UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

SENTENCING MEMORANDUM ON BEHALF OF ANTHONY (AMR) ELGINDY

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We respectfully submit this sentencing on behalf of Anthony (Amr) Elgindy, who is scheduled for sentencing by this Court on March 6, 2006 on both CR-02-589 (S-2) (the "securities fraud case") and CR-04-652 (the "airport" or "false statements" case). In the (many) pages that follow, we address the sentencing considerations laid out in 18 U.S.C. § 3553(a), highlighting what we believe to be the most relevant facts and arguments. We submit that a full consideration of all of the § 3553(a) factors in this case – including a legally correct application of the advisory Guidelines (as opposed to the PSR's unfathomably severe and repeatedly erroneous calculation), the true nature and circumstances of the proven offenses (as opposed to the PSR's completely one-sided and often factually incorrect description of the offense conduct), Mr. Elgindy's personal history including humanitarian works and good deeds, his struggles with manic-depressive disorder, a long if complicated record of cooperation with law enforcement, and the need to avoid disparity in sentencing similarly situated defendants such as co-defendant Jonathan Daws (as to whom the government has endorsed a proposed Guidelines sentence of 18 to 24 months in prison) – counsels strongly in favor of a sentence of no more than 41 to 51 months in prison for the securities fraud case and 2-8 months for the airport case.

I. INTRODUCTION

This case went to trial on the theory that Mr. Elgindy and others engaged in insider trading and market manipulation with respect to the stocks of 41 separate companies, but comes before this Court for sentencing with the jury having found securities fraud (limited, as we demonstrate below, to insider trading) with respect to only 4 stocks: OSIN, PLMD, JUNM and SEVU.

At trial, the government's summary charts suggested that Mr. Elgindy's trading profits from insider trading were close to $800,000 (*see* GX 2582, 2583, 2584 and 2585), but in our

post-trial submissions (including below) we have demonstrated that Mr. Elgindy's properly calculated insider trading profits from the 4 stocks of conviction amount to $41,897.89, and even including the other 22 stocks as to which insider trading evidence was offered at trial (but as to which no jury verdict was rendered), Mr. Elgindy's properly calculated insider trading profits would still add up to only $157,506.93.

The government argued at trial that the Anthonypacific web-site was a "virtual den of thieves" (Tr. 46), but the evidence demonstrated that Anthonypacific.com was overwhelmingly a legitimate site with legitimate members seeking and exchanging lawfully-obtained information about stocks and benefiting from Mr. Elgindy's extensive trading experience and entertaining personality; indeed, over 95% of the trading "calls" on the site related to stocks *other than* the 19 as to which the government claimed the site was used for insider trading and/or manipulation at trial (Affidavit of Joshua Kelner submitted in connection with Mr. Elgindy's Memorandum in Opposition to Forfeiture, dated August 2, 2005 ("Kelner Aff.") ¶¶ 28-31 & Exs. F & G).

This case was indicted on the theory that Mr. Elgindy and Derrick Cleveland "corruptly induced" then-FBI agent Jeffrey Royer (S-2 Indictment ¶ 15), but the evidence at trial demonstrated that to the extent Agent Royer acted corruptly, either no external inducement was necessary or he was induced and/or corrupted by Mr. Cleveland well before Mr. Elgindy first knew of or interacted with Mr. Royer.

Finally, this case began publicly with the government's suggestion that "perhaps" Mr. Elgindy had foreknowledge of the terrorist attacks of September 11, 2001 and attempted to profit from them, but comes before this Court for sentencing with no charges relating to September 11th or terrorism being brought against Mr. Elgindy and the jury rejecting the government's related charge – which provided the only basis for admission of all the 9/11-related evidence – that Mr. Elgindy obstructed the grand jury's investigation into those (as well as other) issues.

In other words, this case comes before this Court as a significantly less dramatic and simpler set of proven charges as to Mr. Elgindy – boiling down to an insider trading case involving confidential law enforcement information and the use of the internet, a financial extortion of approximately $130,000, and a few add-on charges of defrauding site members (none of whom complained or lost any money) in connection with a small handful of the many thousands of Mr. Elgindy's trades and trading calls announced on the site, all packaged together under the label of "racketeering."

Yet astoundingly, shockingly, the Presentence Report – adopting whole-hog (and even going beyond) the government's sweeping and all-inclusive pre-verdict view of its case against Mr. Elgindy – calculates Mr. Elgindy's advisory Guidelines at a total offense level of 45, which is literally "off the chart" and calls for a sentence of *life imprisonment*. As we demonstrate below, this calculation is based on a number of glaring and fundamental legal and factual errors – including the use of the wrong Guidelines version in violation of the *Ex Post Facto* Clause, the inclusion of enhancements that add *years* to Mr. Elgindy's Guidelines range of imprisonment based on conduct of which he was *acquitted* (such as obstruction of justice) and as to which the government's proof was totally inadequate, and reliance on a wholly unproven and unsupported theory of market manipulation losses to the tune of some $11 million. And when the calculation is done properly, using the correct Guidelines book, the correct Guidelines sections and only the applicable adjustments, and when acquitted and other unproven conduct is excluded, the Guidelines range of imprisonment comes out to something extraordinarily different – 41 to 51 months on the securities fraud case and 2 to 8 months on the airport case.

A search for federal defendants who in recent years have been sentenced to life in prison leads to such notorious crimes as the 1993 bombings of the World Trade Centers, the 1996 Olympic Park bombing, the Oklahoma City bombing, incitement of terrorism and violence

against the United States, murder and organized crime, and espionage.[1] By way of contrast, a review of Sentencing Commission statistics shows that even in Mr. Elgindy's Criminal History Category of III, the average sentence in fraud cases is 18.3 months, and only in cases involving actual, proven *murder* does the average sentence in Criminal History Category III rise to anything close to life in prison (267.8 months).[2] Having been placed in the same league as convicted terrorists, traitors and murderers, Mr. Elgindy is justifiably frustrated and angry and cannot help but feel that he is being singled out for unusually, even unconscionably harsh treatment.

We recognize that of course every defendant and every case is different. Our point is that the prosecution of Mr. Elgindy has gotten, to put it colloquially, completely out of whack. The fact that Mr. Elgindy – convicted of a relatively contained set of securities fraud and financial extortion charges (packaged together under the RICO label) – is forced to argue that life in prison is outrageously excessive is but the most obvious example that this is so. And so we

[1] *See, e.g.*, Larry Copeland, *Olympic Bomber Apologizes, But Not To All Victims*, USA Today A3 (Aug. 23, 2005) (discussing Olympic Park bombing); Eric Lichtblau, *Scholar Is Given Life Sentence in "Virginia Jihad" Case*, The New York Times A21 (July 14, 2005) (discussing incitement of terrorism and violence against the United States by Ali al-Timimi); Eli Sanders, *Guardsman Gets Life In Prison for Trying to Help Al Qaeda*, The New York Times A11 (Sept. 4, 2004) (discussing National Guardsman Ryan Anderson's attempts to provide military secrets to Al Qaeda); Sylvia Moreno, *Nichols Seeks Forgiveness for Okla. City Bombing*, The Washington Post A2 (Aug. 9, 2004) (discussing Oklahoma City bombing); *Life Sentence For Bid to Sell Secrets to Iraq*, The New York Times A14 (Mar. 21, 2003) (discussing espionage by Air Force master sergeant Brian Regan's attempts to sell classified national defense information to Iraq and China); Brooke A. Masters, *Hanssen Sentenced To Life in Spy Case*, The Washington Post A1 (May 11, 2002) (discussing espionage by former FBI agent Robert Hanssen who spied for the former Soviet Union and Russia for over 20 years); Benjamin Weiser, *Judges Uphold Convictions in '93 Bombing*, The New York Times D5 (Apr. 5, 2003) (discussing 1993 World Trade Center bombing); *Retired Colonel Gets Life Term In Spying Case*, The New York Times A22 (Sept. 28, 2001) (discussing espionage by former Army colonel George Trofimoff who spied for the former Soviet Union and Russia for over 20 years); Selwyn Raab, *Sons Follow in Footsteps of 2 Imprisoned Crime Bosses*, The New York Times B1 (June 17, 2000) (discussing murder and racketeering by mob boss John Gotti).

[2] *See Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category*, U.S. Sentencing Commission's Sourcebook of Federal Sentencing Statistics, Table 14, *available at* http://www.ussc.gov/ANNRPT/2003/table14.pdf (2003).

emphasize that in decrying the suggestion of life in prison, we do not for a moment mean to suggest that a sentence to anything less than life, or even substantially less than life, would be a just one. To the contrary, we most respectfully submit that if Mr. Elgindy is sentenced on the basis of what he was actually convicted, he should be sentenced to something less than five (5) years in prison.

But we need not look to other cases and other defendants to see the outrage of the life sentence that has been calculated here, because the calculation of life imprisonment for Mr. Elgindy represents a particularly troubling disparity in comparison to the plea deal that the government made with a similarly situated co-defendant and co-conspirator in this very case. Jonathan Daws, it will be recalled, was charged by the government as a *manager/supervisor* (S-2 Indictment, ¶ 87) of almost the full range of illegal activity with which Mr. Elgindy was charged, including racketeering conspiracy, insider trading, market manipulation, and extortion. Mr. Daws admitted in his plea allocution that he sometimes received information directly from FBI Agent Jeffrey Royer and Derrick Cleveland and that he disseminated that law enforcement information – as well as other information – to other traders completely independently of Mr. Elgindy (Ex. 1 (Daws Plea Tr.) at 21-22), through (as other evidence showed) an independent chat room ("RC chat") that was kept hidden from Mr. Elgindy. Mr. Daws is described by the government and Probation as someone who profited through alleged insider trading to the tune of between *5.5 and 6.2 million dollars* (Gov't Forfeiture Mem. Exs. C&D; PSR ¶ 90).

Yet, as part of a plea bargain with Mr. Daws, the government has agreed that his Guidelines sentence should be a mere 18-24 months in prison. (Ex. 1 (Daws Plea Tr.) at 19.) In other words, if Mr. Elgindy lives until the age of only 77, a life sentence for him would represent a punishment *20 times as severe* as the anticipated sentence for Mr. Daws. And even if the calculations for Mr. Daws are adjusted to account for the fact that Mr. Elgindy did not admit

guilt and has a prior felony conviction, the range of imprisonment increases only to 33-41 months. This result would be unjustifiably disproportionate not just to the PSR's maximally extreme recommendation of life in prison, but even to a sentence of 8 years in prison.

Accordingly, and fully appreciating Your Honor's familiarity with the underlying facts and circumstances and that this is not the time or place to attempt to re-litigate issues of proof and guilt that have been determined by the jury, we will endeavor in this sentencing submission to present a very different picture of the offense conduct than the one painted by the PSR; a picture that, consistent with the jury's verdicts, focuses more precisely on the actual proven criminal conduct that we believe should inform this Court's sentencing decision.

We will also attempt to place the offense conduct in a fuller context, highlighting some of Mr. Elgindy's broader life accomplishments (and struggles) before his arrest on May 22, 2002, including:

- the many good deeds he has done throughout his life, from helping friends and family in need to his significant rescue efforts with respect to Kosovar refugees in 1999, during which time he put his own personal safety at risk and facilitated the exodus to the United States of at least 28 families from that war-ravaged country, and the later provided substantial support to a number of those refugees;

- his life-long struggle with bipolar disorder and depression how that disease provides critical context for much of Mr. Elgindy's conduct (including during trial); and,

- his significant history of providing assistance to law enforcement prior to the time of the conduct at issue in this case, which also helps put in perspective Mr. Elgindy's understanding and sense of the contacts with both SEC attorneys and former S.A. Royer about which the Court heard so much at trial.

We will focus as well on the enormous emotional devastation that Mr. Elgindy's wife and three young boys have suffered and continue to suffer because of the absence of an involved and caring father, especially Mr. Elgindy's youngest son Samy, who is only 8, and his oldest son Adam, age 13, who on top of his father's absence struggles with the severe neurological disorder

known as Tourette's Syndrome as well as Attention Deficit Disorder. In addition – and not accounted for or even contemplated by the Sentencing Guidelines or reflected in the PSR – we explain below how Mr. Elgindy and both his immediate and more extended family (all Egyptian-Americans) have suffered the separate but related devastation of the insidious and unshakeable stigma thrust upon them by the unfounded and unproven accusations of Mr. Elgindy's alleged foreknowledge of the attacks of September 11th and/or associations with terrorism more generally.

The Court will recall that it was while the jury was deliberating in this case that the Supreme Court handed down its landmark decision in *United States v. Booker*, 125 S. Ct. 738 (2005), fundamentally altering federal sentencing law by rendering the once mandatory Sentencing Guidelines only one among a number of congressionally mandated factors to be "considered" in sentencing. As the Second Circuit subsequently explained in *United States v. Crosby*, to arrive at a just and "reasonable" sentence the sentencing judge now "must consider the Guidelines *and* all of the other factors listed in section 3553(a) [of Title 18]." 397 F.3d 103, 113 (2d Cir. 2005) (emphasis added). And while the district courts have adopted a range of approaches to weighing the § 3553(a) factors, including the Guidelines, there is widespread agreement that in the aftermath of *Booker*, the new federal sentencing regime – aptly described by one law professor as a system of "rules moderated by mercy"[3] – now entrusts district judges with a sufficient degree of added discretion to achieve "more individualized justice." *Crosby*, 397 F.3d at 114.

As Your Honor well knows, the issue is to determine a "reasonable" sentence "sufficient, but not greater than necessary" to achieve the goals of sentencing as enumerated in § 3553(a).

[3] Comments of Prof. William Stuntz, Harvard Law Bulletin, Summer 2005, at 17.

Here, for reasons we now explain, that "reasonable" sentence is no more than 41-51 months for the securities fraud case and 2-8 months for the airport/false statements case.

II. ANALYSIS OF THE § 3553(a) FACTORS

The Court must determine a sentence that is "sufficient, but not greater than necessary," by considering all of the following factors:

(1) the nature and circumstances of the offense, 18 U.S.C. § 3553(a)(1);
(2) the history and characteristics of the defendant, *id.*;
(3) the purposes of sentencing, including reflecting the seriousness of the offense, promoting respect for the law, punishment, deterrence, and protecting the public, *id.* § 3553(a)(2);
(4) the kinds of sentences available, *id.* § 3553(a)(3);
(5) the advisory guidelines and any pertinent policy statements, *id.* § 3553(a)(4) & (a)(5);
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, *id.* § 3553(a)(6); and
(7) the need to provide restitution to any victims of the offense, *id.* § 3553(a)(6).

In determining the appropriate sentence, the Court should not give greater weight to the Guidelines, but rather should give these factors equal weight. *See Simon v. United States*, 361 F. Supp. 2d 35, 40 (E.D.N.Y. 2005) ("[T]he Guidelines are advisory and entitled to the same weight accorded to each other factor that the court is instructed to consider by § 3553(a)."); *United States v. Ranum*, 353 F. Supp. 2d 984, 986-87 (E.D. Wis. 2005); *United States v. Myers*, 353 F. Supp. 2d 1026, 1028 (S.D. Iowa 2005); *United States v. Mooreland*, 366 F. Supp. 2d 416, 418 (S.D.W. Va. 2005) (Guidelines do not carry "greater weight than any of the other § 3553(a) factors"). Giving presumptive weight to the Guidelines amounts to imposition of a mandatory Guidelines sentence and contravenes *Booker*. *See Myers*, 353 F. Supp. 2d at 1028; *Mooreland*, 366 F. Supp. 2d at 418; *United States v. Jaber*, 362 F. Supp. 2d 365, 371 (D. Mass. 2005); *United States v. Biheiri*, 356 F. Supp. 2d 589, 593 (E.D. Va. 2005); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1023 (D. Neb. 2005).

A. Section 3553(a)(1): History and Characteristics of Anthony Elgindy

1. Anthony Elgindy's Childhood, Education and Early Employment

Anthony Elgindy was born 38 years ago on November 28, 1967, in Cairo, Egypt to Ibrahim Elgindy and Laila Gomaa. (PSR ¶ 171.) On August 6, 1969, Mr. Elgindy's first brother, Khaled, was born. (PSR ¶ 172.) Then in September of 1970, the entire Elgindy family legally immigrated to the United States in search of a better future. They settled in Chicago, Illinois. (*See* Presentence Report filed in the Texas case, No. 4:99-CR-109-Y (01) ("TX PSR") ¶ 45.)[4] Mr. Elgindy's father continued his engineering studies while working as a draftsman making $150 per week and later earned his Ph.D. His mother, who received an M.D. from the University of Cairo, studied English and continued to study medicine in preparation to become a licensed physician.

Mr. Elgindy's parents became naturalized United States citizens in 1976 and he and his brother Khaled derived United States citizenship through them. (TX PSR ¶ 47.) (The PSR states that Mr. Elgindy is a US Permanent Resident. (PSR ¶ 183.) Mr. Elgindy is a United States Citizen. He surrendered his United States passport to the government. We have objected to the omission of this fact from the PSR.) Later that year, the Elgindys had another child, Mona Elgindy, and the next year, Anthony's younger brother Waleed was born. (PSR ¶ 172.)

Mr. Elgindy and his siblings grew up quickly because both parents were busy working and studying most hours of each day. As the oldest, he took the brunt of a strict disciplinarian upbringing. (PSR ¶ 173.) Mr. Elgindy attended public schools during his childhood and teen years. He wrestled and played football in high school. He took Honors and Advanced

[4] The government adopted the findings in the TX PSR. (*See* TX PSR Addendum stating objections.)

Placement classes and was awarded a certificate from the Governor of Illinois naming him an Illinois State Scholar. Mr. Elgindy's mother has described him as "a very intelligent and creative child. He was always motivated and very handy." She also described him as "very emotional and sensitive." (TX PSR ¶ 48.) A family friend who grew up with Mr. Elgindy describes him in his youth as "the one that always enhanced our activities, yet instilled the discipline his and my parents expected out of us. I always knew that our time would consist of massive amounts of play time as well as a grueling study time." (Compendium of Sentencing Letters (hereinafter "Letters") Ex. C (Ahmed Amer).) The father of Ahmed Amer confirms this: "Amr El-Gindy always showed responsibility and a leadership trait that made him to be considered, from my three boys, as the older brother you can rely on for schooling, and for fun . . . ." (*Id.* Ex. D (Mohamed Amer.) In Mr. Ahmed's opinion, Mr. Elgindy has a "heart of gold" and has "always demonstrated responsibility, care and kindness towards anyone he came across." (*Id.*) In addition to being a caring and responsible youth, Mr. Elgindy is described as having a wonderful sense of humor. (*See, e.g.*, *id.* Exs. J (Marwa Elboghaddy) and AA (Yusra Gomaa), cousins.)

Mr. Elgindy graduated from Hinsdale Central High School in June 1985. He had no disciplinary history at the school nor had he ever been in trouble out of school. (TX PSR ¶ 62.) But all was not well with Mr. Elgindy's psyche. Anthony Elgindy has suffered from depression on and off since he was a teenager. (TX PSR ¶ 57; PSR ¶ 184.) As the PSR reflects, he had a physically abusive father. (PSR ¶ 173.) The summer after graduating from high school, in what Mr. Elgindy describes as a cry for help, he attempted to overdose on Valium, and flushed additional pills down the toilet to make it look like he had ingested more than he did. (TX PSR ¶ 48; PSR ¶ 184.) He was treated at Hinsdale Hospital for two weeks and after release, he and his parents attended counseling. (TX PSR ¶ 48.)

In the fall of 1985, he entered the University of Southern California in Los Angeles. He attended for three semesters through December 1986, majoring in bioengineering. (TX PSR ¶ 62.) In January of 1987, Mr. Elgindy enrolled at San Diego State University and changed his major to microbiology. In the summer of 1987, while taking summer classes, he looked for a job that would earn him some extra money when he wasn't in class or studying. As a boy and teenager, Anthony Elgindy loved cars. He built model cars, go-Karts and race car sets, so it was a perfect match when he was hired at Hagen Chevrolet near his school. His love for cars made him a natural at selling cars. He eventually was recruited to C & M Chevrolet, the largest Corvette Dealer in all of San Diego. (*See* PSR ¶ 206.) Mr. Elgindy became the top salesman at C & M and he believed he was on his way to owning his own dealership some day.

One day in late 1987, a couple came onto the lot of C & M looking to buy a car The man told Mr. Elgindy that he was a stockbroker at a place called Blinder Robinson. Mr. Elgindy was so impressed and fascinated with this work that he called all the major brokerage firms looking for a way into the world of stocks. Nobody showed any interest. Then one day in the paper he saw an advertisement for a seminar for potential stock-broker trainees. The firm was Blinder Robinson. In June 1988, Mr. Elgindy and his roommate, another salesman at C & M, attended the seminar with another 200-plus people. Everyone was asked to complete a questionnaire and an "aptitude" test. Those who scored well were promised an interview.

A couple of weeks later he got the call. His scores were high and according to Blinder, he would do well as a stockbroker. He interviewed and was offered a job. Unfortunately, Mr. Elgindy was only 20 years old and Blinder required that licensed stockbrokers be at least 21 years of age. The manager therefore offered him an assistant position that would allow him to work around the office until he turned 21. (*See* PSR ¶ 205.) Mr. Elgindy accepted, leaving the car world behind and taking his first steps toward Wall Street.

Within a few weeks, Mr. Elgindy convinced his boss to let him take the series 7 exam, which he passed. He was sent to Blinder's national training center in Colorado. Upon his arrival, he saw film crews from *60 Minutes* filming at Blinder's Headquarters. Everybody was told the story would be great for Blinder since Ed Bradley was doing the piece and he only does "positive stuff." During his training in Colorado, Mr. Elgindy did very well. He was sent back to San Diego as a licensed and "trained" stockbroker. He had arrived on Wall Street, or so he thought.

Later that year, Blinder Robinson told all its brokers and employees to watch the 60 Minutes story by Ed Bradley. Each office manager bought pizza and beer for the brokers and clients that Sunday evening so they all could watch the show together. The *60 Minutes* story was devastating; Blinder Robinson was exposed as a shameless penny stock pusher, and the phones rang incessantly as clients all over the country tried to sell and close their accounts that same night.

Mr. Elgindy was able to keep all his clients and go to another firm. He joined JW Gant (PSR ¶ 204) but was not comfortable there and left within 90 days. He then accepted a job at Thomas James in the spring of 1989. (PSR ¶ 203.) A few of the stocks he sold to his clients went up and he thrived. He rose to be one of the top producers at Thomas James and was sent to various offices nationwide to teach others how to sell stocks and build a clientele.

In November of 1989, Anthony Elgindy married Mary Faith Lumpkin, the young daughter of a Baptist minister from Clarksville, Tennesee. In September 1991, Anthony and Mary had a baby boy named Adam. (PSR ¶ 176.) Adam was born slightly premature and had to be rushed to the emergency room after he and Mary were discharged from the hospital. Adam was diagnosed as being hypoglycemic, and nearly suffered irreversible brain damage or death. Anthony and Mary spent the next eleven days in the ICU with Adam until he was able to

regulate his own sugar levels. Those first two weeks of Adam's life created a bond between Anthony and Adam that Mr. Elgindy describes as special and all encompassing.

