CASE NO. 14-15621-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THE UNITED STATES OF AMERICA,
Appellee,

vs.

MITCHELL J. STEIN,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
DISTRICT COURT NO. 9:11-cr-80205-KAM-1

REPLY BRIEF FOR APPELLANT MITCHELL J. STEIN

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT
United States v. Mitchell J. Stein
Case No. 14-15621-FF

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-2, the undersigned counsel for Appellant certifies that, to the best of his knowledge, the list of interested persons and entities provided in Appellant's opening brief, served May 27, 2015, as updated by all subsequent briefs, is complete.

Very respectfully submitted,

/s/Jonathan B. Kasen
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INTRODUCTION

The Government's brief is replete with factual and legal errors, as well as new arguments never raised in the district court. The brief reveals significant government misconduct, including the prosecutors' breach of the magistrate's discovery order and substantial violations of Fed. R. Crim. P. 16 and *Brady v. Maryland*. With regard to its suppression of the 200-million-file database, the Government now explains that it would be "illogical" to expect it could produce documents out of that database because the "database belonged to the SEC, not DOJ." The Government does not even deny that the prosecutors refused to turn over, *from their own files*, the requested categories of favorable evidence despite the magistrate's order.

With respect to the prosecutors' *Giglio* violations, the Government advances a new theory about Tribou and his CHM purchase order that is the polar opposite of the one it presented at trial. It further argues that the prosecutors told the jury of Tribou's involvement with the purchase order, but that is untrue. Most importantly, the responsive brief extends to this Court the number of forums in which the Government has "urge[d] the truth of what it knows to be false,"[1] arguing that Tribou did not sign the CHM purchase order on behalf of Cardiac Hospital Management ("CHM") while the prosecutors' own files show he did; and then arguing that its

[1] *Brown v. Wainwright*, 785 F.2d 1457, 1464 (11th Cir. 1986).

prosecutors did not know of the falsity of their witnesses' testimony although it now concedes they did.

On the district court's sentencing errors, the Government now admits for the first time that but-for causation is required to establish a loss enhancement but identifies no evidence in the record establishing such factual causation, and further admits that the purported disclosure "may not have directly caused investor losses." The Government argues that proximate causation is not required to establish loss, but cites caselaw flatly contradicting that proposition. It then argues any sentencing error was harmless, but the alternative loss theory it advances was rejected by the district court and the other theories it now proposes are belied by the law and by the record evidence.

In a criminal prosecution that should focus on the "search for truth,"[2] the Government simply will have none of it. While unquestionably a drastic remedy, it is respectfully submitted that this is the rare case where reversal is the proper outcome.

[2] *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 1948 (1999).

I. PROSECUTORIAL MISCONDUCT MERITS REVERSAL

A. Misstatements About CHM Purchase Order

1. Misrepresentations About What Happened At Trial

The Government claims its prosecutors' conduct at trial regarding the CHM purchase order was "proper" (GB:45) and that their statements in closing argument to the jury were "fair comments on the trial evidence." (GB:43.) This position is indefensible.

While its theme on appeal is to allege the prosecutors told the jury that "Tribou's signature was on the purchase order" (GB:42) and "the jury was aware that some back-up had been received for one of the purchase orders" (GB:53), the Government fails to cite any sections of the record that verify these new arguments. To the contrary, the prosecutors' intention from the outset was to get the jury to believe the CHM purchase order did not involve *any bona fide* customer. (DE240:21 (opening statement: "… fake positive news about the company"); DE248:34,46-47 (closing argument: "You know that [CHM purchase order] sale *never happened*;" emphasis added).)

a. Tribou's Signature

Curiously, the prosecutors never called Tribou as a witness although Tribou was a signatory to the purchase order they alleged "never happened," and although Tribou had previously told both the SEC and the prosecutors that he understood the

CHM purchase order he signed was a binding contract. (RE312-1:10-11;DE337-2:4,¶5.)

Despite knowing of Tribou's deep involvement in Signalife's reseller program (AOB:10,17,26;DE453-14:3-4,5-9,16-19[GX78];DE453-9[GX64];DE312:5; e.g., RE312-1:10-11 ([TRIBOU:] "I was buying the units…. As I sold the units, I would have 90 days to pay [Signalife] the money")), the prosecutors briefly brought up Tribou once during their 7-day case-in-chief for the sole purpose of adducing testimony from Woodbury that the various agreements Signalife entered into with Tribou (AOB:10,17,26;DE453-14:3-4,5-9,16-19[GX78]) had "[nothing] to do with the purchase orders." (DE240:82-84.)

The prosecutors then never mentioned Tribou again in the presence of the jury until rebuttal closing after Stein read to the jury the stipulation about Tribou's $50,000 payment "for goods and services he expected to receive." (DE248:107;DE452-122[DX418].) Stein reminded the jury that the CHM purchase order called for a $50,000 down-payment during the same time frame and asked: "Can a fake person deposit $50,000?" (DE248:87;GX64.) In rebuttal closing, the prosecutor quashed any opportunity for the jury to make the truthful connection between the payment and GX64:

> "[I]f Tom Tribou ... is Cardiac Hospital Management, where's ... Thomas Tribou's name? Does it say sold to Thomas Tribou? It doesn't, ladies and gentlemen. Take a look closely. I apologize. I know this is small on the screen,

> but take a look on Government's exhibit 64. See if Thomas Tribou's name appears on there."

(DE248:114.)

Undoubtedly, the suggestion that Tribou's name does not appear on GX64 is false inasmuch as his signed name does appear, and at least when viewed cumulatively, was not harmless regardless of any curative instructions. *United States v. Herberman*, 583 F.2d 222, 230-31 (5th Cir. 1978) (prosecution made too many improper suggestions; introduced too much improper evidence, to be cured by instruction).

b. "Back-Up"

With respect to its claim that the jury was aware of a "back-up … for one of the purchase orders" (GB:53), the Government first argues that the stipulation "strongly suggested that Signalife received a down-payment for at least one of the purchase orders" (GB:53). But actually, after the district judge suggested that the prosecutors privately telephone Tribou to "verify … if he put that purchase order number on [the check]" in an effort to "get [the prosecutors] to agree that Mr. Tribou actually issued that check with that purchase order number on it" (DE247:50-51), the prosecutors endeavored to keep the stipulation "vague" (DE248:108), assuring it did not mention the corresponding purchase order number or any purchase order. (DE247:42;DE247:58 ("[The prosecutors] are not willing to stipulate that that check

… was prepared by Mr. Tribou with the legend on it").[3]

The Government then argues the jury knew of the down-payment in referring to GX73:22 (GB:53), which reports the down-payment as an "accounts payable." But while the prosecutors presented GX73:22 four times at trial, they specifically asked the witnesses not to read the information about the down-payment (DE240:95-96;DE241:124-125;DE242:208;DE246:14-15; e.g., DE240:96 ("I'm not going to have you read all that language")) and then elicited the false testimony from Woodbury that he never received any "independent information" that would back up the statements on GX73:22 (DE240:95-96) although Woodbury produced the Tribou check to the prosecutors. (DE322-1:1,7-9.)

Perhaps most telling is the district judge's extemporaneous reaction – outside the jury's presence, after the conclusion of the Government's case – to Tribou's check, which substantiates that the jury knew nothing about "some back-up:"

> THE COURT: "I'm sorry. So your understanding is that [Tribou] did give a $50,000 payment and they did cash a $50,000 check of his?"
>
> PROSECUTOR: "That he had a $50,000 -- that a $50,000 payment was made by Mr. Tribou and got nothing for it."
>
> THE COURT: "But … they did actually collect money, and that check did clear?"

[3] This entire exchange about Tribou occurred outside the jury's presence. (DE246:219-235;DE247:6-68,75-79;DE248:86 ("[jury] sent off for a day and a half").)

> PROSECUTOR: "I'll assume so. I don't know that I can go that far, but that he made a payment to Signalife, absolutely."
>
> THE COURT: "With that purchase order number on it?"
>
> PROSECUTOR: "… I don't know. See, … *what I don't know is whether he wrote that purchase order number on there or who wrote that purchase order number on there*."

(DE247:41-42; emphasis added.)

The prosecutors never included the check in their submission of hot documents and indeed conceded at trial that they failed to even investigate the check. (*Id*.) Given the Government does not now challenge the authenticity of the check[4] and admits Tribou actually did make the down-payment on the CHM purchase order, it is difficult to conceive how the prosecutors' conduct in keeping the check out of evidence and then rebutting any connection between it and the CHM purchase order was not a corruption of the truth-seeking function of the trial.

[4] The Government now admits the check was processed within Signalife. (GB:51-52,64; *see*, AOB:31-32;RE264-3;RE264-4.) It then claims "Provencio did not audit any purchase orders" (GB:64), but the record shows Provencio received the Tribou check while serving as "chairman of the audit committee of [Signalife's] board of directors" and performed audit functions relating to the purchase orders. (GX73:39[DE453-11:39];GX93:93[DE453-16:93];DX412:11[DE452-117:11]; RE264-3:2;DE264-1:2 ("P.O follow ups"); DE266:11 (Provencio's questions to Pickard and Harmison about purchase orders).) This further disproves that Stein "exerted significant control" over Signalife (GB:5), which was fully Sarbanes-Oxley compliant (DE241:92,177-184). In fact, Stein had very little involvement in SEC filings, which were reviewed and signed off on by a group of some seven executives who ran Signalife. (DE241:176-177;DE241:74-75;DX412:257-258[DE464-19:257-58];GX93:100[DE453-16:100].)

2. The Government's New Theory

Perhaps most detrimental to the Government's argument that its prosecutors' trial conduct was "fair" (GB:43) is a new claim that is diametrically opposed to the case they presented at trial. The Government now adopts the position set forth in the SEC's complaint that it was only *after* Tribou executed the CHM purchase order, when allegedly "Signalife could not ship any product to Tribou, that Stein 'orchestrated an elaborate scheme.'" (GB:43;AOB:15.) Had the prosecutors presented to the jury this different theory (i.e., the CHM purchase order happened) instead of the one they advanced at trial (i.e., the CHM purchase order "never happened"), the balance of their case would undoubtedly have been called into question.

While this new theory corresponds with the reality that Tribou's CHM purchase order was not "all made up," it also exposes a flaw in the prosecutors' case: How could Carter's testimony that Stein made up the name CHM have been truthful, when the scheme was purportedly orchestrated as a result of production delays *after* Tribou entered into the CHM purchase order? If Carter was not involved in the Tribou transaction involving the CHM purchase order – and the Government never claimed he was – how could Carter have known anything about the transaction or the very purchase order that was in Tribou's possession right after he executed it as "G.P." of "CHM?" (*See*, next section *infra*.)

