corporation ("ORCL"); Overstock.com, Inc. ("OSTK"); Owens Corning ("OC"); Panera Bread Company ("PNRA"); PAREXEL International Corporation ("PRXL"); Parker-Hannifin Corporation ("PH"); Payless ShoeSource ("PSS"); The PNC Financial Services Group, Inc. ("PNC"); Qualcomm, Inc. ("QCOM"); RadioShack Corporation ("RSH"); Silicon Graphics International Corp. ("SGI"); Southwestern Energy ("SWN"); Stone Energy ("SOY"); Synopsys, Inc. ("SNPS"); Tesla Motors, Inc. ("TSLA"); Texas Instruments Incorporated ("TXN"); TreeHouse Foods, Inc. ("THS"); VASCO Data Security International, Inc. ("VDSI"); VeriSign, Inc. ("VRSN"); VMware, Inc. ("VMW"); and Weight Watchers International, Inc. ("WTW") (collectively, the "Target Companies").

III. Relevant Terms and Definitions

14. An "Internet Protocol" address ("IP address") was a numerical label assigned to each device (e.g., computer,

printer) participating in a computer network that used the Internet Protocol for communication. An IP address served two principal functions: host or network interface identification and location addressing. Because every device that connected to the internet used an IP address, IP address information could identify computers and other devices that were used to access the internet.

15. A "Uniform Resource Locator" ("URL") was a computerized reference to a resource that specified the location of the resource on a computer network and a mechanism for retrieving it. URLs most commonly referenced web pages.

16. "Malware" referred to malicious computer software programmed to, *inter alia*, gain and maintain unauthorized access to computers and to identify, store and export information from hacked computers.

17. "PHP script" was a server-side scripting language designed for web development but also used as a general-purpose programming language. An unauthorized PHP script was an unauthorized program that could run undetected within a hacked server.

18. "Structured Query Language" ("SQL") was a computer programming language designed to retrieve and manage data stored in computer databases.

19. "SQL Injection Attacks" were methods of hacking into and gaining unauthorized access to computers connected to the internet.

20. "Password hashes" were encrypted data strings generated when a password was passed through an encryption algorithm. Passwords for network accounts were often stored on the network as a password hash as a security measure.

21. "Brute force attacks" or "bruting" referred to one method for decrypting data. This method could be used to decrypt a password hash, revealing the unencrypted password.

22. "Phishing" referred to an attempt to gain unauthorized access to a computer or computers by sending an email that appeared to be a legitimate communication from a trustworthy source, but contained malware or a link to download malware.

23. "Short-selling" or "selling short" was the selling of a stock that the seller did not own. When a trader engaged in short-selling he or she was anticipating a decline in the share price.

24. A "put option" gave the holder of the option the right, but not the obligation, to sell a specified amount of the underlying security at a specified price within a specific time period. Generally, the holder of a put option anticipated that the price of the underlying security would decrease during a specified amount of time.

25. A "call option" gave the holder of the option the right, but not the obligation, to purchase a specified amount of the underlying security at a specified price

within a specific time period. Generally, the holder of a call option anticipated that the price of the underlying security would increase during a specified amount of time.

26. A "Form 8K" was a form that the SEC required publicly-traded companies to use to notify investors of any material event that was important to the company's shareholders.

IV. The Fraudulent Hacking and Trading Scheme

A. Overview

27. In or about and between February 2010 and August 2015, the defendants VITALY KORCHEVSKY and VLADISLAV KHALUPSKY, together with Leonid Momotok, Alexander Garkusha, Arkadiy Dubovoy, Igor Dubovoy, Pavel Dubovoy, Ivan Turchynov, Oleksandr Ieremenko and others, engaged in a scheme whereby they executed and caused others to execute securities transactions in the Target Companies based in whole or in part on material, nonpublic information ("MNPI") that was fraudulently obtained through unauthorized attacks on the computer networks of the Victim Newswires. The defendants, together with others, stole MNPI about the Target Companies, which was in the form of confidential press releases, by using sophisticated intrusion techniques, such as SQL injection and brute force attacks, and then traded in the Target Companies based on the stolen MNPI for substantial financial gain.

