

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:	
	:	
v.	:	Cr. No. 02 - 589 (S-2) (RJD)
	:	Cr. No. 04 - 652 (RJD)
ANTHONY (AMR) ELGINDY,	:	
Defendant.	:	
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REPLY SENTENCING MEMORANDUM ON BEHALF OF ANTHONY (AMR) ELGINDY

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I. INTRODUCTION

Since Mr. Elgindy was indicted in 2002, the government has insisted that the AP site was all about illegally obtained law enforcement information and trading on that information. As late as April 1, 2005 when the government filed its initial forfeiture memorandum, the government claimed that Mr. Elgindy was responsible for over \$9.1 million in illegal trading profits, as well as the total amount of site fees collected. Now in its sentencing memorandum, the government concedes that its profit figures were wildly overstated by proposing three different calculations for the Court to consider as illegal gains, each one successively smaller. In fact, the government admits that if limited to the four stocks of conviction, even its own trading profits calculation comes all the way down to \$670,000, of which only \$216,000 is attributed to Mr. Elgindy's trading, representing a 93% reduction from the government's original forfeiture demand of \$9.1 million. It is a staggering revision, yet the government barely acknowledges it in a footnote. In addition to highlighting that the government's figures are wholly unreliable, it provides further proof that the AP site and its members were engaged in overwhelmingly legitimate stock discussion and investing of which only a tiny fraction involved either Mr. Cleveland or Mr. Royer.

In a strange twist of irony, the government's sentencing memorandum accuses Mr. Elgindy of asking the Court to "ignore the convictions" and sentence the defendant without regard to "the jury's verdict." (Government's Sentencing Memorandum ("Govt Mem.") 4.) In fact, it is the government that ignores and seeks to subvert the verdict – and in particular its acquittals on 18 out of 29 counts – arguing the Court should sentence Mr. Elgindy: (1) as if he had been convicted of obstruction of justice when in fact he was acquitted; (2) as if he had been convicted of market manipulation when, as we argued in our opening memorandum, the verdicts

reflect and require this Court to find that the jury rejected that theory of securities fraud; and, (3) as if he had been convicted of securities fraud with respect to SLPH and securities fraud and extortion with respect to FLOR, when the jury specifically acquitted him of those charges.

Beyond this acquitted conduct, the government seeks to hold Mr. Elgindy accountable for insider trading as to the stocks of 28 additional companies, notwithstanding the facts that there is no jury finding as to securities fraud with respect to any one of these additional companies and the government's proof – such as it is – cannot even satisfy the preponderance of the evidence standard, much less a heightened clear and convincing or beyond a reasonable doubt standard that should be applied to such uncharged and unproven conduct. To remind the Court of just one such example, BGII, we note that the government offers no response whatever to the indisputable facts laid out in our opening memorandum (at pp. 66-68) – i.e., that notwithstanding Cleveland's (false) suggestions to the contrary, there is no evidence that Royer ever searched any FBI database for BGII, the information about a Texas Rangers investigation came from a newspaper article, and SEC attorney Doug Gordimer admitted that the SEC's informal investigation was opened "based on the report [prepared by Mr. Elgindy] that was on InsideTruth.com." Despite this overwhelming evidence refuting any claim of insider trading with respect to BGII, the government apparently credits Cleveland's testimony over Gordimer's and thus its proposed Guidelines calculation includes over \$1,000,000 in alleged illegal profits from trading in BGII (in fact, BGII is the single largest component of the government's insider trading profit calculations).¹

Mr. Elgindy, on the other hand, proposes a sentence commensurate with the actual specific conduct of which he was convicted – limited to insider trading with respect to the

¹ Similarly clear evidence refutes claims of insider trading in numerous other stocks as to which there is no jury finding, such as VLPI and BIOP, as discussed below.

four stocks of conviction, the extortion of NSOL, a small handful of frontrunning and trading against advice counts, and his regrettable false statements to TSA officials at MacArthur Airport. And he asks that his sentence not be dramatically multiplied – and respectfully submits that the Constitution forbids such a result – based on claims that were either rejected by the jury or are otherwise unproven and unsupported (and many times outright refuted) by the record. *See United States v. Gigante*, 94 F.3d 53, 56 (2d Cir. 1996) (affirming this Court’s finding that “compelling evidence” supported enhancing a defendant’s sentence based on involvement in an uncharged murder conspiracy, but also explaining that a heightened standard of proof, “such as clear and convincing or even beyond a reasonable doubt,” may be warranted where unproven conduct would result in a “substantially enhanced sentence range”), *cited with approval in United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005) (instructing district courts after *Booker* to “consider the jury’s acquittal when assessing the weight and quality of the evidence presented by the prosecution and determining a reasonable sentence”).

Indeed, the government’s approach turns upside down the Sixth Amendment principles enunciated in *Booker* by rendering Mr. Elgindy’s right to a jury trial a nullity for sentencing purposes. If a defendant who has been acquitted of nearly two-thirds of the charges against him can be sentenced as if he were convicted on *all* counts – resulting in a manifold increase in his sentence – the right to a jury trial is meaningless, and the Sixth Amendment is but an empty shell that fails to offer a defendant any protection.

The difference between the government’s approach and Mr. Elgindy’s approach could not be any more dramatic. Even using the government’s own expansive method for calculating the dollar figure or “loss amount” attributable to Mr. Elgindy (which we vigorously dispute for reasons set forth below), if we back out of the government’s calculation just two of

the three aspects of *acquitted conduct*, market manipulation and obstruction,² the Guidelines range comes down dramatically, from life in prison to 135 to 168 months (in other words, assuming Mr. Elgindy lives to the age of 75, the inclusion of just these two aspects of acquitted conduct causes an *increase in punishment of over 300%*.)³ Backing out the remainder of the acquitted and otherwise unproven conduct, the Guidelines range is reduced further, from life in prison down to 97 to 121 months.⁴ If we then follow the methodology set out in our opening memorandum for calculating insider trading profits (including appropriate and reasonable limits on the traders and the trades), the dollar figure used to calculate the sentence is further reduced,

² We note that if Your Honor follows the jury's verdict rejecting a market manipulation theory and uses instead the insider trading guideline (2B1.4), the Court will not have to decide several disputed legal and factual issues because they have no bearing on the insider trading Guidelines analysis, i.e.: (1) whether to use the November 2001 Guidelines book, as Mr. Elgindy argues, or a later, harsher version of the Guidelines as the government contends (*see* Govt Mem. 80 n.40); (2) what percentage if any of the site fees to include in the gains calculation (as 2B1.4 does not allow for inclusion of such alleged indirect profits), and (3) whether the investment advisor, more than 250 victims and sophisticated means enhancements apply, as those enhancements are relevant only under 2B1.1 and not under 2B1.4.

³ The 135 – 168 months comes from the government's calculation in the second paragraph of footnote 40 on page 80, which uses insider trading instead of manipulation, but then eliminating +2 for obstruction and reducing the gain calculation by the amount of the site fees, which are not cognizable profits under 2B1.4. The result is a base offense level of 8, +18 for a gain of over \$2,500,000 and +4 for leadership role. When this group offense level of 30 is combined with the extortion group offense level of 23 (the government's 25, less 2 levels once obstruction is backed out) and the bail-release offense level of 7, the total offense level after grouping is 31, which in Criminal History Category III yields a range of 135-168 months.

⁴ This calculation is the same as in the prior footnote, except the gains are limited to the government's profit calculation for the 4 stocks of conviction, which is \$670,176 (*see* Declaration of Diego Brucculeri in Support of Criminal Forfeiture ("Brucculeri Dec.") Ex. 4), representing a +14 instead of a +18 from the loss table in 2B1.1. When this group offense level of 26 is combined with the extortion group offense level of 23 (the government's 25, less 2 levels once obstruction is backed out) and the bail-release offense level of 7, the total offense level after grouping is 28, which in Criminal History Category III yields a range of 97-121 months.

resulting in a Guidelines sentence of 63 to 78 months.⁵ Finally, if leadership role is eliminated (for the reasons set out in our opening memorandum and further discussed below), the Guidelines come down to 41 to 51 months – the ultimate range as calculated in Mr. Elgindy’s opening submission.⁶

Removing the lens of the Guidelines and simply looking at trading profits, a similar picture emerges. While the government asks the Court to sentence Mr. Elgindy based on his own trading, the trading of at least 9 other individuals (most of whom have never testified or been cross-examined) and the total amount of AP site fees he earned during the charged conspiracy, in fact, Mr. Elgindy’s own actual trading profits in the only 4 stocks of conviction add up to less than \$42,000. Yet Mr. Elgindy faces the prospect of years and years in prison when a co-defendant like Jonathan Daws, who had his own secret site and his own relationship with Agent Royer and who, by the government’s own revised calculations, had personal trading profits of \$397,706.20 and additional profits through his hedge fund (Gryphon) of \$1,319,030.97, faces just 18 to 24 months.

The variance between Mr. Daws’ recommended sentence and what the government seeks for Mr. Elgindy represents the paradigm of “unwarranted disparity” that §3553(a)(6) directs should be avoided. While the government cites the “one book rule” for

⁵ This calculation is the same as in the prior footnote, except the profit figure for the insider trading group is reduced from \$670,000 down to \$64,736, as set forth in our opening memorandum, bringing the offense level for that group down from 26 to 18 (base of 8 plus 6 for profits between \$40,000 and \$70,000 plus 4 for leadership role). Combining that with the extortion group offense level of 23 and the bail-release offense level of 7, the total offense level after grouping is 24, which in Criminal History Category III yields a range of 63-78 months.

⁶ This calculation is the same as in the prior footnote, except the insider trading group offense level is reduced by 4 levels, to 14, and is then combined with an extortion group offense level of 19 (the government’s 25, less 2 levels once obstruction is backed out and 4 more levels once leadership role is back out) and the bail-release offense level of 7, the total offense level after grouping is 20, which in Criminal History Category III yields a range of 41-51 months.

purposes of consistency, any such desire for evenhandedness would require utilizing the same Guidelines calculation methodology for Mr. Elgindy as the government applied to Mr. Daws.

The government's sentencing memorandum, echoed in the government's forfeiture reply memorandum, also betrays the government's arbitrary and unreliable approach to calculating the profits properly attributable to Mr. Elgindy. The Court will recall that in its moving papers seeking a judgment of forfeiture, the government demanded forfeiture of over \$11.8 million plus the Elgindy home in California. Now, in both its sentencing memorandum and its forfeiture reply papers, by scaling back its gains calculations and its forfeiture demands by 60%, down to \$4.8 million, the government concedes that its initial figures were wildly overstated. The government further admits that if limited to the four stocks of conviction, even its own trading profits calculation comes all the way down to \$670,000, of which only \$216,000 is attributed to Mr. Elgindy's trading, while \$450,000 is attributed to Mr. Daws. As we explain in further detail below, the government's profit calculations are riddled with additional significant legal and factual flaws that, together with these other dramatic variances, render the government's figures completely unreliable.

Apparently not satisfied with its calculation of between many years and life in prison for Mr. Elgindy, the government attempts to turn up the heat up even further by portraying this case as "one of the most egregious instances of corruption of governmental functions in recent history." (Govt Mem. 83.) But as with many of the government's claims throughout this prosecution, the grandiose rhetoric is not backed up with any evidence or any proof of any actual impact on a government investigation or a government agent. Whatever might be said about the behavior of former Special Agent Jeffrey Royer -- behavior that began well before he ever met Mr. Elgindy and apparently involved hundreds and hundreds of illegal searches of FBI databases

that had nothing whatsoever to do with Mr. Elgindy or investigating possible stock frauds, and behavior that we do not defend here -- the only evidence in the record shows that Mr. Elgindy's interactions with law enforcement and the activities of the AP site members either assisted the government in a variety of securities investigations (as we laid out in our opening memorandum at pages 50-54) or, at worst, had no impact on the government's investigations, as the government's memorandum all but concedes at page 33 footnote 13.

In the end, Mr. Elgindy simply asks that he be sentenced based only on proven facts and not on matters rejected by the jury or theories and generalized assertions that cannot withstand scrutiny or empty and prejudicial labels such as "RICO" and "racketeering"; that he be sentenced based on his own actual conduct and not based on the unforeseeable actions or trading of others or speculative harms that have no basis in the record; that he be sentenced fairly and consistently in comparison to his alleged co-conspirators, some of whom have admitted their own criminal activity and yet, like Jonathan Daws, face dramatically and inexplicably lower sentences; and that the full range of factors under 18 U.S.C. §3553(a) be considered, including his family's dire circumstances, his record of humanitarian and good deeds, his history of bipolar disorder, and the significant ways in which he has already been punished; and that pursuant to the framework of *United States v. Booker* and *United States v. Crosby*, Mr. Elgindy receive a non-Guidelines sentence of less than 41 months in prison.

II. THE GOVERNMENT'S GUIDELINES CALCULATIONS ARE LEGALLY ERRONEOUS AND FACTUALLY UNSUPPORTED

A. The Insider Trading Guideline (2B1.4), Not the Fraud/Market Manipulation Guideline (2B1.1), Should Be Applied

1. The Government Concedes That the Jury's Verdict and *Sturdivant* Mean That Market Manipulation Must Be Treated as Acquitted Conduct

The government does not dispute that (1) the jury's acquittals for securities fraud with regard to SLPH and FLOR can only logically mean that the jury acquitted Mr. Elgindy of market manipulation across the board and (2) *United States v. Sturdivant*, 244 F.3d 71 (2d Cir. 2001), compels this court to treat the market manipulation allegations as acquitted conduct. (Elgindy Mem. 70-73.)

Under *United States v. Vaughn* 430 F.3d at 527, the court must analyze the "weight and quality" of evidence presented with respect to acquitted conduct and may decline to consider such conduct in arriving at a "reasonable" sentence. This is especially so since it is the acquitted manipulation conduct that, by the government's own calculations, transforms a Guidelines recommended sentence of 168-210 months into a recommended sentence of life in prison. (Govt Mem. 80 n. 40.) With such a dramatic and draconian impact on the Guidelines, we respectfully submit that *Vaughn* strongly recommends, and the Court should require, that the government persuade Your Honor that it has proven its manipulation theory by a heightened burden of proof, beyond a reasonable doubt or at the least by clear and convincing evidence. As we now explain, the government's arguments make clear that it cannot meet and has not met even the preponderance standard, much less the more exacting standard that such a dramatic outcome-altering theory demands.