3. The Claim That Tribou Was Uninvolved With CHM

Though the Government admits Tribou was a legitimate customer under the CHM purchase order (GB:43), it maintains – in what is a new theory on appeal – that Tribou had nothing to do with the name CHM, which was "a fictitious entity that was not known to [Tribou]." (*Id*.) There are two problems with this theory. First, the theory does not excuse the prosecutors' strategy of telling the jury in closing argument that this "sale never happened" (DE248:46-47) and that GX64 was "fake positive news" because the CHM purchase order was "all made up," given the prosecutors always knew that "Signalife contracted to sell 180 units of the Fidelity 100 to Tribou and that Tribou sent Signalife a check for $50,000 as a deposit" under the CHM purchase order. (GB:43.)

Second, the prosecutors' own files demonstrate that this new theory – that the purchase order never happened because CHM was unknown to Tribou – is unfounded. Record Excerpt 312-1:59-61[5] is a copy of the CHM purchase order Tribou produced to the SEC. This version of the purchase order is identical to GX64, but it contains a facsimile legend ("Sep. 20 07 2:30 p.m. INTERIOR MOTIVES 503-620-2191 p. 1" (RE312-1:61)), which establishes that at the time Tribou signed the CHM purchase order (September 2007), he knew of and was in fact "G.P." of

[5] Discovered by the Defense after trial. (DE312-1:2,¶18.) (*See*, Appellant's Supplemental Appendix.)

"Cardiac Hospital Management." During the investigation, Tribou confirmed that "Interior Motives" is owned by his ex-accountant's wife and that RE312-1:61 was in his possession right after he executed it. (RE312-1:6 (Tribou "took [the purchase order] to … the accountant [who] sent it back to [Tribou]").) Tribou even confirmed that he performed under the purchase order (RE312-1:7 ("salespeople [performed]")).

Tribou reasoned in a pre-trial interview with the prosecutors that "Cardiac Hospital Management . . . was something Harmison suggested as a name" under this purchase order.[6] (DE337-2:4.) Harmison, who personally had prior business dealings with Tribou (DE260-6:5-6;DE246:219;DE337-2:1), explained to the SEC that the devices would be delivered to "a subunit of [Tribou's company] TZ Medical because [Tribou] wanted to keep things separate from ... his company" (DE312-1:65;DE312:24,fn.34), which further shows that Tribou was fully aware that the purchase order would not be under his personal name. Coupled with Tribou's SEC testimony (RE312-1:10-11), it also strongly suggests that Harmison was in charge

[6] This interview memorandum was discovered and added to the record after the trial. (DE337;DE339.)

of the purchase order transactions[7] (DE312-1:65-68;DE260-6:14-15,11,12,1-2;DE312-1:27-28;DE241:186 ("[Pickard] presume[d] [Stein] had gotten knowledge from Dr. Harmison with regard to purchase orders")), which corroborates Signalife's disclosures to the public (GX93:22[DE453-16:22];DX412:73[DE464-19:73]) as well as Stein's SEC testimony (*see*, p. 30, *infra*), and more importantly, further contradicts the story told by Carter and the prosecutors at trial.[8] (DE244:108,112;DE248:34,46-47.)

Consequently, the Government's allegations that the name CHM "was not known to [Tribou]," that "Tribou was not CHM" and that "CHM never submitted a purchase order" (GB:43-44) are baseless.

4. Stein's Trial Decisions Were Justified

The Government contends Stein is not entitled to relief based on his failure to call Tribou (GB:40-41), but it does not cite to any case relieving the prosecutors of

[7] Jones' testimony that Stein was in control is belied by her admission that she went to Harmison for approval of everything she did. (DE241:97-98; DX194[DE452-38] ("Not one penny goes out without my approval.").) She said Harmison "wanted things done right" (DE241:98), which did not surprise her because "[h]e was the president." (DE241:101;DE241:98;DE240:187 ("strong personality").)

[8] When Harmison was shown the change-of-address letter the Government now suggests was the actual "elaborate scheme" Stein purportedly concocted "after Signalife could not ship any product to Tribou" (GB:43), Harmison explained "Tribou ... was trying to establish an external international linkage." (DE312:24,fn.34;DE312-1:68.)

their burden to correct misstatements. In his opening brief, Stein cited to controlling law in this Circuit to the effect that this burden never shifts and that factual misrepresentations in closing argument tip the scales toward reversal. (AOB:29-30.) Moreover, the truth is that Stein consistently asked that Tribou be called, but was repeatedly deterred. After Stein's first attempt to call Tribou, the district judge responded:

> THE COURT: "He's on your witness list, isn't he, or is he on the Government's witness list? I'm sorry. I apologize. He's not on your witness list; the Government's witness list. … All right. Anyway, where are we now? I'm sustaining the objection to the admission of 410, 411 [the check and Signalife email transmission of it]."

(DE247:38.)

Stein *again* "asked that Mr. Tribou be called" (DE247:42), but the district court only addressed Stein's alternative suggestion of re-calling Woodbury to authenticate Tribou's check. When the prosecutors indicated they would object to admitting the check through Woodbury (DE247:46-47), and the district judge indicated he was "trying to avoid delaying" (DE247:50), he asked the prosecutors to privately telephone Tribou to "verify" the check's authenticity and "let … Stein establish what he wants to establish." (DE247:50-51.) After they telephoned Tribou, the prosecutors stated that Tribou was "skeptical that that could be his handwriting with this [purchase order number on the check]," and they therefore were not "in a position to stipulate" to its authenticity. (DE247:54.) When Stein responded that

the check was obviously executed by Tribou's wife[9] (DE247;RE264-4:2) the judge inquired: "[D]id you ask him … whether his wife may have put that legend on there?" The prosecutor dismissed the suggestion. (DE247:57.)

Stein ultimately settled on the stipulation that "Tribou paid Signalife $50,000 for goods he expected to receive" (DE452-122[DX418]), which was a reasonable trial decision under the circumstances that neither invited nor justified the prosecutors' false statements in summation.

5. Improprieties Excused Failure To Object

The Government alleges its prosecutors' misstatements are subject to plain error review for the reason that Stein failed to object during closing arguments. (GB:36.) But prior to closing, the prosecutors announced: "The way we play ball, … we don't like to object during closing arguments" (DE247:160), and Stein adopted the same decorum. Further, Stein was acting as his own counsel, and thus faced a heightened form of the dilemma that objecting may have "serve[d] to draw … unnecessary attention to the [prosecutor's] prejudicial-albeit improper-conduct." *United States v. Wilson*, 149 F.3d 1298, 1302 fn. 5 (11th Cir. 1998). The circumstances further suggest the prosecutors' conduct may have been an attempt to

[9] Thus the prosecutor's comment about "his handwriting" appears disingenuous.

goad Stein into objecting. *Cf., Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S. Ct. 2083, 2089 (1982).

Moreover, "'continued improprieties on the part of the prosecution may, in some circumstances, excuse the defense of its duty to object.'" *Wilson*, 149 F.3d at 1302 at n. 5. (citation omitted); *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979) ("'if you throw a skunk into the jury box, you can't instruct the jury not to smell it'") (citation omitted); *Ginsberg v. United States*, 257 F.2d 950, 955 (5th Cir. 1958) (reversing conviction for improper argument despite failure to object).

Lastly, this case should be reversed on the basis of cumulative error without proceeding to the plain error inquiry. *See, e.g., United States v. Hands*, 184 F.3d 1322, 1334-35 (11th Cir.) corrected, 194 F.3d 1186 (11th Cir. 1999) ("[w]e do not proceed to the [plain error] inquiry, … because we assess not the prosecutorial misconduct alone, but the combined impact of the errors on the verdict"). *See*, section I.F *infra*. And regardless of what standard is used, the conviction should be reversed. *See, e.g., Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994) (reversing under plain error analysis); *United States v. Foster*, No. 14-10437, 2015 WL 5294823, at *5 (11th Cir. Sept. 11, 2015) (same); *Garza*, 608 F.2d at 666 (5th Cir. 1979) (same).

B. Other Misstatements

The Government suggests that Jones and Woodbury did not perjure themselves because they may have "simply forg[otten] that they received [the

check].” (GB:52.) This misses the point. The prosecutors should have corrected the false testimony. The Government never denies that Jones’ testimony that she called the purchase orders “phantom” because she never received “any backup or anything”[10] (DE241:117;AOB:31) and Woodbury’s testimony that he received no “independent information” (DE240:96) were factually untrue, and the prosecutors knew it. (GB:51-52.) Accordingly, the prosecutors should have corrected the record instead of exploiting its falsity in summation. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177 (1959). Furthermore, the prosecutors’ failure to correct violates *Giglio* regardless of whether such misstatements resulted from confusion or mistake. *See, United States v. Brown*, No. 12-15206, 2013 WL 1760581, at *3 (11th Cir. Apr. 24, 2013) (applying different standards to “presentation of perjured testimony” (“willful intent to provide false testimony”) and prosecutor’s “failure to correct … false statement” (“could have” standard)).

[10] It took the prosecutors three attempts to adduce this testimony. (DE241:116.) More importantly, the Government’s argument is disingenuous, because even if Jones had forgotten about the Tribou check at trial, a faulty memory could not explain how Jones – *at the time she received the back-up* – could have called the purchase orders “phantom” for the reason that she “never received any backup.”

C. Suppressing The SEC Database Was Wrongful

1. Suppressing Nearly 200 Million Relevant Files Violated Rule 16

In its expanded brief, the Government does not address Fed. R. Crim. P. 16 or that the magistrate's order (DE63) directed it to produce the requested information "within the scope of Rule 16 and *Brady*." (DE63:2.) The prosecutors' conduct in effectively secreting nearly 200 million SEC files – some 99% of the universe of documents – is unprecedented and indefensible. The Government conflates its Rule 16 obligations with the *Brady* requirement that it search and produce favorable evidence. (GB:55-57.) By its terms, the magistrate's order purported to relieve the Government of the obligation to search for "*Brady* material in the sole possession of the SEC and unknown to the Department of Justice." (*Id*.) (DE63:2.) But relieving a prosecutor of his obligation to produce "*Brady* material" does not relieve him of the obligation to produce documents under Rule 16.[11] Indeed, Rule 16 has a different scope, requiring the government to produce information in response to a specific request that is *relevant* to the defense, though not necessarily exculpatory. *See, United States v. Jordan*, 316 F.3d 1215, 1250 (11th Cir. 2003).

