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F.#2002R01303

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

-against- 02 CR 589 (S-2) (RJD)
04 CR 652 (RJD)

AMR I. ELGINDY,

Defendant.

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GOVERNMENT'S SENTENCING MEMORANDUM

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

-against- 02 CR 589 (S-1) (RJD)
04 CR 652 (RJD)

AMR I. ELGINDY,

Defendant.

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PRELIMINARY STATEMENT

The defendant contends that he should be sentenced as if this case were about nothing more than his personal trading in four stocks. Over more than one hundred pages, the defendant barely acknowledges that he was convicted of racketeering through the eponymous Elgindy Enterprise. He barely acknowledges that he was convicted of conspiring with others to commit a securities fraud that went far, far beyond those four stocks. He denies that he played any significant role in the Elgindy Enterprise, despite the fact that he was its leader. He glosses over the fact that, after being released on bail in this case, he committed yet another crime by lying to federal officials in an attempt to flee.

Perhaps most importantly, the defendant, in his desire to divert this Court's attention, eschews any mention of the extraordinary scope of the corruption of governmental functions that lies at the heart of this case. By seizing on the capacity

of his co-defendant, Jeffrey Royer, to misappropriate law enforcement information and by promising him lucrative employment, the defendant induced Royer to steal information about dozens of FBI and SEC investigations. Those investigations involved undercover agents and cooperating witnesses, some of them involved in organized crime and terrorism cases. When Royer left the FBI, the defendant ensured that a successor, Lynn Wingate, replaced him. Together, Royer and Wingate performed hundreds and hundreds of illicit searches in the FBI's confidential databases. In essence, numerous sensitive investigations were compromised for the sake of the defendant's and his co-conspirators' greed. Even had this defendant failed to earn a single dollar through his criminal enterprise, his role in this extraordinary breach of the public trust would warrant a lengthy sentence.

Below, without attempting to reprise all the facts adduced over a twelve-week trial or to reargue years of legal wrangling, the government (relatively) briefly sets out the relevant factual and legal settings that we submit should guide this Court's sentencing determination. Applying what the government believes to be the appropriate guidelines analysis, the guidelines imprisonment range for this defendant is life. The government respectfully submits that, in keeping with the true nature of the defendant's crime, this Court should sentence him to a very substantial term of imprisonment.

I. THE NATURE AND CIRCUMSTANCES OF THE OFFENSE

The defendant was convicted of racketeering conspiracy through his leadership of the criminal Elgindy Enterprise, an organization composed of the defendant, Derrick Cleveland, Jeffrey Royer and various others, including members of the defendant's AnthonyPacific.com website (the "AP site"). The Elgindy Enterprise operated through the AP site and another of the defendant's corrupt entities, Pacific Equity Investigations.

In connection with the defendant's leadership of the Elgindy Enterprise, he was convicted of the following racketeering acts, as well as the corresponding substantive crimes: conspiring to commit securities fraud; four securities frauds associated with Seaview ("SEVU"), Optimum Source ("OSIN"), Polymedica ("PLMD") and Junum ("JUNM"); conspiring to commit extortion; extortion of Paul Brown and his company, Nuclear Solutions ("NSOL"); defrauding AP site members by frontrunning the defendant's trading call on Vital Living Products ("VLPI"); and defrauding AP site members by trading against the advice the defendant gave them on Innovative Software Technologies ("INIV") and VLPI. The defendant, however, would like this Court to ignore the convictions for racketeering and conspiracy and sentence the defendant as if the jury's verdict were limited to the substantive acts of securities fraud and extortion. But the racketeering and securities conspiracies go far, far beyond those individual acts. Rather, the defendant led an enterprise that

obtained and traded on confidential law enforcement information in dozens of stocks. The defendant, through the AP site and his InsideTruth stock reports, manipulated the market in dozens of stocks through deceptive trading, timed release of information, exaggerated claims of influence over market prices and other misrepresentations. The entire scope of the defendant's criminal conduct - not an isolated sliver - is the proper subject of sentencing.

A. An Introduction to the Defendant's Criminal Enterprise

Derrick Cleveland met Jeffrey Royer - an FBI agent then working in Oklahoma City - in early 2000 when Royer appeared at Cleveland's office. (Tr. 172).[1] Shortly after that initial encounter, Royer appeared again and Cleveland showed him the AP site, (Tr. 174), whose primary purpose was to recommend shorting certain stocks. (Tr. 191).

Royer first provided confidential law enforcement information to Cleveland in March 2000 regarding Broadband Wireless ("BBAN"). (Tr. 214; GX-JL-1). Cleveland immediately conveyed the information to the defendant, because he "knew that the information was information you couldn't get anywhere else. It was the best information that a person could get a hold of in my opinion . . . ." (Tr. 217). In fact, the defendant traded on the information. (GX-2582). Cleveland told the defendant that

[1] Transcript references are to the electronic transcript, which varies at certain points from the hard-copy transcript.

he learned the information from an FBI agent. (Tr. 219). The defendant suggested a three-way call, in which the defendant did not announce his presence, so that the defendant could assure himself that Cleveland had described the information and its source correctly. (Tr. 219). During his very first contact with Royer, the defendant urged Cleveland to get more specific confidential law enforcement information from Royer. (Tr. 221).

Shortly after Royer provided Cleveland and the defendant confidential law enforcement information on BBAN, Royer provided Cleveland additional misappropriated information about other companies. (Tr. 226). Cleveland suggested to Royer that they could make a lot of money trading in these and other companies' stocks based on Royer's information, and that they could give the information to the defendant so that, through the defendant's website, they could "crush" the stocks. (Tr. 228).

The defendant was incarcerated from June through September 2000 following his conviction for insurance fraud. Once the defendant was released from jail in early October 2000, Cleveland started feeding the defendant confidential law enforcement information,[2] initially on Seaview Underwater Research, Inc. ("SEVU"). (Tr. 266-67). If there was any doubt as to the source of this information, Cleveland told the

[2] While the defendant claims that certain information provided by Royer was available elsewhere, the defendant ignores witnesses' testimony that similar information is more valuable when the source is the FBI. (Tr. 3839).

defendant when first passing information on SEVU that he received it from "Jeff," "my FBI friend." (Tr. 270). Included in the information Cleveland passed the defendant was a reference to an "undercover" SEC operative at SEVU. (Tr. 278). The defendant released some, but not all, of the SEVU confidential law enforcement information on AP through chat and audio. (Tr. 287). The defendant specifically instructed AP members that they should use the information for trading purposes but should not release the information. (Tr. 320). When the defendant asked Cleveland why Royer was providing this information, Cleveland told him "as far as money goes, I'm taking care" of Royer. (Tr. 322).

After the SEVU insider trading, the defendant continued to obtain confidential law enforcement information from Royer through Cleveland. Most of the time, the information was passed to the defendant. In late 2000, the defendant asked to speak, and did speak, with Royer directly. (Tr. 323). From that point forward, while most information still flowed through Cleveland, the defendant and Royer also communicated directly with one another. (Tr. 324). On some occasions, the defendant initiated discussions with Royer, or asked Cleveland to initiate discussions with Royer, to obtain misappropriated information with respect to particular stocks. (Tr. 482-83; 596). The defendant insisted to Cleveland that he be the first to receive confidential law enforcement information and that he be the person who determined whether to disseminate it to AP site

members, in part to avoid exposing the unlawful conduct. (Tr. 528, 610, 761-62).

The defendant had Royer, whom the defendant called "my personal FBI agent," appear on the AP site, under the name AP Cork, so that Royer could verify to AP site members that the information they received did indeed originate with the FBI. (Tr. 441; 450). In addition to placing confidential law enforcement information on the AP site and encouraging his members to trade on the information, the defendant actively worked with Royer to pry information from SEC personnel. (Tr. 329). He simultaneously ridiculed them - "I need a public servant to wipe my boots." (Tr. 421).

At the same time that the defendant was engaging in the controlled dissemination of confidential law enforcement information provided by his personal FBI agent, he routinely sought to conceal his criminal conduct by purging chat logs that contained such information. (Tr. 407; 452 ("Erase the log Hansen"); 2488 "Be sure to purge the logs"; 2542 (ordering Hansen to purge chat mistakenly placed on AP site concerning Nuclear Solutions ("NSOL")).

B. The Devolution of the Defendant's AP Site

The defendant's racketeering enterprise revolved around and depended on his AP site. Between December 1999 and April 2002, AP site members paid between $200 and $600 per month to subscribe to the AP site. During that period, site fees totaled

$2,705,213.33. (GX-3002). While Robert Hansen, the AP site administrator, believed that the AP site started as a "bona fide research site," its nature and purpose changed in late 2001, starting with the dissemination of SEVU confidential law enforcement information. (Tr. 2498). Kent Terrell testified that, after the defendant was released from jail in October 2000, the AP site began to focus on "scam stocks." (Tr. 3813). While the defendant cites Jeffrey Rubenstein's testimony concerning the emphasis of the AP site, Rubenstein testified that "he didn't pay close attention" to the specifics of the stocks about which confidential law enforcement information was provided to AP site members because he generally did not trade them. (Tr. 5880). Rubenstein also conceded that InsideTruth - an integral part of the defendant's manipulative scheme - focused on "scam stocks." (Tr. 5932). The defendant himself stated in chat that the FBI information was "what the site is all about. Fidelity and bravery and insider selling." (Tr. 584).

Further, while the defendant falsely told site members that all site fees went to the maintenance of the site, in fact the defendant paid Hansen only a small percentage of the fees for Hansen's services and site maintenance. (Tr. 2469, 2635). That percentage started at 15%, but was reduced to 9% in early 2001. (Tr. 2469, 2635, 2645).

C. The Defendant's Personal FBI Agent

While the defendant would like this Court to focus its attention on the relationship between Royer and Cleveland, the evidence makes clear that the defendant, once involved in the enterprise, made it his own. He did this, in part, by actively cultivating his relationship with Royer. In February 2001, the defendant invited Royer and Cleveland to the defendant's house in San Diego. (Tr. 552). While there, Royer told the defendant how FBI investigations worked (Tr. 560); the defendant told Royer how much money he had made from certain information provided by Royer (Tr. 561); the defendant proposed to Royer that Royer work for the defendant, and Royer accepted (Tr. 568-69); and Royer asked whether the defendant could loan him money. (Tr. 569). On May 23, 2001, the defendant told the AP site that he was hiring a "current FBI agent" to act as an investigator (which the defendant conceded was a "conflict of interest" while Royer remained with the FBI). (Tr. 621; GX-3311 "I'm hiring another FBI Agent . . . he'll have to leave the FBI at the time. . . . . I've put a very lucrative deal in front of him"). On June 27, 2000, Royer, e-mailing the defendant about his prospective job, wrote, "i want to make a million dollars a year . . . if you want to make 20 million, then i will make 2." (GX-2222).

In fact, it's clear that Royer essentially worked for the defendant well before he left the FBI at the end of December 2001. For example, on July 12, 2001, Royer e-mailed the

defendant, “Laughed my ass off at GAHI today. What a shit company. Take care of Derrick on this one. He got some good info in my opinion. Solomon Grey could potentially keep us in business for a long time. Meanwhile, we can drive them crazy by driving their dick in the dirt on all their turd deals.” (GX-2093).

In the Summer of 2001, the defendant organized a trip to Las Vegas with various AP site members - not including Cleveland (Tr. 617) - and Royer joined them and stayed with the defendant in his hotel room. (Tr. 616). Among other things, during the trip Royer provided the defendant with confidential law enforcement information concerning JUNM and further discussed with the defendant Royer’s employment. (Tr. 617, 620). As part of the Las Vegas festivities, the defendant and several AP site members were photographed with Royer’s business card plastered to their foreheads. (Tr. 617). After promising to pay Royer for his trip expenses, the defendant eventually partially reimbursed him. (Tr. 616, 620). Also during the Summer of 2001, and later, the defendant and Cleveland discussed Royer’s ability to continue obtaining confidential law enforcement information after he left the FBI through Royer's girlfriend Lynn Wingate and another law enforcement officer. (Tr. 800, 803).

Royer was sufficiently in the defendant’s pocket that Royer wrote a letter to the defendant’s probation officer, recommending early probation-termination, in which Royer falsely

claimed he was still an FBI agent. (Tr. 812). As is clear from discussions about this letter, the defendant wanted to use Royer's position as an FBI agent in any way that satisfied the defendant's ends and Royer was willing to do anything to curry the defendant's favor. Thus, on August 14, 2001, the defendant told Royer he would "need a letter saying how valuable I am to the U.S. government . . . ." (GX-2104). Royer replied,

> Can I start with something like Tony is so cool he shits ice cubes or Tony is as valuable to the U.S. Government as two-ply is to toilet paper. Both of these statements are true to the best of my knowledge. I know I have to write a recommendation for you, but when, where and how. It would be great if I didn't have to due to some flunky finding out about it later and holding it against us, but whatever works, I know you don't want me to leave the bureau before it is written, all I want to know is if that will be in October, April or next October." (GX-2104).

Finally, in January 2002, both Royer and Cleveland officially started working in the defendant's office in San Diego. (Tr. 837). The defendant even paid a portion of Royer and Cleveland's San Diego apartment rent. (Tr. 943).

D. The Scope of the Defendant's Insider Trading Scheme

Royer provided Cleveland confidential law enforcement information - not all of it associated with computer searches - with respect to more than fifty companies. (Tr. 489). With respect to the computer searches alone, between March 30, 2000 (BBAN) and March 4, 2002 (IMCL), Royer and Lynn Wingate misappropriated and passed confidential law enforcement

information on dozens of companies and individuals.[3] On numerous occasions, the defendant published some or all of this information on the AP site. With respect to additional stocks, the defendant's co-conspirator, Kent Terrell, published confidential law enforcement information on the AP site. On other occasions, the defendant received confidential law enforcement information but did not place it on the site.