2. The Government's Proof and Theories of Market Manipulation Are Extremely Weak and Should Be Rejected under *Vaughn*

The government's only response to our argument that it failed to prove that Mr. Elgindy manipulated the market for any stock is to rehash the same old legally and factually insufficient arguments about what constitutes criminal market manipulation. The government's "examples" of the ways in which Mr. Elgindy supposedly "manipulat[ed] share price in certain stocks" (Govt Mem. 15), invariably include statements taken out of context and conduct by Mr. Elgindy that, even if true, under no circumstances constitutes market manipulation. And in keeping with its theme of not acknowledging that Mr. Elgindy was acquitted of anything at trial, two of the three stocks the government cites as examples of market manipulation are stocks for which the jury specifically acquitted Mr. Elgindy of market manipulation, *i.e.*, SLPH and FLOR.

The government first contends that Mr. Elgindy manipulated the market by directing site members to keep certain stocks at a certain price. For example, with regard to SEVU, the government states that Mr. Elgindy "instructed AP site members to stop 'hitting' SEVU stock because he wanted to maintain the price at around \$7/share and threatened to cut off inside information if they did not obey." (Govt Mem. 15.) As support for this contention, the government relies on Cleveland's testimony that he interprets the following interchange in chat on December 12, 2000 -- "Are we putting SEVU stock price into a nose dive now? [Mr. Elgindy's answer:] No, we shouldn't be. SEVU should be about 7" -- as Mr. Elgindy telling people to stop hitting SEVU to keep it at \$7 per share. (Tr. 339-40.)

Cleveland's interpretation is shown to be incorrect when the statements are viewed in context. Specifically, on December 12, 2000, the site is discussing SEVU as a scam and conducting due diligence. During a call to Home Depot, a site member asks if what the site is doing is causing the stock price to fall. Mr. Elgindy says no, it should be in the 7s, which it

was. There is no mention of trading, shorting or not shorting, hitting or not hitting SEVU, or wanting SEVU at \$7. (JX 28.)⁷ The site continues to do due diligence on SEVU for the rest of the day and, later that evening, Mr. Elgindy makes a call on SEVU: “SEVU<----sell short 30-40% from 6 to 9 , building on rallies..or on stagnation.” (JX 28; GX 3001 (broadcast 12/12/00 18:57).) Nothing indicates that Mr. Elgindy wanted SEVU in the 7s or expected SEVU to be in the 7s. If anything, the SEVU call indicates that he was surprised such a scam was still in the 7s.

As for SLPH and FLOR, the jury with good reason specifically rejected the government’s allegations that Mr. Elgindy manipulated the market for SLPH and FLOR stock. The government nevertheless contends, for example, that when Mr. Elgindy stated “I want SLPH in the 5s,” he was telling the site to trade in such a way to artificially keep SLPH at \$5 so he could get a cheap block of stock. (Govt Mem. 15.) The government supports this with Cleveland’s testimony that he was upset that he was not included in a block sale of SLPH that did not occur and Cleveland’s fabricated testimony that information about an FBI investigation that was received from a former SLPH employee was “independent verification” of information given to Mr. Elgindy by Mr. Royer.⁸ This testimony does not support the government’s contention. Moreover, the government does not even cite to the chat where Mr. Elgindy says he wants SLPH in the 5s, likely because the context shows what was really happening. Mr. Elgindy was trying to sell short 5,000 shares of SLPH at \$6.30 to the Market Maker HRZG, which, according to “Derrick,” was fighting to keep SLPH’s price up. Members were complaining that they couldn’t short any SLPH shares and another member warned that SLPH started in the 11s

⁷ The Exhibits will be submitted in a separate Compendium of Exhibits in Support of Mr. Elgindy’s Reply Sentencing Memorandum (“Compendium of Exhibits”).

⁸ It was shown at trial that Royer could not have given Mr. Elgindy the information about a SLPH FBI investigation before Mr. Elgindy received the information from the SLPH employee, Todd Orme. (*See Infra* Pt. II.B.4.)

and so they should consider whether they really want to take the risk of shorting it in the 6s. Mr. Elgindy then states that he wants SLPH in the 5s, in other words, would still want to short it in the 5s, because it is going further down and soon won't be able to stay above \$3. The rest of the conversation consists of Mr. Elgindy telling members that SLPH is going to tank and telling others not to worry about buy ins. (JX 151.)

June 7, 2001 chat:

[14:12] anthony >> 4comon slph dont crap out on me yet
 [14:13] Derrick >> HRZG putting up fight on SLPH
 [14:14] anthony >> well i hope its ok if i sell 5 to hrzg
 [14:14] anthony >> at 6.30
 [14:14] rag133 >> damn I cant get shares still of SLPH
 [14:16] anthony >> ok so i took out hzg
 [14:16] anthony >> ok so i took out hrzg
 [14:17] ned_flanders >> rag SLPH was started at around 11, you sure you want it at 6 that badly?
[14:18] anthony >> i want slph in the' 5's
 [14:23] Davidh >> are buy in's still a problem with SLPH? I was bought in when it was still FWLD
 [14:23] peter >> yes David
 [14:24] Davidh >> thnx peter
 [14:25] bond1 >> 3 SLPH..B/I FOR TODAY APPROX 90K
 [14:27] anthony >> bond they are getting worse and worse
 [14:27] anthony >> soon they wont be able to stay a bove 3 bucs
 [14:27] bond1 >> 3 AP..ITS BEEN VETW 50 TO 100 FOR A WHILE LOL
 [14:28] petewitt >> Bond buy ins?
 [14:28] anthony >> im sorry but slph reeks of death
 [14:28] +SEAN007 >> and tin foil
 [14:28] bond1 >> PETEWIT...reread
 [14:28] alongman >> i been getting threatened with between 8 and 15 everyday
 [14:29] anthony >> longy i dont think there is anything to fear
 [14:29] anthony >> they wt out of s deal

Nowhere in this conversation does Mr. Elgindy direct anyone to do anything and the context shows that Mr. Elgindy wanted anything but to keep SLPH in the fives. He wanted to short it in the fives and profit as it dropped to \$3 or lower.

The government also attempts to support its manipulation theory by claiming that Mr. Elgindy misrepresented certain information about the principals of NSOL and GENI.

Among 1100 days of chat logs, millions of lines of text from those chat logs, tens of thousands of Mr. Elgindy's own personal trades, over 3,000 official trading calls, and over 85,000 posts on Silicon Investor, the government found two instances of allegedly inaccurate information. That

in and of itself is enough to reject the argument that two isolated allegedly false statements could somehow manipulate the market. In addition, one of the statements, regarding a link between Kashoggi of GENI and Osama bin Laden, can be found over and over in speculation across the world-wide web. The other, regarding Paul Brown's criminal record, was believed by Mr. Elgindy to be true when he said it.

To use the NSOL allegation as an example of the government's stretch here, the government points to allegedly "false information" about Paul Brown's criminal history, claiming that Mr. Elgindy stated on the AP site that Mr. Brown "had three felony convictions whereas he had only one conviction which had been expunged." (Govt Mem. 18.) The government does not say this information was "materially" false, perhaps because the truth was that Mr. Brown *had* been convicted three times, as Mr. Elgindy explained in specific and accurate detail in a chat broadcast just before he called Mr. Brown a "three-time felon." The convictions were for "possession of a controlled substance," "carrying an illegally concealed weapon," and "passing bad checks." (GX 3001 (12/19/01 13:30 broadcast).) While one of Mr. Brown's convictions may have been expunged and the others as a legal technical matter may have been misdemeanors, the essence of Mr. Elgindy's statements -- that the CEO of a public company had a repeat criminal record -- was absolutely true and is not disputed by the government. The government's argument that Mr. Elgindy's largely accurate disclosure about Mr. Brown to his site members could be characterized as injecting materially false information into the marketplace or could have "artificially impacted" the price of NSOL stock is for these reasons clearly without merit. Indeed, the impact would not have been any different if Mr. Elgindy's descriptions had been *entirely* accurate.

Having presented no credible evidence that Mr. Elgindy or any of his alleged coconspirators made any material misrepresentations intended to or capable of artificially affecting any stock price, the government argues that timing the release of *truthful* information to the public and actually just publishing *truthful*, negative information on Insidetruth.com is somehow market manipulation if the purpose of the timing of the publication or of the publication itself is to cause the price of the stock to fall so that you make a profit. (Govt Mem. 16-17.⁹) The release of truthful information to one group of people before it is released to a larger group of people, however, is not market manipulation. Moreover, if that group of people trades on that accurate information, and even if that trading moves the price of a stock, the trading is injecting into the market *accurate* information about the value of that stock and the

⁹ In support of this argument the government quotes statements by Mr. Elgindy out of context in an effort to make it look like Mr. Elgindy treated the public as his “enemy,” when Mr. Elgindy was really trying to warn others about the way market makers and other big players treat the public. The government quotes a statement from chat where Mr. Elgindy said “the public is my enemy” and they are there to “absorb my risk.” (Govt Mem. 16.) What the government does not cite is the rest of that chat on November 29, 2000 where Mr. Elgindy is conducting a training class and opens with “look if you want to survive this mkt then you must learn how the whole scammy thing works . . . its a scam . . . its corrupt . . . and most of all its geared to put you all at a disadvantage . . . I learned early on as a MM that the public is my enemy.” (JX 18, *see also* remainder of chat log for 11/29/00.) This makes it crystal clear that Mr. Elgindy is talking about when he *was* a market maker, as opposed to at the time of the training, when he was trying to warn people about market makers pushing bad stocks. The government’s quote from *The Dumbass, The Daytrader, and the New Democracy*, (Govt Mem. 16 n.6), is also past tense and taken out of context. The next sentence makes clear that Mr. Elgindy is saying that the public is “there to absorb the risk” of brokers and broker dealers and further down in the article of “market makers.” (Sentencing Memorandum on Behalf of Anthony Elgindy (“Elgindy Mem.”) Ex. 5.)

The government then argues that Mr. Elgindy controlled and threatened his members by quoting two sentences of a site broadcast by Mr. Elgindy. (Govt Mem. 16-17.) The government cites to GX 3306, a five-sentence excerpt of the transcript. We include the full transcript in our Compendium of Exhibits. The broadcast is about site members needing to treat each other with respect even when the market is tough and not taking advantage of each other by trading against what people are saying on the site. Mr. Elgindy tells members if they won’t play nice, he will kick them off the site. The government twists that into a threat that if they don’t trade the way he says, he will kick them off the site.

supply and demand for that stock. To put it simply, shorting the stock of a fraudulent company because you think the stock is overvalued does not cause *artificial* trading volume or movement in a stock price. In addition, it does not matter whether you intend by your conduct to affect the price of a stock if that conduct results in the injection of *accurate* information into the market, as is the case here. The government stubbornly refuses to accept that the price of a stock cannot be criminally manipulated by releasing accurate information or by making *bona fide* trades in reliance on that information.¹⁰

The government's theory would expose *all* accurate reporting to charges of manipulation if it moved the price of a stock. Included within that umbrella of liability would be whistleblowers, who would know (and often likely intend) that the information they release

¹⁰ The government cites cases that stand for the proposition that market manipulation under the federal securities laws requires deceptive conduct that *artificially* affects the price of securities in a manner that does not comport with natural forces of supply and demand. See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476-77 (1977). Some sort of deception in the form of false statements or deceptive trading techniques is required. *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 204-05 (3d Cir. 2001); *Sullivan & Long, Inc. v. Scattered Corp.*, 47 F.3d 857, 864-65 (7th Cir. 1995); *Olympia Brewing Co. Sec. Litig.*, 613 F. Supp. 1286, 1290-92 (N.D. Ill. 1985). As we have shown, the government's evidence fails to show any material misstatement by Mr. Elgindy that could or did affect the price of any security. In addition, even assuming the government's evidence shows that Mr. Elgindy intended to exert downward pressure on the price of a stock and coordinated with others to achieve that result, that conduct has never been held to be and cannot be manipulative if the trading is a real securities transaction with a *bona fide* investment purpose. See *United States v. Mulheren*, 938 F.2d 364, 368-69 (2d Cir. 1991) (expressing "misgivings about the government's view" that open market purchases made with the sole intent to affect the price of the security is market manipulation, but holding that the government failed in any event to prove that Mulheren subjectively intended to affect the price of the securities at issue); *In re College Bound Consol. Litig.*, No. 93 Civ. 2384, 94 Civ. 3033 (MBM), 1995 WL 450486, *4 (S.D.N.Y. July 31, 1995) (relying on *Mulheren* to dismiss open market manipulation claim that defendants purchased large blocks of stock to move the price upwards because the defendants' motivation was "at least in part influenced by the same impulses that influenced other purchasers of the stock - namely, the hope of future investment income"). In light of the overwhelming evidence that Mr. Elgindy and the other AP site members honestly disparaged the companies they sold short and honestly believed the stocks were overvalued, the government's theory of manipulation through coordinated trading fails.

would have a detrimental effect on the stock price of the subject company. That dangerous expansion of the concept of manipulation cannot be, and *is not*, the law.

The remainder of the government's market manipulation theories are just silly. The government argues that as part of the manipulation of some unidentified stock, Mr. Elgindy tried to "use the SEC to halt trading in a stock." (Govt Mem. 15.) Never mind that the government argues elsewhere in its memorandum that Mr. Elgindy's information had no influence on the SEC's actions (Govt Mem. 33 n.13); for these purposes, it seeks to criminalize providing truthful information about stocks to the SEC in the hope that the SEC will act on it. The government also argues that Mr. Elgindy's alleged deception of his site members about the site fees being used to maintain the site as opposed to being used to compensate him¹¹ and his alleged deceptions intended to exaggerate his ability to predict the market are part of his manipulation of the market. These vague and generalized allegations about alleged deception completely unrelated to any particular stock cannot form the basis of a finding of market manipulation, and the government cites no authority holding otherwise.