As stated in Stein's opening brief (AOB:34-35), the Government cannot cite

[11] *See, United States v. Bagley*, 473 U.S. 667, 674, 105 S. Ct. 3375, 3379 (1985) (*Brady* "requires disclosure *only* of evidence that is both favorable [and material]") (emphasis added).

to a single case sanctioning the result it engineered here, in which the prosecuting agency received most of its files from a cooperating agency that conducted *all* of the investigatory depositions and served numerous investigatory subpoenas, yet the prosecutors were absolved of any obligations under Rule 16 or *Brady* as to the remaining 99% of files in the cooperating agency's hands – a result which has allowed both agencies to now feign ignorance over the facts and evidence in their cases. *See*, Ex. 1 to RJN filed herewith, at 15 – SEC counsel stating at summary judgment hearing that the SEC just "make[s] allegations" without knowing "what the truth is." *See also*, GB:54,56 – "possession of 'Exhibit X' should not be imputed to DOJ" because "'Exhibit X' was not part of [DOJ's access request]."

The Government's claim that it is "illogical" to think it should have produced what is in the SEC database because it "belonged to the SEC, not DOJ, and it was not within the DOJ's authority to grant access to a database it did not possess or control" (GB:57) is absurd. It is unjustifiable for the Government to say it is unable to access documents from the SEC after admitting to have accessed those documents earlier in the prosecution. The scope of the Government's discovery obligations extended to each of Stein's specific requests, and the magistrate's order expressly directed the Government to produce all requested categories of information regardless of whether the DOJ had custody or control over them. (DE63:2.) It has

long been settled law in this Circuit that Rule 16 obligations extend to relevant documents in the possession of a cooperating agency other than the prosecuting agency. *Jordan*, 316 F.3d at 1249 (11th Cir. 2003) ("Rule 16(a) ... applies to ... materials in the hands of a governmental investigatory agency closely connected to the prosecutor"); *United States v. Scruggs*, 583 F.2d 238, 242 (5th Cir. 1978) ("government [not] excused from … [Rule 16] obligation by the fact that the documents were in the possession of the FBI prior to trial"); *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977) (same). As stated in *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (citation omitted):

> "[The rules of] criminal discovery indicate the need for disclosure of important information . . . in order to promote the fair administration of justice." … "[I]f disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States government. This we decline to do."

2. *Brady* Violations

a. Obligation To Search Database

The Government's explanation for its failure to search the SEC database for *Brady* material – such as Exhibit X – is that the SEC was not a part of the prosecution

team. (GB:57.)[12] Notably, the Government's brief does not even deny that – in truth and in fact – the SEC substantially assisted the DOJ in the prosecution and that the DOJ accessed the SEC database to obtain most of its case files. Rather, the Government says its admissions and press releases are not enough to show the two agencies were part of the same prosecution team. This position is confuted by the findings of district courts that have considered the issue. *See, United States v. Causey* (Skilling, Lay), 356 F. Supp. 2d 681, 691 (S.D. Texas 2005) (prosecutor access to SEC files and "press releases" sufficient to show prosecution team); *United States v. Cerna*, 633 F. Supp. 2d 1053, 1059-60 (N.D. Cal. 2009) (government access to files of ICE, DEA, FBI and ATF and DOJ "press releases" sufficient to require prosecutor to search those agencies' files for *Brady* material).

The Government admits that the prosecution team determination is "fact-specific" (GB:55), but the district court had no facts from which to find that the DOJ's admissions of involvement and access are anything other than the truth. The prosecutors consistently opposed any evidentiary hearing where they could try to

[12] Below, the Government argued that the magistrate's order relieved it of the obligation to search the SEC database for *Brady* material, but it abandoned that argument on appeal, presumably because *Brady* is a self-executing constitutional duty which cannot be curtailed by court order (*see, United States v. Garrett*, 238 F.3d 293, 302 (5th Cir. 2000) (Fish, J., concurring) (*Brady* is self-executing); *United States v. W. R. Grace*, 401 F. Supp. 2d 1069, 1080 (D. Mont. 2005) ("prosecution's constitutional duty under *Brady* is self-executing, and cannot be enlarged or curtailed by court order")), and because the record changed after the magistrate's order. (AOB:34,45-46;DE146:41;DE305-1:4.)

explain how the SEC's substantial assistance did not happen, or why their "access request" somehow excluded information on Yossi Keret – the very name the district court found is "connected to the wires upon which Defendant's convictions on Counts Six and Seven of the indictment are based." (DE388:1;DE298-1:28-29;DE318:18-19;DE362:12-13;DE335:15 ("evidentiary hearing [would] be a colossal waste of … time").)

Thus, the "facts of this case" (DE362:7) are those of record: The SEC substantially assisted the DOJ, in fact, led the investigative effort in compiling a 200-million-file database, which the DOJ then accessed in compiling its own small subset database that is "almost exclusively comprised of information obtained from the Securities and Exchange Commission." (DE46-1:2;DE146:41;DE305-1:4.) In these circumstances, the circuit courts are clear that the SEC was a part of the prosecution team. *See, United States v. Naranjo*, 634 F.3d 1198, 1212 (11th Cir. 2011) (disclosure obligation when agencies significantly "*pooled their investigative energies*") (emphasis added; citation omitted); *Owen v. Sec'y for Dep't of Corr.*, 568 F.3d 894, 921 (11th Cir. 2009) (same); *United States v. Risha*, 445 F.3d 298, 305 (3rd Cir. 2006) ("close working relationship" between agencies sufficient to find prosecution team); *Auten*, 632 F.2d at 481 (finding suppression of "available information," because the prosecutor *chose not to seek* the information although he *knew how to acquire it*); *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979)

(relevant factors include the "spirit of cooperation" between the agencies); *United States v. Deutsch*, 475 F.2d 55, 57 (5th Cir. 1973) ("there is no suggestion in *Brady* that different 'arms' of the government … are severable entities"); *United States v. Wilson*, 237 F.3d 827, 832 (7th Cir. 2001) (knowledge of evidence imputed if agency is "part of the team that investigated [the] case or participated in its prosecution") (citation omitted); *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) ("[i]nformation possessed by other branches of the federal government, including investigating officers, … typically imputed to prosecutors [under] *Brady*"); *cf.*, *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989) ("prosecutor … deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the … investigation").[13]

b. Materiality

The Government never addresses the materiality of Exhibit X other than in footnote 28 of its brief, where it says that Exhibit X "does not make it any more likely" that the Yossi Keret on Exhibit X is one and the same as the Yossi Keret who signed the purchase order documents Carter fabricated. (GB:58.) The Government misses the importance of the other information on the face of Exhibit X showing that

[13] The prosecutors also violated their own policy manual. (DE305-1:37-40 ("obligation of federal prosecutors to seek all exculpatory and impeachment information from all … law enforcement officers *participating* in the investigation and prosecution") (emphasis added).)

the SEC placed the document into its investigative file on 2/23/2010. (RE355-1.) The fact that "[e]vidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial" (*United States v. Agurs*, 427 U.S. 97, 111, 96 S. Ct. 2392, 2401 (1976)), because of the use a defendant can make of it. In *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1353 (11th Cir. 2011), this Court explained that

> "courts should consider how the defense's knowledge of the withheld information would have impacted not just the evidence presented at trial, but also the strategies, tactics, and defenses that the defense could have developed and presented to the trier of fact."

See also, Kyles v. Whitley, 514 U.S. 419, 420, 115 S. Ct. 1555, 1559 (1995) (evidence creating "opportunities to attack … the thoroughness and even the good faith of the investigation …" is material).

Had the jury known about Exhibit X, it would have impugned not only the veracity of Carter's testimony that Stein invented Keret's name, "but the character of the entire investigation." *Guzman*, 663 F.3d at 1353. Had the jury known the truth, it might have reasonably considered that Carter was honest in telling the SEC about his intentions to assist Harmison with the reseller network (RE312-1:26-29) and that his trial testimony was proffered as a means to appease the Government. The existence of Exhibit X obviously contradicts the Government's representation that "there [is] no Yossi Keret." (DE248:28,34.) It also reveals that the investigation into

Keret either came to a full-stop after learning on February 23, 2010 that he exists and was an executive at an Israeli biotech company, or it suggests the presence of additional investigative files about Keret have not been turned over. The fact that Carter told the prosecutors before trial that *he* invented the name at the core of Counts Six and Seven of the indictment (Yossi Keret) made all additional information about Keret that was available to them vital to Stein's defense. (DE337-1:1 ("'Yosi Kenet' is a name Carter made-up (sic)");DE244:108,112;DE388:1.) It was wrongful for the prosecutors to allow Carter to testify obliquely that Stein "made up all these names" (DE244:108:112) and then expand that testimony in summation into knowingly untruthful assertions. *See, Davis*, 36 F.3d at 1548 (11th Cir. 1994) ("[l]ittle time and no discussion is necessary to conclude that it is improper for a prosecutor to use misstatements and falsehoods").

D. Suppression Of The Mijares Letter

1. Violation of Court Order, Rule 16 and *Brady*

The Government does not address its duty to separately produce the Mijares change-of-address letter ("letter") (RE305-1:9) pursuant to the magistrate's order (DE63) following Defense counsel's specific request for such material (DE41-1:17) or its independent duty to do so.

By way of additional background, among the specific pre-trial discovery requests made by Defense counsel was "evidence of the involvement of … friends

and relatives of [alleged co-conspirators] in the wrongdoing the government alleges." (DE41-1:17.) Defense counsel also requested that the Government disclose if such evidence does not exist. (DE41-3:8.) After the Government refused to produce the information, the magistrate granted Stein's motion as to the

> "categories of material, which the government asserts it *has turned over*, intends to turn over, is *not* within its custody or control, or is not *Brady* material"

(DE63:2; emphasis added), and only denied the motion as to exculpatory information "in the *sole* custody of the SEC, and which the DOJ *is unaware of*." (*Id*.; emphasis added.)

Despite the order, the prosecutors never produced these specific categories of documents which encompassed, for example, the Mijares letter, Carter's confidentiality agreement with Cohen, evidence relating to Yossi Keret and information regarding documents lost, destroyed, or not preserved by the Government or its witnesses.[14] (DE41-1;DE41:1-3;DE47:7;AOB:35,39,41.) Importantly, the Supreme Court has repeatedly held that failure by the government to respond to a specific request is "seldom, if ever, excusable." *Agurs*, 427 U.S. at 106, 96 S. Ct. at 2399; *Bagley*, 473 U.S. at 690, 105 S. Ct. at 3387 ("[w]henever the

[14] The fact that the *unsearchable* Mijares and Cohen files were generally contained within the over two million files they produced (GB:60), does not excuse the violation. Indeed, the magistrate's order specifically included "categories of material, which the government asserts it has turned over." (DE63:2.)

Government fails, in response to a request, to disclose impeachment evidence relating to the credibility of its key witnesses, the truth-finding process of trial is necessarily thrown askew").

