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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 23 Cr. 430 (KPF)

ROMAN STORM,

Decision

Defendant.

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New York, N.Y.
September 26, 2024
4:30 p.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

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(Case called)

MR. REHN: Good afternoon, your Honor.

This is Thane Rehn for the government. Also on the line are Ben Gianforti and Ben Arad, Assistant United States Attorneys, and Special Assistant United States Attorney Kevin Mosley.

THE COURT: Good afternoon to everyone, and thank you.

And representing Mr. Storm this afternoon?

SPEAKER2: Good afternoon, your Honor.

This is Brian Klein on the line, also my colleagues Keri Curtis Axel and Kevin Casey, and then David Patton, and our client is also dialed in, Mr. Storm.

THE COURT: Thank you very much.

Good afternoon to each counsel.

Mr. Storm, this is Judge Failla. Are you able to hear me, sir?

THE DEFENDANT: Yes, your Honor, I'm able to hear you. This is Roman Storm.

THE COURT: Thank you very much.

Mr. Klein, I thought that, given that this was going to be a lengthy oral decision, it might make sense for the parties to appear telephonically. I also thought that might be a convenience to you and to your client, but of course I would like to obtain, if I may, your client's waiver of having this proceeding take place in person.

SPEAKER2: Your Honor, yes, you have that. And we greatly appreciate you letting us do this over phone. Do you need him to agree over the phone?

THE COURT: I would, thank you. And you'll excuse me, there was an interruption a moment there. Hopefully there won't be multiple interruptions during this conference.

Mr. Storm, were you able to hear me just speaking with your counsel a moment ago?

THE DEFENDANT: Yes, I did. And I do agree to proceed. Thank you.

THE COURT: By that, you mean you agree to proceed telephonically, and I thank you for noting that.

THE DEFENDANT: Right.

THE COURT: Well, then let me give folks an idea of the afternoon's proceedings. I have a long oral decision to read into the record, and at times like this, I think that I probably should issue it in writing, but it would get to you much more quickly if I did it orally, and that's why I'm doing it this way.

I am going to give everyone a moment or two to mute themselves so that there aren't any interruptions as I give this. And just for your planning purposes, I did not time myself, but I imagine that this is a 45- to 60-minute decision, so I appreciate in advance all of the patience and the attention that you can give me. So I'll pause for a moment and

then I will begin.

I do begin by thanking everyone on the call, in particular counsel for both sides and Mr. Storm for your comprehensive submissions, which took me a while to get through, and of course your oral argument presentations, but also your patience. Right after the oral argument in this matter, I found out that I had very time-sensitive issues in two other cases that I have with classified components to them, and I've also spent most of the month of September on trial. My trial finished this past Monday, so I thank for you your patience.

I also thank those who might be listening to this call or who will see the transcript of this who submitted *amici curiae* briefs to aid me in considering the issues in this case.

After the oral argument in August, I was advised by the parties that they had resolved the issues regarding the motion to suppress. I won't be discussing it here; instead, I'll be dealing with the motion to compel and the motion to dismiss. And for the reasons that I'm about to outline, I'm denying both motions.

I will ask the parties to obtain a copy of this transcript whenever it's convenient for you.

I'm going to begin with the motion to compel. And Mr. Storm is moving the Court for an order compelling the government to produce basically two categories of information.

I'll refer to the first category as "MLAT" communications, and I know the parties know what I'm speaking of. And at the time of the oral argument, what I had understood was that Mr. Storm had received some portion of the materials that the government had received in response to MLAT requests but not the other line communications with, for example, the Dutch authorities.

I also did appreciate Mr. Klein's proviso that the defense didn't want nonsubstantive communications like transmittal letters or scheduling emails, so nothing of that nature.

There's also the second category, which would be communications with or involving the office of Foreign Assets Control, which I will refer to as "OFAC," and the Financial Crimes Enforcement Network, which I will refer to as "FinCEN," materials and communications regarding Mr. Storm or this case. And Mr. Storm argued that the government was required to produce this information in accordance with their obligations under Federal Rule of Criminal Procedure 16 and cases such as *Brady v. Maryland*, 373 U.S. 83, from 1963. He argued that the information was material to his defense preparation and, in particular, that there was a strong indication that it will play an important role in uncovering admissible evidence, aiding in witness preparation, corroborating testimony, or assisting impeachment or rebuttal, and in so doing he was quoting from Judge Kaplan's decision in *United States v. Stein*,

488 F. Supp. 2d 350, from 2007.

The government opposed the motion and argued that Mr. Storm had not made a *prima facie* showing of materiality, and instead argued that these requests amounted to "a speculative fishing expedition." Their words, not mine.

So, looking first at the applicable law, I'm aware, and I know the parties are aware, so I might proceed somewhat summarily here, that pretrial discovery is governed by Rule 16 of the Federal Rules of Criminal Procedure, which provides, in pertinent part, that a defendant is entitled to obtain from the government documents and objects that are "within the government's possession, custody, or control" if they are either "material to preparing the defense" or will be used by the government in its case in chief at trial.

And what makes something material is if it could be used to counter the government's case or to bolster a defense. And the Second Circuit and other courts have found that information not meeting either of those criteria is not to be deemed material. This would include cases such as *United States v. Stevens*, 985 F.2d 1175, from 1993, and *United States v. Scully*, which is an Eastern District decision from 2015, discussing this, 108 F. Supp. 3d 59.

The courts are directed to consider "the logical relationship between the information and the issues in the case" and "the importance of the information in light of the

evidence as a whole." "There must be some indication that the pretrial disclosure of the disputed evidence would ... enable [] the defendant significantly to alter the quantum of proof in his favor." And I am quoting here from *United States v. Maniktala*, 934 F.2d 25, a Second Circuit decision from 1991. And in this setting, it is "a defendant who bears the burden of making a *prima facie* showing that the information sought is material."

There are many cases for this proposition. One recent one is Judge Cronan's decision in *United States v. Alexandre*, at 2023 WL 416405, and the *United State v. Rigas*, 258 F. Supp. 2d 299, a Southern District decision from 2003.

Separately, there is the line of cases, including *Brady* and others, that establishes "the government has an affirmative duty under the Due Process Clause to disclose favorable evidence known to it, even if no specific disclosure request is made by the defense." Cases discussing the *Brady* and *Giglio* obligations of the government include *United States v. Hunter*, 32 F.4th 22, a Second Circuit decision from 2022.