In sum, on close inspection, the government's recycled manipulation theories -- already rejected once by the jury (a point, it is worth repeating, that the government has not disputed) -- are shown to be without foundation and without merit. Particularly in light of the dramatic increase in the Guidelines range that a Court finding of manipulation would effect, this acquitted conduct should be rejected by the Court as unproven by even the preponderance

¹¹ This argument is of course inconsistent with the government's argument that the site fees should be included in Mr. Elgindy's "gain" because "the defendant himself described his site fees as a substitute for profits on trading he gave up to AP site members." (Govt Mem. 62 (citing GX 3312 ("I'm gonna give up X amount of dollars in gains on my Trades. And in order to share that with more people . . . that's why the Site was created, and why there was a charge. So what I give up on fills, I make up in the site fees.")) It is unclear how he could deceive his site members about what he means by using site fees in "maintaining the site" when he is telling them exactly what he means -- to compensate him for lost fills.

standard, much less proven when held up to the heightened proof standards that should be applied under these circumstances. *See, e.g., Vaughn*, 430 F.3d at 527.

B. The Government's Profit Calculation Is Non-Sensical and Unsupported by the Record

1. Trading By Non-testifying and Unproven Coconspirators Should Be Excluded

As to the alleged “downstream tippees”¹² Jonathan Daws, Kendall McGreggor, David Slotnick, and Jeffrey Thorpe,¹³ the government comes up short in providing any evidence that these people (other than Daws) were coconspirators or that any of them received any confidential law enforcement information about any particular stock from Mr. Elgindy and then made trades “informed by” that information.

The only specific “evidence” cited by the government to show that Daws received information about a particular stock from Mr. Elgindy is in sum total Cleveland’s testimony that Mr. Elgindy arranged for Daws to speak to Royer about OSIN. (Govt Mem. 54 n.26.) The rest of the evidence the government cites in support of including Daws is related to his direct contact with Cleveland and Royer, particularly on IMCL. (*Id.*) We addressed Mr. Daws’ direct contact

¹² We argued in our opening memorandum that Mr. Elgindy should not be responsible for the trading activities of the “upstream tipper” and mastermind of the “Derrick and Jeff show,” Mr. Cleveland. (Elgindy Mem. 76-77.) We nevertheless calculated Mr. Cleveland’s profits using our methodology and indicated what the impact of adding his profits would be. (*Id.* 83 n.30.) As the government has not added any argument not addressed there, we refer Your Honor to our opening submission on this point.

¹³ The government incorrectly asserts that we did not include Terrell and Hansen in our calculation of profits. We did. (Elgindy Mem. 79, 82-83.) We also note that the government states without support that Terrell put misappropriated information on the site. (Govt Mem. 55 n.27.) The government is wrong. Terrell may have made short calls (a quack call or quack raid) on those stocks, but he did not post law enforcement information in chat and he did not testify that he did so. In fact, he testified that he *did not post the source of the information* that he was relying on to “call” a stock. (Tr. 4029.)

with Royer and Cleveland and his direct dissemination of law enforcement information to RC Chat without Mr. Elgindy's knowledge in great detail in our opening memorandum. (Elgindy Mem. 49, 76-79, 80, 104-07.) We also addressed the lack of any evidence as to what law enforcement information informed any of his particular trades. (Elgindy Mem. 79.) Considering the government's dearth of a response, we refer Your Honor to those arguments.

As for McGregor, the government provides no evidence that Mr. Elgindy knew of McGregor's existence or that McGregor was even a member of the AP site during the time when any law enforcement information was disseminated there. (Govt Mem. 55 n.28.) The government concedes that McGregor was not on the AP site until the spring of 2002, *after* Royer left the FBI and *after* all of the stocks at issue other than IMCL were accessed. (*Id.*) The government supports its inclusion of McGregor as Mr. Elgindy's coconspirator and tippee by citing to his active participation on *RC chat*, a website whose members excluded and disparaged Mr. Elgindy, and by citing to evidence that he was told by Daws on RC chat that *Daws* had an FBI contact through Derrick Cleveland. (*Id.*) In addition, the government relies on the fact that information on REFR was put on the RC chat (*id.*), but concedes it was not put on the AP site (*id.* at 13 n.3). It defies reality and is patently unfair to say that Mr. Elgindy could foresee that Cleveland would disseminate information to Daws or Slotnick, who would then disseminate it without Mr. Elgindy's knowledge on a secret site about which Mr. Elgindy knew nothing to a person that Mr. Elgindy never met and who was not a member of Mr. Elgindy's website. McGregor thus appears to be included for no other reason than that he traded for a fund that generated large profits. If he conspired with anyone to do anything, it was with Daws, not Mr. Elgindy. Yet, as we have noted, Mr. Daws' recommended sentence does not reflect this offense conduct; thus, there is not any reason Mr. Elgindy's should, either.

More egregious than including McGregor's trading profits, however, is the government's inclusion of the trading profits in the "Spinner" account. The government now for the first time asserts that Jeffrey Thorpe is responsible for this account, but we believe that Spinner is the fund traded by Joseph Spiegel, not Thorpe. (*See generally* Tr. 4493-98.)¹⁴ Joseph Speigel, "jjs64," was an active member of the RC Chat. While Speigel apparently was a member of the AP site for a short time in late 1999 according to chat discussions, he apparently was not a member during the alleged conspiracy and is not on the member list provided by the government. Once again, there is no way Mr. Elgindy could have foreseen that Speigel might receive any law enforcement information through Daws or otherwise. Even if the government could show that McGregor or Speigel traded on law enforcement information they received from Daws, their trading was not within the scope of the conspiracy Mr. Elgindy was convicted of participating in.

As for Slotnick and Thorpe, the government provides only generalized evidence that Slotnick and Thorpe "engaged in discussions concerning stocks about which confidential law enforcement information was disseminated." (Govt Mem. 55-56 n.29 & 30 (listing BGII, NSOL, SEVU, EGBT & REFR for Slotnick and TDNT, IVSO, EGBT, VLPI & NSOL for Thorpe).)¹⁵ Engaging in general discussion about a stock is insufficient to show that they were in possession of specific law enforcement information regarding those stocks, let alone that the

¹⁴ The government attempted to introduce the records of the Spinner Global fund. The defense asked whose account it is, and the government did not respond, but listed "Mr. Speigel, Mr. Terrell and Derrick Cleveland" as the other site members whose records were being offered.

¹⁵ In a glaring error, the government claims in support of including Slotnick's trades in the 32 stocks that Slotnick was on the chat logs while Royer is on the chat logs as APcork. (Govt Mem. 55 n.29.) The government does not even acknowledge that its own witness, Mr. Hansen, proved that APcork could not have been Mr. Royer. Hansen testified that he was able to trace APcork to an ISP address in Canada at Pacific Securities International. (Tr. 2520-22.)

information informed their trades in those stocks.¹⁶ And this evidence that each of them discussed a handful of specific stocks in chat is without doubt insufficient to show that they were in possession of law enforcement information when they traded on the remainder of the 32 stocks included by the government in its trading analysis. Thus, the government does not even meet its own “knowing possession” standard (Govt Mem. 52) with regard to each stock for each of these alleged tippees.¹⁷

2. The Government’s Methodology is Flawed.

The government’s profit calculation is flawed because it calculates insider trading profits without regard to when or if the allegedly “inside” information was disseminated to the “public.” In order for there to be insider trading profits, the information that was non-public must become public and cause the price of the stock to move. In the shortselling context, the insider sells the stock short while in possession of the non-public information and then profits by covering *after* the information becomes public. In this case, if the law enforcement information never became public, there could be no profit made from having it. Thus, the government must be arguing that Mr. Elgindy made the information available to the public or the AP site members’ trading effectively made the information public by impounding it into the stock price. But the government does not indicate when this occurred, likely because profits occurring before

¹⁶ We of course dispute the knowing possession standard and contend that this Court should apply the law to require, at a minimum, what it charged the jury, *i.e.*, that the information must have “informed” the decision to trade.

¹⁷ The government’s assertion that Mr. Elgindy might be responsible for all of the trading profits of all of his innocent site members in any stock about which any law enforcement information was accessed *or* disseminated is so overbroad and speculative that it cannot be considered as a basis for including trading by McGregor, Slotnick, or Thorpe, or for applying an upward variance as the government suggests. In fact, a large number of site members could not have short sold bulletin board stocks at all because they did not even have the kind of account in Canada that would have made it possible to short such thinly traded stocks.

the information becomes public are not insider trading profit. After the information becomes public, no additional profit can be made. So the government argues both sides, claiming that the site members somehow profited from the law enforcement information indefinitely, regardless of whether it ever became public and regardless of whether their trading occurred while the information remained non-public. The only reason given in a case where for this unprecedented and extraordinary insider trading analysis is that “[u]nlike in cases where an individual trades on advance knowledge of a negative earnings report . . . , the information . . . was made public only when the defendant chose to do so for his own ends.” (Govt Mem. 58-59.) But this makes no sense. Mr. Elgindy’s “own ends” would have been to profit from the information by making it public so that the stock price would go down *after* he had obtained his short position. Regardless of who controls when inside information becomes public, it must become public for an insider to reap a profit. The government’s methodology is far too speculative to support a proper profit calculation by this Court, particularly in light of the significant degree to which the profit calculation alters the Guidelines analysis.

Other than this obvious flaw, the government’s methodology in its sentencing memorandum and forfeiture *reply* brief – its original forfeiture brief having contained no methodology – is remarkably similar to the defense’s methodology. The government first states that it agrees that the proper start date for calculating insider trading profits is the date on which confidential law enforcement information was disseminated, but claims that the defense did not use different dates for Mr. Elgindy and Mr. Cleveland than for the other site members. (Govt Mem. 57-58.) In fact, the defense used exactly the same theory of start dates –and the same source, GX-JL-1 – as the government. *See* Affidavit of Joshua Kelner, dated August 2, 2005 (“Kelner Aff.”) ¶10 (“For Mr. Elgindy and Mr. Cleveland, we assumed that the information was

disseminated immediately and directly to them from law enforcement and therefore calculated profits on short positions in a stock taken [after]the first date on which a law enforcement database was accessed For the other admitted insider traders, . . . we . . . calculated profits on their short positions in a stock taken [after] the first date on which alleged inside information about the stock was disseminated on the site”), ¶¶ 12-13 (referring to GX-JL-1).

Although it is not entirely clear, it appears that the government also chose the same short positions to start its profit calculation. *See* Brucculeri Aff. ¶ 6 (“In order to start the analysis as of that date at a flat position, I offset all the short positions taken prior to the new dates with long positions taken after.”); Kelner Aff. ¶ 15 (“[P]rofit calculations take account of only short positions acquired during the applicable time ranges. Because the alleged inside information was negative . . . , the relatively rare instances in which traders assumed, and proceeded to sell, long positions within the relevant date ranges were not included in the calculations.”). To the extent the government has done something different, we believe our analysis is the proper one.¹⁸

Where we depart from the government is in choosing a date at which the alleged information was made public either by announcements or by trading impounding the information into the price, or a date at which this particular information was no longer material. We chose three days. The government chose infinity. Infinity is clearly not a rational or fair choice; we believe that three days is. *Cf. Dura Pharms. v. Broudo*, 125 S. Ct. 1627, 1632 (2005)

¹⁸ In addition, the government states at page 60 footnote 31 that it is not clear whether or how the defendant’s methodology accounts for the fact that Mr. Elgindy posted law enforcement information about a given stock on the AP site on multiple occasions. Our methodology accounts for this by choosing a “date range” for trading. In other words, if Mr. Elgindy put some law enforcement information about a certain stock on the site in one month and then more information two months later, we accounted for all of the short sales in that three-month period, plus three days. (Kelner Aff. ¶ 10.)

(recognizing that when allegedly illegal stock transactions are unwound, the ultimate price and profit "may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all" of the changed price).

3. Non-Conviction Stocks Should Be Excluded Because the Government Has Not and Cannot Meet Its Burden

The government relies almost exclusively on GX-JL-1 to say that it proved insider trading by Mr. Elgindy and others with respect to 32 stocks. This single exhibit cannot form the basis for such a finding by this Court. All that GX-JL-1 shows is (1) that Agent Royer attempted to access law enforcement information with regard to the 32 stocks listed on GX-JL-1 (law enforcement access chart) and Exhibit 1 to the government's sentencing memorandum (trading profits calculation); (2) that in some, but not all instances, Agent Royer actually did access law enforcement information, *i.e.*, his search actually returned a result (Tr. 4325-26 (testimony of Agent Jack Liao, who created the chart, that searches did not always obtain results)); and (3) that in some of those instances, but not all, similar information showed up on the site (*id.*). This does not show that law enforcement information was passed to Mr. Elgindy for all 32 stocks – it was not.¹⁹ This does not show that the law enforcement information was put on the site in all cases –

¹⁹ We argued in our opening memorandum that Mr. Elgindy could not have foreseen trading on law enforcement information that Derrick Cleveland specifically kept from him with respect to CATH, CWON, INIV, MDPA, NAPH, REFR, and TTRE. (Elgindy Mem. 49,77.) With the exception of TTRE and REFR, the government does not address these stocks at all, but nevertheless includes them in its profit calculation. Although the government claims that Terrell gave the TTRE information to Mr. Elgindy and put it on the site (Govt Mem. 13 n.3), Terrell's testimony does not support this. What Terrell said is that he called a "quack raid" on the stock, meaning he expressed his opinion that it was a good short. (Tr. 3870.) He did not testify that he gave Mr. Elgindy the law enforcement information or put law enforcement information on the site, and the chat logs confirm that he did not put it on the site. (*Id.*) The government actually discusses REFR only in the context of RC chat, arguing that Slotnick put law enforcement information on RC chat and McGreggor saw it. (Govt Mem. 55 n.29.) That is because no law

it was not. And it does not show that the information passed to Mr. Elgindy and put on the site was material in each case— it was not.

