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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 UNITED STATES OF AMERICA,)	No. CR 16-00440 WHA
)	
15 Plaintiff,)	UNITED STATES’ MEMORANDUM RE
)	RESUMING TRIAL
16 v.)	
)	Hearing: April 9, 2020
17 YEVGENIY ALEXANDROVICH NIKULIN,)	Time: 12:00 p.m.
)	By Telephone
18 Defendant.)	
)	
19)	

20 On March 18, 2020, the Court continued trial until April 13, 2020, and set a status conference for
21 April 9, 2020, “to re-assess the circumstances surrounding the practicality and safety of resuming the
22 trial.” (ECF 191.) The United States is prepared to proceed to trial on April 13 so long as the trial can
23 proceed in accordance with recommended safety protocols and sufficient waivers from the defendant
24 with respect to his right of confrontation.

25 **I. BACKGROUND**

26 **A. The Charges and Potential Penalties**

27 Defendant Nikulin is charged with nine felony counts related to the hacks of LinkedIn,
28 Formspring, and Dropbox in 2012. He faces a statutory maximum of ten years’ imprisonment if

1 convicted of intentionally transmitting information, code, or a command causing damage to a protected
2 computer, in violation of 18 U.S.C. § 1030(a)(5)(A) (Counts Two and Eight); or trafficking in
3 unauthorized access devices, in violation of 18 U.S.C. § 1029(a)(2) (Count Six). He also faces an
4 additional two-year mandatory minimum sentence of imprisonment to run consecutive to any other
5 sentence, if he is convicted of aggravated identity theft, in violation of 18 U.S.C. § 1028A (Counts Three
6 and Nine). Each of the remaining counts carries a statutory maximum prison term of five years.

7 Defendant has been imprisoned for approximately 41 months. He was arrested in the Czech
8 Republic in October 2016 and spent approximately 18 months in custody there, awaiting extradition. He
9 first appeared in U.S. District Court in April 2018.

10 **B. Jury Selection**

11 When trial began on March 9, 2020, with jury selection, there were several known cases of the
12 novel coronavirus (COVID-19) in the Northern District of California, however, the World Health
13 Organization (WHO) had not yet declared a pandemic. There were no restrictions on travel or
14 movement, though authorities were generally recommending taking precautions against the spread of
15 germs, such as frequent hand washing.

16 Given the context and the planned trial schedule of three days of trial to be followed by three
17 dark days (see ECF 164), the parties and the Court agreed that it would be prudent to select four
18 alternate jurors, instead of the customary two. During voir dire, the Court excused potential jurors who
19 self-reported symptoms of illness, but did not conduct any voir dire specific to the COVID-19 issue,
20 such as asking about underlying health conditions or contact with persons who might have such
21 conditions. In the end, sixteen jurors—twelve regular jurors and four alternates—were sworn and
22 impaneled as the jury in the case.

23 **C. The Trial**

24 When opening statements and presentation of evidence began on March 10, 2020, both sides
25 were eager to try the case to the jury. Although twelve court days were reserved for trial, the government
26 estimated that it would be able to present its case-in-chief in four or five court days. The government
27 originally planned to call fourteen witnesses—four law enforcement agents and ten civilians. Two of the
28 agents and three of the civilians live out of state and planned to fly to San Francisco for their testimony.

1 The first two days of trial went as planned. Seven witnesses testified. By design, the testimony
2 during the first half of trial was intended to establish that an intrusion had happened at each victim
3 company and to explain how the hacks occurred. The civilian witnesses from LinkedIn, Formspring, and
4 Dropbox explained their companies' respective technical infrastructure, investigations, and analysis of
5 system logs. The government's computer forensic expert then reconstructed the cyberattack on one
6 LinkedIn employee's computer, showing jurors a screenshot of madnez.php, a malicious shell that had
7 been run on both LinkedIn's and Formspring's systems. This installation of malicious software
8 established the damage caused to protected computers. The testimony, including testimony by the
9 individual victims, also showed how "means of identification" had been used in furtherance of the
10 offenses.

11 The witnesses who testified during this first part of the trial were not involved in the
12 identification of defendant as the person responsible for the offenses. As proffered during opening
13 statements, the government planned to call law enforcement witnesses, in particular the case agent, to
14 introduce the evidence obtained during the FBI's investigation that established defendant as the one who
15 had committed the attacks on LinkedIn, Formspring, and Dropbox. These law enforcement witnesses
16 would also introduce the evidence regarding trafficking of the stolen Formspring credentials.