In January 1992, Mr. Elgindy accepted a position at a new firm located in the same building as Thomas James. It was called Armstrong McKinley. The president, Russell Armstrong, recruited Mr. Elgindy and offered him an opportunity to be a partner at Armstrong McKinley. In May of 1992, Armstrong McKinley moved its offices to Texas, so Anthony and Mary brought their son Adam to Texas and bought their first home in the suburbs of Dallas. (PSR ¶ 177.) By December of 1992, Mr. Elgindy and Russell Armstrong had a falling out over Armstrong's business practices in the San Diego office. Mr. Elgindy took over the business and tried to continue it but concerns about Armstrong McKinley's practices in San Diego overwhelmed him and he suffered an emotional breakdown. He decided to shut down all operations of Armstrong McKinley in June of 1993. (TX PSR ¶ 58, 68.) He then checked himself into Charter Hospital in Grapevine, Texas. There he was first diagnosed with and began outpatient treatment for bipolar disorder and severe depression. (TX PSR ¶ 58 (indicating diagnosis by Dr. R.D. Bennett of Bipolar Disorder on June 23, 1993 and Major Depression on October 22, 1994); PSR ¶ 185.) He regularly attended therapy with Dr. Bennett through December 1994. (TX PSR ¶ 58; PSR ¶ 185.)

Mr. Elgindy was disabled by this condition from June 1993 until January 1995. (TX PSR ¶ 68.) During this period, Mr. Elgindy received disability insurance payments from Mass Mutual Insurance Company. While receiving disability payments, Mr. Elgindy worked at Bear Stearns for two months in 1994 and worked for Barron Chase for approximately 5 months in 1994-95. (TX PSR ¶¶ 68-69; PSR ¶¶ 155, 200-201.) He received compensation from Bear Stearns and Barron Chase, but did not inform Mass Mutual. He later settled a civil claim by Mass Mutual for the disability payments he received while employed by Bear Stearns and Barron Chase. (TX

PSR Addendum; PSR ¶ 155.) This conduct in 1994 and 1995 led to his federal indictment in Texas in 1999 and plea of guilty in 2000 to one count of mail fraud involving approximately $55,000 in improperly received payments, for which he served 4 months in prison from June 6 to October 6, 2000, and 4 months home detention. (PSR ¶ 154.)

2. Anthony Elgindy Evolves from a Long to a Short

Mr. Elgindy's first six years on Wall Street had taught him that the typical brokers' view is that the public exists to absorb the risk while brokerage firms take a cut in and out regardless of profit or loss. During 1994, Mr. Elgindy explored the "blue-chip" world of big name firms on Wall Street and the small regional firms like Barron Chase. Then one day Mr. Elgindy asked himself how would his clients have done if all their trades were reversed, meaning their buys became sells and their sells were buys? He concluded they would have done very well. Instead of trying to find the four or five companies out of a hundred that make it, he decided to concentrate on the 80-90% that don't.

In 1995, Mr. Elgindy started Key West Securities ("Key West"), an NASD firm that he created specifically to expose fraudulent and corrupt companies and short them along with other overvalued stocks. (*See* PSR ¶ 199.) Before long, he began making $75,000 to $100,000 per month in trading profits, and Key West's presence became known on Wall Street. In 1996, he and Key West were featured in *Business Week*, "The Mob on Wall Street," for being the only firm to stand up to the mobsters who were manipulating shares of First Colonial Stock (FCVL). He and other brokers had been threatened with assault and even death if they did not comply with the mobsters demands. (*See* Ex. 2 (Business Week Article); *see also* Ex. 3 (Forbes Article); Ex. 4 (20/20 Interview Transcript).)

During this same time period, as the Court will recall, Mr. Elgindy provided his most significant cooperation with the U.S. Attorney's Office in San Diego in connection with its investigation of the payment of bribes to stockbrokers by Melvin Lloyd Richards and others at the Armstrong McKinley brokerage firm, where Mr. Elgindy had been co-owner. While Mr. Elgindy has acknowledged that he himself received compensation in return for pushing a stock called ALCO to clients of the brokerage firm, his assistance and cooperation were substantial enough to culminate in a formal cooperation agreement with the U.S. Attorney's Office in San Diego and, later, a letter from that office to the U.S. Attorney's Office in Fort Worth, Texas, which at the time was considering pursuing charges against Mr. Elgindy in connection with the above-described Mass Mutual disability payments issue.

Although it did not come out at trial, Mr. Elgindy's cooperation against Mr. Richards and others at Armstrong McKinley allowed the government to bring major high-profile criminal cases against a number of notorious stock swindlers. Prior to Mr. Elgindy's cooperation, Richards had been sued several times by the SEC, had been convicted for tax evasion and conspiracy, and had faced a second federal indictment but had defeated the charges. When Mr. Richards and his co-defendant pled guilty in 1997 in the case where Mr. Elgindy was the primary cooperator, it was covered in *The Wall Street Journal* as well as *Barron's*. (DX12066.) Later, the then-U.S. Attorney for San Diego, Alan Bersin, appeared on *20/20* in the same segment that featured Mr. Elgindy, and both spoke of the case against Mr. Richards.

As the government would write to the U.S. Attorney's Office in Fort Worth:

> From May 1995 through June 1996, Mr. Elgindy cooperated in the following manner: 1) He was debriefed numerous times, both in San Diego and Texas, concerning his involvement with our targets and others; 2) He made numerous monitored telephone calls at our direction; 3) He met our major target two different times for extended conversations while wearing a body wire; 4) He met

> another target in a hotel room in San Diego where the meeting was video taped by Government Agents and; 5) He provided boxes of records which were pertinent to our investigation.
>
> As a result of Mr. Elgindy's cooperation, three targets of our investigation pled guilty. We are in the process of negotiating pre-indictment dispositions with the remaining two primary targets. *The government could not have made its cases without the assistance of Mr. Elgindy.*

(DX 12063) (emphasis added.)[5]

At around this same time, in 1996-97, Mr. Elgindy also provided significant assistance in the SEC's investigation of a man named Michael Zaman and a stock called Conectisys. At trial the defense offered the testimony of two SEC attorneys concerning the nature and extent of Mr. Elgindy's cooperation in this investigation. Among other things, these SEC attorneys explained how Mr. Elgindy: was a "key witness" in the government's investigation; traveled to Washington at the government's expense, where he was debriefed over a 2-day period and provided an affidavit used to support the SEC's federal district court injunctive action against Mr. Zaman; and, later testified in federal district court as an "extremely helpful" witness on behalf of the SEC

[5] As the Court may also recall, the NASD Department of Market Regulation would later bring a separate disciplinary proceeding against Mr. Elgindy based on his testimony in another NASD proceeding (in which he was ultimately vindicated by the SEC, and involving a company called Saf-T-Lock) that he had not entered into an "immunity agreement." An NASD hearing panel rejected the NASD's charge, concluding that Mr. Elgindy's answer was "literally true" because he had received testimonial use and derivative use immunity, not transactional immunity. (DX 12009.) That same hearing panel subsequently found that San Diego AUSA Yasmin Saide's affidavit in this NASD proceeding -- in which she challenged Mr. Elgindy's position and statements -- was "unreliable" and "raises a serious question about Saide's possible bias against Elgindy." (DX12064 at 5-6.) As noted below, Mr. Elgindy was ultimately vindicated – and the NASD's prosecution theory rejected – by the SEC on the underlying Saf-T-Lock case.

Before the NASD's case against Mr. Elgindy was rejected by the NASD's own hearing panel, the U.S. Attorney's Office in Texas used the same exact (false) charge of alleged perjury in its opposition to Mr. Elgindy's motion for a downward departure in his Texas case.

and against Mr. Zaman and a former Assistant U.S. Attorney, resulting in findings that both had committed securities fraud. (Tr. 5987-5998.)[6]

Mr. Elgindy's cooperation against securities fraudsters continued in 1997 and into 1998, with his assistance to the SEC and then-SEC attorney Jonathan Levy in connection with the government's investigation into a company called Quigley Corp., which marketed Cold-eez, and a trader named Jerry Rosen. As established at trial, Mr. Elgindy's cooperation with respect to Quigley Corp. included reaching out to and providing information to the government (*see* DX 783T and 789T (transcripts of calls with then-SEC attorney Jonathan Levy)) and later flying to New York to provide testimony on behalf of the NASD in a proceeding against Mr. Rosen and a firm called J. Alexander Securities (*see* DX 17105).

In 1998, after a string of successful cooperation relationships with the government, Mr. Elgindy decided to become a private researcher and trader and closed down Key West Securities to start Pacific Equity Investigations. Pacific Equity was formed to investigate "scam" or fraudulent companies for the purpose of determining good short selling opportunities. At the same time, he also started a thread on the very popular internet investing site SiliconInvestor.com. The thread was called "Dear Anthony" and focused on overvalued stocks. The thread became extremely popular and Mr. Elgindy developed a strong following on the internet based on his colorful humor, his ability to identify scam and otherwise overvalued

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[6] Mr. Elgindy continues to take exception to the argument advanced at trial that he (Mr. Elgindy) was a knowing, culpable participant in the Conectisys stock fraud nearly a decade ago. Although Mr. Elgindy submitted an affidavit in support of the SEC's preliminary injunction application in the Conectisys case, and later was called by the SEC as their witness in that same federal court proceeding, no such self-inculpatory statement was ever made or elicited by the government from Mr. Elgindy. Nor during this cooperation was Mr. Elgindy ever advised by the SEC to consult or retain his own counsel. In any event, Mr. Elgindy's behavior in connection with the trading of Conectisys stock was consistent with what his firm Key West Securities and he

companies, and his successful trading techniques. *See, e.g.*, Ex. 5, Joey Anuff and Gary Wolf, *The Dumbass, The Day Trader, and the New Democracy*, Wired Magazine (April 2000) ("Tony, who is 32, stocky, and bellicose, is respected for his rare ability to sift the complexities of the market and reduce his analysis of a company's value to simple terms."); Ex. 6, John R. Emschwiller, *Online Maverick Sells the Internet Short*, The Wall Street Journal, C1 (July 22, 1999) (describing Mr. Elgindy as "one of the leaders in a sort of cyberspace countermovement – investors who are trying to make money when Internet stocks fall" and noting his "loyal following" on SiliconInvestor.com and being featured "in a 1997 segment on ABC's '20/20' news program as someone trying to help clean up Wall Street"); Letters Ex. AAA (Bob Zumbrunnen, Managing Partner of Silicon Investor) ("I've seen countless online 'gurus' come and go and Tony was easily the most well-known and widely-followed of them.").

By 1999 and early 2000, Mr. Elgindy was financially successful and very well known. There were newspaper and magazine articles, and several books published about him, his trading abilities and his tireless efforts to expose scam companies and the corruption on Wall Street. *See, e.g., id.*; John R. Emschwiller, Scam Dogs & Mo-Mo Mamas: Inside the Wild and Woolly World of Internet Stock Trading, Chs. 9-12 (HarperCollins 2000); Aaron Elstein & Jason Anders, *Heard on the Net: Two Message-Board Posters Foretold eConnect's Woes*, The Wall Street Journal Online (March 14, 2000). Mr. Elgindy was considered a friend to the small and inexperienced investor.

The Dear Anthony thread on Silicon Investor was not only followed by investors seeking to learn from Mr. Elgindy, the thread was also followed by the SEC because Mr. Elgindy often provided leads on companies that might be engaged in fraudulent activities. In fact, two of the

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believed they were obligated to do as a market-maker: set the bid and asked spread as directed by Smith, Benton & Hughes, a NASD member firm.

SEC attorneys who testified at trial stated that they followed Mr. Elgindy's thread on Silicon Investor. SEC Attorney Patrick Hunnius testified that he "regularly" followed the thread because of the leads he found there. (Tr. 6205-06.) SEC Attorney Bob Tercero testified that he followed Mr. Elgindy's thread on Silicon Investor with regard to E-connect (ECNC). (Tr. 6254.)

Indeed, in 1999, Mr. Elgindy provided a great deal of information about E-connect directly to the Los Angeles Office of the SEC. (Tercero Tr. 6229-31). Bob Tercero testified that Mr. Elgindy's information was "a starting point . . . to consider . . . looking further into E-connect" (Tr. 6232), and that the SEC ultimately halted trading and took action against the company (Tr. 6232-38). Patrick Hunnius also testified that Mr. Elgindy gave useful information on E-connect that led to SEC action. (Tr. 6210.)

Despite all of Mr. Elgindy's cooperation and assistance to the government from 1995 through 1999, and the strong and unequivocal letter, written in 1997 by the San Diego U.S. Attorney's Office to the U.S. Attorney's Office in Texas and describing Mr. Elgindy's substantial cooperation in the cash bribes/ALCO investigation (as outlined above), Mr. Elgindy was – as also noted previously – indicted federally in 1999 in Texas on the eve of the expiration of the statute of limitations for his conduct with regard to working while receiving improper disability payments back in 1993 and 1994. Although the indictment came as a disappointment and a surprise to Mr. Elgindy, particularly in light of all of the significant work he had done for a variety of government agencies over the preceding years, he determined to accept responsibility and plead guilty and serve four months in jail, four months home detention, and three years supervised release. (PSR ¶ 155.) During his supervised release, "[h]e submitted monthly documents in a timely fashion, and maintained contact with his supervising officer. . . . He even provided his supervising officer the contact information for co-defendant Jeffrey Royer as a law enforcement official he was in contact with in a cooperation fashion." (PSR ¶ 155.)

In 2000, the NASD initiated an administrative action accusing Mr. Elgindy of some technical rule violations and the manipulation of Saf-T-Lock (LOCK) stock *in 1997*. The NASD also initiated a perjury case against Mr. Elgindy based on his testimony at the initial interview in 1997. Two different NASD hearing panels ruled in Mr. Elgindy's favor on the manipulation and perjury issues. The NASD appealed the manipulation decision, which ultimately went up to the SEC Commissioners for review. The SEC agreed with Mr. Elgindy that the NASD had not proven that he manipulated Saf-T-Lock stock, holding that the market cannot be manipulated through truthful, albeit negative, statements, or through the timed release of that information. *In re Amr Elgindy*, Exchange Act Release No. 49,389, 2004 SEC LEXIS 555 (Mar. 10, 2004). In an unprecedented action, the NASD petitioned the DC Circuit for review of the SEC's decision. *NASD v. SEC*, No. 04-1154, slip op. at 4, 11, 16-17 (DC Cir. Dec. 13, 2005) (noting that "we can find no case in which NASD, in its capacity as a first-level adjudicator in disciplinary actions, has ever petitioned for judicial review to challenge a SEC judgment overturning the initial decision rendered by NASD"). The SEC defended its decision and Mr. Elgindy intervened as a party in interest. The DC Circuit dismissed the NASD's petition for lack of jurisdiction on December 13, 2005, *see id.*, resulting in yet another occasion where the NASD's attempts to prosecute Mr. Elgindy were rebuffed.[7]

[7] Your Honor may recall that this NASD decision that was later reversed by the SEC in Mr. Elgindy's favor was the government's principal authority before this Court for its (erroneous) theory that the release of truthful information can be manipulative. *See* November 18, 2003 Ltr. from the government providing authority that "market manipulation can be effectuated through the dissemination of truthful information and through actual trading activity."

3. Anthony Elgindy Has Provided Compassionate Assistance to Others

Anthony Elgindy has made remarkable and unusual humanitarian efforts in traveling to the war-torn country of Kosovo in 1999, rescuing numerous Kosovo refugees, bringing them to the United States, and financially and emotionally supporting them.[8]

In 1999, Mr. Elgindy told his son, Adam, who struggled in school, that if Adam could get A's on his next report card, he would take him to see a real live active volcano. Adam was fascinated with volcanoes as are many young children. Adam made the A's and as promised, Mr. Elgindy took the family to Hawaii to spend their spring break together and explore a live volcano. While in Hawaii, the United States started bombing Yugoslavia in response to a campaign of genocide by the Serbs against Albanians in Kosovo and Mr. Elgindy was watching this on the news. Mr. Elgindy is not Albanian. He did not know anyone there and certainly did not speak the language, but the images on CNN of children being orphaned and homeless compared with images of his own three sons playing on the beach triggered something. (*See* Ex. 7 (Motion for Downward Departure in Texas case ("TX Departure Motion")) at 4-5.)[9]

Unlike many white-collar defendants with substantial means, Anthony Elgindy did not just hand over a check to some charities. In a matter of weeks, Mr. Elgindy was on a flight to Athens, Greece, where he set out for the Macedonia and Kosovo borders. He traveled without government support to a dangerous, war-torn country to provide aid directly to the refugees.

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[8] Although the Guidelines advise that charitable, civic and good works are *ordinarily* not relevant in determining whether a sentence should be outside the otherwise applicable Guidelines range, USSG § 5H1.11, Mr. Elgindy's conduct was extraordinary, and in any event, after *Booker*, the Court must consider all such relevant personal history and characteristics in determining the appropriate sentence.

[9] The government did not contest the facts in the TX Departure Motion related to Mr. Elgindy's bringing refugees from Kosovo and his support of them thereafter.

While there, he visited refugee camps and provided clothes, blankets and money. (Ex. 7, TX Departure Motion at 7.) Mr. Elgindy was traveling with Ana Mehmetaj, a Kosavar woman living in the United States who had three sisters and other family members who were missing and who she hoped find. Ana testified at Mr. Elgindy's Texas sentencing hearing that:

> he cried every day in those camps. He showed so much love and support and hope for these people. . . . He would spend the whole day with the children. I think at one point if he could have taken all the children that lost their parents he would have. He did a lot. You just had to be there to see this.

(Ex. 8 (TX Sentencing Transcript) at 21-22.)

Once in Macedonia, Anthony and Ana found one of Ana's sisters and her daughter and rescued them from a squalid refugee camp. Mr. Elgindy then convinced the United States Embassy to issue them visas. As presented in the *Chicago Tribune*, "Initially . . . the U.S. Embassy in Macedonia would not issue visas for the two because the official [United States] refugee program was not yet in place. But . . . Elgindy worked the Internet contacting friends and politicians . . . asking for help. About a week later the U.S. Embassy declared that the two could go to the U.S. immediately, as well as several other Kosovars at a later date." (Ex. 9 (Julie Deardorff, *2 who fled Kosovo land in Chicago*, Chicago Tribune, B1, at B8 (May 1, 1999).) ("*Chicago Tribune* Article").) Ana Mehmetaj was quoted in the *Chicago Sun Times* upon her return with her family members as saying of Anthony Elgindy, "What a wonderful man." (Ex. 10 (Neil Steinberg, *Analyst lends hand to refugees: Helps 28 to settle in U.S.*, Chicago Sun Times, at 12 (May 1, 1999) ("*Chicago Sun Times* Article").)

Anthony's successful efforts to save and support Kosovar refugees were chronicled in major newspapers and television news stories. (*See, e.g.*, Ex. 9 (*Chicago Tribune* Article); Ex. 10 (*Chicago Sun Times* Article); Ex. 11 (Caitlin Rother, *Kosovo refugee escapes assassins'*

bullets, San Diego Union Tribune B1 (May 28, 1999) ("*Union Tribune* Article").)[10] His humanitarian efforts were so significant that he and some of the refugees he brought home with him were invited to testify before Congress regarding the situation in Kosovo. (Letters Ex. N (Khaled Elgindy 9/9/05) ("He even participated in a congressional 'teach-in' on Capitol Hill and was personally congratulated by several House and Senate members.").) Three days after Mr. Elgindy gave this eye-witness testimony of the events in Kosovo before Congress (*see* Ex. 12), the United States agreed to allow 20,000 Kosovo refugees to enter the United States to save them from the butchery and starvation they faced in their country. (*See* Ex. 7 (TX Departure Motion) at 6.)

After returning to the United States and testifying before Congress, Mr. Elgindy sponsored 28 additional Kosovar refugees and their families. (Ex. 10 (*Chicago Sun Times* Article).) One of those refugees was Hasan Hoti. Hasan Hoti lived in Pristina, the capital of Kosovo, where he was a former judge and practicing attorney. On March 23, 1999, he and another attorney were in court defending Kosovo Liberation Army fighters when they learned that they were on a list of intellectuals to be exterminated. (*See* Ex. 11 (*Union Tribune* Article) at B1.) Hoti gathered his family and escaped to Macedonia, but his colleague and his family were killed. While in Macedonia, Hasan Hoti met Anthony Elgindy. Mr. Elgindy ultimately sponsored the Hoti family, getting them visas and plane tickets to California, where Hasan's son Valton Hoti was a college student. (*Id.*) Mr. Elgindy had the Hoti family stay at his home while he went out and rented them an apartment in San Diego; he thereafter paid for their furniture, food and clothing, purchased them a car, and assisted them in learning English and finding work.

[10] *See also* David Cohen, Chasing the Red, White and Blue: A Journey in Tocqueville's Footsteps Through Contemporary America 262-65 (Picador 2001) (discussing Mr. Elgindy as an immigrant living the American dream, his trip to Kosovo and his aid to refugees).

Hasan Hoti describes this experience in his own words:

> I am Hasan Hoti, an Albanian refugee from Kosova. . . .
> Faith had it that, accidentally, I met Mr. Elgindy in Macedonia where he had come to help the refugees. Ten days after arriving in America, specifically in the city of Pomona, I called Mr. Elgindy requesting that we meet on one weekend in the beautiful city of San Diego where I wanted to visit with my family. I was very surprised, pleasantly, when he told me without thinking it through: "If you would like to live in San Diego, I will take care of all the expenses for rent, food etc." It is hard to imagine our emotional state, our happiness at that moment. After all the trauma from the war, from loosing everything that we created for almost 30 years of working, from coming to a different country where you do not know anyone, this man, that I had accidentally met in Macedonia a month ago through a friend from Chicago, now offered us everything. He picked us up at the San Diego Airport and brought us to his house. We stayed at his house for two weeks. After that he found us a two-bedroom apartment, signed the contract, paid the deposit and the rent for the first month on that same day and had continued to pay our rent for well over a year. Without us asking, he went and fully furnished the apartment with new furniture. After that he bought for my family a brand new car, make of Hyundai Accent. Until my wife Drita and my son Toni started working, he constantly helped us by giving us money.

(Letters Ex. DD (Hasan Hoti).)

Mr. Elgindy also provided much needed moral and emotional support to Hasan Hoti's family and many other refugee families:

> [The] moral support given to my family, and to many families from Kosova, by Mr. Elgindy, was very important as well. Through me, Mr. Elgjindy[sic] met most of the Refugee families. He came to our meetings and helped everyone that needed help. Tony became known to and close to every Kosovar refugee family in San Diego. He became a symbol of hope and future for these people. What is more important, Mr. Elgindy became the hope for every Kosovar Refugee because they knew that he will be there to help.
>
> Now my family and I reside in Chicago. We own a luxurious Day Spa in the center of downtown Chicago, and I am the president of the Albanian-American Community of Illinois. Tony Elgindy paved the way to prosperity for my family and I. I cannot even

> imagine what life would have been like without having him in our lives. I consider Tony, Mary, and the kids, Adam, Gabriel, and little Sammy, as my family, the only extended family that I have here in the U.S.

