UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No.: 11-80205-CR-MARRA

UNITED STATES OF AMERICA,

vs.

MITCHELL J. STEIN,
Defendant.
_____/

DEFENDANT MITCHELL J. STEIN'S SECOND MOTION FOR A NEW TRIAL, OR, IN THE ALTERNATIVE, TO DISMISS WITH PREJUDICE

The Defendant, Mitchell J. Stein, hereinafter (hereinafter "Mr. Stein" or "Defendant"), by and through the undersigned attorney, pursuant to Federal Rule of Criminal Procedure 33 and the additional authorities cited below, hereby moves this Honorable Court for an entry of an order setting aside the conviction and rescheduling this case for a new trial, dismissing this case with prejudice, or, in the alternative, scheduling this motion and Defendant's First Motion for New Trial for an evidentiary hearing.

I. PRELIMINARY STATEMENT

As Mr. Stein stated in his First Motion for New Trial,[1] the misconduct in this case is disconcerting under *Brady*, *Giglio* and Rule 16. Based on the scope of its initial post-trial findings, the Defense predicted it would discover even more violations and that additional motions for new trial would inevitably be filed. The Defense files this Second Motion for New Trial after uncovering additional exonerating evidence.

[1] DE 279 (First Motion for New Trial); DE 308 (Amended Reply to Response in Opposition to Defendant's First Motion for New Trial).

The Defense respectfully submits that the new evidence presented herein and in its First Motion for New Trial must be considered cumulatively and as a whole.[2] In addition to the overwhelming evidence of *Giglio, Brady* and Rule 16 violations by the Department of Justice (hereinafter "DOJ") and its witnesses presented in Defendant's First Motion for New Trial, this motion brings to light the newly discovered evidence that (a) the DOJ made extensive false statements to the Court, after its purported private phone call with Tom Tribou, about his companies and about his $50,000 check toward the Cardiac Hospital Management ("CHM") purchase order; (b) IT Health Care exists in Texas as shown on the purchase order and was not "made up" by Mr. Stein, contrary to the DOJ's representations at trial; (c) when key Government witness Martin Carter was in Israel, he entered into a Confidentiality Agreement with an individual named Paul Cohen who also happens to have an address on Smilansky Street, Netanya, Israel; (d) buried in the DOJ hard drive is a snippet of an agreement to be signed by Dr. Harmison and Martin Carter's uncle as an "International Partner" of "Pacific Global Cardiovascular;" and (e) Tim Cutter committed perjury when he testified Carter didn't tell him Carter was trying to distribute Signalife devices.

II. INTRODUCTION

In its First Motion for New Trial, the Defense established the falsity of the statements by the DOJ to the Court and jury about names and addresses being "made up" by Mr. Stein. (DE 279, 292.) The Defense further proved perjury by key DOJ witnesses Martin Carter, John Woodbury and Tracy Jones.[3] The DOJ never complied with its duty to file a notification of its errors with this Court.[4] Rather, its response has been to say that the errors are of no moment, because the evidence of guilt at

[2] *See* Summary Chart – Cumulative Evidence Analysis on page 24 of the instant motion. *See also* First Amended Addendum filed concurrently herewith.

[3] *See* First Motion for New Trial, DE 279 at 7, 15, 16.

[4] *See, e.g. United States v. Alzate,* 47 F.3d 1103 (11th Cir. 1995); *United States v. Friedlander*, 395 Fed. Appx. 577, 580 (11th Cir. 2010).

trial was "overwhelming." (*E.g.*, DE 292 at 5.) However, in the Eleventh Circuit, this response is not a response to *Giglio* misconduct. *See, e.g., United States v. Friedlander,* 2009 U.S. Dist. LEXIS 14264 (2009 D.C.M.D. Fla.), Case No. 8:08-CR-318-T-27 TGW; *United States v. Friedlander*, 395 Fed. Appx. 577, 580, n. 2 (11th Cir. 2010) (court ordering new trial under *Brady/Giglio* despite "overwhelming" evidence).

An order vacating this conviction is warranted here; and, the Defense submits, the Court should strongly consider dismissing this case with prejudice.

III. THE NEW EVIDENCE

A. THE *GIGLIO* MISSTATEMENTS ABOUT MR. TRIBOU AND CARDIAC HOSPITAL MANAGEMENT

Any misstatement to the Court, or the jury, is a "corruption of the truth-seeking function of the trial" and warrants an order vacating the conviction if it certainly "could have" affected the outcome of the trial. *United States v. Agurs*, 427 U.S. 97, 103, 104 (1976); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Circ. 1995); *United States v Arnold*, 117 F.3d 1308, 1315 (11th Cir. 1997); *United States v. Lyons*, 352 F.Supp. 2d 1231, 1244 (M.D. Fla. 2004).

i. *Giglio* Misstatements to the Court About Tribou and CHM

On trial days 8 and 9 – May 15, and 16, 2013 – the Defense attempted to admit into evidence a $50,000 check from Mr. and Mrs. Tribou to Signalife, as well as related email correspondence as Defense Exhibits 410 and 411. (Trial Tr. Vol. 8 at 233-241 and Vol.9 at 6-61.) The memo section of the $50,000 check shows the order number from the very CHM purchase order apparently signed by Mr. Tribou.[5]

After objections from the DOJ and extensive discussions, the Court agreed to admit the check

[5] Ex. C (DE 264-4) and Ex. B (DE 264-3) to the Decl. of Reichardt in support of First Motion for New Trial.

into evidence if the DOJ "can verify whether that's the check he issued, if he put that purchase order number on there []." Trial Tr., Vol. 9 at 50. After the DOJ Prosecutors purportedly conducted its private phone call with Tribou, they made made various false representations to the Court in a furious attempt to keep this now crucial $50,000 check out of evidence. The Court then sustained the DOJ's objections. (Trial Tr. Vol. 9 at 32.) Indeed, they represented to the Court, among other things, that "[the check] says Tribou & Associates, but that "Mr. Tribou indicated on the phone he's not familiar with what that even is." Trial Tr. Vol. 9 at 57. This is inaccurate.[6] Mr. Tribou himself testified before the SEC that Tribou & Associates is his company:

> Q Where did he get the name Tribou and Associates?
> TRIBOU: That's mine. That's what my taxes are underneath; that's what I do everything, all of my separate consulting with.
> Q I guess my question is: Did you give him company names previous to --
> TRIBOU: Well, Lowell and I had talked about it --
> Q -- the meeting?
> TRIBOU: -- and I told him to put it through as Tribou and Associates.

SEC deposition transcript of Thomas Tribou, January 22, 2010, at 192-193. Ex. A to Decl. of Reichardt.

The DOJ also represented to the Court that Tribou "will deny unequivocally that he has anything to do with Cardiac Hospital Management" and that he "was never a reseller." Trial Tr. Vol. 9 at 41. Tribou's SEC testimony, however, reveals the falsity of the DOJ's representations to the Court. Consistent with the Defense's theory at trial, the CHM purchase order Tribou signed was authentic, and CHM was a reseller:

> Q But you recall that Cardiac Hospital Management is the same name that's listed on the purchase order --

[6] Either Mr. Tribou lied to the Prosecution on the during-trial-telephone-call or the Prosecution lied to the Court about Mr. Tribou said. However, "a lie is a lie." *Napue v. Illinois*, 360 U.S. 264, 269-270 (1954).

TRIBOU: That's what I saw on the purchase order, yeah.
Q That you signed?
TRIBOU: Yeah.

Id. at 217.[7]

Q Okay. Now, you understood that this would be a purchase order?
TRIBOU: Correct.
Q You were going to own the units?
TRIBOU: Correct.
Q At the top, it says -- in the grid, in the top line, it says, "method of payment, lease."
TRIBOU: They might have put that in there because I only put down 50 grand -- I don't know what the lease thing was. Because I was buying the units.
[…]
Q And as far as you understood, you were buying 180 units?
TRIBOU: Correct.
Q For $11,000 each?
TRIBOU: Correct.
Q For a total price of $1,980,000?
TRIBOU: Correct.
Q And you were going to deposit -- you were going to send a check for the deposit of $50,000?
TRIBOU: Correct.
Q Okay. And when would the -- the balance be paid?
TRIBOU: As I sold the units, I would have 90 days to pay them the money. I wasn't getting -- I wasn't getting 180

[7] This testimony is Mr. Tribou's unequivocal verification that he signed the Cardiac Hospital Management purchase order. Strangely, Tribou also testified before the SEC that he is "not familiar with Cardiac Hospital Management" (SEC Tr. at 217, Ex. A of Decl. of Reichardt), but that he did agree to purchase the $1,980,000 worth of heart devices from Signalife referenced in the CHM purchase order, Govt. Exhs. 64, 300. (SEC Tr. at 203-204, Ex. A of Decl. of Reichardt.) To the extent the DOJ now states that its representations to the Court at trial – that Tribou and his wife did not draw the $50,000.00 check for that CHM purchase order (or the DOJ's other representations) – were accurate based upon this perplexing testimonial equivocation by Tribou about CHM, the often cited *Kyles v. Whitley* line of cases is apposite. It would be at least "slovenly" for the DOJ to believe or to represent to the Court (a) that "Mr. Tribou is not familiar with what [Tribou & Associates] even is" (Trial Tr. Vol. 9 at 57) and/or (b) that "Mr. Tribou is "skeptical that this is his handwriting on" the $50,000 check(Trial Tr. Vol. 9 at 54)or that "Mr. Stein didn't give them a copy of this purchase order, which he doesn't recall having a purchase order number in there" (Trial Tr. Vol. 9 at 57), while, in fact, Tribou produced that very purchase order to the SEC (Ex. P to Decl. of Reichardt). *Kyles v. Whitley*, 514 U.S. 419, 475 (1995) ("conscientious investigative work will enhance [the probative force of evidence] and slovenly work will diminish it"); *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (evidence implicating thoroughness of the investigation is a relevant line of inquiry under *Brady*); *United States v. Friedlander*, 2009 U.S. Dist. LEXIS 14264 (even innocent prosecutorial mistakes at trial that may have affected the jury verdict, grounds for a new trial).