17 At the end of the trial day on March 11, 2020, the Court instructed the jurors to return promptly
18 at 7:45 a.m. on March 17, 2020.

19 **D. The Public Health Emergency**

20 At the trial's mid-point, however, external events intervened. On March 11, 2020, the World
21 Health Organization declared a pandemic, and the United States blocked most visitors from Continental
22 Europe. Organizations across the United States began cancelling events. On March 13, 2020, the
23 President of the United States declared the COVID-19 outbreak a national emergency. Airlines cut back
24 their flight schedules. Over the weekend of March 11-12, the Governor of California directed that all
25 persons over the age of sixty-five should self-isolate at home; he also ordered the closure of all bars.

26 On Monday, March 16, 2020, local authorities took their most aggressive containment actions to
27 date: six Bay Area counties—San Francisco, Santa Clara, San Mateo, Marin, Contra Costa and
28 Alameda—announced a "shelter in place" order for all residents that went into effect at 12:01 a.m. on

1 March 17, 2020 and was scheduled to continue for three weeks, through April 7, 2020. The orders
2 generally prohibited gatherings of people and required county residents to stay in their homes except as
3 required for essential business or life activities.

4 **E. Continuance of the Trial**

5 The Court declared a short suspension of the trial from March 17th to March 19th and scheduled
6 a hearing to evaluate how to proceed. Defendant sought a continuance “to a future date in concert with
7 county, state, and federal directives regarding public gatherings in the midst of the Covid-19 pandemic.”
8 (ECF 182.) The Court held a hearing on March 18, 2020, and ultimately decided that there was good
9 cause to continue trial some three and a half weeks, to April 13. (ECF 191.) At the time, the shelter-in-
10 place orders described above expired on April 7, 2020. Still, the Court cautioned at the time that
11 defendant’s approach was not without risks, including the possibility that not all jurors would be able to
12 return on April 13.

13 Prior to the hearing, the Court requested the jurors inform the Court of their ability to continue to
14 serve if trial resumed on April 13. The Court informed the parties that it received nine responses. Two of
15 the jurors reported ongoing health conditions that likely put them in heightened risk categories regarding
16 COVID-19. Two other jurors expressed concerns regarding employment scheduling with a continued
17 trial. The remaining responding jurors were willing to serve, but the Court received no response from
18 seven of the sixteen jurors.

19 **F. The District’s Response to Date**

20 The continued functioning of the federal courts is, of course, essential. In response to the
21 COVID-19 outbreak, the Judges of this District have issued a series of General Orders, after considering
22 and balancing a host of interests, including “the health of jurors, witnesses, parties, attorneys, the public,
23 court staff, Probation and Pretrial Services staff, chambers staff, and judges; the constitutional rights of
24 criminal defendants and other parties; and the public’s interest in, and the court’s duty to ensure, the
25 effective and expeditious administration of justice.”¹ Most relevant here, General Order 72, originally
26 promulgated on March 16, 2020, provided that that “no jury trial will be commenced before May 1,
27

28

¹ General Order 72 preamble.

2020.” General Order 73 (as amended April 2, 2020), states that “only persons having official court business authorized by General Order No. 72, or by a presiding judge, may enter the San Francisco Courthouse property. Members of the press and public who have a legitimate need to observe an in-person hearing may do so, and such attendance will be considered ‘official court business.’ **However, courtroom spectators are reminded that a shelter-in-place has been ordered throughout the State of California, and that there are health and safety risks associated with attending an in-person court hearing**” (emphasis in original). The original General Order 73 ordered all essential court proceedings consolidated and relocated to the San Francisco Courthouse until April 7, 2020. The amended General Order extended that consolidation until May 1, 2020. All other courthouses in the District are entirely closed to the public until May 1, 2020. General Order 74, issued after the passage of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, authorizes the use of teleconferencing for many preliminary criminal court appearances and explicitly finds that “felony pleas...cannot be conducted in person without seriously jeopardizing public health and safety.” Taken together, the General Orders evince a desire to ensure continuity of essential court operations, while at the same time minimizing in-person appearances and their attendant public health risks.

G. The Current Situation

San Francisco, along with five other Bay Area counties, remains under a shelter-in-place order. On March 31, 2020, after the Court made the decision to continue the trial to April 13, the original order discussed above was superseded and extended by a more stringent order “based on evidence of increasing occurrence of COVID-19 within the County and throughout the Bay area.”² At a high level, the current order directs individuals to stay at home except for essential activities. When people need to leave their homes, they are to strictly comply with social distancing requirements, including staying at least six feet apart from other individuals, washing hands frequently, and covering coughs and sneezes. Public and private gatherings are generally prohibited. These measures are necessary because “some individuals who contract the virus causing the COVID-19 disease have no symptoms or have mild symptoms, which means they may not be aware they carry the virus and are transmitting it to others.

