UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No.: 11-80205-CR-MARRA

UNITED STATES OF AMERICA,

vs.

MITCHELL J. STEIN,
Defendant.
_____/

REPLY TO THE RESPONSE OF THE UNITED STATES IN OPPOSITION TO DEFENDANT MITCHELL J. STEIN'S SECOND MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE, TO DISMISS

Defendant Mitchell J. Stein, by and through his undersigned counsel, hereby submits his Reply to the Response of the United States in Opposition to Defendant's Second Motion for a New Trial or, in the Alternative, to Dismiss with Prejudice.

I. INTRODUCTION

As in its December 9, 2013 opposition, the Government's opposition to this Second Motion for a New Trial contains the same citations to inapplicable standards, the same refusal to address the untruths it and its witnesses have created, and the same expanded rhetoric, characterizing Mr. Stein's motions as "outlandish," "muddied," and "absurd."[1] The Defense will demonstrate herein that the Government's opposition is spurious. To the extent practicable, each of the DOJ's arguments will be addressed in the order in which they appear.

[1] It appears that the Prosecution has an affinity for mantras in hopes that, if repeated often enough, it becomes the truth. As American philosopher and psychologist William James stated: "There's nothing so absurd that if you repeat it often enough, people will believe it." No amount of inflammatory diatribe could answer the question why the Prosecution falsely mentioned the "fakeness" of people, companies and documents some 300 times throughout trial.

II. THE PROSECUTION REFERS TO THE WRONG STANDARDS

A. The Correct "New Trial" Standards Under *Napue/Giglio*[2] Shows the Defense's Motions are Timely

The DOJ makes a truly specious argument when it maintains that Defendant's Second Motion for a New Trial is "entirely untimely," and that the "newly discovered" standard – and other traditional Rule 33 standards – are the ones to be applied in this *Napue/Giglio* motion. This is not the case.

> "A court evaluating a motion for new trial involving *Brady* or *Giglio* violations does not use the Rule 33 standard based on newly discovered evidence."

United States v. Cao, 2011 U.S Dist. LEXIS 143830, 2011 WL 4625383, at *5 (S.D. Fla. October 2, 2011).

In *Cao*, which was affirmed by the Eleventh Circuit, 2012 U.S. App. LEXIS 502 (11th Cir. 2012), Florida District Judge Joan A. Lenard instructed that, for *Giglio* cases, the Rule 33 "newly discovered" standard is replaced by the constitutional standard:

> "Instead [of the traditional Rule 33 standard requiring newly discovered evidence], to obtain a new trial based on an alleged *Giglio* violation, the defendant must demonstrate that the prosecutor 'knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material. [Footnote omitted.] This same standard applies to the allegation of prosecutorial misconduct based on the use of false testimony. [Citation omitted.]"

Thus, when constitutional *Napue/Giglio* due process issues are involved, the new trial motions must not meet the Rule 33 standards, but must (a) be brought within 3 years, and (b) meet the standards for establishing a due process violation under *Napue* and *Giglio. See, United States v. Rivera Pedin*, 861 F. 2d 1522, 1530, n. 8 (11th Cir. 1988) ("[the Rule 33] showing is not applicable,

[2] While the new trial standard for *Brady* violations also does not require "newly discovered" evidence, the Defense is only addressing the *Napue/Giglio* standard herein because this second new trial motion is only concerned with such issues.

however, where the Government's case included false testimony and the prosecution knew or should have known of the falsehood") (internal quotation marks omitted); *see also, United States v. Turner*, 490 F.Supp. 583, 598 (E.D.Mich.1979), *aff'd*, 633 F.2d 219 (6th Cir.1980) (noting that in cases of governmental misconduct strict adherence to traditional four requirements is not necessary). In other words, the evidence of falsehoods presented in Defendant's Second Motion for a New Trial which the Prosecution knew or should have known can be brought within the three year period after the verdict as set forth under Fed.R.Crim.P 33(b)(1). Indeed, the *Napue/Giglio* falsehoods are indeed "newly discovered,"[3] but need not be found by this Court to be "newly discovered" under the Rule 33 standards. Rather, the Court must find even a single due process violation under the *Napue/Giglio* constitutional standard.

B. <u>The Correct Legal Standard for *Napue/Giglio* Violations</u>

The DOJ has now spent some 50 pages opposing Mr. Stein's meritorious and serious motions for a new trial without <u>once</u> acknowledging that – in ruling on Mr. Stein's numerous constitutional claims – this Court should determine whether there is "any reasonable likelihood that the false [statements] <u>could have</u> affected the verdict." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added); *accord. Giglio v. United States*, 405 U.S. 150, 154 (1972); *Napue v. Illinois*, 360 U.S. 264, 271 (1959).

Instead, the DOJ obliquely refers to a strange derivative of the actual *Napue/Giglio* standard as follows:

> "Stein plainly cannot cite evidence that would satisfy these analyses, which likely explains his efforts to invoke a different, albeit inapplicable, legal standard." And, "Stein incorrectly suggests this Court should apply a different or truncated version of the analyses set forth above [ ]."

[3] Ms. Reichardt discovered the violations discussed herein between the filing of the First and Second Motion for a New Trial. *See* Decl. of Reichardt filed concurrently herewith.

DE 318 at 4, 5.

The standard established in a half dozen Supreme Court cases and countless decisions by the Eleventh Circuit is "whether there is a reasonable likelihood that the false statements could have affected the verdict." *See, e.g. United States v. Agurs*, 427 U.S. 97, 103 (1976); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995); *United States v. Wainwright*, 785 F.2d 1457, 1476 (11th Cir. 1986).

C. The DOJ's Meritless Argument that the Courts Only Find *Giglio* Violations When Admitted by the Government

Next, the DOJ makes the perplexing argument that its and its witnesses' numerous misstatements – which have not yet subsided – are not proven by Mr. Stein because "he is completely unable to prove what is required." (DE 318 at 5.)

The Government claims the dozen of cases cited by the Defense in their two motions contain *Napue/Giglio* violations that "have already been established." *Id.* Then, it says the appellate courts in these decisions (mostly the Eleventh Circuit) are simply considering what to do about the violations. For example, in discussing the important case of *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995) the DOJ makes the stunning claim that the Eleventh Circuit did not "resolve [ ] a dispute as to the falsity of evidence introduced at trial, which it most certainly did not." DE 318 at 7. The truth, however, is that the Eleventh Circuit's ruling included the following factual analysis:

> "On at least eight different occasions during his closing, however, [the prosecutor] argued that Alzate had transported the cocaine for one purpose only: to receive payment of $8,000. Indeed, the alleged statement about $8,000 was central to [the prosecutor's] closing argument []." [] [T]he district court judge did admonish [the prosecutor] before ruling: 'I think that the Government cut it a little too close here.... I think it came very close to misleading [ ].' [ ] The government is more forthcoming in its brief — which was not written by [the prosecutor] — than it was at trial. The government concedes that [the prosecutor] learned of the existence of the box prior to the presentation of rebuttal evidence and that he took no steps

> either in rebuttal, or by reopening the government's case, to correct the false impression left by his cross-examination."