> units at one time.

Id. at 203-204. *See* Ex. A to Decl. of Reichardt.[8]

Tribou further confirmed that the press release was related to his purchase order, and was, thus, not misleading:

> TRIBOU: It's a press release -- let me just make sure -- is this the one that says about my order and then another order? There was two separate press releases.
> MR. BITTNER: Just read it.
> TRIBOU: Okay. Yeah, this is a press release that they made on selling the product to me.

Id. at 208. Ex. A to the Decl. of Reichardt.

Because of the DOJ's "made it up" trial mantra proffered from cooperator Martin Carter,[9] the real (not "made up") Thomas Tribou and his real (not "made up") $50,000 check paid for the real (not "made up") CHM purchase order (no. H-2003-0001), suddenly became critical and vital to the Defense. Given that the real person, Thomas Tribou, and his real $50,000 check, could not possibly have been made up by Mr. Stein (or by anyone), their existence would crush the DOJ's "Mitch Stein made it all up" story.

Rather than to loudly protest or to claim the foregoing facts are "outlandish," the Prosecution team should concisely explain the exact reason for their misstatements to the Court. Irrespective of their explanation, the misstatements are still prosecutorial misconduct warranting a new trial. *Napue*

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[8] *See also* "Summary Chart - Cumulative Evidence Analysis" on page 24 of this Motion for additional *Giglio* misstatements to the Court regarding Tom Tribou.

[9] The Defense could not have known of the Carter "made it up" mantra, because, interestingly, Carter previously never testified to it anywhere, even before the grand jury. (Trial Tr. Vol. 6 at 136-137.) In its opposition to the First Motion for New Trial, the DOJ infers that the "made up" mantra "figured prominently in the indictment at ¶¶ 7 and 16." DE 292 at 5-6. This is untrue. In these two paragraphs of the indictment, the Government alleges only that Mr. Stein and his "co-conspirators" [ ] "created false" purchase orders; "false" purchase order confirmations; and "false" change of address notices that purportedly were from Signalife's customers; and that Mr. Stein and his co-conspirators issued "false and misleading" press releases and SEC filings; and "false" documents and letters. DE 292 at 7, 16. Conspicuously absent from the indictment is any allegation – even just one – that, out of whole cloth, Mr. Stein "made up" surnames, company names, street addresses in Israel, or anything else.

v. Illinois, 360 U.S. 264, 269-270 (1954) ("a lie is a lie"); *United States v. Alzate*, 47 F.3d 1102, 1110, 1111 (11th Cir. 1995); *Imbler v. Craven*, 298 F.Supp. 795, 808-809 (C.D.Cal. 1969); s*ee also United States v. Ramming*, 915 F. Supp. 854 (S.D. Texas 1996) ("only a person blinded by ambition or ignorance of the law and ethics would have proceeded down this dangerous path [as the prosecutors did]").

ii. *Giglio* Misstatements to the Jury About Tribou and CHM

The Prosecutors here obviously had one strategy in making their misstatements to this Court, to wit: Cooperator Carter had already given his scripted "Mitch Stein made it up" testimony and the Prosecution now wanted to continue to discredit Mr. Stein and to argue it to the jury. Indeed, during closing arguments, the Prosecution unleashed the full weight and force of the false "made it up" story to the jury:

> PROSECUTION: "Cardiac Hospital Management, exhibit 300, $1.98 million. Now, the evidence is pretty clear that, I'd submit, that that was all made up."

Trial Tr. Vol. 10 at 34.

> PROSECUTION: "First and most obviously, if Tom Tribou, Thomas Tribou, is Cardiac Hospital Management, where's Tom Tribou's name, Thomas Tribou's name? Does it say sold to Thomas Tribou? It doesn't, ladies and gentlemen."

Id. at 114.

> PROSECUTION: "[Mr. Stein is falsely] urging upon you today in closing, that somehow Tom Tribou's payment makes the Cardiac Hospital Management purchase order legitimate, not fake."

Id. at 116-117.

> PROSECUTION: "[Mr. Stein is] standing up here and he's saying, ladies and gentlemen, that wasn't a fake document. You should have some kind of doubt as to whether [the CHM purchase order] was a fake document."

Id. at 117.

> PROSECUTION: "If Cardiac Hospital Management was a real company, if Tom Tribou is really Cardiac Hospital Management, why was Mr. Stein making up names?"

Id. at 118.[10]

iii. A Court-Ordered New Trial – or Dismissal of the Indictment – is Warranted

All of the foregoing misstatements represent serious *Giglio* violations, and they should have been corrected by now. The Prosecutors knew of the SEC testimony of Tribou as well as the legitimacy of the $50,000 check and Tribou's signature on the CHM purchase order. They should not have presented the lies and falsehoods, thereby injecting them into this trial on the core issues of their case. *United States v. Agurs*, 427 U.S. 97 (1976); *Brown v. Wainwright*, 785 F.2d 1457, 1464 (11th Cir. 1986); *see also*, *United States v. Friedlander*, 395 Fed.Appx. 577, 580 (11th Cir. 2010); *United States v. Rodriguez*, 799 F.2d 649 (11th Cir. 1986) ("trial by ambush").

The false representations made to the Court (after the purported telephone call between the DOJ Prosecutors and Tribou) prejudiced the Defense. It led to the exclusion from evidence of the $50,000 check. Also, it lent credibility to the story we now know to be false, i.e., that Mr. Stein "made up" all of the names, addresses and documents. The Prosecutor's burden is to not allow perjurious testimony to go to the jury. And once the Prosecutors learn of those kinds of false statements, their obligation is to immediately correct them. Those burdens are never shifted to the Defendant. *Napue v. Illinois*, 360 U.S. 269 (1959); *United States v. Bernal-Benitez*, 594 F.3d 1303, 1315 (11th Cir. 2010).

The question why the DOJ Prosecutors made their misstatements to the Court and the jury while they knew of Tribou's truthful involvement with and control over the CHM purchase order –

[10] If the Prosecutors claim Mr. Stein should have known of Tribou's SEC testimony, then the Prosecution, too, should have known as well.

which they now admit in their opposition to Defendant's First Motion for New Trial[11] – is compelling. The question why the DOJ repeatedly maneuvered to keep the $50,000 check out of evidence and relayed false information to the Court about Tribou, then criticized the Defense's First Motion for New Trial which brought the initial Giglio violations to light, is even more compelling.

The Prosecutors and their witnesses misled the Court and the jury on the core issues of the case. A new trial is warranted, and dismissal of the indictment would be just and proper. *Alzate*, 47 F.3d at 1110-1111 (it "may be that Alzate will be convicted after a fair trial. We do not know, but we do know that he has not yet had one"); *United States v. Lyons*, 352 F.Supp. 1231, 1251 (M.D. Fla. Sept. 30, 2004) (dismissing the indictment for continued *Brady* and *Giglio* violations).

B. IT HEALTH CARE

Attached as Ex. B to the Declaration of Reichardt filed concurrently herewith is a printout of the Franchise Tax Account Status of a company called *IT Health Care Partners, Inc*., (hereinafter "IT Health Care") located in Texas, with an effective registration date of February 7, 2008. IT Health Care exists in the State of Texas, just as set forth in the allegedly false purchase order. *See* Govt. Ex. 70 attached as Ex. C to the Decl. of Reichardt filed herewith.

The fact that IT Health Care exists goes to the very heart of the DOJ's case against Mr. Stein. The purchase orders with IT Health Care and Cardiac Hospital Management and the documents, press releases and SEC filings surrounding it are alleged by the DOJ to be "made up" by Mr. Stein some 300 times throughout the trial. The DOJ's statements to the jury, e.g. "Tony Nony was made up. Just like Yossi Keret; just like IT Healthcare" [12] were false.

The Defense submits that had the jury known that IT Health Care exists in Texas, there is a

[11] [W]hile there is indeed a connection between Tribou and the Cardiac Hospital Management purchase order []." DE 292 at 28, fn. 13. Emphasis added.