These cases also make clear, however, that "there is no general constitutional right to discovery in a criminal case," that *Brady* did not create such a right, and that "Rule 16 does not entitle a criminal defendant to a broad and blind fishing expedition among items possessed by the

government on the chance that something impeaching might turn up." I've been quoting from two cases here, the first is *Weatherford v. Bursey*, 429 U.S. 545 from 1977, and the second is the *Scully* case I mentioned earlier.

Let me now turn to my analysis of this motion. And as I suggested in my questioning at oral argument, I find now, and I found then, Mr. Storm's arguments to compel production of the MLAT communication, and that's where I'm beginning, to be too speculative and too attenuated to satisfy his burden of showing materiality.

Even under Judge Kaplan's *Stein* standard, Mr. Storm has not demonstrated a "strong indication" that the information he seeks would aid defense. And that is because, in the papers I read and in the discussions at oral argument, everything was couched in terms of "may": Disclosure of these communications may provide insight into the government's theories of the case, particularly if they have changed; they may particularize the evidence the government intends to use at trial; they may give insights into other complicit parties, or parties the government thought were complicit earlier on; they may help the defense identify percipient witnesses for trial. But Mr. Storm has not succeeded in connecting the dots and explaining precisely how the communications sought would aid the defense. And that's insufficient under the law that I've just listed.

Of course, the defense argues that, because it does

not know the precise content of the requested materials, it must couch what it understands are in the requested materials and communications with terms like "could" and "may." While that may be understandable, it is still insufficient. There must be some showing that the MLAT communications are, in fact, and not just in theory, material to the defense. Instead, at oral argument, Mr. Klein recalled that, as a former prosecutor, he had observed "MLAT requests and communications, again, can often involve substantive facts about the case" or exhibits. And I'm quoting from the transcript at page six.

I, too, am a former prosecutor, but my experiences, which, as it happened, never resulted in a request for, much less a disclosure of, MLAT communications, it just can't be the basis for me to make a finding that such communications would be material to the defense.

Mr. Klein also sought to analogize the MLAT communications to search warrant applications, which are typically disclosed. But, as the government noted, those materials do not implicate comparable "diplomatic sensitivities." And ultimately, upon looking at the little bit of case law in this area, I agree with the conclusion that Judge Furman reached in the *Ralston* case, *United States v. Ralston*, 2021 WL 5054464 from 2021, that he rejected a motion to compel MLAT communications after reviewing the materials. Another case in which the motion was denied was

United States v. Hutchins, 2018 WL 1695499, from the Eastern District of Wisconsin.

Now, to be clear, I'm aware that there are some factual differences. In Judge Furman's case, for example, the materials there were sought in order to prove that the government had made a pretextual use of MLATs in order to toll the relevant statute of limitations. That's true, but as it happened, the defendant in the *Ralston* case made a much more detailed, even if ultimately unsuccessful argument, than Mr. Storm makes here.

I am also aware that Judge Furman reviewed the MLAT materials *in camera* before arriving at his decision. In that case, of course, the argument had been that they had been pretextual and the government had consented to their inspection. There's no comparable consent or showing in this case. And as I'll discuss shortly, I am not going to review these materials *in camera* simply because I've been asked to do so. And in part, that is because, as Mr. Klein confirmed at oral argument, the defense was not, at this time, raising an argument of government misconduct, the likes of which might be discussed in cases like *Kyles v. Whitley*, 514 U.S. 419, from 1995.

I also do see that the *Hutchins* Court noted that the government had produced all of the information it had received from the request at issue. I don't have that exact

representation in this case; I have, instead, the government's representation that it has complied with its Rule 16 and its disclosure obligations.

At oral argument, defense counsel also suggested that Mr. Storm had the right to review the MLAT materials in order to see what individuals or arguments were on the government's radar screen when the requests were submitted, and from this, Mr. Storm might learn of potential witnesses or of individuals the government once thought were co-conspirators, or once thought might have been involved in the underlying offense but elected not to charge, but neither of these reasons suffices to compel disclosure. To the extent the defense is moving for disclosure of other co-conspirators or government informants, there is a different vehicle, and that would be a motion under *Roviaro v. United States*, 353 U.S. 53, from 1957.

To the extent the government may have abandoned an earlier theory of the case because, as Mr. Klein argued, it is "somehow helpful to" Mr. Storm, that information would be subject to disclosure, if at all, under the government's *Brady* or *Giglio* obligations, it would not necessitate disclosing the underlying communications with the foreign prosecuting office or other state organizations.

Mr. Klein also suggested that, because the case "is a novel, complex case of first impression … understanding the government's theory would be generally helpful to us." I'm

quoting here from the transcript at page 11. But there is, in fact, a 37-page speaking indictment, and defense conceded that things were learned from that indictment and from the briefing in this case.

As a fallback position, Mr. Storm asks this Court to conduct an *in camera* review of the MLAT communications, and I am denying this request as well. I want to be clear, and some of you know this, that I come from the appellate side of the house, and I will frequently extend myself to do things that aren't technically required under the law simply to stave off an appellate issue. I'm not doing that here, however, because I believe it would set a bad precedent. To conduct an *in camera* investigation of the communications with the Dutch authority, for example, on this slender a record would effectively call for *in camera* reviews in all cases or nearly all cases. The defense hasn't met its burden, and I'm not interested in being a data point for some later motion for an *in camera* inspection on a similarly sparse record.

Now, there is a second prong of the motion to compel. And here, Mr. Storm is seeking to compel the government to produce all communications with OFAC and FinCEN relating to him or to this case more broadly. In his reply submissions and then again in oral arguments, Mr. Storm had narrowed his request to three, asking the Court to, first, have the government confirm that it has produced everything received

from OFAC and FinCEN, and, of course, if it hadn't produced things, to produce the materials that it held back; number two, to confirm that their agents had not had separate contact with OFAC and FinCEN; and number three, to order to OFAC and FinCEN to conduct prudential *Brady* reviews. As the government, at oral argument, confirmed the second point, that is now moot, and this Court is denying the remaining two requests.