United States v. Alzate, 47 F.3d 1103, 1108-09 (1995).

The Circuit Court in *Alzate* actually had to make findings based upon the record, which caused the government – apparently as recalcitrant there as the DOJ is in the case at bar – to concede for the first time on appeal that the *Napue/Giglio* materiality standard is applicable to false statement cases, and that the statements before the trial court were knowingly false.

Indeed, the Eleventh Circuit recognized that the government had to concede "that the *Napue/Giglio* materiality standard is the proper one" for that appeal. *Id.* at 1110.[4]

The DOJ is apparently arguing (a) that this Court is perhaps not empowered to determine whether the prosecutors and their witnesses made false statements at trial, (b) that the Eleventh Circuit is neither empowered to review this Court's new factual findings (about the false statements) on appeal, nor is it empowered to conduct a *de novo* review and determine from the record (now being developed) whether the statements were false and violative of the constitution, and (c) the Supreme Court is not empowered to make a completely new factual *Napue/Giglio* determination from the record before this Court and the Eleventh Circuit. That is precisely what the DOJ is saying in its opposition:

> "[] Stein ignores the *Alzate* court's words at the very outset of its "Discussion" section, where it made clear that it only needed to consider the impact of the violations '[b]ecause of the undisputed facts and the government's concessions in light of those facts.' [*Alzate* at 1110] Stein skips over that critical distinction and mistakenly implies that the Eleventh Circuit resolved a dispute as to the falsity of evidence introduced at trial, which it most certainly did not."

DE 318 at 7.

[4] Unless the DOJ admits to the proper standard here or in any oral argument or evidentiary hearing, this case may in that sense be identical to *Alzate*, 47 F.3d at 1109, 1110-11 (United States acknowledging the "could have" materiality standard for the first time on appeal when it replaced the prosecutor.)

Contrary to the DOJ's bizarre statement about the rules of appellate review, in all of the *Napue/Giglio* cases involving governmental disputes over the truth or falsity of the prosecutor's trial statements (or those of his witnesses), the trial courts and the circuit courts have actually been empowered to – and have in fact – made brand new factual determinations. *See e.g. United States v. Bailey*, 123 F.3d 1381 (11th Cir. 1997) (constitutional issue of perjury raised for first time on appeal); *Alzate*, 47 F.3d 1108-11 (government never admitted the prosecutor's testimony to the trial court and jury were materially false; it was only in the appellate briefs that the government replaced its trial counsel and conceded certain [but not all] of the issues); *United States v. Wainwright*, 785 F.2d 1457, 1463-64 (11th Cir. 1986) (district court making factual findings to develop the record and government continued to dispute falsity despite the Eleventh Circuit's "diligent inquiry [ ] at oral arguments").

Indeed, in affirming the Florida District Court ruling in *United States v. Coe*, the Eleventh Circuit specifically provided that cases involving "allegations of prosecutorial misconduct are reviewed *de novo*." *Coe*, 2012 U.S. LEXIS 502 (11th Cir. 2012). *See also, United States v. Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006). Furthermore, although often disputed by parties before it (including the government), the Supreme Court is also empowered to make new factual findings with respect to claims of prosecutorial or witness false evidence:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded."

Niemotko v. Maryland, 340 U.S. 268, 271 (1951).

There is

> "no such avenue of escape from the paramount authority of the Federal Constitution. [ ] It has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the federal question, the court may, and should, analyze the facts."

Sterling v. Constantin, 287 U.S. 378, 398 (1932).

In reversing the appeals court in *Napue v. Illinois*, Chief Justice Earl Warren concluded:

> "[O]ur own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect of the outcome of the trial."

Napue v. Illinois, 360 U.S. 272 (1959).

D. <u>The Government is Wrong to Contend that a Defendant Must Prove *Brady* Suppression of Evidence in Order to Establish a *Napue/Giglio* Violation</u>

At pages 7, 8, 9 at n. 5, 13, 15, 17-19 of its opposition, the DOJ alleges or strongly implies that the Defense must prove suppression of evidence by the Government in order for a new trial to be ordered under *Napue/Giglio*. The DOJ is wrong:

> "A prosecutor's duty not to knowingly present false evidence is related to, but conceptually distinct from, the prosecution's duty to reveal exculpatory evidence to the defense."

Oble v. Johnson, 696 F.Supp. 2d 1348, 1363 (11th Cir. 2008). *See also, Alzate*, 47 F.3d 1109 (only on appeal did the government concede that the "materiality standard" applicable to [the case] is not that which applies when favorable evidence has been suppressed, but instead is that which applies when false testimony has been knowingly used," i.e., the "could have" standard); *United States v. Rivera Pedin*, 861 F. 2d 1522, 1530 (11th Cir. 1988) (evidence not suppressed in case of *Giglio* violation); *Brown v. Wainwright*, 785 F.2d 1457, 1464 (11th Cir. 1986) (describing both duties); *United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977) (evidence not suppressed, but *Giglio* violation for "capitalizing" on false statements to jury); *United States v. Ott*, 489 F.2d 875 (7th Cir. 1973) (information regarding other docketed cases before the court).[5]

[5] While the misrepresentations here were not in any way isolated or immaterial – instead, they involve the core issues in this case – the situation in *Ott*, involving just one misrepresentation that was "arguably collateral," shows the comparable seriousness of the DOJ's conduct.

III. THE FALSE STATEMENTS BY THE GOVERNMENT AND ITS WTNESSES

A. Definition of "False Statement" Under *Napue/Giglio*

Given the apparent reluctance of the Prosecution to even admit the falsity of even one of its representations, it is important to understand the difference between a "false statement," on the one hand, and "perjury" on the other hand.

With respect to the "Tribou & Associates" misstatement, for example, the Government will not simply admit that the representation to the Court was false. Instead, it cleverly says that "Stein correctly notes an apparent divergence between Mr. Tribou's recollection about 'Tribou & Associates' between his SEC testimony and his conversations with the United States during trial." DE 318 at 13, n. 8. (Emphasis added.)[6] Indeed, the Government also represents to the Court prior to its call with Mr. Tribou that Mr. Tribou "never was a reseller []." Trial Tr. Vol. 9 at 41. This was an unequivocal representation not dependent upon any alleged statement by Mr. Tribou in the private telephone call.

Both of the above statements are false, although it is entirely possible that – at trial – the Prosecution was unaware of their falsity. As the Fifth Circuit stated in *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1979):

> "Evidence is 'false' if, *inter alia*, it is 'specific misleading evidence important to the prosecution's case in chief."