(*Id.*) Mr. Hoti's son, Valton Hoti, writes:

> Although Tony has helped my family and I financially beyond what words can describe, the quality that I value most about him is that he is a true friend to me. Whenever I needed someone to listen to me and give me advice on many personal and professional matters, he was always there for me. Now I feel that I have lost not only a person that I can always count on, but also a friend whom I miss very much.
>
> It seems impossible for me to express my gratitude and the feelings that I have for Tony Elgindy. He has done more for my family and me than I ever imagined possible. He has helped many other Kosovar families in San Diego that I personally know. To me, Tony is a mentor and a row[sic] model. He is someone that I can only hope of becoming one day.

(*Id.* Ex. EE (Valton Hoti).)

These extraordinarily caring and generous acts of Mr. Elgindy were not limited to his work with Kosovar refugees. As the many letters from friends and family attest, Mr. Elgindy has always been ready to lend a helping hand to his friends and family and others in need. He has provided financial and emotional support and guidance to countless people, without asking for anything in return. For example,

- Charles Bell, Ph.D., of the Refugee Assistance Program at the Methodist Church in San Diego, in a letter submitted to Judge Means in Texas:

  > I met "Tony" again (mid 1998) when I became engaged with social action programs and the plight of refugees. During this sojourn I sought him out to be a mentor to some of the young persons. He eventually emerged as a vital community resource and viewed as a champion to the underserved. He and his wife volunteer countless hours with this population and appear always eager to lift up the fallen, brace the staggering, and bring into ranks, those that lag behind. This is not always done with collateral but humane services are performed as well. For example, I personally am aware that they have housed homeless in their home when other doors were closed. I am personally aware that trips have been made during late hours, far away from their residence, to rescue the perishing.

- Dan Cohen, Anthonypacific.com site member and friend:

  I know Tony as a kind, generous and honest person. . . . From the beginning, he was sincerely concerned with my personal and financial well-being. During the course of my membership, there were times when I needed the benefits of Tony's expertise to guide me through . . . . Tony always responded to me with genuine concern and helped me in any way he could.

  . . . . Despite the challenges he faced, Tony dedicated himself to helping others.

- Patricia Irby, wife of Scott Helvenston, a close friend of Mr. Elgindy who was killed in Iraq:

  My husband was Scott Helvenston – he was murdered in Fallujah Iraq, along with three other very brave men, then dragged through the streets and hung from a bridge. My children know how life is without a husband and a father. It is horrible.

  Scott and I first met Tony when he took one of our Navy SEAL "boot camps". Tony was a very brave and strong man. After the camp, Tony helped Scott and I pursue a dream of putting on a race involving SEAL team like events. It was incredible!!! Without Tony, we couldn't have done it. He took his time and knowledge to help us, and even used his own truck to hold up one of the obstacles.

  After getting to know Tony we also realized what a wonderful father, husband, and friend he is. He put everyone before himself and would help any of his friends who needed him. . . . He is a wonderful man and a great father.

- Kathryn Helvenston-Wettengel, Scott Helvenston's mother:

  I knew Tony thru my sons, Scott and Jason Helvenston. They all lived in Southern California and became friends thru Scott's charity events. Scotty was a world class pentathlon medalist and would have charity sports competition on La Jolla beach. Tony helped with the logistics and promoting the event. When Scotty went thru a bad divorce Tony was there and provided temporary housing for Scotty until he was able to get on his feet. Scotty died last year. He was one of the four contractors that was slaughtered, dismembered, torched and hung over a bridge in Fallujah, Iraq. Tony was there for me in the immediate days following this horror.

  Jason, my youngest son was working on a degree in architecture in the same area. Since the boys father died in 1973, money has been tight. Well, when Jason was really broke, Tony gave Jason work remodeling his kitchen. This was a time when Jason thought he may have to drop out of school due to lack of funds. Well,

> Jason is now working at this incredible job coordinating a very large development working in design and management. Thanks to Tony, Jason's life will be so much better.
>
> Tony has a good heart. His wife and children need him desperately. Please consider the goodness in Tony when you make the decision to sentence him.

- Ahmed Amer, family friend:

  > [A] few years ago I was faced with many personal issues . . . . Out of nowhere, I ran into Amr. . . . After hours of listening to me, he was able to guide me through this mess . . . This was the Amr I know and love, always there to guide you through life's greatest challenges.

- Mohamed Sadek, cousin:

  > Amr is the kind of man that a person in need can rely on for a genuine helping hand.

- Hope Desormeaux, sister-in-law:

  > Tony has always been someone I know I can turn to for help with anything.

- Laila Gomaa, mother:

  > [Amr] likes to give and is always willing to help people. He approached me so many times in the middle of the night to ask me (as a physician) for medical advice for the people who needed help whether they are close to him or even strangers, rich or poor.

(Ex. 20, Letters Exs. H, FF, WW, C, QQ , I, & W.) And these are just a few examples of the many letters that attest to Mr. Elgindy as a caring and generous man who would help anyone in need. (*See* Letters.)

4. Anthony Elgindy's Struggles with Bipolar Disorder

As the Court may be aware, and as Mr. Elgindy's most recent private psychiatrist, Dr. Eric Raimo, explains (*see* Letters Ex. MM (Dr. Eric Raimo):

> [B]ipolar disorder is a brain disorder that causes unusual shifts in a person's mood, energy and ability to function. The disease causes dramatic mood swings, and the symptoms can be quite severe, including (in the manic stage) increased energy, activity and restlessness, euphoria,

> extreme irritability, distractability and inability to concentrate, racing thoughts and talking very fast, poor judgment and provocative or intrusive behavior and (in the depressive stage) lasting sad, empty or anxious mood, feelings of hopelessness, guilt, and worthlessess, decreased energy and fatigue, restlessness and irritability and thoughts of death or sucicide (including suicide attempts). Sometimes severe episodes of mania or depression are accompanied by symptoms of psychosis, including delusions of grandeur or auditory halucinations. If untreated, bipolar disorder has an approximately 15% risk of death by suicide and it is the sixth leading cause of disability (lost years of healthy life) for people aged 15-44 years in the developed world.

As described earlier, Mr. Elgindy's struggles with the serious and severe disease known as bipolar disorder were manifest as early as high school, when depression caused Mr. Elgindy to make his first (but not last) suicide attempt. Following his emotional breakdown several years later in 1993, Mr. Elgindy finally began therapy and started to learn how to deal with and how to minimize the severity of the mood swings caused by bipolar disorder, for example, by reducing certain stressors and changing his lifestyle. In 1995, Mr. Elgindy discontinued his therapy. (TX PSR ¶ 58; PSR ¶ 185.)

Mr. Elgindy did not seek therapy again until he was arrested in May 2002 and heard the government accuse him of having foreknowledge of September 11th and attempting to profit from such knowledge. The stress of those accusations sent Mr. Elgindy into a deep depression. When he was released on bail in 2002, he began to see Dr. Raimo for his depression. (Letters Ex. MM (Dr. Eric Raimo).) It soon became clear to Dr. Raimo, based on his observation of Mr. Elgindy and Mr. Elgindy's history, that Mr. Elgindy was not only depressed, but exhibited the common symptoms caused by bipolar disorder. (*Id.*) Mr. Elgindy had a history of alcohol dependence, which conforms with bipolar disorder as at least 80% of individuals with bipolar disorder suffer from a substance abuse disorder. (*Id.*) In addition, Mr. Elgindy "manifested depression symptoms (depressed mood, low energy, hopeless/helpless feelings, suicidal

thoughts), as well as manic symptoms (rapid speech, racing thoughts, elevated mood, grandiose thoughts, impulsivity, and impaired judgment)." (*Id.* at 2.)

Dr. Raimo continued treating Mr. Elgindy until March 2004, just prior to his remand to federal custody in April 2004. (*See Id.*; Ex. 13 (6/3/04 Ltr. of Dr. Raimo).) According to Dr. Raimo, Mr. Elgindy's medication regimen "helped his symptoms significantly, most notably mood swings, depression, hopelessness, suicidal thinking, and anxiety." (Ex. 13 (6/3/04 Ltr. of Dr. Raimo).) Even on the medications, however, the stress of the pending criminal case, and the September 11th and terrorism allegations made in connection with that matter, continued to exacerbate his symptoms. (Letters Ex. MM (Dr. Eric Raimo).) The most significant risk of the depressions was suicide. Mr. Elgindy "also was very impulsive and highly self-destructive in his manic phases and would demonstrate a severe lack of judgment in a variety of his behaviors." (*Id.*)

At this time, Mr. Elgindy was living every day with the tremendous stress he felt because of the government's efforts to bring September 11th into his trial. Being an Egyptian-born United States citizen in New York added to his fear of being linked to the worst mass murder in United States history. He was bombarded with accusations of terrorism and profiteering. He began drinking alcohol heavily, which in combination with his medications, only exaggerated the ups and downs of his disease. As noted by Dr. Raimo, during the manic phases, it would not be unusual for him to do things that could jeopardize his freedom, "like testing the limits of his GPS ankle bracelet." (*Id.*)

5. The September 11th Stigma and the Government's Investigation and Prosecution Have Taken a Severe Toll on Mr. Elgindy and His Family

As noted, Anthony Elgindy is married to Mary Faith Elgindy and they have three children, Adam (age 13), Gabriel (age 11) and Samy (age 8). (PSR ¶ 176.) Mr. Elgindy's family, including his wife, his parents, and his siblings, continue to support him. (PSR ¶¶ 171-72, 176.) Mr. Elgindy has been a caring and devoted father and his absence has had and will continue to have a profoundly detrimental effect on his children. The PSR reflects that his wife and his mother believe this to be true (PSR ¶¶ 178-79), and this sentiment is echoed throughout the many letters from his extended family and friends. (*See* Letters Exs. B, H, J, M, N, R & V (Osama Abbas, his step-brother). ("It's very obvious how much his absence would have a negative effect on his children's lives. . . . He's not just their father, he's also their friend."); (Dan Cohen) ("Tony Elgindy's children will be waiting for his release . . . . Tony has already paid a heavy price for his errors in judgment."); (Marwa Elboghaddy, cousin) (Amr "grew up to be an amazing father. . . . [H]e is their father, brother, friend, and mentor it makes his role in their lives all the more vital."); (Ibrahim Elgindy, father) ("As his boys have grown over the years, I have watched with utmost admiration how Amr had devoted his time and energy to his children in so many ways."); (Khaled Elgindy, brother) ("Amr is without doubt an extraordinarily caring and attentive father to his three boys. His boys are very much the center of his world."); (Waleed Elgindy, brother) ("He loves his boys more than anything in the world an[d] wants them to have the best and brightest future."); (Ehab Gomaa, cousin) ("I know how much his kids miss him, because they told me.").)

Mr. Elgindy has in particular been indispensable in the past in helping his son Adam through the difficult times he has faced due to his Attention Deficit Hyperactivity Disorder and

Tourette's Syndrome. Adam was diagnosed in 2000 with several medical and social disorders including Attention Deficit Hyperactivity Disorder, Tourette's Disorder, Gerstmann Syndrome and Social Problems. (*See* Ex. 14 (Evaluation and Report of Debora Mishek, M.D., F.A.A.P. and Barbara Stein Cureton, Ph.D, M.F.T.) at 2, *see also* TX PSR ¶ 54.) As a result of the Attention Deficit Hyperactivity Disorder, Adam has difficulty with the attentional process, difficulty in school, is compulsive and fidgety, and has poor memory. Adam's Tourette's Syndrome causes him to have uncontrollable vocal and motor tics which has lead to his being teased by his peers. The Gerstmann Syndrome causes Adam to have difficulty processing information, leading to letter and number reversals, motor sequencing difficulties, and visual-motor integration difficulties. Because of these disorders, Adam has low self esteem and poor peer interaction. (*See Id.*) Adam's doctors recommended several intervention techniques that required substantial involvement of his parents. (*Id.* at 19-25.) Prior to his incarceration, Mr. Elgindy dedicated much of his time to implementing these techniques to help Adam.

This long ordeal, now three years running, has simply devastated this family emotionally and psychologically. Dr. Gregory C. Teregis, M.D., the Elgindy family doctor for years, has observed the following:

> I have definitely seen the unfortunate effects in a medical and psychosocial situation around this family. I feel this is most precipitous with [their] youngest child, Sammy, who definitely has an anxiety disorder and suffers from many different phobias and displays many obsessional and compulsive activities bordering on possible compulsive neurotic disorders. . . . I have definitely seen many traits and symptoms that I am very concerned about with their entire family. They are good kids, but I feel the stressors of what is going on interpersonally are definitely making their situation more precipitous and worse. Adam, I have been seeing for a number of years and suspected some degree of attention-deficit recently. . . .
>
> Mary has been suffering quite severe headaches that have turned into migraines and on multiple occasions has required Toradol

> shots and a trial of many different medications including serotonin uptake inhibitors "antidepressants" to treat her muscular headaches that are indeed secondary to tension. Mary also suffers from pretty severe temporomanibular joint disorder, which is due to unconscious tension in the evening where she clenches her mouth and grinds her teeth. There is noticeable teeth destruction and significant jaw popping dislocation and headaches associated with this as well.
>
> . . . . I know as a family physician taking care of many families that the incarceration of their father is a huge and tremendous precipitating factor for all their psychosocial and medical woes at this time.

(Letters Ex. UU (Gregory C. Teregis, M.D., family doctor for years).)

Moreover, Dr. Jerry A. White, who is currently the family therapist for Mr. Elgindy's wife and children, observes: "On the basis of my time with this family in therapy, it is my professional opinion that the impact of Mr. Elgindy's incarceration has been *catastrophic and devastating* to each member of the Elgindy family." (*Id* Ex. XX (Jerry A. White, Psy.D., family therapist) (emphasis added) (noting, among other things, that that Samy is most severely impacted by his father's incarceration, Gabriel is lashing out, and Adam is symptomatic with Tourette's Disorder); *see also id.* Ex. E (Lynda R. Ariella, Ph.D., Clinical Psychologist).)

Mr. Elgindy's sister, Mona Elgindy, has observed that the children are having a difficult time dealing with his absence and the effects of the trial. (*Id*. Ex. Q (Mona Elgindy).) Mr. Elgindy's mother has observed that his youngest, Samy, is now suffering from severe psychological trauma, anxiety, panic attacks and depression. She has seen the negative impact on his children and fears the continuing psychological trauma his absence will inflict. (*Id*. Ex. W (Laila Gomaa).) At a recent visit with Mr. Elgindy, his son Samy "sat on his father's lap and told him, 'Daddy, if I could stay here with you, I would.'" (Ex. 16 (John R. Emschwiller, *Paradise Lost*, Wall Street Journal A1, A12 (Nov. 29, 2005).) Mr. Elgindy's son Gabriel has written a letter directly to the Court, which speaks for itself. (Letters Ex. K (Gabriel Elgindy).)

The children's aunt, Hope Desormeaux, who has been babysitting the children during Mary's absences, saw "first hand the physical, emotional, mental and financial pain that this horrible situation has caused the whole family." (*Id*. Ex. I (Hope Desormeaux).) She "personally witnessed anger, depression, anxiety, frustration, and lack of social interaction from all three of [her] nephews." (*Id.*) Similarly, Anthony's sister-in-law, Nabila Assaf, observes that the three years of this ordeal have:

> exacted a high price not only from Amr, but from his family as well. Our emotions have been drained. Our finances have been stretched beyond their limits. Media and gossip have affected our personal and professional lives. The impact on Amr's children, Adam, Gabriel, and especially the youngest, Samy, who only wants to know how long before his father returns, is difficult to comprehend.

(*Id*. Ex. F (Nabila Assaf).)

Perhaps the best person to describe the devastation to this family caused by the investigation, trial and incarceration of Mr. Elgindy in this case is Anthony Elgindy's wife, Mary Faith:

> We are all so angry – angry at this situation, angry that we have to go through life with the stigma of 9-11, a stigma that we had nothing to do with! The boys don't understand how something like this could happen. I've tried my best to explain to them but no words will ever be enough for the trauma they've endured. They've been teased and taunted at school. Kids have asked them if their dad was a terrorist. . . . Our youngest Samy, had one boy tell him that if he didn't do what he wanted, he would tell all Samy's friends that his dad was in jail. Samy is only 8 years old! . . . [Samy] doesn't think he deserves happiness when his dad can't be.
>
> Our oldest, Adam, suffers from Tourette's Syndrome and Attention Deficit Disorder and while both have improved with medication and maturity, he still struggles every day with self esteem issues and this situation has only added to his depression and low self-esteem. . . . He's stopped being affectionate and has become very withdrawn.

> Our middle son, Gabriel, is trying, and has done so since my husband was arrested, to be the strong one, even trying to shoulder the responsibility of a father role. . . . Often I've asked him to do things for me forgetting that he is only 11 years old. But this tragedy has taken its toll on him as well.
>
> It has been so devastating for them. Three years we've been dealing with this, hoping, praying that God would allow Daddy to come back home to us. That's an awful long time for an 8, or 11, or 14 year old to wait. It's the waiting that has been unbearable – waiting for dad to get out on bail, then waiting for the trial that we will hopefully win, then waiting for a verdict. And when a guilty verdict came in, more waiting – for sentencing – to find out if Daddy gets to come back home or if he will be "locked up til I'm 40 years old!" That's what Samy says all the time. . . . They need their dad at home with them as soon as possible so they can begin their lives again, because for them, their lives have been put on hold. They are simply going through the motions, waiting for the end of this nightmare.

(*Id.* Ex. P (Mary Faith Elgindy).)

The unusually long duration of this case has already been extremely punishing for Mr. Elgindy as well, physically, emotionally and psychologically. Mr. Elgindy's bipolar disorder worsened and his symptoms escalated under the stress of the investigation, preparation for trial, and trial. Indeed, Mr. Elgindy attempted suicide while incarcerated pretrial, and the inappropriate psychiatric treatment he was receiving in prison appears to have substantially contributed to that desperate act.[11] He has been physically assaulted and called a terrorist while

[11] As Dr. Raimo explained to the MDC, the antidepressants given to Mr. Elgindy were not the proper treatment for bipolar disorder and "[o]n the contrary, it is virtually certain that the Elavil has contributed to Mr. Elgindy's destabilization and suicide attempt . . . ." (BOP Medical Records, submitted separately under seal (hereinafter "Medical Records"), Letter of Dr. Raimo, dated September 1, 2004.) Dr. Raimo warned in September 2004 that Anthony was in grave danger of worsened bipolar symptoms and completed suicide if his medication regimen was not changed to treat bipolar disorder. (*Id.*) It was not. Although Probation appears to have had these medical records in its possession and apparently reviewed them, *none* of the history of Mr. Elgindy's psychiatric treatment or his attempted suicide at MDC was reported in the PSR.

incarcerated pretrial, and he continues to be depressed and emotionally distressed now.[12] As noted above, his family has been devastated emotionally and psychologically and he blames himself for this. (*See* Ex. P (Mary Faith Elgindy).)

In addition, as a result of the lengthy investigation and trial in this case, Mr. Elgindy is financially ruined. Legal fees and living expenses while Mr. Elgindy has been unable to work have depleted the family's entire savings. Mr. Elgindy's wife and children must move out of their home (which is in foreclosure and on the market) and she has been forced to drop even the

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The PSR also fails to report the very relevant and important information found all over his medical records that Mr. Elgindy is substance dependent and otherwise has a history of substance dependence. (*See* Medical Records at "problem list" and 6/24/04 through 11/18/05 Dr. Sundstrom notes.)

The PSR also inaccurately interprets Mr. Elgindy's medical records as suggesting that he "suffers" from *borderline personality disorder*. (PSR ¶ 186.) This is a medical conclusion with potentially serious consequences to Mr. Elgindy within the Bureau of Prisons. But in fact, Dr. Sundstrom, the staff psychiatrist for MDC and MCC, noted in those records that she ruled out borderline personality disorder. (Medical Records at 9/24/04 Dr. Sundstrom notes (under DSM, II indicates no personality disorder after earlier 8/10/04 note to rule out borderline personality disorder).) Furthermore, Dr. Raimo stated in his letter to this Court that Mr. Elgindy has no personality disorders. (Letters Ex. MM (Dr. Eric Raimo).) Accordingly, we have objected and asked that Probation strike the inaccurate reference to a personality disorder.

[12] While the PSR describes some incident reports regarding Mr. Elgindy during his incarceration at MDC and MCC, the PSR fails to report the incident on January 1, 2005 at the MDC where Mr. Elgindy was assaulted by another inmate, resulting in *serious* bodily injury. (*See* Ex. 15 (Response to Inmate Request of Staff Member, dated 3/1/05); Medical Records at 1/1/05 Dr. Sundstrom notes.) This man was attempting to extort Mr. Elgindy because he believed from the news he saw that Mr. Elgindy was a "rich terrorist." As a result of this attack, Mr. Elgindy suffered from pain in his knee, severe headaches, blurred vision, and hearing loss. (Medical Records at 1/1/05 & 3/15/05 Dr. Sundstrom notes.) Mr. Elgindy was informed that the MDC referred the incident report on the inmate responsible to the U.S. Attorney's Office for the Eastern District of New York for prosecution, but has not been informed of whether the U.S. Attorney's Office chose to prosecute. As a result of this incident, Mr. Elgindy was forced to attend trial with a bloody bandage wrapped around his head. Incidents like this and those that have gone unnoticed have caused Mr. Elgindy great and continuing emotional stress. (*See, e.g.*, Medical Records at 6/24/04 Dr. Sundstrom notes ("He is terrified of the other inmates and appears to be intimidated by the other inmates on his unit.").)

family's health insurance and mental health therapy because she cannot afford it. (*See* Ex. UU Dr. Teregis); Ex. 16 *Paradise Lost* at A12).)

