UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-80205-cr-Marra-Hopkins

UNITED STATES OF AMERICA,

Plaintiff
v.

MITCHELL J. STEIN,
Defendant.
_____/

DEFENDANT'S REPLY IN OPPOSITION TO THE RESPONSE OF THE UNITED STATES TO DEFENDANT STEIN'S MOTION TO COMPEL PRODUCTION OF MINUTES AND TRANSCRIPTS OF GRAND JURY PROCEEDINGS

COMES NOW, the Defendant, Mitchell J. Stein, by and through the undersigned counsel, and hereby submits this Reply in Opposition to the Response of the United States to Defendant's Motion to Compel Production of Minutes and Transcripts of Grand Jury Proceedings [DE 336], and in support thereof states as follows:

The government's response to the defendant's efforts to obtain the grand jury materials to support his pending motions for new trial and to dismiss consists of vociferously attacking the defendant and his attorneys and to misrepresent positions taken by the undersigned. Instead of addressing the substance behind the defendant's motion, the government makes much protest over that fact that new counsel utilized the conditional "if" with reference to the merits of defendant's previously filed motions, as though use of that word somehow suggests that defendant does not believe his own allegations. The twisted logic employed by the government reflects the careless regard for candor which gave rise to the very errors for which defendant seeks relief.

To be clear, the undersigned has not retreated from the defendant's position that the prosecutors in this case engaged in misconduct in their presentations to the court and jury.

Bruce L. Udolf, PA
Broward Financial Centre, 500 East Broward Blvd., Suite 1400, Fort Lauderdale, Florida 33394
(866) 951-9058/ budolf@udolflaw.com

Rather, the undersigned merely indicated in the motion and before the court at the status hearing that he is loathe to level such claims against an adversary but that such claims, *if colorable*, would be serious, would certainly merit deeper scrutiny and could result in sanctions, including, potentially, dismissal. The use of the conditional "if" followed by the subjunctive tense is a clear, distinct statement of fact that can hardly be disputed -- not a retreat from the defendant's earlier position. The government's effort to "spin" this as some sort of acknowledgement by the defendant that his earlier claims are insufficient does not merit serious discussion. For the reasons set forth below, there is abundant evidence that government counsel took repeated liberties with the truth at trial which transcended more than mere spin by making representations to the Court and jury through both witness testimony and argument of counsel which they knew to be contradicted by evidence which they failed to bring to the jury's attention. Because most of these errors have been addressed exhaustively in the defense's earlier papers, we have highlighted only two below to illustrate how the significant issues regarding the government's conduct has impacted this case and how an examination of the grand jury records of this investigation would further establish government misconduct which would justify either a new trial or dismissal.

Perhaps the most significant instance of government misconduct relates to its star witness, Martin Carter. Carter clearly had a motive to lie to help himself. He was chargeable as a co-conspirator and was facing a Draconian sentence. For his testimony, he was rewarded with a favorable recommendation by the government that resulted in a sentence of 36 months of supervised release, and 360 days of house arrest (D.C. Case No. 1:11-cr-00278; DE 57).

Part of the testimony Carter was rewarded for concerned his creation of a change of address letter for a person named "Yossi Keret," which was presumably prepared so as to prevent exposure of the alleged fraud he claimed to be involved in along with the defendant.

Carter told the jury that he created the letter, but that the defendant made up "all the names" (Vol 6; 108) and that the address on the letter (10 Smllansky Street (*sic*)) was also "made up." (Vol. 6, at 59.) The problem with this testimony is that it is exactly the opposite of what Carter told the government prior to trial, as recorded in a memorandum of one of his several interviews. Indeed, Carter has given multiple versions as to the alleged fabrication of this document. Previously, he had testified at a deposition with the SEC that he did not have any knowledge of the letter or a "Yossi Keret". *See,* Exhibit "A," attached hereto. Then, at trial, in an effort to blunt his exposure as a serial liar, the government fronted Carter's supposed SEC perjury based on a simple question as to whether he had lied in his SEC testimony "across the board." (Vol. 6 at 126.) In this portion of Carter's direct testimony, the prosecution developed that the defendant had stayed with Carter in the same Washington, D.C. hotel room in the days prior to, and during, Carter's testimony, so that the defendant could coach Carter through his "across the board" lies to the SEC. *Id*. Notably, the prosecutor did ***not*** ask at trial specifically whether the defendant had made up the name Yossi Keret; instead, Carter was permitted to testify (***generally***) that the defendant made up "all the names." (Vol. 6, at 108.) Subsequently, however, in both opening and rebuttal closings, both prosecutors (***specifically***) argued on numerous occasions that it was the defendant who made up the particular name Yossi Keret. (Vol. 10, at 28, 119.) Why did the government make such specific accusations several times in closings that it was the defendant that made up the name Yossi Keret, when one of those prosecutors was so deliberately vague in eliciting a general statement from Carter on direct examination regarding the defendant's role in making up names. The undersigned discovered why just last week when he came upon a report of an interview of Carter which was produced nearly a year earlier than the other *Jencks* materials for this witness. The particular document discovered was a report of an interview with Martin Carter by, among others, the very