Id. at 415. *Citing Donnelly v. DeChristoforo,* 416 U.S. 637, 647 (1974).

It is important to note that only a false statement – not perjury – is required for a *Napue/Giglio* violation, at which point the prosecutor has a duty to step forward and correct. *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995); *United States v. Lyons*, 352 F.Supp. 2d 1244,

[6] The Defense respectfully submits that "[i]t is a constitution we deal with, not semantics." *Brown v. Wainwright*, 785 F.2d 1465 (11th Cir. 1986).

1248 (M.D. Fla. Sept. 30, 2004). The presence of perjury, a particularly egregious form of false statement, is not required to prove a *Napue/Giglio* violation. Indeed, perjury is a statement under oath that is false, known to be so, and material to the proceeding. 18 U.S.C. § 1623. This is why the prosecution has a responsibility to step forward and admit the falsity when it appears: Any other result would be a "corruption of the truth seeking purpose" of the proceedings." *Alzate*, 47 F.3d 1110-11.

When the prosecutor allows its or its witnesses' falsities to stand, it adopts them as a matter of law and any conviction underlying them should be vacated if the falsities "may have had an effect of the outcome of the trial." *Napue v. Illinois*, 360 U.S. 272 (1959). The jury here was expected to repose a special trust in the Prosecutors; and the Prosecutors had a solemn obligation to honor that trust. *United States v. Sullivan*, 937, F.2d 1146, 1150 (6th Cir. 1991) (because jurors are likely to "place great confidence in the faithful execution of the obligations of a prosecuting attorney improper insinuations or suggestions [by the prosecutor] are apt to carry [great] weight against a defendant" and therefore are more likely to mislead the jury).

B. The DOJ's Tribou Arguments Miss the Mark

The Government first argues that the SEC testimony of Mr. Tribou was not "suppressed"[7] or "newly discovered" within the meaning of Rule 33. This objection is spurious. Where, as here, the Government's case includes false statements to the Court or jury, the "newly discovered" and "due diligence" showings "ordinarily" required under Rule 33 are "not applicable." *United States v. Rivera Pedin*, 861 F. 2d 1522, 1530, n. 8 (11th Cir. 1988); *see also, United States v. Sanfillippo*, 564 F.2d 176, 178-179 (5th Cir. 1977) (prosecutor satisfied his obligation and disclosed the evidence; defendant knew witness was lying and "futilely attempted" to impeach him with the disclosed

[7] *See*, DE 318 at 9, n.5. "[T]here cannot possibly be any '*Giglio* violation' here, given that nothing was 'suppressed' from Stein."

information, but because prosecution did not disclose, did not correct, capitalized on, and then argued the point to the jury, reversal ordered).

The DOJ then states in its opposition that no misrepresentations were made to the court and jury regarding Tribou. (DE 318 at 8.) However, the opposition failed to address its misstatements to the jury in closing argument about Tribou's connection to the Cardiac Hospital Management ("CHM") purchase order, its repeated misstatements about the authenticity of the purchase order – the chief ingredient in this hodge-podge of allegations against Mr. Stein – throughout the trial and during closing argument, its misstatement to the Court that "Tribou was never a reseller," and, indeed, it begrudgingly admitted the "inconsistency" about "Tribou & Associates." (DE 318 at 13, fn. 8.) Even though the DOJ, in its response to the First Motion for a New Trial still pending, acknowledges some connection between Tribou and the CHM purchase order,[8] it now denies any connection between Tribou and Cardiac Hospital Management. It fails to address that Mr. Tribou produced to the SEC the fully filled out CHM purchase order including purchase order number "H-2003-0001," and the entity name "Cardiac Hospital Management" next to Mr. Tribou's signature, bearing an Oregon fax transmission header dated September 20, 2007.[9] While Mr. Tribou's testimony appears contradictory with respect to CHM, he does confirm that the CHM purchase order was real and that he was to perform as a reseller of Signalife devices under the purchase order agreement,[10] and even confirms to the SEC that the CHM purchase order was still in effect in late 2007/early 2008:

Q "To your knowledge, as of March 21st, 2008, was the purchase order

[8] The DOJ admitted in its Response to Defendants First Motion for a New Trial that "there is indeed a connection between Tribou and the Cardiac Hospital Management purchase order [ ]." DE 298-1 at 28, fn. 13.

[9] We have learned from Mr. Tribou's SEC testimony that the fax header is that of the accountant of his wife, Delores Tribou, who signed the check. Ex. P to Decl. of Reichardt in support of Second Motion for a New Trial, or, in the Alternative, to Dismiss; DE 312-1 at 61.

[10] DE 312 at 5-6 and Ex. A thereto, 312-1 at 10-11.

> between Cardiac Hospital Management and Signalife still in effect?"
> TRIBOU: "Yes. I told him I didn't want -- it was out there. I told [Dr. Harmison] I wasn't involved anymore in January and February of '08."

Ex. A to the Decl. of Reichardt. (Tr. of SEC testimony of Thomas Tribou, at 234.) [11]

Meanwhile, the Defense has discovered the very same Tribou check, the authenticity of which the DOJ disputed during trial, in the DOJ's own records it produced to the Defense.[12]

On trial days 8 and 9, when the Defense attempted to admit the check into evidence, the Prosecution refused to stipulate to the check's authenticity and admissibility, and did so based on what we now know to be a multitude of false statements[13] to the Court about Mr. Tribou and the check towards the Cardiac Hospital Management purchase order.[14] This is the same Prosecution that interviewed Mr. Tribou and failed to ever ask him about this particular $50,000 check referencing the CHM purchase order by purchase order number H-2003-0001 contained in its hard drive.

Contrary to the DOJ's reconstruction of how it came about that neither the Defense nor the Prosecution called Mr. Tribou (DE 318 at 9), Mr. Stein was willing to call several witnesses,[15]

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[11] In its opposition, the DOJ also does not address Dr. Harmison's SEC testimony cited in the second motion, which also confirms that the CHM purchase order he and Mr. Tribou signed was real – not "fake."

[12] Indeed, the DOJ had produced the native email file from Provencio to Woodbury (as file name JW00179103) as well as the Tribou check which is attached to it (JW00179104) buried within its hard drive. These files are contained in a folder named "Heart Tronics_Company Docs" which contains a total of 724,460 files and 1,460 sub-folders. *See* files produced by the Government and screen shot of properties of the folder it is contained in as Ex. B to the Decl. of Reichardt. This check was not contained in the DOJ's "hot documents." We are now left to assume that the SEC also never investigated or asked Mr. Tribou about this particular check referencing the CHM by purchase order number during its four-plus-year investigation.

[13] It is unclear whether the misstatements originated from Mr. Tribou or the Prosecution. Given that the Prosecution had produced the check and knew or should have known what Tribou truly testified before the SEC, the false statements should have never been presented to the Court.