On top of all of this, from the day the government suggested in public that Mr. Elgindy may have had foreknowledge of September 11th and attempted to profit from that information, Mr. Elgindy and his family have suffered immeasurably from the false accusations and rumor related to that issue. In addition to the entirely innocent Elgindy children being "teased and taunted at school," asked "if their dad was a terrorist," and otherwise harassed and threatened, Mr. Elgindy's more extended family has had to contend – in the words of Mr. Elgindy's brother Khaled – with "the indescribable anguish and humiliation of being associated with the most horrific terrorist attack in our nation's history." (Letters Ex. O (Khaled Elgindy 12/11/05).) Khaled Elgindy's powerful and devastating letter continues in relevant part as follows:

> The fact that these allegations were never even charged, much less proven, did not in any way diminish our pain or mitigate the damage done to our family's reputation and careers. It didn't matter *why* the government chose to make those allegations, and in the manner in which they did—only that they did. It didn't even matter that they said "perhaps" or that no charges in support of the allegations would ever be brought. Once those words were uttered by the government in a public hearing, word spread like wildfire and they simply took on a life of their own.
>
> The massive media hysteria triggered by the government's 9/11 allegations has haunted us ever since. Not surprisingly, the "news" was immediately picked up by CNN, the Wall Street Journal, the New York Times, and other media. That day, I came home to find numerous phone messages on my answering machine from reporters wanting to talk to me about the government's 9/11 allegations. The same was true of my sister and mother as well, not to mention my sister-in-law, Mary, who also had to contend with the jeers and taunts that would be directed at her three boys as a result of the allegations against their father.
>
> For several weeks, members of our family continued to be bombarded with phone calls and emails from reporters, at both our homes and our work places. . . .
>
> To make matters worse, many of those who seized on the government's allegations against my brother fanned the flames with their own innuendoes about other members of our family. Several "news" articles,

for example, mentioned my father and I by name, citing the fact that we both had been "involved in Muslim causes" or were "active" in Muslim organizations to raise the prospect of our own "terrorism" connections. . . .

Along with the severe emotional toll all this was having on members of our family, particularly my mother, among the most lasting consequence of the government's allegations was its devastating impact on my career. At the time, I was working on Capitol Hill for a Member of Congress whom I had known for many years, even before I began working for her in January 2002, and whom I had considered a personal friend. In the days immediately after the government's 9/11 allegations, the Congresswoman had become concerned that reporters would eventually make the connection to her. So she urged me to stay home for a while until the immediate hysteria died down, which I did.

. . . .

For an Arab-American trying to make a career in Washington politics, any association with "terrorism", no matter how tenuous or bizarre—much less being the brother of the guy who had "pre-knowledge" about 9/11—was effectively career-ending. Less than four months after the government made its allegations about my brother, I was summarily fired from my job on Capitol Hill. I was offered no notice, no severance, and no explanation by the Congresswoman, who did not even offer me the courtesy of being present while I was let go. In fact, since that day in September 2002, she has refused any and all contact with me.

Needless to say, I was deeply distressed at being fired from a job that I loved and that would have been a significant stepping-stone in my career. Still, at the time, I had no reason to believe my termination had anything at all to do with my brother's case or the allegations leveled against him. It was not until a few months later when I was contacted by one of the internet "journalists" who had written about my brother's case that I learned otherwise. He informed me that he personally met with the Congresswoman on September 10, the *day before* I was fired, to "warn" her of my "terrorism-related" affiliations.

Though somewhat gratified at having finally learned why I was fired, as the months went by, my prospects of finding a new job became increasingly dim. With the exception of a few small research projects and other odd jobs I was able to secure here and there, I remained unemployed for more than 16 months. Moreover, despite having a master's degree from Georgetown University and nine years of solid political experience, both in and out of government, only three of the dozens of positions to which I applied would even grant me an interview. The first and only employer to offer me a position since that time was an international development firm based in London and working in the West Bank, with whom I am now employed.

> Perhaps some day the media and internet hype will finally fade, and I will once again be able to work in Washington and our family can return to something resembling normalcy. But the past 3½ years have taught us that with each new article or development in my brother's case comes a new wave of internet attacks against me and my family, as was the case just a few weeks ago. The prospect of having hundreds of people who neither care nor know anything about us engage in continuous commentary about me and my family, much of which is openly racist and vulgar, is a violation that no person should have to endure

6. Anthony Elgindy's Activities While Incarcerated

Notwithstanding the shock and dismay of his arrest and indictment, the devastation of the jury's verdicts of guilty on certain counts, and all of the personal, familial, emotional, and psychological collateral consequences that have flowed from these events, Mr. Elgindy is making great efforts to make the most of his time in prison. Mr. Elgindy has motivated himself to work toward finally getting his bachelor's degree. He is enrolled at the University of Colorado at Boulder, Division of Continuing Education. (*See* Ex. 17 (Class Schedule and Statement of Account).) He is taking college courses in Anthropology, Philosophy, Criminology and Ethics. He currently maintains an A average in Anthropology, Philosophy and Criminology and a B average in Ethics.

B. Section 3553(a)(1): Nature and Circumstances of the Offense

At trial, the government presented its theory of the nature and circumstances of the offense and Mr. Elgindy presented a very different account of his conduct. We understand that we are bound by the jury's verdict for sentencing purposes. In rendering its verdict, the jury of course rejected the notion that Mr. Elgindy engaged in obstruction of justice or participated in such activities with Agent Royer, Agent Wingate or others, rejected the government's theory that Mr. Elgindy extorted AJ Nassar or Floor Décor (FLOR), rejected that Mr. Elgindy traded on any inside information with regard to Sulphco (SLPH) and FLOR, and rejected the vast majority of

the government's allegations with regard to frontrunning and trading against advice (acquitting on 13 out of 16 such counts).

The PSR, however, effectively ignores that there even was a trial and adopts wholesale the government's original theory of this case. The PSR fails to fairly reflect that the government's original theory of Mr. Elgindy's conduct was not borne out at trial and that the jury *acquitted* Mr. Elgindy of much of that alleged conduct. Indeed, the PSR's description of the offense conduct is so utterly one-sided that it even incorporates theories of criminal conduct that the government did not rely on at trial. For example, the PSR heavily relies on three theories of market manipulation supposedly engaged in by Mr. Elgindy that we believe were not even part of the government's proof of market manipulation at trial. (PSR ¶¶ 37-39 (describing manipulation through "price walls," "carpet bombing," and "painting the tape").) We therefore object to the entirety of the section of the PSR covering the offense conduct with regard to the securities fraud case (¶¶ 22-61, 65-103 and 106) because it reflects only the government's overblown and all-encompassing pre-verdict view of the case and of the evidence with regard to charged, uncharged and acquitted conduct.

We submit that the true and most relevant nature and circumstances of this case and the offense are as follows.

1. Anthonypacific.com and Insidetruth.com

The trial record and further documentation submitted for sentencing purposes support a finding that members joined Anthonypacific.com because Mr. Elgindy was a well-known and highly entertaining internet personality on SiliconInvestor.com and other websites who had a very good track record in the area of stock trading long before he met Derrick Cleveland or

former FBI Special Agent Jeffrey Royer. In the words of some of the people who lived and worked in that internet community with Mr. Elgindy:

- Bob Zumbrunnen, former site administrator and currently Managing Partner and majority shareholder of Silicon Investor:
  Tony's not an especially nice guy, but he has done orders of magnitude more good than harm. And the kind of good he does can't be done by a 'nice' guy. The only people who have complained to me that he had harmed them were people who owned securities he advocated shorting. Countless times I watched Tony call a company a scam, people would complain to me that he was lying, and, sure enough, the price would plummet as people realized he was right or the SEC indirectly put their own stamp of agreement on his statements by halting trading.
  . . . Tony was an extremely prolific writer on Silicon investor. His posts were often very harshly critical of companies and the people who ran them, but were also witty and often educational. Constant (paraphrased) themes in his posts were "Don't believe everything the company says," "Be skeptical of any and all praise heaped on a company by other posters" and . . . "Manage your money: Don't bet too much even if you know you're right."
  Tony taught a lot of people the valuable trait of skepticism when investing. I believe very strongly that were it not for his presence on Silicon Investor, far more people would have been fleeced by crooked companies. I just as strongly believe that there are countless thousands of people getting fleeced right now simply because Tony's voice isn't there to be heard shouting "This is not a good investment" in his often colorful way. . . .
  It is my considered opinion that he was easily one of the most important [stock gurus] when evaluated in terms of the amount of good he did for the investing community as a whole. I remain convinced that a lot of companies that no longer trade would still be trading and fleecing investors out of countless billions of dollars were it not for his frequent "Something's not right here" posts.

- Janice Shell, member of Silicon Investor:
  I've known Tony (Amr) Elgindy for about eight years . . . [through] the Silicon Investor financial message board.
  The Tony Elgindy that I know helped expose a great many scams. While his activities in this line may have hurt some individual shareholders, in the long run they were of help to the financial markets and to the investing public in general.

- Alan Schwartz, Anthonypacific.com member:
  I "met" Mr. Elgindy over seven years ago, and "met" is in quotes because I met him on the internet. I had had what I thought was a very unfair transaction with a stock brokerage and searched for someone who could give me an explanation of what happened and what to do. Mr. Elgindy was very generous with his time and his knowledge, and where I only sought an answer to a specific question, I received an education.

Later, I saw Mr. Elgindy's many writings and public statements about publicly traded stocks help a lot of people, of whom I was one. At a time when the public was manipulated into a frenzy before being fleeced of uncounted billions in vaporized investments, Mr. Elgindy's opinions, although often brashly expressed, stood out as a lone voice of caution. In light of how events subsequently unfolded, his message was both accurate and prophetic. He was an important whistleblower at a time of inconceivable excess in the stock market, which harmed many thousands of investors.
I believe his intention was aligned with the public good, which was to advocate for a more level playing field for the small investor in the stock market. There was a lot of good intention in what he did for others. On public message boards, he gave the most honest answers of anyone I ever saw, and would go out of his way to help people who didn't understand how the game was rigged against them. Often times, the counterparty to his message were the most powerful pundits in the media, the most powerful analysts in Wall Street's biggest firms. But in retrospect, over and over again, it was his opinion that turned out to be right.

- Sean Maddox, Anthonypacific.com member and later Mr. Elgindy's office manager:
Tony Elgindy from my perspective was a good man whose goal was to teach people how to avoid the dishonesty and corruption that is rampant on Wall Street. The irony is that those who stole millions from so many are still prospering and walking free.

- Chuck Norris, Anthonypacific.com member:
I heard about [Tony] from a friend who researches stock fraud and he told me to read Tony's free thread, and so I did. He struck me as a friend of all investors who were just wanting to put their hard-earned money into legitimate stocks, and advised of the many scoundrels that ran crooked companies and ventures.
So I read his Silicon Investor thread for some months, and joined his private site. He was always rather accessible to us regular investors, and I spoke personally with him at least 5 times on the phone. He was always pleasant, and his typical self when discussing stock scammers who ran despicable companies. He's also a very funny fellow at times. . . .
[I]f you were to decide to reduce whatever sentence you will be imposing on him by one day for every thousand dollars he has saved **hard-working** Americans, he won't be in jail for very long.
He was a hardcore assist to us average Joe's out here in America.

- Kevin Podsiadlik, Anthonypacific.com member:
[F]ar more valuable than the returns on his short-term advice, was an insight into how the stock market really works, how stocks of questionable value are promoted and what to watch for in terms of signs of trouble at a company. It is the things Mr. Elgindy has taught me and the other members of the site, that have and will continue to serve us for the rest of our lives.

> In an investing world where the worst imaginable advice is shamelessly promoted and devotedly followed by far too many people, there are simply not enough people like Mr. Elgindy to show what is really going on in the stock market. My worst fear, with respect to this case, is that future perpetrators will use this case to portray anyone who attempts to point out what they are doing as "just another Elgindy."

(Letters Exs. AAA, SS, RR, HH, KK, & LL.)

It was for these legitimate reasons that people joined the Anthonypacific.com site. (*See also* Hansen Tr. 2498-99 (testifying that when the site started in 1999, it was a "bona fide research site"); Terrell Tr. 3964-65, 3972-73 (testifying that when he joined the site he was paying for Mr. Elgindy's identification of overvalued stocks, discussions about those stocks, and investigation of those companies).) And for the vast majority of the approximately 300 paying subscribers (Hansen Tr. 2470), it was for these legitimate reasons that they remained on the site. The evidence shows that the site was predominantly (indeed overwhelmingly) a legitimate site with legitimate members seeking and receiving legitimate, lawfully-obtained information about stocks in an entertaining environment.

To see that the site was overwhelmingly *not* about stocks as to which law enforcement information was shared, one need only recall that the broadcast calls related to the 19 stocks as to which the government claimed inside information from law enforcement sources was disseminated on the Anthonypacific.com website amounted to only 4.86% of all broadcast stock calls issued on Anthonypacific.com starting in March 2000. (*See* Kelner Aff. ¶¶ 28-31, Exs. F & G.) And this does not even account for the thousands of legitimate broadcast calls made before March 2000. Thus, at minimum, 95.24% of the stock tips given out on the site were based on information that the government has not even claimed was "tainted" by any unlawful "insider information."

As NYU professor and Anthonypacific.com website member Jeffrey Rubenstein writes,

> A small portion [of the activity on the site] was based on 'bulletin board' stocks or scams. And only a small portion of those scams involved contact with the FBI. There was some effort by the government to portray the website as a criminal enterprise focused on gaining illegal information from FBI informants. This was simply not the case. All the stocks mentioned at the trial amount to a very, very small percentage of the website's activity.

(Letters Ex. NN (Jeffrey Rubenstein).) Mr. Rubenstein also testified at trial that the site:

> was just a trading room, chat room like hundreds of others on the web. It was for discussing ideas, for sharing information, for raising, you know, suggestions about a trade and getting feedback to see if people had different perspectives. It was to enhance everybody's trading abilities, and it was also to be a kind of community, you know, it was very isolating. It's very lonely to sit at your computer at home and trade, and it's tedious, sort of boring a lot of times. Not much is happening. You are looking at numbers. So this was a way to have fun, to have sort of a trading community.

(Tr. 5586-87.)

Dan Cohen, a site member who did not testify due to what he understood to be the government's warning that testifying could subject him to criminal prosecution,[13] has written to explain his view that the site was legitimately researching scam companies and discussing stocks and the market:

> From the little I have read in published sources, it appeared that the portrayal of the fundamental operations of the Anthonypacific chat site misrepresented the reality. As with all Internet chat sites,

[13] Dan Cohen writes:

> I was prepared to testify at Tony's trial. In fact, I had traveled from my home in Boston to New York for that purpose and was in the queue of witnesses awaiting my turn. What stopped me was the publication of an article in the Wall St. Journal in which the Federal prosecutor publicly warned former members of Tony's chat site that their testimony at trial would be tantamount to self-incrimination and would subject them to risk of prosecution. After reading this warning, my personal [lawyer] withdrew his reluctant approval of my participation and insisted that I not testify citing the risk of the prosecutor making good on his warning.

(Letters Ex. H (Dan Cohen).)

> regular members on this website used shorthand and idioms that could not be taken out of context and interpreted literally. Without contextualization, any snippet or phrase could be subject to a host of potential meanings. My testimony would have given the jurors an authentic view of the meaning of many of the actions and statements that appeared in the chat logs.
>
> Further, as an independent researcher, I did my own due diligence of many of the companies discussed on the site. For example, my father-in-law is an Emeritus Professor of nuclear physics at Boston University. I asked him to review some technical literature published by Nuclear Solutions. My testimony might have buttressed the defense argument that members were not vicariously attacking small companies like a school of piranhas, but were engaged in credible investment research.

(Letters Ex. H (Dan Cohen); *see also id*. Ex. SS (Janice Shell) ("I wasn't a member of his 'club', but I knew many members, and I most certainly did not and do not believe it was the evil cabal that some have described. My impression is that it was a fairly ordinary, if rather pricey, investment club, to which members contributed information, research and stock picks."); Ex. KK (Chuck Norris) ("For some months I was on his pay site. At no time did he ever ask me to do anything criminal. Evidently he upset many fraudulent stock **scammers** and they wanted their ounce of blood from him, or so it seems from a distance.").)

Moreover, Mr. Elgindy's motive in creating this website was not to create a "virtual den of thieves." Mary Faith Elgindy provides a different view of Mr. Elgindy at the time he decided to create Anthonypacific.com:

> The evil, selfish man the prosecution tried to portray to the public and to the jurors is not the man I know as my husband. He was trying to make a difference in the market, in the world. I believe he did. He was helping to expose fraud on Wall Street and at the same time teaching people a new trade so they could make a better life for themselves and their families. I know he made some mistakes, but they were mistakes of incredibly poor judgment in associating with those he believed to be good people. Many of his decisions were impulsive and I believe you will understand more about this if you have the opportunity to study his medical history. The bottom line is that he believed he was doing a good thing, and

> providing a valuable service to the investing public. I was never more proud of him than when he came up with the idea to start this website to investigate fraudulent companies in the stock market. I thought for the first time that he was really making a difference in the world and in the lives of so many people. Truthfully, I had never seen him feel so good about what he was doing. He definitely didn't feel this sense of pride and accomplishment when he was a broker or when he owned the brokerage firm. Those were just jobs - a way to make a living. With this website, he had a passion I've never seen in him before. In his quest to uncover fraud on Wall Street, he frequently interacted with a wide variety of people, both good and bad, and by intentionally being confrontational, brash, and funny yet sometimes rude and offensive, he attracted public attention that a quiet, mild mannered analyst would never receive. By cultivating his controversial persona he developed a larger audience of people to hear his message of caution and education about stock market scams. Unfortunately with his zeal and enthusiasm, he became involved with people whose motives and goals were not the same as his. While we must all accept the jury verdict at this point, please don't judge him exclusively on the four corners of that verdict; please also consider what those who know him best have to say about him.

Id. Ex. P (Mary Faith Elgindy).)

And Alan Schwartz believed the same:

> It was my direct and consistent experience that there is a good and genuine heart in the man. It is difficult to reconstruct the core of a person's intent from a mountain of details, but it is my firm belief that Mr. Elgindy did not believe his actions were violating the law. Of course, to the extent that he was wrong in that belief, the law must hold him accountable. But . . . I appeal to you to consider the actions of someone carried away by manic excitement who did not hold criminal intent in his heart, and did not intend to bring harm to innocent victims.

Id. Ex. RR (Alan Schwartz, site member).)

These observations and impressions of Mr. Elgindy's mind-set during the events in question are corroborated by Mr. Elgindy's own words at the time. As he wrote in an April 14, 2002 letter to Probation Officer Lori Bryant seeking permission to travel: "I honestly have done

everything in my power to be a good person and to help not only the community but My country and the Government on almost a daily basis." (GX 3742A.)

Thus, the jury's conclusion that only in certain limited instances was the site used for illegal insider trading activities, the evidence adduced at trial, and the letters of various site members and outside observers show that the site was predominantly about short-selling fraudulent and overvalued companies, learning to trade and having fun doing it. The vast majority of the subscribers were not part of any conspiracy. The government has not even attempted to prove otherwise as to any but the handful of members who testified at trial and/or pleaded guilty.

When Anthony Elgindy returned home from prison in October 2000, he started the free website called Insidetruth.com, where he posted information and reports on companies he and others had investigated and determined to be fraudulent or otherwise overvalued companies. As was made clear at trial, the work that went into these reports was thorough and time-consuming. Mr. Elgindy and others would spend weeks, sometimes months, collecting information for the reports, making site visits, contacting executive officers, researching technology, and debunking press releases. One SEC attorney, Brent Baker, actually signed up to receive and did receive the email notices from Insidetruth.com and provided Mr. Elgindy a username and password for a free subscription to the private site Anthonypacific.com. (Tr. 5840-43, 5853-54; DX 12193-94 (emails between Mr. Baker and Mr. Elgindy).) SEC Attorney Rob Long was also on the Insidetruth.com email alert list and testified that he reviewed the alerts he received. (Tr. 6156-57.) There is no evidence that *any* information on Insidetruth.com about a company was knowingly and materially false or misleading.

2. "Another Day in the Life of Derrick and Jeff"[14]

The evidence at trial showed that Derrick Cleveland was the mastermind behind his own insider trading scheme. According to Mr. Cleveland, he met Agent Royer in early 2000 (Tr. 172), and soon thereafter he and Agent Royer devised a scheme by which Agent Royer would provide confidential law enforcement information to Mr. Cleveland for him to trade on. (Tr. 214-17 (discussing BBAN); 224-29 (Cleveland suggests in early summer 2000 that Royer provide him information and they trade together).) Mr. Cleveland testified, for example, that he and Mr. Royer obtained information about Potomac Energy and Energas through Royer's FBI investigation in the summer of 2000 and traded on that information (Tr. 244-49), but did not tell Mr. Elgindy about this information or trading because he was "in prison at the time and he wasn't around" (Tr. 248). In fact, Mr. Cleveland testified that he did not begin giving Mr. Elgindy any information from Agent Royer until October 2000. (Tr. 266-67.)

At the same time that Mr. Cleveland was devising his scheme with Agent Royer, he began ingratiating himself with codefendant Jonathan Daws. In the spring and summer of 2000, Mr. Cleveland gave law enforcement information to Mr. Daws and put Agent Royer in touch with Daws directly to discuss certain fraudulent companies. (Tr. 254 ("Jonathan Daws was an individual that I was developing a relationship with, he was one of the heavy hitters, the big hitters . . . on Tony's site, he was one of the guys in blue. While Tony was unavailable, Jonathan who we called Archer was one of the guys who helped keep the private site moving along."); 261-65.) Mr. Daws disseminated the law enforcement information he received from Agent

[14] This is a statement made by Derrick Cleveland to investigating agents. While describing the insider trading scheme that he had orchestrated, "CLEVELAND stated 'initially I was on a high horse with all the inside information. After a while it seemed so normal. Another day in the life of Derrick and Jeff!'" (GX 3500-DWC-6.)

Royer on his own trading and discussion site, Retired Chat ("RC Chat"), of which Mr. Elgindy was purposely kept unaware. (*See* Ex. 1 (Daws Plea Tr.) at 21-22; Kelner Aff. ¶¶ 42-44.)

By the time Mr. Elgindy left prison in October 2000, Mr. Cleveland admitted that his plan had been to first take a short position based on the information provided to him by Agent Royer, and then use Mr. Elgindy to disseminate the law enforcement information on Anthonypacific.com and various public trading sites. (Cleveland Tr. 227.) Mr. Cleveland hoped that exposing the law enforcement information to Mr. Elgindy would cause the price of the company's stock to decline when Mr. Elgindy made it known to the public. (Tr. 227.) His plan was to impress Mr. Elgindy by sending him meticulously fabricated law enforcement documents regarding the company Seaview (SEVU) with the forged signature of Agent Royer on them. (Tr. 304, 1287-1307, 1637.) This is how he attempted to recruit Mr. Elgindy into his scheme.

Even after October 2000, Agent Royer remained *Cleveland's* contact. (*See, e.g.*, Tr. 3842-43 (Terrell discussing email from Cleveland stating "If I get burned on this, my sources and I disappear. Thing is, he [Elgindy] could care less.") It was Mr. Cleveland who ran the show, deciding what companies and individuals Agent Royer would search and what law enforcement information would be passed on and to whom. A "day in the life of Derrick and Jeff," as Mr. Cleveland put it, was Cleveland choosing a stock being researched and discussed on Anthonypacific.com (usually a stock that had already been declared a scam), providing Agent Royer with the names of the company and the directors and officers for Agent Royer to search, receiving information about any investigations into the companies or individuals, and deciding whether to keep the information for himself or give it to others. (*See, e.g.*, Tr. 881 (Cleveland discussing his "normal procedure").) As Mr. Cleveland testified, he "controlled the flow of information." (Tr. 1680-81.)