After receiving confidential law enforcement information from the FBI, the defendant himself traded in at

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[3] Royer and Cleveland passed confidential law enforcement information to the defendant, who then passed the information to AP members, concerning the following stocks: Seaview ("SEVU); Freedom Surf ("FRSH") (Tr. 495); SoftQuad ("SXML") (Tr. 508); BioPulse ("BIOP") (Tr. 529); GenesisIntermedia ("GENI") (Tr. 538, 3874); Optimum Source ("OSIN") (Tr. 579); Polymedica ("PLMD") (Tr. 595); Hercules ("HDBG"); Junum ("JUNM") (Tr. 629, 3859); Global Asset Holdings ("GAHI") (Tr. 637); Flor Decor ("FLOR") (Tr. 735); Trident ("TDNT") (Tr. 762); TTR Technologies ("TTRE") (Tr. 3870); Real Time Cars ("RTCI") (Tr. 783, 3863); Hypermedia ("NMNW") (Tr. 788); Vital Living ("VLPI") (Tr. 814); Eagle Building ("EGBT") (Tr. 3873); Nuclear Solutions ("NSOL"); BGI Industries ("BGII") (Tr. 906, 2542); Medi-Hut ("MHUT"); and ("IVSO") (Tr. 917). Royer and Cleveland passed confidential law enforcement information to the defendant and Terrell concerning the following stocks: ("BYTE") (Tr. 516) and Jaguar ("JGUR") (Tr. 646). Terrell put the BYTE and JGUR information on the AP site. (Tr. 524, 646). Royer and Cleveland passed confidential law enforcement information to the defendant regarding Sulphco ("SLPH"), after which the defendant made an AP site trading call on that stock. (Tr. 656-58, 672). As noted, the defendant also received confidential law enforcement information regarding Broadband Wireless ("BBAN"). By reviewing FBI records, Special Agent Jack Liao was able to determine that Royer misappropriated confidential law enforcement information for at least 37 stocks, including all of the stocks mentioned in this footnote. (GX-JL-1).

least 23 stocks.[4] The defendant actively encouraged AP site members to do the same, in part to put downward price pressure on the stocks and thereby increase the value of the defendant's short positions. As Cleveland described, AP was a short-selling site where people were trading in the same way, causing downward momentum in a stock. (Tr. 201). As the defendant expected of them, members did, in fact, frequently follow the defendant's trading calls. (Tr. 2496, 2576, 3817 (members were "expected to take – you know, the same positions that were the same as" the defendant's)). The defendant even told his co-conspirator Terrell where to set up a trading account so that Terrell could short sell stocks discussed on the AP site. (Tr. 3808).

Even the defendant's trial witness, Peter Michaelson, admitted that he knew that he has received and traded on material confidential law enforcement information from FBI and SEC sources on the AP site. (Tr. 5391, 5450, 5564). Michaelson further stated that he believed others on the AP site traded on this information as well. (Tr. 5878). Michaelson also testified that he thought the defendant "lied all the time. Exaggerated,

[4] See Gov't Sentencing Mem., Attachment 1. This attachment shows trading by the defendant and his co-conspirators in 32 of the at least 37 stocks for which confidential law enforcement information was accessed by Royer and/or Wingate (the government did not perform a trading analysis with respect to the remaining 5 stocks).

enhanced. Made himself look good." (Tr. 5476).[5] Rubenstein himself traded PLMD while in possession of confidential law enforcement information. (Tr. 5868).

E. The Defendant's Manipulation Scheme

In conjunction with his insider trading scheme, the defendant actively engaged in manipulating share price in certain stocks in order to enhance his profits. For example, the defendant 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. (Tr. 340; 419-20; 424). With respect to SLPH, the defendant told AP site members, "I want SULPH in the fives," i.e., in the five dollar range, so that he could get a cheap block of stock to cover short positions. (Tr. 690, 694). In connection with with his extortion of A. J. Nassar and FLOR, the defendant instructed his site members on how and when to trade in order to artificially set FLOR's price. (GX-DC-163). Indeed, one of the defendant's goals was to use the SEC to halt trading in a stock, a boon to short sellers. (Tr. 421).

The defendant sought to impose control on the flow of

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[5] In fact, Michaelson's testimony was riddled with inconsistencies. When asked on cross-examination about his direct testimony, Michaelson stated "I don't affirm or I don't know what I said yesterday, I was really tired." (Tr. 5478).

Q. So, are you saying that we should just disregard your testimony from yesterday altogether?

A. I wish you would. (Tr. 5478).

information to the public. (Tr. 371; 459; 511; 547; 924). He discouraged dissension on the AP site. (Tr. 668, 2574). Indeed, the defendant closely controlled the information that was placed on the site, and would monitor and penalize members who acted in opposition to his wishes. (Tr. 932). Once the defendant and others had established a short position, they would feed the information to the "enemy" - in effect the public market for the stock - "so the fish start gagging." (Tr. 430; Tr. 504 ("[T]he public is my enemy. They are only there to provide me with a Bozo to absorb my risk. I would stick a buyer with as much toilet paper stock as I could, as fast as I could."); Tr. 507; Tr. 2594).[6] While the defendant called "Tokyo Joe"'s group trading style "collusion and manipulation," (GX-2008), he essentially organized the same type of trading among AP members, in which AP members would blindly follow the defendant's advice. (Tr. 2563-66, 2572-73; (GX-2012 ("The site will be a amster planned community where we all move as a group and sweep secretly in and out of deals . . . we will take the public eye off our picks and be far more effective as a secret group"); GX-3306 ("either you make friends, and you play ball with the way everybody's played ball for years, or you leave. And if you

[6] The defendant espoused this same view of the investing public in an article entitled The Dumbass, The Daytrader, and the New Democracy. (Def.'s Sentencing Mem., Exh. 5 ("'The public is there for one reason and one reason only,' Anthony told me when I got him on the phone. 'To absorb the risk.'")).

[continue] to be a thorn in everyone's side I will pluck you out").

The defendant used his InsideTruth reports to further his manipulative scheme. Rather than being a genuine research tool, InsideTruth's true purpose was to put out negative reports on stocks that the defendant, his co-conspirators and site members were shorting in order to cause those stocks to fall. (Tr. 344, 726, 851 (purpose was "to do as much damage as we possibly could"); 2578 (InsideTruth became "a trading vehicle"); 2588; 3819 (purpose of InsideTruth was "to put pressure on the stock")). The defendant also sent the reports to market makers so that they would "back away" from the reported stocks. (Tr. 358). The defendant intended that InsideTruth garner a reputation for "exposing a stock and causing the stock to plummet." (Tr. 2581).

InsideTruth sometimes included false publication dates in order to persuade the public of InsideTruth's importance, thus exaggerating the potential impact of the defendant's future trading calls and reports. (Tr. 2591 (false dates as to BIOP, GENI and EGBT reports); GX-3012, GX-3016, GX-3017, GX-3022, GX-3022, GX-3024). In an InsideTruth report on GENI, the defendant disseminated false information via InsideTruth regarding a supposed relationship between Osama Bin-Laden and Adnan Kashoggi. (Tr. 801; GX-3012 (InsideTruth initiated coverage on GENI "with an immediate sell and a terrorist warning")). In connection with

GENI, prior to the publication of the InsideTruth report, defendant told AP site members that "[w]e just raped the sheep." (Tr. 802). The defendant also disseminated false information about Paul Brown's criminal history, claiming that Brown - the CEO of Nuclear Solutions ("NSOL") - had three felony convictions whereas he had only one conviction which had been expunged.

From the commencement of the prosecution of this case, the defendant has argued that the mere dissemination of accurate, negative information is insufficient to prove manipulation. He has also argued that group trading, standing alone, is insufficient to prove manipulation. This Court's jury instructions were consistent with those arguments. (Jury Charge, Tr. 8845).

As summarized above, however, the government proved much more than that. The defendant disseminated misappropriated information to his site members, then instructed them on how to use that information in their trading. He reprimanded members when they disobeyed him. As the SEVU and SLPH examples noted above illustrate, the defendant did this for the purpose of achieving a particular stock price. The defendant engaged in similar conduct with respect to FLOR. (GX-DC-163 ("GET the hell off the bid on FLOR at 2.50 & leave the 2.45 bid. . . . you are screwing up everything for everyone.")). The defendant also intentionally exaggerated the significance of his research reports, in part through backdating them. The defendant lied to

his site members about the use of the site fees, again to give the impression that he was a selfless "crusader," thus further exaggerating his influence. As Michaelson testified, the defendant "lied all the time. Exaggerated, enhanced. Made himself look good." (Tr. 5476). As noted, he outright lied with respect to GENI and Paul Brown. All of these deceptions served to intentionally enhance the defendant's ability to influence trading and prices.

Taken together, the defendant's actions artificially impacted the market prices of the shares of companies he targeted, putting the defendant's actions squarely within the definition of manipulative conduct.[7]

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[7] See Santa Fe Indus. v. Green, 430 U.S. 462 (1977) ("Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices."); Gurary v. Winehouse, 190 F.3d 37, 45 (2d Cir. 1999) ("gravamen of manipulation is deception of investors into believing that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand."); United States v. Mulheren, 938 F.2d 364, 368 (2d Cir. 1991) (expressing discomfort with finding manipulation based on one trader's intention to benefit another, but noting that evidence of an agreement between the parties would have made the case "much less troubling"); Nanopierce Technologies v. Southridge Capital Management LLC, 2002 WL 31819207 (S.D.N.Y. Oct. 10, 2002) (combination of manipulative intent and other indicia of manipulation, such as trading timing and market domination, sufficient to state market manipulation claim). Cf. GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 204 (3d Cir. 2001) (while short selling itself is insufficient to show manipulation, intentional injection of "inaccurate information" into market or creation of "false impression" that prices are set by natural interplay of supply and demand is sufficient).

F. The Defendant's Extortion Scheme

The defendant was convicted of conspiring to commit extortion and of extortion with respect to Paul Brown and Nuclear Solutions. While the defendant was acquitted of the substantive act of extortion with respect to A. J. Nassar and Flor Decor, as the defendant himself concedes, the extortion of NSOL and FLOR "were very similar." (Def.'s Sentencing Mem., p. 57).

With respect to NSOL, the defendant put extremely negative, confidential law enforcement information obtained from Royer on the AP site. (Tr. 885). In particular, the defendant told site members that Brown was "scum" and a "three time felon," despite the fact that the defendant knew that Brown had only one conviction which had been expunged. (Tr. 885, 889). Based on that information, the defendant and AP site members, at his direction, heavily shorted NSOL stock, causing significant downward movement in the stock price. (Tr. 3890; GX-2582).

The defendant then made offensive phone calls to Brown. (GX-3901 ("Paul M. Maurice, three time Felon Brown. . . . can you give me a call . . . 1-800-The Jig Is Up.")). Through Troy Peters, working with David Slavney and Roland Chapin, the defendant made it clear to Brown that he and his AP site members would "go away" and stop disseminating inaccurate information only if Brown paid the defendant off by giving him a discounted block of stock to cover his and his AP site members' short positions. (Tr. 3486, 3893; GX-3905, p. 8 ("David . . .

explained that I'd have to cover Elgindy's . . . shorts."; GX-3925 (the defendant to Brown, "I already made my deal. We're gonna exit . . . and I'm going to leave you alone because you're friends with Troy.")).

Peters described to Brown that he and the defendant had made the same sort of deal with A. J. Nassar at Flor Decor. (GX-3915 ("Tony was shorting Floor Decor. And I, and I went through the same gymnastics as as as we're going through now. . . . So I had Floor Decor sign an investment banking agreement with my brokerage firm.")). The defendant, through his co-conspirators, told Brown to call Nassar to give Brown comfort that paying off the defendant would make him go away. (GX-3911 (Nassar told Brown, "Actually, [Elgindy] had been beating up a couple things I was involved in and putting, you know crap out and uh, Troy actually made it go away. . . . [Elgindy] is gonna lie, cheat, steal and do whatever he can to drive your stock down)).

For that purpose, the defendant solicited from site members an accounting of their NSOL short positions. (Tr. 889, 891, 2542 ("I am being offered a block of [NSOL] stock at $1.50. Working on a better price. We either do it all together or we don't do it at all. . . . Oh shit. Hansen, erase this log")). The defendant then caused Brown to sign an agreement with Peters in which Peters's company, Valhalla Capital, would allegedly provide investment banking services to NSOL in exchange for unrestricted stock. (Tr. 3510). In fact, no such services were

contemplated or provided. (Tr. 3530). Because Brown did not provide the block of stock rapidly enough for the defendant's liking, he recommenced his short-selling campaign. (Tr. 3900 ("Dr. Brown will be my bitch."); GX-3923 (Peters told Brown, "I just want you to know at this particular juncture . . . if [this deal] doesn't go down these guys are gonna declare war.")) Finally, after NSOL provided the discounted block of stock to the defendant, the defendant terminated coverage of NSOL. (Tr. 3901-02 ("we are pulling out of NSOL")). On April 8, 2002, having learned that Brown had died in a car accident, the defendant wrote, "yeah i must have killed him . . . thats how badlky i need to make a buck . . . NSOL<—no longer banned." (GX-DC-331). On May 15, 2002, the defendant reminded his site members that NSOL was back in play: "NSOLE<–short 15% @1.15. Don't forget he CEO Is no worm food . . . ." (GX-DC-341).