[14] *See* Second Motion for a New Trial, or, in the Alternative, to Dismiss; DE 312. E.g.: "Tribou doesn't know what Tribou & Associates is." "Tribou will deny he has anything to do with Cardiac Hospital Management." "Tribou was never a reseller." "Tribou doesn't recall that purchase order number being on there."

[15] Mr. Stein: "Your Honor, I have no problem calling Tracy Jones or John Woodbury, who -- directly on that, or Ms. Provencio. It would take a day to get them here, but I have no problem doing that." Trial Tr. Vol. 9 at 33. Mr. Stein: "Your Honor, to the extent the Court is not allowing either of these documents into evidence, I would like to have the opportunity to subpoena either Mr. Woodbury or Ms.

including Mr. Tribou, to authenticate the check. However, what the opposition fails to point out is that it was only after the Court stated it was willing to admit the check into evidence that it asked the DOJ to call Mr. Tribou and authenticate the check. (Trial Tr. Vol. 9 at 54.) Only after the DOJ's private call with Mr. Tribou, and the subsequent misrepresentations to the Court preventing the check from being admitted into evidence, the decision was made not to call Mr. Tribou:

> MR. STEIN: "That is emblematic of why I have the right to recall Mr. Woodbury, and I've asked that Mr. Tribou be called, but the Court has said I didn't subpoena him correctly, but Mr. Woodbury has already testified, he's on 48 hours' notice, and the Government is obviously and so far correctly under the law, under the Court's viewpoint, keeping out of evidence a document that now they say may have cleared the bank.
> And, Your Honor, the fact that they interviewed Mr. Tribou and he said something, there are two SEC transcripts of his interview, and I am well prepared to cross-examine him on everything that was said."

Trial Tr. Vol. 9 at 42.

Indeed, the Prosecution even implied it is "all but certain" that the Government would put Mr. Tribou on as a witness if it were to reach out to Tribou to authenticate the check:

> MR. STIEGLITZ: "I think we can try to get in touch with Mr. Tribou and ascertain that and see if that's -- but I can, as the Court has anticipated, I think that if we were to go that route, it's all but certain that the Government would want to put Mr. Tribou on."

Id. at 51.

As substantiated above, both the Defense and the Prosecution considered calling Mr. Tribou at some point prior to the DOJ's phone call which was suggested by the Court in an effort to allow Mr. Stein to establish what he wanted to establish,[16] yet, the Prosecution prejudiced that very prospect with false representations that led to the exclusion of the check from the evidence, the

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Jones or to subpoena or attempt to get Ms. Provencio in the courtroom. She's in California -- by tomorrow morning to testify regarding this matter." *Id.* at 34-35.

[16] The Court: "Well, I would rather let Mr. Stein establish what he wants to establish in his case, and you can do whatever you want to do in response to it." Trial Tr. Vol. 9 at 52.

exclusion of critical details that tie Mr. Tribou and his check to the CHM purchase order, and the misrepresentations to the jury during closing argument.

When Mr. Stein persisted that the stipulation contain all contents of the check, including its memo line,[17] and the Court was willing to admit the check into evidence, if the check could be authenticated:

> THE COURT: "Well, let me just ask the Government. I assume you're in contact with Mr. Tribou."
> MR. STIEGLITZ: (Nods head.)
> THE COURT: "Can you verify whether that's the check he issued, if he put that purchase order number on there, and if it's true, then why don't we just put it into evidence, and if you want to call him to explain why or how, you can do that. I'm trying to avoid –"
> MR. STIEGLITZ: "I think we can -- I'm sorry, I didn't mean to speak over Your Honor."
> THE COURT: "-- avoid delaying for a couple of days and bringing Mr. Woodbury back for it seems like a very minor, and maybe completely unnecessary to bring him back for that. He may not even be able to accomplish what Mr. Stein wants him to establish. If you could just agree that that actually was received by Signalife, he filled it out, he put that purchase order on there, that's all true, Mr. Stein will be happy, and then if you want to, by way of rebuttal, give an explanation of how and why it came about, you can do it."

Trial Tr. Vol. 9 at 50-51. After its phone call with Tribou, the Prosecution stated:

> MR. STIEGLITZ: "Your Honor, we were able to reach Mr. Tribou. He interestingly is -- obviously was not able to look at this document, but based on the characterization of it, I'll just proffer to the Court, was to put it mildly, skeptical that that could be his handwriting with this number that Mr. Stein is suggesting he wants in evidence. So I don't
> think, based on what Mr. Tribou said, that the Government's in a position to stipulate to this document."

Id. at 54.

Mr. Stein struggled to admit the check into evidence, and the Prosecution furiously fought

[17] Mr. Stein: "Your Honor, all I want to stipulate to is what this document reflects, and it reflects the check, the date, the check number, it reflects Wachovia Bank, Signalife, a deposit slip made out, and it reflects a purchase order number. [ ]" Trial Tr. Vol. 9 at 50.

against it. Mr. Stein honestly suggested that he would rest his case once the check was admitted. (Trial Tr. Vol. 9 at 7.) Fully aware of what this real check – from a real reseller of heart devices – meant to its "made up" case, the Prosecution embarked on a reckless path of making false representations to the Court so it could mislead the jury in summation. The new importance of the check to the "made up" story had been clearly identified in colloquy with the Court:

> MR. STEIN: "Your Honor, just emblematic of the reason why I'm being so persistent is that this check says Dolores Tribou, Thomas Tribou, and it's signed by Dolores Tribou. So when he says it's not his handwriting, it's signed by Dolores Tribou, his wife, and she obviously wrote the check because she signed it. [ ] So the fact -- and [Mr. Tribou] is a real person. So this idea of fake people, this is one of the purchase orders, and this is why I'm struggling so hard for my right to put in this evidence, and I appreciate the Court trying to reach a stipulation and then telling them they can re-call [Mr. Tribou]."
> THE COURT: "Could I just ask Mr. Stieglitz something? Do you -- would you agree that that check, even though the legend may not -- he's skeptical about the legend, but that is the check that was submitted to Signalife and that's the check that was cashed, that is the check that he submitted for payment of goods?"
> MR. STIEGLITZ: "I'm sorry, with or without what's in the memo line?"
> THE COURT: "Regardless. Forget about the memo line. Just, that is the check."
> MR. STIEGLITZ: "I think -- I'm not trying to be difficult, Your Honor. I think we could; I just out of an abundance of caution would want to actually have Mr. Tribou say that. We could do that today. I mean, we'd need to send it to him and just have him look at it. But I don't -- so I'm not trying to hold up the Court."
> THE COURT: "I'm just wondering if you would agree that that can come into evidence with the understanding that you dispute that the legend was written by Mr. Tribou, and he could -- and you can have Mr. Tribou refute it on Monday when he comes here."
> MR. STIEGLITZ: "Your Honor, I apologize. I really am not trying to be difficult. I really think that admitting the check without the person who can actually testify as to what on it is true and false and is actually written by him versus somebody else, I can't agree to that. I just . . ."
> THE COURT: "Do you know if his wife -- did you ask him about whether his wife may have put that legend on there?"
> MR. STIEGLITZ: "I did, and he indicated that he didn't know how she would, given that she wasn't aware of a purchase order, she wasn't there when a purchase order was signed. Mr. Stein didn't give them a copy of this purchase order, which he doesn't recall having a purchase order number in

> there. It furthermore says Tribou & Associates. Mr. Tribou indicated on the phone he's not familiar with what that even is."