² Paragraph 8. <https://www.sfdph.org/dph/alerts/files/HealthOfficerOrder-C19-07b-ShelterInPlace-03312020.pdf>.

1 Because even people without symptoms can transmit the infection, and because evidence shows the
2 infection is easily spread, gatherings and other interpersonal interactions can result in preventable
3 transmission of the virus.” The new order is now in effect through May 3, 2020.

4 **II. APPLICABLE LEGAL STANDARD**

5 None of the guidance, from shelter-in-place orders to General Orders, speaks directly to the
6 situation in this case: what should be done about an in-progress criminal jury trial? The options are to
7 proceed and resume the trial on April 13, to continue the trial until such date as the crisis has passed, or
8 to declare a mistrial.

9 At the time the Court continued the trial to April 13th, the assumption was that the shelter-in-
10 place order would be lifted on April 7, 2020. The hope was that things would be getting back to normal
11 by April 13. On March 27, the Court directed the parties to file any further motions for continuance or
12 motions for mistrial by April 7. (ECF 196.) The parties met and conferred telephonically on April 1, and
13 defense counsel informed that, notwithstanding the ongoing public health emergency, the defendant
14 wishes to resume trial on April 13.

15 Given the current situation, the Court must now decide whether “defendant’s valued right to
16 have his trial completed by a particular tribunal” must, in this instance “be subordinated to the public’s
17 interest in fair trials designed to end in just judgments.” *Wade v. Hunter*, 336 U.S. 684, 689 (1949). As
18 set forth in the government’s prior filing, the legal standard for declaring a mistrial over defendant’s
19 objection is manifest necessity. “Necessity” is not interpreted literally, but a “high degree” of necessity
20 is required before concluding that a mistrial is appropriate. *Arizona v. Washington*, 434 U.S. 497, 506
21 (1978). A determination of manifest necessity is reviewed for abuse of discretion and “where the judge’s
22 determination is based on his or her own observations and personal assessment that a fair trial would be
23 impossible, that view must be given special deference.” *Id.*, at 510-11. In *Walls v. Konteh*, 490 F.3d 432,
24 439 (6th Cir. 2007), a federal appeals court upheld a trial court’s sua sponte declaration of manifest
25 necessity requiring a mistrial on September 11, 2001. As the Sixth Circuit described it, the trial judge
26 found that “calamitous events occurring outside the courtroom—the September 11, 2001 attacks upon
27 the World Trade Center and Pentagon—created the kind of ‘manifest necessity’ that justified a mistrial.”
28 *Id.* at 434. The Sixth Circuit recognized the trial judge’s “expressed concern that the jurors would be so

1 distracted by outside events that they would be unable to focus on the trial, thereby compromising
2 petitioner's right to a verdict based upon the evidence.” *Id.*

3 The Court has scheduled the April 9th hearing to evaluate the “practicality and safety of
4 resuming trial.” In order to proceed with trial as scheduled on April 13, the following significant
5 concerns regarding health, safety, and the defendant’s right of confrontation would have to be
6 successfully addressed.

7 **III. OBSTACLES TO RESUMING THE TRIAL**

8 **A. Health and Safety Risks**

9 First and foremost, the Court must ensure that the health and safety risks associated with
10 proceeding are adequately addressed. During the first two days of evidence in the case, there were at
11 least 30 people in the courtroom at any given time:

12 Courtroom Personnel	9	Judge, Courtroom Deputy, Court Reporter, 13 2 Russian language interpreters, 2 Deputy U.S. Marshals, 2 Court Security Officers
14 Defense	3	Defendant, 2 defense attorneys
15 Prosecution	4	2 AUSAs, case agent, paralegal
16 Jurors	16	12 regular and 4 alternate jurors
17 Witness	1	Rotating
18 Total	33	

19 Virtually all of these people will have to return if trial resumes. Given the continued shortage of
20 COVID-19 test kits³, there can be no guarantee that each participant who returns is virus-free. That
21 means each participant is a vector, potentially carrying the virus from their home to court (or vice versa)
22 each additional day trial is in session. Moreover, even if test kits were readily available, test results are
23 not instantaneous and require participation of medical professionals.

