

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No.: 11-80205-CR-MARRA

UNITED STATES OF AMERICA,

vs.

MITCHELL J. STEIN,
Defendant.

DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

The Defendant, MITCHELL J. STEIN, hereinafter ("Mr. Stein" or "Defendant"), by and through the undersigned attorney, hereby moves to compel the timely production of all documents or information relating to guilt or punishment which might be reasonably considered favorable to the defendants' case, and moves this Court for an Order requiring Defendant to comply with this Court's September 26, 2012 Order. More appropriately, Defendant moves to compel the Prosecution to turn over the 200 million page universe of documents it has access to.

INTRODUCTION

The Defense recently filed an extensive Motion for New Trial (DE 260) which brings to this Court's attention significant *Brady* violations and non-compliance with the Court's *Brady* Order. Former Defense counsel Michael Pasano moved this Court on June 4, 2012 to compel the Prosecution to comply with its *Brady* obligations in an attempt to prevent the predicted "cherry picking" of files by the Government (DE 41). On September 26, 2012, this Court ordered the Prosecution to provide to Defendant "other categories of material, which the government asserts it has turned over, intends to turn over, is not within its custody or control, or is not *Brady*

material.” (DE 63 at 2). Defendant’s first Motion for New Trial filed on September 22, 2013, delineates non-compliance with this Court Order by the Prosecution and suggests an Evidentiary Hearing if the Court is inclined to further evaluate specific violations of the Court Order or *Brady*. (DE 260 at 26.) In addition, Defendant’s first Motion for New Trial clarifies that the Prosecution withheld from the Defense access to the 200 million page universe of documents the Government had access to. (DE 260 at 18.)

Thus, the Prosecution’s *Brady* violations not only deprived the Defense of an opportunity to properly prepare for trial, but also currently deprives the Defense of access to potential documents or information relating to guilt or punishment likely to reduce Defendant’s potential sentence, and deprives the Defense of documents and information likely to result in an order for new trial.

I. BRADY OBLIGATIONS EXTEND TO SENTENCING PROCESS

The obligation of the prosecutor to search for and turn over *Brady* material extends to the sentencing process. *United States v. Weintraub*, 871 F.2d 1257 (Fifth Cir. 1989). Indeed, *Brady was a sentencing case*. The Court in *Brady* held that all evidence favorable to an accused whether material either to guilt or punishment must be supplied to the defendant. *Brady v. Maryland*, 373 U.S. at 87. *Brady* has a two pronged disclosure requirement but in the words of one federal district court judge, “Prosecutors all too frequently forget about the second requirement for disclosure [punishment]”. See *United States v. Feeney*, 501 F. Supp. 1324 (D. Colo. 1980).

The Prosecutor's *Brady* obligation in the sentencing process is even more important considering the requirements of the Federal Sentencing Guidelines. The sentencing guidelines require the Court to make numerous findings concerning the defendant's role in the offense, such as whether sophisticated means were used, the amount of financial loss in a fraud case, or the defendant's actual role in a conspiracy, all of which could be affected by favorable material.

Unlike the guilt phase where the material must affect a finding of guilty beyond a reasonable doubt, the standard at the sentencing phase is whether the material would alter a finding of preponderance of the evidence required to prove any of the sentencing guideline adjustments.

II. EVIDENCE PERTAINING TO MARKET DAMAGE

The Defense respectfully requests access to all evidence pertaining to the causation of market damage. The Government proposes \$80 million in market damage allegedly caused by Defendant. This includes all material pertaining, inter alia, to Pat McBaine (investor and trader in Signalife stock), Ron McMahon (trader and leader of hostile takeover attempt as to Signalife), Phil Kierl (Signalife agent and trader) and the Signalife Transfer Agent. Also contained in the 200 million universe of documents is content pertaining to the naked short selling of Signalife stock, e.g., information relating to Mark Taylor who is believed to be the leader of the publicly reported naked short selling campaign against Signalife stock that heavily depressed the stock price during the period in question.

Further, as described in detail in Defendant's first Motion for New Trial, the Defense was never given access to other crucial material contained in the 200 million page database, such as

the "Tracy Jones subfolder" (Ms. Jones was one of the key witnesses for the Government), or the "Norma Provencio subfolder" (Ms. Provencio was Signalife's CPA and board member with knowledge of the Purchase Order transactions), the "Budimir Drakulic subfolder", all of which contain information relating to the causation of market damage.¹

As stated above, the 200 million universe of documents contains transfer agent records, including every Signalife share certificate that was ever traded. Without these records, Defendant could not rebut the frivolous allegation of depressed stock price caused by him.