At oral argument, the government confirmed that it did not produce all materials received from OFAC and FinCEN, but that it did fully comply with its discovery and disclosure obligations. And as with the MLAT communications, there are standards for the production of discovery pursuant to Rule 16, and for the disclosure of information pursuant to cases like *Brady*. There is nothing to suggest that the government wasn't warranted in withholding from disclosing things outside of the bounds of these obligations, and I am therefore not going to compel them to turn over the withheld materials. But as I made clear at oral argument, and as the government is aware from my work in other cases, if it turns out the government ultimately has interpreted its obligations too narrowly, there likely will be unfortunate consequences for their case.

This Court is also declining the invitation to issue prudential search requests to OFAC and FinCEN to conduct *Brady* reviews, assuming that, as the government does not but I do here, that I have the jurisdiction to compel such actions in

the first instance.

And here, the issue, as the parties are aware, distills to whether either of these agencies qualifies as a part of the prosecution team. Now, the notion of the prosecution team is discussed in cases such as *United States v. Avenatti*, 2022 Westlaw 457315, *United States v. Avellino*, 136 F.3d 249, a Second Circuit decision from 1998, *United States v. Meregildo*, 920 F. Supp. 2d 434, a Southern District decision, from 2013, and I just looked recently, and it's been discussed by Judge Oetken in *United States v. Middendorf*, 2018 WL 3956494, from the Southern District. And the notion there is that "the prosecution's obligation extends to any material in the possession of any entity that has acted as an 'arm of the prosecutor' in a given case." I am quoting from the *Middendorf* decision here. And Judge Oetken set forth order of five primary factors that a Court is to consider, which include "whether the entity participated in the prosecution's witness interviews, was involved in presenting the case to the grand jury, reviewed documents gathered by or shared documents with the prosecution, played a role in the development of prosecutorial strategy, or accompanied the prosecution to court proceedings."

Here, I am accepting the government's representation that OFAC and FinCEN did not affect the development of the government's investigative or prosecutorial strategy; did not

assign any employees to the prosecution team as Special Assistant United States Attorneys; were not involved in presenting the case to the grand jury; did not receive grand jury transcripts; have not participated in the execution of search warrants or responsiveness reviews; did not obtain materials produced to the government pursuant to grand jury subpoenas; have not attended government interviews; did not contribute to drafts of the indictment or the prosecution memorandum used to make the criminal charging decision; and have not attended court proceedings in this case." And in consequence, this Court will not order them to review their files for *Brady* or Rule 16 material.

Once again, and this was a theme in the motion to compel, Mr. Storm has not made a showing that these files contain exculpatory material. There is, of course, the citation to the 70-page OFAC report, but to reason from this that OFAC may have materials that are Brady materials, my concern is that to order OFAC to review its files for such material would be a complete end-run around the prosecution team construct, and this Court will not do it, and therefore that motion to compel production is denied.

I now turn to the motion to dismiss. And here, Mr. Storm is seeking dismissal of each of the three charges against him. Because the Count One dismissal arguments are dependent, in part, on the Count Two, that's where the Court is

beginning. So, as to Count Two, which is Conspiracy to Operate an Unlawful Money Transmittal Business, Mr. Storm argues that the indictment fails to allege that he or Tornado Cash had the requisite control to be a money transmitting business, and, additionally, that the indictment fails to allege that he or Tornado Cash charged a fee for the transfer of funds.

Turning now to Count One, which was the Conspiracy to Commit Money Laundering, that's what it charges, Mr. Storm argues first that the alleged "financial transactions" do not come within the ambit of Section 1956 because Tornado Cash was not a "financial institution"; second, he argues that he did not conspire or agree with anyone to conduct a financial transaction involving the proceeds of specified unlawful activity; and third, that he lacked the specific intent to further an illegal purpose.

As to Count Three, which is the Conspiracy to Violate IEEPA, Mr. Storm argues first that the "informational materials" exception requires dismissal of the count, and separately, that it fails to allege that he willfully conspired to evade sanctions on North Korea.

There are also several broader grounds that I'll talk about a little bit later. There are some arguments made under the First Amendment about overbroad or First Amendment violations, and Mr. Storm also argues that the indictment should be dismissed on Due Process grounds, and I'll talk about

that a little bit later.

Again, I'll be somewhat summarily in this area. But a defendant can move to dismiss an indictment on the grounds that it is defective Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, including for lack of specificity and for failure to state an offense. And because "federal crimes are solely creatures of statute, ... a federal indictment can be challenged on the grounds that it fails to state or fails to allege a crime within the terms of the applicable statute." One case for this proposition, and there are many, is *United States v. Aleynikov*, 676 F.3d 71. That said, courts have found that a defendant faces a "high standard" in seeking to dismiss an indictment because Federal Rule of Criminal Procedure 7 requires only that the indictment provide "a plain, concise, and definite written statement of the essential facts constituting the offense charged." As a result, courts generally find that "an indictment need 'do little more than track the language of the statute charged and state the time and place, in approximate terms, of the alleged crime.'" I'm quoting here from *United States v. Stringer*, 730 F.3d 120, a Second Circuit decision from 2013.

And another case that stated a similar proposition is *United States v. Yannotti*, 541 F.3d 112, a Second Circuit decision from 2008, which indicates that "[a]n indictment is, sufficient when it charges a crime with sufficient precision to

inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events."

At the motion to dismiss stage, this Court must "accept as true all of the allegations of the indictment." That's stated in *United States v. Goldberg*, 756 F.2d 949, a Second Circuit decision from 1985. In addition, the Court is not to "look beyond the face of the indictment and draw inferences as to proof to be adduced at trial, for 'the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss[.]'" Here, I'm quoting *United States v. Alfonso*, 143 F.3d 772, a Second Circuit decision from 1998. In another more recent case, *United State v. Dawkins*, 999 F.3d 767, a Second Circuit decision from 2021, the Court finds that summary judgment proceedings "do[] not exist in federal criminal procedure."

Now, before I get into the merits of Mr. Storm's argument, I want to echo something that I observed at oral argument, which is that, to the extent that Mr. Storm is asking me to decide a controverted issue of fact, or to insert a clarifying factual allegation into the government's charging language, I'm just not able to do that based on the cases that I've just cited. These factual arguments that have been proffered to me include, as two examples, Mr. Storm's assertions regarding the nature of the Tornado Cash service,

and those concerning the degree to which Tornado Cash's components were "open source" or "immutable."