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28. The defendants and their co-conspirators were generally organized into three groups: (i) the individuals, including Ivan Turchynov and Oleksandr Ieremenko, who used sophisticated intrusion techniques and stole MNPI from the Victim Newswires' computer networks from overseas locations such as Ukraine and Russia (collectively, the "Hackers"); (ii) the individuals, including the defendants VITALY KORCHEVSKY and VLADISLAV KHALUPSKY, Leonid Momotok, Alexander Garkusha, Arkadiy Dubovoy and Igor Dubovoy, who executed securities transactions based on the stolen MNPI (collectively, the "Traders"); and (iii) the individuals, including Pavel Dubovoy, who communicated and coordinated between the Hackers and Traders (collectively, the "Middlemen").

29. The MNPI stolen by the Hackers contained information relating to the Target Companies' earnings, gross margins, revenues and other confidential and material financial information. Thus, the confidential press releases contained economically valuable information and the Victim Newswires and Target Companies had a right to control the use of that information. The Target Companies provided the Victim Newswires with this MNPI, typically in press releases, which was then uploaded on the Victim Newswires' computer networks and disseminated to the public at the direction of the Target Companies. Until the designated distribution time, the Victim Newswires were contractually bound to keep the content of the press releases confidential and non-public.

30. The Target Companies' press releases were maintained on the Victim Newswires' computer networks for a limited period of time. Consequently, the Hackers stole the MNPI shortly after it was uploaded onto the Victim Newswires' computer networks and quickly made the MNPI available to the Traders, initially through the Middlemen, so that the Traders could engage in illegal securities transactions before the MNPI was released to the public (hereinafter referred to as "inside the window trades"). In sum, in or about and between January 2011 and February 2014 alone, the defendants and their co-conspirators stole more than 100,000 press releases and executed approximately 1,000 inside the window trades in the Target Companies based on MNPI stolen from the Victim Newswires resulting in approximately $30 million in illegal profits.

B. The Hacking of the Victim Newswires

31. The Hackers, including Ivan Turchynov and Oleksandr Ieremenko, attempted to gain access to the Victim Newswires' computer networks to steal the Target Companies' MNPI using various methods, such as phishing attempts and the surreptitious infiltration of servers the Victim Newswires leased from data storage providers.

32. In or about July 2010, the Hackers gained access to PR Newswire through the use of malware. The Hackers sent unauthorized PHP commands to the PR Newswire servers. Through these and other techniques, the Hackers could access press releases maintained on PR Newswire's

network from any internet-connected computer in the world. Web server logs recovered from the hacked PR Newswire servers show repeated and regular improper accesses to the PR Newswire servers. On or about October 10, 2012, Oleksandr Ieremenko sent a message, in Russian, to an unidentified individual, which stated, "I'm hacking prnewswire.com." When PR Newswire identified and removed malware that the Hackers had installed on its servers, an IP address associated with Ivan Turchynov made several unauthorized attempts to regain access to the PR Newswire servers.

33. The Hackers also gained unauthorized access to Business Wire's servers. Oleksandr Ieremenko's computer contained a file listing user IDs and associated hashed passwords for more than 200 employees of Business Wire. On or about March 25,2012, in an internet chat between Ivan Turchynov and Ieremenko, Ieremenko stated that he had successfully "bruted" a number of hashed passwords. The next day, Ieremenko sent Turchynov an electronic communication containing a link to malware that had been placed on Business Wire's computer network.

34. Beginning in at least February 2010, the Hackers gained unauthorized access to press releases on Marketwired's networks using a series of SQL injection attacks. For example, on or about and between April 24, 2012 and July 20, 2012, Ivan Turchynov sent SQL injection attack commands more than 390 times into Marketwired's computer network and was able to steal more than 900 press releases, including press releases from some of the Target Companies.