2. Materiality

The Mijares letter was critical to Stein's defense, because it makes it plausible the "conspiracy alleged did not depend on or involve Mr. Stein" and "supplies a motivation for individuals to testify in line with the government's expectations." (DE41-3:8.) The suppression of the letter was especially prejudicial to Stein given that the Defense explained *prior to trial* that it was specifically relying on this kind of material evidence in rebutting the Government's case. *See*, *Kyles*, 514 U.S. at 429, S. Ct. at 1563 (when the government suppresses *Brady* material, "its case [i]s much stronger, and the defense much weaker, than the full facts would … suggest[]").

Antonio Mijares is not a "made up" person but Carter's relative. (GB:59.) The Government concedes that Carter admitted he tried to "find someone in Asia … to purchase products" in an effort to "impress Stein with his purported contacts in Asia." (*Id*.) Carter's testimony that his efforts were unsuccessful does not discount the materiality of the Mijares letter; to the contrary, it shows a motive by Carter to conceal his lack of success. The Government does not allege Stein knew about the letter or directed Carter to use his uncle-in-law's name on any document. The Mijares letter raises questions about the Government's case that the jury would have

undoubtedly considered, such as the prospect that Carter acted alone and reached out to his contacts – real people like Mijares, Cohen and Keret – because Carter "wanted to make money" (DE244:109 ("it was greed")) and that, in order to cover his tracks, Carter fabricated the documents and then repeatedly presented inconsistent stories.

Carter's testimony about Mijares does not make the Mijares evidence cumulative impeachment evidence. (GB:61.) Cumulative evidence is "[a]dditional evidence of the same character as existing evidence … that supports a fact established by the existing evidence." (*Black's Law Dictionary*, 7th ed., p. 577.) The Mijares letter is anything but evidence of the same character and does *not* corroborate Carter's testimony that "Mijares was a person he knew … but … never had any contact with Signalife" (GB:59-60), but actually supports an entirely different chain of events: Not that Stein gave Carter names for purchase order documents, but that Carter took it upon himself to prepare documents using his contacts to impress Harmison in his efforts to expand the reseller network. *See also*, RE312-1:26-29 (Carter discussing reseller network)). The Government's case depended on Carter's testimony, and all impeachment of Carter's stories would have been essential to the jury's evaluation of the evidence. *See, generally, United States v. Giglio*, 405 U.S. 150, 92 S. Ct. 763 (1972); *United States v. Svete*, 521 F.3d 1302, 1315 (11th Cir. 2009).

3. Mijares Letter Could Not Have Been Found By Reasonable Diligence

The Government never denied that the Mijares letter could not have been located through a keyword search, but argues instead that its prosecutors made offers of assistance. (GB:60-61.) Actually, the prosecutors refused to assist and alleged that material regarding Carter's relatives and friends sought "information well beyond the scope of the government's discovery obligations" and that all important information was included in "a set of hot documents." (DE41-2:5.)[15]

Further, no index (e.g., DE46-1:1-8) or software could have uncovered the letter. Many of the over two million PDF and TXT files within more than 4,000 folders (RE264-14:2,¶10;DE308:6,fn11) are in searchable format within the DOJ database (DE305-1:1,¶4;DE46:3). Because the name "Antonio Mijares" at the very bottom of the PDF version was partially cut off (RE305-1:9), the name was not decipherable during the Government's conversion to searchable format, and *does not appear* in the corresponding (searchable) TXT file produced by the Government (DE305-1:8). As a result, a keyword search for "Antonio Mijares" does not pull up this document within the database, regardless of which software is used. (DE305-1:11;DE305-1:1,¶4.) Accordingly, had the Defense relied on the "document management software" and "index," as the Government suggests (GB:60), the

[15] The suppressed Mijares, Cohen and Keret evidence was not included in any "hot" documents.

Defense would have never found the Mijares letter. Remarkably, the letter (Bates-stamped "DOJ-Carter_000008") was discovered in a folder named "120131" – not in a Carter-related folder (DE264-9:2;DE312-1:1,¶10; DE308:6;fn11).[16] Critically, the version of GX300 in the prosecutors' file contains eight pages (DOJ-Carter_000001 through DOJ-Carter_000008 (RE279-2;DE260-4)), but the version of GX300 introduced at trial somehow failed to include the eighth page – the Mijares letter. Thus, in order to assure its discovery, the Defense would have had to review each of the millions of pages within the database from top to bottom, even if it had already seen a copy of that file (i.e., the Carter-produced purchase order). Considering the circumstances and authorities, the prosecutors' treatment of the Mijares letter smacks of bad faith.

E. Misconduct Not Excused Based On "Overwhelming Evidence"

1. District Court Made No Finding Of Overwhelming Evidence

The Government argues the misconduct is excused because it claims this is a case of overwhelming evidence. (GB:47-49.) The district judge was confronted with this identical argument (DE298-1:1,5,13,29;DE318:20;DE362:9,10,13), but refused to adopt it (DE340;DE388). To assure there was no ambiguity with respect to the

[16] The declarations of Stein's paralegal laying out these post-trial discoveries (DE260-1;RE264-14;DE280;DE305-1;DE312-1;DE322-1;DE355-2) have never been addressed by the Government.

district court's findings, Stein moved for an explanatory record (DE359;DE365), arguing that

> "this Court has admonished district courts that their orders should contain sufficient explanations of their rulings so as to provide this Court with an opportunity to engage in meaningful appellate review."

Danley v. Allen, 480 F.3d 1090, 1091 (11th Cir. 2007). *See also*, *Bailey v. United States*, 307 Fed. Appx. 401, 402 (11th Cir. 2009) (applying rule to motion for new trial). Paradoxically, the Government opposed the motion. (DE362:13-14.) Stein pointed out that a reasoned decision could merely entail the district court "incorporating a parties' arguments as to the basis and explanation for its ruling" (DE359:1;DE365:2,fn.1), such as the Government's overwhelming evidence argument. *United States v. Valencia-Trujillo*, 462 Fed. Appx. 894, 897 (11th Cir. 2012). Nevertheless, the district judge never found that the trial evidence was overwhelming.[17] (DE388.) *Cf.*, *United States v. Caro*, 589 Fed. Appx. 449, 455 (11th Cir. 2014) (deferring to trial judge's findings on overwhelming evidence).

2. The Record Does Not Independently Support It

An independent review of the evidence also shows that the Government did not present an overwhelming case. Typically, a claim of overwhelming evidence

[17] In ruling on Stein's first motion under Fed. R. Crim. P. 29, the district judge actually found that "the evidence is conflicting." (DE247:102.)

involves trial allegations that the defendant either admitted or did not seriously controvert. *See, e.g.*, *Brown*, No. 12-15206, 2013 WL 1760581, at * 2 (because of recordings in which defendants "repeatedly and clearly implicate[d] themselves in their conspiracy," trial court found evidence overwhelming and this Court concurred); *United States v. Hogan*, 240 Fed. Appx. 324, 329 (11th Cir. 2007) (evidence overwhelming largely because defendant *admitted* he lied to investors and then to the grand jury). In contrast, this case involves a vigorous dispute regarding each of the Government's claims, many of which are controverted even by the testimony and evidence presented by the prosecutors. Moreover, contrary to the Government's claims (GB:23-24), a review of Stein's SEC testimony reveals no such inculpatory admissions. For example, the Government alleges Stein feigned ignorance about CHM when, in reality, Stein's testimony – expressing his understanding of the relationship between the purchase orders and the Signalife-sponsored reseller program – was neither inculpatory nor inaccurate.

> "From talking to Dr. Harmison, [the purchase orders are] all related to Innet or Tom Tribou…. [T]here is definitely a link between units distribution, final Harmison end users and Tom Tribou. …My best estimate from the meeting I had with [Tribou was that he] was a distributor. [They] had the name, they were distributors, customer service, salespeople, trainers.… [I]t is a best estimate … that Tom Tribou was involved in distribution with Harmison. … [T]here would have to be a reseller there working with them…."

(GX217:411[DE468-2:44];GX219:518-520,528,533-534[DE468-3:13,15,17].)

And, Stein's SEC testimony was not otherwise inaccurate: Stein said he was uninvolved with public filings and Government witnesses Pickard and Jones confirmed as much at trial (DE241:176-177,73-75); Stein's testimony that he "was not getting paid" was merely a referential comparison to the millions of dollars received by Company staff[18] (GX216:106-107[DE468-1:106-107] ("one lawyer got paid $8 million, and I did all of his work") versus the small sum Stein received as "a lawyer getting paid" (GX220:844[DE468-4:31]), while Stein invested millions of his own money into Signalife (*see*, section III.A.4, *infra*); and there is no evidence that Stein knew Keret, Nony or Muscillo. (GB:23,24;DE337-1:1;GX219:225,549 [DE468-3:14,21];GX220:921,926,938[DE468-4:50,51,54].)

In actuality, the Government's case hinged on Carter's trial testimony (its brief cites to it some 85 times), however, on cross-examination Carter contradicted himself and was unable to answer some 71 questions on the basis he did not recall the events (DE244:132-178,181-233;DE245:4-124), e.g., whether he designed a snap-cable for Signalife, supervised Advantage Medical, discussed the reseller network with Signalife board members, or even what he had testified about an hour

[18] For example, Signalife employees regularly liquidated millions of S-8 shares to pay their salaries. (DE242:76;DX334;DE241:79-80 (e.g., securities counsel Woodbury earned over $80,000 per quarter); DE241:32 (executive assistant Jones earned a $125,000 salary in 2007).)

ago. (DE244:191,207;DE245:80.) In contrast to his alleged incapability of performing services, Carter confessed to an extensive entrepreneurial and technological background. Carter owned successful food and electrical businesses. His family owned Lighthouse, Inc., which was the largest reseller of lighting equipment in the Midwest, the exclusive reseller of Casablanca Fans and "did all the lighting for the Smithsonian Institute." Carter's family also had generational expertise in repairing grandfather clocks and his father invented the air-compressed staple-gun. Carter admitted a lawyer for whom he did clock repair may have assisted him in his Signalife dealings. Carter later claimed he was somehow "not sure" whether his electrical business was involved with Signalife. (DE244:229-230;DE245:6,8-9,15-21,23,124;DE244:170-171;DE245:18,22.)

Regarding the purchase order documents, Carter testified during the SEC investigation:

> CARTER: "… In 2008, [Harmison] wanted me to start to set up a network for distribution facilities, manufacturing facilities, distribution center, because we were going to have a lot of units being done. He told me anywhere between 50 and a hundred thousand units…. [Harmison] wanted me to start getting people that I knew for a reseller network, the distribution facilities. I knew a couple of companies, like I said. There was TZ Medical, there was Sarasota Hospital, … Baylor University, Davis Medical…."
>
> "Let me explain to you what a reseller does. A reseller gets the product. … Either they repackage it or they go to the end supplier who is going to be receiving it. They are going

> to make sure that they know how to set up everything for customer service...."
>
> Q: "And you had those contacts?"
>
> CARTER: "Yes, that was for my family business, absolutely."
>
> Q: "You had it as it pertains to medical devices."
>
> CARTER: "I had it as it pertained to anything. I had the network. That is what I had, was the network."[19]

He also professed to designing a snap-cable for Signalife:

> CARTER: "[T]here was the shielding. It was because they were getting too much artifact noise. So I developed what -- it is called a DB15 with gold pins that snap into the unit, and cables would work with that. I used the approved FDA facility…. But what I did is I developed a cable, the snap-in system, so this way they would get good continuity with it. … I designed it over there at Advantage Medical."