As to the first, the indictment charges that Tornado Cash comprised a website, a user interface, various smart contracts, including those smart contracts that were referred to in the indictment as "Tornado Cash pools," and a network of "relayers" who provided customers with enhanced anonymity in exchange for a fee. Now, as to the second, the indictment alleges that Tornado Cash's three founders controlled the user interface, or UI, and had the ability to make changes to it at their own discretion throughout the charged time period. The government also notes in its opposition that the Tornado Cash UI wasn't announced as open source until July 2022, and argues that even then, such an announcement was largely a public relations move without any real effect.

Relatedly, Mr. Storm argues that the Tornado Cash pool smart contracts were "immutable" after May of 2020, but the indictment charges, and the government has argued to me, that other aspects of the Tornado Cash service were not similarly free from tinkering.

The point is, at this stage in the case, this Court cannot simply accept Mr. Storm's narrative that he is being prosecuted merely for writing code. For starters, that's an overstatement of what's actually charged in the indictment. What is more, if the jury ultimately accepts his narrative,

then it will acquit, but there is no basis for me to decide, as a matter of law, that the government hasn't alleged criminal conduct sufficient to satisfy each of the elements of the offenses charged. But I will now turn to the legal challenges to each statute.

Count Two charges an offense under 1960. And there's a lot of discussion in the parties' submissions about what is a money transmitting business. There are references to it in Section 1960 itself, there are references to it in Section 5530 of Title 31 of the United States Code, there are references to a money transmitter or a money services business in the FinCEN implementing regulations, which are set forth at 31 C.F.R. 1010.100.

And so on this point, I won't get into the minutia of all the various definitions, except to disagree, to the extent that anyone, including Mr. Storm, is arguing that the definitions of "money transmitting" in Sections 1960 and 5330 are co-extensive. I do not believe that to be the case.

Mr. Storm also reminds me that exempted from the definition of "money transmitter" are individuals who merely provide the delivery communication or network access services used by a money transmitter to support money transmission services.

So, getting to the meat of Mr. Storm's argument, he argues that Count Two must be dismissed for two independent

reasons: First, that the statute requires allegations that the defendant in question had control over the funds being accepted or transmitted; and second, the absence of allegations that he or his colleagues charged a fee for transmitting funds.

And in support for the first point, Mr. Storm cites various definitions about accepting and transmitting, and also cites the Second Circuit's decision in *United States v. Velastegui*, 199 F.3d 590, and *United States v. Bah*, 574 F.3d 106. He also cites FinCEN guidance regarding intermediaries who do not qualify as money transmitters. And in his estimation, the use of what is known sometimes in this case as the "secret note," which permitted the Tornado Cash user to access and use the funds, always remained with the user.

Here, this Court agrees with the government that control is not a necessary requirement of the Section 1960 offense. First of all, and as a threshold matter, I am required to accept at this stage the allegations of the indictment that the charged money transmitting business included the conduct of Tornado Cash's founders and network of relayers, and not merely the pool.

But getting back to the issue of control, the control requirement is not in the statute, and this Court is not going to read it in. Section 5330 also employs a broader definition of "engag[ing] as a business in the transmission" of funds, and

that definition includes "any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system."

And let me turn for a moment to the FinCEN 2019 regulatory guidance. Yes, it does speak of control, but it does that in the context of setting forth a four-factor test for determining whether a wallet provider is a money transmitter. The section addressing cryptocurrency mixing services does not similarly require control.

At its core, the Section 1960 offense seeks to prevent the unlicensed transmission of customer funds from one location to another, irrespective of whether the transmitter obtained temporary control over the funds to effectuate the transfers or constructed the transfers specifically in a manner to avoid such control. Here, the value-add of Tornado Cash, or in the Tornado Cash system, was that it allowed customers to send cryptocurrency from one wallet to another, without an obvious link between the two wallets, by pooling the customers' funds in an intermediary wallet on the blockchain, and without necessitating direct customer interaction with Ethereum. That is not meaningfully different from the cryptocurrency mixing services recognized as money transmitting businesses in the *United States v. Murgio*, 209 F. Supp. 3d 698, a Southern

District decision from 2016; *United States v. Harmon*, 474 F. Supp. 3d 76, a District of the District of Columbia decision from 2020; and *United States v. Sterlingov*, 573 F. Supp. 3d 28, a District of the District of Columbia decision from 2021.

I do appreciate that Mr. Klein, who I know was involved with some of these cases, disagrees with me and believes that all of those have control, but looking at the actual businesses, I don't find this one to be meaningfully different.

I also do agree that to accept Mr. Storm's argument would frustrate the purpose of Section 1960, which was designed to "keep pace with … evolving threats" as new methods of moving criminal proceeds emerged over time. Quoting here from *United States v. Faiella*, 39 F. Supp. 3d 544, from 2014.

So, as fallback position, Mr. Storm suggests that Tornado Cash would fall within the exception for network access services. Here, while acknowledging the paucity of case law, this Court agrees with the government that the conduct alleged in the indictment and attributed to Mr. Storm and his co-conspirators goes far beyond the provision of access to a network. The Court also agrees that the phrase itself is best construed as referring to a provider of access to a general network such as the internet, as was discussed in the *WorldCom* decision. That's *In re WorldCom, Inc.*, 371 B.R. 19, a

Bankruptcy decision from 2007.

But the Court is also rejecting Mr. Storm's second argument for dismissal, and that is that the government was required to allege that he or his colleagues or Tornado Cash charged a fee for money transmitting services. To be sure, in the *Velastegui* decision that they cite, the Second Circuit referred to "a money transmitting business receiving money from a customer and then, for a fee paid by the customer, transmitting that money to a recipient in a place that the customer designates, usually a foreign country." But to the extent that that description was meant to be definitive, the Second Circuit later clarified, in *United States v. Banki*, a 2012 decision reporting at 685 F.3d 99, that "under Second 1960, a 'business' is an enterprise that is carried on for profit or financial gain." That was also discussed in *United States v. Mazza-Alaluf*, 607 F. Supp. 2d 484, a Southern District decision from 2009, that was then affirmed by the Second Circuit in 2010.