C. Sharing the Stolen MNPI

35. To execute the fraudulent scheme, the Hackers, Middlemen and Traders worked in concert and shared the fraudulently obtained MNPI from the Victim Newswires through, *inter alia*, interstate and international emails, telephone calls and internet chats. For example, a Gmail email account registered to and used by Igor Dubovoy exchanged numerous emails with a Gmail email account registered to and used by the defendant VITALY KORCHEVSKY. On or about April 26, 2013, Igor Dubovoy sent an email to KORCHEVSKY instructing him to sell their stock, per Arkadiy Dubovoy's orders. In response, KORCHEVSKY stated that they "got the numbers right" but that the market's "reaction [was] mixed." In fact, around the time of this email exchange, the Traders began trading 12 stocks, specifically, ECHO, EHTH, CAMP, CENX, MCRI, PFPT, IKAN, GDI, ACO, CALX, MCRL and VRSN, with mixed results.

36. On or about December 18,2013, the defendant VLADISLAV KHALUPSKY sent an email from his Gmail email account to his Yahoo! email account attaching screenshots of an unreleased native-file version of an Oracle Corporation ("Oracle") Form 8K containing earnings and other financial information for Oracle.

37. On or about January 3, 2014, Pavel Dubovoy sent an email to Arkadiy Dubovoy attaching five images displaying information about upcoming unreleased press releases for U.S. publicly-traded companies. On or about January 6, 2014, Arkadiy Dubovoy forwarded this email to

Alexander Garkusha. These images collectively contained information about the timing of press releases for more than 100 companies and the newswire service that would be issuing the press release.

38. In an effort to expand their fraudulent hacking and trading network, the defendants and their co-conspirators shared information on additional fraudulent schemes and attempted to recruit new traders and hackers through, *inter alia*, internet chats and emails. For example, between January 15, 2013 and January 20, 2013, the defendants VITALY KORCHEVSKY and VLADISLAV KHALUPSKY exchanged emails with Arkadiy Dubovoy and Pavel Dubovoy in which they discussed a "proprietary trading business" that involved a "special daytrading strategy" that "never los[t] money in the twelve months of 2012" and where the "typical trader" is alleged to make "a profit between $40,000 to $50,000" per month.

D. Trading on Stolen MNPI

39. The defendants VITALY KORCHEVSKY and VLADISLAV KHALUPSKY, together with Leonid Momotok, Alexander Garkusha, Arkadiy Dubovoy, Igor Dubovoy and others, coordinated their fraudulent inside the window trades. On or about October 8, 2013, Pavel Dubovoy sent an email to Arkadiy Dubovoy with a blank subject line and attached a photograph of a printout of a spreadsheet that contained information about 18 U.S. publicly-traded companies that were scheduled to issue press releases concerning earnings and other economically valuable information in October 2013 (the "Wish List").

On or about October 9, 2013, Arkadiy Dubovoy forwarded this email to Garkusha. In October 2013, KORCHEVSKY, Momotok and Arkadiy Dubovoy executed inside the window trades on six of the 18 companies listed in spreadsheet, specifically, ALGN, AMD, PNRA, JNPR, VMW and GNTX.

40. For example, the Wish List indicated that Marketwired would issue the ALGN press release on October 17, 2013. The press release was uploaded on Marketwired on October 17, 2013 at approximately 1:28 AM and issued to the public later that day at approximately 4:00 PM. Within this window, Arkadiy Dubovoy bought approximately 91,000 shares of ALGN on October 17, 2013, beginning at approximately 12:34 PM. A little over two hours later, beginning at approximately 2:36 PM, the defendant VITALY KORCHEVSKY bought approximately 95,500 shares of ALGN. As a result of this inside the window trading in ALGN based on stolen MNPI, KORCHEVSKY and Arkadiy Dubovoy made approximately $1.4 million.