As the defendant agrees, the FLOR extortion scheme - which occurred prior to the NSOL extortion - was very similar. The defendant put extremely negative, confidential law enforcement information about Nassar on the AP site. (Tr. 735, 739; GX-3463 ("najjar [sic] is under investigation for terrorism links and rico")). Based on that information, the defendant and AP site members, at his direction, heavily shorted FLOR stock, causing significant downward movement. Nassar believed that the information posted by the defendant on the AP site caused FLOR's stock to drop and created a severe, potentially bankrupting

problem for the company. (Tr. 3690). Nassar, therefore, contacted David Slavney, who put Nassar in touch with Peters. (Tr. 3692). Nassar asked Peters how to get rid of the defendant, and Peters told Nassar he should offer the defendant a below-market block of stock. (Tr. 3694). Nassar then signed an investment banking agreement with Valhalla Capital that served no purpose other than to transfer FLOR stock to the defendant to get rid of him. (Tr. 3695-98; GX-1890). Later, the defendant solicited from site members an accounting of their FLOR short positions so that he could extort an appropriately-sized block of stock from Nassar. (Tr. 739-41, 2537). The defendant exhorted site members not to offer to purchase FLOR stock for a higher price than the one he wanted for the block. (Tr. 743). After negotiating that price, the defendant told site members to cover their short positions at the arranged price, despite the fact that some members thought the price would drop further. (Tr. 745, 755). The defendant agreed to "go away" if Nassar gave him the block. (Tr. 756). When Nassar gave him the block, the defendant terminated coverage. (Tr. 759).

G. The Defendant Functioned as an Investment Adviser

While the defendant denies that he acted as an "investment adviser," the defendant, as detailed above, essentially told AP members what stocks to trade and when to trade them. (Tr. 939). As Hansen testified, the AP "site

basically offered stock advice. It offered trading advice." (Tr. 2472).

The Supreme Court's decision in Lowe v. Securities and Exchange Comm'n, 472 U.S. 181 (1985) supports finding that the defendant was an investment advisor. There, Lowe published three newsletters that the Court held were "bona fide" publications specifically excluded from the Investment Advisers Act because, though they discussed buying and selling securities, they were "completely disinterested, and [ ] were offered to the general public on a regular schedule . . . ." Lowe, 472 U.S. at 206. The Court explicitly differentiated the newsletters published by Lowe from those that "were designed to tout any security in which petitioners had an interest" or that were "timed to specific market activity" because these type of publications were prone to the "dangers of fraud, deception and overreaching that motivated the enactment of the statute . . . ." Id. at 209-10.

Here, the defendant's trading calls on the AP site were not offered to the public on a regular basis, were timed to specific market activity - including the defendant's acquisition of misappropriated information - and were anything but disinterested. Moreover, unlike Lowe, the defendant responded directly to the AP site members comments about particular securities, hardly the "entirely impersonal" type of communication the Court found excluded from the Act. Id. at 210.

H. The Defendant Front Ran and Traded Against Advice

AP members were told that the defendant did not trade in front of trading calls and that the defendant always traded consistently with his advice. (Tr. 194, 197, 2623). In fact, Hansen came to believe that the defendant was doing both. (Tr. 2596). A comparison of the defendant's trading calls and his trading records demonstrates, as Hansen stated, that the defendant regularly traded ahead of AP site broadcasts on particular stocks. (Attachment 2; Tr. 4546; GX-DB-2; GX-2582; GX-3001).

While the defendant demeans the jury's guilty verdicts with respect to the certain frontrunning and trading against advice charges in connection with VLPI and INIV - he calls them "'gotcha'-type add-on charges" (Def.'s Sentencing Mem., p. 59) - it remains that the jury did find the defendant committed those crimes on at least some occasions.

The defendant also states that there were no profits from these crimes. In fact, as shown in Attachment 3, on just those instances where the jury convicted him of frontrunning and trading against advice, the defendant made $31,877.80.[8]

[8] This figure was calculated as follows. The average price for all sales occurring on the same day, but only after, the defendant "front ran" or "traded against advice" was calculated. The difference between that price and the price the defendant obtained for his sales was then determined. That difference was multiplied by the total number of shares sold by the defendant to derive the profit realized by the defendant

I. The Defendant's Obstruction of Justice

The defendant wrote in chat, with respect to one of his insider trading stocks, "[o]bstruction of justice very serious stuff. Wouldn't want to jeopardize safety of agent or anything." (Tr. 2504). Nonetheless, the defendant did not hesitate to obstruct justice with respect to the FBI's investigation of him.

Because the defendant understood that he was routinely committing crimes and because Royer could and did provide information to the defendant about criminal investigations of others, the defendant had an obvious interest in keeping tabs on whether he himself was under investigation. On several occasions prior to September 2001, the defendant asked Cleveland to determine from Royer whether the defendant was under investigation (which Royer informed the defendant he was not). (Tr. 483-84, 775). On various other occasions, the defendant made this request directly of Royer. (Tr. 487).

In September 2001, Royer told Cleveland that the defendant was under investigation for a serious matter

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through frontrunning or trading against advice.

This figure, of course, greatly understates the defendant's profits from frontrunning and trading against advice as it only accounts for the counts of conviction. Because these profits are included in the defendant's insider trading profits and therefore do not increase the defendant's gains for sentencing purposes, however, the government has not calculated the gain to the defendant for frontrunning and trading against advice with respect to the other stocks in the indictment.

independent of securities fraud. (Tr. 805). Royer and Cleveland spoke about the matter many times, both before and after Royer left the FBI in December 2001. (Tr. 806, 946). Royer told Cleveland that the defendant had been reported to the FBI by two individuals, Matthew Tyson and John Liviakis. (Tr. 807). Royer also mentioned that FBI reports indicated that the defendant had contributed to a Middle Eastern charity called "Mercy International." (Tr. 809). Royer similarly told Michael Mitchell that the defendant was being investigated in connection with money given to a Middle Eastern charity. (Tr. 3129).

At least some of this information was passed on to the defendant. After Royer and Cleveland had moved to San Diego to work with the defendant, Royer told Cleveland that he had given some information to the defendant about the investigation, though Royer had not provided specifics to the defendant. (Tr. 947). That the defendant did possess knowledge about the investigation was demonstrated when he spontaneously told Special Agent David Sutherland in a post-arrest interview that he did not contribute to Middle Eastern charities. (Tr. 4456).

Moreover, the defendant acted like someone who understood he was being investigated by the FBI in connection with a serious matter. While in San Diego working at the defendant's office in 2002, Cleveland saw the defendant handling large sums of cash and witnessed him wiring money to Lebanon.

(Tr. 957). Cleveland also witnessed a conversation between Royer and the defendant in which the defendant asked Royer what would happen if the defendant - without his supervising probation officer's permission - "fled" to Lebanon. (Tr. 959). The defendant told Cleveland that Lebanon had "the best bank secrecy laws in the world." (Tr. 961). During Spring 2002, the defendant asked Hansen to start wiring site fees to a bank in Lebanon. (Tr. 2604; GX-3449).

In fact, the defendant, without permission from his supervising probation officer, traveled to Lebanon in November 2001.[9] (Tr. 3429-30; GX-3700, p. 20). During this period, the defendant arranged for the purchase of an apartment in Beirut, (GX-4617), which he did not communicate to the probation officer. (Tr. 3501). Nor did the defendant disclose to her that he had transferred $124,995 to a Lebanese bank account on one occasion, (GX-1058; Tr. 3501), or $225,000 on a second occasion. (GX-371; GX-3743; Tr. 3502-03). In addition, in October 2001, the

[9] The defendant argues that, because he told AP site members that he was going to Lebanon, he was clearly not planning to flee. (Def.'s Sentencing Mem., p. 100). The defendant, however, frequently broadcast his criminal activities to site members, then attempted to control further dissemination. Additionally, he never told site members about the details of his activities in Lebanon. Most significantly, as detailed, he kept the matter secret from his probation officer. The defendant, while he did eventually tell the probation officer that he had been in Lebanon, did not do so until she had discovered the fact from an FBI agent and directly asked the defendant where he had been. (Tr. 3489).

defendant opened a trading account in which he described himself as a resident of Lebanon, and, in April 2002, arranged for the transfer of significant assets to that account. (GX-1054; GX-1055; GX-1058; GX-4011). Meanwhile, in February 2002, the defendant requested that his supervising probation officer grant him permission to travel to Lebanon for a second time, shortly after which he told her he was quitting the "whistleblowing" business. (Tr. 3498; GX-3700).

In order to further free himself from the scrutiny of his probation officer, the defendant had Royer write a letter to the District Court Judge in the Northern District of Texas recommending the defendant for early supervised release termination. (Tr. 3487; GX-3738). In the undated letter, submitted to the court on January 11, 2002, Royer claimed to write in his "capacity as a Special Agent with the Federal Bureau of Investigation," despite the fact that he had left the FBI the prior December and was employed by the defendant, a fact he conveniently omitted.[10]

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[10] That the defendant knew of the investigation and took steps to alter his behavior is supported by an e-mail Royer wrote the defendant on February 7, 2002, in which Royer stated "[w]e definitely need some breathing room . . . I need to get a feel for what the bureau is doing in regard to this whole ordeal. We are so close, no need to screw things up." (GX-2499). In that same e-mail, Royer told the defendant, "Get some good facetime with Derrick as he has lots on his mind." (GX-2499). As Cleveland testified, what was primarily on his mind in February 2002 was the FBI's investigation into the defendant.

J. The Defendant's Commission of Yet Another Crime While Released on Bail

The defendant pled guilty to lying to federal officials in connection with the following events. On April 17, 2004, after he had been arrested in this case and released on bail, the defendant traveled to MacArthur Airport on Long Island and tried to board a plane with fake identification.[11] The defendant was traveling under the name "Herbert Manny Velasco." (Tr. 3445). The defendant's destination was Phoenix, with a connecting flight to San Diego. (GX-3801). The defendant apparently purchased his ticket with a coupon issued in the name of "Richard Hatch." (GX-3807). Among other things, the defendant had in his possession approximately $25,000 in cash (GX-3800); $30,000 to $40,000 in assorted jewelry (GX-3800; GX-3801); various prescription narcotics, including Valium (secreted in a bottle marked Lithium) and morphine (GX-3800); a Montana identification card in the name of "Herbert Manny Velasco," issued February 17, 2002 (GX-3808); an expired California identification card in the name of Heriberto M. Velasco (GX-3808); blank checks for a bank account belonging to his mother (GX-3804); blank checks for the account he had created listing himself as a resident of Lebanon (GX-3804); a Costco card in the name of "Herbert Velasco" issued

[11] The defendant specifically (and falsely) informed his pre-trial services supervising officer that he would travel to San Diego on April 19, 2004, just two days later. (Tr. 4222-23).

August 2003 (GX-3815); a Sam's Club card in the name of "Herbert Velasco" of "Velasco Export" issued August 2003 (GX-3814); air flight coupons issued in a number of different names; and cellular phones subscribed in the name of Joseph Torelli and Hisham Sadek (Tr. 3454).

Upon arrest, the defendant falsely maintained that his name was Manny Velasco and that he was a jewelry dealer. (GX-3800; GX-3801). When asked the identity of Amr Elgindy, whose name appeared on various documents and prescriptions in the defendant's possession, the defendant claimed Elgindy was his lawyer. (GX-3801). It was not until officials discovered a California driver's license bearing the defendant's photograph that he belatedly admitted his true identity.

II. THE HISTORY AND CHARACTERISTICS OF THE DEFENDANT

A. The Defendant's Employment History and Cooperation with Authorities

The defendant boasted to Royer and others that he had been employed by boiler rooms and chop shops - including the notorious Blinder, Robinson & Co. ("Blinder") - promoting overvalued penny stocks.[12] (Tr. 2629, 5554, 7796). The defendant met Troy Peters, who assisted the defendant in his extortions of Paul Brown and A.J. Nassar, while working at

[12] The defendant actively marketed himself on his AP site as a reformed "bad boy," claiming he was an expert in assessing scam companies and their principals because "I used to be one of them." (GX-DC-98).

Blinder. The defendant later worked at Thomas James & Associates, again with Peters and David Slavney, another participant in the extortion schemes. In 1991, Thomas James terminated the defendant, later stating that he had violated "investment-related statutes" and "rules of industry standards and conduct." (GX-3455, p. 74). In 1997, the defendant was censured and suspended by the NASD, and ordered to pay a $30,000 fine, in connection with his entry of "non-bona-fide" trading orders in 1995 while at AMR Securities. (GX-3455, p. 31). The NASD revoked the defendant's NASD registration when the defendant refused to comply with its orders in connection with that matter. (GX-3455, p. 35). Also in 1997, the State of Ohio refused to license the defendant as a broker, concluding that he was of "not of good business repute." (GX-3455, p. 40). Additionally, before his broker license was revoked, the defendant had a history of customer complaints while at various brokerage firms, including one brought by the defendant's mother that he settled for $30,000. (GX-3455, pp. 23-79).

On at least two additional occasions - with respect to Alco International Group Inc. ("Alco") and Conectisys Corp. ("Conectisys") - the defendant was an active participant in securities fraud conspiracies. Moreover, while the defendant touted at trial, and continues to tout, his role as a "crusader for propriety in the marketplace," (Def.'s Sentencing Mem., p.

54), the details of his involvement with Alco and Connectisys make abundantly clear that he was, in fact, forced to help authorities to avoid prosecution himself.[13]

In May 1995, the defendant signed a cooperation agreement in which he agreed to provide testimony against individuals in connection with a fraudulent 1993 scheme to promote Alco stock. (GX-4006; Tr. 7808; GXC-4001, p. 431 (FBI report referencing the defendant's cooperation in exchange for immunity from prosecution)). In January 1997, the Assistant United States Attorney handling the Alco case wrote to her counterpart in Texas - where the defendant was being investigated

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[13] While the defendant also touts his relationship with Brent Baker, (Def.'s Sentencing Mem. at 51-52), particularly as regards the investigation of Sulphco, Baker's testimony was in no way consistent with the defendant's characterization. When asked on direct examination whether the Reno, Nevada FBI office was investigating Sulphco based on information provided by the defendant, Baker testified "I remember specifically to the contrary." (Tr. 5930).

While the defendant now attempts to gain credit for his involvement in the NECO investigation, (Def.'s Sentencing Mem., p. 53, n. 18), SEC attorney Patrick Hunnius testified that the defendant's information did not assist the SEC in bringing a securities fraud case with respect to NECO. (Tr. 6358). While the defendant also attempted to gain credit for halting trading in EGBT and NECO, he was not the reason trading was halted in either of those stocks. (Tr. 6085, 6368).