(RE312-1:26-29;DE245:121-123;DE244:190,215-216.)

Both Carter's inability to recollect critical events during trial and his supposed ability to memorize his SEC testimony comprising 350 transcript pages (GB:24 ("false [a]cross the board")) after he purportedly wrote notes "on a [restaurant] placemat" (*id*.) now appear suspect. Because the case revolved around Carter's inconsistent testimony, the Government's claim that "even if Carter testified falsely"

[19] During the investigation, Carter's long-time associate Timothy Cutter corroborated Carter's testimony about Carter's distribution network. (RE312-1:41 (Cutter admitting he was previously "part of … Carter's distribution network").)

at the trial, "the evidence overwhelmingly establishe[s] that [Stein] orchestrated" the alleged purchase order scheme (*id.*), is belied by the record.

And contrary to the Government's contention (GB:50,fn.26), Anand's testimony does not corroborate its prosecutors' trial theories but rather evidences a government case riddled with inconsistent and questionable theories. For example, the Government brief references two documents – GX94 and GX151 – as evidence that Anand fabricated documents regarding Signalife. (GB:23;DE242:214-216.) However, GX94 and GX151 are documents that Carter (not Anand) claimed to have fabricated. In fact, Anand testified that, on two different occasions, he sent to both Harmison and Stein documents that were "similar" to GX94 and GX151 using a name Stein allegedly gave him, "Yossi Keret," (GB:23;DE242:214-216;DE244:56-57,106-107), but neither Anand nor the Government ever produced these purported documents and no person testified to having received them. (AOB:19.) It is unclear why these documents do not exist anywhere in the record, why Stein would have asked Anand to send such documents if Carter allegedly sent similar documents or why the Government falsely reported the Anand story to the public. (AOB:19-20;DE243:30-31.)

The combined effect of Anand's and Carter's testimony is even less believable when viewed alongside certain other accounts and theories advanced by the Government and its witnesses. As its prosecutors did at trial, the Government brief

continues its attempt to create the false appearance that Stein invented names, identities and documents, now arguing that Stein told Anand to use the "alias" Sameer Gulati. (GB:17.) This allegation is specious. Sameer Gulati is a real person who was Anand's business partner. (DE243:31-32.) Even the stories about warehousing devices for an improper purpose – i.e., so that "Signalife … could realize revenue" (DE242:197,198) – are unreasonable given "Signalife always announced that it would never recognize revenue from merely shipping an item to a warehouse." (DE243:38-39;DX392[DE452-109];AOB:14,fn.3.) At their core, the trial testimony of these two key witnesses was inconsistent, unsubstantiated and perhaps best explained by the fact that they are both government cooperators and convicted perjurers who lied about "[m]any things." (DE242:160;AOB:17-18.)

In sum, while the Government's conflicting trial evidence may have been sufficient to convict Stein, it is certainly not enough to excuse the prosecutor and witness misconduct in this case. *See, e.g.*, *Kyles*, 514 U.S. at 434-35, 115 S. Ct. at 1566 ("[t]he possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict"); *Chapman v. California*, 386 U.S. 18, 52, 87 S. Ct. 824, 842 (1967) ("fact that sufficient evidence to support the conviction is present absent the tainted evidence [does not] preclude a reversal").

F. Cumulative Evaluation Under Brady And Giglio

Viewed in the aggregate, the errors in this case were significant and deprived Stein of a fair trial. The prosecutors first ignored the magistrate's order, suppressing the exculpatory and impeaching Mijares letter as well as removing nearly 200 million relevant files from the case, including Exhibit X. With the Defense hamstrung, the prosecutors proceeded to perpetuate oblique testimony and expand it in summation into specific assertions of wrongdoing they knew or should have known were false and misleading. For example, the Government now concedes it knew its witnesses received "some back-up" for one of the purchase orders (GB:53), yet it failed to correct their testimony that they "*never received* any back-up," (DE241:117;DE240:96 ("[no] independent information")) instead capitalizing on the falsehoods in summation and now rationalizing that the witnesses had memory problems. (DE248:40,34;GB:52.)

The prosecutors expanded on Carter's vague testimony about "all these [made up] names" (DE244:112) by arguing to the jury in closing and rebuttal closing what they knew to be untrue: That Stein invented the name Yossi Keret, that Tribou's name does not appear on the face of the CHM purchase order, that Tribou's $50,000 payment was unrelated to the purchase order, and that, accordingly, the CHM purchase order was "fake" and "all made up." Their cagey approach in eliciting this general testimony, and then expanding it in closing argument into knowingly

untruthful assertions, was violative of *Giglio*. *See, United States v. Barham*, 595 F.2d 231, 243 (5th Cir. 1979) (even where defense counsel is aware of the falsity, there may be a deprivation of due process if the prosecutor poses misleading questions to the witness); *see also, Brown*, 785 F.2d at 1464 ("government has a duty not to exploit false testimony by prosecutorial argument affirmatively urging to the jury the truth of what it knows to be false"). The prosecutors further conceded they never investigated Tribou's check (DE247:42), yet represented to the jury that the related CHM purchase order "never happened" based on Carter's testimony that CHM was made up. Yet that testimony was insidious in light of the Government's concessions that Tribou legitimately contracted to buy Signalife products and that the related down-payment happened, as well as its failure now to deny the authenticity of the Tribou check bearing the CHM purchase order number. Indeed, the prosecutors' own files reveal that Tribou possessed the purchase order bearing the name "Cardiac Hospital Management" (with the title "G.P.") right after he executed it in 2007.

Had the jury known any of these facts, the course of the trial would have been drastically altered. If the jury had been told that Carter and the prosecutors prevaricated the involvement of Carter's relatives, for example, or the extent of Carter's dealings in Netanya, Israel, or that Exhibit X had been placed into the SEC's files three years before the prosecutors told the jury Yossi Keret does not exist, there is a reasonable likelihood they "would … have been troubled" (*Kyles*, 514 U.S. at

443, 115 S. Ct. at 1570) and concluded they were being misinformed in other areas of the case. All these untruths bore not only on the credibility of the prosecutors and their witnesses, but on the accuracy and veracity of the entire case. Considering what we now know to be true, it would be indefensible to conclude there was no reasonable likelihood that these false statements "could not have affected the outcome of the case." *Guzman*, 663 F.3d at 1355. There is certainly a reasonable possibility that the foregoing errors "might have contributed to the conviction" and were thus not harmless. *Fahy v. State of Conn*., 375 U.S. 85, 86, 84 S. Ct. 229, 230 (1963); *United States v. Labarbera*, 581 F.2d 107, 110 (5th Cir. 1978) ("cumulative effect of the errors . . . convinces us . . . that the defendant did not receive the fair trial he is entitled to under the law."). Indeed, if advised about the cumulative misstatements and conduct of the prosecutors and their witnesses, the jury could "very well have brought in not-guilty verdicts." *Chapman*, 386 U.S. at 25-26, 87 S. Ct. at 829.

II. DISTRICT COURT'S ABUSE OF DISCRETION IN FAILING TO GRANT A NEW TRIAL, EVIDENTIARY HEARING OR DISCOVERY

The district court clearly erred by not evaluating the prosecutors' misstatements and failing to take into account evidence such as the Mijares letter and Carter-Cohen agreement, as well as by ignoring the suppression of the relevant documents from the SEC database.

The Government maintains the district court's decision was properly based on the prosecutors' "comprehensive and detailed" responses to the motions (GB:63), however, those responses were largely inapt. For example, the prosecutors argued that judicial review of *Giglio* claims is limited to considering "what to do about" violations "that have already been established" where the "government *conceded* that it acted improperly," and applying the *Giglio* "could have" standard would be an improper and "truncated" version of the correct *Giglio* analysis unless the prosecutors "*conceded* [they] acted improperly." (DE318:4-6; emphasis added.)[20] They cited no authority for the novel proposition that government admission of wrongdoing is required to establish a *Giglio* violation but instead erroneously represented that, in *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995) this Court did *not* "resolve … a dispute as to the falsity of evidence introduced at trial, which it most certainly did not." (DE318:7.)

The Defense then demonstrated that evaluating the truth or falsity of evidence is a critical consideration for the reviewing court and is a cornerstone of appellate review. *See*, DE322:5,6 (citing *Napue* (Supreme Court conducting its "own evaluation of the record" in considering false evidence claim); *Niemotko v.*

[20] For this reason, the Government consistently applied the "would have" standard in the district court without once applying the "could have" standard to any of Stein's claims (DE298-1:5,6,7,9,14,20,27,29; DE318:3,4,20;DE362:8,15), but it has abandoned this approach on appeal (GB:28,35,51,52 ("could have")).

Maryland, 340 U.S. 268, 271 (1951) (when considering constitutional claims, Supreme Court not bound by the conclusions of lower courts and "will re-examine the evidentiary basis on which those conclusions are founded"); *Brown*, 785 F.2d at 1464 (Eleventh Circuit reexamining evidentiary basis; making "diligent inquiry"). Nevertheless, the district court failed to conduct the required analysis, adopting instead the Government's limited comparison of the misstatements against "the record evidence developed" at trial and finding that the prosecutors had "[no] reason to believe that anything that was presented to the jury was not true" (DE388:2), when this finding is belied by the record and by the Government's arguments on appeal.

The Government proffered no new facts in the district court and maintains it did not need to file affidavits to rebut the facts asserted in the Defense's affidavits. (GB:63.) Basic hornbook law provides that the way for a party to rebut evidence in a law and motion proceeding starts with the submission of affidavits and declarations. Instructively, in *United States v. Duran*, 486 Fed. Appx. 768, 771 (11th Cir. 2012), a key witness testified falsely and this Court affirmed the denial of a motion for new trial and evidentiary hearing because "the government's affidavits and declarations submitted in response to the motion … demonstrated that the prosecutors were unaware [the testimony was false]." Analogously, the prosecutors here could not refute their own admissions and rebut the misstatements and other alleged misconduct by filing no affidavits even attempting to do so. And the

Government has never contested it is plausible the 200-million-file SEC database contains exculpatory or relevant evidence. For these reasons, it is respectfully submitted that regardless of this Court's rulings on the individual issues in this appeal, the discovery should be produced and the evidentiary hearing held prior to any further proceedings in the district court relating to liability or sentencing. (DE41;DE264;DE261;DE277;DE356.)