As I understand the charges in the indictment, the Tornado Cash enterprise was not an altruistic venture. Among other things, the indictment alleges that Mr. Storm and other Tornado Cash founders solicited approximately $900,000 in financing from a venture capital fund in exchange for an expectation that the fund would receive a share of future profits from the Tornado Cash service; that they used a bank

account to host the Tornado Cash website and to pay for traffic between the user interface and the Ethereum blockchain; that they designed and promoted the Tornado Cash service's relayer feature, including its structure of charging fees for withdrawals; that they created a formula for capitalizing on relayer fees to boost the value of TORN tokens, the cryptocurrency token they created; and that they cashed out TORN holdings for millions of dollars. To the extent that a fee was required, this Court finds that the fees that were charged and received by the relayer co-conspirators would suffice.

So, I turn now to Count One, which is the Money Laundering count and its Concealment Money Laundering count. And I believe the parties are aware of the elements of the offense, so I will skip over them and simply note that they are discussed in cases that include *United States v. Gotti*, 459 F.3d 296. And in particular, that deals with the conflict of concealment money laundering.

Here, Mr. Storm first argues that Count Two must be dismissed because of the failure to allege a "financial transaction." But for the reasons that I just discussed, the Court finds that the government has adequately charged an unlawful money transmitting business offense under Section 1960, the logical extension of that is that Tornado Cash also qualified as a financial institution, and the transactions at

issue also involved the use of a financial institution.

The government offers a fallback position, noting that the statutory definition of "financial transaction" contains two alternative definitions; either "a transaction which in any way or degree affects interstate or foreign commerce … or a transaction involving the use of a financial institution[.]" And they argue that, in paragraph 78 of the indictment, they were charging in the conjunctive.

Now, that point may be somewhat academic, giving my resolution of the motion, but on this point, I do find merit in the arguments in the defense's reply brief that, if the government is really seeking to charge an offense under Section 1956(c)(4)(A), the statute contains additional elements that I don't believe are clearly alleged, such as the transaction might involve the movement of funds by wire or involve monetary instruments, or involve the transfer of title to real property, vehicle, vessel, or aircraft. So if the government is really going that route, they might want to clean up confusion in a superseding charging instrument, if that's the track they're pursuing at trial.

But Mr. Storm's second argument for dismissal straddles the "financial transaction" and "conspiracy" elements of the offense. He argues that the government was required to allege that he knew the property involved in a particular financial transaction represented the proceeds of an unlawful

activity, and that's an accurate statement of the law. But from this, Mr. Storm reasons that Count One must be dismissed because it does not allege either that Mr. Storm entered into an unlawful agreement with any person who used Tornado Cash smart contracts or the Peppersec UI for illicit purposes; or, number two, that he had the specific intent to commit money laundering; or, number three, that the indictment alleges, or in his case, he said, fails to allege the necessary *mens rea*. Let me unpack these arguments now.

The law is clear that, to be guilty of money laundering, the defendant need not be guilty of, involved in, or even aware of the specifics of, the specified unlawful activity. One case for that proposition is *United States v. Silver*, 948 F.3d 538, a Second Circuit decision from 2020. Another case in which it's discussed is *United States v. Kozeny*, 493 F. Supp. 2d 693, and that's a Southern District decision from 2007, affirmed by the Second Circuit in 2008.

"Conspiring to launder money requires that two or more people agree to violate the federal money laundering statute, and that the defendant 'knowingly engaged in the conspiracy with the specific intent to commit the offenses that [are] the objects of the conspiracy.'" I'm quoting from *United States v. Garcia*, 587 F.3d 509, a Second Circuit decision from 2009. And "transaction money laundering ... it requires proof that the purpose or intended aim of the transaction was to conceal or

disguise a specified attribute of the funds." I'm quoting here from *United States v. Huezo*, 546 F.3d 174, a Second Circuit decision from 2008.

Let me put this more simply. "The government did not have to allege that Mr. Storm conspired with any of Tornado Cash's users to promote or further any of the illicit purposes of their transactions. Indeed, the government did not have to allege that Mr. Storm was aware of the specific nature of, much less be a participant in, the underlying criminal activity. Instead, the government needs to prove Mr. Storm needed to know that he was "dealing with the proceeds of some crime, even if he [did] not know precisely which crime." Cases for that proposition include *United States v. Prevezon Holdings Ltd.*, 122 F. Supp. 3d 57, a Southern District decision from 2015, and *United States v. Tillman*, 419 F. App'x 110, a Second Circuit summary order from 2011.

So, in light of cases like *Prevezon Holdings*, I reject Mr. Storm's argument that "whether or not an express agreement is required, the government must show 'sufficient proof of mutual dependence and assistance' between the perpetrators of the underlying criminal acts and the alleged money laundering conspirators." I'm quoting here from the motion to dismiss briefing at pages 28 through 29. In some cases, "the same bad actors are alleged to have both perpetrated the underlying specified unlawful activity and to have conducted the financial

transactions in which the proceeds of that activity were laundered." It is true that is in some cases, but it is not a requirement. Stated somewhat differently, it is indeed the case that the Venn diagram of the specified unlawful activity and the money laundering conspiracy often involves common conspirators, but it is not necessary, as my restaurant hypothetical at oral argument explained. And a contrary holding would run counter to the decision that I just discussed.

I did have a similar conversation with Ms. Axel about this at oral argument, where she argued that in every money laundering conspiracy case that she had seen, the defendant was either a participant in the underlying crime or there was "some connection or interdependence between the group conducting the unlawful activity and the money laundering." I accept that these fact patterns are common, and certainly they would aid the prosecution in proving both the knowledge and the willfulness elements that they are required to prove in the money laundering offense, but I cannot go so far as to say that they are necessary to demonstrate a money laundering conspiracy; they are not, in fact, elements of the money laundering offense, and I will, therefore, not dismiss Count One on this basis.

Separately, Mr. Storm made, and I reject, a timeline argument that ascribes significance to the fact that the

development of Tornado Cash preceded the charged dates of the money laundering conspiracy, because, as I understood from my conversations with Mr. Rehn, the government is not alleging that Tornado Cash was specifically developed as the first step in that conspiracy. And I am rejecting the related suggestion that somehow the government is conflating "the agreement to develop the Tornado Cash protocol and UI with a non-existent, later-in-time agreement to engage in purported concealment money laundering." That's from the defense's reply brief at page 15.