41. As another example, the Wish List indicated that Marketwired would issue the PNRA press release "after market," or after the stock market closed at 4:00PM on October 22, 2013. The press release was uploaded on Marketwired on October 22, 2013 at approximately 9:04AM and issued to the public later that day at approximately 4:05PM. Within this window, Arkadiy Dubovoy sold short at least 29,000 shares ofPNRA on October 22,2013, beginning at approximately 2:04 PM. A little over an hour later, but still within the window, Leonid

Momotok bought approximately 1,000 shares, 26,000 call options and 2,000 put options of PNRA, beginning at approximately 3:18 PM. Momotok was followed by the defendant VITALY KORCHEVSKY who sold short approximately 50,000 shares and purchased 100 put options of PNRA, beginning at approximately 3:21 PM. As a result of this inside the window trading in PNRA based on stolen MNPI, KORCHEVSKY, Momotok and Arkadiy Dubovoy made approximately $950,000.

42. The timely coordination between the defendants and their co-conspirators was critical to the success of this fraudulent hacking and trading scheme that yielded more than $30 million in illegal proceeds. For example, on August 3, 2011, the DNDN press release was uploaded on PR Newswire at approximately 3:34PM and issued to the public less than thirty minutes later at approximately 4:01PM. Within this 27-minute window, beginning at approximately 3:56 PM, the defendant VITALY KORCHEVSKY bought 1,100 put options of DNDN. The next day, KORCHEVSKY sold all 1,100 put options for a profit of more than $2.3 million. Telephone records revealed that KORCHEVSKY called Arkadiy Dubovoy's business on August 2, 2011, and again on August 3, 2011, before the DNDN press release was uploaded on PR Newswire. On August 4, 2011, after KORCHEVSKY sold the put options, KORCHEVSKY placed a call to and received a call from Arkadiy Dubovoy's business on two occasions. A few months later, in or about October 2011, through a series of intermediary transactions, KORCHEVSKY used $400,000 from the same brokerage account he used to execute the DNDN trade to purchase

real estate in Glen Mills, Pennsylvania. Later that year, in or about December 2011, KORCHEVSKYused the balance of assets in this same brokerage account to purchase additional real estate.

43. As another example, on November 7, 2011, the TRAK press release was uploaded to PR Newswire at approximately 11:56 AM and issued to the public later that day at approximately 4:05PM. Within the window, beginning at approximately 1:37PM, the defendant VITALY KORCHEVSKY began buying 66,552 shares of TRAK. One minute later, beginning at approximately 1:38PM, Arkadiy Dubovoy began buying 94,420 shares of TRAK. A little over an hour later, beginning at approximately 3:49PM, Leonid Momotok began buying 5,424 shares of TRAK. Telephone records revealed that Momotok placed two telephone calls to Arkadiy Dubovoy's business at 1: 12 PM and 1: 13 PM, approximately 25 minutes before Arkadiy Dubovoy began trading in TRAK, and received a telephone call from Arkadiy Dubovoy's business at 3:34 PM, approximately 15 minutes before Momotok began trading in TRAK. As a result of this inside the window trading in TRAK based on stolen MNPI, KORCHEVSKY, Momotok and Arkadiy Dubovoy made approximately $540,000.

44. In exchange for the stolen MNPI, the Traders paid the Hackers, *inter alia*, a percentage of the Traders' profits from their inside the window trades. To conceal their ties in this fraudulent scheme, the Traders wired their fraudulent trading proceeds to, *inter alia*, accounts in Estonia in the names of shell companies controlled by

the Hackers and the Traders. The Traders and Hackers also shared access to the same brokerage accounts. For example, the IP address associated with Ivan Turchynov frequently accessed brokerage accounts controlled by Arkadiy Dubovoy and Igor Dubovoy that were used to execute hundreds of inside the window trades. Additionally, Arkadiy Dubovoy and Igor Dubovoy shared login and password information for brokerage accounts that they controlled with the defendant VLADISLAV KHALUPSKY and an IP address associated with KHALUPSKY accessed these brokerage accounts on numerous occasions over the course of the conspiracy.