III. THE SENTENCE SHOULD BE VACATED

A. Procedural Error

1. Loss Enhancement Unsupportable

In his opening brief, Stein referred to U.S.S.G. Supp. 2 App. C, Amend. 617 (Nov. 1, 2001), requiring that the Government prove both but-for and proximate causation to establish "actual loss" under § 2B1.1. (AOB:48,62;DE395:3; DE428:229.) The Government ignores Amendment 617 entirely, but cites no authority rejecting it. (GB:78.)

Notably, the Government now admits for the first time that factual causation is required to establish loss under § 2B1.1. (GB:75.) This is a departure from the sentencing hearing, where the Government dissuaded the judge from evaluating causation. (E.g., DE428:206 ("the framework… used … in the Eleventh Circuit … for determining … loss … in a securities fraud case, … is the reasonable foreseeability analysis.") After Defense counsel asked the district court for the

"evidentiary basis" for "causation and reliance" (DE429:34) as well as the date of disclosure to the market "for purposes of causation" (DE429:35), the prosecutor interjected as follows:

> "… I think what counsel is attempting to do, and I understand the tactical approach here, is sort of reimpose the framework that I believe Your Honor is explicitly rejecting. *So, again, I don't believe there's a need to find a date of disclosure or, you know, any of the things that he's now asking Your Honor to find*."

(DE429:35; emphasis added.)

The prosecutors introduced no evidence of causation or reliance during the sentencing hearing. Indeed, the only witness the Government called at sentencing admitted he rendered "no opinion" on causation or reliance. (DE428:60.) The standard they presented was not whether the alleged offense conduct in fact caused an actual loss to 2,417 investors,[21] but whether it was reasonably foreseeable that an actual loss *would result*. (DE428:203.) Their quest on loss was to "find a number" (DE428:207) and, in so doing, they asked the judge to also *assume* causation, because, in their view, it was "hard to fathom" any other conclusion. (DE428:205.) And symbolically, even the September 20, 2007 start-date for the loss tabulation is suspect. According to the prosecutor, the date was "so significant" because it was "the *first* fake press release" (about the CHM purchase order). (DE248:211.) The

[21] Though the Government uses the number 2,415 (GB:69,87), the only victim list produced to Stein contains 2,417 names. (DE414-6.)

difficulty, of course, is that the Government now concedes that on September 20, 2007 (GX69) the purchase order was a binding contract (GB:43), and for that additional reason the foundation of the entire loss enhancement is unsound.

The Government argued that *United States v. Stanley*, 739 F.3d 633 (11th Cir. 2014) used "the very methodology that Mr. Melley testified to" at sentencing. (DE428:180;DE394:5,fn4;DE428:205,180;DE386:35;DE394:5;DE429:61.) However, the government in *Stanley* measured losses following the disclosure date (RE414-1:2;DE414:5;DE414-4:12), after analyzing reliance and causation and while instructing that "the typical question in securities cases is how much of the loss is attributable to fraud as opposed to other external factors" and that it is only "proper to attribute the entire trading losses to the fraud" "[when] the company had no value and the fraud itself drove all or most of the investment demand." (DE414:7;DE414-4:20-22 ("buyer's only" model works only on a "worthless stock in [a] worthless company").) Here, neither stock nor company were worthless – both were backed by life-saving, patented technologies still owned by the Company, and utilized by the National Institute of Health, Titan Systems and Teledyne, Inc. (DX323:7,23[DE452-75:7,23];DX412:60[DE464-19:60].)

Indeed, Signalife published 42 significant press releases surrounding the buyer's only time-frame, including announcements of Signalife's $100-million line

of credit, FDA-clearance and celebrity endorsements.[22] (RE414-5:7-12,15-17;DE414:12, fn7;DE428:223-224.) Thus, the prosecutor's statement at sentencing that the Signalife "stock [was] backed by sort of nothing" (DE428:205) is untrue. In fact, due to Signalife's historical achievements (RE387-6:2;DE414:12; DX323:7,23[DE452-75:7,23];DX412:60[DE464-19:60];DX79:16-19[DE452-12:16-19];DX78:14[DE452-10:14] (2005 10-KSB: "FDA ... clearance" in 2004);GX93:19[DE453-16:19] ("Frost & Sullivan ... awards ... in 2006 and 2008")), the average value of the Signalife stock prior to the purchase order period was significantly higher ($1.23 (DE428:36)) than the average price during the purchase order period (which would ordinarily be the inflationary period) ($0.75 (DE428:37)), and because the purchase orders could not have driven "all or most of the investment demand" given the stock started dropping only 15 days after the first press release

[22] Although once an emerging company, the development of Signalife has been undeniably impeded over the past seven years as a result of civil and criminal prosecutions based on inconsistent theories, arguments and proof. (*See*, RJN, Ex.1:22 (California district judge acknowledging inconsistencies at summary judgment hearing in parallel civil case: "[D]oes disregarding [the CHM purchase order] really work given the nature of the verdict?").)

(DE414:12;RE387-6:2), a proper application of *Stanley* would support a finding of no loss.[23]

The Government also references *United States v. Snyder*, 291 F.3d 1291 (11th Cir. 2002). (GB:75.) However, *Snyder* adhered to the requirement of establishing a logical link between disclosure and stock decline in finding that "[t]he stock fell dramatically after the fraud was announced" (*Snyder* at 1293), whereas in this case, the Government told the court it need not even find a date of disclosure (DE429:35) and now concedes that the "disclosure … may not have directly caused investor losses" (GB:77), thus essentially admitting it cannot satisfy Amendment 617. This case is more comparable to *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005), where most of the decline in stock price occurred before disclosure and thus "a substantial portion of the entire loss . . . could not have been caused by [defendant's conduct]"). *Id*. at 548.

The Government also states "there is sufficient evidence to demonstrate both reliance and causation of damage to the shareholders," summarily reasoning that "as a result of Stein's fraud, individuals were induced to purchase Signalife stock; in

[23] If the sentencing court were inclined to "carve out [the CHM purchase order]" (Ex. 1:22, RJN filed herewith) given the Government's concession that the purchase order was legitimately entered into by Tribou (GB:43), it would only further reinforce a finding of no loss as the stock began to drop between the two IT Healthcare press releases on October 5, 2007.
(DE414:12;GX72;GX76;RE387-6:2.)

other words, but for the misrepresentations, investors would not have purchased shares that later declined in value." (GB:77.) It then cites to *Burrage v. United States*, 134 S. Ct. 881, 888 (2014), which Stein referenced to substantiate that a term like "resulting from" requires at least a showing of but-for causation. (AOB:48.) The Government's reasoning misses the mark. First, its "but-for" rationale focuses only on reliance (investors were "induced" and "would not have purchased shares") without even considering but-for causation of stock decline. Further, in pronouncing that but for the fraud, the 2,417 investors would not have purchased the stock, the Government again simply presumes all of the market traders relied on the news about the purchase orders as opposed to the other 42 press releases or additional disseminated information during the period. (RE414-5;DE414:12,fn7; DE428:223-224;GX93:16-19[DE453-16:16-19].) Such a presumption wholly eliminates any analysis of reliance in a stock fraud scenario. The trading chart itself shows that all of the 2,417 investors could not have relied on the purchase order news, because that would have axiomatically caused the stock to incline, not decline. (DE414:13;RE423-1:10.)

The Government's unsupportable pronouncement is also silent on what actually caused the stock to decline, which is not surprising since its buyer's only period ends before the market could have possibly known of any problem with the

purchase orders.[24] (DE386:10;AOB:49,51;RE387-6:2.) Indeed, but for the rampant naked short-selling attacks, the 2008 financial crisis and concomitant nationwide panic-selling of stock (DE428:109 ("just get me out")), the Rubbermaid litigation and other such unrebutted Company and market-specific factors, the stock would likely not have dropped by 97%.

In actuality, the Government makes two fundamentally inconsistent presumptions: First, that positive news about the purchase orders induced all 2,417 investors to purchase their shares; but second, that the same positive news about the purchase orders somehow then caused those shares to decline during the same period. These theories are illogical. Simply put, the plain fact that all investors "purchased shares" is obviously not enough to establish reliance; similarly, the mere argument that the stock "later declined" is not enough to prove causation.

2. No Support For Government's Loss Position

a. No Circuit Court Has Disavowed Proximate Causation

The Government continues its attempt to concoct a split among the circuits on the issue of loss causation. (DE386:6 ("invites this Court to make new law in the

[24] For the same reason, the Government's assertion that the loss amount "actually was understated" because it did not account for shareholders who purchased shares earlier (GB:28) is untenable – first, because those traders obviously did not rely on something that did not yet occur; second, because their losses could not have been caused by something that did not yet occur.

Eleventh Circuit"); DE394:4 ("the Eleventh Circuit has clearly and repeatedly explained what is required in terms of proof of loss at a criminal sentencing, and it is not *at all* what the defendant claims") (emphasis added).) It contends there is no requirement of proximate causation (GB:78) and causation can be presumed, because "… this Court and several other courts of appeals have never made applicable to criminal cases principles of loss causation used in private securities fraud cases." (GB:75.) The Government references three cases that actually contradict these positions. For example, in *United States v. Berger*, 587 F.3d 1038 (9th Cir. 2009), the Ninth Circuit unambiguously stated that the "government must show but-for and proximate causation in establishing loss" in securities fraud sentencing cases. *Id*. at 1043 (citation omitted). The other two cases – *United States v. Poulsen*, 655 F.3d 492 (6th Cir. 2011) and *United States v. Georgiou*, 777 F.3d 125 (3d Cir. 2015) – are inapposite, because in both cases the enhancements were comprised, in whole or in large part, of losses to financial institutions who lent money directly to the defendants (or their companies) through the defendants' fraudulent scheme.[25]

[25] For example, Poulsen misappropriated some $3 billion advanced to his company through contracts with institutional investors, prompting the Sixth Circuit to state that *Dura* – a case not involving such misappropriation – "did not inform its discussion." *Poulsen*, 655 F.3d at 514.

The Government also claims these cases rejected application of *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 125 S. Ct. 1627 (2005), but *Dura* and its progeny are only a reference point of the common law fraud rule, which is analogous on the issue of securities fraud-on-the-market loss causation. (AOB:47-58; *see* p. 50: "well-established roots in the common law;" p. 52: reliance "arguably [cannot] be presumed.") *See, e.g., Meyer v. Greene*, 710 F.3d 1189, 119 (11th Cir. 2013) (citing *Dura*) (noting that "corrective disclosure" and reactive price drop "is the essence of loss causation"). As the Ninth Circuit noted in *Berger*, however, *Dura* would require the Government in a criminal sentencing matter to show that the investors suffered loss caused "exclusively" by the offense conduct. *Berger*, 587 F.3d, at 1044. Stein has never made this assertion. His objection has been that the Government did not even attempt to prove causation, nor could it have, because all of the market loss measured by the Government occurred before the only disclosure in this case that the Government claimed could have possibly "signaled to investors that anything was amiss regarding the [purchase orders]." (DE386:10). Thus, the Government has incidentally admitted that any loss in the buyer's only period *could not have been caused* by anything related to the purchase orders.