[12] Closing argument, Trial Tr. Vol. 10 at 119.

reasonable probability that the jury could have concluded that the purchase order was not "made up" by Mr. Stein, and that, thus, the press releases and SEC filings were not misleading.[13] Absent this false statement under *Giglio*, the jury could have had a different factual basis to evaluate the IT Health Care transaction; from this, there is a reasonable probability that it could have concluded that IT Health Care indeed placed a legitimate order with Signalife through Dr. Harmison, and that the only reason the products were not delivered by Signalife was due to production delays as admitted by Government witness John Woodbury (Trial Tr. Vol. 2 at 100) – and not because the purchase orders were "fake" as so misleadingly represented by the DOJ in closing argument. (Trial Tr. Vol. 10 at 40.)

We have already learned that *Giglio* misstatements are grounds for a new trial. *Napue, Giglio, Agurs, Alzate*[14]. Indeed,

> "[t]he duty of good faith is not merely a negative one to omit from one's case outright lies. It imposes as well an affirmative duty to avoid even unintentional deception and misrepresentation, and in fulfilling that duty the prosecutor must undertake careful study of his case and exercise diligence in its preparation, particularly where he is confronted with facts tending to cast doubt upon his witness' testimony. The prosecutor's objective is justice; his role is not that of a mere advocate. The goal of justice is hardly satisfied by less."

Imbler v. Craven, 298 F.Supp. 795, 808-809 (C.D.Ca. 1969) (emphasis added).

Here, the "Mitch Stein made it up" mantra created a false impression of facts at the core of the allegations. *See Hamric v. Bailey*, 386 F.2d 390, 394 (4th Cir. 1967) ("evidence may be false either because it is perjured, or, though not itself factually inaccurate, because it creates a false impression of facts known not to be true"); *see also United States v. Alzate*, 47 F.3d 1110, 1111, at n. 6 (11th Cir. 1995) (prosecutor wrongfully created the false impression about money and drugs allegedly

[13] This is particularly true given its "cumulative" effect alongside the Tribou CHM purchase order misstatements. *See* section IIIA(i), *supra*.

[14] *Napue v. Illinois*, 360 U.S. 264, 271 (1959); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Agurs*, 427 U.S. 97, 103 (1976); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995).

involved in defendant's drug arrest).

C. CONFIDENTIALITY AGREEMENT BETWEEN CARTER AND COHEN

A newly discovered document reveals that on January 3, 2008, Martin Carter and an individual named Paul Cohen executed a Confidentiality Agreement. Ex. D to the Decl. of Reichardt. Martin Carter was in Israel at the time, as his itinerary confirms. Ex. E to the Decl. of Reichardt. Additional research reveals that Mr. Cohen is the owner of *Yakir Cohen International Trading* (Ex. F to the Decl. of Reichardt) located on Smilansky Street, Netanya, Israel, the address on the change of address letter discussed in Defendant's First Motion for New Trial, and alleged to be "made up" by Mr. Stein.[15]

The testimony adduced from Carter at trial about his trip to Israel is misleading:

> Q Did you have any business contacts in Israel, Mr. Carter?
> CARTER: Not really.
> […]
> Q Mr. Carter, who had you spoken to in Israel before you left for your trip?
> CARTER: I think I spoke to a cousin. That's all I can remember.
> Q Were you going to sell products to that cousin?
> CARTER: No.
> […]
> Q Mr. Carter, when you were in Israel, will you just describe for the members of the jury what you spent your time doing?
> CARTER: Basically I just went sightseeing, ate. That's about it.
> Q Did you have any meetings?
> CARTER: I had a meeting with one guy.
> Q And where -- what type of establishment were you in when you had that meeting?
> CARTER: A restaurant.
> A Maybe a half hour.
> Q Did you convince this guy to buy heart monitors?
> CARTER: No, I did not.

Trial Tr. Vol 6, at 46, 54-6. Ex. G to the Decl. of Reichardt.

[15] The document was buried in a folder holding 2,813 non-searchable image files. *See* screen shot attached as Ex. H to the Decl. of Reichardt.

Had the jury known that Carter signed a Confidentiality Agreement with Paul Cohen, and that Mr. Cohen has an address on Smilansky Street, Netanya, Israel, the address Carter used on the change of address letter, it could have reasonably concluded that Carter came to an agreement with Mr. Cohen to set up a reseller network in Israel, which would be consistent with Carter's SEC testimony.[16] The jury could have reasonably disbelieved the "Mitch Stein made it up" mantra adduced by Government witnesses and parroted by the DOJ throughout the trial. *See*, *United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977) ("a jury may very well give great weight to a precise reason to doubt credibility when the witness has been shown to be the kind of person who might perjure himself").

Had the Defense known of the Paul Cohen agreement, it may have had the chance to establish a connection between the Paul Cohen on Carter's Confidentiality Agreement whose address is on Smilansky Street, Netanya, Israel used on the IT Health Care change of address letter, and the Avi Cohen, who signed the IT Health Care purchase order.[17]

The Defense could have also investigated whether this is the same Paul Cohen Signalife's CTO Budimir Drakulic met with as early as early 2004 and the same Paul Cohen wrote a 45-page

[16] CARTER: "Again, [Dr. Harmison] wanted me to start getting people that I knew for a reseller network, the distribution facilities. I knew a couple of companies, like I said, there was TZ Medical, there was Sarasota Hospital, there was for Baylor University, Davis Medical. But I was very excited because there were going to be 50,000 to 100,000 units sold. Q I don't know what a reseller – CARTER: Okay, let me explain to you what a reseller does. A reseller gets the product, they sit there, either they repackage it or they go to the end supplier, who is going to be receiving it. They are going to make sure that they know how to set everything up and customer service. That is what a reseller is. Q And you had those contacts? CARTER: Yes, that was for my family business, absolutely. Q You had it as it pertains to medical devices? CARTER: I had it as it pertained to anything. I had the network. That is what I had was the network." Carter's testimony before the SEC, February 25, 2010, Tr. at 145-46. Ex. G to Decl. of Reichardt. "[Mr. Cutter] was a friend of mine, and he didn't assist me with anything but Mr. Harmison asked me who I knew to be able to do -- to set up a reseller network, a distributor/reseller network. He asked me if I knew because he knew I was from Cincinnati, and he knew that I happened to be into that business, our lighting business. So he asked me if I knew anyone, and of course I told him, yes, I do know somebody." *Id*. at 41.

[17] Carter's friend of 22 years and Government witness Tim Cutter, who received the "fake" shipment alleged to be orchestrated by Mr. Stein, testified before the SEC that he thought Avi Cohen may be a relative of Carter. He certainly knew an "Avi" in connection with Carter. SEC Tr., Cutter, at 72. Ex. K to the Decl. of Reichardt.

analysis on Signalife, then known as Recom Managed Systems, on May 12, 2004. Ex. I to Decl. of Reichardt.[18] That Paul Cohen is the founder of Cohen Independent Research Group, Wall Street's #1 Independent Research Firm, founder of Bear Stearns Western Regional Offices, and regarded by many to be one of the top 12 security analysts in the nation. He also was Advisory Davis Cup Coach for the Nation of Israel. See Ex. L to the Decl. of Reichardt. However, since the DOJ failed to properly identify this document – let alone disclose the Netanya, Israel connection – the Defense could not have reasonably investigated this matter or called Mr. Cohen as a witness.

The Defense respectfully submits that Carter misled the jury and Court when he testified that Mr. Stein lied after the DOJ played clips of Mr. Stein's SEC testimony in which he stated that he did not know the people affiliated with IT Health Care. (Govt. clip 22, Trial Tr. Vol. 6 at 107-108; Carter: "No, he's lying. […] Because he's the one who made up all those -- the name [sic] of the companies and everything.") As it now turns out, the names and addresses on the IT Health Care documents were likely affiliated with none other than Martin B. Carter – his relatives and contacts in Asia.

> "The reckless use of highly suspicious false testimony is no less damaging or culpable than the knowing use of false testimony, and a conviction based on such evidence must suffer the same consequences."

Imbler v. Craven, 298 F. Supp. 795, 807-808 (C.D.Ca. 1969); *see also United States v. Alzate*, 47 F.3d 1103, 1110 (1995); *United States v. Lyons*, 352 F.Supp. 2d 1231, 1258 (M.D. Fla. Sept. 30, 2004) (misstatements contradicting defendant's testimony or calling credibility into question are themselves grounds for new trial).

Factually, the DOJ's case rested upon the testimony of Martin Carter. He was one of two cooperators, and the only one who tells the incredible story about the change of address letters for IT

[18] Ex. I is the first page of the report by Cohen Independent Research Group dated (converted from a .txt file to PDF), the originals of which are apparently among those native files the Government admits it failed to retain. (S*ee* DE 41-2 at 7.) Attached as Ex. J is an expense sheet from Mr. Drakulic reflecting a meeting with Mr. Cohen.

Health Care in Netanya, Israel and Cardiac Hospital Management in Tokyo, Japan. Any revelation of perjury or prosecutorial misstatements – any untruths at all – could have certainly changed the judgment of the jury.