COUNT ONE
(Conspiracy to Commit Wire Fraud)

45. The allegations contained in paragraphs one through 44 are realleged and incorporated as if fully set forth in this paragraph.

46. In or about and between February 2010 and August 2015, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants VITALY KORCHEVSKY and VLADISLAV KHALUPSKY, together with Leonid Momotok, Alexander Garkusha, Arkadiy Dubovoy, Igor Dubovoy, Pavel Dubovoy, Ivan Turchynov, Oleksandr Ieremenko and others, did knowingly and intentionally conspire to execute a scheme and artifice to defraud the Victim Newswires and the Target Companies, and to obtain money and property from the Victim Newswires and the Target Companies by means of materially false

and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice, to transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures and sounds, contrary to Title 18, United States Code, Section 1343.

(Title 18, United States Code, Sections 1349 and 3551 *et seq.*)

COUNT TWO
(Conspiracy to Commit Securities Fraud and Computer Intrusions)

47. The allegations contained in paragraphs one through 44 are realleged and incorporated as if fully set forth in this paragraph.

48. In or about and between February 2010 and August 2015, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants VITALY KORCHEVSKY and VLADISLAV KHALUPSKY, together with Leonid Momotok, Alexander Garkusha, Arkadiy Dubovoy, Igor Dubovoy, Pavel Dubovoy, Ivan Turchynov, Oleksandr Ieremenko and others, did knowingly and willfully conspire to:

(a) use and employ manipulative and deceptive devices and contrivances, contrary to Rule 106-5 of the Rules and Regulations of the United States Securities and Exchange Commission, Title 17, Code of Federal

Regulations, Section 240.10b-5, by: (i) employing devices, schemes and artifices to defraud; (ii) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) engaging in acts, practices and courses of business which would and did operate as a fraud and deceit upon investors and potential investors in the Target Companies, in connection with the purchase and sale of investments in the Target Companies, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails, contrary to Title 15, United States Code, Sections 78j(b) and 78ff; and (b) access one or more computers without authorization and exceed authorized access, and thereby to obtain information from one or more protected computers for the purpose of commercial advantage and private financial gain, and in furtherance of criminal and tortious acts in violation of the laws of the United States and any State, and the value of the information obtained exceeded $5,000, contrary to Title 18, United States Code, Sections 1030(a)(2), 1030(b), 1030(c)(2)(A) and 1030(c)(2)(B).

49. In furtherance of the conspiracy and to effect its objects, within the Eastern District of New York and elsewhere, the defendants VITALY KORCHEVSKY and VLADISLAV KHALUPSKY, together with Leonid Momotok. Alexander Garkusha, Arkadiy Dubovoy, Igor Dubovoy, Pavel Dubovoy, Ivan Turchynov, Oleksandr Ieremenko and others, committed and caused to be committed, among others, the following:

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OVERT ACTS

a. On or about November 26, 2010, Pavel Dubovoy sent an email to Garkusha that contained instructions on how to download the hacked press releases.

b. On or about December 9, 2010, Garkusha sent an email to a co-conspirator, an individual whose identity is known to the Grand Jury, containing instructions on how to download the hacked press releases and advising how to conceal one's IP address while viewing the hacked press releases.

c. On or about May 23,2012, Momotok bought approximately 3,000 put options of HPQ stock at approximately 3:54PM, which was between the time that the press release was uploaded onto PR Newswire's servers and the time that the related press release was disclosed to the public.

d. On or about January 15, 2013, Pavel Dubovoy sent an email to KHALUPSKY discussing trading strategies designed to manipulate the price of stocks and stating that traders make "a profit between $40,000 [and] $50,000" a month.

e. On or about April 26, 2013, KORCHEVSKY sent an email to Igor Dubovoy stating that they "got the numbers right" but that the market's "reaction [was] mixed" in response to instructions to sell the stock.

f. On or about December 18, 2013, KHALUPSKY sent an email from his Gmail email account to his Yahoo! email account, which was registered in Brooklyn, New York, attaching an unreleased native file version of an Oracle press release.