For example, Mr. Cleveland testified that he received information from Mr. Royer on CATH, CWON, INIV, MDPA, TTRE, NAPH and REFR, and did not provide any of the information to Mr. Elgindy. There were times when Mr. Cleveland did not share information that he received from Agent Royer with anyone and there were times when he did not share such information with Mr. Elgindy, but shared such information with Kent Terrell ("quack"), Jonathan Daws ("archer"), and others.[15] Moreover, Mr. Cleveland testified in many instances that he acted independently of Mr. Elgindy and in fact purposely kept information from him. (*See, e.g.*, Tr. 439 (discussed with Terrell how they should communicate in a way that Mr. Elgindy could not view), 514-16 (gave information on SXML to Terrell so they could build a position before giving information to Mr. Elgindy), 521 (discussed with Terrell how to hide that they kept information from Mr. Elgindy), 605-06 (Terrell, not Mr. Elgindy, called HDVG on Anthonypacific.com), 688 (joined a separate "Tony-bashing room").)

In short, Mr. Cleveland was the originator and organizer of this scheme and was manipulating everyone to achieve his goals. He lied to both Mr. Elgindy and Agent Royer about his relationship with the other in order to make himself look important. (Tr. 189 (Cleveland "exaggeration" to Royer); 218 (lied to Elgindy that Royer was his high school friend).) He meticulously fabricated documents and forged Royer's signature on the documents to impress and recruit Mr. Elgindy into his scheme. (Tr. 1637.) He recruited Mr. Terrell into his scheme

[15] *See, e.g.*, Tr. 226 (received CATH information from Royer while Mr. Elgindy in prison; no testimony passed on information to anyone), 236-37 (received CWON information from Royer while Mr. Elgindy in prison; no testimony that he passed the information to anyone), 238 (NAPH information from Royer), 247-48 (Energas information from Royer; no testimony that it was given to Elgindy), 253-55 (gave Potomac information to Daws and told Daws about Royer because Daws was a "big hitter" and he was "developing a relationship" with Daws, but did not give it to Elgindy), 260-66 (gave NAPH information to Daws not Mr. Elgindy), 645-47 (gave REFR information to Terrell and Slotnick, aka, "ectopy"; no testimony that it was given to Mr. Elgindy), 738-742 (gave MDPA and TTRE information to Terrell, and not Elgindy), 1680-81 (gave information directly to Terrell, Slotnick, "nico", Daws, John Fiero); 2198-99 (discussed INIV with Terrell; no testimony that any information was given to Elgindy).

and then he lied to Terrell, telling him that he needed $2,000 to pay Agent Royer for information when he had told Agent Royer nothing about it. (Tr. 1867-68 (Cleveland); Tr. 3828-31, 3928, 4023 (Terrell).) Instead, Mr. Cleveland kept Mr. Terrell's money for himself. (Tr. 1867-68 (Cleveland).) He recruited Mr. Daws into his scheme when Mr. Elgindy was unavailable. *See supra*. Mr. Cleveland used Mr. Elgindy and others in an insider trading scheme that he devised in early 2000 and ran until his arrest in May 2002.

3. Insider Trading by Mr. Elgindy

As the record shows, Mr. Elgindy gave information on fraudulent companies to law enforcement agencies such as the SEC for years before he encountered Agent Royer. (*See, e.g.,supra* Pt. II.A.2. (discussing information and assistance provided to SEC on CNES, to SEC and NASD on QGLY, and to SEC attorneys Bob Tercero and Patrick Hunnius on ECNC).) The record shoes that after he met Royer, he continued to send information directly to the SEC, the FBI, and other agencies, and he also sent information to Agent Royer to pass on to these agencies. Mr. Elgindy's efforts assisted law enforcement in their investigations of many instances of stock fraud, particularly in the penny stock market where the government has never had the resources to keep up with the rampant fraud committed by stock promoters and the officers of these fraudulent companies. (*See* Ex. 18 (Microcap Stock: A Guide for Investors (SEC August 2004) ("In the battle against microcap fraud, the SEC has toughened its rules and taken actions against wrongdoers, but we can't stop every microcap fraud. We need your help in winning the battle.")).)

The trial was filled with the undisputed testimony of SEC attorneys and FBI agents who admitted – albeit at times unwillingly – that Mr. Elgindy's information had assisted them in starting and continuing investigations and, at times, taking action against a fraudulent company

or individual. SEC Attorney Doug Gordimer worked with Agent Royer on BBAN when Royer was in Oklahoma City (Tr. 3522-23),[16] and later became Agent Royer's conduit for providing Mr. Elgindy's and others' information on fraudulent companies to the SEC (*see, e.g.*, Tr. 3548). Gordimer testified that Royer told him about Insidetruth.com in late 2000 and about Mr. Elgindy and his background in January 2001. (Tr. 3548, 3553.) Gordimer visited Insidetruth.com "numerous times" and found "good," "useful" and "helpful" information there. (Tr. 3548 ("good information"); 3567 ("useful"); 3611 ("At times the website did have helpful information"); 3615-16.) Gordimer reviewed the reports and other information on Insidetruth.com and in fact, he used the information to start several investigations. (Tr. 3562-64, 3622-24 (reviewed IJON report and called Mr. Elgindy, who explained the fraudulent activities surrounding IJON); 3625 (IJON information "certainly was interesting and useful to us"); 3568 ("We opened an informal inquiry [into BGII] based on [Mr. Elgindy's] report."); 3569 (BGII information on Insidetruth.com "did prove out to be the case"); 3640 ("opening of the informal investigation [on BGII] was based on the report on Insidetruth.com"); 3591 (allegations on Insidetruth.com "turned out to be accurate in some cases"); 3620 (information from Insidetruth.com report was "exclusively" the basis for opening informal investigation into BYTE).) In addition, the information provided by Mr. Elgindy and his website sometimes led to SEC action against certain companies. (*See, e.g.*, Tr. 3649 (SEC took action against BGII); 3553 (opened investigation into BYTE).)

SEC Attorney Brent Baker testified to a long and fruitful relationship with Mr. Elgindy. He was contacted by Mr. Elgindy at the behest of site member Floyd Schneider in early 2001 regarding SEVU. (*See* JX 50 (chat regarding contact); DX 12190 (notes of conversation with

[16] The page numbering used for the 12/1/04 transcript was repeated in the 12/2/04 transcript. All transcript cites to Mr. Gordimer's testimony are to the 12/2/04 day of testimony.

Baker); Tr. 5768, 5770-75 (Baker).) Baker testified that some months later he received Mr. Elgindy's InsideTruth.com report on SLPH, including photographs of company equipment and other information that Baker had never seen before. (Tr. 5779-5793; DX 5218 (email to Baker).)[17] Baker contacted Mr. Elgindy seeking information about certain individuals affiliated with SLPH that Baker had read about in Mr. Elgindy's report, and thanked Mr. Elgindy for this information; Baker then continued to request information from Mr. Elgindy about SLPH to assist him in his investigation. (Tr. 5811-5815, 5819-5820, 5830-5832, 5834-5836 (Baker); DX5371, DX5370, DX5203, DX12199, DX5373 (emails between Baker and Elgindy).) In fact, Baker indicated in an August 14, 2001 phone conversation with FBI Agent Marcus Knutson that he was investigating SLPH and had "worked with" Mr. Elgindy in the past. (DX6142.) This caused Knutson to refocus his own FBI investigation from Mr. Elgindy to SLPH. (*Id.*) Knutson admitted that Mr. Elgindy's SLPH report contributed to the SEC investigation that uncovered the fraud at SLPH. (Tr. at 3397-3398.) Mr. Elgindy continued to send information directly to SEC Attorney Baker for some time after the SLPH investigation terminated. (*See, e.g.*, DX5321 (BGII); DX5444 (EGBT Report).)

SEC Attorney Rob Long testified that Agent Royer contacted him in January 2001 with information on Genesis Intermedia (GENI) that he had received from Mr. Elgindy. (Tr. 6064-68, 6095.) Long then contacted Mr. Elgindy several times and Mr. Elgindy gave him additional, useful information about GENI. (Tr. 6095, 6100-104, 6119-22.) In fact, Long requested Mr. Elgindy's report on GENI (Tr. 6104-05), contacted Mr. Elgindy to "follow up" on GENI (Tr. 6124-25, 6133-40), and received and reviewed the email alert on GENI from Insidetruth.com

[17] We are in the process of collecting the trial exhibits (DXs, GXs, and JXs) cited herein, which we will separately submit to the Court for the Court's convenience.

(Tr. 6145-46). The SEC ultimately sued several individuals for the manipulation of GENI stock, many of whom had been discussed with Mr. Elgindy.

SEC Attorney Bob Tercero, to whom Mr. Elgindy had provided information on E-connect in 1999 (Tr. 6228-31), testified that he received information directly from Mr. Elgindy regarding OSIN (Tr. 6238, 6247-48, 6253-54) and that the information contributed to his opening OSIN as a matter under investigation ("MUI") just a few days after he received the information (Tr. 6244). Tercero testified similarly with regard to NECO, including that he reviewed Mr. Elgindy's report on NECO on Insidetruth.com. (Tr. 6268-69.)[18]

[18] There were many additional such instances. SEC Attorney Patrick Hunnius testified that, in addition to providing useful information on E-connect that led to SEC action (Tr. 6210), Mr. Elgindy provided a recording that Hunnius used when taking witness testimony in the NECO investigation. Hunnius also read Mr. Elgindy's NECO report as part of that investigation. (Tr. 6212-13, 6207.) And Hunnius testified that he received information on Paul Brown and NSOL from Mr. Elgindy that he noted as part of that investigation. (Tr. 6207-08.)

SEC Attorney Brian Bressman testified that in late 2000 Mr. Royer provided him information from Mr. Elgindy about cash bribes being paid to pump Freedom Surf (FRSH). (Tr. 5934-35; DX 6112 (notes of FRSH-related conversations).) Bressman noted that Mr. Elgindy called him and provided additional information about Solomon Grey's manipulation scheme. (Tr. 5937-41, 5944-46; DX 6112.) The SEC eventually brought charges against Solomon Grey for the manipulation of FRSH stock. (Tr. 5950-51.)

SEC Attorney Kyra Armstrong admitted that she and a colleague received a call from Mr. Elgindy where he provided information regarding Seaview (SEVU), and that she received and forwarded Mr. Elgindy's SEVU Insidetruth.com Reports Part I and II to other SEC attorneys because the information was useful. (Tr. 2932-36, 2978-79.) Neil Palenzuela admitted that Agent Royer referred the SEVU informant Ken Cook to him and that the information he received from Cook, including Mr. Elgindy's Insidetruth.com reports, formed the basis for his opening an FBI investigation into SEVU. (Tr. 3201-02, 3212-13, 3244-49, 3251-54, 3257-58, 3262, 3271, 3275-77.)

SEC Attorney James Scoggins testified that he read information about EGBT on InsideTruth.com (Tr. 5864-5865) and then requested additional information from Mr. Elgindy about fraud at EGBT as part of an investigation he was conducting (Tr. 5863-5871; DX5437). He also testified that Mr. Elgindy provided him with information about EGBT's fraud and misrepresentations in various emails and in his EGBT Insidetruth.com report. (Tr. 5870-5890, 5894; DX5442, DX5438, DX5429, DX5443, DX12100.)

SEC Attorney Bob Tercero even stated to a coworker that Mr. Elgindy was a "crusader for propriety in the market place" and was "effective in exposing some fraudulent stock operations and in providing his information to the LA office." (DX 6022 (email of SEC attorney Tom Etter describing statements of SEC Attorney Bob Tercero). SEC Attorney Tom Etter testified as follows about this conversation with SEC Attorney Bob Tercero:

> We were talking about the company, OSIN, and I think I asked who this man was, Elgindy. Mr. Tercero said he is someone who has had a checkered past but who is now doing some useful work in the industry, noting that he has investigated companies, especially companies that have an inflated market value, and he has done some useful investigation work reporting some of the information to the LA office of the SEC, but also selling the stock short at the same time.

(Tr. 6462-63.)

The information that Mr. Elgindy and other site members provided to these law enforcement agencies derived from a lot of hard work researching companies and their directors and officers on the internet; contacting the companies and their vendors, customers, competitors, etc.; visiting the companies; asking colleagues about the viability of technologies; and much, much more. The seemingly endless chat that we presented at trial (and a lot more that was not presented) shows the due diligence the site members engaged in with regard to the companies at issue. In fact, the vast majority of information the site obtained on these companies and used to trade came from such research. Only a tiny percentage of the information Mr. Elgindy had about a given stock was law enforcement information.

Agent Royer expressed appreciation and encouragement to Mr. Elgindy and Mr. Elgindy was emotionally intoxicated by the attention he received from the FBI through Agent Royer. Mr. Elgindy saw the information he received from Agent Royer as validation and as a reward for

the help he provided to the SEC, FBI and other law enforcement. (GX-DC-56 (Mr. Elgindy tells the site that the information on the investigations into SEVU is "for all of our hard work").)

The jury, of course, apparently found that information misappropriated by Agent Royer informed some of Mr. Elgindy's trades in relation to four stocks, OSIN, PLMD, JUNM and SEVU.

Even with regard to these stocks, much of the information that the government tried to link to the Royer-Cleveland-Elgindy pipeline was shown at trial to already have been in the public domain and already discovered by Mr. Elgindy and his site members before Royer accessed it. For example, the government tried to link information about an FBI investigation into PLMD to Agent Royer's searches of PLMD in the FBI database on March 23, 2001 (Tr. 594-602 (Cleveland); 8071 (summation); GX-JL-1 (ACS search at 14:46, Gordimer search at 14:51, ACS search at 19:49)), but hours before the first search a site member posted information about an FBI investigation into PLMD on the site, having gotten it from "sources at CIBC world markets." (JX 103 (at 13:55, "Tara" states "Polymedica PLMD, update -- Hearing from sources at CIBC World Markets that analyst covering stock has *confirmed FBI investigation* into billing practices") (emphasis added). The government also tried to link information about an SEC investigation into OSIN to Agent Royer's discussions of OSIN with Doug Gordimer on February 26, 2001. (Tr. 3556 (Gordimer testified that Agent Royer called him on February 26); Tr. 579-80 (Cleveland testified that Agent Royer told him about the SEC investigation). SEC Attorney Bob Tercero testified, however, that Mr. Elgindy had been providing him information on OSIN from February 23 to 26 that he used to open the investigation on *February 27*, 2001, the day after Agent Royer spoke with Mr. Gordimer. (Tr. 6242-50, 6253.) Thus there was no investigation open when Agent Royer spoke to Mr. Gordimer about OSIN.

In addition, often no one traded on the information that Cleveland claimed was "the best information that a person could get a hold of" (Tr. 217), so important, so "material." For example, two weeks or more went by before anyone traded on the now-infamous "confirmation" of three investigations into SEVU that Mr. Elgindy put in chat on January 12, 2001:

> [16:44] AnthonyPacific >> 4 the 3 investigations are wire fraud, mkt manipulation, and mail fraud officially by the FBI SEC is dong a title 15 investigation..and none of this can leave or go public..if you do you willbe pros

(GX-DC-56.) Cleveland did not short SEVU until 13 days later on January 25, 2001 (GX 2578); Hansen did not short SEVU until 25 days later on February 6, 2001 (GX 2581); Terrell did not trade on the information (Tr. 4078-81); and Mr. Elgindy did not short SEVU until 17 days later on January 29, 2001 (GX 2582).

4. Extortion

Consistent with the Jury's verdict of acquittal, the record shows that Mr. Elgindy did not extort FLOR or its CEO AJ Nassar. Mr. Elgindy was disseminating truthful, negative information about FLOR and Nassar and shorting the stock and Nassar did not like it because he felt it was hurting his ability to raise capital. (TR. 3710, 3715-16 (Nassar.) Nassar decided to buy out the shorts and contacted his friend David Slavney to help him. (Tr. 3717, 3723-24.) Slavney put him in touch with Troy Peters, an investment banker and stock promoter who wished to promote FLOR. (Tr. 3720-21.) Troy Peters contacted Mr. Elgindy to discuss Mr. Nassar's providing FLOR stock at a certain price to buy out the short position of Mr. Elgindy and others so that Mr. Elgindy would stop covering the stock. Mr. Elgindy never spoke to Nassar. Nassar arranged for a shareholder to sell his shares on the open market for what Nassar called a fair price. (Tr. 3751.) In fact, the shares were offered at a price between the high and low prices for that day. (Tr. 3751.) Mr. Elgindy bought 9300 shares that day. The jury properly found that this did not prove extortion.

The circumstances that led to the block trade of NSOL were very similar. Mr. Elgindy first determined that NSOL was a scam company and that its CEO Paul Brown was a fraudster who lied about his education (*see* JX 282; DX 8726 (mail order Ph.D.)) and about the technological capabilities of himself and the company (*see* JX 283; Ex. H Dan Cohen).). Mr. Elgindy and the site also found that the CEO Paul Brown had been found to have engaged in securities fraud in Oregon (SEC enforcement action for securities fraud), and Idaho (State securities fraud action). (*See* DX 8735 (Letter of Paul Brown posted on Silicon Investor re: his prior frauds); DX 8737 (SEC v. Brown case); DX 8815 (Oregonian article re: SEC enforcement action against Brown); DX 8816 (Forbes article about State of Idaho securities fraud case); DX 8817 (private securities fraud litigation documents against Brown); GX 3001 (broadcast of SEC complaint).) Moreover, the site found that Paul Brown had a felony drug conviction, which they confirmed with the Idaho Department of Corrections (Tr. 885 (Cleveland), but later learned was expunged. Based on this information gathered by the site and by others who were posting it on Raging Bull and Silicon Investor, Mr. Elgindy sold short the stock of NSOL (*see* GX 2582) and discussed the fraudulent nature of the company and its CEO on his private site and on Silicon Investor. Mr. Elgindy also called the company and aggressively and even obnoxiously and crassly accused Paul Brown of not disclosing his felony conviction.

This truthful exposure of NSOL's technological shortfalls and not-to-be-trusted CEO caused Paul Brown to become concerned that his company's stock would lose value and prompted him to search for a way to stop Mr. Elgindy. (*See* JX 284 (Bostonblackie, aka, Dan Cohen, telling Mr. Elgindy that Paul Brown met with his lawyers to figure out how to get Mr. Elgindy "off his back").) Brown was in contact with David Slavney, who referred him to Troy Peters for the purpose of getting rid of Mr. Elgindy. (Tina Brown Tr. 3537-38.) Slavney suggested that Brown offer Mr. Elgindy a block of stock to cover his short position in exchange

for Mr. Elgindy's discontinuing the coverage of (and thereby the dissemination of negative (truthful) information about) NSOL and agreeing not to short NSOL stock. (*See* Tina Brown Tr. 3540 (confirming that her brother Paul Brown had stated that Slavney suggested this); GX-DC-363 (chat log reflecting Mr. Elgindy's statement that he was "being offered a block of stock . . . . they approached us and are beggin[] for us to go away").) Slavney and Peters gave AJ Nassar as a reference and Brown contacted him. Nassar told Brown that Slavney and Peters were good guys and that they had helped him negotiate a reasonable deal with Mr. Elgindy. (GX 3911 (transcript of call); Nassar, Tr. 3731-32.)

Over the course of several phone conversations, some of which were played for the jury and the Court, Peters negotiated a deal whereby Brown sold Mr. Elgindy 325,000 shares of NSOL at $1.00/share, a 40-cent discount to the market price on that day. (*See* GX 2038, at 66 (trade ticket), 74 (account statement); DX 7481 (NSOL price chart).) While the jury found that Mr. Elgindy's actions amounted to extortion with respect to NSOL, at most the dollar amount attributable to the offense is $130,000 (325,000 shares multiplied by the 40-cent discount to the market price).

5. Frontrunning/Trading Against Advice

As it pertains to sentencing, we submit that the three counts of conviction involving alleged so-called front running and trading against advice -- Counts 21, 29 and 32 -- should have no impact whatsoever on the Court's determination of an appropriate punishment. As Your Honor is aware, the jury largely rejected the government's theories in these respects, acquitting Mr. Elgindy on 13 of the 16 separate counts charging frontrunning and trading against advice. In addition, as we argued in post-trial Rule 29 submissions with respect to the three such counts on which Mr. Elgindy was convicted, the evidence was legally insufficient to sustain any of these

charges, and there also were fatal defects in the grand jury proceedings with respect to these counts. (*See* Mr. Elgindy's Supplemental Rule 29 letters dated February 25, 2005 and May 10, 2005.)

More to the point, the three counts that survived on these theories amount to little more than "gotcha"-type add-on charges, reflecting a selective presentation of a tiny fraction of Mr. Elgindy's thousands and thousands of calls and trades and arguments that, in a selected few instances, Mr. Elgindy did something other than what he allegedly told site members he was doing. But as we pointed out in our Rule 29 letters, all of the site member testimony from both government and defense witnesses showed that the kinds of things Mr. Elgindy was convicted of – such as trimming down but not eliminating a short position following a trading call, or trading mere minutes before announcing a trading call – were either known and/or immaterial to the investment decisions of his site members.[19] In addition, the government presented no evidence that any site member suffered one penny of loss in connection with these allegations. To the contrary, all the evidence indicates (and the government has never disputed) that site members consistently would have made money by following the trading calls that the government charged and claimed at trial were part of criminal frauds.

6. Conclusion

The nature and circumstances of the proven offenses comprising the securities fraud case turned out to be relatively straightforward. Mr. Elgindy investigated many overvalued and

[19] For example, in Count 29, Mr. Elgindy was charged with "trading against advice" where he accumulated a short position in 8,000 shares of INIV, then broadcast an official call, and then trimmed his position by covering 3,500 of those 8,000 shares (at a loss). How this trading pattern could constitute "trading against advice," much less a fraud and a crime, is at best difficult to understand.

fraudulent companies and gave a lot of information about those companies to many law enforcement officials, including Agent Royer. Accepting the jury's verdict for purposes of sentencing, Mr. Elgindy also has been found to have received confidential law enforcement information from Agent Royer on the four stocks of conviction and to have disseminated that information on Anthonypacific.com and/or traded on it. Mr. Elgindy's negative information was found to have been improperly used to threaten the reputation of NSOL and CEO Paul Brown, allowing Mr. Elgindy to obtain discounted shares of NSOL stock from Paul Brown. Mr. Elgindy also was found to have traded ahead of his site members or against his own advice to his site members on two stocks and just three occasions out of the hundreds of stocks and thousands of trading calls that appeared on the site over time.

Mr. Elgindy did not conspire to obstruct justice or obstruct justice. He did not extort AJ Nassar or FLOR. He did not lead or organize Cleveland's insider trading scheme and he did not control anyone's trading or any other activities.