D. PARTIALLY PRODUCED DOCUMENT REVEALS MORE INVOLVEMENT OF CARTER'S UNCLE

The Defense has also discovered the last page of an agreement produced by Carter, apparently with Carter's handwriting on it, indicating that this agreement was to be executed by his uncle as an "International Partner," *Pacific Global Cardiovascular,* and by Dr. Harmison. Ex. M to Decl. of Reichardt. The signature page is dated January 2, 2008, one day prior to the execution of Carter's Confidentiality Agreement with Mr. Cohen in Israel (see iii. above). This signature page could not have been discovered by way of keyword search (*see* Decl. of Reichardt) and was contained in a folder holding 2,813 non-searchable image files. *See* screen shot attached as Ex. H to the Decl. of Reichardt. The Bates number on the Confidentiality Agreement dated January 3, 2008 as described above is DOJ-CARTER_000472; this signature page to be signed by Carter's uncle bears Bates number DOJ-CARTER_000473. The Bates numbers and dates indicate a possible correlation between the two documents. In any event, it is highly suspicious that either Carter or the DOJ never produced the full document, or that the DOJ failed to request the full document from Carter. The Courts do not tolerate "slovenly" investigations[19]. Given the role Mrs. Carter's uncle played in connection with these purchase orders and change of address letters – the very heart of this case – it was, at a minimum, at least "slovenly" of the Government to not fully investigate the role of Mrs. Carter's uncle and fail to identify these documents in its "hot documents" for the Defense pursuant

[19] *Kyles v. Whitley*, 514 U.S. 419, 475, n. 15 (1995) ("[ ] when, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative work and slovenly work will diminish it. *See* discussion of purse and gun, *infra*, at 1572-1573").

to, *e.g. United States v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009); *see also, United States v. Poindexter*, 727 F. Supp. 1470, 1482, 1483 (D.D.C. 1989); and *United States v. Turkish*, 458 F. Supp. 874 (S.D.N.Y. 1978).

E. CUTTER LIED AT TRIAL ABOUT CARTER'S DISTRIBUTION PLANS

Government witness Timothy Cutter – who has known Carter for over 20 years – was the receiver of the allegedly false shipments of Signalife devices as a representative of IT Health Care in Ohio. Cutter denied at trial that Carter had plans to distribute the Signalife devices stored at Cutter's home:

> Q Did [Carter] tell you that he was trying to set up some sort of distribution network for medical devices?
> CUTTER: No, he didn't.

Trial Tr. Vol. 3 at 198.

However, Cutter testified before the SEC on March 17, 2010 that it was his understanding he was storing the boxes because Carter tried to distribute the devices[20]:

> Q Why did [Carter] need the boxes stored there?
> CUTTER: Supposedly, he was going to distribute them somewhere in the Midwest. I say "Midwest," because it's just a generality for me, my purposes. I cannot recall, and I'm sure he told me where he was delivering them, but at this point, I cannot recall what he had said to me.
> Q So, you understood that this -- these boxes pertained to some sort of business that Mr. Carter was doing?
> CUTTER: Yeah.
> [ ]
> Q So, the manufacturer was going to send them to a distributor, who was going to send them to the end-user?
> CUTTER: Correct. I guess that -- correct, as Marty being the distributor.

SEC Tr. of Cutter deposition, March 17, 2010 at 130, 158. Ex. K to the Decl. of Reichardt. Cutter

[20] Apparently, Cutter and Carter had previously worked on a distribution network together: "Q Did you consider yourself part of Mr. Carter's distribution network? CUTTER: I guess, in those four instances [referring to Carter's food distribution network], I was. Yes." SEC Tr. of Cutter deposition at 112. Ex. K to Decl. of Reichardt.

also stated before the SEC that he did not believe the boxes had any affiliation with Mr. Stein:

> Q So, you're absolutely certain it was Martin Carter who called you about the boxes?
> CUTTER: Yes, absolutely certain it was Martin Carter.
> BY MS. NONAKA:
> Q And, in that phone call, did he mention anything about the boxes being affiliated with Signalife or Mitchell Stein?
> CUTTER: Mitchell Stein, no. He may have expressed to me what was in the boxes or -- I can't recall any exact information, but I'm sure Marty did, but whatever he expressed to me didn't bother me, otherwise I would have -- it would have raised a red flag.

Id. at 133.

Cutter admitted at trial he never met with or talked to Mr. Stein. Trial Tr. Vol. 3 at 204. According to Cutter's SEC testimony, Carter did mention Mr. Stein during conversations. ("In talking to Marty, on a friendly basis, he would bring Mitch up a lot in conversation." SEC Tr., Cutter, March 17, 2010, at 39.) In admitting that Carter didn't mention to Cutter any affiliation between the boxes being shipped to him and Mr. Stein, Cutter's testimony casts doubt on Carter's and the DOJ's story that Mr. Stein orchestrated the shipment of products.

Cutter's testimony on their expectations from storing the boxes at Cutter's home:

> Q So, no sort of, you know, "help me out now, and it will come back to you in the future?"
> CUTTER: I could see -- you could say that. I mean, as a -- like, a personal thing. Marty's always done that. He's, like, "Tim, if I ever make it rich, you know, I'm going to bring you with me," that type of stuff. []

Id. at 151. Ex. K to the Decl. of Reichardt.

Clearly, according to Carter's long-time friend, Carter had grand dreams of his own for both himself and Cutter. Had the Prosecution corrected Cutter's testimony about Carter's distribution plans at trial, the jury could have reasonably concluded that Carter made a deal with Cutter with the

prospect of enriching themselves, or, at a minimum, Martin Carter enriching himself – a deal that was not orchestrated by Mr. Stein.

IV. THE *GIGLIO* VIOLATIONS MANDATE NEW TRIAL OR DISMISSAL OF THE CASE

A. DOJ Must Show Its *Giglio* Violations Were Harmless Beyond a Reasonable Doubt

In the face of the foregoing evidence, false testimony and prosecutorial misstatements, this Circuit requires an order granting a new trial, unless the DOJ persuades this Court that its numerous *Giglio* violations were harmless beyond a reasonable doubt:

> "The could have standard[21] requires a new trial unless the prosecution persuades the court that the false statement was harmless beyond a reasonable doubt."

Smith v. Sec'y, Dep't of Corr., 572 F.3d 1327, 1333-1334 (11th Cir. 2009). *See also, Guzman v. Sec'y, Dep't of Corr*., 661 F.3d 602, 614 (11th Cir. 2011); *United States v. Alzate*, 47 F.3d 1103, 1110 (1995).

The alleged falsity of the purchase orders and other documents was mentioned by the DOJ some 300 times at trial. In the face of numerous, striking *Giglio* violations about false allegations that names and addresses were "made up" – recounted in detail in the First Motion for New Trial and in the instant motion[22] -- the DOJ's only response thus far is to say that the Defense should have uncovered the lies before those lies were told at trial.

Another district court in this circuit follows the same set of rules:

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[21] In its opposition to the First Motion for New Trial, the DOJ does not even acknowledge the "could have" standard for evaluating its and its witnesses' false statements at trial. Hence, the DOJ has not even attempted to meet its burden of proof to overcome the presumption in favor of a new trial. Nor could it. The DOJ's entire case was premised on the purchase orders and the change of address notices. It cannot seriously claim that its and its witnesses' repeated false statements about everything being "made up" could not have affected the judgment of the jury beyond a reasonable doubt.

[22] *See also* Addendum in support thereof, DE 281; *and see* First Amended Addendum filed concurrently herewith.

> "[The prosecution's] conduct in this case, suppressing the evidence, allowing false testimony to go uncorrected and then arguing that false testimony to the jury borders on prosecutorial misconduct and is "a corruption of the truth-seeking function of the trial." *See Alzate*, 47 F.3d 1110 (1995). Accordingly, the court concludes that the petitioner is also entitled to relief on his *Giglio* claim regarding [the impeachment evidence].
> [...]
> [T]he prosecutor made explicit factual representations based on [his witness'] inconsistent testimony. *Id*. The prosecutor reinforced that [false] testimony [to the jury], which the prosecutor was charged with knowing was inconsistent with prior statements. Thus, by his actions, the prosecutor contributed to the fundamental unfairness of [the criminal trial]."

Spellman v. Haley, 2001 U.S. Dist. LEXIS 26029, Civil Action No. 97-T-640-N (11th Cir, D.C. Ala. 2001).

The Defense submits that the DOJ cannot meet its burden of proof beyond a reasonable doubt to make the required showing that each of its misstatements[23] could not have possibly affected the judgment of the jury. However, the DOJ may argue that its violations – taken individually – did not have the required effect on the jury. If the DOJ is to be believed, we are required to review all of the government and witness misstatements together for their cumulative effect on the jury in this case. If the *Brady/Giglio* violations, taken cumulatively, meet the standard set forth in *Brady*[24] (exculpatory evidence) and/or *Giglio*[25] (misstatements), then a new trial is required. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *United States v. Alzate*, 47 F.3d 1110, 1103 (1995). *See*, section v, *infra*.