prosecutor who was propounding these questions that were vaguely crafted so as to deliberately avoid asking specifically whether the defendant had made up the name Yossi Keret. That report reveals that on July 13, 2012, in Washington, D.C., Martin specifically told that very prosecutor that it was he (Carter) – not the defendant – who "made up" the name Yossi Keret. (*See,* Exhibit "A," attached to the Motion to Supplement the Record filed concurrently herewith.) Nevertheless, the two prosecutors who were present at that interview each argued to the jury that it was the defendant who made up the name.[1]

From the above, notwithstanding the fronting of Carter's admission that he lied about everything in his testimony to the SEC, it is clear that the prosecutors knew that Carter had provided them with a previous statement that was 180 degrees opposite from his trial testimony. This earlier contrary statement was made at an interview with the prosecutors in their Washington D.C. offices during a time when the defendant was ***not*** present in a hotel room to "coach" him as Carter testified, and those prosecutors failed to disclose that fact to the jury. Thus, the government through Carter, was able to concede that their star witness gave false testimony before the SEC by conveniently laying the blame for that perjury at the defendant's feet, while avoiding its obligation to disclose the whole truth (*i.e.,* that his previous statement to

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[1] Of course, the government has argued that the Defendant should have known of the prosecutors' misstatements before they were made to the Court and the jury and thus should have corrected them. DE 298-1, at 6, 7. However, the settled law of this Circuit is contrary to the government's position. The law never shifts the burden to the defendant to correct a prosecutor's misstatements. *See*, *United States v. Alzate,* 47 F.3d 1103 at n. 6 (11th Cir. 1995) (". . . we reject that argument on the law and the facts. The defendant did not make the misstatement; the government did); *United States v. DeMarco*, 928 F.2d 1074, 1077 (11th Cir. 1991) (defendant's knowledge of falsity not enough to save a prosecutor who "argued" and "capitalized" on false statements in closing*); United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977) (defendant's knowledge irrelevant to *Giglio* violation when prosecutor "argued" and "capitalized" on the falsity in closing arguments).

Bruce L. Udolf, PA
Broward Financial Centre, 500 East Broward Blvd., Suite 1400, Fort Lauderdale, Florida 33394
(866) 951-9058/ budolf@udolflaw.com

them was diametrically opposed to his testimony before the jury). This was a flagrant violation of the letter and spirit of the cases cited n. 1, *infra* and in the defendant's earlier papers.

Presumably, the government will resurrect its earlier argument that the evidence in this case is so overwhelming that any error resulting from its disingenuous behavior is harmless. To that, we would merely point out that the evidence in this case without the unimpeached testimony of its star witness, Martin Carter, was underwhelming at best.[2] Indeed, lest there be any doubt as to the significance of Carter's testimony to the conviction obtained in this case, it bears noting that the prosecutors mentioned his name no less than 130 times during their combined closing arguments at the trial's conclusion.[3]

Under these circumstances, the government clearly capitalized on its star witness who it deliberately characterized in a false light. As such they had a duty to correct that misimpression and because Carter's testimony was so critical to their case, their failure to do so cannot be fairly said to be harmless beyond a reasonable doubt. If Carter had been exposed as he should have been, the credibility of a witness in whose basket the prosecution placed most of its eggs could have been significantly undermined.