III OTHER CATEGORIES OF MATERIAL TO WHICH DEFENDANT IS ENTITLED

Any documents material to the Defense and containing exculpatory information in possession of another federal agency other than the one prosecuting the Defendant must be produced. And if the other federal agency participated in the investigation leading to the indictment the Prosecution is deemed to have knowledge of their files. See, e.g. *U.S. v. Bryan*, 868 F.2d 1032 (9th Cir. 1989) ("We observed that the Fifth Circuit had stated in dictum that under 16(a)(1)(C) the government included both the prosecutor and closely connected investigative agencies." 763 F.2d at 1047, citing *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir.1977)(Internal quotation marks omitted).)

On the eve of sentencing, the Defense is entitled to the following categories of material:

¹ It was company policy that Signalife employees and Directors sold significant amounts of stock on a regular basis which affected the market. The subfolders of these personnel -- one of which was a star prosecution witness (Tracy Jones) -- is obviously materially relevant to the Government's theory of both guilt and sentencing.

1. All files labeled as Tracy Jones, Ajay Anand, Thomas Tribou, Martin Carter, Norma Provencio, Ryan Rauch, Phillip Kierl, Pamela Bunes, Budimir Drakulic, Jennifer Black, Jamie Yaffa, Mike Boliek, and Elliott Davis folder in the possession of the Securities and Exchange Commission and the Department of Justice appertaining or relating to the company known as Signalife, Inc. nna HeartTronics, Inc. ("Signalife");
2. All documents produced to the United States of America by Tracy Jones, Ajay Anand, Thomas Tribou, Martin Carter, Norma Provencio, Ryan Rauch, Phillip Kierl, Pamela Bunes, Budimir Drakulic, Jennifer Black, Jamie Yaffa, Mike Boliek, and Elliott Davis in connection with either the Securities and Exchange Commission's investigation into Signalife or the Department of Justice's investigation of and prosecution of Mitchell J. Stein;
3. All writings of correspondence mailed or emailed or overnighted or faxed by Tracy Jones, Ajay Anand, Thomas Tribou, Martin Carter, Norma Provencio, Ryan Rauch, Phillip Kierl, Pamela Bunes, Budimir Drakulic, Jennifer Black, Jamie Yaffa, Mike Boliek, and Elliott Davis to any person, that are in the possession of the Securities and Exchange Commission or the Department of Justice arising out of those agencies investigations into and/or prosecution of any person appertaining or relating to Signalife;
4. All documents or copies of documents bearing or purporting to bear the signature of any of the following people: Tracy Jones, Ajay Anand, Thomas Tribou, Martin Carter, Norma Provencio, Ryan Rauch, Phillip Kierl, Pamela Bunes, Budimir Drakulic, Jennifer Black, Jamie Yaffa, Mike Boliek, and Elliott Davis.

5. All documents produced to the United States by John Woodbury, Lowell Harmison, Kevin Pickard, Mark Nevdahl and Rowland Perkins in searchable format.²

IV. DEFENSE SHOULD HAVE ACCESS TO UNIVERSE OF DOCUMENTS

The Court ordered the Government to turn over all documents and materials, except for those "in the sole possession of the SEC and unknown to the Department of Justice." (DE 63 at 2.) When the Department of Justice disclosed for the first time the existence of the 200 million page database (at the *Faretta* hearing), it admitted that it knew of the database. By not turning over access to that database, and by continuing to refuse to do so, the Department of Justice has violated and continues to violate the Court order.

Further, DOJ chose not to request from the SEC files of specific witnesses who testified at trial, such as Tracy Jones or Ajay Anand, who testified before the SEC and provided a detailed file.

In light of the *Brady* violations and non-compliance with this Court's September 26, 2012 order, the Defense respectfully requests this and order the Prosecution to finally and promptly turn over the 200 million page universe of documents it has access to (see Transc. of *Faretta* hearing at 41). Such an order cannot possibly prejudice the Government, but continued suppression of documents contained in the 200 million page database would -- certainly -- prejudice Mr. Stein who the Government is now seeking to incarcerate for a possible term of life.

² Thousands of documents produced to the Defense are in non-searchable image format -- each page of each document being a separate, non-searchable image, making a keyword search impossible which significantly handicaps the Defense.

The universe of documents the Prosecution referred to at the *Faretta* hearing contains the relevant subfolders described in paragraph II above, yet, to date, the Prosecution failed to turn over these folders.

In any event, Department policy requires disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999)(Emphasis added.).