C. Sections 3553(a)(4) and (a)(5): The Advisory Sentencing Guidelines

Sections 3553(a)(4) and (a)(5) direct the Court to consider the sentence suggested by the Sentencing Guidelines, and "any pertinent policy statement." The Second Circuit has determined that this requires the district court to determine the applicable Guidelines range in the same way it did pre-*Booker* and then consider it along with the other factors. *Crosby*, 397 F.3d at 112. Moreover, the correct application of the Guidelines "has force even under the discretionary sentencing regime imposed by *Booker* because a district court must first consider the proper Guidelines range even when it decides to vary from them." *United States v. Valdez*, 436 F.3d 178, 184 (2d Cir. 2005) (citing *United States v. Maloney*, 406 F.3d 149, 152 (2d Cir. 2005)).

In this case, the PSR calculates Mr. Elgindy's total offense level at level 45, exceeding the highest level of 43 that calls for a life sentence under the Sentencing Table. The Guidelines calculation in the PSR is erroneous in virtually every respect and includes multiple specific offense characteristics and adjustments that have no application in this case. As set out here, a correct application of the Guidelines for the securities fraud case results in a level 20 and for the false statements case results in a level 7, calling for an overall sentence of less than 5 years in prison.

1. Legal Standards Applicable to the Advisory Guidelines Calculation

a. If the Court Considers Facts Not Proven to the Jury, Acquitted Conduct Should Not Be Considered

Based on the Sixth Amendment right to have a jury find the facts that determine punishment as expounded in *Booker*, we submit that the Court should refuse to consider any acquitted conduct for purposes of sentencing. *See United States v. Pimental,* 367 F. Supp. 2d 143, 150-54 (D. Mass. 2005) (holding that under *Booker* it is not appropriate to consider acquitted conduct in determining sentence). "It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, and also conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing." *Id* at 150 (citation omitted).

> To consider acquitted conduct trivializes 'legal guilt' or 'legal innocence' – which is what a jury decides – in a way that is inconsistent with the tenor of recent case law. . . . [W]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved. . . . In any event, concerns about respecting the jury as an institution persist in this post-*Booker* advisory regime . . . .

Id. at 152; *United States v. Coleman*, 370 F. Supp. 2d 661, 670-73 & n.14 (S.D. Ohio 2005); (rejecting consideration of acquitted conduct because "the legal innocence associated with acquittal would be summarily eviscerated" and noting that "consideration of acquitted conduct has a deleterious effect on the public's view of the criminal justice system"). "A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal." *United States v. Frias*, 983 F.2d 369, 396 (2d Cir. 1993) (Newman, J., concurring).

Consistent with these cases, the Second Circuit's recent decision in *United States v. Vaughn*, No. 04-5136 CR(L), 04-6288 CR(CON), 2005 WL 3219706 (2d Cir. Dec. 1, 2005) confirms that this Court has the discretion to reject acquitted conduct in calculating and determining Mr. Elgindy's sentence. *See Id.* at *7 (holding that "while district courts may take into account acquitted conduct in calculating a defendant's Guidelines range, *they are not required to do so*. Rather, district courts should consider the jury's acquittal when assessing the weight and quality of the evidence . . . and determining a reasonable sentence.") (emphasis added).

Accordingly, we submit that all of the acquitted conduct in the securities fraud case – including obstruction of justice, extortion of FLOR, insider trading with respect to SLPH and FLOR, market manipulation with respect to all charged stocks (*see infra* Pt. II.C.2.a.), and 13 of the 16 trading against advice/frontrunning fraud counts – should be disregarded for purposes of sentencing (particularly because, as the PSR makes clear, consideration of this acquitted conduct dramatically increases Mr. Elgindy's Guidelines sentence).[20]

[20] Even if the Court chooses to consider acquitted conduct, the Court should not rely on such conduct for sentencing unless it is proven beyond a reasonable doubt, not by a preponderance of the evidence as the PSR suggests. *See United States v. Baldwin*, 389 F. Supp. 2d 1, 2 (D.D.C. 2005) ("acquitted conduct (if it may be considered at all)" must be proven beyond a reasonable

b. Alternatively, Facts That Increase Mr. Elgindy's Sentence Beyond the Maximum That Could Be Imposed Based on the Jury's Verdict Should Be Proved Beyond a Reasonable Doubt

In the post-*Booker* era, courts have "a new concern for procedural fairness in the finding of facts." *United States v. Malouf*, 377 F. Supp. 2d 315, 328 (D. .Mass. 2005). Where a particular fact increases a defendant's sentence, procedural fairness – whether cast as a matter of "due process," "confidence," or "reasonableness" – compels more rigorous fact-finding and a higher burden of proof than mere preponderance of the evidence. Under the principles set out by the Supreme Court in *Blakely*, *Booker* and *United States v. Shepard*, 125 S. Ct. 1254, 1257 (2005) (rejecting contention that sentencing court can determine nature of prior conviction by determining facts not found by jury or admitted by defendant), all facts that increase a sentence should be proved beyond a reasonable doubt.

> The principle of constitutional avoidance mandates that the federal sentencing statutes should be construed to avoid the difficult constitutional question of whether the imposition of a harsher sentence – whether characterized as a Guidelines sentence, a departure, or a deviance – violates due process when the greater punishment is based on facts found under a standard lower than proof beyond a reasonable doubt.

United States v. Kwame Okai, No. 05 Cr. 19, 2005 WL 2042301, at *10 (D. Neb. Aug. 22, 2005); *see United States v. Siegelbaum*, 359 F. Supp. 2d 1104, 1107 (D. Or. 2005) (*Blakely* and *Booker* stand for the principle that facts used to enhance a sentence must be admitted or proven beyond a reasonable doubt rather than by a preponderance of the evidence); *Malouf*, 377 F.

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doubt); *United States v. Carvajal*, No. 04 Cr. 222, 2005 U.S. Dist. LEXIS 3076, at *10-11 (S.D.N.Y. Feb. 22, 2005) (Hellerstein, J.) (declining to consider argument that acquitted conduct was proved by a preponderance of the evidence). As explained below, the Second Circuit's decision in *Vaughn* supports and is consistent with a heightened burden to the extent the Court chooses to consider acquitted conduct. And as we discuss below, none of the acquitted conduct has been proven beyond a reasonable doubt.

Supp. 2d at 329; *Pimental*, 367 F. Supp. 2d at 153 ("Certain facts like the amount of loss continue to assume inordinate importance in the sentencing outcome. So long as they do, they should be tested by highest standard of proof."); *United States v. Huerta-Rodriguez*, 355 F.Supp.2d 1019, 1027, 1028-29 (D. Neb. 2005) (requiring proof beyond reasonable doubt for facts that produce a "significant increase" in order to "comply with due process in determining a reasonable sentence"); *United States v. Gray*, 362 F. Supp. 2d 714, 723 (S.D.W. Va. 2005).[21]

[21] We note that the timing of this case presents a so-called "pipeline" situation where Mr. Elgindy should receive the benefit of the constitutional rule announced in *Booker*, *see Griffith v. Kentucky*, 479 U.S. 314, 321-28 (1987), but not be burdened with retroactive application of the unforeseeable judicial amendment to 18 U.S.C. § 3553 wrought by the *Booker* remedial decision, *see Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964); *Rogers v. Tennessee*, 532 U.S. 451, 456-464 (2001); *Marks v. United States*, 430 U.S. 188, 191-92 (1977). While we recognize that the Second Circuit recently addressed this issue in *Vaughn*, 2005 WL 3219706, at *4, and held that the *Booker* remedial decision could be applied retroactively because the maximum sentence at the time of any offense was the statutory maximum, we most respectfully submit that the court did not consider the implications of the Supreme Court's decision in *Miller v. Florida*, 482 U.S. 423, 429-435 (1987), and in any event we write to preserve this issue for appeal.

Under *Miller*, a mandatory sentencing guidelines system, like the pre-*Booker* Guidelines in effect at the time of Mr. Elgindy's offense, makes the maximum potential sentence for fair warning purposes the presumptive sentencing guidelines range on the date that the offense was committed, *regardless* of whether the statutory maximum was higher. *See Miller*, 482 U.S. at 429-435; *see also Booker*, 125 S. Ct. at 748-51, 756-71 (at least since *Jones* and *Apprendi*, the guidelines, not the code, represented the maximum permissible punishment); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 2537 (2004). The unforseeable remedial decision, *see Booker*, 125 S. Ct. at 767 ("We do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system . . . ."); *Booker*, 125 S. Ct. at 771 (Stevens, J., dissenting) (*Booker's* remedy was so unforeseeable that neither the parties nor any of the *amici* thought it necessary to address it), increases the possible penalty to the statutory maximum, violating the fair warning restrictions of the due process clause.

Taken together, the Fifth and Sixth Amendment protections mean that Mr. Elgindy's sentence should not be based on any fact (other than a prior conviction) that was not proven to the jury beyond a reasonable doubt. *See* Douglas A. Morris, *Booker's Impact on Due Process Rights of Defendants in Pipeline Cases*, 29 Champion 10 (May 2005). Because no such factors were put before the jury for consideration (despite the fact that the second superseding indictment charged them as matters for the jury's consideration), Mr. Elgindy's maximum sentence on the underlying case should be limited to the minimum base offense level on the RICO conspiracy charge, which is 19.

A higher burden of proof is particularly appropriate for facts not found by a jury, but which significantly increase the Sentencing Guidelines range. Again, the Second Circuit's recent decision in *Vaughn* confirms this Court's discretion to hold the government to a higher burden of proof for so-called "uncharged conduct" or "relevant conduct." 2005 WL 3219706, *6-7. Specifically, *Vaughn* cites with approval two pre-*Booker* Second Circuit cases holding that where conduct not proven to a jury beyond a reasonable doubt would result in either a "substantially enhanced sentencing range," *United States v. Gigante*, 94 F.3d 53, 56 (2d Cir. 1996), or "an enormous upward adjustment," *United States v. Cordoba-Murgas*, 233 F.3d 704, 708 (2d Cir. 2000), a higher standard of proof – "such as clear and convincing evidence or even beyond a reasonable doubt where appropriate," *Gigante*, 94 F.3d at 56 – should be applied. If the government's proof does not meet these heightened standards, the conduct should be discounted if not disregarded. *Id.*[22]

In this case, therefore, any alleged crimes or criminal acts that were not specifically found by the jury to have been proven should not be considered for sentencing purposes until and unless this Court makes a specific finding that each such crime or criminal act has been proven to the Court beyond a reasonable doubt. This includes (in addition to acquitted conduct, to the extent the Court decides to consider it at all) insider trading or manipulation as to any of the following stocks, as to which the jury was not asked to render a verdict: Softquad Software (SXML), Vital Living Products (VLPI), New Energy (NECO), Biopulse (BIOP), Freedom Surf (FRSH), Global Asset Holdings (GAHI), Hercules Development Group (HDVG), Jaguar

[22] While both *Gigante* and *Cordoba-Murgas* directed the district court to use the downward departure mechanism to address such situations where the government's proof falls short of a heightened standard of proof, those cases were decided pre-*Booker*, when a departure was the only mechanism for reducing the sentence. Post-*Booker*, the logic of these cases, as reinforced by *Vaughn*, suggests that the Court has wide discretion in determining how to account for the

Investments (JGUR), Metropolitan/Health Networks (MDPA), Real Time Cars (RTCI), Trident Systems (TDNT), TTR Technologies (TTRE), Eagle Building Techs (EGBT), Investco (IVSO), Piranha, Univercell Holdings (UVCL), Broadband Wireless Int., AARW, Princeton Video Imaging, Innovative Software (INIV), Teligent Inc., Creative Host Services, Liquidix (LQDX), H-Net Net Inc. (HNTN), Astralis (ASTR, previously HDVG), BGI Inc. (BGII), Choice One Communications (CWON), Genesis Intermedia (GENI), Global Seafood Techs Inc., Hypermedia/Universal Holdings (NMNW, later UVCL), Imclone Systems (IMCL), Medi Hut (MHUT), Micromen Tech, Nano World Projects (NAPH), Nuclear Solutions (NSOL), Research Fronteirs (REFR). (PSR ¶ 42.). Such specific stock-by-stock findings by Your Honor as to each such stock and each such alleged criminal act are particularly appropriate, again, because of the dramatic increase in the Sentencing Guidelines range that inclusion of such uncharged conduct causes.

For example, the PSR, relying on the government's assertion that it can prove insider trading and manipulation on all stocks by a preponderance of the evidence (PSR ¶ 106), includes BGII in its calculation of "loss" from manipulation, even though the jury was not asked to make and therefore made no finding as to that stock. At $2,451,958.82, BGII accounts for by far the largest amount of "loss" alleged in the PSR. However, a review of the evidence presented at trial shows that the testimony of the government's own witness, SEC Attorney Doug Gordimer, disproves that Mr. Elgindy committed insider trading or manipulation with regard to BGII.

First, the only evidence regarding BGII is Cleveland's testimony that he learned of raids by the Texas Rangers and of an SEC investigation into BGII from Royer in December 2001 and that he passed on that information. (Tr. 908-10.) According to GX-JL-1, Agent Royer did no

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fact that the government's proof of "uncharged" or "relevant" conduct does not rise to the level of, e.g., proof beyond a reasonable doubt.

searches related to BGII. The information about the Texas Rangers came from an article in the newspaper from October 2001. (DX 3534 (article); DX 5322 (email from Mr. Elgindy to Brent Baker of article).) Moreover, Agent Royer could not have been the source of the information about an SEC investigation in December 2001 because the SEC investigation was started based on Mr. Elgindy's Insidetruth.com report published in January 2002. As SEC Attorney Gordimer testified:

10 Q I'd like to talk to you about a stock called BGII. That
11 is the symbol.
12 And do you recall the business of BGII?
13 A Yes.
14 Q What was that?
15 A They were in the business of putting eight liners or
16 gambling machines in Seven-Elevens and road stops, rest stops
17 and things like that.
18 Q Do you recall, I think you talked about that that was an
19 investigation that began based on information obtained by Mr.
20 Elgindy and other people who worked with Mr. Elgindy on the
21 site?
22 A I believe that the opening of the informal investigation
23 was based on the report that was on InsideTruth.com.

(Tr. 3640.) And Gordimer testified that no one at the SEC was looking at this company until Agent Royer told Mr. Gordimer about the Insidetruth.com Report. (Tr. 3642.) Thus, Mr. Elgindy and his site members did not trade on any confidential information regarding BGII.

With regard to the manipulation allegations, Mr. Gordimer testified that BGII's stock price plummeted not because of any manipulation by Mr. Elgindy, but because the truth became known to the public, truth that was published in Mr. Elgindy's Insidetruth.com report and mirrored in the news:

15 Q The stock price plummeted, correct?
16 A Yes.
17 Q And it plummeted because the investors found out the
18 company had been involved with fraud?
19 A I believe it initially plummeted because of the article
20 in the newspaper disclosing some of the things that were
21 already in InsideTruth.com website. It plummeted before we
22 brought our action.

4 A I don't know if it was just because of InsideTruth.com.

I think there was also an article in the newspaper about it but either way it did fall not too long after this came out.
Q You recall -- I think you said the information in the article was the same information as InsideTruth?
A I don't know if it was all identical but very similar.
Q There was no doubt in your mind it was falling because the truth of the company was coming out, correct?
A It was falling because it showed the company was not telling the truth earlier.
Q So investors saw that what they are investing in was, in fact, not what they expected it to be correct?
A Yes?

(Tr. 3650-51.) Thus, as Mr. Elgindy argued at trial, his *truthful* exposure of the stock on Insidetruth.com caused the stock price to fall and caused the SEC to open its investigation into BGII.

As the BGII example demonstrates, the government cannot meet, and cannot be assumed to have met, its burden of proof for insider trading or manipulation beyond the four stocks as to which the jury has spoken.

2. Mr. Elgindy's Guidelines Calculation for the Securities Fraud Case

Mr. Elgindy was convicted on charges relating to securities fraud, extortion, and defrauding Anthonypacific.com site members by frontrunning or trading against his own advice. The convictions relating to securities fraud include one count of RICO conspiracy involving securities fraud predicate acts (Count One, predicate acts 1 through 5), one count of conspiracy to commit securities fraud (Count Two), and four substantive counts of securities fraud (Counts Three through Six) (hereafter the "securities fraud convictions"). The convictions related to extortion include the same count of RICO conspiracy involving extortion predicate acts (Count One, predicate acts 9 and 11), one count of conspiracy to commit extortion (Count 10), and one substantive count of extortion (Count 12) (hereafter the "extortion convictions"). The convictions related to defrauding site members include three substantive counts of fraud related to frontrunning or trading against advice in the stocks of VLPI and INIV (Counts 21, 29, and 32)

(hereafter the "fraud-against-site-members convictions"). Our Guidelines analysis proceeds in the same order as the PSR's, calculating the offense level for the fraud convictions together based on the aggregated loss/gain from all the fraud offenses, separately calculating the offense level for the extortion convictions, and then doing the grouping analysis to achieve the appropriate total offense level.

a. The Proper Offense Conduct Guideline for the Securities Fraud Convictions is § 2B1.4 (Insider Trading)

Although each securities fraud charge alleged two different theories, market manipulation and insider trading, we submit that the Guidelines analysis for the securities fraud convictions should proceed exclusively under the insider trading theory that was the heart of the government's case and that is governed by USSG § 2B1.4. The first reason this is so is because the government fell far short of proving at trial that manipulation of any stock occurred. The government presented no credible or reliable evidence that Mr. Elgindy or any coconspirators injected into the market any materially false information (through statements or trading) intended to artificially affect the price of any stock. *See GFL Advantage Fund v. Colkitt*, 272 F.3d 189, 207 (3d Cir. 2001) (defining market manipulation); Jury Charge, Tr. 8844 (manipulation means conduct designed to deceive "by artificially affecting the price of securities"). In fact, there was no evidence of *any* impact on a stock price, artificial or otherwise, from these alleged activities.

Indeed, as Mr. Elgindy argued and believes he proved at trial, and as the government barely contested, all of the stocks about which the government offered evidence were in fact the stocks of scam companies or at the very least seriously overvalued companies. Thus, any alleged activity by Mr. Elgindy or his site members that may have had the effect of driving the prices of these stocks down – more precisely, down closer to their true value – cannot be regarded as

evidence of market manipulation. *See GFL*, 272 F.3d at 205-207, 209 ("[S]hort selling, even in large volumes, is not in and of itself unlawful and therefore cannot be regarded as evidence of market manipulation. That short selling may depress share prices, which in turn may enable traders to acquire more shares for less cash . . . is not evidence of unlawful market manipulation, for they simply are natural consequences of a lawful and carefully regulated trading practice.").

Second, the only reasonable interpretation of the jury's verdicts is that the jurors *rejected* the market manipulation claims across the board. In acquitting Mr. Elgindy on the securities fraud charges comprising Counts 7 and 8, as well as rejecting predicate acts 6 and 7 of Count One (RICO), the jury necessarily found that the government failed to prove securities fraud under *both* its insider trading and manipulation theories for two of the stocks as to which it made such allegations: SLPH and FLOR. (*See* Jury charge, Tr. 8850 (instructing the jury to evaluate the proof separately under both theories).) The manipulation evidence presented to the jury, however, was the same for every stock, including SLPH and FLOR. To take just one example, the government argued in summation that everything Mr. Elgindy said was part of a fraud on and manipulation of the market because his allegedly false statements about anything (his background, his prowess as a trader, whether he frontruns) amounted to a pervasively deceptive atmosphere on his websites. (Tr. 8117.) Had the jury accepted this theory (which Mr. Elgindy argued at trial and continues to maintain is meritless), it logically should have convicted Mr. Elgindy of manipulation on every stock, including SLPH and FLOR.

The same is true for all of the government's manipulation arguments. The government argued in summation that it had proved manipulation through: (1) group or controlled trading; (2) false statements to the market; and (3) timed release of negative information to put downward pressure on a stock. (Tr. 8008, 8025-26, 8117-21.) Putting aside that "the dissemination of truthful information, negative or not, into the marketplace by itself is not market manipulation"

(Jury charge, Tr. 8845), and that "group trading by itself without the intent to deceive and defraud is not market manipulation" (Jury charge, Tr. 8845), the government attempted to present precisely this kind of evidence for SLPH and FLOR and the jury rejected it. The only logical conclusion to be drawn from the jury's rejection of the manipulation charges as to SLPH and FLOR then is that the jury must have rejected the government's manipulation theory as a basis for securities fraud across the board.[23]

Third, and even assuming, *arguendo*, that the jury's guilty verdicts on the securities fraud counts could be considered ambiguous as to whether the findings were based on manipulation or insider trading or both -- an ambiguity that, if it exists, was created by the government's decision to combine its two theories in single counts and its opposition at the end of trial to Mr. Elgindy's more specific proposed special verdict form (Tr. 8782 (government request for general verdict form); Tr. 8923-24 (defense request for special verdict form listing each securities fraud theory separately) – any such ambiguity must and should be resolved in Mr. Elgindy's favor.

United States v. Sturdivant, 244 F.3d 71 (2d Cir. 2001), is directly on point. There, the jury returned a general verdict on a single count charging two distinct drug transactions and the district court sentenced the defendant based on the total amount of drugs it found involved in

[23] The government argued that Mr. Elgindy caused "massive sell orders" that depressed stock prices. The evidence shows, however, that Mr. Elgindy made very few official short calls on the stocks of conviction and thus could not have caused massive sell orders even if his site members followed those calls – which they very often did not. For OSIN, there was one call. For PLMD, there were three, one in March, one in April and one in July 2001 (which included the comment "I am not short, exited"). For JUNM, there were two, one of which included the comment that the stock was thin, maybe a gator, and people should trade accordingly and watch it. For SEVU, there were two, one of which included the comment that the stock was building on rallies or on stagnation. (*See* GX 3001; Kelner Aff. Ex. G.) This alone severely undermines the government's manipulation argument with regard to these stocks. But Mr. Elgindy did not only trade in these "thin" stocks. The majority of his time and concentration was spent on large volume NASDAQ stocks like DTHK, for which he made 12 short calls as the stock dropped from the $30s to $10, HAND, for which he made 16 short calls and three long calls as the stock went from the $60s, $70s and $80s to $11, and ZIXI, for which he made 8 short calls as the stock dropped from $27 to $6. (*See* GX 3001; Kelner Aff. Ex. F.)

both transactions. *Id.* at 75. On appeal, the Second Circuit held that the sentence did "not properly take into account 'the uncertainty of whether a general verdict of guilty conceal[ed] a finding of guilty as to one crime and a finding of not guilty as to the other.'" *Id.* at 78 (quoting *United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981)). The Court went on to explain that:

> Principles of equity prohibit the government from benefitting from the prejudicial ambiguity that the government alone was responsible for creating. It was the government which submitted the duplicitous indictment to the jury, and which decided not to seek a special verdict. By these actions, the government has effectively conceded that the indictment is not impermissibly duplicitous, *i.e.*, that the defendant will not be prejudiced by the harms caused by duplicity, including the harm arising from a jury verdict that does not definitively communicate the jury's findings with respect to the two crimes charged in Count II.