With respect to OSIN, while the defendant claims credit for providing information to SEC attorney Robert Tercero, Tercero stated that he had already been looking at the company and that the defendant's information was not the reason Tercero opened a formal Matter Under Investigation. (Tr. 6418). In any case, the OSIN matter went nowhere. (Tr. 6418).

for insurance fraud - that the defendant, as co-owner of Armstrong, McKinley & Co., "accepted bribes from Melvin Lloyd Richards and Allen Stout to sell securities, that Richards and Stout were promoting, to the firm's customers."[14] (GX-4007).

On the second occasion, with respect to Conectisys, the defendant was a member of a "daisy chain" manipulation in which a number of traders sold short positions, one to another, creating artificial downward pressure on the stock. (Tr. 6267). More particularly, in 1996 an individual named Mike Zaman dictated bid and offer prices to the defendant, who acted as a market maker, and the defendant set the bid and offer at the dictated prices despite the fact that they did not result from market forces. (Tr. 6557-59). In fact, the SEC viewed the defendant as an "accomplice" who "knowingly participat[ed] in transactions and [took] actions that were in furtherance of a manipulation." (Tr. 6277, 6559, 6561, 6567, 7269).[15] The defendant himself, in

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[14] In an ABC 20/20 piece broadcast on May 2, 1997, the defendant, though he was not asked about taking cash bribes himself, proudly stated that many of the brokers working at Armstrong McKinley were receiving cash bribes from Richards to pump up Alco. (Def.'s Sentencing Mem., Exh. 4). The defendant went so far as to acknowledge that he saw the cash delivered to the brokers for whom he - as an owner of the firm - was responsible.

[15] In a July 29, 1996 article in *Forbes*, appropriately titled One Day Soon the Music's Going to Stop, the author recounted another incident in which yet another of the defendant's brokerages, Key West Securities, manipulated the share price of WellCare Management Group. (Def.'s Sentencing Mem., Exh. 3).

testimony he gave during the SEC's case against Zaman, acknowledged that Zaman had told the defendant that Zaman's firm was pushing the stock to the firm's retail customers. (DX-12169, p. 370). The defendant admitted that Zaman told the defendant what bid and offer prices to set, and further told the defendant to move the prices up without regard for demand for the stock. (DX-12169, p. 372).

In fact, when authorities did use the defendant to assist them, they did so with justifiable caution. For instance, FBI Special Agent Michael Gaeta used the defendant as a confidential informant in December 1996 for only five days before he shut him down due to his "questionable reliability." (Tr. 4821, 6507). With respect to more recent "cooperation," the defendant, of course, never revealed to authorities with whom he claims he was "working" that certain of the information he passed them was illicitly obtained from his personal rogue FBI agent. (Tr. 6083).

B. The Defendant's Criminal History

As detailed in the Pre-Sentence Investigation Report ("PSR"), the defendant committed insurance fraud in 1994 by accepting disability payments when, in fact, he was actively employed. (PSR, ¶ 154; GX-3702). Through his conduct, the defendant defrauded the insurer of $55,366. (GX-3702). The defendant pled guilty to mail fraud and was sentenced on May 15,

2000. He was sentenced to four months' incarceration and three years' supervised release. (PSR, ¶ 154).[16]

C. The Defendant's History of Bipolar Disorder

The defendant relies heavily on his diagnosis of bipolar disorder as a mitigating sentencing factor. (Def.'s Sentencing Mem., pp. 6, 27-29, 112 (listing the defendant's disorder as one of the "most relevant factors" supporting a sentence of five years or less)). The defendant, however, has done little to mitigate the alleged effects of his disorder on himself and his family members.

The defendant was initially diagnosed with bipolar disorder in June 1993.[17] (PSR, ¶ 184). According to his sentencing submission, at that time the defendant "finally began therapy and started to learn how to deal with the severity of [his] mood swings." (Def.'s Sentencing Mem., p. 28). Despite his stated concern for his family, surely addressed by his treatment, the defendant stopped seeing a therapist in 1995.

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[16] The defendant was arrested on at least four additional occasions and charged with crimes including "Grand Theft Auto," "Assault with a Deadly Weapon," "Driving While Intoxicated" and "False Report to a Peace Officer" between 1985 and 1997. On each of these occasions, the defendant was not prosecuted. (PSR, ¶¶ 162-169).

[17] The PSR also noted that, while the defendant was diagnosed with Major Depression in 1994, at least one psychologist concluded "that the defendant was very likely exaggerating or fabricating his depressed mental condition . . . ." (PSR, ¶ 185).

(Def.'s Sentencing Mem., p. 28). He did not recommence therapy until after he was arrested in the instant case, seven years after he had ceased treatment, even though his disorder was addressed in connection with his sentencing on the insurance fraud conviction in 2000. (Def.'s Sentencing Mem., p. 28).

Meanwhile, the defendant - rather than seeking help for his acknowledged problems - was apparently engaged in destructive behavior. (Def.'s Sentencing Mem., Exh. 16 ("By his own admission - online and in interviews - he drank too much, partied too much, and cheated on his wife." "In 1996, Mrs. Elgindy filed for divorce.") Moreover, the defendant states that one of his sons, who suffers from Tourette's Syndrome and Attention Deficit Hyperactivity Disorder, has been particularly (and understandably) impacted by the defendant's incarceration and the possibility of a lengthy jail term. (Def.'s Sentencing Mem., p. 30-31). The defendant, however, emphasized his son's disorders in asking for a downward departure in connection with the 2000 insurance fraud sentencing, attaching some of the same reports he now offers for this Court's consideration.[18] (Def.'s Sentencing

[18] In his sentencing memorandum, the defendant also writes at length about his good works on behalf of Kosovar refugees. (Def.'s Sentencing Mem., pp. 21-27). These same good works - together with his son's condition - formed the basis for the downward departure motion made by the defendant at his 2000 sentencing. After hearing from several witnesses, some of whom vigorously disputed the defendant's narrative concerning his beneficence, the sentencing judge rejected the downward departure motion and pronounced the evidence regarding the defendant's

Mem., Exh's 7, 14). Despite his stated concern for his son and his other family members, immediately upon his release from jail in October 2000, the defendant - rather than mending his ways for their sake - became the leader of a criminal enterprise.

D. The Defendant's Lack of Remorse

Despite being convicted for racketeering, conspiracy to commit securities fraud, extortion and other crimes, the defendant accepts no responsibility for his conduct. Instead, he has smeared prosecutors and proclaimed his innocence on one of the very websites, Silicon Investor, where he found fame as an allegedly former - but obviously unreconstructed - criminal.

For at least the period between November 2, 2005 through January 14, 2006, the defendant has caused e-mails he has written to be posted on the "Dear Anthony" thread he started on the Silicon Investor website. Those e-mails are attached hereto as Attachment 5. Following is a handful of excerpts:

- "The trial had nothing to do with the truth . . . Witnesses were intimidated from day one. The search for justice took a back seat to a prosecutor's ambition, rabid zeal and refusal to concede the truth." (Attachment 5A, 11/2/05, p. 37).

- "The prosecution was more interested in destroying my character than presenting evidence." (Attachment 5C, 12/2/05).

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humanitarian efforts "murky." (See Attachment 4 (May 15, 2000 Minutes of Sentencing Proceeding), p. 117-18). The judge also stated, "[t]here is a reason why you have these people willing to come here and testify against you as they have. I don't see that very often, especially in sentencing." (Attachment 4, p. 124).

- "I lost to hatred, prejudice and a 'convict at all cost' methodology . . . ." (Attachment 5C, 12/2/05).

- "I have publicly made allegations of serious misconduct by former AUSA Ken Breen and Seth Levine." (Attachment 5D, 12/11/05).

- "[M]y Insidetruth report, 'The trial crimes of Cleveland and Breen' will be released first to the US Attorney General's Office, the US Attorney's Office in Brooklyn, and to the Honorable Raymond Dearie." (Attachment 5D, 12/11/05).

- Referring to Cleveland and suggesting that prosecutors suborned perjury, "It is my firm belief that not only myself, but you, Breen and Levine all know what you did . . . ." (Attachment 5D, 12/11/05).

- Referring to former Assistant United States Attorney, Kenneth Breen: "The real terrorist is out there, walking free, having used my life as a spring-board into the private sector, doing exactly what he found so distasteful by Royer." (Attachment 5E, 12/23/05).

- "Isn't this all being done so they can finally lynch the nasty Arab guy?" (Attachment 5F, 1/14/06).

As this Court knows, the government was extremely restrained in its presentation of evidence touching on certain aspects of this defendant's conduct.[19] For this defendant, who finds it impossible to mind his own store, to lash out by impugning the government's integrity is unjust and irresponsible. It is, however, sadly consistent with the defendant's need to wrongly castigate others while minimizing his own misdeeds, a theme that runs through his sentencing submission.

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[19] The government refers this Court to sealed records submitted during pre-trial litigation.

III. THE SENTENCING GUIDELINES

As described in detail below, the government, consistent with the PSR, has applied Section 2B1.1 of the 2004 Guidelines Manual to the defendant's racketeering and securities conspiracy convictions. In some ways, however, the guidelines themselves are inadequate in a case such as this. While the primary object of the Elgindy Enterprise may have been to profit through securities fraud, the means it used to accomplish that object are not encompassed by guidelines associated with monetary crimes. This defendant helped compromise dozens of FBI and SEC investigations and diminish public trust in this country's law enforcement agencies to further his own corrupt ends. While the defendant would have this Court ignore those means, they must inform this Court's sentencing determination. Thus, while the government believes that its guidelines calculations are wholly accurate, the government also believes that this Court should review the defendant's conduct not just through the mechanical application of the guidelines but in light of its uniquely egregious nature.

A defendant's sentence under the United States Sentencing Guidelines (the "Guidelines") is to be determined based on "relevant conduct." "Relevant conduct," as defined in Section 1B1.3 of the Guidelines, means:

> all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

> in the case of a jointly undertaken criminal activity (a plan, scheme, endeavor, or other enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.

The defendant here stands convicted of being a member of a racketeering conspiracy - indeed, he was its leader - and of a securities fraud conspiracy spanning the period March 2000 through April 2002. As detailed above, that conspiracy involved the defendant's dissemination of an enormous volume of misappropriated, confidential law enforcement information upon which the defendant traded and upon which he instructed others to trade. While the defendant was convicted of fraud with respect to only four individual stocks - putting aside his convictions for frontrunning and trading against advice - the record demonstrates that the defendant and his co-conspirators traded on, disseminated information regarding, and manipulated the price of dozens of stocks. Moreover, the defendant caused, indeed commanded, his site members, wittingly or not, to trade on the basis of confidential law enforcement information.

As the enterprise's leader, the defendant was intimately involved in trading, disseminating information on, and manipulating most of those stocks. On some occasions, however, the defendant was made aware of confidential law enforcement information on which he did not trade. On other occasions, while

co-conspirators received and traded on confidential law enforcement information, the defendant was not made privy to it. But it is fundamental to both the "relevant conduct" standard cited above and the law of conspiracy that a conspirator may be held responsible for the acts of his co-conspirators, whether or not he was aware of, or caused, each of those acts. That is all the more appropriate here, where the defendant was the conspiracy's leader. Any claim that the defendant did not foresee that others would trade on or disseminate misappropriated information other than in the instances in which he himself did so is meritless.

A. Use of Acquitted Conduct and The Standard of Proof for Relevant Conduct

The defendant contends that, in sentencing him, i) this Court should disregard acquitted conduct; and ii) this Court should rely only on conduct proven beyond a reasonable doubt. The defendant is wrong on both counts.

Initially, the defendant - in keeping with his desire for this Court to ignore the big picture - maintains that his sentence depends solely on his convictions for trading in four stocks. The defendant, however, was convicted of racketeering and securities conspiracies whose object was to steal law enforcement information, trade on it, disseminate it and otherwise use it for corrupt ends. The object of those conspiracies was to steal information not about four stocks, but, over more than two years, about dozens of stocks. The jury

convicted the defendant of that conduct. That the jury acquitted the defendant of substantive securities fraud counts as to two stocks - putting aside the separate counts of frontrunning and trading against advice - does not impugn the jury's verdict as to the broad activity of which it found the defendant guilty. In sum, the scope of the "acquitted conduct" about which the defendant concerns himself is highly circumscribed.

Even as to the acquitted conduct, in United States v. Vaughn, 430 F.3d 518 (2d Cir. 2005), the Second Circuit held that, just as in the pre-Booker world, a sentencing court could consider such conduct when sentencing a defendant. Vaughn, 430 F.3d at 526-27 (noting that, in doing so, the Second Circuit was joining the Seventh, Tenth and Eleventh Circuits). The Court reasoned that the Supreme Court's decision in United States v. Watts, 519 U.S. 148 (1997), holding permissible the use of acquitted conduct for sentencing, survived Booker. Id. at 526. Because district courts may make factual findings for sentencing purposes by a preponderance of the evidence, conduct need not be disregarded because a jury did not find the defendant guilty of that conduct beyond a reasonable doubt. Id. Although the Second Circuit noted that use of acquitted conduct for sentencing purposes was not mandatory, it did not suggest that such conduct could be rejected out of hand. Id. at 527. Rather, the Court stated that the fact of acquittal may be relevant in assessing the "weight and quality" of evidence presented. Id.

In Vaughn, the Second Circuit also reaffirmed that the proper standard of proof for determining relevant conduct was a preponderance of the evidence. Id. at 525. The Court stated that, before Booker, the preponderance standard was consistent with due process. Id. The Court then succinctly held that "[n]othing in Booker or its predecessors undermines our binding precedent."[20] Id.