B. DOJ Misstates Standard for Ruling on a *Giglio* Violation

In its Opposition to the First Motion for New Trial (DE 292), the DOJ was in error when it stated that the standard for ruling on a *Giglio* violation was that the violation was only reversible if it "would have" affected the outcome of the case. This use of "would" instead of "could" differs from the standard uniformly followed by the Supreme Court and by the Eleventh Circuit Court of

[23] And those of its witnesses, e.g., Martin Carter, John Woodbury, and Tracy Jones.
[24] *Brady v. Maryland*, 373 U.S. 83 (1963).
[25] *Giglio v. United States*, 405 U.S. 150 (1972).

Appeals." *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986). As the Eleventh Circuit and the United States Supreme Court have made abundantly clear, the only standard for *Giglio* violations is the test of whether the violation(s) "could have" affected the judgment of the jury. *United States v. Agurs*, 427 U.S. 97, 103 (1976). *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Napue v. Illinois*, 360 U.S. 264, 271 (1959); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995); *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Hayes v. Brown*, 399 F.3d 972, 990 (9th Cir. 2005).

In *Alzate*, the Eleventh Circuit was faced merely with the question of a simple prosecutorial misstatement (and not a witness misstatement) to the Court and the jury. The court applied the "could have" standard, ruled that the defense's knowledge of the falsity at trial was no excuse,[26] and ordered a new trial. Here, we now have at least thirteen prosecutorial misstatements to the Court and the jury and the Court, and at least nine instances of perjury by the DOJ's witnesses. *See* "Summary Chart - Cumulative Evidence Analysis" at 24 of this Motion. *See also*, First Amended Addendum filed concurrently herewith.

The DOJ repeatedly claims that the Defense should be penalized for learning of the DOJ's misstatements after trial, some through the public records. This is not the law. The law never shifts to the Defense the prosecutor's burden (a) to conduct a reasonable investigation before making representations to the jury, (b) to tell the truth at trial, and (c) to report the false statement, once uncovered, pursuant to a separately noticed pleading or by some other conspicuous means.

C. Due Diligence Standard Does Not Apply To *Giglio* Violations

In its opposition to the First Motion for New Trial, the DOJ argues repeatedly that the Defense did not exercise "due diligence" and therefore its discoveries – after trial from the public records – that the DOJ and its witness' statements to the Court and the jury were false, defeats the *Giglio*

[26] *Id.* at n. 6.

claims in this case. *E.g*., DE 292 at 7. The DOJ is wrong. As set forth in the Defense's reply to opposition to its First Motion for New Trial, the Government's burden to not make false statements and to correct any such misstatements – if they are made – is never shifted to the Defense. *United States v. Alzate*, 47 F.3d, n. 6 (11th Cir. 1995); *United States v. Friedlander*, 2009 U.S. Dist. LEXIS 14264 (2009 D.C. M.D. Fla.), Case No. 8:80 CR-318-T-27 TGW; *United States v. Friedlander*, 395 Fed.Appx. 577, 580, at n. 2 (11th Cir. 2010) (new trial ordered for *Brady/Giglio* violation – but not dismissal of the case – because prosecution candidly filed "Notice of Mutual Mistake of Fact at Trial").

Indeed, the DOJ's contention that, in the face of a *Giglio* violation, the Defense must make a showing that the failure to learn of the evidence was due to no lack of diligence on the part of the defendant (DE 292 at 4, 5, 7) is false. As the Eleventh Circuit held even prior to *Alzate*, the due diligence showing that normally accompanies a Rule 33 or *Brady* claim "is not applicable, however, where the Government's case included false testimony and the prosecution knew or should have known of the falsehood." *United States v. Rivera Pedin*, 821 F.2d 1522, 1529, 1530, n. 8 (11th Cir. 1988) (*citing United States v. Antone*, 603 F.2d 566, 568-69 (5th Cir. 1979)).

Here, the DOJ candidly admits that the Defense's discovery of the falsity of its trial mantra "there is no Yossi Keret" (Closing, Trial Tr. Vol. 10 at 34), 10 Smilansky Street, Netanya, Israel was "made up," (Trial Tr. Vol. 6 at 59) and IT Health Care "doesn't exist" (Closing, Trial Tr. Vol. 10 at 119)[27], was available from the public records. DE 292 at 6, 7. Given this admission by the DOJ, it "should have known" better than to make the entire prosecution of Mitchell J. Stein about "made up" names, "made up" addresses, and "made up" companies[28] without carefully researching these

[27] *See also*, Carter's perjury that Mr. Stein "made up" all the names. Trial Tr. Vol. 6 at 112.

[28] "You heard the evidence, ladies and gentlemen, made up." Trial Tr. Vol. 10, at 39, ll. 2-3; "Tony Nonoy was made up. Just like Yossi Keret; just like IT Healthcare." Trial Tr. Vol. 10, p. 119, ll. 9-10

scandalous allegations ahead of time. The DOJ does not deny that it knew its claims were false, however, we still don't know the extent of its culpability. What we do know is that the DOJ has affirmatively claimed these lies were discoverable from the public records and that the Defense should have uncovered the lies before the DOJ made them at trial. DE 292 at 6. Under *Giglio, Agurs, Alzate, Antone* and *Rivera Pedin*, the inquiry ends there: The Government is guilty of *Giglio* violations and a new trial should be ordered.[29]

D. New Evidence Exacerbates the Already Severe *Brady* and *Giglio* Violations

A *Giglio* error – a species of *Brady* error – occurs when the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." *Ford v. Hall*, 546 F.3d 1326, 1331 (11th Cir. 2008) (internal citation and quotation marks omitted) (emphasis added). *See also, Sargent v. Fla. Dep't of Corr*., 480 Fed. Appx. 523, 529 (11th Cir. 2012); *Ventura v. Atty. Gen. Fla*., 419 F.3d 1269, 1276 (11th Cir. 2005).[30]

There is no difference between false testimony, on the one hand, and prosecutorial misstatements to the court and/or jury, on the other hand. *United States v. Alzate*, 47 F.3d 1103, 1110-1111 (11th Cir. 1995). If the prosecution knew or should have known of the falsity of either the testimony or the statements to the court or jury, a *Giglio* violation occurs. *See also, United States v. Agurs*, 427 U.S. 97 (1976).

The law is that

> "[i]t is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the

[29] In view of the extent of the violations of law set forth in the first motion for new trial and the second motion for new trial, the Defense respectfully submits that all charges against Mr. Stein should be dismissed with prejudice. *See, United States v. Lyons*, 352 F.Supp. 2d 1231, 1258 (M.D. Fla. Sept. 30, 2004).

[30] Given the DOJ's arguments that Mr. Stein should have discovered before trial that the DOJ's statements (and those of its witnesses) were false, the DOJ cannot seriously contend that it too is not charged with the knowledge that its and its witnesses' statements and testimony were false.

> government has the responsibility and duty to correct what he knows to be false. [The possible fact that the prosecutor's false statement] was not the result of guile . . . matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair. […] Due process is violated when the prosecutor although not soliciting false evidence from a government witness, allows it to stand uncorrected when it appears. That the false testimony goes only to the credibility of the witness does not weaken this rule."

Napue v. Illinois, 360 U.S. 264, 269-270 (1954); *Giglio v. United States*, 405 U.S. 150 (1972).

E. Prosecutors' Statements Violate ABA Criminal Justice Standard Rules

The DOJ has never argued that it and its witnesses made their false statements unintentionally. It has never argued that the statements did not mislead the Court and the jury.[31] The statements were calculated to mislead, and they did just that. In *Berger v. United States*, 295 U.S. 78 (1934), the Supreme Court struck down a conviction when the prosecution attorney's argument to the jury[32] was "undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." *Id.* at 85. In *United States v. Corona*, 551 F.2d 1386, 1390-1391 (5th Cir. 1977), the court noted "the heavy responsibility [of prosecutors] . . . to conduct trials with an acute sense of fairness and justice." (Citation omitted.)

Here, the DOJ's "Mitch Stein made it all up" mantra was like a thread of poison that laced the entire fabric of this case. The DOJ's witnesses lied. The DOJ's remarks at trial that names, companies and addresses were "made up" violated ABA standards[33] and were at the very least "misleading." *Id.* It is submitted that this trial was fundamentally unfair and a new trial should be ordered.

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[31] Rather, the DOJ says the Defense should have learned the truth before trial about the DOJ's false statements and the witnesses' false statements at trial. *E.g.* DE 292 at 7.

[32] About people that (a) did or did not exist, and (b) did or did not have an involvement in the alleged crimes.

[33] "The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw." Prosecution Function; ABA Standards for Criminal Justice 3.5.8(a). Ex. N to the Decl. of Reichardt.

V. CUMULATIVE IMPACT OF ALL NEW EVIDENCE

In assessing whether suppressed evidence is "material" for *Giglio* and *Brady* purposes, the impact of the evidence must be considered cumulatively, not item by item. *Kyles v. Whitley*, 514 U.S. at 421, 436 (1995). This requirement is significant because "the sum of the parts almost invariably will be greater than any individual part." *Smith v. Secretary, Dep't of Corrections*, 572 F.3d 1327, 1347 (11th Cir. 2009).