Then there is the evidence regarding Tom Tribou. The government went to great lengths at trial to have the jury believe that any document purporting to be a Purchase Order between Signalife and any entity controlled by Tom Tribou was fraudulent and created by the

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[2] In this regard, the Court, in denying the defendant's Rule 29 motion at the close of the government's case, stated that "I believe that the evidence is *conflicting* and creates a question of fact for the jury . . ." (Vol. 9 at 102) (*emphasis added).*

[3] Specifically, the prosecution mentioned Carter 97 times during its opening (closing) argument and some 33 times during its rebuttal argument, during a combined time of 95 minutes. (Vol. 10, at 3.) Thus, the government having made an average mention of Carter more than once per minute during its combined closings, the importance of Carter's testimony and his credibility as a witness cannot be gainsaid.

Bruce L. Udolf, PA
Broward Financial Centre, 500 East Broward Blvd., Suite 1400, Fort Lauderdale, Florida 33394
(866) 951-9058/ budolf@udolflaw.com

defendant solely to cause an increase of Signalife stock share values. The Court will recall that the prosecution vigorously attempted to prevent evidence from coming in regarding a $50,000 check signed by Tribou's wife around the same time as a Purchase Order for in excess of $1.9 million dollars' worth of product. Indeed, the prosecutor fought a stipulation to the extent that it would suggest there was a legitimate agreement by an entity controlled by Tribou to purchase product from Signalife. (Vol. 9 at 54-58).

Notably, the government never called Tribou as a witness. The government's reluctance to do so is understandable, as Tribou had previously testified before the SEC that he did, in fact, enter into an agreement to purchase product from Signalife and that his signature appears on the Purchase Order. (SEC deposition transcript of Thomas Tribou, January 22, 2010, at 203-204, 217).[4] From this, it is apparent that Tribou's testimony would be inconsistent with the theory pressed by the government in its closings; for this very reason, though, it is inconceivable that the government would not have endeavored to "lock in" his testimony in the grand jury prior to trial.

Significantly, it was not until ***rebuttal*** closing that the government first raised the issue of whether Tribou had in fact entered into an agreement to purchase product from Signalife. (Vol. 10, at 117, 118.) It was only at this point, when the defendant no longer had a right to respond, that the prosecution (through Mr. Stieglitz) for the first time began to suggest to the jury that Mr. Tribou's name did not appear on the Purchase Order. These "suggestions" were made repeatedly to the jury and in a manner calculated to give the false impression that Tribou's name appeared nowhere on the Purchase Order. The problem, of course, is that Tribou's name

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[4] Tribou provided the same information to the prosecutors and their investigator. See Exhibit "B" to the Motion to Supplement the Record filed concurrently herewith – August 20, 2012 interview memorandum of Thomas Tribou, at 4.

Bruce L. Udolf, PA
Broward Financial Centre, 500 East Broward Blvd., Suite 1400, Fort Lauderdale, Florida 33394
(866) 951-9058/ budolf@udolflaw.com

actually *does* appear on the document . . . in the form of his signature. Yet, knowing this, several times during his *rebuttal,* the prosecutor exhorts the jury to look at the document and "…see if Thomas Tribou's name appears on there" (Vol. 10, at 114.) And on another occasion, the prosecutor rhetorically asks the jury with respect to this same document, "where's Thomas Tribou's name? Does it say 'sold to Thomas Tribou'? It doesn't, ladies and gentlemen." *Id.* True enough. It does not say "Sold to Thomas Tribou." It ***does*** however, say the words "Thomas Tribou," written in script on the signature line of the Purchase Order. Tellingly, and revealing just how disingenuous this conduct was, the prosecutor was careful not to say "Tribou's name is not on the document," because 1) he knew Tribou's signature was visible on the Purchase Order; 2) he knew that Tribou had previously testified as such to the SEC; and 3) ***because Tribou had similarly told Mr. Stieglitz and his colleagues that he did, in fact, sign the purchase order.*** (*See*, Exhibit "B," attached to the Motion to Supplement the Record also filed this same date) (DE 337) Thus, it is submitted, this part of the rebuttal was nothing more than a rhetorical shell game that Mr. Stieglitz knowingly played with the jury.