The defendant cites United States v. Cordoba-Murgas, 233 F.3d 704 (2d Cir. 2000), to support his position that a standard more rigorous than preponderance of the evidence should apply if uncharged or acquitted relevant conduct has a significant influence on the guidelines calculation. (Def.'s Sentencing Mem., p. 65). In fact, Cordoba-Murgas reaffirmed that a sentencing court is "required to employ the preponderance of the evidence standard" to determine relevant conduct and remanded the case because the district court, in a case in which the defendants were subject to life imprisonment under the guidelines, had not done so. Id. at 709 (the Court held that the remedy, if the defendant could show an "extraordinary combination

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[20] The defendant argues that this is a so-called "pipeline" case in which a defendant should receive the benefits of Booker but not be burdened with the retroactive application of Booker's remedial opinion. (Def.'s Sentencing Mem., p. 64, n. 21). As the defendant concedes, in Vaughn, 430 F.3d at 524-25, the Second Circuit addressed this matter squarely and held that retroactive application of the remedial opinion did not violate due process.

of circumstances," was for the sentencing court to depart downward).

B. The One-Book Rule

The defendant contends that the probation officer erred in calculating the defendant's sentence based on the November 2004 Guidelines.[21] (Def.'s Sentencing Mem., pp. 88-92). Instead, the defendant argues, he should be sentenced for the racketeering and conspiracy charges based on the November 2001 Guidelines, and for the false statements charges based on the November 2004 Guidelines. For the reasons set forth in the margin, the defendant is wrong.[22]

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[21] The defendant's argument is relevant only if this Court chooses to employ Section 2B1.1 to calculate the defendant's sentence. Should the Court disagree with the government's and probation's analyses that Section 2B1.1 applies, and instead uses Section 2B1.4, the 2001 and 2004 Guidelines Manuals produce the same result.

[22] Guidelines Section 1B1.11(b)(3) and associated commentary state that if a defendant commits multiple crimes, the Guidelines manual in effect at the time the later crimes were committed is applicable. This is the so-called "one-book rule," and it has been approved by the Second Circuit. See United States v. Keller, 58 F.3d 884, 890 (2d Cir. 1995); United States v. Stephenson, 921 F.2d 438, 441 (2d Cir. 1990) ("Applying various provisions taken from different versions of the Guidelines would upset the coherency and balance the Commission achieved in promulgating the Guidelines."). But see United States v. Johnson, 1999 WL 395381 (N.D.N.Y. June 4, 1999), aff'd, 221 F.3d 83 (2d Cir. 2000) (the Second Circuit did not address the Ex Post Facto issue); United States v. Santopietro, 166 F.3d 88, 95 (2d Cir. 1999) (the Second Circuit raised, but did not answer, the Ex Post Facto issue with respect to multiple-count convictions).

This provision is found in both the 2001 and 2004 Guidelines Manuals, and it placed the defendant on notice at the

C. Guidelines Calculation for Securities and Wire Fraud Charges

As detailed above, the government proved at trial that the defendant manipulated the market in the stock of numerous securities. The government believes, therefore, that the probation department properly applied Section 2B1.1 of the Sentencing Guidelines in calculating the defendant's Guidelines sentence. (PSR, ¶ 110).

Consistent with the PSR, the government submits that Racketeering Acts 1 through 7, Counts 2 through 6, and Counts 21, 29 and 32 - the securities and wire fraud charges - should be considered together. (PSR, ¶ 109). See Guidelines Manual, § 3D1.2(d). As noted above, the "relevant conduct" associated with these charges for sentencing purposes includes acts counseled,

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time of his earlier crimes that commission of future crimes could negatively impact his guidelines sentence as to all his crimes. That the defendant's crimes committed prior to May 2002 and those committed after May 2002 may not be "groupable" - in other words, may not be part of a common scheme or plan (see Guidelines Section 3D1.2) - is made specifically irrelevant under Section 1B1.11. See Guidelines Section 1B1.11, Application Note 2 (the "one-book rule" "should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped," as the Ex Post Facto Clause "does not distinguish between groupable and nongroupable offenses"); United States v. Butler, 429 F.3d 140, 153 (5th Cir. 2005) (in rejecting defendant's Ex Post Facto argument based on application of a later Guidelines manual to "two sets of discrete charges," the Court cited Application Note 2's commentary on "groupable" and "nongroupable" offenses). Because the key to the Ex Post Facto Clause is notice, the defendant's Ex Post Facto arguments fail. See, e.g., United States v. Sullivan, 255 F.3d 1256, 1262 (10th Cir. 2001) (in discussing Section 1B1.11(b)(3), Court noted that "the central concern of the Ex Post Facto Clause is fair notice to a defendant").

aided or caused by the defendant, and all reasonably foreseeable acts in furtherance of jointly undertaken activity. The Guidelines Manual states that the "court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake." See Guidelines Manual (2004), Application Note 2. Here, the defendant was convicted of being a member of the Elgindy Enterprise, whose members, from March 2000 through May 2002, conspired to profit from insider trading, manipulation and extortion. The defendant was the epicenter of this enterprise. When Cleveland first obtained misappropriated information from Royer, he passed it to the defendant. Cleveland did so because he knew that the defendant could make the scheme profitable by using the power of his AP site.

The defendant did just that. He actively solicited misappropriated information from Cleveland and Royer. He fed that information to his members and instructed them to trade on it. He recruited Royer to work with him, enticing Royer with the promise of millions of dollars. He manipulated the market for stocks by, among other means, controlling his members' trading activities and by publishing reports timed to place artificial pressure on stock prices and to exaggerate his own influence. As Michaelson, the defendant's own witness, testified the defendant "lied all the time. Exaggerated, enhanced. Made himself look good." (Tr. 5476). The defendant also used the misappropriated information to extort shares from Paul Brown and A. J. Nassar.

In short, the defendant was the leader of the Elgindy Enterprise. While most of the trading on inside information was a result of the defendant's direct participation in the enterprise - by obtaining that information from Royer and Cleveland, trading on it, and passing it to his members - there were occasions on which he was not made privy to the information. Given the scope of the defendant's participation, however, it was certainly foreseeable to the defendant that others would trade on misappropriated information obtained from Royer or Cleveland as part of the enterprise. While the defendant attempted to make sure that he was always the first recipient of all the misappropriated information, the defendant knew that Cleveland sometimes passed it to others first. In some cases, that information was published on the AP site. Thus, under the "relevant conduct" provisions of the Guidelines manual, the defendant is responsible for both his own insider trading and that of all those individuals who traded on the misappropriated information.

For purposes of calculating the defendant's gains in connection with his enterprise, the government looks to two sources:[23] 1) trading in stocks for which he and his co-

[23] The government believes that, as part of the overall scheme, gains attributable to frontrunning/trading against advice should be aggregated with these other gains attributable to the defendant's securities fraud conduct. The defendant made $31,877.80 through his frontrunning/trading against advice just in those stocks with respect to which he was convicted for this

conspirators had confidential law enforcement information and 2) revenue from AP site fees. See Guidelines Manual (2004), § 2B1.1, Application Note 3(B) (defining gains broadly as those "that resulted from the offense").

1. Trading Gains

The defendant effectively contends that, because the government did not charge dozens of separate substantive securities fraud charges, this Court is now required to ignore the real nature and scope of the defendant's crimes and limit the "loss" calculation to the defendant's personal trading in SEVU, OSIN, JUNM and PLMD. (Def.'s Sentencing Mem., p. 74). The facts established at trial belie that contention.

a. The Relevant Stocks

Royer provided Cleveland confidential law enforcement information - not all of it associated with computer searches - with respect to more than fifty companies. (Tr. 489). Royer misappropriated computerized confidential law enforcement information with respect to more than dozens of companies and individuals, as verified by the FBI computer audit. (GX-JL-1). With respect to at least 23 of these companies, the defendant himself traded in their stocks after receiving misappropriated information. (See note 3, infra). With respect to numerous

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activity. (Attachment 3). Because these stocks are among the 32 stocks used to calculate the insider trading gains, however, they are reflected in the defendant's trading gains.

companies, the defendant knowingly passed misappropriated information to AP site members. (See note 2, supra). With respect to several additional companies, the defendant obtained misappropriated information but chose not to disseminate it on the AP site. (See id.).

Because the government has not performed a trading analysis on each of the stocks about which Royer misappropriated and disseminated confidential law enforcement information, the government has limited its "gain" calculation to the 32 stocks listed on Attachment 1.[24] The government proved at trial, beyond a reasonable doubt but at least by a preponderance of the evidence, that Royer and/or Wingate misappropriated and disseminated confidential law enforcement information to the defendant and others pertaining to each of these 32 stocks. (Jury Charge, Tr. 8838; see note 2, supra; GX-JL-1). Additionally, lest it be forgotten, the jury convicted the defendant of being a member of a racketeering enterprise and a securities fraud conspiracy - covering the period in which the information on these 32 stocks was misappropriated - whose very purposes were to manipulate stock prices and to disseminate and trade on misappropriated information.

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[24] With respect to at least five additional stocks - CPFS, CTI, PCBM, SMTV and WEWW - Royer ran searches and provided information to Cleveland. (GX-JL-1). Any trading in those stocks is not included in the calculation.

The government also proved, beyond a reasonable doubt but at least by a preponderance of the evidence, that the confidential law enforcement information about the 32 stocks was material. (Jury Charge, Tr. 8839-40). Cleveland described the misappropriated information obtained from Royer as the "best information that a person could get a hold of." (Tr. 217). The defendant himself stated that the misappropriated FBI information was "what the site is all about. Fidelity and bravery and insider selling." (Tr. 583). Because of the source of the misappropriated information, the fact that some of it, in some form, was available in the public domain did not diminish its materiality. (Tr. 3839). That the defendant and his co-conspirators, on many, many occasions, traded in stocks after procuring misappropriated information itself supports a finding of that information's materiality.

b. The Relevant Traders

The defendant contends, however, that, even if the government can prove the dissemination of material, non-public information as to these 32 stocks, the government cannot show that the defendant or others traded "on the basis of" that information except as to SEVU, OSIN, PLMD and JUNM. (Def.'s Sentencing Mem., p. 75).

This Court instructed the jury that a trade made "on the basis of" non-public information means a trade made when the trader "was aware of the material non-public information" and

"the information in some way informed the investment decision." (Jury Charge, Tr. 8841-42). In fact, as this Court noted, that charge was generous to the defendant, given the Second Circuit's approval of "knowing possession" of misappropriated information as sufficient to establish the connection between that information and the purchase or sale of securities. See United States v. Teicher, 987 F.2d 112, 120 (2d Cir. 1993) (citing several reasons why a "knowing possession" standard is appropriate for insider trading cases); (Colloquy, Tr. 7709 ("I'm going further than I might go, as the Second Circuit states, Teicher")); 17 C.F.R. §10b5-1(b) (as of October 23, 2000, the SEC had adopted the Teicher rule as part of its rules-promulgating function: "Definition of 'on the basis of.' Subject to the affirmative defenses in paragraph (c) of this section, a purchase or sale of a security of an issuer is 'on the basis of' material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale").

The defendant himself traded in 23 of the 32 stocks after confidential law enforcement information was obtained by Royer. Cleveland traded in many of those stocks as well. While the defendant suggests that he should not be responsible for these "upstream tippers," (Def.'s Sentencing Mem., p. 77), the Application Note to the insider trading guideline clearly states that "gain" means "the total increase in value realized through

trading in securities by the defendant and persons acting in concert with the defendant *or* to whom the defendant provided insider information. . . ." See Guidelines Manual (2004), Section 2B1.4, Application Note (emphasis added). Here, the defendant was convicted of being a member of a racketeering enterprise and a securities conspiracy whose membership included, among others, Royer, Wingate and Cleveland. The defendant, however, reads the guidelines' "acting in concert" language as if this case involved a discrete series of unconnected frauds rather than the racketeering and conspiracy for which the defendant was convicted. See also Section 1B1.3(a)(1)(B) (defining "relevant conduct"). On most occasions, the defendant was a direct participant in the acquisition and dissemination of misappropriated information. On some occasions, the acquisition and dissemination of that information occurred without his direct participation. Nonetheless, particularly given the scope of the defendant's involvement in the criminal enterprise, he is responsible for Royer's, Wingate's and Cleveland's trading.

The defendant also seeks to deny responsibility for his "downstream tippees." Again, the guidelines - both Section 2B1.4's Application Note and Section 1B1.3's definition of relevant conduct - demonstrate that the defendant is responsible for the trading of, at a minimum, Hansen, Terrell, Jonathan Daws,

Kendall McGreggor, David Slotnick and Jeffrey Thorpe.[25] As the defendant concedes, Daws,[26] Hansen and Terrell have admitted to trading on the basis of misappropriated information received and disseminated by the defendant. (Def.'s Sentencing Mem., pp. 76-79). While, on occasion, Daws, Hansen and Terrell may have obtained misappropriated information outside the usual pattern - Royer to Cleveland or the defendant to AP site members - the defendant is nonetheless responsible for all their trading as the

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[25] See also Securities and Exchange Commission v. Tome, 638 F. Supp. 638, 639 (S.D.N.Y. 1986). In Tome, the defendant contended that he should not be responsible for trades made by his "tippees" because he "did not benefit financially from the tippees' transactions." Id. The court rejected the contention that a financial benefit to the tipper is necessary to hold him liable for the tippees' trades. Id. To the extent some benefit is required to hold a tipper liable for the tippees' trades, here the defendant was handsomely benefitted by the AP site fees paid by his tippees. (GX-3002).