Ultimately, the *Berger* court reversed because the district "court's method appears to have assumed that defendant-caused shareholder loss existed, and only then purported to measure that loss." *Id*. at 1046. In this sense, the Ninth Circuit's

criticism of the district court's methodology in *Berger* is precisely the one Stein has advanced in this case, and thus *Berger* is antithetical to the Government's position, leaving the Government without factual or legal support for its loss theory.

Had the Government simply followed the reasoning of *Berger*, perhaps it would have eschewed the approach of submitting to the district court nothing but an arithmetic tabulation of 2,417 investors' trading records as the sole evidence underlying a loss enhancement that produced Stein's 17-year prison sentence. In the words of the *Berger* court, "[the Guidelines do] not obviate the requirement to show that actual, defendant-caused loss occurred." *Berger* at 1045.

Causation was further disproven based upon the additional factors at work in this case, such as the 2008 financial crisis, the illegal naked short-selling and the cancellation of the Rubbermaid contract. (AOB:50-58,63;RE387-7:2.) Furthermore, even the investors themselves rejected the notion that the stock's decline resulted from the purchase orders. On August 28, 2008, 13-days after the "buyer's only" period, a class of Signalife investors filed a lawsuit in which they complained about manufacturing problems – not fraudulent purchase orders. (DE387:23-24.) In that action, led by Mark Taylor (one of the Government's alleged victims) and Bryan Harris (the only investor who testified at trial), the certified class alleged not that the three purchase orders were "fake," but that Signalife "had no means to manufacture or market any kind of saleable model 100 ECG device," and "the Fidelity 100 was

not commercially ready for sale." (DE387:23.) However, these claims were specifically excluded by the Government in this case. (DE240:29 ("want to be clear that this is not a case about ... if that technology worked").) The foregoing reflects a concern about market-readiness of Signalife product in general – *not* that the purchase order never happened and was "false information [Stein] put into the marketplace." (DE248:34,36,37,42,46,47,49,50,51,52,121.) Underscoring this fact, Harris bought more Signalife stock after the August 15, 2008 disclosure. (DE428:236-237 ("200,000 shares").)

The Government's convoluted discussion of foreseeability, loss causation and *Dura* is a transparent attempt to deflect from its refusal to even attempt to establish but-for or proximate causation, let alone rebut the unique micro and macro-economic phenomena proven by Stein – with supporting charts, graphic analysis and other evidence – to have substantially caused the decline in stock price.

c. Post-Disclosure Period Does Not Support Any Loss Enhancement

Even though there was no "legally cognizable disclosure" in this case (AOB:55), the Government tries to justify its loss enhancement by saying the amount "could have been much larger because Signalife's stock price continued falling after August 15, 2008." (GB:74.) The argument is erroneous, and highlights the impact of the illegal naked-short selling. Subsequent to August 15, 2008, essentially all of the price decline was created by an increased level of illegal naked

short-selling (one billion shares in October, 2008 alone) (DE387:33-34;RE387-7:3), particularly by one unlawful trade in which an unknown seller sold 50% of the entire float – nearly 46 million shares – to an entity called "Uncle Mills Partners" at a 97.5% discount from the immediately preceding trades, dropping the stock price from $45.00 to $1.10 in a single trade. (DE260-3;DE387:26-29;RE387-7:3;DE387-8 (share amounts using pre-split numbers).) The prosecutors neither disputed the illegality of the trade nor its impact on the market, stating instead that "little … is known about the transaction." (DE396:6,fn.5.) Government witness Mark Nevdahl testified that this abrupt price drop could have happened only through illegal naked short-selling because "even … 30,000 shares could not be borrowed" following the reverse stock split. (DE242:136-137,95-96,144-145.) The courts have never allowed a finding of civil or criminal loss causation to be based upon a single trade more than 97% below the market price for half the issuer's stock, which is likely the reason the district court excluded the post-August-15-2008 period from its loss calculation.[26]

[26] Further, any post-August-15-2008 evaluation would have to exclude all the pre-August-15-2008 price-decline, because that loss was not caused by the alleged offense conduct. (DE387:24-33;AOB:58,fn.16,62-63,56-57;RE387-6:2;RE387-7:2.)

B. The Error Was Not Harmless

1. The Alleged Theft Cannot Support A Loss Enhancement

The Government next argues that this Court can alternatively look to the purported "theft" from Signalife to affirm the 17-year sentence. (GB:79-80.) This analysis is deeply flawed for a variety of reasons, beginning with the fact that it was rejected by the district judge who refused to use the alleged theft amount in his Guidelines loss calculation. (DE429:40.) Because a reviewing court "cannot assume without unambiguous indication to the contrary, that the sentence would be the same absent the error," *United States v. Feldman*, 647 F.3d 450, 460 (2nd Cir. 2011), and because the district court gave no such indication, the Court should reject the Government's theft analysis.

Of the alleged theft number ($6,691,229.76), the majority ($5,342,550.15) is comprised of money paid under purported conspiracies about three contracts unrelated to the purchase orders – one involving Ajay Anand and his company (Silve Group) and the other two involving Carter's consultation contract. (GB:79;DE386:15;DX9[DE452-3];GX43[DE453-6];GX110[DE453-18];DE244:61;DE245:159.) Stein vigorously contested the theft allegation, prompting the probation office to suggest that the Government introduce "additional" and "further" testimony on the issues. (Second Addendum to PSR, at pp. 6-8.) For example, Stein disputed the allegation that the Anand contract was a

sham, as well as the allegations that Stein "caused money to be wired to himself" or otherwise was involved in a conspiracy relating to Carter's agreements. (*Id*.) The Government never introduced testimony regarding these issues at sentencing despite having 19 months to prepare and despite the probation office's suggestion that it do so. (DE428:23-83.)

Moreover, there could be no sentencing accountability as to these contracts unless and until the district court first determined the scope of the criminal activity the parties agreed to jointly undertake regarding the contracts, because "[t]he scope of relevant conduct is not necessarily the same as the scope of the entire conspiracy or the same for" every defendant. *United States v. Walker*, 578 Fed. Appx. 812, 818 (11th Cir. 2014) (citing U.S.S.G. § 1B1.3 cmt. n. 2 (2011). This determination is also important inasmuch as the jury may have convicted Stein based on the evidence regarding the purchase orders and not based on these unrelated contracts. *See, generally*, *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189 (1970) (because criminal verdicts are general verdicts, it is usually difficult to determine the precise route of the jury's reasoning or the basis on which the verdict rests).

The requirements of "causation" and "actual loss" were critical, because these were service contracts lawfully executed and entered into by Signalife, significant services were performed and the Government introduced no evidence that Signalife, or any of its officers or directors, ever complained about them.

(DE242:230-238 (e.g., Silve's efforts to "develop clinical testing centers in India" under Harmison's supervision); DE243:23-24 (Anand confirming he was consultant for and investor in Signalife from 2003 – 2008) DE243:53-54,32,46-47 ("Silve … indicated to Signalife that it hoped to become a middleman to distribute [Signalife product]"); DE242:168-169; AOB:19 (Carter services); DX9[DE452-3];GX43[DE453-6];DX54[DE452-8].)

The proposed "theft" and "gain" figures were contrived differently. The Government's "theft" figure totals $6,691,229.76 and includes $2,156,000 that the Government says Carter received under his consulting agreement.[27] (GB:79;DE386:15.) At trial, the Government only introduced evidence of payments from Carter to Stein or Five Knights Partnership totaling $158,718. (DE246:16,19,22;GX120;GX341;GX339;GX255;GX256;GX254.) At trial, Postal inspector George Clark summarily testified to additional moneys without supporting bank records, and at sentencing Peter Melley did not testify about Carter. (DE246:24;GX258;DE428:46-52.) Particularly in view of Carter's admissions that before he entered into his consulting agreement he agreed to "help . . . with those cables, … with Signalife," and that after providing services he felt entitled to be paid

[27] Of this sum, $182,780 pertains to the Muscillo contract which the Government claims relates to the Carter conspiracy, but the Government does not dispute that services were performed under the Muscillo contract (GX110;DE245:159), and it never called Muscillo as a witness at trial or sentencing.

(DE244:14,217;DE245:6), an analysis of the scope of Stein's purported involvement with the contracts would be critical for sentencing purposes. Furthermore, Stein's reinvestment and related loss amounts – never contested by the Government – would, in any event, eliminate the proposed theft figure under the Guidelines. *See*, section III.A.4, *infra*.

The Government also includes in its alternative loss calculation Anand's gross earnings of $3,003,770.15. Because Anand testified to having performed significant services under his consulting agreement (DE242:230-238;DE243:23-24;DE243:53-54,32,46-47;DE242:168-169;GX43[DE453-6];DX54[DE452-8]), the $3,003,770.15 could not constitute a loss to Signalife, let alone a loss caused by Stein. (Second Addendum to PSR, at 8: "this issue remains unresolved").) Melley's hearsay testimony about "value of ... shares" was insufficient and unreliable to prove the contested PSR claims, indeed completely failed to address the objections. (DE428:46,48-49.) *See*, *United States v. Johnson*, 349 Fed. Appx. 387, 389 (11th Cir. 2009); *United States v. Reme*, 738 F.2d 1156, 1168-69 (11th Cir. 1984) (vacating sentence where unreliable hearsay evidence triggered sentence). The district court failed to make specific findings as to each contested issue. For these reasons alone, the alternative methods could not be used to affirm Stein's sentence. *United States v. Jone*s, 608 Fed. Appx. 822, 829-30 (11th Cir. 2015) (remanding for re-sentencing; stating "[w]e require strict adherence to the requirements of [Fed. R.

Crim. P. 32(i)(3)(B)]"). And even if the fees paid to Anand were found to be unearned, Signalife already evaluated the portion of payments it deemed unearned and Anand returned this portion to Signalife, thus precluding his remaining, unchallenged earnings from being considered a loss to Signalife. (DE243:50.)

With respect to the Credit Suisse shares, the Government introduced no evidence whatsoever at trial and then never even attempted to establish a nexus between the shares and any purported offense conduct. The Government does not deny that Stein received no proceeds from the shares, and that the shares were never sold. To the contrary, the Government didn't "care about any aspect of that" transaction except that they were "things of value … received by … Stein." (DE248:261,14;DE262:4-5.)

