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 RENEWED MOTION TO COMPEL PRODUCTION OF GRAND JURY MATERIALS

COMES NOW, Defendant Mitchell J. Stein ("Mr. Stein" or "Defense"), and hereby respectfully renews his request for production of grand jury materials, and states:

1. Following the Court's denial of the initial Motion to Compel Production of Minutes and Transcripts of Grand Jury Proceedings [DE 332 (Motion); DE 340 (Order)], the Defense obtained a large production of portions of the universe of documents held by the Securities and Exchange Commission ("SEC");

2. Within the universe of documents is a Volume of "SEC Investigative" documents including Bates numbers SEC-Investigative-E-0037195 – SEC-Investigative-E-0037198 (Exhibit "X" to Defendant's Third Motion to Dismiss the Indictment or for a New Trial filed herewith);

3. After discovering Exhibit "X", the Defense filed the Third Motion for a New Trial, because Exhibit "X" reveals the government learned that Yossi Keret exists some three years before telling the jury that Yossi Keret doesn't exist. (Trial Tr. Vol. 10, at 28.);

4. Because the government maintains that "Yossi Keret is [] a name on the purchase order

that was the basis of Count 6 in the Indictment" (DE 298-1, at 7), grand jury materials should be ordered produced as set forth below.

MEMORANDUM OF LAW

Since the standards for ordering production of grand jury materials were already briefed in this case, they are incorporated herein by reference instead of being extensively reviewed again. *See* DE 332 (Defendant's Motion to Compel); DE 336 (Government's Opposition); DE 338 (Defendant's Reply). The Defense will highlight certain aspects of the law bearing on the instant Motion.

In light of the revelation of Exhibit "X," we now know the government's statements, testimony and evidence regarding Yossi Keret are false. If the Court agrees with this statement of fact, the Defense respectfully submits it should order the production of grand jury materials. If the Court disagrees, then this Motion should be denied. Indeed, if any Count of the Indictment was wrongly procured from the grand jury, it would work a substantial injustice on the Defendant to maintain the grand jury transcripts in secrecy. *See, Douglas v. Oil Co. of Cal. v. Petrol Shops,* 441, U.S. 222 (1979) (discussing "particularized need requirement"); *United States v. Valencia-Trujillo,* 462 Fed. Appx. 894 (11th Cir. 2012) ("particularized need"); *Bank of Nova Scotia v. United States,* 487 U.S. 250, 256 (1988) (*citing United States v. Mechanik*, 475 U.S. 67, 78) (dismissal of indictment may properly arise from grand jury misconduct by the government); *United States v. Holloway*, 778 F.2d 653, 655 (11th Cir. 1985) (dismissal of indictment is a proper remedy for prosecutorial misconduct at trial). *See also,* Fed. R. Crim. P. 6(e)(3)(E)(i) and (ii).

Given the Defense's post-trial discoveries, it is submitted that the following is undeniable:

1. The Government learned of Yossi Keret's existence and his whereabouts on or around

February 23, 2010. *See* Exhibit "X" to Defendant's Third Motion for a New Trial;[1]

2. Thus, the government's statement to the jury in closing that "there is no Yossi Keret" (Trial Tr. Vol. 10, at 34) was knowingly untrue;

3. Its statement to the jury in rebuttal closing that "Yossi Keret [] was made up" (Trial Tr. Vol. 10, at 119) was knowingly untrue;

4. Star witness Martin Carter's testimony that "[Mitch Stein] is the one who made up all these names" was false under the law, because it "… create[d] a false impression of facts which were known not to be true."[2]

5. Martin Carter knew his testimony "[Mitch Stein] made up all these names" was false for the additional reason he told the government – in a meeting at the Bond Building with prosecutors Albert Stieglitz and Kevin Muhlendorf, and postal inspector Timothy D. France – that he (i.e., Mr. Carter, not Mr. Stein) "made up" the name Yossi Keret on July 31, 2012 *See*, DE 337, Exhibits A and B made part of the record by order dated June 3, 2014 (DE 339).