The government has not proved that the information accessed as to each of the 32 stocks was “material.” The government gives no explanation whatsoever as to how or why the law enforcement information that was disseminated was material considering the “total mix” of information on a particular stock as reflected in the trial record. (Tr. 4369-70 (testimony of Jack Liao that he only looked at the DC chat selected for him by the prosecutors to see if and where any of the accessed information may have been put in chat).) Instead, the government offers essentially three affirmative arguments for materiality: (1) Cleveland says Royer’s information was the “best information that a person could get a hold of”; (2) Mr. Elgindy said in chat that the site is all about “fidelity, bravery and insider selling”; and (3) site members traded in stocks after law enforcement information was put on the site. (Govt Mem. 51.) None of these arguments is even close to sufficient.

enforcement information about REFR was *ever* put on the AP site. It was only on RC chat. The government does argue generally that Mr. Elgindy’s role makes him responsible for all tippees of Derrick Cleveland. As shown in our memorandum, however, Cleveland was the leader of his own scheme, controlled the flow of information, and deceived Mr. Elgindy on multiple occasions. Mr. Elgindy had no control over Cleveland or his information and should not be held responsible for Cleveland’s actions outside the scope of Mr. Elgindy’s knowledge or involvement.

We also presented evidence in our forfeiture brief at pages 19-20 showing that Mr. Elgindy clearly did not receive or trade on any law enforcement information about IMCL and could not have foreseen anyone else’s trading on such information. There is no evidence whatsoever that Mr. Elgindy knew that Ms. Wingate accessed any law enforcement information about IMCL, that she gave Royer any information about IMCL other than contact information, or that Royer gave anyone else any confidential law enforcement information about IMCL. The government does not address IMCL in its brief, and IMCL is conspicuously absent from the list in the government’s memorandum of stocks about which Mr. Elgindy received law enforcement information (Govt Mem. 13 n.3). Again, Mr. Elgindy should not be held responsible for actions outside the scope of his knowledge or involvement.

Cleveland's testimony about the value of the information is so general as to have no probative value and surely cannot establish materiality as to every access Royer made on 32 separate companies. The "insider selling" comment was both misinterpreted and taken out of context. Cleveland, Terrell, and Rubenstein testified that the common meaning of "insider selling" on the site was that insiders of a company were selling large amounts of stock and that was a red flag. (*See* Tr. 1488-89, 1496-1502, 1507 (Cleveland); 3989 (Terrell); 5604-05 (Rubenstein).) In any event, that too is far too general to establish materiality for 32 different stocks. Finally, trying to prove materiality by arguing that site members traded after information was accessed or even released on the site is circular. There is no case law to support this. The information in a trader's possession must be both non-public and material to make the trades illegal. In any event, site members also traded in these stocks before law enforcement information was accessed and/or disseminated on the site – as the government concedes in excluding all such pre-access trades (Govt Mem. 57) – and traded in each stock before and after law enforcement information was disseminated because the site was following it, not necessarily because the law enforcement information was so "material."

As to whether the law enforcement information "informed" anyone's trades, the government argues that "the jury found[] this information clearly informed trading decisions." (Govt Mem. 60.) But the jury's finding in this regard goes only to the four stocks of conviction and only to trading by Mr. Elgindy. The government also claims, "[t]o the extent that AP site members continued to trade those stocks [after law enforcement information was disseminated to them], their decisions *must have been* informed by the information to which their membership made them privy." (Govt Mem. 61 (emphasis added).) But an assertion that trades "must have been informed" by certain information is no substitute for actual evidence in the form of

testimony by those doing the trading that their decisions as to particular stocks were in fact informed by particular information.²⁰ To use the government's words, it is far too "speculative" to extrapolate from a few generalized statements by cooperators and a jury verdict finding insider trading as to 4 stocks but rejecting it as to 2 others that, for 26 additional stocks, the law enforcement information "must have informed" all site members' trades for an indefinite period of time after it was disclosed to the site. And that is of course assuming, as the government inappropriately does without presenting any proof, that each non-testifying site member it seeks to include in its calculation was logged on when the information was put on the site or was otherwise at any point even aware of the information.

4. The Record Rebutts Claims of Insider Trading Beyond the Four Stocks of Conviction

The government seeks to include alleged insider trading gains not just as to stocks as to which there is no jury finding, but also as to stocks where the jury rejected the government's contentions and acquitted Mr. Elgindy of insider trading (SLPH and FLOR). As we argue above, the government has not met its burden with regard to any of these uncharged and acquitted stocks because the government either presents no evidence or insufficient evidence of insider trading with regard to each stock. In reality, however, the record goes beyond a failure of the government to prove insider trading with regard to these stocks and affirmatively rebuts the claims of insider trading. SLPH, BIOP and VLPI provide three examples.

²⁰ To the extent the Court is considering including trading profits of any alleged co-conspirators who did not testify at trial and who Mr. Elgindy has not had a chance to examine (e.g., Daws, McGregor, Slotnick, Thorpe), in connection with either calculating the Guidelines or determining a forfeiture amount, Mr. Elgindy reiterates his request for an evidentiary hearing during which he would have the opportunity to examine these individuals about the basis for their trading. We appreciate that one or more of these individuals may invoke his Fifth Amendment privilege, but submit that we are entitled to an opportunity to attempt to elicit their testimony and/or to seek to compel the government to immunize them.

The evidence at trial made abundantly clear that Agent Royer did not provide any law enforcement information to Mr. Elgindy regarding SLPH and that Mr. Elgindy's information on SLPH came from the site's due diligence, his probation officer, SEC Attorney Brent Baker and former SLPH employee Todd Orme. The site followed SLPH for months before Royer searched it on May 18, 2001. (JX 93; JX 100; JX 138; JX 139; GX-JL-1.) The search result: "No records found." (GXC-3100.) SEC Attorney Gordimer searched SLPH on May 21, 2001 and found nothing. (Tr. 3558, 3560 (12/2 Gordimer testimony); GX-DG-3.) On May 29, Daws provided Mr. Elgindy a report on SLPH (JX 125) and Mr. Elgindy shorted SLPH (GX 2582). That short sale is included in the government's profit calculation even though the accesses by Royer and Gordimer had turned up absolutely nothing. This is clearly improper.

Mr. Elgindy and some other site members then visited SLPH on June 6, 2001, taking pictures and interviewing its officers. (JX 151.) On June 7, Mr. Elgindy shorted 8000 shares, covered 2500, shorted 1000 more, and covered 4000 shares. (GX 2582.) From June 5 to 7, Cleveland shorted SLPH and between June 7 and 15, he covered and closed out his position. (GX 2578.) On June 18, 19 and 22, Mr. Elgindy shorted a total of 5500 shares, then covered 900 shares from June 22 to June 28. (GX 2582.) All of these trades are included in the government's profit calculation, even though no law enforcement information had even been *accessed*. (GX-JL-1 at 19; *see supra*.) On June 22, Mr. Elgindy posted *publicly* on Silicon Investor that SLPH is a scam (DX 1338) and on June 26, Mr. Elgindy published a report on SLPH *free to the public* on Insidetruth.com. On June 29, Royer searches again: "No records found." (GX-JL-1; GXC 3100 at B1559.)

GX-JL-1 lists chat on July 17 (GX-DC-155) that supposedly contains law enforcement information. It says "SLPH is complaining to the FBI." The chart would suggest

that this information came from one of the earlier searches listed on the chart, but there have been no results found from those searches, so the connection to chat on GX-JL-1 is misleading and untrustworthy. The information really came from Mr. Elgindy's probation officer, who had been contacted that day by FBI Agent Knutson, the agent that was investigating Mr. Elgindy regarding SLPH. (Tr. 3418 (Reidling testifying that he "received a call from Agent Knutson on July 17").) Royer did not find this investigation until he searched "Todd Orme" as opposed to "SLPH" on July 26. (GX-JL-1; GXC 3100.)

On July 24, 2001, former SLPH employee Todd Orme contacted Mr. Elgindy and told him about the FBI investigation and Mr. Elgindy then put that in chat. (JX 182.) Not until July 26 does Royer even get a result by searching "Todd Orme" and then the search still indicates that it is Mr. Elgindy under investigation. (GXC 3100.) On August 3, 2001, Mr. Elgindy gave SEC Attorney Brent Baker Orme's contact information. (DX 5371.) Cleveland claimed Royer told Mr. Elgindy about the SEC investigation, but it was clearly Baker. (DX 5371 (Baker-Elgindy email); Tr. 5851 (Baker testified he had never heard of Royer); Tr. 3558, 3560 (12/2 Gordimer testimony); GX-DG-3 (Gordimer never found anything).) On August 6, Todd Orme told Mr. Elgindy that SLPH was under FBI investigation. (GX 3001 (broadcast 8/6/01 9:15 pm).) This is before Agent Royer could have known, as he first saw the document changing the target to SLPH on August 23. (GX 3102 (showing that Royer viewed Serial 4 indicating the change in target on 8/23).)

Meanwhile, Mr. Elgindy shorted SLPH on July 5, July 24 (the day Orme informed him of the FBI investigation into SLPH that Royer was still unaware of), July 30, not again until September 24 and then October 18, roughly corresponding with emails between Mr. Elgindy and Brent Baker about SLPH. These trades too are improperly included in the

government's profit calculation. If there is one stock where the evidence at trial proved Cleveland a liar and the government's insider trading theory impossible, it was SLPH. That is why the jury rejected it and why this Court should reject the government's efforts to include it in their profits calculation without any explanation or justification for second-guessing or reconsidering the jury's finding.

The evidence at trial also indicates that Mr. Elgindy's and others' BIOP trades were the product of site member research and not any law enforcement information from Royer. As early as December 1, 2000 and continuing through January 5, 2001, Mr. Elgindy expressed skepticism about BIOP's urine-based cancer vaccine and the tactics of its majority shareholder, John Liviakis. (DX 8953; DX 8954; DX 8955.) Mr. Elgindy also sent his probation officer a critical Bloomberg report about BIOP, Liviakis, and the company's claims of a cure for cancer around this time. (GX 3725.) Cleveland admitted that he did not even learn about BIOP and Liviakis until January 18, 2001, when he asked about the company in chat in response to which site members posted a copy of the Bloomberg article for him to read. (DX8951; DX8952; Tr. 1923.)

SEC attorney Doug Gordimer accessed the SEC database on January 18, 2001 and found there was an investigation into BIOP that had been closed six months earlier. Royer attempted to access information about the company on January 22, 2001, finding nothing. (GX-JL-1 at 2.) Cleveland falsely testified that Royer told him that there was a pending investigation into BIOP (Tr. 531), when in fact, there were no investigations pending at that time (DX 10098). As for the chat exhibits listed on GX-JL-1 that supposedly indicate the dissemination of law enforcement information, two of them (GX-DC-65 and GX-DC-72) have no law enforcement information about BIOP whatsoever, and the third (GX-DC-73) shows Mr. Elgindy stating at

14:18 on February 9 that BIOP will be investigated to see if they are in violation of federal Mexican laws. Mr. Elgindy's statement about the Mexican investigation derives from another Bloomberg article released on February 9, 2001 at 14:01 reporting that Mexican authorities were planning an inspection of BIOP facilities to investigate whether the company was in compliance with its licenses. (DX 3231.) A site member copied text from the article into chat seven minutes later. (JX 74.) Two minutes after that, Mr. Elgindy shorted the stock (GX 2582), and eight minutes after that Mr. Elgindy broadcasted his trade in chat and made the above statement (JX 74). On February 16, 2001 another Bloomberg article reported that the Mexican officials shut down BIOP's facility. (DX 3237.) Mr. Elgindy immediately copied the article's title into chat (JX 80), and shorted the stock again that same day (GX 2582). This evidence leaves no doubt that Mr. Elgindy's trades followed from his own skepticism as well as the research and close monitoring of news reports by the AP site members. In fact, there actually was no law enforcement information found about BIOP when Gordimer and Royer searched it; yet, the government includes all trading in BIOP starting on January 18, 2001, the day Gordimer found that there was no investigation.

The evidence regarding VLPI similarly demonstrates that no insider trading occurred. Mr. Elgindy first took large short positions in VLPI from October 15-18, 2001 because he recognized it as being an overvalued scam company early on. (GX 2582.) The site at that time was monitoring news that VLPI supposedly had invented a home anthrax test, and site members were scrutinizing the company's financials as well as its scientific claims. The discussions noted how unfeasible the claim was in light of their research into the company's resources and the scientific research and development demands of such a product. (JX 237 at 1-2; JX 239 at 5, 8, 11; JX 237 at 12; JX 240 at 2-3.)

Cleveland shorted VLPI when the market opened on the morning of October 18, 2001, following one of the more extensive of these discussions occurring late night on October 17-18, 2001. (GX 2578, DX 8829.) Cleveland testified that he shorted the stock in response to inside information provided by Royer (Tr. 1898-99), but the government's own documentation indicates that Royer did not even search for law enforcement information about VLPI (specifically, its CEO, Donald Podrebarac) until the *evening* of October 18, 2001, after Cleveland had taken his short position. (GX-JL-1.) Moreover, the searches querying Podrebarac and VLPI revealed no record of any investigations. (GXC 3400 at 1-3; GX-HS-1 at A1746.) Mr. Elgindy's InsideTruth.com report about VLPI, released on October 23, 2001, indicates that he continued to investigate the company since taking his initial short positions; the report discussed VLPI's use of a not-for-profit corporation to finance its operations, analyzed VLPI's paltry finances, and criticized the feasibility of its anthrax test claims. (Tr. 5344; DX 12118 at 1-2.) About a month later, on November 27, 2001, VLPI announced that its anthrax test had been certified by an independent laboratory. (DX 3299.) The site members immediately spotted this release as a sham, and various site members including Mr. Elgindy responded by shorting the stock. (JX 265 at 1-3.) Mr. Elgindy placed his trades within three hours of VLPI's bogus press release. (GX 2582.)

The next day, on November 28, 2001, a Bloomberg article reported that the SEC had issued a subpoena for documentation concerning the supposed certification and that the independent lab denied VLPI's certification claims. (DX 3300.) The site members picked up on this report (JX 266), and shortly thereafter on that very same day Mr. Elgindy took another short position in VLPI (GX 2582). Cleveland testified that he received information about the SEC's inquiry from Royer and passed it along to Mr. Elgindy. (Tr. 816-18.) If that were true, Mr.

Elgindy would have had no reason to wait until after the Bloomberg article was published to make his trades. Moreover, the only VLPI query Royer ran during that timeframe did not occur until December 4, 2001, a full week later. (GXC 3400 at 11.) And Gordimer never ran a query in the SEC database. (GX-JL-1 at 20-21.)