[26] Cleveland communicated confidential law enforcement information to Jonathan Daws while the defendant was incarcerated in 2000. (Tr. 254). Daws (AP site member handle "Archer") spoke with Royer while Royer and Cleveland were staying with the defendant in San Diego. (Tr. 575). The defendant arranged for Royer to speak with Daws about OSIN. (Tr. 580). Cleveland believed it would be useful to involve Daws in the sharing of confidential law enforcement information because Daws was "one of the big guys" on the AP site. (Tr. 581). Daws has admitted to conspiring to commit securities fraud and, in particular, to trading on inside information he knew to be misappropriated from the FBI. (Def.'s Sentencing Mem., Exh. 1, pp. 21-22). Royer told Cleveland that Daws had asked Royer to gather confidential law enforcement information on Imclone ("IMCL"). (Tr. 925). Royer then asked Wingate to run computer searches related to IMCL. (Tr. 926). Royer also tried to pry confidential information from FBI Special Agent Catherine Farmer regarding Imclone. (Tr. 2901).

leader of the Elgindy Enterprise.[27]

As to McGreggor,[28] Slotnick[29] and Thorpe,[30] they were

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[27] When Terrell obtained misappropriated information directly from Cleveland - a practice the defendant, who wanted the information first, actively discouraged - Terrell put the information on the AP site. The defendant's maintenance of the corrupt site, and its emphasis on the dissemination of misappropriated information, thus made Terrell's actions possible.

[28] McGreggor did not join the AP site until several months before the defendant's arrest. However, as early as September 14, 2000, Daws ("Trebuchet" or "Archer" on RC) told McGreggor ("Leto" on RC), David Slotnick ("Hemo" on RC) and others on the RC chat room that Daws had an FBI contact, "a friend of a friend." On March 1, 2001, Daws told RC site members, including McGreggor, that he had spoken with the FBI agent regarding OSIN. (Daws noted, "Insider trading is illegal.") The following day, McGreggor asked Daws for additional information about the FBI's interest in OSIN. Daws responded, "FBI agent is the one AP does a lot with," and gave his name as "Jeff Rory," information which McGreggor stated was "great to know." On March 16, 2001, Daws identified "Derrick" as an "AP guy" with "the FBI friend" who "feeds Derrick info on scam company investigations." Daws told McGreggor, Slotnick and others that he had asked Derrick to have "Jeff the FBI guy" look at SLPH. On April 9, 2001, McGreggor asked Daws whether information on HDVG was coming "from your ap site friend with an FBI friend," and Daws offered to check. On May 22, 2001, McGreggor, Slotnick and others discuss JUNM information from the AP site, which "AP claim[s] he got . . . from 'US.Gov't.'" On this occasion, McGreggor asked Daws to follow-up with the defendant, and Daws told McGreggor "I am going to call you about JUNM." After that, Daws gave information to the RC site about his conversation with the defendant concerning FBI information on JUNM. On May 24, 2001, Slotnick posted to RC members, including McGreggor, that REFR "is supposedly under some sort of FBI investigation." On April 23, 2002, Daws told RC members, including McGreggor, that "Jeff [Royer] is the one who gave us the Ft. Worth SEC contact for BGII." Finally, on May 22, 2002, after the defendant was arrested, McGreggor asked his fellow RC members, "do you think i have any liability for being a subscriber for the last few months on the ap site?" (All referenced RC chat logs are gathered as Attachment 6).

[29] David Slotnick (AP site member handle "Ectopy") actively engaged in discussions on the AP website concerning

active participants on the AP and RC sites who received and traded on misappropriated information.

In fact, limiting the relevant traders to just these eight individuals is likewise generous to the defendant. As the defendant himself recently stated, "[m]y site had between 150-200 people logged on at any given time during market hours . . . ." (Attachment 5A, 11/2/05). The defendant disseminated misappropriated law enforcement information on numerous stocks to his site members. He did so for the very purpose of inciting them to trade in these stocks, in part because, having his own short position, he could profit from the downward pressure caused by site members' short selling. Without having to determine whether any of these individuals were themselves exposed to

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stocks about which confidential law enforcement information was disseminated, including BGII (Tr. 4085), NSOL (Tr. 4052), SEVU (Tr. 1250, 1446) and EGBT (Tr. 1619, 4037, 4047). Slotnick was Cleveland's "best friend" on the AP website, (Tr. 3924), and he understood that information posted on the site was obtained from the FBI. (Tr. 2514 (Slotnick wrote on the AP site, "[a]m I the only one here without a personal FBI agent."); GX-RH-9 (Slotnick on chat logs while Royer is in "AP Cork" persona as disclosed FBI agent)). Slotnick, Terrell and Cleveland were privy to confidential law enforcement information from Royer regarding REFR, but that information was not passed to the defendant. (Tr. 648-50, 1819, 3871). REFR, however, was a stock initially brought to Cleveland's attention through his participation on the AP site.

[30] Jeffrey Thorp (AP site member handle "Mweka") actively engaged in discussions on the AP website concerning stocks about which confidential law enforcement information was disseminated, including TDNT, (Tr. 765-76; GX-DC-143, 144, 145, 146, 147), IVSO (Tr. 918-24; GX-DC-322, 324, 325), EGBT (Tr. 1662; GX-DC-301, 305, 306), VLPI (GX-DC-229) and NSOL (GX-DC-243).

"tippee" liability, the defendant certainly understood and profited from the fact that site members were trading on misappropriated information. Through the defendant's scheme, hundreds or thousands of individual counter-parties to his site members' trades were materially disadvantaged by the defendant's criminal acts. The defendant should, therefore, properly be charged with his site members' gains in stocks they traded after he disseminated misappropriated information on the AP site. Unfortunately, the scope of the defendant's scheme makes it extremely difficult to calculate these gains. While those gains, therefore, have not been used to calculate the defendant's guidelines sentence, this Court can consider them as a basis for an upward variance under T. 18, U.S.C., Section 3553(a).

c. The Relevant Trades

As the defendant correctly states, the proper start date for calculating insider trading profits is the date on which confidential law enforcement information was disseminated. (Def.'s Sentencing Mem., p. 81). Unlike the defendant, however, the government has used two sets of start dates.

For the defendant, Royer, Cleveland and Wingate, the start date for calculating trading gains is the date on which the misappropriated information was first accessed by Royer or Wingate. (GX-JL-1). There is ample evidence in the record of a pattern in which Cleveland obtained information from Royer and quickly passed it to the defendant. On some occasions, the

defendant obtained information directly from Royer. The defendant proposes that, instead of the access date, this Court should look at the date information was first posted on the AP site. That makes little sense because the record demonstrates that the defendant did not always disseminate misappropriated information to AP site members on first receiving it (in some instances, he did not disseminate the information at all).

For Daws, Hansen, Terrell, McGreggor, Slotnick and Thorpe, the government agrees for sentencing purposes that the start date for calculating insider trading gains should be the date information was first posted to the AP site.

The defendant argues that the end date for calculating gains should be three days after the misappropriated material first appeared on the AP site. (Def.'s Sentencing Mem., p. 82). The government disagrees. For the reasons specified below, the government has calculated trading gains by including all trading in the relevant stocks after misappropriated information was first accessed.

As this Court explained in its jury instructions, information remains non-public "until it is disseminated in a manner sufficient to insure its availability to the investing public or to insure that the market has had an opportunity to 'absorb' [it] such that the company's stock price has already adjusted to reflect the information." (Jury Charge, Tr. 8839). Unlike in cases where an individual trades on advance knowledge

of a negative earnings report or a glowing magazine article, the information misappropriated by Royer and disseminated by the defendant was made public only when the defendant chose to do so for his own ends. Indeed, the defendant actively controlled the dissemination of the misappropriated information in order to insure that it became public only as he dictated - in part to conceal his criminal activity - and threatened to penalize anyone who crossed him.

The defendant contends, however, that the market absorbed the information through AP site members' trading. (Def.'s Sentencing Mem., p. 82). This is an interesting contention, as it concedes the government's argument that the defendant's dissemination of misappropriated information invariably caused site members to heavily trade on that information as the defendant instructed. The defendant's theory that the negative information is fully absorbed into a stock price - let alone the stock price of 32 different companies - in three days, however, is sheer speculation. See Securities Exchange Commission v. Mayhew, 121 F.3d 44, 50 (2d Cir. 1997) (discussing "impounding" in context of corporate merger); United States v. Libera, 989 F.2d 596, 601 (2d Cir. 1993) (discussing "impounding" in context of publication of information in magazine article). It may be that people disadvantaged by the asymmetrical access to the misappropriated information see a buying opportunity as the stock price drops. It may be that

insiders with an interest in the company's share price support it. It may be that, on certain occasions, AP site members' short selling of a particular stock was light in those first three days. In any case, there is no evidence that the misappropriated information was fully "impounded" into the stock price within the first three days after it was first posted to the AP site.

The defendant also argues that, after three days, inside information likely would not "motivate" someone's trade and that "the connection between the trade and the information becomes too attenuated."[31] (Def.'s Sentencing Mem., p. 82). To meet the standard for insider trading, however, the trader need only be aware of non-public information that "in some way informs" his or her investment decision. As noted above, the information used and disseminated by the defendant was not made public unless and until he said so. And, as the jury found, this information clearly informed trading decisions. (Colloquy, Tr. 7709 ("It will not be a 'but for' type of instruction but something along the lines of the information playing some part or informing the investment decision. The government doesn't have to prove but for this information these trades would not have occurred, [that] obviously goes way too far.")). This is

[31] Another problem with the defendant's methodology is that, after initially placing misappropriated information on the AP site, the defendant frequently posted additional information, sometimes on multiple occasions. (GX-JL-1). It is not clear how, or whether, the defendant's methodology accounts for this.

particularly true here where the defendant, speaking to the same audience to whom he provided misappropriated information, routinely discussed stocks over weeks or months after providing misappropriated information. To the extent that AP site members continued to trade those stocks, their decisions must have been informed by the information to which their membership made them privy.

For these reasons, the government's insider trading gains calculation includes all trades (including losing trades) in any of the 32 stocks made: as to the defendant, Royer, Cleveland and Wingate, after the information was first misappropriated by Royer; and, as to Daws, Hansen, Terrell, McGreggor, Slotnick and Thorpe, after the information was first disseminated on the AP site.

d. Total Insider Trading Gains

Based on the methodology articulated above, the gains attributable to the defendant from trading on misappropriated information are $3,017,317.86. (Attachment 1).

2. Revenue from AP Site Fees

The defendant earned $2,705,213.33 from the inception of the AP site in December 1999 through its termination in May 2002. (GX-3001). Of that, the defendant earned $1,608,273.33 between October 2000 and May 2002. (Attachment 7). The defendant argues, however, that only a small fraction of the AP site was dedicated to misappropriated law enforcement

information. (Kelner Aff., pp. 8-9). Moreover, the defendant does not include any AP site fee revenue in his guidelines calculations.

And yet, the defendant was found guilty of operating a racketeering enterprise, and the engine of that enterprise was the defendant's AP site. The reason Cleveland initially contacted the defendant to share misappropriated information was because of the power of the site. Once on board, the defendant disseminated the misappropriated information to site members. The defendant told the site members how and when to trade on the misappropriated information, and he tightly controlled its use. Indeed, the defendant himself described his site fees as a substitute for profits on trading he gave up to AP site members. (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 whey the Site was created, and why there was a charge. So what I give up on fills, I make up in the site fees.")). While the defendant now claims that only a tiny fraction of his site was dedicated to misappropriated information, Cleveland, Hansen and Terrell described how the site changed to covering "scam" companies in October 2000 when the defendant was released from prison. While the AP site had members prior to the defendant's participation in the Elgindy Enterprise, the site's membership declined while he was in jail. Regardless of the percentage of trading calls and broadcasts associated with the stocks about

which the defendant had misappropriated information, the nature of that information was a significant part of the AP site.

Moreover, the defendant's success as a stock manipulator was due, in part, to the manner in which he deceived AP site members about site fees. While he told members that their fees went in their entirety to maintain the site, that was patently false. In fact, in early 2001, the percentage of those fees that went to site maintenance fell from 15% to 9%. It is far less likely that members would have paid the defendant hundreds of dollars a month had they known it went to line his pockets. The defendant's deception allowed him to maintain the myth that he was providing an exclusive service largely to benefit his members, as opposed to enrich himself. That gave him an exaggerated influence he undoubtedly would not otherwise have enjoyed. That exaggerated influence, manifest in his instructing his members when and how to trade, together with the exaggerated influence the defendant claimed for InsideTruth, enabled the defendant to artificially impact stock prices.

In addition, the defendant's own trading in misappropriated stock was assisted by his use of the AP site. Because he was able to influence stock prices through dissemination of misappropriated information, he benefitted by being able to cover his short positions at advantageous prices.

The AP site, in sum, lies at the very heart of the

defendant's racketeering enterprise and securities fraud schemes, and the defendant obtained the revenues from it - at least those generated from October 2000 through May 2002 - because of those schemes.

3. Offense Level for Securities and Wire Fraud Charges

The base offense level is 7. See Guidelines Manual (2004), § 2B1.1. The total gains from the offense attributable to the defendant are $4,625,591.19 ($3,017,317.86 from trading and $1,608,273.33 from site fees), resulting in an adjustment of 18 levels. See Guidelines Manual (2004), § 2B1.1(b)(J). The defendant's insider trading and manipulation scheme harmed untold trading counterparties - the "sheep" that the defendant "raped" - and thus a 6 level enhancement is appropriate. See Guidelines Manual (2004), § 2B1.1(b)(2)(C). The defendant acted as an investment advisor to his site members, telling them when and how to trade, an integral part of his scheme; a 4 level enhancement is therefore warranted. See Guidelines Manual (2004), § 2B1.1(b)(15)(A)(iii). Finally, the defendant clearly used sophisticated means to effect his scheme, including orchestrating site member trading and timing release of information in order to control stock prices. An additional 2 level "sophisticated means" enhancement is thus appropriate. See Guidelines Manual (2004), § 2B1.1(b)(9)(C). The total offense level for the securities and wire fraud charges, excluding the enhancements discussed below, is 37.