Id. The remedy for such uncertainty was to sentence the defendant based upon conviction for only the offense carrying the lesser penalty. *Id* at 80. As the Court concluded in its directions on remand: "The district court must give defendant the benefit of the verdict's ambiguity and sentence him assuming that he was convicted of the transaction involving the lower drug quantity--the Evening Transaction--and acquitted him of the transaction involving the higher drug quantity--the Afternoon Transaction." *Id.*

Here, the government was put on notice by defendant Daws' September 24, 2003 Pre-Trial Motions, in which Mr. Elgindy joined, that the duplicitous nature of the securities fraud counts in the superseding indictment could lead to this exact problem. (*See* Memorandum of Law in Support of Jonathan Daws' Pre-Trial Motions at 31 (arguing that the duplicitous securities fraud counts implicate a defendant's right to, among other things, "appropriate sentencing" (quoting *United States v. Crisci*, 273 F.3d 235, 238 (2d Cir. 2001)) and citing *Sturdivant*, 244 F.3d at 75)); Defendant Anthony Elgindy's Motion to Join Defendant Daws' Pretrial Motions.) The defense argued specifically that "a defendant convicted of 'securities

fraud' as currently alleged by the government will have no way of knowing whether the jury convicted him of insider trading or market manipulation." (*Id.*) In its opposition brief, the government *conceded* that it would be "estopped from acting on any interpretation of the jury's verdict that would prejudice [defendants'] double jeopardy rights," citing *Sturdivant*, adopting its "estoppel" language and citing to the very pages in that decision (77-78) where the Second Circuit discussed the sentencing harms that impermissibly flowed from the duplicitous charge and the ambiguous verdict. (United States Memorandum of Law in Opposition to the Defendants' Pretrial Motions at 70-71.)

Accordingly, because the government did not properly charge insider trading and market manipulation as separate counts, objected to the jury specifying whether it was convicting for insider trading or market manipulation or both, and effectively conceded in its pretrial motion papers that it would be estopped from arguing for any adverse consequences flowing from the ambiguity of its own creation, Mr. Elgindy's sentence on the securities fraud counts can only be calculated on the assumption that he was convicted of insider trading, which carries the lesser sentencing consequences, and acquitted of the more severely penalized market manipulation.

b. Calculating the Offense Level for the Securities Fraud Convictions Based on Insider Trading

Having established the applicability of the insider trading Guideline, the base offense level under § 2B1.4 is 8, two levels higher than the general fraud guideline § 2B1.1. This is because insider trading "is treated essentially as a sophisticated fraud." USSG § 2B1.4, comment. (backg'd.); *see* § 2B1.1(b)(8)(C) (2 level increase for sophisticated means). Thus, the only specific offense characteristic applicable to the offense of insider trading is the amount of "gain resulting from the offense." USSG § 2B1.4(b)(1). The "gain resulting from the offense" is defined in the commentary to § 2B1.4 as "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 inside information." USSG § 2B1.4, comment.

Three questions must be answered before this calculation can be made.[24]

- The first question is what are the stocks as to which the government has proven that Mr. Elgindy received and disseminated inside information. We submit that the answer is only the four stocks as to which the jury made a finding with respect to the securities fraud/insider trading charges: OSIN, PLMD, JUNM and SEVU.

- Once the universe of relevant stocks is identified, the second question is whose trades should be included. The Guidelines commentary specifies that Mr. Elgindy's gain calculation is to include the gains of those "acting in concert with" him and his "tippees." We submit that there is sufficient ambiguity on the record about who was disseminating what information to whom, and sufficient evidence that others who were involved in the Anthonypacfic.com website and who have admitted their own guilt were acting independently of Mr. Elgindy, that a fair calculation should be limited to Mr. Elgindy's insider trading profits and at most, the insider trading profits of the two site members who actually testified in open court that they traded on law enforcement information regarding the conviction stocks that they received through the site (i.e., Messrs. Hansen and Terrell).

- Once the universe of proven stocks and the universe of proven coconspirators is properly identified, the third and last question is which particular trades are properly included in the profit calculation. We submit that the calculation should include only those specific trades that both followed the receipt of the alleged inside information and preceded the point at which the alleged inside information reasonably may be presumed to have been impounded into the price and therefore was no longer non-public or material.

i. Identifying the Proven Insider Trading Stocks

The first step in making a reasonable calculation of the gain from insider trading is to identify the stocks as to which the government has *proven* that Mr. Elgindy received and traded on inside information. Clearly the stocks as to which Mr. Elgindy was acquitted on securities fraud/insider trading charges – FLOR and SLPH – should be excluded. As noted *supra* in Part

[24] The methodology for calculating insider trading gains that is outlined in the following pages is the same methodology we set out in Mr. Elgindy's Memorandum in Opposition to Forfeiture, dated August 2, 2005.

II.C.1.a., such acquitted stocks should be excluded as a matter of law. In addition, such acquitted stocks should be excluded because the government's inadequate proof does not even come close to satisfying the preponderance standard, much less a heightened standard of proof beyond a reasonable doubt that we argued in Part II.C.1.b. applies. The record makes clear that Mr. Elgindy neither received nor traded on any information from Agent Royer with regard to SLPH and FLOR. Mr. Elgindy investigated SLPH, did a report on SLPH, interviewed SLPH informant Todd Orme and contacted Brent Baker of the SEC regarding SLPH before Royer even found any information on the company as a result of any of his searches. (*See* Ex. 19 (SLPH Timeline).) And FLOR was a fraudulent "cash bribe" stock, something Cleveland found out from his contact at Solomon Grey and passed on to Mr. Elgindy and Agent Royer. (Tr. 2005-06.) Agent Royer provided absolutely no material information on FLOR.

As to the remaining stocks as to which the government introduced evidence of the dissemination of alleged inside information to Mr. Elgindy and/or from Mr. Elgindy on the Anthonypacific.com website,[25] there is no jury finding that insider trading (or securities fraud of any sort) was proved. As to each of these stocks, therefore, before it can be considered for inclusion in any calculation of profits "*resulting from*" the alleged insider trading (§ 2B1.4(b)(1)) the government must show and the Court must find beyond a reasonable doubt at a minimum: (1) that the information disseminated about the particular stock was non-public and came from an FBI database or other law enforcement source (Jury Charge, Tr. 8838); (2) that such information was material (*id.* at 8839-40); and (3) that such information "informed" a particular trade in that

[25] For BGII, BIOP, EGBT, FRSH, GENI, GAHI, HDVG, IVSO, JUNM, MHUT, NMNW, NSOL, OSIN, PLMD, RTCI, SEVU, SXML, TDNT, and VLPI, the government submitted evidence of the dissemination of alleged law enforcement information on the website. For BBAN, BYTE and JGUR, the government submitted evidence of dissemination of law enforcement information to Mr. Cleveland and Mr. Elgindy, but not to the site. For all other

stock (*id.* at 8841-42). We submit that the government has not offered sufficient proof on these prerequisite points as to any of the stocks beyond the four stocks as to which the jury rendered its verdicts and Mr. Elgindy would challenge – at any evidentiary hearing – any claim to the contrary. Accordingly, absent an adequate showing by the government and specific stock-by-stock findings by the Court, there is no basis in the record for including profits attributable to any of the stocks beyond the four conviction stocks.

ii. Identifying the Relevant Trader(s)

The second step in calculating the gain from insider trading in this case is identifying whose trades should be included. As noted, the commentary to § 2B1.4 indicates that the gain resulting from the offense includes the total increase in value realized through trading in the relevant securities by the defendant "and persons acting in concert with the defendant or to whom the defendant provided inside information." § 2B1.4, comment. (backg'd.). First, we submit that the government has failed to prove (beyond a reasonable doubt or otherwise) that anyone other than Agent Royer, who never traded any of the relevant securities and received no gain whatsoever, was "acting in concert with" Mr. Elgindy with regard to insider trading on the conviction stocks. Second, we submit that the "persons . . . to whom [Mr. Elgindy] provided inside information," i.e., Mr. Elgindy's "tippees," must be limited to the convicted defendants who testified at trial and specifically admitted to insider trading in specified stocks based on information provided by Mr. Elgindy on the website (i.e., Mr. Hansen and Mr. Terrell).

The record is rife with ambiguity as to who was disseminating what information to whom, and when, and therefore as to who was acting "in concert" with whom in providing,

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stocks, the government did not submit any evidence of the dissemination of law enforcement information to Mr. Elgindy.

disseminating and trading on inside information. Derrick Cleveland testified that he acted independently of Mr. Elgindy and in fact purposely kept from Mr. Elgindy information about stocks that he received from Agent Royer and information about his relationships with other traders. (*See supra* Pt II.B.2.) There were times when Cleveland kept to himself the information that he received from Agent Royer and there were times when he kept such information from Mr. Elgindy but shared it with Mr. Terrell, Mr. Daws and others. (*See id.*) Mr. Terrell was Cleveland's friend and interacted almost exclusively with Mr. Cleveland; he had no interaction with Mr. Elgindy outside chat. In fact, Terrell received most of his law enforcement information directly from Mr. Cleveland before it was put on Anthonypacific.com and received law enforcement information that was never even given to Mr. Elgindy. (*See supra* Pts. II.B.2., II.C.3.d.i.) Thus, Cleveland was often acting independently of Mr. Elgindy and without Mr. Elgindy's knowledge in disseminating information he received from Agent Royer.

In addition, Mr. Daws admitted in his plea allocution that he received information directly from Agent Royer and Derrick Cleveland and that he disseminated it to other traders completely independently of Mr. Elgindy. There is also evidence that Jonathan Daws participated in the independent chat room RC Chat from which Mr. Elgindy was specifically excluded and the existence of which was purposely kept hidden from Mr. Elgindy. (*See* Kelner Aff. ¶¶ 42-43.) For example, in the RC Chat log for November 27, 2000 starting at 15:50, Mr. Daws, aka, "Trebuchet", states that he does not share any information from RC Chat with Mr. Elgindy or on Anthonypacific.com and that he has not told anyone that RC Chat even exists. (*Id.*) In the RC Chat log for January 12, 2001 starting at 15:22, an RC Chat member states that he wants nothing to do with Mr. Elgindy. In the RC Chat log for March 12, 2001 starting at 12:02, Daws asks if he should give Mr. Elgindy information about OSIN and says he will keep it

secret if the RC Chat members prefer, but states that he likes the idea of Mr. Elgindy "being the lightning rod" for trouble on OSIN. (*Id.*)

In the RC chat room, Mr. Daws disseminated the law enforcement information that he received from Jeffrey Royer, Derrick Cleveland and Mr. Elgindy without Mr. Elgindy's knowledge. For example, in the RC Chat log for March 1, 2001 starting at 16:36, Mr. Daws says "Ok I got news for this site only. No one repeats this. Ok. Just talked to FBI agent. OSIN under investigation by SEC. . . . Nice to get confirmation. . . . . I am going to encourage him to short a little OSIN tomorrow." In the RC Chat log for March 16, 2001 starting at 11:29, Mr. Daws states that Derrick is asking him about FWLD/SLPH and that he gave Derrick information on SLPH for "Jeff the FBI guy" to look at. Mr. Daws then states that Jeff is Derrick's friend who feeds Derrick information about scam companies. Mr. Daws then states that Jeff "confirmed the OSIN SEC investigation to [him]." In the RC Chat log for April 23, 2002 starting at 14:01, Mr. Daws states that Jeff gave the RC Chat members the Fort Worth SEC contact for BGII. In the RC chat log for April 29, 2002 starting at 11:11, Mr. Daws states that he has spoken to Jeff Royer who is working in Mr. Elgindy's office, calling Royer his "bug" in Mr. Elgindy's office. (*Id.* ¶ 44.)

Moreover, many of the stocks included in the government's summary trading exhibits and therefore in the PSR as part of the "loss" calculation for Mr. Elgindy are stocks that were discussed in the RC Chat room without Mr. Elgindy's knowledge or participation, *but were not discussed* on Anthonypacific.com or were not traded by Mr. Elgindy. (*Id.* ¶ 45; *see also id.* ¶ 7 (listing non-41, RC Chat stocks Britesmile; Global Seafood; Micromem Tech.; Piranha, Inc.; Teligent, Inc.; Creative Host Services; Nanopierce; Princeton Video Imaging).) This evidence

makes clear that Mr. Daws acted independently of Mr. Elgindy and without Mr. Elgindy's knowledge in receiving, disseminating, and trading on law enforcement information.

In addition, as to possible tippees, only Mr. Hansen and Mr. Terrell admitted in Court to insider trading in specified stocks based on information provided by Mr. Elgindy on the website, and thus only those individuals can be considered Mr. Elgindy's tippees. Cleveland testified that he traded on the "inside" information he received from Agent Royer, not on any "inside" information he received from Mr. Elgindy. Therefore he was not a "tippee" of Mr. Elgindy. As to Mr. Daws, while he did plead guilty to insider trading, he specifically stated that in only "*some cases*" did "the law enforcement information inform[] my decision to trade" (Daws Plea Tr. at 22 (emphasis added)) and in only some cases did his information come from Mr. Elgindy, as opposed to Agent Royer or Mr. Cleveland (*id.*). He did not specify – and we thus do not know – in which cases the alleged inside information did not come from Mr. Elgindy or "inform" Mr. Daws' decision to trade. As to other alleged tippees (such as Kendall McGreggor and his fund Highgate, David Slotnick, Joseph Spiegel and his fund Spinner, and Jeffrey Thorpe and his fund at Langley Capital), none of these individuals or entities (or representatives of such entities) was ever called to testify that they either received and were in possession of the alleged inside information or that their trades in any specific stock were "informed by" such information.[26] Absent such stock-specific and trade-specific testimony from these other individuals and entities, and absent an opportunity for Mr. Elgindy to challenge any such evidence, there is no basis for a finding that the government has proven beyond a reasonable doubt (or even by a preponderance)

[26] Moreover, the trading by these hedgefunds such as Gryphon, Highgate, and Spinner, who were not members of Mr. Elgindy's site, was not foreseeable to Mr. Elgindy. Indeed, with the exception of Mr. Daws, the individuals responsible for trading in these funds were active members of RC Chat and *not* active members of Anthonypacifc.com.

that any of these possible tippees' stock gains "*resulted from*" the alleged inside information that was disseminated.

We submit that the government's recent Guidelines stipulation in connection with the guilty plea of co-defendant Jonathan Daws is highly relevant in this respect. It appears that the government stipulated that the insider trading profits for which Mr. Daws should be held accountable under § 2B1.4 fell in the range of, at most, $120,000 to $200,000.[27] In other words, it appears that the government stipulated that Mr. Daws should be held accountable only for some sub-set of the trading profits the government attributes directly to him and not for any trading profits of other convicted co-conspirators (including Mr. Cleveland or Mr. Elgindy) or other individuals arguably acting "in concert with him," notwithstanding the facts that he – like Mr. Elgindy – both received certain information directly from Cleveland and Royer and in certain instances disseminated the information to others. We respectfully submit that Mr. Elgindy should be treated no worse than the government has stipulated Mr. Daws should be treated, and that accordingly, Mr. Elgindy's trading profits calculation should be limited to his own trading and the trading of the only two tippees who testified that they received inside information on specified stocks from Mr. Elgindy through the Anthonypacific.com site and traded on it.[28]

[27] If the stipulated range is 18-24 months, as the plea transcripts indicates, that corresponds to a total offense level of 15 (for someone in Criminal History Category I), which must reflect a Guidelines calculation of 18 minus 3 levels for acceptance. As the base offense level under § 2B1.4 is 8, the greatest possible figure from the § 2B1.1 loss table would be $120,000-$200,000, which would add 10 levels to the base offense level of 8.

[28] We also note that using our method of calculation on the 19 stocks for which the government submitted evidence that law enforcement information was disseminated on the Anthonypacific.com website results in trading profits for Mr. Daws of $195,361.51. (*See* Kelner Aff. ¶ 27 and Ex. E.) Thus, our method of calculation appears to closely conform to the method the government used to calculate the trading profits Mr. Daws derived from the alleged conspiracy.

iii. Identifying the Relevant Trades

The third and final step in calculating the relevant insider trading gains for Guidelines purposes is to identify which particular trades are properly included in the calculation. Of course trades made on dates *prior to* when the first alleged inside information was disseminated must be excluded. (*See* Jury Charge, Tr. 8842 ("For each stock, the government alleges insider trading only for those trades by a defendant that occurred in a particular stock after the defendant became aware of material, non-public information concerning that stock.") What we have done to arrive at what we believe is a reasonable, fair and economically accurate calculation of insider trading gain is to determine the profits from trades in the relevant stocks that occurred (1) after the dissemination of inside information on each of those stocks and (2) before the inside information was either no longer reasonably informing the trade or was impounded into the price. *See id.*; *United States v. Libera*, 989 F.2d 596, 601 (2d Cir. 1993) ("Once the information is fully impounded in price, such information can no longer be misused by trading because no further profit can be made."); *see also S.E.C. v. Mayhew*, 121 F.3d 44, 50 (2d Cir. 1997); *SEC v. MacDonald*, 699 F.2d 47, 54-55 (1st Cir. 1983) (en banc) (excluding from insider trading profits the increase in value a reasonable time after the previously non-public information became public).

Using these principles as a guide, we took into account all short positions in each of the relevant stocks entered into between the first date on which alleged inside information about each such stock was disseminated and three days after the last date on which such information was disseminated. Although we maintain that only Mr. Elgindy's, Mr. Hansen's and Mr. Terrell's profits in the four conviction stocks should be included in the gain calculation, we calculated the profits using our method for all of the convicted defendants. For Mr. Elgindy and Mr. Cleveland, we assumed that the information was disseminated immediately and directly to

them from law enforcement and therefore calculated profits on short positions in each of the relevant stocks taken between the first date on which a law enforcement database was accessed and three days after the last date on which a law enforcement database was accessed with regard to each such stock. For Mr. Terrell and Mr. Hansen, the government has argued that they received their information from Mr. Elgindy through publication on the Anothonypacific.com website and we therefore calculated profits on their short positions in each of the relevant stocks taken between the first date on which alleged inside information about the stock was disseminated on the site and three days after the last date on which such information was disseminated on the site.

We chose three days as a reasonable time within which inside information would inform or motivate someone's trade. After three days have elapsed, the connection between the trade and the information becomes too attenuated. Furthermore, inside information concerning a company's stock is quickly absorbed by the market through trading activity, so that the price of a security will reflect the inside information in a reasonable amount of time after the insiders begin trading. *See Libera*, 989 at 601; *Mayhew*, 121 F.3d at 50. We choose three days as a reasonable (and arguably conservative) amount of time for the information to be impound into the price of the stocks in question. Once the date range was determined, we calculated the difference between the amount received for a given short position and the amount paid for the next cover (or combination of covers) in that stock for an offsetting number of shares. *See SEC v. McCaskey*, No. 98-CIV-6153 (SWK) (AJP), 2002 WL 850001, at *10 (S.D.N.Y. Mar. 26, 2002) (discussing "pocket measure" of calculating gains from insider trading where there is a promptly offsetting trade).

Following this methodology, we calculated that Mr. Elgindy's total trading profits from insider trading on the four conviction stocks – OSIN, PLMD, JUNM and SEVU – amount to

$41,897.89. (Kelner Aff. ¶ 23 & Ex. D.)[29] Applying this same methodology to the four conviction stocks for Mr. Hansen and Mr. Terrell adds $22,838.64 (*see id.* ¶ 23 & Ex. D), for a total gain resulting from the offense of $64,736.53.[30]

In sum, Mr. Elgindy submits that the calculation under § 2B1.4 should be limited to his own trading and the trading of Hansen and Terrell in the specific four stocks as to which the jury rendered verdicts of guilty, based on the inside information disseminated to him and through him on the site, for a total of $ 64,736.53. This amount of gain results in a 6-level increase to the base offense level of 8, for a total offense level for the securities fraud convictions of 14.[31]

We also submit that there are no applicable adjustments. We address the two adjustments suggested by Probation, role in the offense and obstruction of justice, in our objections to the PSR's Guidelines calculations.

c. Calculating the Offense Level for the Fraud-Against-Site-Members Convictions

The appropriate offense conduct guideline for the fraud-against-site members convictions is USSG § 2B1.1, the general fraud provision. This carries a base offense level of 6. The PSR does not address these convictions separately from the securities fraud convictions and does not include any loss from these convictions in its calculation. In any event, none of the §

[29] Using the same methodology, Mr. Elgindy's total trading profits from all 22 stocks as to which the government submitted evidence that inside information from law enforcement sources was disseminated to Mr. Elgindy, plus the conviction stocks, would amount to $157,506.93. (*Id.* ¶¶ 24-26 & Ex. E). If the Court determines that some or all of these 22 stocks should be included in the insider trading calculation after an evidentiary hearing, we will provide the appropriate calculation of profit for those stocks at that time.

[30] Although we do not believe his profits are properly included in this calculation, we note that Mr. Cleveland's profits on these four stocks, calculated according to our methodology, is slightly under $7,000. Adding Mr. Cleveland's gain in these stocks results in a total gain of $71,614.66.

[31] We are using the version of the Guidelines effective November 1, 2001 for our calculations for reasons set forth *infra* in Part II.C.3.a.

2B1.1 specific offense characteristics enhancements apply to Mr. Elgindy's conduct in this regard because (1) the government did not present any evidence of any loss to any alleged victim or any gain to Mr. Elgindy resulting from the fraud-against-site-members offenses, and we are aware of no such evidence; (2) the site members having incurred no loss, there were no victims; and (3) the offense did not involve sophisticated means. In addition, there is no role enhancement because Mr. Elgindy acted alone in this conduct, which was not charged as part of the RICO or any other conspiracy. Thus, the offense level for these convictions would be 6.

d. Calculating the Offense Level for the Extortion Convictions

The appropriate offense conduct guideline for the conspiracy to commit extortion and extortion of Nuclear Solutions (NSOL) is § 2B3.3, "Blackmail and Similar Forms of Extortion." According to the commentary to § 2B3.3, this offense conduct guideline applies to violations of 18 U.S.C. § 1951 "where there clearly is no threat of violence to person or property." USSG § 2B3.3 comment. (n.1). The commentary also mentions "[e]xtortionate threats to injure reputation" as an example of the type of extortion that falls under this offense conduct guideline. *See id.* comment. (backg'd.). The interaction between Mr. Elgindy and the CEO of NSOL, Paul Brown, clearly falls within this category of extortion. (*See supra* Pt. II.B.4.) The government argued as much in its summation while discussing the conspiracy to extort and the extortion of NSOL. (Tr. 8092 ("It doesn't have to be a physical threat . . . . [W]e have proven Mr. Brown was under economic threat.").) Any threat by Mr. Elgindy that led to his receipt of discounted shares of NSOL was clearly a financial or economic threat and/or a threat to the reputation of Paul Brown and Nuclear Solutions, and without doubt did not involve a threat of violence. Thus, § 2B3.3 applies.