This evidence again demonstrates not only that Mr. Elgindy's VLPI trades proximately followed rigorous news monitoring and investigation by site members, but also that no inside information could have influenced those trades. In fact, as with BIOP, the evidence indicates that no relevant inside information even existed, as Royer's queries identified no investigations into the company or its CEO.

As the Court can see through the three examples of SLPH, VLPI and BIOP, a thorough review of the record in fact refutes the government's conclusory claims of insider trading. A similarly rigorous and detailed analysis of each of remaining 25 stocks beyond the 4 stocks of conviction would, we submit, similarly rebut any claim of insider trading. In light of this record and these examples, the government's near-exclusive reliance on GX-JL-1 to establish insider trading for the 28 non-conviction stocks and as the basis for incorporating profits from those 28 stocks into Mr. Elgindy's Guidelines calculation, with the result of driving that Guidelines calculation significantly higher, is plainly insufficient.

5. The Government's Site Fees Calculation is Grossly Over-Inclusive and Double Counts the Insider Trading Profits

The government concedes that the site fees earned before the indictment period, before Mr. Cleveland claimed he recruited Mr. Elgindy, and before anyone claimed that the site was being used to disseminate law enforcement information should not be included in its profits calculation. (Govt Mem. 61, 64; Forfeiture Reply 23). Nevertheless, the government includes in

its calculation of “gain” from insider trading all of the site fees paid by all members beginning in October 2000, *i.e.*, \$1.6 million dollars. (*Id.*) The government’s position is flawed, for several reasons. First, the insider trading guideline, § 2B1.4, provides that the relevant “gain” includes only “the total increase in value realized *through trading in securities*,” § 2B1.4 comment (emphasis added), which cannot include the site fees. Second, the government argues that the site fees are a substitute for profits Mr. Elgindy gave up to AP site members. (*Id.*) If that is the case, however, then including some or all of the site fees constitutes double counting of the profits of site members that the government asserts also should be included in Mr. Elgindy’s gain from the offense.

Third, even assuming that the site fees are relevant to determining Mr. Elgindy’s gain, as we showed in our opening memorandum: (1) Mr. Hansen retained some of the site fees as payment for being the webhost and those should be excluded (Elgindy Forfeiture Brief 25-26); (2) the vast majority of site members paid site fees for legitimate services having absolutely nothing to do with the alleged RICO or securities fraud conspiracy and their fees should therefore not be included (*id.* 13-15); and (3) only a “tiny fraction” of the site was even arguably dedicated to law enforcement information and no more than that percentage of site fees should be considered illegal gain (*id.* at 13.). The government ignores the first two assertions and focuses on the third.²¹

The government argues that “Cleveland, Hansen and Terrell described how the site changed to covering ‘scam’ companies in October 2000 when the defendant was released from prison.” (Govt. Mem. 62.) To test this assertion, we recalculated our percentage of

²¹ In fact, as reflected in his tax return for calendar year 2001, the trading gains attributed to Mr. Elgindy in connection with the 4 conviction stocks (\$216,000) represents less than 10% of his gross income and profits for the year. (*See* Compendium of Exhibits.)

allegedly “tainted” stock calls (*i.e.*, calls on the 19 stocks about which the government claims law enforcement information was disseminated on the site) from October 2000 forward. The percentage of “tainted” stock calls during that period was still only a tiny percentage (5.36%) of all calls, and increased only minimally from the 4.86% figure going back to when Hansen began running the site in 1999. (Kelner Aff. Exs. F & G.) In short, this empirical evidence shows the site did not change to being all about (and in fact was never mostly or even substantially about) “scam” stocks or law enforcement information.

The government also argues that Mr. Elgindy’s “success as a stock manipulator was due, in part, to the manner in which he deceived AP site members about site fees.” (Govt Mem. 63.) This argument is spurious. The government contradicts itself by arguing in this same section a page earlier that Mr. Elgindy told his site members that *he* received fees in exchange for giving up his fills on the stocks he traded. He did not deceive his site members into thinking that he did not receive site fees to “line his pockets.” He told them. In addition, the argument that making his site members think he was providing a service as opposed to enriching himself “gave him exaggerated influence he would not otherwise have” (Govt Mem. 63), borders on absurd.

In sum, site fees should not be included in Mr. Elgindy’s gain for purposes of his guidelines calculation because such non-trading profits are specifically excluded from § 2B1.4 and otherwise represent double counting the AP site member tippees’ profits. If site fees are included, the amount should be no more than the amount we calculated based on the evidence in the record: the \$30,300 paid by the convicted co-defendants from October 2000 through May 2002. (Kelner Aff. ¶ 35 and Ex. H.)

C. The Jury Rejected the Government's Obstruction of Justice Theories and Evidence and So Should This Court

Notwithstanding the jury's rejection of the government's obstruction of justice charges – a fact that, remarkably, is not even acknowledged in the government's almost eight full pages of argument as to how it proved Mr. Elgindy's pre-arrest obstruction of justice – the government continues to press for this two-level enhancement. At pages 99-102 of Mr. Elgindy's opening memorandum, we summarized both the legal and factual reasons why the Court should not impose the obstruction enhancement. The government's insistence on pressing this discredited claim compels us to address the allegations in fuller detail here.

Before responding to each of the government's arguments, we want to underscore one extremely powerful piece of evidence that affirmatively refutes the heart of the government's obstruction theory – that Mr. Elgindy was being fed details about (i.e., “monitoring”) the FBI's investigation of him. The Court will recall that it was Mr. Elgindy's family stock broker – David Ross – who reported to the FBI Mr. Elgindy's failed attempts to sell the long positions in his children's' trust accounts on September 10, 2001.²² At trial we introduced two pieces of paper – DX 17131 and DX 17130 -- showing that six months after 9/11, Mr. Elgindy opened a new account – a pension account for himself – with this same broker, David Ross, and deposited \$65,000 into that account for Mr. Ross to manage. As we argued at trial, it simply defies logic to claim that if Mr. Elgindy had been “monitoring” the FBI's investigation, and thus had learned that Mr. Ross had reported him to the FBI as a 9/11 suspect, six months later Mr. Elgindy would have opened another account with this same broker. And of

²² These attempted sales were no secret – Mr. Elgindy announced them to all his site members in chat and in a broadcast call that same afternoon – September 10th. (See GX 3001 (broadcast 9/10/01 14:48)).

course, if Mr. Elgindy had been preparing to flee to Lebanon, it would have made little sense for him to be opening a new U.S.-based pension account.

As to the evidence on which the government specifically relies, we begin with Derrick Cleveland's thoroughly discredited eleventh-hour alleged recollection that Royer told Cleveland that he had told Mr. Elgindy "a little bit" about the FBI's investigation. (Tr. 947 (direct); 2103 (cross).) As we established at trial, and argued in summation, Cleveland first "remembered" this alleged fact on September 15, 2004, two years after he began cooperating and after having met with the government some 10 to 15 times for 20 to 30 hours. (Tr. 2104-05.) The circumstances thus strongly suggest Cleveland's testimony on this point was a fabrication; at the least, its "weight and quality" (*Vaughn*) are so questionable that it should not be the basis for any finding by the Court.

Second, the government resurfaces Mr. Elgindy's alleged post-arrest interview spontaneous utterance that he did not give money to Middle Eastern charities. But again, as we established and argued at trial, well before Mr. Elgindy's arrest, and following the events of 9/11, there had been controversy and a discussion on the AP site about the very subject that Mr. Elgindy mentioned – his alleged donations to Middle Eastern charities. That chat broadcast – GX 3001 (broadcast 9/25/01 17:26) -- showed that Mr. Elgindy had been concerned about his donations to an organization -- Mercy International -- that was being reported as having ties to Osama Bin Laden. But the broadcast also showed that there were two charities with the name "Mercy," and that the one Mr. Elgindy had donated to was a U.S.-approved organization and not the one with ties to terrorists. In addition, as we showed on cross-examination of former Agent Sutherland, just before the alleged Middle Eastern charities utterance, Mr. Elgindy was being challenged about a bank account he had opened in Lebanon. Mr. Elgindy had already explained

– in fact, volunteered -- during this interview that he had opened an account in Lebanon in connection with his plan to make a real estate investment by purchasing a vacation home there. Agent Sutherland was challenging Mr. Elgindy on why he would leave a lot of excess cash in that account in Lebanon, considering what an active investor Mr. Elgindy was. It was at that point that Mr. Elgindy attempted to respond to the suggestion that these funds were being put to nefarious purposes by stating that he didn't give any money to Middle Eastern charities (Tr. 4442–46.) In short, when considered in a full and fair context, as opposed to the isolation in which the government presents it, Mr. Elgindy's alleged "spontaneous utterance" does not rise to the level of "weight and quality" of evidence that should be demanded before the Court second-guesses the jury's rejection of the government's various obstruction theories.

Third, the government reprises its litany of Lebanon-related actions by Mr. Elgindy. But as we showed at trial, and noted in Mr. Elgindy's opening memorandum (at p. 100), substantial evidence demonstrated that Mr. Elgindy was *not* preparing to flee, including the facts that: (1) on April 15, 2002, months after the government claimed he learned he was under investigation, and weeks before his arrest, Mr. Elgindy paid \$305,000 in taxes to the U.S. government (DX 16083); (2) he repeatedly disclosed his travel to and activities in Lebanon (including purchasing an investment property and opening a bank account) not just to his site members in chat and through broadcasts (*see* Defense Summation Blow-up of DX 10564; DX 17115; DX 16100; GX 3001), but also publicly on the internet, through Silicon Investor (DX 10567; 10566)²³; (3) Mr. Elgindy's perfectly legitimate investment in a vacation condominium in Lebanon explains his transfer of funds there; (4) his non-disclosure to Probation of this purchase and these transfers is easily explained by the fact that the monthly form he filled out had no place

²³ In fact, it was revealed at trial that it was likely through the Silicon Investor posts that the FBI itself learned of Mr. Elgindy's travel to Lebanon. (Tr. 5060-61.)

for vacation homes or investment properties and only required disclosure of purchases of “goods or services” over \$500 (*see* GX 3723, Part A)²⁴; (5) all indications are that it was Global Securities, not Mr. Elgindy, that filled out the account-opening paperwork that mistakenly lists him as a resident of Lebanon, most likely because, at the time he signed these forms in October 2001, Mr. Elgindy was in fact visiting Lebanon, as the date and location next to his signature clearly indicate (*see* GX 4011); (6) while in the fall of 2001 Mr. Elgindy did not specifically tell his Probation Officer prior to his departure that he intended to travel to Lebanon (as part of a trip where he had been approved to travel for multiple weeks to a variety of countries including Egypt, Spain, Kosovo and all the nations in the Caribbean), Probation Officer Bryant made it clear that, upon Mr. Elgindy’s return, he did *volunteer* on the first occasion when she asked him where he had traveled that he had been to Lebanon, and several months later, in the spring of 2002, he specifically asked her if he could return to Lebanon (Tr. 3489-92); and, (7) while P.O. Bryant reported that Mr. Elgindy told her in April 2002 that he was thinking of quitting the whistleblowing business (Tr. 3499), this was because of scathing emails and personal attacks, including death threats (*See, e.g.*, GX 3001 (broadcast 10/24/01 11:22)), and as it turned out all that Mr. Elgindy did was take InsideTruth private (making it a paying site), and the AP site kept going.²⁵

²⁴ In fact, Probation Officer Bryant confirmed that even when the Elgindys moved into their new multi-million dollar primary residence in San Diego, she did not request any of the purchase documents. (Tr. 3513.)

²⁵ As to the government’s footnoted argument that an obstruction enhancement could be separately justified by the statement by Mr. Elgindy’s prior counsel in connection with bail proceedings, suggesting (in response to a question by the Court) that Mr. Elgindy’s decision to travel to Lebanon in October 2001 may have been spontaneous rather than pre-planned (Govt Mem. 73 n.37), the government cites no authority supporting the nonsensical proposition that such attorney advocacy in the form of a proffer to the Court could amount to a statement by the defendant that “unambiguously demonstrates an intent to obstruct.” *United States v. Khimchiavili*, 372 F.3d 75, 78 (2d Cir. 2004).

Particularly puzzling is the government's reliance for its obstruction theory on Agent Royer's letter to the federal district court in Texas in support of Mr. Elgindy's motion for early termination of supervised release. Far from proving he knew of the FBI's investigation and was altering his behavior accordingly, Mr. Elgindy's repeated openness with his probation officers and others (including the court in Texas) about his relationship with Agent Royer and his dealings with various law enforcement officers and agencies – which continued well past the time when the government claims he knew he himself was the target of an FBI investigation – powerfully rebuts any claim of obstruction of justice. (*See, e.g.*, Defense Summation Chart on Disclosures to Probation, including in the Compendium of Exhibits, and GX 3710 at 5; 3709 at 3; 3710 at 3; 3711 at 5; 3711 at 6; 3711 at 6; GX 3717 at 7).²⁶

In sum, while the government continues to *theorize* that Mr. Elgindy monitored its investigation of him, altered his behavior and prepared to flee, the simple facts are that he did not

²⁶ As argued at trial, Mr. Elgindy also believes that these disclosures to his probation officers – who told Mr. Elgindy that they were charged with monitoring his affairs to ensure he did not commit any further crimes – fatally undermine any argument that he acted with criminal intent with respect to the insider trading charges, although we of course acknowledge that the jury found otherwise, at least with respect to the 4 stocks of conviction.

To take just one example, in March 2001, as Mr. Elgindy's then-PO Mark Riedling testified, Mr. Elgindy included with his monthly report an entry concerning law enforcement contacts as follows:

Bob Terceror from, with a line indicating SEC, from Louisiana office, called. Want a audiotape or written copy of OSIN broadcast. Sent audio via FedEx on 3/14. FedEx provided by him official report on OSIN regarding assault and fraud committed by CEO James O'Brien, part of a company called OPTIMUN. I don't know source. 3/01 call from FBI in Quantico with phone number congratulations on a good report on OSIN 3/18 regarding GENI and KASH daughter. Random calls from Agent Royer at FBI during March and then it say[s] signed by Mr. Elgindy.