The government cannot lawfully deny the foregoing by ignoring it. These are either facts or they are not facts, and the government's failure to deny them cannot form the basis for a court order in this Circuit. *See, Jordan v. United States*, 2014 U.S. Dist. LEXIS 22707 (S.D. Ala. Feb. 24, 2014)

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[1] Information in the files of a government agency "substantial[ly] assist[ing]" the prosecution (in this case, the SEC) is imputed to the prosecutor as a matter of law. *See, e.g. Moon v. Head*, 285 F.3d 1301, 1309 (11th Cir. 2002) (the duty to search investigative files is a duty to search the files of the "prosecution team [] both investigative and prosecutorial personnel"); *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980) ("we decline to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel") (*quoting United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979); see also, *United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) (information possessed by state investigators imputed to federal prosecutors because the two governments pooled their investigative energies to prosecute the defendants); *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977) (the prosecutor would not be allowed to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial).

[2] *United States v. Bartko*, 728 F.3d 327, 336-7 (4th Cir. 2013) ("evidence may be false either because it is perjurious or, though not itself factually inaccurate, because it creates a false impression of facts which are known not to be true"). *Id.*

(incorporating party's arguments may properly serve as explanation for ruling "so long as those arguments, in conjunction with the record, provide the Court of Appeals an opportunity to engage in meaningful review (citations omitted)."") *See also*, Motion for Explanatory Record filed herewith; *United States v. Valencia-Trujillo*, 462 Fed. Appx. 894 (11th Cir. 2012) (applying reasoned decision rule to case seeking production of grand jury materials). The Defense submits that this evidence strongly suggests there was nothing the prosecutors could have possibly told the grand jury on this issue that would not have amounted to serious prosecutorial misconduct. If they told the grand jury they interviewed Yossi Keret and he had nothing to do with the purchase order documents, then their conduct at trial in telling the jury he "doesn't exist" and was "made up" was wrongful. If the prosecutors told the grand jury that Keret didn't exist, this would have been a knowing falsehood. If any witness told the grand jury that Keret did not exist or that Mitch Stein "made up" his name, it would have been perjurious.

For this reason, the Defense submits the government should be ordered to produce all statements before the grand jury appertaining or relating to either Yossi Keret, or the change of address notice[3] bearing his name that was "the basis of Count 6 in the Indictment." (DE 298-1, at 7.) (Emphasis added.) In the event the prosecutors and their witnesses did not refer to the very signatory (Keret) – whether by name or otherwise – on the change of address notice then there would be nothing to produce appertaining or relating to Keret. While the Defense respectfully pleads for production of the identical matters as those in its first motion to compel production of grand jury material (DE 332), this alternative – targeted specifically to evidence about the "basis for Count 6 of the Indictment" – is certainly a way to compromise at this juncture with a production covering

[3] Govt. Trial Ex. 130.

material that is neither unrelated to "substantial allegations" nor "unnecessary" ones. *Valencia-Trujillo,* 462 Fed. Appx. 894 at 898.

Indeed, this limited request is the antithesis of "unsupported hope[s] of useful information" (*Id.*), because it relates to inconsistencies in the government's proof related to "the basis for Count 6 of the Indictment." (DE 298-1, at 7.)

CONCLUSION

If the government has nothing to hide, why doesn't it voluntarily agree to production of all grand jury transcripts appertaining or relating to Govt. Trial Exhibit 130, "the basis for Count 6 of the Indictment?" (DE 298-1, at 7.)

The government's statement to the jury that "there is no Yossi Keret" was knowingly false – there is indeed a Yossi Keret and the government knew it as far back as February 23, 2010.

The Defense submits it would be hard to imagine a more appropriate, concise and limited request in the context of grand jury transcripts than the instant Motion.

WHEREFORE, it is respectfully requested the Court order the limited production of grand jury transcripts.

Dated: August 27, 2014

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 27, 2014, I electronically filed the foregoing documents with the Clerk of the Court and all counsel of record using CM/ECF.