I also find unavailing the argument that the government did not sufficiently allege *mens rea*. The indictment alleges that Mr. Storm "willfully and knowingly" entered into the conspiracy. I don't get to make a determination of Mr. Storm's intent at this stage; and the government having adequately alleged the requisite intent, the decision regarding the sufficiency of the evidence of that intent is for the jury and not for me. One take for that proposition is Judge Caproni's case in *United States v. Percoco*, 2017 WL 6314146, from 2017.

Now, throughout his submission, Mr. Storm expresses concern that he is being charged, and would be convicted, on a negligence theory. In this Court's estimation, neither is true. In terms of the offense charged, there are sufficient factual allegations, and representations made in the

government's opposition submission, that, if proven at trial, would allow a jury to find that Mr. Storm acted with the requisite intent.

There was also no danger of Mr. Storm being convicted on the basis of negligent acts. The money laundering conspiracy charge that I give, and I have recently given it, specifically requires the government to prove beyond a reasonable doubt that the defendant "knowingly and willfully became a member of the alleged conspiracy." Willfulness is defined as acting "knowingly and purposely, with an intent to do something the law forbids, that is to say, with a bad purpose either to disobey or disregard the law." And I specifically indicate in my charge that the object of the conspiracy cannot be satisfied by negligence. For this reason, I am not going to dismiss Count Two.

I will turn now to the defendant's challenges to Count Three. He begins first by arguing that the count should be dismissed because IEEPA's "informational materials" exemption applies to all alleged components of Tornado Cash system. And because I don't believe these facts are in doubt, I'm not going to review the history of the issuance of Executive Order 13466 or OFAC's designation of the Lazarus Group hacking organization to the Specially Designated Nationals and Blocked Persons List.

Let me turn, instead, to the IEEPA violation, which requires the government to prove, generally speaking, that,

number one, the defendant attempted to violate orders, regulations, or prohibitions issued pursuant to IEEPA relating to North Korea; number two, the defendant attempted to commit the violation or violations willfully; and number three, the defendant did not have a license issued by a part of the United States Treasury Department, known as OFAC, or to engage in the attempted conduct that would have violated the Executive Order or corresponding regulation.

I'm aware of the "informational materials" exception. I won't read it into the record. I note as well that there's a bit of a counterweight to that exemption, the software and technology regulation that OFAC has issued. The fact is that the courts in this circuit really have not had occasion to apply the informational materials exemption to the software. Mr. Storm argues that it is well established that the software is speech subject to the First Amendment protections. And in particular, he alleges that the IEEPA conspiracy charge impermissibly seeks criminal sanctions against him for his role in publishing one piece of software, Tornado Cash, on top of another, the Ethereum blockchain, and making it available on the internet. For reasons similar to those outlined earlier in this opinion, this Court rejects the argument. The government argues in the first instance, and the Court accepts, that the software does not constitute informational materials under this section.

Actually, let me back up a moment. That is the government's argument. They may well be right, but I don't think I need to find that finally. The indictment doesn't predicate criminal liability on the mere development of software. To the contrary, Count Three alleges that Mr. Storm conspired with others to knowingly, actively, and profitably cause the Tornado Cash service, the UI, the relayer network, the pools, other smart contracts, and other components of the service, in order to launder funds for the OFAC-designated North Korean Lazarus Group, to then accept deposits from that group's OFAC-sanctioned cryptocurrency wallet, and to process withdrawals of those funds. Mr. Storm is not being charged with exporting Tornado Cash software, but with laundering funds using the Tornado Cash service, which definitionally extends beyond the software.

Once again, Mr. Storm challenges the indictment's allegations concerning his *mens rea* on this count as well, and these challenges also fail. To begin, he is charged with entering into the conspiracy knowingly and willfully, which tracks the requisite statutory language. The government has also alleged facts that, if accepted by the jury, suffice to demonstrate his awareness of the specific sanctions he was violating. And here, as before, a motion to dismiss the indictment is an inappropriate procedural vehicle for testing the strength of the government's evidence regarding intent. So

for all of these reasons, I am not going to be dismissing those counts on those bases.

But there are some broader arguments that I do want to take a moment to discuss. I really do thank the parties for the analyses and these arguments. I found them fascinating. Let me spend a few moments on them.

Mr. Storm argues that all three statutes are overbroad in the violation of the First Amendment because they criminalize the writing and dissemination of computer code, as well as the maintenance of a website publishing such a code. And the First Amendment overbreadth doctrine, speaking generally, requires the Court hold facially unconstitutional statutes that punish too much protected speech despite lawful applications, because such "overbroad laws 'may deter or 'chill' constitutionally protected speech." I'm quoting here from the Supreme Court's decision in *United States v. Hansen*, 599 U.S. 762 from 2023. And there are many cases that it addresses and that deal with similar things.

The challenger, the person offering a First Amendment challenge, must demonstrate that the statute “prohibits a substantial amount of protected speech” relative to its “plainly legitimate sweep.” Again, I quote from the *Hansen* decision. The challenger bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists. Quoting here from *New York State Club*

Association v. City of New York, 487 U.S. 1, from 1988.

An overbreadth challenge is less likely to succeed where Congress intended to use terms of art in order to prescribe only a narrow band of speech, as opposed to the terms used in every day conversation, which would encompass a broader swath of speech. Courts here are to consider not only conduct clearly prohibited by the statute, but also conduct that arguably falls within its ambiguous sweep. That said, ordinarily, overbreadth challenges to laws that do not target speech or expressive activity do not succeed.

The first step in deciding whether any statute is overbroad is to determine what conduct the statute covers. That was discussed in the *Hansen* case I mentioned earlier. Here, in relevant part, the statutes and regulations that support the three counts prescribe the conducting of a financial transaction to conceal the proceeds of unlawful activity, the operation of an unlicensed money transmitting business, and the receipt of funds from a sanctioned entity without obtaining OFAC's approval. Mr. Storm contends that these provisions in fact criminalize and chill the legitimate expressive activity of publishing computer code that itself supports a constitutionally protected interest, to which privacy over financial transaction, where specifically Mr. Storm contends that Counts One and Two punish the mere writing and/or dissemination of the code for smart contracts as

a conspiracy to commit money laundering by defining the terms "conducting" and "transmission" to include this writing or dissemination. I am focusing here on pages 47 and 48 of the opening brief.