(Title 18, United States Code, Sections 371 and 3551 *et seq.*)

COUNT THREE
(Securities Fraud - PR Newswire Hack)

50. The allegations contained in paragraphs one through 44 are realleged and incorporated as if fully set forth in this paragraph.

51. In or about and between February 2010 and August 2015, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants VITALY KORCHEVSKY and VLADISLAV KHALUPSKY, together with Leonid Momotok, Alexander Garkusha, Arkadiy Dubovoy, Igor Dubovoy, Pavel Dubovoy, Ivan Turchynov, Oleksandr Ieremenko and others, did knowingly and willfully use and employ one or more manipulative and deceptive devices and contrivances, contrary to Rule 106-5 of the Rules and Regulations of the United States Securities and Exchange Commission, Title 17, Code of Federal Regulations, Section 240.106-5, by: (a) employing one or more devices, schemes and artifices to defraud; (b) making one or more untrue statements of material fact and omitting to state one or more material facts necessary

in order to make the statements made, in the light of the circumstances in which they were made, not misleading; and (c) engaging in one or more acts, practices and courses of business which would and did operate as a fraud and deceit upon one or more investors or potential investors in the Target Companies that used PR Newswire, in connection with the purchases and sales of investments in the Target Companies that used PR Newswire, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails.

(Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 *et seq.*)

COUNT FOUR
(Securities Fraud - Marketwired Hack)

52. The allegations contained in paragraphs one through 44 are realleged and incorporated as if fully set forth in this paragraph.

53. In or about and between February 2010 and August 2015, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants VITALY KORCHEVSKY and VLADISLAV KHALUPSKY, together with Leonid Momotok, Alexander Garkusha, Arkadiy Dubovoy, Igor Dubovoy, Pavel Dubovoy, Ivan Turchynov, Oleksandr Ieremenko and others, did knowingly and willfully use and employ one or more manipulative and deceptive devices and contrivances, contrary to Rule 10b-5 of the

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Rules and Regulations of the United States Securities and Exchange Commission, Title 17, Code of Federal Regulations, Section 240.10b-5, by: (a) employing one or more devices, schemes and artifices to defraud; (b) making one or more untrue statements of material fact and omitting to state one or more material facts necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading; and (c) engaging in one or more acts, practices and courses of business which would and did operate as a fraud and deceit upon one or more investors or potential investors in the Target Companies that used Marketwired, in connection with the purchases and sales of investments in the Target Companies that used Marketwired, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails.

(Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 *et seq.*)

COUNT FIVE
(Money Laundering Conspiracy)

54. The allegations contained in paragraphs one through 44 are realleged and incorporated as if fully set forth in this paragraph.

55. In or about and between February 2010 and August 2015, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants VITALY KORCHEVSKY

and VLADISLAV KHALUPSKY, together with Leonid Momotok, Alexander Garkusha, Arkadiy Dubovoy, Igor Dubovoy, Pavel Dubovoy, Ivan Turchynov, Oleksandr Ieremenko and others, did knowingly and intentionally conspire to transport, transmit and transfer monetary instruments and funds from one or more places in the United States to one or more places outside the United States, and from one or more places outside the United States to and through one or more places in the United States, (i) with the intent to promote the carrying on of specified unlawful activity, to wit: wire fraud, in violation of Title 18, United States Code, Section 1343, and fraud in the sale of securities, in violation of Title 15, United States Code, Sections 78j(b) and 78ff (the "Specified Unlawful Activities"), contrary to Title 18, United States Code, Section 1956(a)(2)(A), and (ii) knowing that the monetary instruments and funds involved in the transportation, transmission and transfer represented the proceeds of some form of unlawful activity and knowing that such transportation, transmission and transfer was designed in whole and in part to conceal and disguise the nature, location, source, ownership and control of the proceeds of the Specified Unlawful Activities, contrary to Title 18, United States Code, Section 1956(a)(2)(B)(i).