(Tr. 3453.) As PO Riedling went on to confirm, this detailed disclosure and the many other detailed law enforcement disclosures like it from Mr. Elgindy went well beyond the detail he was used to getting from probationers. (Tr. 3454.)

flee to Lebanon despite ample opportunity to do so after allegedly learning of the grand jury inquiry, and he continued to operate the AP site and investigate and expose scam companies well after the point in time at which government claims he knew the FBI was targeting him for criminal prosecution (including, for example, his activities with respect to exposing NSOL and Paul Brown in late 2001 into early 2002). These actions, along with all of the other facts adduced above, overwhelmingly refute the government's obstruction claims, and at the very least demonstrate that the "weight and quality" (*Vaughn*) of the government's so-called proof on this issue is woefully short of what this Court should require to second-guess the jury's rejection of the obstruction evidence.²⁷

D. Mr. Elgindy Was Not a Leader

The government claims that the offense here "involved a massive enterprise" (Govt Mem. 74) including Mr. Elgindy, Royer, Wingate, Cleveland, Hansen, Terrell and Daws,

²⁷ The government's additional obstruction argument – that Mr. Elgindy's arrest at MacArthur Airport is itself sufficient to support the enhancement – is also without merit. The government characterizes the April 2004 incident at MacArthur Airport as an "attempt[] to flee" (Govt Mem. 73), yet concedes that "mere flight from arrest" is insufficient to support a finding of obstruction under § 3C1.1 (Govt Mem. 72), and fails to even acknowledge, much less distinguish, the Second Circuit's recent reaffirmation in *United States v. Bliss*, 430 F.3d 640, 648 (2d Cir. 2005), cited in our opening memorandum, that "flight itself is insufficient to support the [§ 3C1.1] enhancement" even when combined with the use of an alias. The post-arrest obstruction argument therefore plainly fails as a matter of law.

It also fails as a matter of fact. The evidence cannot support a finding that Mr. Elgindy was fleeing or attempting to avoid appearing in court when he was arrested on April 17, 2004, as the government suggests. On April 13, a few days before, Mr. Elgindy was in Florida attending the funeral of a close friend, Scott Helveston, who had been murdered as an American contractor working in Iraq. *See* Sentencing Letter WW, attached to Mr. Elgindy's opening memorandum (letter from Mr. Helveston's mother describing how Mr. Elgindy provided comfort to Mr. Helveston's family). Mr. Elgindy then returned to New York in anticipation of a court conference scheduled for April 15, 2004. And of course, as the Court knows, when he was arrested he was headed home, not to Lebanon or some far off jurisdiction where he might elude trial. Nor did he fail to appear at any conference where his appearance was required.

but the only people the government has proved to be members of any enterprise are Mr. Elgindy, Mr. Royer and Mr. Cleveland. Contrary to the government's assertion, Mr. Hansen, Mr. Terrell and Mr. Daws did not plead guilty or allocute to membership in any RICO enterprise. Three people is hardly massive. In addition, although the government attempts to include McGregor, Slotnick, Thorpe "and dozens of others" who allegedly traded on misappropriated information (Govt Mem. 75), the government has never proven that McGregor, Slotnick, Thorpe or anyone else was a coconspirator in the RICO or securities fraud conspiracy for which Mr. Elgindy was convicted. Merely saying that they were co-conspirators does not make it so. Rather, the overwhelming majority of members were not co-conspirators because they did not knowingly participate in any criminal wrongdoing. (Elgindy Mem. 95-96.)

The government goes on to argue that Mr. Elgindy solicited information from Cleveland and Royer and directed their efforts to particular companies and individuals. (Govt Mem. 75.) This is not true. As we showed in our opening memorandum, Cleveland's routine was to see a stock being covered on the AP site, gather the names of its officers and directors, give them to Royer to search and, if Royer provided information, decide himself how, when and to whom it would be disseminated. (Elgindy Mem. 48-49.) It was "[a]nother day in the life of Derrick and Jeff!" (GX 3500-DWC-6), not in the life of Derrick, Jeff and Tony. Moreover, the government's claim that Mr. Elgindy disseminated information to everyone is not supported by the record. Daws, Terrell and Slotnick received information directly from Cleveland; McGregor and Spiegel did not receive any information from Mr. Elgindy. In fact, Daws did many of the same things that Mr. Elgindy allegedly did – received and disseminated law enforcement information, ran his own website, made trading calls on the AP site – and Daws, not

Mr. Elgindy, made the lion's share of the profits, but the government apparently is not seeking a role enhancement for him.

The government's allegations that Mr. Elgindy was the leader of a market manipulation scheme are also wholly unsupported. The government claims that Mr. Elgindy orchestrated members' trading activity and published false and misleading reports as part of this market manipulation scheme, but there is *no evidence* that Mr. Elgindy controlled anyone's trading (Elgindy Mem. 97-98), and publishing false and misleading reports, even if it were the case – which it was not – has nothing to do with whether or not Mr. Elgindy was in a leadership role in this offense.

As we argued in our opening memorandum, this was not an extensive, hierarchical conspiracy with many members. Rather, it was a small group of people acting independently of each other in furthering their own aims. Moreover, if anyone was the leader, it was Cleveland, not Mr. Elgindy.

As for the extortion conspiracy, the government argues that Mr. Elgindy was the leader of Royer, Cleveland, Slavney, Peters and Roland Chapin. (Govt Mem. 77.) As we argued in our opening memorandum, the government has presented *no evidence* that Slavney or Chapin were knowing culpable participants in the extortion scheme and in any event, Mr. Elgindy never met or interacted with either of them. We are aware of no evidence that Royer or Cleveland participated in the alleged extortion of AJ Nassar or Paul Brown. Peters controlled the NSOL and FLOR transactions, acting as an intermediary among Paul Brown, AJ Nassar, Mr. Elgindy, Slavney and Chapin. On tape, Peters told Brown that he lied to Mr. Elgindy and told him Brown and he were friends, and that is why Mr. Elgindy did the deal, as a favor to Peter. (Tr. GX 3917

at 3.) Peters was the only other potential culpable participant and was the only leader if there was one. (Elgindy Mem. 98-99.)

E. November 2001 Guidelines Manual, Not the November 2003 Guidelines Manual, Applies to the Securities Fraud Case²⁸

In asserting that the “one-book rule” requires that the November 2004 Guidelines should be applied to both Mr. Elgindy’s airport offenses and the securities fraud offenses, the government barely acknowledges that the only on-point case purporting to apply Second Circuit law applied *different* versions of the Guidelines to “distinct,” ungroupable counts preceding and following a guidelines revision on *ex post facto* grounds, which is exactly the case here. *United States v. Johnson*, Nos. 97CR206, 98CR160, 1999 U.S. Dist. LEXIS 8819, at *27 (N.D.N.Y. June 4, 1999), *aff’d*, 221 F.3d 83, 92 (2d Cir. 2000) (recounting district court’s departure from the one-book rule and affirming sentence).²⁹ Instead, the government relies on decisions from other Circuits to argue that the one book rule applies here regardless of the fact that the airport offenses and the securities fraud offenses are not groupable and are completely distinct in time, kind and harm. (Govt Mem. 45 & n.22 (citing *United States v. Sullivan*, 255 F.3d 1256 (10th Cir. 2001), and *United States v. Butler*, 429 F.3d 140 (5th Cir. 2005).) At the same time, the government completely ignores our argument that the commentary to 1B1.11(b)(3) indicates that

²⁸ We repeat that, if the Court agrees with our argument that it should use the insider trading guideline (2B1.4) and not a market manipulation analysis (under 2B1.1) in calculating the Guidelines for the securities fraud case, the Court need not address this argument about which version of the Guidelines applies (as the government concedes that the insider trading calculation is the same under both the 2001 and the 2003 books). Nor would the Court need to address the arguments that follow about the applicability of certain enhancements under 2B1.1, including investment advisor, more than 250 victims and sophisticated means.

²⁹ In fact, *Johnson* disagreed with the commentary to §1B1.11(b)(3), cited by the government, which states that the *ex post facto* analysis does not depend on whether counts are groupable. In addition to *Johnson*, other circuits have rejected application of §1B1.11(b)(3) in circumstances similar to the case at bar, as noted on page 91 of our opening Memorandum.

the Court can only apply that guideline provision without violating the *Ex Post Facto* Clause where the pre-revision offense is relevant conduct to the post-revision offense.

Sullivan does not support the argument that grouping is irrelevant. In *Sullivan*, the counts of conviction straddling the Guidelines revision *were* grouped, 255 F.3d at 1258, and the court relied on that groupability to conclude that using the later Guidelines did not violate the notice requirement, *id.* at 1262-63 (“When Mr. Sullivan committed his last failure to file, post-amendment, he was on notice that losses from his first two failures to file would either be grouped with his latest offense or be considered as relevant conduct, and that the penalty for his grouped tax offenses had been increased.”). *Butler* gives no independent *ex post facto* analysis, but refers to a prior case, *United States v. Kimler*, 167 F.3d 889 (5th Cir. 1999), where again the counts straddling the Guidelines revision were groupable under § 3D1.2(d), 167 F.3d at 891, and the court relied on that groupability to hold that there was no *Ex Post Facto* violation, *id.* at 895 (“Kimler had proper notice that, if he continued to commit related offenses that would be grouped under § 3D1.2(d), he would be sentenced under the guidelines in use when he committed the last offense in the grouped series.”).

In fact, the *Sullivan* case supports our unanswered argument that the commentary to §1B1.11(b)(3) indicates that use of a revised guideline does not violate the *Ex Post Facto* Clause only when a defendant is on notice when he commits the *later* offense that conduct from earlier offenses “would either be *grouped* with his latest offense or be considered as *relevant conduct*” with respect to his latest offense. *Sullivan*, 255 F.3d at 1262-63 (emphasis added); *see* § 1B1.11(b)(3) comment (stating that relevant conduct *after* an offense cannot extend the date of the offense for *ex post facto* purposes and providing rationale for punishing a pre-revision offense under post-revision law based on the ability to sentence the later conduct with reference

to grouping and relevant conduct rules regardless of whether the grouped offenses or relevant conduct result in a conviction). The government argues that §1B1.11(b)(3) put Mr. Elgindy on notice that “commission of future crimes could negatively impact his guidelines sentence as to all his crimes.” (Govt Mem. 45-46 & n.22) But that is only true if the *future* crimes can be sentenced based on the earlier conduct, and that can only occur, as the 10th Circuit notes, if that earlier conduct can be grouped with the later crime or can be considered relevant conduct to the later crime.

The government concedes that the securities fraud offenses and airport offenses are not groupable (*id.* at 78-80; PSR ¶ 142), which leaves only one category of relevant conduct that is even potentially applicable in this circumstance. *See* §1B1.3(a)(1) (relevant conduct includes conduct “that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense”); §1B1.3(a)(2) (relevant conduct includes conduct that was “part of the same course of conduct or common scheme or plan as the offense of conviction” “solely with respect to offenses of a character for which §3D1.2(d) would require grouping”). The securities fraud conduct simply does not fit within this framework; it is not logical to say that Mr. Elgindy engaged in the securities fraud conduct “during,” “in preparation for,” or “to evade detection or responsibility for” the later, post-revision airport offenses. The November 2001 Guidelines therefore must be applied to the securities fraud case if § 2B1.1 is applied.

F. Even if Theoretically Applicable, There Is No Factual Basis for Applying Investment Advisor or Multiple Victim Enhancements

1. Mr. Elgindy Was Not an Investment Advisor

The government argues that Mr. Elgindy was an investment adviser as defined in the Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(11), and §2B1.1(b)(15)(A), because his stock commentary on the AP site was “not offered to the public on a regular basis,” was “timed to specific market activity,” was “anything but disinterested,” and included responses by him “directly to the AP site members’ comments about particular securities.” (Govt Mem. 24, *citing Lowe v. SEC*, 472 U.S. 181, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985).) While the government’s argument disputes the applicability of the “publisher’s exception” to the definition of “investment adviser,” the government fails to explain how Mr. Elgindy’s commentary on the AP site falls within this definition in the first place.

The Supreme Court explained in *Lowe* that the “[Investment Advisers] Act was designed to apply to those persons engaged in the investment-advisory profession – those who provide personalized advice attuned to a client’s concerns, whether by written or verbal communication. The mere fact that a publication contains advice and comment about specific securities does not give it the personalized character that identifies a professional investment adviser.” *Id.* at 207-208.

Here, Mr. Elgindy’s participation on the AP site was neither advisory nor personalized. First, the AP site was a research and discussion forum, not a source for trading advice. (*See* Tr. 5586-87 (testimony of NYU professor Jeffrey Rubenstein that the AP site was “for discussing ideas, for sharing information, for raising . . . suggestions about a trade and getting feedback to see if people had different perspectives. It was to enhance everybody’s

trading abilities . . .”).) Site members repeatedly were told that the purpose of the site was to discuss and exchange information about companies, that all members could share their views, and that any such commentary was not investment advice. Each time site members logged in, a disclosure in bold print reminded them that the site “was created as a place for people to meet and discuss the market or anything else for that matter,” that any member was able “to broadcast important information to all members,” and that “the owners of the site do not review the information before it is broadcast.” (DX 10533.) In addition, the terms of use that all members had to affirmatively accept started with number 1, “**Scope of Agreement: THIS IS NOT A FINANCIAL ADVISORY SITE,**” and included in “Rights and Responsibilities,” that

We do not advise on the purchase or sale of securities. Every member must do their own due diligence regarding this site, its operators and all content any member offers. None of the statements and expressions of opinion made on our Site are meant to be a solicitation or recommendation to buy, sell or hold securities. . . . **THE SITE OFFERS NO FINANCIAL ADVICE IN ANY FORM WHATSOEVER** You, the investor, not us, assume the entire risk of any trading that you choose to undertake. You hereby agree to hold us harmless in the event you suffer financial loss or hardship by following or ‘mimicking’ trades posted on this site either by us, or other members or our agents.