Importantly, most of the violations in this case are either *Giglio* misstatements or *Giglio* perjury. As a result, the DOJ is required to prove beyond a reasonable doubt that these misstatements could not reasonably have been expected to have affected the jury's decision. Thus, the DOJ must prove beyond a reasonable doubt that its "I got all information from Mitch Stein" mantra – which we now know is false – could not have affected the jury result in this case. The DOJ must also prove beyond a reasonable doubt that its mantra "Mitch Stein made it all up" – which we also now know is untrue – could not have possibly affected the jury's decision. The DOJ cannot come close to meeting its burden of proof, and – at least – a new trial is warranted. The DOJ's "Mitch Stein did it all" mantras were the bedrock of its case. They permeated the entire trial. The following summary chart bears this out, as well as showing the overwhelming impact of the new evidence and the truth (new *Giglio* violations presented herein highlighted):

Summary Chart - Cumulative Evidence Analysis

No.	Type of Violation	The Testimony/Misstatement	The Truth
1.	*Giglio* misstatement to the jury: Mr. Tribou's name does not appear on the CHM purchase order – Govt. Exhs. 64, 300. (By Prosecution.)	PROSECUTOR "First and most obviously, if Tom Tribou, Thomas Tribou, is Cardiac Hospital Management, where's Tom Tribou's name, Thomas Tribou's name? Does it say sold to Thomas Tribou? It doesn't, ladies and gentlemen. Take a look closely. I apologize. I know this is small on the screen, but take a look on Government's exhibit 64. See if Thomas Tribou's name appears on there." Closing, Trial Tr. Vol. 10 at 114.	Mr. Tribou testified before the SEC that he signed the CHM purchase order, and Mr. Tribou produced the CHM purchase order he signed to the SEC – the very purchase order the Prosecution referred to throughout the trial and in closing. Q "But you recall that Cardiac Hospital Management is the same name that's listed on the purchase order -" TRIBOU: "That's what I saw on the purchase order, yeah." Q "That you signed?" TRIBOU: "Yeah." *See* Exhs. A (Tribou testimony) and P (purchase order produced by Tribou) to the Decl. of Reichardt.
2.	*Giglio* misstatement to the Court: Mr. Tribou will deny he has anything to do with Cardiac Hospital Management. (By Prosecution.)	PROSECUTOR to Court: "Your Honor, we were able to reach Mr. Tribou. He interestingly is [ ] skeptical that that could be his handwriting with this number that Mr. Stein is suggesting he wants in evidence." Trial Tr. Vol. 9 at 54. [ ] "[Tribou] will deny unequivocally that he has anything to do with Cardiac Hospital Management [ ]." *Id.* at 41.	Tribou testified before the SEC: Q "But you recall that Cardiac Hospital Management is the same name that's listed on the purchase order -" TRIBOU: "That's what I saw on the purchase order, yeah." Q "That you signed?" TRIBOU: "Yeah." […]Ex. A to Decl. of Reichardt.
3.	*Giglio* misstatement to the jury: Mr. Tribou has nothing to do with Cardiac Hospital Management. (By Prosecution.)	PROSECUTOR: "If Cardiac Hospital Management was a real company, if Tom Tribou is really Cardiac Hospital Management, why is Mr. Stein making up names?" Closing, Trial Tr. Vol 10 at 118.	TRIBOU: "Lowell talked to me that night, when we went become to the hotel, and told me about the leads that he had and everything. He said what we could do is probably put something in terms. So I end up getting, say, two million rounded off, two million dollars' of stuff, 1.9 something, for $50,000 down." Ex. A to Decl. of Reichardt. Dr. Harmison also doesn't deny the validity of the purchase order before the SEC.[34]

[34] Dr. Lowell Harmison – former Principal Deputy of the Food and Drug Administration, and signator on the purchase orders – testified before the SEC that the purchase orders were real. E.g.: Q As of December 27th, 2007, the date of this e-mail, did you view the purchase order that Tom Tribou signed as still in effect or still enforceable? HARMISON: Yes. Q As of this date, did you expect that Tom Tribou was going to receive 180 units and in return pay the company point some million dollars? HARMISON: Yes, because his reputation was his contacts and the hospitals and clinics was now on the line to – to deliver products that he told them about. So there was ever -- not any reason to question his sincerity in doing this. Q Well, I believe earlier you testified at some point, you know, he backed away and said – HARMISON: It was -- that some point being, in my judgment, I gave him the lure at the end of December, the end of the year. That moving away occurred in January, February time frame. Q And what happened between this e-mail in December 27th and the January, February time period? HARMISON: He still wasn't receiving his devices.[…] 4/16/10 SEC Tr. at 400. Ex. Q to the Dec. of Reichardt. HARMSION: There was a effort to get the production straightened out, to meet the conditions, to meet – to provide units under that purchase order that met the full requirements of what was sold to him or purchased by him. *Id.* at 340. HARMISON : It's a change of address and Tribou and TZ and -- was trying to establish an external international linkage. They had one person that was assigned to doing that. I don't remember his name, but this is just a statement that it was done. *Id.* at 408. HARMISON: Well, the -- it was a -- an agreement that addressed whether devices would be provided to TZ Medical or any subunit of TZ Medical because he wanted to keep things separate from his -- his company. So I think they had a separate organizational entity. So issues regarding what were plausible terms and they were converted to a purchase-order-type delineation of things to which Tribou signed and I signed. *Id.* at 305. Ex. Q to Decl. of Reichardt.

No.	Type of Violation	The Testimony/Misstatement	The Truth
4.	*Giglio* misstatement to the Court and jury: The Cardiac Hospital Management purchase order was "fake." (By Prosecution.)	PROSECUTOR: "Over the last two weeks, the evidence has [ ] demonstrated that Mr. Stein [ ] faked purchase orders [ ]." Closing, Trial Tr. Vol. 10 at 17. "So how did Martin Carter and Mitchell Stein go about creating these fake sales? Fake purchase orders. You saw those throughout the trial. Cardiac Hospital Management, exhibit 300, $1.98 million. Now, the evidence is pretty clear that, I'd submit, that that was all made up." *Id*. at 34. "Now, the wire fraud, part of the scheme that involves the wire fraud is about getting the -- it's about the false purchase orders and the fake sales that were helping to get the stock price up, helping him sell the shares that he had stolen from Signalife." *Id.* at 46. "Now, all those lies Mitchell Stein told the people about [ ] fake purchase orders, they were all part of a scheme that he had developed." *Id*. at 23. "[Mr. Stein is] urging upon you today in closing argument, that somehow Tom Tribou's payment makes the Cardiac Hospital Management purchase order legitimate, not fake." *Id.* at 116-117. "[R]egardless of whatever signature Mr. Stein was able to get on that purchase order, it's a fake purchase order, and it was put together at the direction of the same person who put together those other purchase orders, the two IT Healthcare purchase orders; Mr. Stein." *Id.* at 118-119.	Tribou's testified before the SEC as follows: Q "But you recall that Cardiac Hospital Management is the same name that's listed on the purchase order -" TRIBOU: "That's what I saw on the purchase order, yeah." Q "That you signed?" TRIBOU: "Yeah." [] Q "Okay. Now, you understood that this would be a purchase order?" TRIBOU: "Correct." Q "You were going to own the units?" TRIBOU: "Correct." Q "At the top, it says -- in the grid, in the top line, it says, 'method of payment, lease.'" TRIBOU: "They might have put that in there because I only put down 50 grand -- I don't know what the lease thing was. Because I was buying the units.[…]" Q "And as far as you understood, you were buying 180 units?" TRIBOU: "Correct." Q "For $11,000 each?" TRIBOU: "Correct." Q "For a total price of $1,980,000?" TRIBOU: "Correct." Q "And you were going to deposit -- you were going to send a check for the deposit of $50,000?" TRIBOU: "Correct." Q "Okay. And when would the -- the balance be paid?" TRIBOU: "As I sold the units, I would have 90 days to pay them the money. I wasn't getting -- I wasn't getting 180 units at one time." Ex. A to Decl. of Reichardt.
5.	*Giglio* misstatement to the Court: Mr. Tribou was never a reseller. (By Prosecution.)	PROSECUTOR: "[Tribou] never was a reseller [ ]." Trial Tr. Vol. 9 at 41.	Contrary to the Prosecution's statement, Tribou testified before the SEC: TRIBOU: "As I sold the units, I would have 90 days to pay them the money." […] Q "And you were going to resell [the Signalife units] at a higher price?" TRIBOU: "Yeah." Ex. A to the Decl. of Reichardt.
6.	*Giglio* misstatement to the Court: Mr. Tribou doesn't know what 'Tribou & Associates' is. (By Prosecution.)	PROSECUTOR: "[The check] furthermore says Tribou & Associates. Mr. Tribou indicated on the phone he's not familiar with what that even is." Trial Tr. Vol. 9 at 57.	Tribou's SEC testimony: Q "Where did he get the name Tribou and Associates?" TRIBOU: "That's mine. That's what my taxes are underneath; that's what I do everything, all of my separate consulting with. […] Lowell and I had talked about it – […] and I told him to put it through as Tribou and Associates." Ex. A to the Decl. of Reichardt.
7.	*Giglio* misstatement: Mr. Tribou doesn't have a copy of the CHM purchase order. (By Prosecution.)	PROSECUTOR: "Mr. Stein didn't give them a copy of this purchase order, which he doesn't recall having a purchase order number in there." Trial Tr. Vol. 9 at 57. (Referring to the identical purchase order number (H-2003-0001) on the check's legend as well as the purchase order, Govt. Exhs. 64, 300.) Ex. O to Decl. of Reichardt.	Mr. Tribou produced a copy of the CHM purchase order to the SEC, bates numbered SEC-TT0003-SEC-TT0008. Ex. P to Decl. of Reichardt. The purchase order produced by Tribou contains a fax header at the bottom which shows the fax number of Tribou's accountant in Oregon, dated September 20, 2007. SEC Tr. at 187-188. Ex. A to Decl of Reichardt.