Mr. Storm also contends that Count Three punishes, as sanctions evasion, the mere retaining of the website providing the public information to access the Tornado Cash smart contracts. I disagree with each of those propositions. Mr. Storm has shown neither a substantial overbreadth, nor the potential for it, based on the laws of purportedly ambiguous sweep, and that is because these laws do not target protective expressive conduct. They do not punish coding, QUA coding, or website maintenance, QUA website maintenance; they punish money laundering, they punish the operation of an unlicensed money transmitting business, and they punish sanctions evasion.

That Mr. Storm's charged conduct includes the writing and dissemination of codes and the maintenance of a public website is insufficient to turn these into some sort of overbreadth challenge. And to the extent that these laws could be applied unconstitutionally, Mr. Storm has failed to show that such instances are disproportionate to their lawful sweep.

And lastly, the implication of certain privacy interests does not make these statutes overbroad. Constraining statutes to criminalize the alleged conduct would not chill the legitimate expressive activity of publishing computer codes

supporting a constitutionally protected interest in privacy over financial transactions. Quite to the contrary, the implication of these interests is of little relevance to the Court's overbreadth analysis. And for this reason, the overbreadth challenge fails.

Now, Mr. Storm also mounts an as-applied challenge, claiming that the statutes violate the First Amendment as applied to his conduct. Here, the threshold issue is, of course, whether Mr. Storm's conduct amounts to protected speech at all, because nonspeech conduct does not merit First Amendment protection. There's one case that it propositions, *CFTC v. Vartuli*, 228 F.3d 94, a Second Circuit decision from 2000.

It is true that computer coding can be expressive conduct protected by the Frist Amendment. One case for that proposition is *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, a Second Circuit decision from 2001.

But when a programmer is using a code to direct a computer to perform various functions, that code is not protected speech. Another Court noted the interaction between programming commands as triggers and semiconductors as a conduit, even though communication is not speech within the meaning of the First Amendment, and the communication between the program and a customer using it as intended was similarly not speech. The functional capability of code is not speech

within the meaning of the First Amendment.

Here, the conduct charged in the indictment includes the functional capability of code, which does not implicate the First Amendment. To the extent that the indictment alleges that Mr. Storm used computer code, it was to design a program that furthered money laundering and sanctions evasion scheme. The use of computer coding or software to achieve these ends is far from the expressive sort of coding that would merit First Amendment protection. And although the Court finds that Mr. Storm's conduct does not implicate the First Amendment, even assuming that it did, the Court finds that the application of these laws to Mr. Storm's conduct satisfies intermediate scrutiny.

Mr. Storm contends that the application of these statutes to his conduct is a content-based restriction on his freedom of speech. More specifically, he argues that the statutes underlying the charges target the function of his supposed speech conduct; namely, computer code designed to improve the privacy of personal financial transactions, which is a constitutionally protected interest. He also argues that the indictment takes the position that there is no legitimate purpose for maintaining privacy over one's financial transactions on an otherwise completely transparent and publically viewable blockchain. These arguments are made in the opening brief at pages 49 and 50 and in the reply brief at

27 and 28.

The Court disagrees with the arguments. The reference as to privacy in the indictment amount to allegations that Mr. Storm had the requisite state of mind, not indications that the government aims to punish the expression of a generalized belief in promoting privacy. I'm looking, in particular, at paragraphs 11, 21, and 35 of the indictment; I believe there are others that fall within this category.

Any restrictions of Mr. Storm's speech are content neutral, and this Court, therefore, need not address the argument that such restrictions fail strict scrutiny. "A content-neutral restriction is permissible if it serves a substantial governmental interest, the interest is unrelated to the expression of free expression, and the regulation is narrowly tailored ... meaning it does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" I'm quoting here from *Corley*. I realize that this is something the government bears the burden on, as noted by the Second Circuit in *Cornelio v. Connecticut*, 32 F.4th 160, a 2022 decision.

The defense argued that the government has failed to meet this burden, but the Court finds that the government has. The government has a substantial interest in promoting a secure financial system by combating money laundering, by combating the operation of unregistered money transmitting services, and

by combating the evasion of sanctions. These interests are wholly unrelated to the suppression of free expression, and the applicability of these laws to Mr. Storm's conduct does not burden substantially more speech than necessary to further the government's substantial interest, because the charged conduct implicates the functional, rather than the expressive features, of computer coding and software. Accordingly, these laws, as applied to Mr. Storm's conduct, satisfy intermediate scrutiny to the extent that Mr. Storm's conduct implicates the First Amendment.

Moving on, Mr. Storm also argues that the statutes are void for vagueness, both facially and as applied to his conduct. This Court disagrees. "The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." I'm quoting here from *Copeland v. Vance*, 893 F.3d 101, a Second Circuit decision from 2018. Challengers can raise an as-applied challenge or a facial challenge to a criminal statute. There are different standards to both, but all vagueness challenges, whether facial or as-applied, require the Court to answer two separate questions: Whether the statute gives adequate notice, and whether it creates a threat of arbitrary enforcement. Indeed, Courts should proceed with

caution when evaluating vagueness challenges and should examine the challenger's conduct before analyzing other hypothetical applications of the law. This is discussed in cases including *Expression Hair Design v. Schneiderman*, 581 U.S. 37, from 2017.

The Second Circuit in *United States v. Houtar*, 980 F.3d 268, in 2020, also instructed lower courts to presume that acts of Congress are not unconstitutionally vague. So although Mr. Storm conflates the reasons supporting his facial challenge with those supporting his as-applied challenge, at bottom, what he is arguing is that all three statutes criminalize the publication of any software that may later be misused by a third party, even where the author of such code is not involved in or even aware of such misuse.

He contends that the statutory definitions of "financial transaction" in Section 1956, "accepting and transmitting" in Section 1960, and "informational materials" in Section 1702(b)(3) are all facially vague. He also argued that these statutes invite arbitrary enforcement because there are no explicit standards for their application to those disseminating code and maintaining websites. Moreover, he claims that it is unclear whether the statutes extend only to the writing and dissemination of the code over which the author contains control or whether they extend to immutable code, subjecting the author to criminal liability for third parties' misuse.