Trial Tr. Vol. 9 at 55-57. Emphasis added.

Id. at 55-57. The Court concluded:

> THE COURT: "Okay. They're not willing to stipulate that that check, as prepared, was prepared by Mr. Tribou with the legend on it. [ ] I don't think I could admit it over the Government's objection with the legend on it as being authentic and true issued by Mr. Tribou."

Id. at 58.

The Defense initially discovered the check and corresponding email in the comparably small database provided by Signalife (referred to by the Defense in prior motions as the "Signalife subset database" and the "RenewData database"), not in the hard drive provided by the DOJ, as, at the time it discovered and attempted to introduce it, the Defense was unable to conduct searches within the DOJ hard drive as described in the Declaration of Reichardt in support of Defendant's First Motion for a New Trial. (DE 264-14.) The Prosecutors should have known what it produced to the Defense. The extent to which the Prosecution went in order to keep this critical document out of evidence (Trial Tr. Vol. 8 at 233-241 and Vol.9 at 6-61), and then capitalize on their misstatements about it during closing arguments to the jury demonstrates the materiality and exculpatory value of this evidence that certainly could have affected the outcome of the trial. *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).

Remarkably, if the Prosecution was indeed not aware during trial that it has produced the Tribou check to the Defense, it not only shows a "slovenly" investigation[18] but also confirms that even the DOJ has difficulties with searching its own database – difficulties which the Defense addressed in its

[18] *Kyles v. Whitley*, 515 U.S. 419 at n.15 (1995).

prior post-trial motions.[19]

Whether it was Mr. Tribou in his private call with the DOJ or the Prosecution when it addressed the Court that made misstatements, the Prosecutors were successful in keeping out the only documentary evidence discovered thus far that could, head on, dispute the "made up" allegations. Still, Mr. Stein – surprised and fighting to get the truth into evidence – persisted. He worked out a stipulation that Mr. Tribou did indeed pay Signalife $50,000 "for goods he expected to receive."[20] As he said he would, Mr. Stein rested. It was not until the Government's rebuttal summation to the jury that it capitalized on its misstatements to the Court and on Carter's false "made up" story when it argued:

> "Fake purchase orders. You saw those throughout the trial. Cardiac Hospital Management, exhibit 300, $1.98 million." [ ]
> [Mr. Stein] wants you to believe that because there's a stipulation in the record to the effect that an individual named Thomas Tribou paid Signalife $50,000, that that means that Government's exhibit 64 -- if we can pull that up -- is not a fake document. [ ] [T]ake a look on Government's exhibit 64. See if Thomas Tribou's name appears on there. [ ] So Mr. Stein's argument isn't even supported by the documents he's showing you and that are in evidence."

Closing, Trial Tr. Vol. 10 at 43, 113-116.

Napue/Giglio violations are most flagrant and egregious when the prosecutor argues them to the jury in summation. *United States v. DeMarco*, 982 F.2d 1074 (11th Cir. 1991) (defendant's knowledge of falsity not enough to save a prosecutor who "argued" and "capitalized" on false

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[19] Thus, the Government's repeated argument that documents discovered by the Defense in the DOJ's hard drive are "not newly discovered" under Rule 33 merely because it is contained in the contents of its hard drive (e.g., DE 318 at 15, 16) is absurd. In any event, the "newly discovered" standard is not applicable. (See Section II.A. herein.) In the event this case is not dismissed, the Defense submits – under its first *Brady* motion – that it is entitled to (a) a properly indexed and fully searchable Government hard drive, and (b) a properly indexed and fully searchable copy of or access to the SEC database. See First Motion for New Trial (DE 279) and Reply to Response to First Motion for New Trial (DE 308).

[20] Defendant's Exhibit No. 418; Stipulation No. 3 between Mitchell J. Stein and the United States of America: "On or about September 29, 2007, and individual named Thomas Tribou paid Signalife $50,000 for goods he expected to receive."

testimony in closing); *United States v. Sanfilippo*, 564, F.2d, 564 F.2d 176, 178 (5th Cir. 1977) (defense knowledge irrelevant when prosecutor "argued" and "capitalized" on falsity in closing argument to the jury). When the misconduct occurs during rebuttal, it is viewed with "special disfavor." *Chatman v. United States*, 801 A.2d 92, 101 (D.C. 2002). The Prosecution describes its arguments to the jury as "narrow and careful." (DE 318 at 13.) However, there was nothing "*narrow or careful*" about telling the jury that Mr. Tribou's name does not appear on Government Exhibit 64, which was signed by Mr. Tribou and whose name, thus, appears on Government Exhibit 64.[21] There was nothing "*narrow or careful*" about telling the jury that the $1.98 million Cardiac Hospital Management purchase order was "fake" and "made up,"[22] when, in fact, Mr. Tribou testified before the SEC that the purchase order was real – not "fake" or "made up" – which is not even disputed in the DOJ's opposition even though it is at the very heart of its case against Mr. Stein.

C. THE DOJ'S ARGUMENTS ABOUT IT HEALTH CARE ARE MERITLESS

The DOJ's arguments about IT Health Care consummately miss the mark. Its opposition entirely ignores the Prosecution's repeated misstatements to the jury that IT Healthcare "does not exist," is "fake," and "made up by Mr. Stein." Instead, the DOJ argues (a) that Mr. Stein does not prove that IT Health Care Partners had any involvement with the purchase order (DE 318 at 14), (b) "that IT Health Care Partners, Inc. apparently registered with the Texas Secretary of State in February 2008, (Dkt. No. 312-1 at 15), whereas the purchase orders introduced as Government Exhibits 70 and 74 were dated in September and October of 2007" (*Id.)* (internal quotation marks omitted), and (c) this entity with a "similar name to [the] one at issue in his case [] disproves none of the evidence." (*Id*. at 15.) In response to the above arguments the Defense submits:

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[21] Closing, Trial Tr. Vol. 10 at 114.

[22] Prosecutor: "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." Closing, Trial Tr. Vol 10 at 34.

(a) In light of the Prosecution's confident and repeated statements to the jury during trial that "IT Healthcare doesn't exist" and was "made up by Mr. Stein," it had a duty to build its allegations on something other than "speculation" based on Martin Carter's bare recollection. The Prosecution then capitalized on Carter's trial testimony that "Mitch Stein made up the names of IT Health Care and Cardiac Hospital Management during closing argument.[23]

> "This duty [by the prosecution to elicit the truth] is not discharged by attempting to finesse the problem by pressing ahead without a diligent and a good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts."