(*Id.* at 2, 4.) New member orientation sessions reiterated these points, as did subsequent training sessions conducted by Hansen and Mr. Elgindy. (*E.g.*, DX 10536; Compilation of 11/14/2000, 11/29/2000, 3/22/2001, 6/7/2001, and 1/14/2002 chat log excerpts, included in the Compendium of Exhibits.) Indeed, Mr. Elgindy was not the only principal commentator; any site member could comment on any matter, and site members would vote to designate their more experienced peers as “Men In Blue,” whose chat commentary would appear in blue print making it easier to identify and follow.

Second, contrary to the government's assertions, the trading calls and Mr. Elgindy's replies to questions from site members were not instances of personalized advice, nor was his commentary "attuned to any specific portfolio or to any [site member's] particular needs." *Lowe*, 472 U.S. at 208. The disclosure and training sessions made clear to all site members that when Mr. Elgindy or anyone else (including the Men In Blue) made trading calls, they were not advising other site members to make a trade but, rather, were simply informing those other members about the trades they themselves were making. (*E.g.*, DX 10536.) This teaching by example approach furthered one of the principal goals of the site, to help members learn to trade more effectively. The government's characterization that Mr. Elgindy "responded directly to the AP site members' comments about particular securities" is misleading because it fails to point out what the members' comments were and that whenever asked specifically for advice about a contemplated trade, Mr. Elgindy consistently responded that he does not give "advice." (*E.g.*, DX 11048-11066 ("achen I cannot give financial advice," "glasno...i cannot tell you what to do...nor can I advise...i am short AMZN & HOMS that's all I can say," "dot i cant answer that question i just tell you what I did," "I cant advise ya...cause I dont know what ya got and what you [w]ant to do," "sangar,, you know I cant answer that," "henk... that is your call... I dont give advice about specifics i only tell ya what i do and how i do it").)

CHAT LOG – November 29, 2000 (DX 17106-7)

[21:21] Henk >> Anthony I did ss TTRE, and bought it back in my long account. So I am "boxed" If it goes up, should I just sell my longs or use it to cover?

....

[21:22] anthony >> henk.... that is your call... I dont give advice about specifics i only tell ya what i do and how i do it

CHAT LOG – December 14, 2000 (DX 17106-13)

[15:10] glasno >> Tony do you think it's time to cover now , or hold ?

....

[15:12] AnthonyPacific >> 4 glasno....i cannot tell you what to do...nor can i advise...i am short AMZN & HOMS thats all i can say

CHAT LOG – March 19, 2001 (DX 17106-21)

[12:46] dotraders >> Tony shouldnt we wait on the calls to see if the market

pops tomorrow

[12:46] AnthonyPacific >> 4 dot i cant answer that question I just tell you what i did

CHAT LOG – September 27, 2001 (DX 17106-26)

[13:38] searchgp >> anthony i missed your last call on invn.....if its a small amount higher than your last call....would it be advisable to catch up so to speak

[13:38] AnthonyPacific >> 4 its b never ever traded that high ever

[13:38] AnthonyPacific >> 4 search i dont do advice

Moreover, the training sessions and other chat discussions made it clear that the resources and investment goals of the various site members including Mr. Elgindy differed considerably; that Mr. Elgindy neither knew about any particular member's resources or investment goals nor geared his commentary to any particular member's needs; that different people assumed different degrees of risk; and that it would be imprudent to blindly follow any particular trading call given these considerable differences in resources, goals, and risk level. (E.g., Tr. 2722-2726 (Hansen testimony); 11/14/2000, 11/29/2000, 3/22/2001, 6/7/2001, and 1/14/2002 chat log excerpts, included in our Compendium of Exhibits.)

These dynamics -- community commentary expressly disclaiming an advisory function -- are far from "the kind of fiduciary, person-to-person relationship[]" "attuned to . . . particular needs" contemplated by the Investment Advisers Act. *Lowe*, 472 U.S. at 208, 210. *See also Wang v. Gordon*, 715 F.2d 1187, 1192 (7th Cir. 1983) (information is not "advice" under the Investment Advisers Act if incidental to the purpose of the parties' relationship); *Zinn v. Parrish*, 644 F.2d 360, 364 (7th Cir. 1981) (direct recommendations to a client about business and investment matters is not "advice" under the Investment Advisers Act if incidental to the purpose of the client relationship). The investment adviser enhancement does not apply here.

2. There Are No Victims of the Alleged Insider Trading.

Without any explanation or justification, the government includes within its manipulation-based Guidelines calculation a 6-level enhancement on the theory that there were

more than 250 victims. (Govt Mem. 78.)³⁰ The government apparently contends that, because the site included many individuals who *might* have traded on inside information, there must be “hundreds or thousands” of victims on the other side of those unidentified trades.

Notwithstanding these bold assertions, the government has not been able to produce a single person who claims to have been victimized or claims to have suffered any loss in this case; nor have they offered any other evidence to that effect. Yet the term “victim” as used in §2B1.1(b)(2) means “any person who sustained any part of the actual loss determined under subsection (b)(1).” §2B1.1, comment. (n. 1). Speculation or conclusory arguments about victims is plainly insufficient under this standard and the government has thus failed to meet its burden of establishing the applicability of this very substantial enhancement. *See United States v. Arnaout*, 431 F.3d 994, 999 (7th Cir. 2005) (reversing enhancement for more than 50 victims, finding “insufficient evidence” that 50 or more out of some 17,000 donors had their donations illegally diverted to non-charitable uses and agreeing with the defendant that the district court was required to “account for each dollar diverted and . . . trace each diverted dollar back to a specific donor”).

The government has not only failed its burden, but it is also just wrong about who was on the “other side” of these trades. The “individual counterparties” to any improper trades were not some mom and pop “individual” investors; the counterparties were a limited number of professional market-makers who set bid and ask prices as they see fit and hold blocks of shares in order to bridge the sporadic trading demand for these kinds of stocks and, in the process,

³⁰ The government has identified only seven site members in addition to Mr. Elgindy that it claims were engaged in improper trades. Although the government quotes Mr. Elgindy’s remark that the “site had between 150-200 people logged on at any given time during business hours” (Govt Mem. 56), this does nothing to identify which of those people allegedly engaged in improper trades. Most site members did not even have access to a Canadian trading account that would have allowed them to short sell the bulletin board stocks at issue.

absorb many of the spikes and drops in price.³¹ The trade tickets show that the counterparty to each trade was a market-maker. (*E.g.*, DX 11508 (Mr. Elgindy trades BGII with JPAZ on broker side), DX 12130 (Mr. Elgindy trades SLPH with NITE on broker side), DX 07363 (Cleveland trades JUNM with NITE on broker side).) Yet again, no such market maker has come forward or been identified claiming to have been a victim of the conduct involved in this case.

The government's victims argument also ignores the broader context of Mr. Elgindy's actions. The companies Mr. Elgindy and the site members shorted were overvalued and, often times, "scams." Mr. Elgindy repeatedly warned the general public to that effect, through his InsideTruth reports and posts on SiliconInvestor.com. For example, on October 27, 2000, before Royer ever made one search into SEVU or gave Cleveland any information on SEVU, Mr. Elgindy posted the following on Silicon Investor: "Not a prayer, SEVU is junk and crappola." (DX 1004; Tr. 6405.) Likewise, on June 22, 2001 Mr. Elgindy publicly posted a warning on SiliconInvestor.com that SLPH was a scam (DX 1338), and on June 26 he posted a report about SLPH on InsideTruth.com that was free to the public. In this way, Mr. Elgindy actually saved people money. As Bob Zumbrennen, managing partner and majority owner of SiliconInvestor, explained:

Tony taught a lot of people the valuable trait of skepticism when investing. I believe very strongly that were it not for his presence on Silicon Investor, far more people would have been fleeced by crooked companies. I just as strongly believe that there are countless thousands of people getting fleeced right now simply because Tony's voice isn't there to be heard shouting "This is not a good investment" in his often colorful way. . . .

³¹ As SEC staff accountant and government witness, Diego Brucculeri, explained: "A market maker is a broker that maintains a bid and ask price in a particular security and if their prices are met, they are willing to trade from their own inventory. They have a vested interest in the price of the stock, they are trying to make money on." (Tr. 4542.)

(Elgindy Mem. 40.) If people chose to ignore Mr. Elgindy’s warnings and bought stock in those overvalued companies nonetheless, it is inequitable to count those people as “victims” in order to increase Mr. Elgindy’s sentence when he warned them against that very conduct in the first place.³²

III. THE GOVERNMENT'S UPWARD DEPARTURE ARGUMENTS ARE UNPERSUASIVE

A. There is No Basis for an Increased Sentence for Disruption of Government Function

The government proposes an upward departure pursuant to USSG §5K2.7 or an increased sentence under 18 U.S.C. §3553(a) based on an argument that Mr. Elgindy’s actions constituted a disruption of governmental function. The Guideline, however, applies only where there is *evidence* – not just conclusory assertion – that the underlying conduct “resulted in a significant disruption of a governmental function.” §5K2.7, p.s.

While the government’s submission on disruption of governmental function is long on rhetoric, it is short – indeed, it is entirely empty – on actual evidence. The government claims Mr. Elgindy’s conduct harmed the reputation of the FBI and “significantly impacted” the relationship between the FBI and the SEC. Yet, notwithstanding the facts that numerous FBI agents and close to a dozen SEC attorneys testified at the trial, and that many, many more law enforcement agents interacted with Mr. Elgindy over the years, the government is not able to cite

³² In fact there was substantial testimony about real victims who were fooled by individuals like Mr. Liviakis, one of the many con-men CEOs and promoters of fraudulent companies that Mr. Elgindy and his site worked to expose.

to a single witness or a single piece of actual evidence establishing any of the alleged damage or disruption or impact.³³

Moreover, even if the government's claim had any merit, there is no reason why the same opprobrium would not apply to Mr. Daws's conduct, and to his sentence. Targeting Mr. Elgindy alone in this context merely aggravates the persistent and unwarranted disparity of treatment between Mr. Elgindy and Mr. Daws.

Similarly, while the government states that "[c]ertain of the investigations *Royer compromised* involved undercover agents and cooperating witnesses" (Govt Mem. 81 (emphasis added)), it again fails to point to even one actual example of anything Mr. Elgindy did that put an agent or cooperating witness at risk or otherwise "significantly disrupted" their work. In fact, the only example cited in the government's memorandum of Mr. Elgindy allegedly learning about an undercover agent is information that Derrick Cleveland passed to Mr. Elgindy that included "reference to an 'undercover' SEC operative at SEVU." (Govt Mem. 7.) Of course, as the Court knows, the SEC does not have undercover operatives, and as we all learned at trial, these SEVU documents – including the alleged undercover operative – were *fabrications* created by Cleveland to try to impress Mr. Elgindy. (Tr. 1223-25; Tr. 2922.)

In addition, the government cites no evidence that any trading allegedly "informed by" law enforcement information in any way interfered with any government investigations. And no evidence is cited that the InsideTruth reports and other tips Mr. Elgindy supplied to the FBI and SEC impeded any investigation or proceeding; in fact, the government's

³³ The government tries to make it seem like Mr. Elgindy was much closer to Royer than he was by claiming that Royer stayed in Mr. Elgindy's hotel room in Vegas (Govt Mem. 11) and that Mr. Elgindy paid part of the rent for Royer (*id.* 12), but the government does not even get that right. Royer stayed in his own hotel room, for which he had a receipt. (DX 16152; Tr. 7559-60). And Mr. Elgindy paid part of the rent for his friend, Scott Helveston, who Royer lived with (Tr. 7596), and who was killed in Iraq two years ago.

own witnesses testified that they actually found that information helpful in many instances (*see* Elgindy Mem. 50-54 & n.18) or, at worst, irrelevant (*see* Govt Mem. 33 n.13).

The government's "most significant[]" claimed evidence of disruption of government function – the alleged fact that Agent Royer advised Mr. Elgindy that he was the subject of "an extremely serious and sensitive investigation" (Govt Mem. 82) – is simply a repeat of the government's obstruction of justice theory that the jury rejected and that this Court should reject as well, for the reasons outlined above. Furthermore, even assuming the Court were to credit these allegations, §5K2.7 ordinarily disclaims as duplicative a departure "when the offense of conviction is an offense such as bribery or obstruction of justice [because] in such cases interference with a governmental function is inherent in the offense." §5K2.7, p.s.

B. Mr. Elgindy's Criminal History is Not "Understated"

Citing his alleged involvement in the ALCO and Conectisys securities frauds, the government claims Mr. Elgindy's criminal history is understated and that his sentence should therefore be increased (apparently beyond even the life sentence that the government claims the Guidelines require). As to Conectisys, the government is simply mistaken when it claims that Mr. Elgindy was "forced to help authorities to avoid prosecution himself." (Govt Mem. 33.) We are not aware of a single shred of evidence – and the government cites none – that Mr. Elgindy was ever threatened with charges by the SEC in connection with Conectisys, much less that he ever faced criminal prosecution. Not even former SEC attorney John Sten – who suddenly claimed when he took the stand that Mr. Elgindy was an "accomplice" in a "daisy chain" fraud related to Conectisys stock – suggested Mr. Elgindy was in danger of prosecution himself,³⁴ and,

³⁴ Based on a sealed side-bar colloquy in which the government attributed a certain statement to Mr. Sten, Mr. Elgindy submits that there is substantial additional evidence calling into doubt Mr.

as noted in our opening memorandum (at p.17 n.6), Mr. Elgindy was never advised to seek counsel in connection with the matter. None of the targets of the SEC's Conectisys case were criminally prosecuted, belying the government's claim that this was one of two occasions when Mr. Elgindy "committed *crimes* for which he was not prosecuted." (Govt Mem. 84 (emphasis added).) The suggestion that Mr. Elgindy's substantial cooperation with the SEC in this matter – which we describe in our opening memorandum (at 16-17) and which the government does not dispute – supports an upward departure as "[p]rior similar adult *criminal conduct not resulting in a criminal conviction*" (Govt Mem. 83 (quoting U.S.S.G., 2004 Manual, Sec. 4A1.3(a)(2)(E) (emphasis added)) is for these reasons wholly without merit.