D. Guidelines Calculation for Extortion Counts

1. Proceeds from Extortion

a. NSOL

On January 31, 2002, as part of the extortionate scheme of which he was convicted, the defendant purchased a covering NSOL block of 325,000 shares for $327,146.75. (Tr. 4502). The trade was executed at $1 per share (the additional $2,146.75 was commissions). On January 31, 2002 NSOL had an opening price of $1.71 per share, and closed at $1.40. The average price for the day was $1.56.[32] The government submits that the defendant's gain from the NSOL extortion was, therefore, $182,000 at a minimum. Once again, this number is extremely generous to the defendant. There is no evidence in the record that the defendant ever paid a single dime for the discounted NSOL stock.

b. FLOR

As the defendant agrees, the FLOR extortion scheme was very similar to that involving NSOL. In fact, the jury convicted

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[32] This figure was derived by taking the price of each NSOL trade (as reported on the audit trail provided by the NASD) executed on January 31, 2002, multiplying that by the number of shares traded, then dividing by the total number of shares traded. This calculation excludes the shares transferred to the defendant as part of the extortion. The defendant employs a similar methodology, but uses NSOL's closing price. The government submits that the average price for the day is the better measure of the price at which the defendant could have obtained shares. Indeed, it is an extraordinarily generous price, because an open-market purchase of 325,000 shares in a single day in the stock of a small company undoubtedly would have driven the price much higher, thus significantly increasing the value of the extorted, discounted shares.

the defendant of an extortion conspiracy that encompassed the defendant's scheme to extort A. J. Nassar and FLOR. Just as he did with Brown and NSOL, the defendant put extremely negative, confidential law enforcement information about Nassar on the AP site. (Tr. 735, 739). Based on that information, the defendant and AP site members, at his direction, heavily shorted NSOL stock, causing significant downward movement. Nassar believed that the information posted by the defendant on the AP site caused FLOR's stock to drop and created a severe, potentially bankrupting problem for the company. (Tr. 3690). In order to get rid of the defendant, therefore, Nassar signed a bogus investment banking agreement with Valhalla Capital that served no purpose other than to transfer FLOR stock to the defendant. (Tr. 3695-98; GX-1890). After negotiating the price for the extorted FLOR stock, the defendant told site members to cover their short positions at the arranged price. (Tr. 745, 755). When Nassar gave the defendant the extorted block of shares, the defendant terminated coverage. (Tr. 759).

As this Court instructed the jury, to prove extortion, the government must show: 1) wrongful receipt of property; 2) by actual or threatened economic injury; and 3) an effect on interstate commerce. (Jury Charge, Tr. 8864). Whether the information he disseminated was truthful or not, the defendant misused misappropriated information to place artificial selling pressure on FLOR stock by exhorting his site members to short it.

Nassar credibly testified that he was very concerned that the defendant's continued dissemination of this negative information would have a material adverse impact on FLOR. The defendant then used the threat of continued negative publicity to wrongfully obtain a block of FLOR stock through a bogus investment agreement, designed to conceal the reality of the extortion. After the transaction was completed, the defendant terminated coverage of FLOR.

The defendant argues that, because the information was accurate, this cannot constitute extortion. But accurate information - in this case, information misappropriated by a corrupt FBI agent - wrongfully employed to create economic fear can constitute extortion. In this case, the defendant had no right to the information and no right to the benefit he received therefrom.

The defendant further argues that the defendant purchased the FLOR stock at the market price. That market price, however, was orchestrated by the defendant. The defendant told members to short FLOR based on misappropriated information. They followed his instructions. When the defendant was negotiating the price of the extorted shares, he tightly controlled site members' trading. The defendant told site members, "GET the hell off the bid on FLOR at 2.50 & leave the 2.45 bid. . . . you are screwing up everything for everyone." (GX-DC-163). Once arrangements were made, he told them, "FLOR we can all cover at

2.45." (GX-DC-164). "Thank you for the FLOR profits and on we go. . . . Shot i think i did good in makin sure we didn't have to fight each other to buy em back." (GX-DC-165). The defendant clearly exercised his ability to control the price of FLOR stock by telling his members how and when to trade. Had the defendant failed to exercise that power, the price at which the defendant and the AP membership would have been able to cover their positions would have increased. As the defendant himself stated, by extorting the FLOR block, he ensured that site members realized profits because they "didn't have to fight eachother to buy em back."

Through his FLOR extortion, the defendant purchased a block of 100,000 shares. Because the block and any payment made for it are difficult to trace, the government submits that the defendant's (modest) gains in FLOR should serve as a substitute. The government submits, however, that this number is woefully inadequate to capture the gains associated with the FLOR extortion, as the defendant orchestrated profitable covering trades for the numerous site members who he had instructed to sell FLOR short.

As shown in Attachment 1, the defendant made $17,514.17 in FLOR trading on misappropriated information.

c. Total Gains from Extortion Scheme

The government agrees with the defendant that the appropriate guidelines section is 2B3.3, carrying a base offense

level of 9. The combined gains in the scheme to extort Brown and Nassar of NSOL and FLOR shares are $199,514.17. See Guidelines Manual (2004), § 3D1.2, Application Note 4 (discussing combining quantities for similar crimes that are part of a common scheme). The total offense level for the extortion scheme, excluding the enhancements discussed below, is 18.

E. Guidelines Calculation for the Defendant's Crimes Committed While Released on Bail

The government agrees with the defendant's conclusion that his crimes committed while released on bail, to which the defendant pled guilty, result in a total offense level of 7. (Def.'s Sentencing Mem., pp. 102-03). Some portion of the sentence associated with these crimes must be served consecutive to the term imposed on the other charges. See 18, U.S.C., § 3147.

While the guidelines sentence associated with the bail-release case is comparatively light, it is worth noting that the defendant - thumbing his nose at this Court's authority - committed yet another federal crime while out on bail during an attempt to flee prosecution. This Court, should it choose to do so, could sentence the defendant to 10 years imprisonment for this crime consecutive to any term imposed on the racketeering and securities fraud charges. See id.

F. Enhancements

1. Obstruction of Justice

a. Pre-Arrest Conduct

Prior to September 2001, the defendant routinely had Royer determine from FBI files whether the defendant was under investigation. In September 2001, Royer told Cleveland that the defendant was under investigation. Royer and, after he left the FBI, Wingate accessed information about the investigation on numerous occasions. Royer and Cleveland spoke about the matter many times, both before and after Royer left the FBI in December 2001. Royer gave Cleveland certain details about the investigation, including that the defendant had contributed to a Middle Eastern charity called "Mercy International."

After Royer and Cleveland had moved to San Diego to work with the defendant, Royer told Cleveland that he had given some information to the defendant about the investigation. The defendant's knowledge about the investigation was clear from his spontaneous post-arrest statement to Special Agent David Sutherland that he did not contribute to Middle Eastern charities.[33]

The defendant also acted like someone who understood he was being investigated by the FBI in connection with a serious

[33] Royer himself lied to FBI Special Agent Gonzalez in an interview conducted December 17, 2001, in which Royer denied ever passing sensitive law enforcement information to the defendant. (Tr. 4640-41).

matter: he handled large sums of cash;[34] he wired money to Lebanon; he asked Royer what would happen if the defendant "fled" to Lebanon; he told Cleveland that Lebanon had "the best bank secrecy laws in the world;" he asked Hansen to start wiring AP site fees to a bank in Lebanon; he traveled to Lebanon, without his probation officer's permission, in November 2001; he arranged for the purchase of an apartment in Beirut, which he failed to tell his probation officer; he transferred $124,995 to a Lebanese bank account, which he also failed to tell her; he transferred an additional $225,000 to a Lebanese bank account, which again he failed to tell her; he opened a trading account in which he described himself as a resident of Lebanon, and arranged for the transfer of significant assets to that account; he asked his probation officer for permission to travel to Lebanon for a second time, shortly after which he told her he was quitting the "whistleblowing" business; and he had Royer write a letter in which Royer falsely claimed to be a current FBI agent to the court in Texas recommending the defendant for early supervised release termination.

The defendant also actively deceived this Court by representing, through his lawyer, that he "had no intention of before he traveled to Egypt in the fall of 2001 to travel to

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[34] Cleveland's testimony on this subject was corroborated by the FBI agents who searched the defendant's business at the time of his May 2002 arrest. They found $42,900 in cash and a stash of gold jewelry. (Tr. 4130-31; GX-137).

Lebanon. . . ." (See Aug. 22, 2002 Hearing Transcript, pp. 112-13). Only after that hearing, the purpose of which was for the defendant to secure pre-trial release, did the government discover from AP site chat logs that the defendant had planned his Lebanon excursion in advance of late-October 2001 trip to Egypt. (GX-3497 (from October 10, 2001, "why dont ya meet me in egypt . . . or lebanon"); GX-3499B (from October 23, 2001, a site member asked the defendant "what part of Lebanon u going to?")).

Under Section 3C1.1, an obstruction enhancement should be applied where "the defendant willfully obstructed or impeded or attempted to instruct or impede, the administration of justice during the course of the investigation. . . ." While "mere flight from arrest" is insufficient to support a finding of obstruction under Section 3C1.1, see United States v. Stroud, 893 F.3d 504, 506 (2d Cir. 1990),[35] conduct that has the "potential to impede" the investigation or prosecution of a defendant is sufficient. See United States v. Khimchiavili, 372 F.3d 75, 80 (2d Cir. 2004) (citing United States v. McKay, 183 F.3d 89, 95 (2d Cir. 1999)). Here, the defendant did much more than prepare for his escape.[36] The defendant, who had frequently received

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[35] Stroud holds that "mere flight in the immediate aftermath of a crime, without more, is insufficient to justify a section 3C1.1 obstruction of justice enhancement." Stroud, 893 F.3d at 507 (emphasis added).

[36] That the defendant prepared to flee is evident from his deception of his probation officer, his attempt to terminate supervised release early, his purchase of property in Lebanon, his transfer of funds thereto, his creation of a trading account

information from Royer about investigations into the defendant's activities, clearly did so here as well. He then altered his behavior in light of the information he received by traveling and transferring funds, in part the illicit proceeds of his crimes, to Lebanon and by communicating to his probation officer that he was quitting the "whisteblowing" business. Monitoring an investigation and changing behavior accordingly, in addition to preparing to flee, is sufficient to warrant an enhancement under Section 3C1.1.[37]

b. Post-Arrest Conduct

The defendant's post-arrest conduct, for which he pled guilty, provides an independent basis for applying an obstruction enhancement as to the racketeering and securities conspiracy counts. Taken together with the pre-arrest conduct, there is more than ample evidence to support that enhancement.

On April 17, 2004, the defendant attempted to flee by assuming the identity of "Manny Velasco," by gathering $25,000 in

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in which he described himself as a resident of Lebanon, and his stockpiling of cash and jewelry. That evidence is supported by the defendant's 2004 attempt to flee.

[37] The defendant also obstructed justice in at least one additional way. He provided "materially false information to a judge or magistrate" when he lied, through his lawyer, about his trip to Lebanon. See Guidelines Manual (2004), § 3C1.1, Application Note 4(f) (enhancement appropriate for "providing materially false information to a judge or magistrate"). That misrepresentation was designed not only to influence this Court's bail decision, but also was relevant to the obstruction charges against the defendant. See Khimchiachvili, 372 F.3d at 80 (misrepresentation in financial affidavit for appointed counsel lacked "obstructive intent").

cash and more than $30,000 in jewelry, by lying to his pre-trial officer about his travel plans and by attempting to board a flight for Phoenix, Arizona. The defendant had many forms of identification bearing the name "Velasco," some dating from August 2003; he had clearly planned his escape for months. When stopped at the airport, the defendant lied to officials, telling them he was Velasco and that Elgindy was his lawyer.

The defendant lied to his pre-trial officer, lied to federal authorities and attempted to flee. While the defendant did not actually fail to appear for a judicial appearance, his attempt to flee supports an obstruction enhancement. See Guidelines Manual (2004), § 3C1.1, Application Note 4(e) (enhancement appropriate for "willfully failing to appear, as ordered, for a judicial appearance").

2. Leadership Role

The government submits that, pursuant to Section 3B1.1(a), the defendant was an organizer and leader of both the racketeering enterprise in general and the extortion conspiracy in particular.

a. Racketeering and Securities Fraud Conspiracies

An "organizer or leader" enhancement is appropriate when an offense involves "five or more participants or was otherwise extensive." See Guidelines Manual (2004), § 3B1.1(a). The offense here involved a massive enterprise through which the defendant and others, over a period of more than two years,

repeatedly stole information from the FBI and SEC about dozens of companies and individuals, traded on that information, disseminated it to others and used it to manipulate the securities market. The defendant, Royer, Wingate, Cleveland, Hansen, Terrell and Daws were all convicted of participating in the enterprise in one form or another. Peters has been indicted on charges relating to the enterprise's extortion scheme. McGreggor, Slotnick, Thorp and dozens of others traded on misappropriated information obtained through the enterprise.

By any measure, the enterprise was extensive. The defendant was its leader.[38] The guidelines provide examples of those factors relevant to determine whether a defendant was an "organizer or leader." They include the defendant's "exercise of decision making authority," "the nature of participation in the offense," "the degree of participation and planning or organizing the offense," "the nature and scope of the illegal activity," and the "degree of control and authority exercised over others."

All of these factors were present in the defendant's conduct. He actively solicited misappropriated information from Cleveland and Royer, and frequently directed their efforts to particular companies and individuals. He offered Royer employment and an opportunity to make millions of dollars in

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[38] It should be noted that the guidelines specifically provide that, in appropriate cases, there may be more than one organizer or leader of an offense. See Guidelines Manual (2004), § 3B1.1, Application Note 4.

order to maintain the pipeline of misappropriated information. He disseminated that information to Daws, Hansen, Terrell, McGregor, Slotnick and Thorp, not to mention his hundreds of AP site members. He orchestrated his members' trading activity to maximize the utility of the misappropriated information and to manipulate stock prices. He published false and misleading research reports to exaggerate his influence in the market. He frequently told his members precisely how and when to trade the stocks of the companies he targeted as part of the enterprise.