Commonwealth v. Bowie, 243 F.3d 1118 (9th Cir. 2001);

(b) The DOJ's argument that IT Health Care Partners was registered with the Texas Secretary of State in February 2008, whereas the purchase orders were dated in September and October of 2007 is without merit. Registering a company a few months after entering into an agreement or commitment is not an uncommon practice, and would not render the purchase orders invalid. More importantly, nothing justifies the Prosecution saying – on May 20, 2013 – that IT Healthcare, Texas, 2008, "doesn't exist" and was "made up" by Mr. Stein;

(c) The DOJ's comment that the entity name is "similar" to the one at issue in this case is equally without merit. "IT Healthcare" was also referred to as "IT Health Care" by Signalife members, e.g. by Signalife CPA and audit committee member Norma Provencio in her projections to Government witnesses Woodbury and Pickard.[24] When Dr. Harmison entered into the agreements with IT Healthcare, the full name of the entity may simply not have been entered on the purchase

[23] Carter: "Because he's the one who made up all these names. [ ] Of IT Healthcare and Cardiac Management." (Trail Tr Vol. 6 at 112-113. Prosecutor: "[T]he evidence in this case [ ] shows that 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.

[24] See Ex. C to the Supplemental Decl. of Reichardt filed herewith.

order. More importantly, the failure to investigate whether "IT Healthcare, Texas" is really "IT Health Care Partners, Texas" does not justify the conclusion that IT Healthcare "doesn't exist," was "made up" by Mr. Stein and that the purchase or lease orders were not as real as indeed the Cardiac Hospital Management purchase order.[25]

D. THE DOJ CHERRY PICKS FROM CUTTER TESTIMONY TO DIVERT FROM INCONSISTENT STATEMENTS

Mr. Cutter testified before the SEC that he had acted as a distributor for Carter's companies in the past[26] and that Carter intended to distribute the boxes stored at his home.[27] At trial, however, his testimony was that he had no idea that Carter intended to distribute the boxes that were stored at his home. (Trial Tr. Vol. 3 at 198.) Here, it is, in fact, the Prosecution that is "cherry picking" from Cutter's SEC testimony in its Opposition, e.g. when it states that Cutter was "guess[ing]" about what was going to happen to the boxes (DE 318 at 17), when in reality Cutter makes it clear in his SEC deposition that he "knew"[28] that Carter intended to distribute them and simply didn't recall *where* he intended to distribute them.[29] The DOJ then continues to cherry pick from its Exhibit 5 – excerpts from Cutter's SEC deposition: "I don't remember asking him what was in the boxes or why he needed to store at my house" Exhibit 5 at *2/129. (DE 318 at 17.) However, whether Cutter *asked* Carter what was in it or *asked* him why he needed to store them is irrelevant in light of the fact that Cutter testified that Carter "[s]upposedly, was going to distribute them," (DE 318-5 at 4, Tr. page 130) and "as far as [he] knew, [Carter would be] taking the boxes from [Cutter's] house [ ] to

[25] Measuring the cumulative effect of all the misstatements, *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) we should also consider the cumulative effect of the Prosecution's false statements about the allegedly "fake" CHM purchase order, its statements that Yossi Keret doesn't exist, that 10 Smilansky Street is a made up address, and other falsehoods delineated in Defendant's First and Second Motions for a New Trial.

[26] *See* Ex. K of Decl. of Reichardt in support of Second Motion for a New Trial; DE 312-1 at 41.

[27] *See* Ex. K of Decl. of Reichardt in support of Second Motion for a New Trial; DE 312-1 at 42, 45.

[28] Cutter: "Taking the boxes -- as far as I knew, taking the boxes from my house -- basically, not from my house, just from Florida, or wherever they were shipped from, and taking them to whomever bought them, and using me in between to store the boxes." See the Government's Ex. 5 to their opposition, page 156.

[29] *See* the Government's Ex. 5 to its opposition, tr. page 130; DE 318-5 at 4.

whomever bought them, and using [Cutter] in between to store the boxes," (*Id*.) and that Cutter was "sure Marty did [tell him what was in the boxes] but whatever he expressed to [him] didn't bother [him]." (*Id.* at 133.) Thus, Cutter was not truthful when he testified at trial that he did not know that Carter intended to distribute the boxes. (Trial Tr. Vol. 3 at 198.)

At all times since October 2008, the United States – through the SEC – has been investigating and prosecuting Mr. Stein in what we now know have been quasi-criminal proceedings.[30] Thus, in the circumstances of this case – the DOJ's suppression of the SEC database, followed by its surprise "Mitch Stein made everything up" trial mantra – the DOJ's decision to inject the contradictory and misleading Cutter testimony into this criminal trial was wrongful. *See, Spellman v. Haley*, 2001 U.S. Dist. Lexis 26029, Civil Action No.97-T-640-N (11th Cir. D.C. Ala. 2001) (wrongful for prosecution to suppress evidence, allow false testimony to go uncorrected and then present that false testimony to the jury); *Imbler v. Craven*, 298 F. Supp. 795, 808-809 (C.D. Ca. 1969) (prosecutor has duty of good faith to undertake careful study of his case and to avoid even unintentional deception and misrepresentation). Indeed, this conduct by the Government may violate Defendant's due process rights. *Smith v. Groose*, 205 F.3d 1045, 1049 (8th Cir. 2003) (due process rights may be implicated by government's use of factually inconsistent and irreconcilable testimony in two proceedings against the same person); c*f., United States v. Dickerson*, 248 F.3d 1036, 1043 (11th Cir. 2011) (acknowledging *Groose* but noting that in the case before it the government did not use "inherently factually contradictory theories").

[30] Central District, California Case No. 11-CV-01962-JVS (ANx). The SEC investigation and allegations against Mr. Stein which ripened into this criminal prosecution – were and are certainly quasi-criminal in nature. *See, e.g. Addington v. Texas*, 441 U.S. 418, 424 (1979).

E. MISSTATEMENTS ABOUT COHEN AND PACIFIC GLOBAL CARDIOVASCULAR DOCUMENTS

The DOJ argues with regard to the Paul Cohen agreement and the "Pacific Global Cardiovascular" signature page, that "[i]t is difficult to conceive of a way two documents could be more closely correlated than to appear immediately before and after one another bearing sequential bates numbers, but Stein nevertheless professes that he could not have identified a possible correlation between these two documents." DE 318 at 16. (Internal quotation marks omitted.) Here, again, it is not the Defense but the Prosecution which is getting muddied on the facts as it should be pointed out that the folder that contains these two files has 654 Carter files (among a total of 2,831 files in that folder) that all appear immediately before and after one another, many of which bearing sequential bates numbers, yet, most of these 654 image files are not correlated despite bearing sequential bates numbers.[31] Indeed, from looking at the two files (DE 312-1 at 19 and DE 312-1 at 51), there is no apparent correlation between the Confidentiality Agreement between Carter and Cohen and the signature page of an agreement with "Pacific Global Cardiovascular." The DOJ's "close correlation" argument is curious.