(Title 18, United States Code, Sections 1956(h) and 3551 *et seq.*)

Appendix I

CRIMINAL FORFEITURE ALLEGATIONS AS TO COUNTS ONE THROUGH FOUR

56. The United States hereby gives notice to the defendants that, upon their conviction of any of the offenses charged in Counts One through Four, the United States will seek forfeiture in accordance with Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), which require any person convicted of such offenses to forfeit any property, real or personal, constituting or derived from proceeds traceable to such offenses, including but not limited to all right, title and interest in: (a) the real property and premises located at 1591 Meadow Lane, Glen Mills, Pennsylvania 19342; (b) the real property and premises located at 3 Skyline Drive, Glen Mills, Pennsylvania 19342; (c) the real property and premises located at 7 Skyline Drive, Glen Mills, Pennsylvania 19342; (d) the real property and premises located at 9 Blackhorse Lane, Media, Pennsylvania 19063; (e) the real property and premises located at 316 Willowbrook Road, Upper Chichester, Pennsylvania 19061; (f) the real property and premises located at 674 Cheyney Road, West Chester, Pennsylvania; 19382 (g) the real property and premises located at 1290 Samuel Road, West Chester, Pennsylvania 19380; (h) the real property and premises located at 1737 Graham Road, Macon, Georgia 31211; (i) the real property and premises located at 122-134 Lancaster Avenue, Malvern, Pennsylvania 19355; and G) the real property and premises located at 1801 East Kings Highway, Coatesville, Pennsylvania 19320.

57. If any of the above-described forfeitable property, as a result of any act or omission of the defendants:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third party;

(c) has been placed beyond the jurisdiction of the court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendants up to the value of the forfeitable property described in this forfeiture allegation.

(Title 18, United States Code, Section 981(a)(1)(C);
Title 21, United States Code, Section 853(p);
Title 28, United States Code, Section 2461(c))

CRIMINAL FORFEITURE ALLEGATION AS TO COUNT FIVE

58. The United States hereby gives notice to the defendants that, upon their conviction of the offense charged in Count Five, the government will seek forfeiture

in accordance with Title 18, United States Code, Section 982(a)(1), which requires any person convicted of such offense to forfeit all property, real or personal, involved in such offense, or any property traceable to such property, including but not limited to all right, title and interest in: (a) the real property and premises located at 1591 Meadow Lane, Glen Mills, Pennsylvania 19342; (b) the real property and premises located at 3 Skyline Drive, Glen Mills, Pennsylvania 19342; (c) the real property and premises located at 7 Skyline Drive, Glen Mills, Pennsylvania 19342; (d) the real property and premises located at 9 Blackhorse Lane, Media, Pennsylvania 19063; (e) the real property and premises located at 316 Willowbrook Road, Upper Chichester, Pennsylvania 19061; (f) the real property and premises located at 674 Cheyney Road, West Chester, Pennsylvania 19382; (g) the real property and premises located at 1290 Samuel Road, West Chester, Pennsylvania 19380; (h) the real property and premises located at 1737 Graham Road, Macon, Georgia 31211; (i) the real property and premises located at 122-134 Lancaster Avenue, Malvern, Pennsylvania 19355; and (j) the real property and premises located at 1801 East Kings Highway, Coatesville, Pennsylvania 19320.

59. If any of the above-described forfeitable property, as a result of any act or omission of the defendants:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third party;

(c) has been placed beyond the jurisdiction of the court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendants up to the value of the forfeitable property described in this forfeiture allegation.

(Title 18, United States Code, Section 982(a)(1);
Title 21, United States Code, Section 853(p))

A TRUE BILL

/s/_____
FOREPERSON