In consideration of the Prosecution's "cherry picking" of material as foreseen by attorney Pasano (DE 47 at 8), there is no reason why the Defense should not have access to the entirety of material in order to fully prepare for the upcoming sentencing hearing, as said materials will prove relevant to rebut or distinguish the appropriateness of a sentencing enhancement sought by the Government. In addition, even though the Defense has, since filing its first Motion for New Trial, already discovered new evidence which it intends to present in new motions for new trial, Defendant must also be given a chance to search the 200 million page bulk of suppressed material for additional new exculpatory evidence.³ The Prosecution's failure to disclose the existence of Yossi Keret (DE 260 at 9), for instance, and then falsely stating to the jury that "Mr. Stein made [him] up, represents a serious *Giglio* violation,⁴ which deprived the Defense of the

³ In conjunction with this Motion, Defendant also respectfully requests conditional release so he may search the 200 million pages of evidence in a separate motion filed concurrently herewith.

⁴ It is the obligation of federal prosecutors to seek all exculpatory and impeachment information from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. *Kyles*, 514 U.S. at 437.

opportunity to properly prepare for cross-examination of Government witnesses, such as Martin Carter.

In the Presentence Report, on file herewith, the Government seeks an increase in offense level based upon the theory that Mr. Stein is liable for some of the loss occasioned by the drop in the public share price of Signalife in 2008. The foregoing documents are vital to defending against what Defendant will argue is a meritless theory. The exonerating evidence already uncovered suggests that the maintenance of the press releases in the public records was either significantly or solely the decision of Signalife's audit committee and its outside auditors. At trial, the Government put forth one piece of evidence that it said proved Mr. Stein was the force behind the false purchase orders being maintained in the public records (i.e., continually reaffirmed by the Company Signalife), to wit: John Woodbury. Mr. Woodbury testified:

19 Q And again, at the time you prepared and filed this
20 quarterly filing, this 10-Q, with the SEC, did you have any
21 additional independent information about these purchase orders
22 other than what we've seen?
23 A No, I did not. I did not speak to Dr. Harmison. I got
24 all my information from Mr. Stein.

Transcript of Jury Trial Proceedings, Vol. 2 at 96.

But Woodbury committed perjury here, because the Government failed to turn over the email from Norma Provencio showing that Ms. Provencio -- not Mr. Stein -- turned over critical payment information to Woodbury prior to filing the 10-Q. Compare: Woodbury's testimony that he received all of his information from Mr. Stein for input into that 10-Q. And, more importantly, there is an email from Tracy Jones contained within the Provencio email trail. See,

Exhibit "A". And Defendant is not in possession of any of the files of Tracy Jones, Norma Provencio, Mike Boliek (the outside auditor), Elliott Davis or other persons dealing with the audit committee of the Company during this period. Now that we all know Woodbury lied when he said "it was only Stein," the Defendant must have access to all communications among these auditors or para-auditors during this period (late 2007 through 2008). It has already been established that these purchase orders complained of by the Government were the only sales of Signalife. Thus, the auditors were performing no other functions during this period to speak of. The risk of "cherry picking" of these highly relevant files from these auditors is solved if (a) the Government merely gives access to the 200 million page database as it should have long ago or (b) the Government merely gives access to the following file folders containing in the production of records to the Government by the following persons: Ajay Anand, Thomas Tribou, Martin Carter, Norma Provencio, Ryan Rauch, Phillip Kierl, Pamela Bunes, Budimir Drakulic, Jennifer Black, Jamie Yaffa, Mike Boliek, and Elliott Davis.

CONCLUSION

WHEREFORE, the undersigned respectfully requests an order requiring the Prosecution to promptly turn over to the Defense the entirety of the 200 million page universe of documents the Prosecution has access to in this matter.

Respectfully Submitted,

JONATHAN KASEN, P.A.
Co-counsel for Defendant Stein

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By: _____
s/JONATHAN KASEN, Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 30, 2013, I electronically filed the foregoing documents with the Clerk of the Court and with all counsel of record,, using CM/ECF.

EXHIBIT "A"

From: nprovencio@provencioadvisory.com
Sent: Wednesday, October 24, 2007 6:54 PM
To: jmwoodbury@shaw.ca
Subject: [Fwd: Emailing: Tribou payment]
Attachments: Tribou payment.PDF

Categories: Signallife Mail

Attached is the \$50K deposit on the 9-14 purchase order.

NP

----- Original Message -----
Subject: Emailing: Tribou payment
From: "Tracy Jones" <tjones@signalife.com>
Date: Wed, October 24, 2007 12:02 pm
To: nprovencio@provencioadvisory.com

The message is ready to be sent with the following file or link attachments:

Tribou payment

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

Regards,

Norma Provencio

Provencio Advisory Services
% Rogers Clem & Company
1067 Park View
Covina, CA 91724

Office 626.475.7581
Fax 626.602.3833
nprovencio@provencioadvisory.com

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