No.	Type of Violation	The Testimony/Misstatement	The Truth
8.	*Giglio* misstatement to the jury: Mr. Stein made up the name IT Health Care. (By Prosecution Witness.)	CARTER: "Because [Mr. Stein is] the one who made up all these names. […] Of the companies, the IT Healthcare, and Cardiac Management." Trial Tr. Vol. 6 at 112.	Obtained from the Office of the Comptroller of the State of Texas is the Franchise Tax Account Status of a company called IT Health Care Partners, Inc. in the State of Texas, just as set forth on the purchase order. Ex. C to the Decl. of Reichardt.[35]
9.	*Giglio* misstatement to the jury: "IT Healthcare, Texas Warehouse" (Govt. Ex. 70) was "made up." (By Prosecution.)	PROSECUTOR: "Cardiac Hospital Management was made up. Tony Nony was made up. Just like Yossi Keret, just like IT Healthcare." Closing, Trial Tr. Vol. 10 at 119.	
10.	*Giglio* misstatement/perjury to the jury: Carter did not do business in Israel for Signalife. (By Prosecution Witness.)	Q "Did you have any business contacts in Israel, Mr. Carter?" CARTER: "Not really." Trial Tr. Vol. 6 at 46. CARTER: "[In Israel] I just went sightseeing, ate. That's about it. […] No, I did not [convince anyone in Israel to buy Signalife product]." *Id*. at 56. CARTER: "I created the [change of address] document. [..] Because I was told to by Mitchell Stein." *Id.* at 57. CARTER: "Because [Mr. Stein is] the one who made up all these names." *Id.* at 112.	Paul Cohen executed a confidentiality agreement with Carter on January 3, 2008, when Carter was in Israel. Ex. D to Decl. of Reichardt. Mr. Cohen's address is Smilansky St., Netanya, Israel, as shown on the change of address letter. Ex. F to Decl. of Reichardt.
11.	*Giglio* perjury to the jury: Carter and his relatives were not involved in Cardiac Hospital Management. (By Prosecution Witness.)	Q "Is Mr. Mijares in any way associated with a company called Cardiac Hospital Management?" CARTER: No, he was not." Trial Tr. Vol. 6 at 42.	Ex. H to the Decl. of Reichardt in support of the First Motion for New Trial shows the Antonio Mijares change of address letter on behalf of CHM, which was never identified by the DOJ. Mr. Mijares is Mrs. Carter's uncle.
12.	*Giglio* perjury/misstatement to the jury: Carter's relatives and contacts were not involved in buying and reselling Signalife product. (By Prosecution Witness.)	Q "Were you going to sell products to [your wife's uncle]?" CARTER: "No." Trial Tr. Vol. 6 at 55.	Ex. M to the Decl. of Reichardt filed herewith is a newly discovered signature page to be executed by Carter's uncle, "International Partner," Pacific Global Cardiovascular, and Dr. Harmison. The Defense was never provided with the full document.

[35] The DOJ cannot say "Mr. Stein could have still made up the name IT Health Care, Texas," even though there really is an IT Health Care, Texas. The "could have" standard forces the Government to prove beyond a reasonable doubt that the misstatement "could not have" affected the jury beyond a reasonable doubt, and not that the Government's failure to research the public records "could have" made its misstatements possibly explainable in hindsight.

No.	Type of Violation	The Testimony/Misstatement	The Truth
13.	*Giglio* misstatement to the jury: Cutter did not know of Carter's distribution plans with the Signalife boxes stored at his home. (By Prosecution Witness.)	Q "Did [Carter] tell you that he was trying to set up some sort of distribution network for medical devices? CUTTER: No, he didn't. Trial Tr. Vol. 3 at 198.	Cutter's SEC testimony reveals that Carter told Cutter that he stored the boxes at Cutter's home because Carter was planning to distribute them to end-users: CUTTER: "Supposedly, [Carter] was going to distribute them somewhere in the Midwest. I say 'Midwest,' because it's just a generality for me, my purposes. I cannot recall, and I'm sure he told me where he was delivering them, but at this point, I cannot recall what he had said to me." Q "So, you understood that this -- these boxes pertained to some sort of business that Mr. Carter was doing?" CUTTER: "Yeah." […] Q "So, the manufacturer was going to send them to a distributor, who was going to send them to the end-user?" CUTTER: "Correct. I guess that -- correct, as Marty being the distributor." Q "And, in that phone call, did [Carter] mention anything about the boxes being affiliated with Signalife or Mitchell Stein?" CUTTER: "Mitchell Stein, no. He may have expressed to me what was in the boxes [ ]." [ ] "Marty's always done that. He's, like, 'Tim, if I ever make it rich, you know, I'm going to bring you with me,' that type of stuff. []" Ex. A to Decl. of Reichardt.
14.	*Giglio* misstatement to the jury: The "fake" shipments to Cutter were orchestrated by Mr. Stein. Cutter didn't know that Carter intended to distribute the Signalife devices stored at his house. (By Prosecution.)	PROSECUTOR: "[ ] fake shipping of products that Mr. Stein orchestrated [ ] Mr. Stein got Mr. Carter to send stuff to his buddy, Tim Cutter." Closing; Trial Tr. Vol. 10 at 41. PROSECUTOR: "[ ] just a dummy address to use as a mail drop, a lie to make it look like good things were happening with the company." Opening; Trial Tr. Vol. 2 at 22. PROSECUTOR: "[Cutter] didn't understand really why [Carter asked him to hold on to the boxes]; he just did it because his friend asked him to." Closing; Trial Tr. Vol. 10 at 41.	
15.	*Giglio* perjury/misstatement to the jury: Carter never spoke to anyone from IT Health Care. (By Prosecution Witness.)	Q "Have you ever talked to anyone from IT Healthcare?" CARTER: "No, I did not." Trial Tr. Vol. 6 at 59.	(1) Tim Cutter's SEC testimony identifies Avi on the IT Health Care purchase order potentially as Carter's relative: Q "Have you ever heard of a person named Avi Cohen?" CUTTER: "I have, I think. Is -- I'm not sure, but it may be a nephew, or something, of Marty. Now, I'm not sure that's his last name. I've heard of the name Avi before, and I've heard, it's a -- I think it's -- might be Susie's kids, I'm not sure. Susie's [Carter's] sister. I've heard of the name Avi. I don't know if that's the last name." Ex. A to the Decl. of Reichardt; (2) Paul Cohen, who Carter met and signed an agreement with Carter in Israel, has an address on Smilansky St, Netanya, Israel, the address on the IT Health Care change of address letter. Paul Cohen might be related to Avi Cohen. Ex. D to Decl. of Reichardt.

No.	Type of Violation	The Testimony/Misstatement	The Truth
16.	*Giglio* misstatements to the jury: There is no Yossi Keret. (By Prosecution.)	PROSECUTOR: "Confirmation letters faxed by Martin Carter, at Mr. Stein's direction, with names Mr. Stein made up, Tony Nony, Yossi Keret." Closing, Trial Tr. Vol. 10 at 28. PROSECUTOR: "[ ] that was all made up. There's no Tony Nony, there's no Yossi Keret." Closing, Trial Tr. Vol. 10 at 34. [ ] "There's not one shred of credible evidence that these people existed or these contracts actually happened." [ ] "You heard the evidence, ladies and gentlemen, made up." *Id*. at 39. [ ] "Tony Nony was made up. Just like Yossi Keret, just like IT Healthcare." *Id.* at 119.	At all times material hereto, there was a Yossi Keret, he reported to the SEC as CFO of a biotechnology company with offices in Israel. See Ex. J Decl. of Reichardt in support of First Motion for New Trial.
17.	*Giglio* perjury to the jury: 10 Smilansky St., Netanya Israel is a made up address. (By Prosecution Witness.)	CARTER: "It's a made up address." Trial Tr. Vol. 6 at 59. CARTER: "Because [Mr. Stein is] the one who made up all those -- the name of the companies and everything." *Id.* at 108.	(1) Electrical Product Imports & Marketing is located at 10 Smilansky St, Netanya, Israel (Ex. K to First Motion for New Trial); Compare to Carter's companies Electrical Connections (Govt. Ex. 96)[36] and M&C Electrical; (2) Paul Cohen is also located on Smilansky Street, Netanya, Israel – the address on the change of address letter. Cohen and Carter executed a confidentiality agreement. Ex. D to Decl. of Reichardt.[37]
18.	*Giglio* misstatement to the jury: Mr. Stein gave Mr. Carter the info and told him to create "fake" change of address forms. (By Prosecution.)	PROSECUTOR: "So Mr. Stein has Mr. Carter create some fake address forms. […]You heard the evidence, ladies and gentlemen, made up." Closing, Trial Tr. Vol. 10 at 38-39. [ ] "[Mr. Stein] gave [Mr. Carter] the info, the names, told him exactly what to do." *Id*. at 47.	
19.	*Giglio* perjury to the jury: John Woodbury got everything for the Form 10-Q for the period ending 9/30/07 from Mr. Stein. (By Prosecution Witness.)	Q "And again, at the time you prepared and filed this quarterly filing, this 10-Q, with the SEC, did you have any additional independent information about these purchase orders other than what we've seen?" WOODBURY: "No, I did not. I did not speak to Dr. Harmison. I got all my information from Mr. Stein." Trial Tr. Vol. 2 at 96.	The email chain transmitting the Tribou check shows that Woodbury received information from the CPA, and audit committee member Norma Provencio when he was preparing the 10-Q, pertaining to the CHM purchase order. Ex. B to the Decl. of Reichardt in support of First Motion for New Trial.