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25 ///

26 _____
27 ³ The undersigned Assistant United States Attorneys have inquired of their office, the FBI, and
28 the U.S. Marshals about the possibility of procuring test kits for use in this case. No test kits are
available. The U.S. Marshals are informed that there are a limited number of test kits at Maguire
Correctional Facility in San Mateo where defendant is currently housed. However, those tests are
reserved for inmates who are symptomatic, in accordance with CDC guidance.

1 As for implementation of physical distancing measures, it will be necessary to configure the
2 courtroom to maintain the recommended six feet of physical distance among the trial participants. The
3 attorneys need to stay close to their respective teams in order to be able to confer. The court's jury
4 assembly room will not permit sufficient distance between jurors. Once in the courtroom, the jurors
5 could theoretically be spread out while hearing evidence and arguments; however, that could result in
6 some jurors being able to see the witnesses and evidence better than others.

7 As a further issue of practicality for trial itself and deliberations, on April 3, 2020, the CDC
8 began recommending that individuals wear "cloth face coverings in public settings where other social
9 distancing measures are difficult to maintain (e.g., grocery stores and pharmacies) especially in areas of
10 significant community-based transmission."⁴ It will be difficult and cumbersome for many individuals
11 present in the Courtroom, including the witnesses and examining attorneys, to participate in the trial
12 while wearing a mask in accordance with CDC guidance.

13 **B. Witness Issues**

14 Regarding witnesses, the government intends to call five additional witnesses in its case-in-
15 chief,⁵ two civilians and three special agents. One of the civilian witnesses has repeatedly expressed
16 hesitation about traveling from his home in Santa Clara County to the federal courthouse.⁶ The
17 government believes he will do so, but his health fears are not without justification. Two of the agents
18 are scheduled to fly into San Francisco to testify. Special Agent Emily Odom lives near Washington,
19 D.C., and Special Agent Richard LaTulip resides near San Diego. Travel for both of them raises health
20 concerns as well as practical ones.

21 In the event the agents are unable to fly to San Francisco, the parties would be forced to present
22 testimony via two-way video conference which would require the defendant to waive his right to face-

24 ⁴ See Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of
25 Significant Community-Based Transmission, *available at* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>.

26 ⁵ The government previously made the difficult decision not to call two out-of-town civilian
27 witnesses, Matt Cudworth and Barry Abrahamson, after balancing the value of their anticipated
28 testimony against the need to streamline trial and minimize travel. Mr. Abrahamson lives in Texas and
has a family member with serious health issues. Mr. Cudworth lives in Australia.

⁶ See Attachment A, Letter from Ganesh Krishnan re Concerns Testifying at Nikulin Trial
During COVID-19 Crisis.

1 to-face confrontation or for the Court to make a specific finding of necessity. *See Maryland v. Craig*,
2 497 U.S. 836, 855 (1990) (allowing child victim of molestation to testify by closed-circuit television). In
3 *Maryland v. Craig*, the Supreme Court held that a trial court must make a case-specific finding of
4 necessity in order to avoid Confrontation Clause problems. In the child victim context, that could
5 include the finding that use of the one-way closed circuit television procedure was necessary to protect
6 the welfare of the particular child witness who sought to testify and that the child witness would be
7 traumatized, not by the courtroom generally, but by the presence of the defendant, such that the trauma
8 would impair the child's ability to communicate. *Id.* at 855-57. If this trial proceeds with video
9 conference testimony, the Court would need to make such a case-specific necessity finding as to each
10 witness' presence in the courtroom given the public health emergency and should also obtain
11 defendant's waiver to allow such testimony.

12 **C. Public Access**

13 The public has a right of access to criminal trials under the First and Fourteenth Amendments.
14 *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The Sixth Amendment additionally
15 guarantees the accused a right to a public trial. *See id.* The government believes that General Order 73,
16 as amended on April 2, 2020, sufficiently preserves the public right of access to proceedings in the San
17 Francisco Courthouse. It should be noted, however, that defense counsel has expressed concern about
18 this aspect of the trial, both at the hearing on March 18 and again during the meet and confer on April 1.
19 Defendant's concerns should be probed at the hearing on April 9.

20 **D. Obtaining a Full Jury Presently Appears Unlikely**

21 The sixteen jurors in this case were not impaneled with the understanding that they would be
22 serving during a public health crisis. Given the limited voir dire at the jury selection phase and the
23 unknown availability of many of the jurors, it is unclear whether a sufficient number of jurors will be
24 able to continue on April 13th.