As to ALCO, again the government does not dispute Mr. Elgindy's extraordinary assistance in bringing to justice a notorious and elusive swindler (Melvin Lloyd Richards), among others (*see* Elgindy Mem. 15-16). Having decided over a decade ago to forego prosecution of Mr. Elgindy and accept his cooperation in connection with ALCO, it is fundamentally unfair for the same United States Department of Justice to now argue that Mr. Elgindy should receive a harsher sentence because his criminal history is by the government's own decision "understated." The government cites no authority for such an extraordinary result.

The government also complains that the defendant's criminal history calculation fails to account for the false statements at MacArthur airport, for which Mr. Elgindy has accepted responsibility and pleaded guilty. But of course Mr. Elgindy's Guidelines calculation

Sten's credibility and in particular his testimony that Mr. Elgindy was an "accomplice" in the Conectisys fraud. (*See* Tr. 5912-13.)

We note as well that what that the government claims Mr. Elgindy and his firm did – accept bid and offer prices at levels set by a NASD member firm – was what Mr. Elgindy believed at the time he was required to do as a market-maker, as pointed out in our opening submission. (Elgindy Mem. 17-18 & n.6.)

does otherwise and expressly take that separate conviction into account, and even requires – under 18 U.S.C. §3147 – that part of his sentence for the airport/bail violation case run consecutively to the time he is ordered to serve on the underlying securities fraud case.

Finally, we note that Mr. Elgindy’s actual prior criminal history includes only one conviction – for a \$55,000 insurance fraud – and it is that single conviction that gets him all the way to Criminal History Category III (because of the proximity of the current offenses to the prior one and the fact that Mr. Elgindy remained on supervised release for the latter at the time of the former). If anything, Mr. Elgindy’s criminal history category *overstates*, rather than understates, the seriousness of his criminal record.³⁵

IV. THE COURT SHOULD IMPOSE A NON-GUIDELINES SENTENCE OF LESS THAN 41 MONTHS IMPRISONMENT

As we believe we have demonstrated in our opening submission and in the preceding pages, a correct application of the Guidelines yields a sentencing range of 41 to 51 months on the securities fraud case. That range, we submit, should be the ceiling from which the Court considers whether to move downward to a more lenient sentence, whether through the downward departure mechanism or in light of the range of considerations set forth in 18 U.S.C. § 3553(a). Of course, the Court needs no reminding that, after *Booker*, the statutory mandate is to determine a sentence “sufficient, but not greater than necessary,” in view of *all* of the purposes

³⁵ For reasons difficult to understand, the government includes in a footnote (p. 36 n.16) several arrests that did not result in prosecutions. Needless to say, the Sentencing Guidelines are perfectly clear that only convictions – not arrests where there weren’t even prosecutions – are relevant to a defendant’s criminal history categorization.

The government also attempts to discredit Mr. Elgindy’s cooperation with FBI Special Agent Michael Gaeta, citing the agent’s testimony that he stopped using Mr. Elgindy, but fails to note that Agent Gaeta also checked the box on the same FBI form saying that Mr. Elgindy should be “considered for future operations.” Tr. 6284.

and considerations set forth in 18 U.S.C. § 3553(a), of which the Sentencing Guidelines are but one.³⁶

But whether the Court agrees with our Guidelines calculation or calculates something different, nothing in the government's memorandum refutes our arguments that the mitigating factors outlined in Mr. Elgindy's opening submission (at pages 21-38 and 103-111) provide multiple grounds for granting leniency. We briefly review these mitigating factors, and address the government's responses, one-by-one.

First, and perhaps most importantly, is the gross disparity between the government's calculation of Mr. Elgindy's Guidelines range for the securities fraud case (life in prison) and its recommended sentence for co-defendant Jonathan Daws (18-24 months in prison). In attempting to defend this glaring disparity, the government cites the fact that Mr. Daws, unlike Mr. Elgindy, has no prior criminal record. But as we noted in our opening memorandum, even accounting for the differences in criminal history (and for the extortion conviction), Mr. Daws still would be facing (in Category III) only 41-51 months in prison – the same range we argue should apply to Mr. Elgindy but only a tiny fraction of the term that the government argues is called for by the Guidelines.³⁷

³⁶ We note in this respect that recent statistics from the U.S. Sentencing Commission Special Post-Booker Coding Project (dated extracted December 21, 2005) show dramatic post-*Booker* increases within the Second Circuit in below-Guidelines sentences (excluding government-sponsored downward departures), from 13.6% downward departures in FY2004 to 23.5% below-Guidelines sentences following *Booker*, representing an increase of almost 80%. In this District, the percentage of post-*Booker* below-Guidelines sentences (again excluding government-sponsored downward departures) is now 32.5%, a rate almost 50% higher than the rest of the Second Circuit.

³⁷ As one Court has explained post-*Booker*, a term of incarceration for one co-defendant that is “five times longer than that imposed on” a co-defendant, “despite the fact that the two men participated together in the offenses,” and notwithstanding significant differences in the two co-defendants' criminal histories, is “disproportionately long” and warrants imposition of a non-

The government also claims Mr. Elgindy's conduct was different from that of Mr. Daws, but much of what the government attributes to Mr. Elgindy – *e.g.*, receiving misappropriated information, disseminating that information to others, manipulating stock prices and participating in the corruption of an FBI agent (Govt Mem. 87-88) – is equally applicable to Mr. Daws. For example, as the government's own submission confirms, Daws both received and solicited law enforcement information from Cleveland and Royer directly, and in fact started doing so while Mr. Elgindy was incarcerated in 2000 and before Cleveland first shared such information with Mr. Elgindy; Daws was "one of the big guys" on the AP site; and Daws admitted to trading on inside information he knew to be misappropriated. (Govt Mem. 54 n.26 & 55 n.28). In addition, the government does not dispute that Mr. Daws operated his own RC chat room, which he kept hidden from Mr. Elgindy,³⁸ disseminated confidential law enforcement information to others via the RC chat, and was an "organizer and leader" (as the government charged in the S-2 indictment) with respect to a range of manipulative conduct as described at pages 103-107 of Mr. Elgindy's opening memorandum, including using Mr. Elgindy as his "lightning rod."

Even putting aside the conduct comparisons, if one simply "follows the money," the disparities become even more pronounced. Although the government's plea agreement with Mr. Daws is based on stipulated insider trading profits of at most \$200,000, in calculating the trading profits attributable to Mr. Elgindy, the government's figure *for Mr. Daws alone* is

Guidelines sentence to reduce unwarranted disparity under § 3553(a)(6). *United States v. Ortiz-Zayas*, No. 02CR0837RWS, at *3 (S.D.N.Y. June 17, 2005).

³⁸ In contrast, Mr. Elgindy invited SEC attorneys like Brent Baker to join the AP site, providing them with usernames and passwords. (Elgindy Mem. 46.) And, instead of hiding Agent Royer and calling him "the Phantom" as Daws did on RC chat, Mr. Elgindy reported his contact with Agent Royer to his probation officer.

\$1,700,000 -- *eight-and-a-half times* as much as the figure used in the Daws plea, and *three times* the government's calculation of Mr. Elgindy's trading profits. (See Govt Mem. Attachment 1.) And if Mr. Daws were to be held liable for all of the alleged co-conspirator trading – as the government argues Mr. Elgindy should be under theories of accomplice liability – the disparities using the government's own figures become even more pronounced.

In sum, the government offers no good explanation – perhaps because there is none – for the disparate treatment recommended for Mr. Elgindy as compared to Mr. Daws. The Court therefore can and, we respectfully submit, should take account of this “unwarranted disparity” in fashioning an appropriate sentence for Mr. Elgindy. Moreover, if the Guidelines are designed to reflect real offense conduct, and not scattered and unsubstantiated allegations well beyond the margins of the conduct found by the jury, *see, e.g., United States v. Pho*, 433 F.3d 53 (1st Cir. 2006), then what suffices for Mr. Daws certainly applies to Mr. Elgindy as well.³⁹

Second, Mr. Elgindy's family's dire circumstances – which the government does not dispute provide a basis for a downward departure or non-Guidelines sentence – cry out for leniency. As set out in our opening memorandum (at pages 30-36), Mr. Elgindy's children are

³⁹ In *Pho*, the First Circuit stated as follows:

Congress's purpose in creating a guideline sentencing scheme was to promote uniformity in federal sentences based on the “real conduct that underlies the crime of conviction.”

...what counts is the uniformity in sentencing sought by Congress. That uniformity “does not consist simply of similar sentences for those convicted of violations of the same statute” but “consists, more importantly, of similar relationships between sentences and real conduct.”

433 F.3d at 63-64 (emphasis added) (citation omitted).

struggling in school and suffering under tremendous emotional distress because of both their father's absence and the sensationalistic nature of the allegations that have been made against him (but never proven); his oldest son, Adam, recently began high school and, for the first time for any of Mr. Elgindy's children, is now reportedly in danger of failing out; and his wife is in dire financial straits, staving off foreclosure proceedings and living on loans from friends and relatives, and can no longer even afford desperately needed counseling or therapy for the Elgindys' children. Only a sentence far below the Guidelines ranges argued in the government's submission will return Mr. Elgindy to his family – while his children are still young enough for their father's presence to make a difference – to provide urgently needed parental, emotional and financial support.

Third, and also undisputed, are the ways in which Mr. Elgindy has already been severely punished. He has spent two years in prison over 3000 miles from his family. Using the blunt instrument of RICO, the government was able to restrain, pretrial, all of the assets of Mr. Elgindy and his family, adding up to several million dollars, even though the government now concedes that Mr. Elgindy's personal trading profits on the 4 conviction stocks are only \$216,000.⁴⁰ As the Second Circuit has recently noted, while forfeiture is a form of punishment, such pretrial restraint is “a particularly severe remedy” that the Supreme Court has called the “nuclear weapon of the law.” *U.S. v. Razmilovic*, 419 F.3d 134, 137 (2d Cir. 2005) (citations omitted). In addition to depriving him of his financial resources, this case has already and probably permanently deprived Mr. Elgindy of his professional reputation and his ability to continue with the work he so loved.

⁴⁰ As the Second Circuit has recently noted, such pretrial restraint is “a particularly severe remedy” that the Supreme Court has called the “nuclear weapon of the law.” *U.S. v. Razmilovic*, 419 F.3d 134, 137 (2d Cir. 2005) (citations omitted).

In addition, as outlined in our opening memorandum, Mr. Elgindy has also been severely, even unimaginably punished through the unfair association of unproven and unfounded accusations relating to 9/11. He has been denigrated, stigmatized and humiliated in the eyes of his children and family, his community and the world. Following the 9/11 allegations, Mr. Elgindy became weighed down by an almost paralyzing sense of fear and desperation, and as the Court well knows, at one point he attempted suicide. The spurious association with terrorism already has led to one violent physical attack against him in prison⁴¹ and also portends future heightened vulnerability for whatever additional period of time he remains incarcerated. *See Koon v. United States*, 518 U.S. 81, 106 (1996) (court may depart downward from Guidelines based on defendants' susceptibility to abuse in prison by reason of their status as police officers and the extraordinary notoriety and national news coverage their crimes had generated).

Fourth, the Court should reject the government's attempts to undermine Mr. Elgindy's extraordinary humanitarian efforts on behalf of Kosovar refugees. As the Texas sentencing transcript shows, the only facts disputed there with respect to Kosovar refugees were the exact amounts of cash that Mr. Elgindy had handed out to refugees during his trip to Kosovo, and whether a claimed \$48,000 contribution to the Mother Teresa society had instead been distributed to needy refugees in California. (*See Texas Tr.* 55-84, 100-105.) Moreover, Mr. Elgindy's only "accusers" at the Texas sentencing proceeding in connection with these collateral financial issues were two individuals whose names are familiar to this Court – Fane Lozman and Matt Tyson – and who harbor admitted and obvious biases and vendettas against Mr. Elgindy;

⁴¹ Following this attack, discussed in our opening memorandum at p. 35 n.12, Mr. Elgindy was placed in a suicide isolation cell and deprived of phone privileges for weeks.

not surprisingly, nothing ever came of their allegations of financial misconduct.⁴² In addition, the government introduced evidence at the Texas sentencing hearing in an attempt to discredit Mr. Elgindy that later proved unreliable, including the claim that Mr. Elgindy provided knowingly false testimony to the NASD concerning whether he had been granted immunity from prosecution by the San Diego U.S. Attorney's Office. As the Court may recall, an NASD hearing panel later rejected that charge, as noted in our opening memorandum. Accordingly, while it is far from clear that Texas District Judge Means' "murky" comment even referred to Mr. Elgindy's humanitarian efforts, the bottom line is that no witness – not even Lozman or Tyson – disputed that Mr. Elgindy's efforts facilitated the exodus of at least 28 families from war-ravaged Kosovo.

Fifth, the government does not dispute and offers no meaningful response with respect to Mr. Elgindy's bipolar disorder. Instead, the government seizes on Mr. Elgindy's bipolar disorder as an opportunity to point out that Mr. Elgindy cited to his son Adam's serious health disorders – which we discuss in our opening memorandum (at pages 30-31) – as part of his motion for a downward departure in Texas. (Govt Mem. 37.) While this is true, the fact remains that Mr. Elgindy's family circumstances are far more extraordinary now than they were back in 2000. That there was no departure then – when Mr. Elgindy faced at worst only several months in prison and away from his family – in no way undermines the argument for a departure now, when the government's sentencing calculation threatens to continue Mr. Elgindy's separation from his family well past the critical time when he might still have a chance to help get his children back on track.

⁴² In fact, the AUSA in the Texas case did not oppose Mr. Elgindy's original application for early termination of supervised release.

Sixth, and finally, deterrence, both general and specific, can be accomplished by measures that do not require a draconian sentence that will have the effect of destroying Mr. Elgindy's family and will threaten his mental health. Indeed, a sentence along the lines that we have proposed is substantial, and can be coupled with extensive community service and particularized conditions of supervised release. Also, it is unclear why the government believes that Mr. Elgindy's sentence needs to be so severe in order to serve the purpose of deterrence, but Mr. Daws' sentence does not.

Conclusion

For the reasons set forth above and in our opening submission, we urge the Court to sentence Mr. Elgindy to a non-Guidelines sentence, pursuant to the framework of *United States v. Booker*, *United States v. Crosby* and 18 U.S.C. Sec. 3553(a), of less than 41 months in prison.

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Respectfully submitted,

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