Indeed, it was the defendant's very ability to provide this kind of leadership that caused Cleveland to contact him in March 2000 with the initial piece of misappropriated information Cleveland received from Royer. The defendant immediately verified Cleveland's source, recognized the value of the information he could obtain, and began his orchestration of this massive fraud. A leadership enhancement as to the racketeering enterprise is therefore appropriate.

b. Extortion Conspiracy

The defendant's role in the extortion conspiracy was equally significant. He placed misappropriated law enforcement information, obtained from Royer, on his AP site. He directed his site members to heavily short NSOL and FLOR stock. The defendant personally harassed Brown, then negotiated with him for the discounted block of stock that was his payoff for going away. When he saw an opportunity to squeeze Brown and Nassar, he took

it by arranging for the purchase of cheap shares for both himself and his site members. The activity involved, besides the site members who covered their positions with extorted shares, Royer and Cleveland, who were the source of the misappropriated information used by the defendant to extort the shares; and Slavney, Peters and Roland Chapin who communicated to the extortion victims how they could get rid of the defendant and who arranged for the phony agreements that concealed the extortion scheme.

G. Final Offense Level[39]

Securities and Wire Fraud

Base Offense Level (2B1.1(a)(1))	7
Plus: Gains from Offense (2B1.1(b)(1)(J))	18
Plus: Greater than 250 Victims (2B1(b)(2)(C))	6
Plus: Sophisticated Means	2
Plus: Investment Advisor (2B1.1(b)(15(A)(iii))	4
Plus: Leadership Role (3B1.1(a))	4

[39] Pursuant to Section 2E1.1 of both the 2001 and 2004 Guidelines Manuals, a racketeering conviction carries a minimum base offense level of 19. That level is only relevant if is lower than the offense level calculated separately for the underlying racketeering acts. See Guidelines Manual (2004), § 2E1.1(a)(2). Because the latter calculation produces a higher guidelines number, it is employed herein.

Under the former, however, all counts would be grouped together under the racketeering activity except for the frontrunning/trading against advice counts, which were not charged as part of the racketeering enterprise, and the false statement counts. The racketeering counts, including enhancements for leadership role and obstruction, produce a guidelines level of 25. The frontrunning/trading against advice counts, only accounting for gains made on the counts of conviction, produce an (understated) total offense level of 19. See Guidelines Manual (2004), § 2B1.1 (Base Offense: 7; "Loss" greater than $30,000 (Attachment 3): 6; more than 50 "site member" victims: 4; sophisticated means: 2). The false statement counts produce a total offense level of 7. (See Section III(E), supra).

Under the grouping rules, the total offense level would be 26 (under Sections 3D1.3 and 3D1.4, the RICO would constitute one "unit," the securities counts ½ "unit," and the false statement count would be disregarded). In Criminal History Category III, the defendant would be facing a guidelines range of 78 to 97 months, with some portion of the incarceration of 4 to 10 months for the bail-release case to follow.

Plus: Obstruction (3C1.1)	2
Adjusted Offense Level:	43
Extortion	
Base Offense Level (2B3.3)	9
Plus: Gains from Offense (2B1.1(b)(1)(F))	10
Plus: Leadership Role (3B1.1(a))	4
Plus: Obstruction (3C1.1)	2
Adjusted Offense Level:	25
Bail-Release Offenses	
Base Offense Level (2B1.1(a)(2))	6
Plus: Commission of Offense on Release (2J1.7)	3
Less: Acceptance of Responsibility (3E1.1(a))	-2
Adjusted Offense Level:	7
Total Offense Level After Grouping	
Securities and Wire Fraud Total Adjusted Level	43
Plus: Unit(s) Based on Extortion	0
Total Adjusted Offense Level:	43

H. Criminal History Category

In his submission, the defendant calculates different criminal history categories applicable to his racketeering case and his false statements case. A defendant's criminal history, however, should be calculated based on the entirety of that history as of the date of sentence. There is no reason, therefore, to apply different categories to the two cases.

The government agrees with the defendant and the PSR

that the defendant should receive 2 criminal history points for the 2000 fraud conviction; 2 points for committing the instant offense while under a criminal justice sentence; and 1 point for committing the instant offense less than two years after release. (PSR, ¶¶ 156-59; Def.'s Sentencing Mem., p. 87).

For an individual in Criminal History Category III, the guidelines imprisonment range for an offense level of 43 is life.[40] To the extent it is relevant (as some portion of it is required to be served consecutive to any other sentence imposed), in Criminal History Category III, the guidelines imprisonment for the false statements case (offense level 7) is 4 to 10 months.

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[40] If this Court does not follow the "one-book" rule, the calculation, applying 2001 Guidelines Manual to everything but the bail-release case, would be as follows: base offense level 6; a "loss" greater than $2,500,000, plus 18; more than 50 victims, plus 4; sophisticated means, plus 2; leadership role, plus 4; obstruction, plus 2. Total adjusted offense level 36, for a guidelines range, in Criminal History Category III, of 235 to 293 months incarceration (plus some portion of the incarceration associated with the bail-release case to follow).

If this Court uses Section 2B1.4 ("insider trading" guidelines), rather than Section 2B1.1, the 2001 and 2004 Guidelines Manuals produce the same results, as follows: base offense level 8; a gain greater than $2,500,000, plus 18; leadership role, plus 4; obstruction, plus 2; grouping (extortion calculated as ½ unit under Section 3D1.4), plus 1. Total adjusted offense level 33, for a guidelines range, in Criminal History Category III, 168 to 210 months incarceration (plus some portion of the incarceration associated with the bail-release case to follow).

I. Upward Departures

1. Disruption of Governmental Function

The above guidelines calculation results in a heavy sentence, yet it takes no account of the very essence of the defendant's crime. He actively assisted in the corruption of an FBI agent in one of the most serious breaches of trust in the FBI's history. Jeffrey Royer used his privileged position as an FBI agent to access confidential law enforcement information on hundreds of occasions for personal gain. Certain of the investigations Royer compromised involved undercover agents and cooperating witnesses. When Royer left the FBI to work with the defendant - lured by the prospect of millions of dollars - the defendant made sure that Royer found a successor, Lynn Wingate, who would continue funneling misappropriated information to the defendant.

The defendant, in March 2000, immediately saw and seized upon this opportunity to benefit himself from Royer's despicable actions. The defendant disseminated misappropriated information to hundreds of others so that he could benefit from their trading and their membership fees. The defendant ensured that the stream of misappropriated information would continue by promising riches to Royer. The defendant recognized that he could use Royer, a corrupt and corruptible agent, for his own ends. Thus, the defendant invited Royer to his San Diego home to show off the defendant's wealth. With respect to the promised

employment, the defendant prolonged his employment negotiations with Royer while he made sure that Royer lined up a replacement source of law enforcement information and wrote a letter to get the defendant's probation terminated early. The defendant invited Royer to a Las Vegas "meeting," then had himself and others photographed with Royer's card plastered to their heads. The defendant referred to Royer as his "personal FBI agent." The defendant went so far as to have Royer falsely claim to be a current FBI agent in a letter to the court in Texas so that the defendant - who was in the midst of committing crimes with Royer - could terminate his supervised release on his Texas conviction early.

Perhaps most significantly, because of Royer's relationship with the defendant, Royer tapped into the FBI computer to find information about an extremely serious and sensitive investigation of the defendant. Royer passed on what he learned to Cleveland and, at least to some extent, to the defendant himself.

The FBI is only able to function because it has the trust of the public. To maintain that trust, the FBI depends on the integrity of its agents. As the defendant himself wrote on his website, through his participation in Royer's corruption, he tried to alter the FBI's motto from "Fidelity, Bravery, and Integrity" to "Fidelity, Bravery and Insider Selling." (Tr. 584). The SEC was also compromised by the defendant's conduct.

The defendant actively encouraged Royer to use his position to pry information from SEC attorneys. The defendant himself used the information he obtained from Royer, and his history as an alleged "crusader for propriety in the marketplace," to gather confidential SEC information so that he could trade on it and pass it along to his site members. Moreover, the relationship between the FBI and SEC - one that is extremely important in policing the securities markets - was significantly damaged by the defendant's conduct.

This case encompasses one of the most egregious instances of corruption of governmental functions in recent history. The true nature of the criminal conduct here would justify a sentence above the guidelines, either as an upward departure under Section 5K2.7 or as a variance under T. 18, U.S.C., § 3553(a). See also Guidelines Manual (2004), § 2C1.1 (Bribing Public Officials), Application Note 7 ("In a case in which the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process or office that may cause loss of public confidence in government, an upward departure may be warranted" under § 5K2.7).

2. Understated Criminal History Category

Under Section 4A1.3, this Court may upwardly depart from the guidelines based on, among other things, "[p]rior similar adult criminal conduct not resulting in a criminal conviction." Guidelines Manual (2004), § 4A1.3(a)(2)(E).

Here, in addition to the defendant's history of working in infamous boiler rooms, on at least two occasions he committed crimes for which he was not prosecuted. As detailed above, (see Section II(A), supra), in 1993, he "accepted bribes from Melvin Lloyd Richards and Allen Stout to sell securities, that Richards and Stout were promoting, to the firm's customers." And, in 1996, the defendant was an accomplice in a "daisy chain" stock manipulation.

Had the defendant been convicted of these crimes - even assuming he was sentenced to a year or less for each of these two serious offenses[41] - they would each add two extra points to his criminal history, moving it from Category III (5 criminal history points) to Category IV (9 criminal history points).[42]

In addition, as calculated, the defendant's criminal history takes absolutely no account of the fact that the defendant committed another federal crime - the false statements offense - while on pre-trial release in an effort to flee prosecution. That crime, if viewed separately from the racketeering offenses, warrants one additional criminal history

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[41] Melvin Lloyd Richards, the primary defendant, was sentenced to 27 months incarceration in connection with the Alco case. Allen Stout was sentenced to 8 months incarceration in connection with that case.

[42] Both crimes occurred within ten years of the defendant's commencement of the crime for which he was convicted. See Guidelines Manual (2004), § 4A1.2(e)(2).

point as a crime for which the defendant, at the time of sentencing, was convicted and not yet sentenced, see Guidelines Manual (2004), § 4A1.2(a)(4), placing the defendant in Criminal History Category V (10 criminal history points).

IV. OTHER 3553(a) FACTORS

A. Section 3553(a)(2)(A) - Seriousness of the Offense

This case involved a massive criminal enterprise dedicated to misappropriating information from the FBI, trading on that information, using it to manipulate stock prices and disseminating it to hundreds of investors who could further use it for their unjust advantage. Throughout his papers, the defendant seeks to minimize the nature and scope of the defendant's crimes and the crimes of his enterprise. The sentence he advocates, less than 43 months incarceration, (Def.'s Sentencing Mem., p. 112), is woefully insufficient to reflect the seriousness of the defendant's conduct.

B. Section 3553(a)(2)(B) - Deterrence

Sentencing this defendant to a significant period of incarceration will, hopefully, serve as a deterrent to those individuals who see profit in defrauding the investing public. That is particularly important here, where the scope of the defendant's crime was dependent on the largely unregulated internet.

More importantly, a significant sentence will send a

message to those who, for their own selfish ends, would corrupt public officials, particularly those in sensitive law enforcement jobs, that such behavior will not be tolerated.

C. Section 3553(a)(2)(C) - Protecting the Public

The defendant was terminated by an employer for violating securities regulations in 1991. He received bribes to peddle stock in 1993. He was an accomplice in a manipulation scheme in 1996. He had his securities license revoked in 1997. He was convicted of insurance fraud in 2000. He has now been found guilty of leading a criminal enterprise over the course of two years between 2000 and 2002. He continues to believe he has done nothing wrong, and sees himself as martyred by overzealous prosecutors and corrupt corporate executives.

In addition, as enumerated above, the defendant has a lengthy history of lying to authorities. He lied to his probation officer in 2001 regarding his trip to Lebanon. He lied to her about various financial transactions associated with his preparations for fleeing there. He lied, through his attorney, to this Court as to whether he had pre-planned his 2001 Lebanon trip. He lied to Transportation Safety Administration officials when they stopped him - in his “Manny Velasco” persona - at the airport in 2004. And he lied to state officials in connection with that incident. Most importantly, when given the opportunity, he did everything he could to undermine the work of

both the FBI and SEC.

There is no reason to believe that this defendant has mended, or will mend, his ways. There is, however, every reason to believe that, once released, the defendant will find a new means of taking advantage of the public.

D. Section 3553(a)(6) - Avoiding Sentencing Disparity

The defendant argues that, because Jonathan Daws's plea agreement stated that the estimated guidelines range for his case is 18 to 24 months, a lengthy sentence for the defendant would be unreasonable. The full text of Section 3553(a)(6) reads: a sentencing court shall consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." First, this is just one of many factors that this Court must consider. Second, Daws's "record" is not similar to the defendant's. The defendant is a convicted felon who routinely, over a period of many years, violated the law for personal gain. And third, Daws's conduct was not "similar" to the defendant's.

As detailed above, the defendant led a massive criminal enterprise through which he received misappropriated information, sometimes gathered at the defendant's direction, disseminated that information to persons whose trading he controlled, manipulated stock prices, extorted shares of stock by threatening continued manipulative conduct, obstructed justice, actively

participated in the corruption of an FBI agent and attempted to flee from facing responsibility for his actions. Daws, while a member of the conspiracy who traded on misappropriated information, engaged in criminal conduct which was simply not equivalent to this defendant's.

CONCLUSION

The defendant was the leader of a massive criminal enterprise that functioned by stealing confidential law enforcement information - regardless of the costs to the FBI, the SEC, undercover agents, cooperating witnesses or the public - in order to satisfy his and his co-conspirators' greed. The defendant's punishment should fit this crime, not the unjustifiably limited, four-stock, small-profit securities fraud case that the defendant conjures up in his sentencing submission. The government respectfully submits that, in keeping with the true nature of the defendant's crime, this Court should sentence him to a very substantial term of imprisonment.

Respectfully submitted,
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