25 As the Court noted on March 18, 2020, before trial can resume there must be additional voir dire.
26 Jurors should be asked about how the pandemic is affecting them, preexisting health conditions,
27 potential exposure to the virus, how they will commute to the courthouse and any changes in their work
28 or childcare obligations since March 11, 2020. The Court should also satisfy itself that none of the jurors

1 has been exposed to any news articles or other outside information about the case. Likewise, there
2 should be some assurance that the jurors have sufficient memory of the testimony they heard on March
3 10 and 11. Jurors should also be asked explicitly about their continued willingness to serve, what health
4 and safety precautions they would like to see implemented in the courtroom, and whether they are likely
5 to feel distracted or distressed by current events.

6 The government also recognizes significant concerns regarding a further continuance. For one
7 thing, it is not known how much longer the shelter-in-place orders will remain in effect; no one can
8 predict the course of the pandemic. For another, there have only been two days of evidence in this case,
9 and with each passing day the jurors' memory of that testimony—much of which was technical—is
10 surely fading. *See United States v. Chapman*, 524 F.3d 1073, 1083 (9th Cir. 2008) (court's
11 determination that jury's attention span could not withstand multi-week delay afforded substantial
12 deference); *United States v. Brandner*, 90 F.Supp.3d 883, 886 (D. Alaska 2015) (finding that due to the
13 considerable time lapse since the first several days of trial, jurors would not make their decision based
14 on what they recalled of the evidence, as is their charge).

15 If the Court determines that the trial should continue, the government proposes that the voir dire
16 should be done by video or teleconference on April 13th, with testimony planned to resume on April
17 14th, so that everyone is not assembled in court, and that the witnesses are not required to travel to the
18 Courthouse, only to find out that the trial cannot continue for lack of a jury.

19 DATED: April 7, 2020

Respectfully submitted,

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21 DAVID L. ANDERSON
United States Attorney

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23 /s/
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KATHERINE L. WAWRZYNIAK
Assistant United States Attorneys
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April 6, 2020

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Re: Concerns Testifying at Nikulin Trial During COVID-19 Crisis

Dear Ms. Kane:

I submit this letter regarding my availability to testify at the trial of Yevgeniy Nikulin if the trial resumes on April 13. As you know, the Bay Area is currently suffering from a global pandemic that has created acute public health concerns for our community. On March 16, due to rapidly increasing COVID-19 case counts and serious illnesses throughout California, all six Bay Area counties issued a shelter-in-place order that required residents to remain in their homes to the maximum extent possible. California Governor Gavin Newsom issued a similar shelter order that extended throughout the entire state three days later. As cases continue to rise in our communities, the Bay Area counties have extended their shelter order until at least May 3.

Over the weekend, Surgeon General Jerome Adams said that this week would be the “hardest and saddest” for “most Americans’ lives,” and described this period as our generation’s “Pearl Harbor moment.” White House Coronavirus Response Coordinator Deborah Birx further stated that practicing social distancing over the next two weeks is “extraordinarily important” and that this “is the moment to not be going to the grocery store, not going to the pharmacy, but doing everything you can to keep your family and your friends safe.”

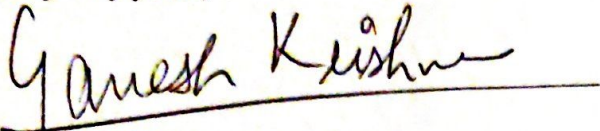
Personally, I have had significant discomfort when I have contracted respiratory infections related to flu and cold in the past. A few months ago, I had a serious medical condition and am currently going through a detailed diagnosis and there are factors that could affect my immune system. Hence, I am extremely concerned that I am more susceptible to Covid-19 due to these reasons.

Given these circumstances, I have significant concerns regarding the prospect of testifying in a federal courtroom full of individuals – including the defendant, defense counsel, government attorneys, a federal judge, court staff, and at least twelve jurors – while this health crisis accelerates out of control. Since the Bay Area counties issued their shelter order, I have followed the order closely and have taken the recommended and necessary steps to protect the health of myself, my wife, and my children to the maximum extent possible, including avoiding public gatherings. Testifying in court before the shelter order is lifted would be an aberration of that approach and would expose myself and my family to undue health risk that we would otherwise avoid.

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I respectfully request that the government do everything possible to avoid restarting Mr. Nikulin's trial before local and state authorities have determined that the COVID-19 crisis is under control and the safety of everyone involved in these proceedings is ensured.

Very truly yours,

A handwritten signature in cursive script that reads "Ganesh Krishnan". The signature is written in dark ink and is positioned above a horizontal line.

Ganesh Krishnan