Finally, the Government failed to show that the $160,679.61 Signalife paid to Stein (GB:25,67) was not rightfully earned by him. The record shows Stein provided significant services as "*de facto* general counsel" (DE240:54) which included handling all of Signalife's litigation (DE240:204 ("[Stein] handled the litigation for the company"), such as the successful resolution of the Rubbermaid litigation in which Signalife was permitted to retain $1,920,000 out of the $2,000,000 it received from Rubbermaid. (DE240:201-204;AOB:9.)

Thus, the evidence does not support the Government's theory of alternative theft loss.

3. The Government's Gain Analysis Is Baseless

a. There Is No Causation

The Government suggests the forfeiture amount could alternatively affirm Stein's sentence. (GB:4,67.) This analysis is without merit, because the Government never showed that the numbers correspond to an actual or intended loss or otherwise resulted from the alleged offense conduct. (AOB:62-63.) Instead, the Government relied on the Clark declaration (DE252-1) and the Melley testimony (DE428:46-52) without attempting to establish a causal link between the forfeiture amounts and the alleged offense conduct or analyze the scope of the alleged conspiracy. *See*, U.S.S.G. § 2B1.1 n.3(B) (2014) ("gain that resulted from"); *Burrage*, 134 S. Ct. at 888 (term "resulted from" requires but-for causation for sentencing purposes). *See also*, U.S.S.G. § 1B1.3, cmt. n.2(B) (2014) (district court "must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake," then consider the "conduct of others that was both in furtherance of, and reasonably foreseeable in connection with [the conspiracy]"). To the contrary, the Government claimed its forfeiture analysis required *no showing* of "nexus" or "foreseeability." (DE428:15,16.)

Moreover, the Guidelines are clear that the sentencing court shall look at gain "*only* if there is a loss but it reasonably cannot be determined." (§ 2B1.1 n.3(B)); emphasis added.) The district court did not state it could not reasonably determine a

loss to Signalife but specifically rejected, for Guidelines purposes, a finding that Signalife is a victim.[28]

In evaluating the differences between forfeiture and loss, "[l]oss is not the total amount of the benefits the defendant received, because some benefits may be rightfully due." *United States v. Parsons*, 109 F.3d 1002, 1004 (4th Cir. 1997). "[T]he gain-loss analysis and the forfeiture analysis are actually quite different." (DE428:253.) Here, for example, the Credit Suisse shares were included in the forfeiture order although the Government never established any impropriety in Stein's receipt of those shares. *See also*, p. 57, *supra* (shares never sold).

As to Carter, the Government previously alleged Stein received $1,823,283 of the $2,156,000 from Carter (DE246:24;GX258), but the Government only showed payments made to Stein or Five Knights Partnership totaling $158,718 (DE246:16,19,22;GX120;GX341;GX339;GX255;GX256;GX254) and never introduced any testimony at sentencing regarding the Carter-related numbers. *See also*, pp. 53-56, 58 *supra*, discussing prosecutors' failure to introduce evidence regarding the scope of conspiracy accountability; section III.A.4, *infra*, discussing Stein's reinvestments and losses.

[28] Even if there were a loss to *investors* that could not reasonably be determined, there could not be a resulting and corresponding gain attributed to Stein because Stein's *trading* losses far exceeded any purported *trading* gains. (DE395:5;DE428:193-194;RE395-1;RE457-6.)

The alleged gain amount also includes the shares in the blind trust ($1,395,302.00), however, the shares were lawfully issued and registered for resale, and the trustee complied with all laws under the supervision of the compliance department of Regal Securities. (DE242:113-121,84-85.) Markedly, the Government specifically excluded the $1,395,302.00 as a loss to Signalife (DE386:15). For these reasons, it could not constitute gain under the Guidelines.

The Government also added $478,600 it claims Anand paid to Stein. It includes $42,100 which pertain to valuable legal services Stein rendered to Anand unrelated to Signalife. (DE242:191-192,196;DE243:44-46.) This figure also includes $380,000 Anand paid in exchange for purchases of stock from Stein at below-market prices. Nevdahl's testimony was definite that these purchases were actually *harmful to Stein*, and arguably could not result in a loss to any person, *except for Stein*. (DE242:123-125,179.)

Lastly, the Government has not shown that the $160,679.61 paid to Stein were anything other than proper payments for his services and thus cannot constitute gain. *See*, p. 57, *supra*.

4. Stein's Losses And Investments Eliminate The Proposed Alternative Sentencing Calculations

Under both of the Government's alternative methods, all consideration Stein reinvested or expended for Signalife's benefit would have to be deducted under the Guidelines. *See, United States v. Munoz*, 430 F.3d 1257, 1370 (11th Cir. 2005)

(under net loss and net gain methods, "defendant will, for sentencing purposes, receive the full benefit of all his return payments to the victims") (citation omitted). For example, all alleged gains involving Carter ($1,823,283) were re-invested into Signalife through Five Knights Partnership – in fact Stein's reinvestments well exceeded them – and any such amounts would have to be deducted under the proposed alternative methods as an offset. (DE246:94;RE395-1:2; "$2,439,277.78").)

The prosecutors never contested Stein's net losses were more than $15 million. (DE395:5.) In addition to net losses from Signalife investments Stein separately suffered through Five Knights Partnership, totaling $2,439,277.78 (09/2007–07/2008), Stein also suffered a net loss of $392,000 in trading Signalife shares (09/2007–12/2008); Stein paid Signalife consultants $389,120 worth of stock (2008); and Stein's overall shareholder losses were a staggering $26,717,827.60 (09/2007–09/2008).[29] (RE395-1:2;RE395-1:3;DE428:194;DE395:5;RE457-6.) The district court never considered these offsets even though the Government did not contest the amounts. For this additional reason, neither the alleged theft nor gain amounts could be used to affirm Stein's sentence.

[29] Stein also invested at least $1,853,069.19 of his own money in Signalife (then under the name Recom Managed Systems) between 2003 and 2004. (DX299-DX315[DE452-52–DE452-68];DE242:87-99.)

C. Substantive Violation

There remains no evidence that the district court considered the sentences of Carter and Anand, which Stein continues to assert was unreasonable under the circumstances in fashioning his sentence. (AOB:20,58.)

D. The Restitution Order Should Be Vacated

The Government admits that proximate causation is required to impose restitutional loss (GB:86), but asks that the district court's order be upheld based upon nothing more than the loss enhancement. Rather than introduce evidence of causation, the Government again says causation is self-evident. (*Compare*, DE428:205 ("hard to fathom") with GB:87 ("strains credulity").) It claims causation should be presumed because "[f]luctuations in the stock market [are] foreseeable" (GB:87) just like "'[f]luctuations in property values.'" (GB:86 (citing *Robers v. United States*, 134 S. Ct. 1854, 1859 (2014)).) But fluctuations in the stock market are not comparable to fluctuations in property values. The real estate market is not nearly as liquid as the stock market, thus explaining the historical volatility of stocks. The value of a piece of real estate could not be artificially inflated like that of a stock. It also could not be entirely diminished by naked short-selling attacks or failures-to-deliver securities (AOB:56,fn.14,57;GB:78.fn.36), which are wrongs perpetrated on both investors and the target company that are neither foreseeable nor related in this case to the alleged offense conduct. The Government's suggestion that a defendant

should be punished for something he "may not have directly caused" (GB:77) is flatly contradicted by this Court's finding that "any subsequent action that contributes to the loss … must be directly related to the defendant's conduct." *United States v. Robertson*, 493 F.3d 1322, 1334 (11th Cir. 2007). None of the events that contributed to the stock decline in this case – such as the rampant naked short-selling, failures-to-deliver (GB:78,fn.36) – are related to the alleged conduct. And even if the 2008 financial crisis was a "foreseeable market fluctuation," the *Robers* Court explained that unexpected external factors (e.g., the ones presented by the Defense in this case (DE387:24-33;AOB:58,fn.16,62-63,56-57)), "[could,] as the Government concedes, … break the causal chain." *Robers*, 134 S. Ct. at 1859.

No amount of rhetoric can replace the need to demonstrate but-for and proximate causation and to prove with reliable evidence "the portion of [Signalife's stock] price that is the result of [the] fraudulent factors." *United States v. Gushlak*, 728 F.3d 184, 189-90 (2d Cir. 2013).

E. Evidentiary Limitations

The Government does not claim any "special circumstances justified, or even explained" its failure to introduce evidence on the issues of reliance, causation, scope of conspiracy liability or the matters requested by the probation department. *See, United States v. Washington*, 714 F.3d 1358, 1363 (11th Cir. 2013). Because the Government should "not get to try again on remand" (AOB:62-63), Stein

respectfully requests that the loss and victim enhancements be set aside and that the Government be precluded from supplementing the evidentiary record on remand.

B. Constitutional Error

The Government defends the district court's view of the jury's findings, arguing that "there was no Sixth Amendment violation" because "the district court's findings on 'date of disclosure' were not relevant." (GB:78,n.35.) But the district court clearly refused to "take the place of the jury" in finding from "[t]he record at the trial" the existence of a legally cognizable disclosure for purposes of causation. (DE429:35.) The judge's comments also reflected his presumption about reliance and the scope of liability:

> "I'm finding from the record … sufficient evidence to demonstrate both reliance and causation of damages to the shareholders…. I'm not going to now take the place of the jury and decide … what was fraudulent and what wasn't and when it was fraudulent…. [T]here was evidence, there was a conviction…. The record speaks for itself."

(DE429:30,34-36.)

These presumptions violated not only the Sixth Amendment, but well-established Circuit law. *United States v. Hamaker*, 455 F.3d 1316, 1338 (11th Cir. 2006) (in the case of a general criminal verdict, court should not speculate "as to the jury's view of the scope of Appellant's guilt").)

CONCLUSION

For all these reasons, it is respectfully requested that the conviction be reversed. Alternatively, it is respectfully requested that the Court reverse or vacate the district court's order collectively denying the motions for new trial. It is further respectfully requested that the Court reverse the district court's denial of the motions for evidentiary hearing and discovery. Stein also respectfully requests that the sentence and the restitution award be vacated, that the loss and victim enhancements be stricken and that the Government be prohibited from supplementing the evidentiary record in connection with any re-sentencing proceeding.

Dated this 4th day of January, 2016.

Very respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7), Federal Rules of Appellate Procedure, in that the brief contains 14,499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4, and this Court has granted Appellant Stein permission to file a reply brief not exceeding 14,500 words.

Undersigned counsel further certifies that this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2013.

By: */s/Jonathan B. Kasen*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 4, 2016, the foregoing document was served on counsel for Plaintiff-Appellee by depositing in the United States Mail a copy of same in an envelope with correct postage for delivery. This is also to certify that the foregoing document was this day uploaded to the Court's website. A signed, bound original and six bound copies of this brief will be mailed to this Court on this date.

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