In this case, the Court finds that the statutes at issue gave Mr. Storm adequate notice that his conduct was criminal and created no threat of arbitrary enforcement. I will point, as adequate notice, the indictment alleged that he knowingly marketed Tornado Cash as a means of allowing customers to conceal the nature and source of their unlawful activity, he had adequate notice that this conduct was prescribed by Section 1956. He also had adequate notice that his conduct was prescribed by Section 1960. Because although Tornado Cash is not a traditional money transmitting outfit, its business fits the plain definition of money transmitting such that he had adequate notice that the charged conduct was criminally prescribed.

Finally, the indictment alleges that Mr. Storm was aware that stolen funds from an OFAC-sanctioned entity were laundered through Tornado Cash and continued to facilitate these transactions. Once again, the statutes afforded him adequate notice that his conduct was criminal, despite that fact that he may have used nontraditional technology to do so.

On the issue of arbitrary enforcement, Mr. Storm's narrow focus on the act of disseminating code and whether the statutes might extend to immutable code confuses the issue. The question in a facial challenge is whether the statute is so fatally indefinite that it cannot constitutionally be applied to anyone. And I'm quoting here from the *Copeland* decision.

That the statutes do not distinguish between mutable and immutable code, or do not directly address computer coding, is insufficient to show fatal indefiniteness, because these are merely the means that Mr. Storm and his colleagues allegedly used to achieve the ends of a conspiracy to launder money, to operate an unregistered money transmitting business, and to evade sanctions, all of which are clearly prescribed by the statute. Not only can these statutes be applied to the conduct of others, but they can also be applied to Mr. Storm's conduct. His facial vagueness challenge, therefore, falls.

In the end, his arguments fail not in due process violation, but in the weight of the evidence as to his state of mind, which, as I noted earlier, is a matter for the jury and not this Court.

Mr. Storm argues that the counts should be dismissed pursuant to the rule of lenity because the indictment alleges a novel and expansive interpretation of the statutes underlying the conspiracy charges, and expanding criminal liability to the alleged conduct would involve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement of Congress. I am quoting his brief at page 54. The parties are aware of the rule of lenity. It ensures fair warning by so resolving ambiguity in a criminal statute so as to apply it only to conduct clearly covered. I'm quoting here from the Supreme Court's decision in *United States v. Lanier*, 520 U.S.

259. And that means it's a threshold matter. That the challenger invoking the rule of lenity must establish that the criminal statute is ambiguous. And absent this showing where the statutory language is unambiguous, a lenity challenge fails. The Second Circuit found this in the 2021 decision of *United States v. Gu*, 8 F.4th 82.

Separately, there is no role for lenity to play if there are two grammatically permissible readings of the statute when viewed in the abstract but only one is consistent with the statute's design. And that is a different Supreme Court decision, *Pulsifer v. United States*, 601 U.S. 24, from 2024.

For many of the same reasons that the Court has rejected Mr. Storm's vagueness and First Amendment challenges, it rejects the lenity challenge. The statutes, as construed by the government in the indictment, extend to Mr. Storm's alleged conduct. He has not made a threshold showing of statutory ambiguity, and there is, therefore, nothing for lenity to resolve.

The final argument being made is that the counts should be dismissed as novel constructions. The *Lanier* case I mentioned a moment ago indicates the due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision had fairly disclosed to being within its scope. And here, Mr. Storm has said that there's simply no precedent for

the expansive application of the statutes to his conduct. He urges the Court to adopt limited constructions of the statute because, he says, he has found no judicial decisions holding that the constitutionally protected activity of providing code to users who wish to protect their financial privacy can constitute money laundering, operating a money transmitting business, or evading sanctions. But here too, Mr. Storm is confusing the issue. Due process does not require the existence of an analogous prior prosecution.

The Second Circuit, in *Ponnapula v. Spitzer*, 297 F.3d 172, from 2002, found that due process is not violated simply because the issue is a matter of first impression. A similar result was obtained in *United States v. Ulbricht*, the District Court decision at 31 F. Supp. 3d 540, in 2014. And Mr. Storm has not shown that the alleged conduct is outside of or not within the scope of the statutes in question, as shown in the *Lanier* case. Accordingly, his argument that all counts be dismissed as novel constructions failed, and this Court will not dismiss the three counts in the indictment.

I appreciate so much the fact that you've listened to me speak for just over an hour. That is my resolution of the open motions to dismiss and to compel. I will issue a bottom-line order that simply notes that they have been resolved.

I am aware that in the last 24 hours there was an

opposition submission from Mr. Storm the government's request for the disclosure of information about an advice of counsel defense and some other things.

Mr. Rehn, I don't know that I authorized a reply brief. I'm not sure I got to that point. Is the government intent on replying?

MR. REHN: I don't think it is necessary, your Honor.

THE COURT: That's fine. Candidly, and this should not shock you, I've been working on this opinion and I haven't really thought about that. I will get to it promptly, and I thank you.

From my perspective, I believe that's all that I need to do today. We have a trial date, we have a schedule. Other than this issue about notice, which I will look at when I can, I don't think there's anything else open.

Mr. Rehn, from your perspective, is there anything I've omitted doing?

MR. REHN: No, your Honor. We're prepared to address the issues raised in our motion filed last week if the Court would like to hear at some future date. It doesn't sound like the Court is ready to hear either of parties.

THE COURT: No, no. You can put this on me. This Court is not prepared to deal with that motion at this exact moment in time, having just spoken to you for almost 70 minutes, so, no. But I do thank you for being prepared.

Mr. Klein, I'm confident that you're prepared as well. I just want a chance to look at it. And if I need oral argument, I can do what I'm doing right here and just have the parties participate by phone.

Mr. Klein, is there anything I've omitted doing this afternoon, sir?

SPEAKER2: No, your Honor.

THE COURT: I thank you all very much.

Again, I appreciate your willingness to remain on the phone, and I really do appreciate the care that you've put into your submissions, which I found really interesting, so thank you for that.

I will let you all go. You have my thanks.

We are adjourned.

(Adjourned)