The DOJ further infers in footnote 11 at 16 of its Opposition that Ex. "M" to the Decl. of Reichardt in support of the motion is not an incomplete document, even though the document starts with: "Articles, Sections and subsections of Sections of this Agreement, unless the context expressly indicates otherwise" – clearly the last part of a sentence on this signature page that belongs to a full agreement.

More importantly, the DOJ does not deny in its opposition that it failed to interview, investigate or subpoena Paul Cohen, who has an address on Smilansky Street, Netanya, Israel[32] and who, as we

[31] See Decl. of Reichardt filed concurrently herewith.
[32] Same street address as shown on the change of address letter purported to be made up my Mr. Stein.

now know, entered into a Confidentiality Agreement with Carter when he was in Israel. The DOJ does not deny in its opposition that it failed to interview, investigate or subpoena Antonio Mijares, Carter's uncle. But as we now know, Mijares is not only listed on a change of address letter Carter produced, but was also apparently a potential signatory as an International Partner of Pacific Global Cardiovascular to an agreement with Signalife which, as the DOJ now maintains, is somehow correlated to an agreement Carter entered into with Paul Cohen.

The Defense respectfully submits, again, that these documents could have changed the outcome of the trial. The "overwhelming evidence" the DOJ likes to refer to really amounts to circumstantial and prejudicial evidence put together in an effort to make Mr. Carter merely appear as Mr. Stein's "gullible"[33] "handyman" and "errand boy"[34] who delivers cappuccinos and deboned fish,[35] always acting at Mr. Stein's directions. As it now turns out, Mr. Carter was, in reality, busy on Smilansky Street, Netanya, Israel, and his contacts and relatives were quite involved, although he curiously professed at trial that it was all to "impress"[36] Mr. Stein, and because Carter was admittedly "greedy."[37]

IV. THE CONTINUED MISCONDUCT OF THE PROSECUTION – VIEWED CUMULATIVELY – WARRANTS DISMISSAL OF THE INDICTMENT

The presentation of either false testimony or prosecutorial misstatements is "inconsistent with rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (false testimony); *United States v. Alzate,* 47 F.3d 1103, 1110 (11th Cir. 1995) (false statements by the prosecutor to the court and jury, grounds for dismissal).

[33] Govt. Closing, Trial Tr. Vol. 10 at 21.
[34] Govt. Closing, Trial Tr. Vol. 10 at 29.
[35] Govt. Closing, Trial Tr. Vol. 10 at 20, 123.
[36] Trial Tr. Vol. 6 at 45, 55, 134, 136.
[37] "Marty Carter told you he did it because he was greedy." Govt. Closing, Trial Tr. Vol. 10 at 42.

A. Unlawful Even Though Bearing Only on Witness' Credibility

"[I]t is of no consequence that the falsehood bore on the witness' credibility rather than directly upon defendant's guilt." *Napue v. Illinois*, 360 U.S. 264, 269-270 (1954) (the rule is not weakened even if the false testimony "goes only to the witness' credibility"); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (impeachment or credibility evidence); *Guzman v. Sec'y Dep't of Corr.*, 661 F.3d 602, 614 (11th Cir. 2011) (credibility evidence may well be given great weight); *United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977) (credibility is as important as evidence bearing on guilt); *United States v. Lyons*, 352 F.Supp.2d 1231, 1244 (M.D. Fla. 2001) (misstatements calling credibility into question are themselves grounds for new trial).

In this case, the Prosecution based its closing – regarding all causes of action – on Martin Carter. Out of all witnesses called by the Prosecution, Carter's name was mentioned during the closing (by both Prosecutors) a total of 137 times; Tracy Jones a total of 6 times; John Woodbury a total of 23 times. Moreover, the Prosecution referred to Mr. Carter and Mr. Stein as "partners in crime."[38] While it can hardly be said that the evidence of "Yossi Keret" not "exist[ing]" and "IT Healthcare [being] made up" did bear directly on guilt, it is of no moment. The credibility of Carter was the central element of this case. Much like in *DeMarco*, Carter was "a star witness for the government [and] the government relied heavily on [Carter's] testimony in [his] summation of the jury. Without him, the government did not have a case against [Mr. Stein]."

In a strikingly similar case to *DeMarco* and the instant case, *United States v. Sanfilippo*, 564 F.2d 176 (5th Cir. 1977), the Government witness lied and the defense counsel knew he was lying. The Court found the Government fully disclosed the truth to defense counsel before the witness perjured himself. The Government argued the misstatements were not a due process violation, because the

[38] Govt. Closing, Trial Tr. Vol. 10 at 42.

defense knew the truth and had "tools" at his disposal to apprise the jury of the truth. One of the tools was "perhaps [ ] calling upon the Government to stipulate to certain facts." In reversing the conviction, the Eleventh Circuit stated:

> "Coupled with the failure [of the prosecutor] to correct [the witness'] false testimony at the time was the prosecutor's capitalizing on it in his closing argument. [ ] Thus the Government not only permitted false testimony of one of its witnesses to go to the jury, but argued it as a relevant matter for the jury to consider. Whether either instance alone would merit reversal, we need not decide, for together they do."

Id. at 178-179.

Here, Mr. Stein did more than defense counsel did both in *DeMarco* and *Sanfilippo*. In *Sanfilippo* the Government suggested that Defense counsel "could have called upon the Government to stipulate to certain facts," but he did not. Mr. Stein did just that. Although the Prosecutor's knew well that Mr. Tribou did indeed sign the Cardiac Hospital Management purchase order, did pay $50,000 thereunder, and did agree to accept $1,980,000 of heart devices from Signalife, the Prosecutors nonetheless "capitalized" on their and Carter's misstatements by arguing all of them in their final summation to the jury. Just as in *DeMarco*, 928 F.2d at 1077:

> "[T]he prosecutor's argument to the jury capitalizing on the perjured testimony reinforced the deception of the use of false testimony and thereby contributed to the deprivation of due process."

B. <u>Prosecutor's Failure to Correct Violates Due Process</u>

A due process violation occurs the instant the prosecutor fails to correct the misstatements. *Brown v. Wainwright*, 785 F.2d 1457, 1464 (11th Cir. 1986) ([prosecutor] failed to step forward and make the falsity known, and knowingly exploited the false testimony in its closing argument to the jury, in violation of the due process clause of the Fourteenth Amendment); *Smith v. Kemp*, 715 F.2d 1459, 1463 (11th Cir. 1983), cert. denied, 464 U.S. 1203 (1983) (prosecutor "must affirmatively

correct"); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment to the Constitution of the United States); *Alcorta v. Texas*, 355 U.S. 28, 30-31 (1957) (prosecutor did not disclose impeachment evidence and failed to correct trial testimony prosecutor knew to be misleading).