Based on the government's conduct at trial -- engaging in repeated efforts to actively leave uncorrected false representations by the prosecutor and a government witness which representations and impressions were material to the credibility of its star witness in particular, and the government's case in general -- there is significant evidence that prosecutors committed successive acts of misconduct that require at a minimum the granting of a new trial, or dismissal of charges. Should the Court believe that it requires further evidence of misconduct in order to grant this Motion, we respectfully suggest that the Court conduct an *in camera* review of the records the defense seeks. The fact that none of the witnesses called at trial were called before the grand jury and that none of the witnesses called before the grand jury were called at trial (against the background of the trial misconduct), raises an additional red flag that reveals that

the government's efforts to prevent exposure of favorable information to the defense extends as far back as the grand jury consideration of this matter. Indeed, the fact that the government has so stridently opposed efforts to reveal the contents of grand jury witness testimony and the colloquies of its attorneys before the grand jury – the transcripts of which they have no doubt reviewed prior to staking out this position – ought to speak volumes about its fear of having its conduct exposed to the light of day. Instead, they continue to regurgitate their worn argument that the evidence is "overwhelming," as if, even assuming that were the case, an accused's guilt would justify means that include misconduct by a prosecuting attorney. In this regard, the words of Mr. Justice Sutherland still resonate nearly eighty years later and bear repeating:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is 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. . . . He may prosecute with earnestness 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 (1935). This duty is enhanced in the collection and presentation of evidence to a grand jury, where the prosecutor performs a quasi-judicial function. Sara Sun Beale, et al., *Grand Jury Law & Practice*, 2nd ed. (West 1997) et sec. 4.15, pp. 4-64.

WHEREFORE, for the reasons set forth above, the defendant respectfully requests that his motion [DE 332] be granted or, in the alternative, that the Court review the records sought *in camera*.

Dated: May 27, 2014

Bruce L. Udolf, PA
Broward Financial Centre, 500 East Broward Blvd., Suite 1400, Fort Lauderdale, Florida 33394
(866) 951-9058/ budolf@udolflaw.com

Respectfully submitted,

BRUCE L. UDOLF, P.A.
Counsel for Defendant Stein
Broward Financial Centre
500 East Broward Blvd., Suite 1400
Fort Lauderdale, Florida 33394
Telephone: (866) 951-9058

By: /s/ Bruce Udolf
BRUCE L. UDOLF
Florida Bar No. 0899933
budolf@udolflaw.com

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically using the Court's CM/ECF system, on this 27th day of May, 2014.

By: /s/ Bruce Udolf

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)

) File No. HO-11153-A

HEART TRONICS, INC.)

ORIGINAL

WITNESS: Martin B. Carter

PAGES: 1 through 352

PLACE: Securities and Exchange Commission
100 F Street, N.E.
Suite 1590, Room 9
Washington, D.C. 20549

DATE: Thursday, February 25, 2010

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 a.m.

TRANSCRIPT

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MR. EISNER: We are back on the record now at 4:35 p.m. after a short break. Mr. Carter, during the break we didn't have any discussions?

THE WITNESS: No.

MR. EISNER: And we didn't have any discussions with your lawyer either?

MR. STEIN: Correct.

BY MR. EISNER:

Q Okay, so we were asking you about Exhibit 77. Exhibit 77, have you ever seen Exhibit 77 before?

A No, I have not.

Q Exhibit 77 is -- appears to be a letter to Signalife, yes, to Signalife from somebody named Yossie Keret, Y-o-s-s-i-e, K-e-r-e-t. Do you know who Yossie Keret is?

A No, I do not.

Q Do you know -- do you recognize the signature on Exhibit 77?

A No, I do not.

Q There is an address of 10 Smilansky, S-m-i-l-a-n-s-k-y Street in Netanya, N-e-t-a-n-y-a, Israel, do you recognize that address?

A No, I do not.

Q Do you have any understanding that IT Healthcare is based in Netanya, Israel?

A No, I do not.

Q Or has operations in Israel?

A No, I do not.

MR. SCHARF: You remember he knows nothing about sales or marketing or advertising or shipping.

MR. EISNER: I understand.

BY MR. EISNER:

Q So putting back before you Exhibit No. 71, Exhibit 71 from March 2008 saying ship to Tim Cutter, IT Healthcare, Loveland, Ohio, a couple of months earlier, January 7, 2008 according to Exhibit 77 says, "Make a notice of change of address for IT Healthcare and product delivery to IT Healthcare in Israel. Can you offer any explanation for why there would be two addresses?

A No, I cannot.

Q Is there anything else about Exhibit 77 that you can help us understand?

MR. SCHARF: There's nothing to begin with.

BY MR. EISNER:

Q Okay. No further questions about Exhibit 77. I'm going to show you now what has previously been marked as Commission Exhibit 76, also a one page document, Bates numbered SEC MS0008366. Take a look at Exhibit 76, and I will ask you if you recognize Exhibit 76?

A No, I do not.