[36] Compare also with "M&C Electrical", the business Carter started in 1990.

[37] Compare with the name "Avi Cohen" who signed the It Health Care purchase order. Govt. Ex. 70, Ex. C to the Decl. of Reichardt.

No.	Type of Violation	The Testimony/Misstatement	The Truth
20.	*Giglio* perjury/misstatement to the jury: Tracy Jones called the purchase orders "phantom" because she did not receive anything "on them." (By Prosecution Witness.)	JONES: "Well, I had a discussion with Lee Erlichman [sic] when he came to visit the office that I called them phantom purchase orders because I never received any backup or anything on them." Trial Tr. Vol. 3 at 117.	Jones' suppressed email embedded within others shows she is was not being truthful. *See* Ex. B to the Decl. of Reichardt in support of First Motion for New Trial. This Tracy Jones email which is embedded in the email chain was never produced to the Defense. The SEC database has been suppressed: A criminal defendant need only make a "plausible showing" that the Government's files contain relevant evidence, and that an evidentiary hearing should be held if the trial court has any doubts about the contents of the database. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). A "plausible" showing has been made and the refusal to give Defendant access to the SEC database is another violation of *Brady.*
21.	*Giglio* misstatements to the jury: The alleged "phantom" nature of the purchase order is why Woodbury and Pickard sent confirmation letters. (By Prosecution.)	PROSECUTOR: "You heard the evidence, ladies and gentlemen, made up." Closing, Trial Tr. Vol. 10 at 38-39. [ ] "Remember Tracy Jones mentioned the phantom purchase orders. So naturally, John Woodbury, the SEC lawyer; and Kevin Pickard, the CFO, want to send out confirmation letters [ ]." *Id.* at 40.	WOODBURY: "These purchase orders dated back seven, eight months prior to them. There had been a number of delays that they had not been fulfilled dealing with issues on chips and Blue Tooth and a bunch of technical stuff. [ ] I prepared confirmation documents that would be sent to these purchasers that would address the various concerns that I had that I had expressed." Trial Tr. Vol. 2 at 100-101.
22.	*Giglio* misstatements to the Court: The SEC was involved in an entirely different investigation than the DOJ, although, at times, parallel. (By Prosecution.)	PROSECUTION: "The SEC is of course a federal agency entirely separate and distinct from the Department of Justice, and Department of Justice prosecutors do not as a general matter have [ ] access to SEC materials." DE 46 at 5. [ ] "[T]he SEC's investigation predated and has been entirely separate from, although at times parallel to, the Department of Justice's investigation, and that therefore the United States' discovery obligations do not extend to materials in the possession of the SEC." *Id.* at 6.	(1) Ex. A to the Decl. of Reichardt in support of Defendant's Reply to the United States' Opposition to the First Motion for New Trial (DE 305-1) shows DOJ press releases revealing the SEC's "substantial assistance" in this matter; (2) At the April 3,2013 *Faretta* hearing, the Prosecution admitted it received its "small subset" of documents from the SEC (not from Signalife and not from RenewData) pursuant to an "access request," (*Faretta* Tr. at 41) which substantiates the extent to which files were shared between the two agencies.
23.	*Giglio* misstatements to the Court: The DOJ did not have access to the SEC's database. (By Prosecution.)	PROSECUTION: "*[A]t no point in time did the prosecution team in this matter have access to [the database]*." DE 292 at 14. [ ] "That smaller database, created by the United States for discovery in this matter, is the only one to which the United States has access. Stein's effort to muddy the facts on this point, and to do so with such total disregard for his own statements, should not be countenanced by this Court." *Id.* at 14. [ ] "The database to which Stein is likely referring is one established by Signalife and its attorneys during the SEC's investigation of this matter using a vendor called Renew Data." *Id.*	PROSECUTION: "That's this sort of 200-plus million pages or documents, I've lost track of which one it is. That's that universe of documents. […] A very small subset of those documents were provided by the SEC to the Department of Justice pursuant to an access request. Those documents, for document management purposes, were then, admittedly, put into a database by my office." Tr. of *Faretta* hearing at 41. (Emphasis added.)

Cumulatively, the Defense submits that the foregoing summary chart shows an

overwhelming case of *Brady* and *Giglio* violations, spanning virtually all of the various kinds of prosecutorial wrongdoing reviewed by the Courts in the 50-years since *Brady*. Indeed, in this case, the Government engaged in a suppression of exculpatory evidence, keeping sole access to a "storehouse" of relevant facts, failing to turn over access to investigatory databases, insisting on unilateral access to those databases, misrepresenting the foregoing to the Court, misrepresenting material facts to the jury, allowing witness misstatements to go uncorrected, continuing its misstatements to the Court following trial, and failing to admit to its mistakes (whether innocent or wrongful) following trial.

VI. THIS CASE SHOULD BE DISMISSED WITH PREJUDICE

A court is empowered to dismiss an indictment for *Brady, Giglio* or Rule 16 violations. *United States v. Lyons*, 352 F.Supp. 2d 1231, 1258 (M.D. Fla. Sept. 30, 2004) (district court dismissal of indictment for *Brady* and *Giglio* violations only); *Virgin Islands v. Fahie*, 419 F.3d 249, 259 (3d Cir. 2009) (dismissing indictment for Rule 16 violations only); *cf. United States v. Friedlander*, 2009 U.S. Dist. LEXIS 14264 (M.D. Fla. 2009) *and United States v. Friedlander*, 395 Fed. Appx. 577, 580, at n. 2 (11th Cir. 2010) (district court ordering new trial, but not dismissing indictment, because prosecution filed "Notice of Mutual Mistake of Fact at Trial"). In the light of the First Motion for New Trial,[38] and this second motion – and upon studying the voluminous *Brady, Giglio* and Rule 16 violations of record – we know the following: Mr. Stein did not "make up" anything. And there are some 200 million documents[39] the Government is still obligated to produce to the Defense. The violations uncovered to date are, indeed, probably the "tip of the iceberg" in this case. *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983).

[38] DE 279, and Amended Reply to the Opposition thereto (DE 308).

[39] The huge database held by the SEC, no matter what its exact size, but in any event, significantly larger than the "small subset" database provided by the DOJ in this case.

In dismissing an indictment, the district court in *United States v. Lyons*, 352 F.Supp. 1231, 1251 (M.D. Fla. Sept. 30, 2004) stated that a federal prosecutor

> "[ ] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnest and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

The DOJ's conduct in the case at bar is much like that faced by the district court in *Lyons*. This is the rare case when the Court may properly decide to dismiss the indictment.

VII. CONCLUSION

The DOJ chose to base this prosecution on false statements regarding device-maker Signalife, and the company's purchase order documents dated during a span of a few months during the end of 2007 and beginning of 2008. The Prosecutors chose to proffer false testimony by at least three key witness and chose to make factually incorrect statements to the Court and the jury. "You have heard the evidence, ladies and gentlemen, made up." Closing argument. Trial Tr. Vol. 10 at 39, lines 2-3. Emphasis added.

It is submitted that the new evidence – taken cumulatively and as a whole – is conservatively characterized as proving substantial violations of *Giglio*, *Brady* and Rule 16. There is a reasonable probability that the foregoing violations "could have" affected the jury's verdict under *Napue, Brady, Giglio, Agurs and Alzate.* This is a *Giglio* case far beyond the "could have" standard. Indeed, given the breadth of the misstatements here by the DOJ and its witnesses – which go the heart of the Government's case – the conviction of Mr. Stein was, literally, engineered. The DOJ cannot meet its

burden of proving, beyond a reasonable doubt, that the foregoing violations were "harmless beyond a reasonable doubt."

Based on the foregoing, it is respectfully requested that the Court enter an order dismissing this case with prejudice. In the alternative, Defendant Mitchell J. Stein requests the Court vacate the conviction and order a new trial.

Dated: January 16, 2014

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 16, 2014, I electronically filed the foregoing documents with the Clerk of the Court and all counsel of record using CM/ECF.