Here, the Prosecution now had at least 90 days to correct its misstatements,[39] and filed two responses in opposition to Defendant's First and Second Motion for a New Trial (DE 298, DE 318), yet has still failed to correct any of its misstatements to the Court and jury.

C. Even If the Defense Knew (or Should Have Known) of the Falsities, the Prosecution's Misconduct Is Not Excused

The duty of the Prosecutor to correct the misstatements is not excused, just because the Defendant knew or should have known of the falsity. *United States v. Alzate*, 47 F.3d 1109, 1110 (11th Cir. 1995) (the fact that the prosecutor told the defense the truth does not excuse the prosecution's misstatements); *United States v. Rivera Pedin*, 821 F.2d 1522, 1529, 1530, n. 8 (11th Cir. 1988) (due diligence requirement "not applicable" where the government's case included false testimony); *United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977) (prosecutor had duty to correct the record although defense knew government witness was lying).

Here, the Defense could not have known the Prosecution's statements were false. Its "Mitch Stein made it up" story was unknown. This is particularly obvious given that we now know that Mr. Tribou did indeed (a) enter into a real purchase order agreement with Signalife, (b) make a $50,000 down-payment toward the Cardiac Hospital Management purchase order, (c) for a price of $1,980,000.00 for 180 units, (d) intend to "resell" the devices, and (e) did not receive his units due to production delays. However, if this Court somehow finds that Mr. Stein knew or should have known

[39] Defendant's First Amended Motion for a New Trial was filed on October 30, 2013. (DE 279.)

of the Prosecutors' misconstruction of the truth or misstatements, it is of no moment. The duty of the prosecutor to correct the record is unqualified. *Napue v. Illinois*, 360 U.S. 264, 271 (1959); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Brown v. Wainwright*, 785 F.2d 1457, 1464 (11th Cir. 1896).

D. The Violations Warrant Dismissal of the Indictment

Friedlander is a case where the United States saved themselves from dismissal because they admitted to the mistake. *Lyons* is a case that was dismissed after the United States never admitted or owned up to its wrongdoing. On the issue of dismissal, it is respectfully submitted that this case is more like *Lyons* than it is *Friedlander*. Just as in *Lyons*, Defendant Mitchell Stein respectfully requests the indictment be dismissed.

In the words of the United States Supreme Court:

> "False testimony in a formal proceeding is intolerable. We must neither reward nor condone such a "flagrant affront" to the truth-seeking function of adversary proceedings. *See United States v. Mandujano*, 425 U.S. 564, 576-577 (1976). *See also United States v. Knox*, 396 U.S. 77 (1969); *Bryson v. United States*, 396 U.S. 64 (1969); *Dennis v. United States*, 384 U.S. 855 (1966); *Kay v. United States*, 303 U.S.1 (1938); *United States v. Kapp*, 302 U.S. 214 (1937); *Glickstein v. United States*, 222 U.S. 139, 141-142 (1911). If knowingly exploited by a criminal prosecutor, such wrongdoing is so "inconsistent with the rudimentary demands of justice" that it can vitiate a judgment even after it has become final. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). In any proceeding, whether judicial or administrative, deliberate falsehoods "well may affect the dearest concerns of the parties before a tribunal," *United States v. Norris*, 300 U.S. 564, 574 (1937), and may put the factfinder and parties "to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross examination, by extraneous investigation or other collateral means." Ibid. Perjury should be severely sanctioned in appropriate cases.

ABF Freight v. NLRB, 510 U.S. 317, 323 (1994). Emphasis added.

In this case, *United States v. Stein*, the necessary "collateral proceedings" resulting from the prosecutors' misconduct are the motions now under consideration before this Court.

And even if a new trial is ordered, there is still the voluminous SEC database that must be properly produced to the Defense under *Brady*.[40]

V. CONCLUSION

As the Supreme Court said 79-years ago in the seminal case of *Berger v. United States*, 295 U.S. 78, 89 (1935):

> "[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

In this case, the Prosecutors not only failed to step forward and correct the untruths of their witnesses, but they embraced, expanded and capitalized on them in summation. They also made representations to the Court that were at best misleading, and then capitalized on these in rebuttal summation as well. It was impossible for the jury verdict[41] in this case to speak the truth.

The Prosecution has not been candid in its opposition briefs. In a similar context, the Sixth Circuit found:

> "The United States Attorney's word is worth considerably less when, as here, it is manifest that he made conflicting representations to the court below. [ ] [C]onfidence in the [prosecutor] is not restored by the use of language characterizing *Brady* allegations by 'bogus speculations' or 'cries of fowl' (sic) nor by rhetorical questions intended to belittle such claims."[42]

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[40] With respect to that database, the DOJ has said that it does not have access to the database. (DE 292 at 15: "And at no point during that [*Faretta*] hearing did the United States [ ] state that it ever had access to such a database.") It has also told this Court that it does have access to it. (Tr. of *Faretta* hearing at 41.) An analogous situation arose in *United States v. White*, 492 F.3d 380, 412 (6th Cir. 2007). There, the Circuit Court noted that a "proper *Brady* disclosure will serve to justify trust in the prosecutor." *Id., citing Kyles v. Whitley*, 514 U.S. 419, 439 (1995). In the event this case is not dismissed with prejudice, the Defense submits an evidentiary hearing is necessary to determine the extent of Government suppression of evidence, and the appropriate indexing procedure the Government must use in producing the SEC databases.

[41] "[V]erdict from the Latin, to speak the truth." *Alzate*, 47 F.3d 1103, 1108 (1995).

[42] Compare, Govt. Opposition, DE 292 at 19: ("desperate and completely ill-founded search for basis for a new trial"); *Id*. at 30 ("His disappointment in the outcome of his trial is understandable"); DE 318 at 18 ("outlandish [] allegations"); *Id*. at 15 ("Stein complains loudly"); *Id*. at 13 ("Stein's repeated efforts to muddle and mischaracterize issues"); *Id*. at 16 ("Stein's indignant rhetoric"); *Id*. at 19 ("breathless terms by Stein").

U.S. v. White, 492 F.3d 412 (6th Cir. 2007). Emphasis added.

Defendant Mitchell J. Stein respectfully requests that the indictment in this matter be dismissed. Alternatively, Mr. Stein requests the Court order a new trial and direct the United States to properly produce the full SEC database resulting from the five year investigation of Signalife, Inc.

Dated: February 7, 2014

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 7, 2014, I electronically filed the foregoing documents with the Clerk of the Court and all counsel of record using CM/ECF.