The only specific offense characteristic under § 2B3.3 is the "amount obtained or demanded." USSG § 2B3.3(b)(1). Pursuant to his agreement with Paul Brown, Mr. Elgindy purchased 325,000 shares of NSOL stock at $1.00 per share on January 31, 2002, when its market value was $1.40 per share. (*See* GX 2038 at 66 (trade ticket), 74 (account statement); DX 7481 (NSOL price chart).). The amount obtained or demanded would be, at most, the discount obtained by Mr. Elgindy from Paul Brown, i.e., the number of shares multiplied by the difference between the price at which he purchased the stock and its then-market value. 325,000 shares at a discount of $ 0.40 per share amounts to a total discount of $130,000. Because the value of the discount obtained by Mr. Elgindy from Paul Brown was more than $5,000, his offense level must be increased based on the table in § 2B1.1. USSG § 2B3.3(b)(1)(B). A $130,000 extortion thus results in a 10-level increase, for a total offense level of 19 for the extortion convictions.

We also submit that there are no applicable adjustments. We address the two adjustments suggested by Probation, role in the offense and obstruction of justice, in our objections to the PSR's Guidelines calculations.

e. Grouping and the Combined Offense Level

The securities fraud convictions and fraud-against-site-members convictions (hereafter the "Fraud Group") are grouped under USSG § 3D1.2(d), which specifically provides for grouping of offenses covered by §§ 2B1.1 and 2B1.4. The commentary to § 3D1.2 provides that a conspiracy to commit an offense is grouped with the substantive offense if the substantive offense is the object of the conspiracy, which is the case here. USSG § 3D1.2 comment. (n.6). Section 3D1.3(b) provides that the group offense level for counts grouped together pursuant to § 3D1.2(d) is the offense level corresponding to the aggregated quantity. As we showed above, the

offense level for the aggregated gain/loss resulting from the securities fraud offenses is 14.[32] Therefore, the Fraud Group offense level is 14.

The extortion convictions (hereafter the "Extortion Group") are specifically excluded from grouping with the fraud convictions under § 3D1.2(d). The conspiracy to commit extortion and the extortion that was the object of that conspiracy are grouped together under § 3D1.2(b). USSG § 3D1.2, comment. (n.4). Section 3D1.3(a) provides that the group offense level for counts grouped pursuant to § 3D1.2(b) is the highest offense level of the counts in the group, here the offense level for the substantive offense of extortion. As we showed above, the offense level for the extortion of NSOL is 19. Therefore the Extortion Group offense level is 19.

The combined offense level is determined under USSG § 3D1.4 by taking the highest group offense level and increasing it in accordance with the number of units applicable to all Groups. The extortion Group has the highest offense level at level 19 and therefore is one unit, § 3D1.4(a), and the fraud Group, which at level 14 is 5 levels less serious than the extortion Group, is ½ unit, § 3D1.4(b). This corresponds to a 1-level increase to the highest group level of 19, for a total offense level of 20.

In sum, our calculation is as follows:

Securities Fraud Group	
Base Offense Level (§ 2B1.4)	8
Gain (specific offense characteristic) $64,736.53	6
	14
Extortion Group	
Base Offense Level (§ 2B3.3)	9
Loss (specific offense characteristic) $130,000	10
	19
Grouping Units	

[32] As noted above, the PSR does not include any loss to any alleged victim or any gain to Mr. Elgindy resulting from the fraud-against-site-members offenses, and we are aware of no such evidence. Accordingly, the fraud-against-site-members convictions should not have any impact on the Fraud Group offense level.

Extortion Group (Level 19)	1
Securities Fraud Group (Level 14)	½
	1 ½ = highest group level + 1 level
Highest Group Level – Extortion	19
Increase from Securities Fraud Group	1
Total Offense Level	20

f. Criminal History Category

Mr. Elgindy is in Criminal History Category III, based on 2 points for his Texas conviction for which he served four months, USSG § 4A1.1(b), 2 points for having committed the instant offense while on supervised release for the Texas conviction, USSG § 4A1.1(d), and 1 point for having committed the instant offense within two years of release from imprisonment on the Texas conviction, USSG § 4A1.1(e).

g. The Advisory Guidelines Sentence Range Before Any Departures

With an offense level of 20 and criminal history category of III, the Guidelines provide a sentencing range of 41-51 months.

3. Objections to the PSR's Guidelines Calculation[33]

a. Objection to Use of 2003 or 2004 Guidelines

[33] Under "Victim Impact," in addition to the allegations regarding the alleged victims of market manipulation and extortion –which we dispute – the PSR includes allegations made by Matthew P. Tyson, Mr. Elgindy's former attorney and business partner. (PSR ¶¶ 67-69.) Although it does not impact the Guidelines calculation, we object to the inclusion of Mr. Tyson as a victim. The dispute between Mr. Tyson and Mr. Elgindy has nothing at all to do with the allegations in this case and Mr. Tyson most certainly is not a "victim" of any of the alleged conduct in this case. While it is true that Mr. Tyson was awarded a judgment against Mr. Elgindy in a civil dispute arising out of their extremely bitter business break-up, and that this judgment remains outstanding, Mr. Elgindy takes the strongest exception to and disputes Mr. Tyson's allegations of threats and other harassment. In any event, it is Mr. Tyson who has continued to harass and intermeddle in Mr. Elgindy's affairs, by, among other things, making false and scurrilous allegations to the FBI about Mr. Elgindy and members of his family after the events of September 11, 2001.

We object to the PSR's advisory Guidelines calculation for the securities fraud case because the PSR applies the incorrect version of the Guidelines Manual. Although the PSR does not identify which version of the Guidelines Manual Probation used to calculate the offense levels with respect to the securities fraud case, it is apparent from the calculations that Probation used a Guidelines Manual including amendments made after the offenses of conviction comprising the securities fraud case were committed. The offense conduct in the securities fraud case ended no later than Mr. Elgindy's arrest in May 2002, as the PSR recognizes in paragraph 22. The Guidelines Manual in effect at that time was the manual incorporating guideline amendments effective November 1, 2001 (the "November 2001 Guidelines"). Because the fraud guideline applied in the PSR was amended to increase the penalty after the offense conduct in the securities fraud case was completed, the November 2001 Guidelines are the latest version of the Guidelines that can possibly apply to Mr. Elgindy's securities fraud-related convictions.

Where the Guidelines have been amended after the offense is committed and those amended Guidelines produce a more severe penalty, the *Ex Post Facto* Clause prohibits application of the amended Guidelines, and the court must apply the Guidelines Manual in effect on the date of the offense. *See United States v. Keller*, 58 F.2d 884, 890-93 (2d Cir. 1995); *United States v. Paccione*, 949 F. 2d 1183, 1204 (2d Cir. 1991); USSG § 1B1.11(b)(1) (where *Ex Post Facto* clause would be violated, use version of Guidelines "in effect on the date that the offense of conviction was committed"). The PSR's application of the amendments to § 2B1.1 that occurred after the date of the offense produces a dramatically more severe penalty than application of the November 2001 Guidelines. *See, e.g.*, PSR ¶ 110 (applying a base offense level of 7 for § 2B1.1(a)(1) where the applicable earlier version applies a base offense level of 6); ¶ 112 (applying a 6 level enhancement for § 2B1.1(b)(2)(C) where the applicable earlier version applies a maximum enhancement of 4 levels); ¶ 114 (applying an "investment advisor"

enhancement under § 2B1.1(b)(15)(A)(iii) that did not exist at all in the applicable earlier version).[34] The PSR therefore applies an edition of the Guidelines that violates the *Ex Post Facto* Clause of the Constitution.

We understand that Probation believes it properly applied the later, amended version of the Guidelines to the securities fraud case counts of conviction based on the 2004 airport/false statements case. Probation presumably either (1) incorrectly construed the false statements convictions as relevant conduct to the securities fraud case and treated the date of the false statements offense conduct as the date the securities fraud case offense was completed; or (2) incorrectly applied § 1B1.11(b)(3)[35] to allow application of the post-revision Guidelines version to both the post-revision (false statements) and pre-revision (securities) conviction offenses. There is no basis for either assertion.

First, not only is the false statements conduct not relevant conduct to the securities fraud convictions, *see infra* note 39, the Guidelines provide and the Second Circuit has held that the last date of the offense is determined only by conviction offense conduct and not relevant conduct. *See* § 1B1.11, comment. (n.2) (conviction offense conduct determines relevant date "even if the defendant's conduct relevant to the determination of the guidelines range under § 1B1.3 (Relevant Conduct) included an act . . . after a revised Guideline Manual took effect"); *United States v. Zagari*, 111 F.3d 307, 325 (2d Cir. 1997) (remanding for re-sentencing under Guidelines in effect during offense despite post-revision relevant conduct because "the date of

[34] While the *Ex Post Facto* Clause prevents the newly-created four-level "investment advisor" enhancement, § 2B1.1(b)(14), from being applied to Mr. Elgindy's pre-enactment securities fraud offenses, we note as well that the evidence at trial showed that Mr. Elgindy was not an investment advisor at the time of the offense. *See, e.g.*, DX 17106, 11048 et al. (chat indicating that Mr. Elgindy did not give "advice").

[35] Section § 1B1.11(b)(3) states: "If the defendant is convicted of two offenses, the first committed before, and the second committed after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses."

relevant conduct cannot be substituted for the date of convicted conduct"). Thus, the last date of the securities fraud case offense is May 21, 2002, the date of Mr. Elgindy's arrest for that conduct for which he was convicted.

Second, § 1B1.11(b)(3) does not apply to these separate convictions for totally unrelated offenses. The rationale of § 1B1.11(b)(3) rests on the concept that the pre-revision offense conduct – here the securities fraud conduct -- would be relevant conduct to the post-revision conviction – here the false statements convictions -- and would thus be analyzed under the post-revision Guidelines if the defendant were convicted only of the post-revision offense. In such a case, conviction for both offenses should not require application of a different, earlier Guidelines version. *See* USSG § 1B1.11, comment. (backg'd.). The problem here is that the pre-revision securities fraud offense conduct cannot be considered relevant conduct to the post-revision false statements convictions. It is illogical to say that Mr. Elgindy engaged in the securities fraud activities "during" or "in preparation for" the false statements offenses, or "to evade detection or responsibility for" the false statements offenses, § 1B1.3(a)(1). Moreover, the securities fraud offenses and false statements offense cannot be grouped under § 3D1.2(d) (PSR ¶ 142 ("the other acts referenced in this paragraph cannot be further grouped with other acts/counts per the rules in Guideline 3D1.2"), as required by § 1B1.3(a)(2) to find relevant conduct based on its being part of the same course of conduct or common scheme or plan.

In any event, the Second Circuit has affirmed a decision rejecting the application of § 1B1.11(b)(3) on *ex post facto* grounds where "distinct" counts of conviction were committed before a revision to the Guidelines. *See United States v. Johnson*, Nos. 97CR206, 98CR160, 1999 U.S. Dist. LEXIS 8819, *27 (N.D.N.Y. June 4, 1999), *aff'd*, 221 F.3d 83 (2d Cir. 2000). Notwithstanding the fact that all of the counts of conviction in *Johnson* related to a pattern of

traveling across state lines with child pornography and for the purpose of having sex with a minor, the court held:

> that the most appropriate way to handle the multiple counts in light of the *ex post facto* clause is to apply the earlier Sentencing Manual to those counts as to which the underlying conduct was completed before the later version became effective (Groups Two and Four) and apply the current version to counts involving subsequent conduct (Groups One and Three). . . . This is because Johnson engaged in multiple discrete acts, many of which were complete before the November 1, 1996 amendments to the Sentencing Guidelines. . . . [U]nder the facts of this case, application of the policy statement in § 1B1.11(b)(3), requiring the Court to use the current Guidelines where a defendant is convicted of two offenses, the first before, and the second after, a revision to the Guidelines, would violate the *ex post facto* clause and, therefore, must yield.

Id. (citations omitted); *see United States v. Ortland*, 109 F.3d 539, 545-47 (9th Cir. 1997) (rejecting application of § 1B1.11(b)(3) on *Ex Post Facto* grounds where it "would cause [defendant's] sentence on earlier, completed counts to be increased by a later Guideline"); *United States v. Bertoli*, 40 F.3d 1384, 1389 (3d Cir. 1994) (rejecting application of USSG § 1B1.11(b)(3) on *Ex Post Facto* grounds and applying Guidelines on a count by count basis); *see also United States v. Vivit*, 214 F.3d 908 (7th Cir. 2000) (applying § 1B1.11(b)(3) by group based on a course of conduct straddling the enactment of revisions).

Here, the false statements counts and the securities fraud counts of conviction are far more "distinct" than the counts in *Johnson*. The false statements counts were charged in a different indictment (consolidated for sentencing purposes only) and were not even alleged to have been part of the securities fraud conspiracy or part of the same course of conduct. The false statement counts involved different victims and none of the same alleged co-conspirators, had a totally unrelated purpose, were perpetrated through different instrumentalities, and occurred after a distinct break in time lasting almost two years and separated by Mr. Elgindy's arrest on the

securities fraud counts. And, as noted above, these counts can not be grouped under any grouping provision. *Accord Johnson*, 1998 U.S. Dist. LEXIS 8819, at *21 (counts not "sufficiently contemporaneous" to be grouped) (citing *United States v. Bkhtiari*, 913 F.2d 1053, 1062 (2d Cir. 1990) ("Escaping from custody on two occasions, separated by three months, are two separate offenses" that cannot be grouped as "closely related" under § 3D1.2)). Thus, Probation improperly applied a revised version of the Guidelines to the counts of conviction from the securities fraud case based on the false statement counts of conviction.

b. Objection to Use of § 2B1.1 for Securities Fraud Convictions

The PSR improperly applies Offense Conduct Guideline § 2B1.1 to the securities fraud-related counts based on a theory of market manipulation as opposed to insider trading. The Guidelines analysis for the securities fraud-related counts should proceed under the insider trading theory that was the heart of the government's case and that is governed by USSG § 2B1.4. First, Mr. Elgindy must be viewed as being acquitted of the market manipulation charges (*see supra* Pt. II.C.2.a.), and the Court therefore should not even consider such conduct (*see supra* Pt. II.C.1.a.). In any event, the government cannot prove market manipulation with regard to any stock even by a preponderance of the evidence, let alone beyond a reasonable doubt. (*See supra* Pts. II.C.2.a.) If the correct Offense Conduct Guideline -- § 2B1.4 -- is used, none of the specific offense characteristics under § 2B1.1 other than the loss/gain enhancement apply to the calculation of Mr. Elgindy's offense level.[36] We have set out what we believe is an accurate and fair calculation of gain from insider trading for purposes of this enhancement.

[36] To the extent the government argues and the Court finds that § 2B1.1 applies to the securities fraud counts based on the acquitted conduct of market manipulation, we submit that there were no victims (and certainly not "thousands" of victims (PSR ¶ 112)). Among other things, Mr. Elgindy told the public to get out of these stocks on Silicon Investor and Insidetruth.com, so if

Even if there was some ground for determining that market manipulation occurred and should be the basis for the loss calculation –which there is not -- the PSR's unsupported and incredible statement that the trading profits of a group of unidentified and unproven coconspirators over the course of more than two years on 43 stocks, most of which have no connection to the trial, represents the "loss" from market manipulation in this case cannot be relied upon by this Court in determining the loss. *See United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005) ("District courts must take a 'realistic, economic approach to determine what loss the defendant truly caused or intended to cause.'" (quoting *United States v. West Coast Aluminum Heating Treating Co.*, 265 F.3d 986, 991 (9th Cir. 2001)). Rather, the court must do a "thorough analys[i]s grounded in economic reality." *Id.* at 547. The government has never presented any evidence of any gain or loss based on the alleged market manipulation. At trial, the government offered several exhibits tallying alleged trading profits by Mr. Elgindy and other alleged co-conspirators (*see, e.g.*, GX 2582, 2574 and 2579), but offered no similar evidence or analysis of "loss" due to alleged manipulation. And the government certainly has not provided any such evidence or analysis in connection with its forfeiture allegations. Thus, no loss from

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they stayed in them, it was at their own well-informed peril. In addition, we submit that Mr. Elgindy's conduct did not involve "complex manipulative techniques to lower stock prices" (PSR ¶ 113). Furthermore, the loss enhancement under § 2B1.1 substantially overlaps with the sophisticated means and number of victims enhancements, warranting a departure. *See United States v. Lauersen*, 348 F.3d 329, 344 (2d Cir. 2003) (cumulative effects of substantially overlapping enhancements of large loss, more than minimal planning, abuse of trust, and leadership is ground for departure); *United States v. Jackson*, 346 F.3d 22 (2d Cir. 2003) (loss, more than minimal planning, role and sophisticated means were "little more than different ways of characterizing close related aspects of Jackson's fraudulent scheme"); *United States v. Lauersen*, 362 F.3d 160, 164 (2d Cir. 2004) (on rehearing of *Lauerson* and *Jackson*, reiterating departure basis where substantially overlapping enhancements significantly increase sentencing range, "as it does at the higher end of the sentencing table").

market manipulation has been proved even by a preponderance of the evidence, much less beyond a reasonable doubt.[37]

c. Objection to Use of § 2B3.2 for Extortion Convictions

The PSR applies Offense Conduct Guideline § 2B3.2, "Extortion by Force or Threat of Injury or Serious Damage," to the extortion of Floor Décor and Nuclear Solutions in paragraphs 119 and 125, respectively. We object to the application of § 2B3.2 because there is no evidence that Mr. Elgindy or anyone else used force or threatened injury or serious damage to either company or its CEO. The extortion of Floor Décor should not be included at all, and the appropriate offense conduct guideline for the extortion of Nuclear Solutions is § 2B3.3, "Blackmail and Similar Forms of Extortion." (*See supra* Pts. II.B.4, II.C.2..d.)

d. Objection to Enhancement for Role in the Offense – Aggravating Role

The PSR applies a four-level enhancement for a leadership role in the securities fraud, extortion and obstruction offenses pursuant to USSG § 3B1.1(a), all based on allegations that Mr. Elgindy directed Agent Royer to provide confidential law enforcement information, received the largest share of the proceeds, disseminated information to enterprise members, organized their activities, and oversaw the coordinated sales of stock (PSR ¶¶ 73 (offense conduct), 116

[37] Even if there were some conceivable grounds for the government's baseless loss calculation – which there is not -- we submit that the resulting monetary loss enhancement would grossly overstates Mr. Elgindy's gain and his culpability and is therefore a ground for downward departure. *See* § 2B1.1, comment. (n. 15(B)) (downward departure may be warranted where offense level substantially overstates the seriousness of the offense); *United States v. Brennick*, 134 F.3d 10, 15 (1st Cir. 1998); *United States v. Stuart*, 22 F.3d 76, 84 (3d Cir. 1994); *United States v. Emmenger*, 329 F. Supp. 2d 416 (S.D.N.Y. 2004); *see, e.g., United States v. Redemann*, 295 F. Supp. 2d887, 889 (E.D. Wis. 2003) (multiple causes such as economic downturn, negligence of victims caused loss to overstate culpability); *United States v. MacCull*, No. 00CR91-13 (RWS), 2002 WL 31426006, at *12 (S.D.N.Y. Oct. 28, 2002) (does not make sense when many people involved in fraud); *United States v. Costello*, 16 F. Supp. 2d 36, 39 (D. Mass. 1998).

(securities fraud counts), 122 (FLOR extortion), 128 (NSOL extortion), 133 (obstruction).) We object to this enhancement because it is factually incorrect; Mr. Elgindy was not a "leader" of the culpable participants in any of these offenses.

i. The Securities Fraud Conduct

Focusing as the PSR does on conduct relevant to the securities fraud offenses, Mr. Elgindy should not be subject to any role enhancement because of: (a) the non-hierarchical nature of the securities fraud scheme; (b) Mr. Cleveland's control over other participants and the dissemination of information; (c) the isolated, independent and equal involvement of the other participants; and (d) Mr. Elgindy's relatively small gain from the offense. While Mr. Elgindy certainly led and operated Anthonypacific.com and Insidetruth.com, it does not necessarily follow that Mr. Elgindy led a criminal enterprise or controlled any of the participants for purposes of § 3B1.1.

To qualify for a role enhancement, "the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." § 3B1.1, comment. (n.2). "A 'participant' is a person who is criminally responsible for the commission of the offense . . . ," *id.* comment. (n.1), and "only knowing participants are included." *Paccione,* 202 F.3d at 624. Thus, the vast majority of the subscribers to the AnthonyPacific.com web site are not "participants" because the government has presented no evidence that they knowingly took part in any criminal wrongdoing. *See, e.g., United States v. Leonard,* 37 F.3d 32, 38 (2d Cir. 1994) (directing store cashiers not to run cash register sales summaries, enabling defendants to modify computerized sales figures without any written record of true figures, did not form basis for role enhancement because "[t]hese employees were not part of the criminal activity"); *United States v. Melendez,* 41 F.3d 797, 800 (2d Cir. 1994) (buyers of stolen property not "participants" in

theft conspiracy because "[t]here is no evidence that the three individuals had advance knowledge of the theft, much less participated in its planning or execution. Nor does the record indicate that they expected to receive the proceeds of the theft."); *United States v. Lanese*, 890 F.2d 1284, 1293-94 (2d Cir. 1989) (bookmakers did not count as "participants" in extortion conspiracy because "[t]he government presented no evidence . . . that the bookmakers participated in, or had knowledge of, the use of extortionate means to collect illegal gambling debts").

The PSR does not identify any of the alleged "enterprise members" that Mr. Elgindy supposedly lead or organized, but excluding uncharged site members, the only potential "participants" in the securities fraud offenses other than Mr. Elgindy include convicted codefendants Royer, Cleveland, Daws, Terrell, and Hansen.[38] Among the factors courts should consider in determining whether to apply this enhancement to a particular individual are:

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

USSG § 3B1.3, comment. (n.4).

[38] Ms. Wingate was not involved in the securities fraud offenses. She plead guilty to obstruction of justice based on her unauthorized searches of the FBI database to determine the status of the EDNY investigation for Mr. Royer. Mr. Peters likewise was not involved in the securities fraud offenses, but rather was involved in the extortion offenses. Mr. Peters was a stock promoter who wanted nothing to do with Anthonypacific.com or shortselling and knew nothing of Mr. Royer. An individual's involvement in the RICO conspiracy does not mean that those individuals are properly counted as participants in connection with the distinct securities fraud, extortion, or obstruction offenses. *See, e.g.*, *Melendez*, 41 F.3d at 800 (individuals convicted of receiving stolen property did not count as "participants" in the theft conspiracy for role adjustment purposes); *Lanese*, 890 F.2d at 1293-94 (bookmakers involved in "illegal gambling operations" did not count as "participants" in related extortion conspiracy).

As an initial matter, the conduct of this group of participants does not present the type of hierarchical conspiracy within which there existed various levels of managers, supervisors, leaders, and organizers controlling and directing what other participants do. *See, e.g.*, *United States v. Torres-Teyer*, 322 F. Supp. 2d 359, 374 (S.D.N.Y. 2004) (describing "vast, hierarchical criminal organization" with "pyramid of criminal authority"), *vacated and remanded on Booker grounds, United States v. Magana*, No. 04-2843, 2005 U.S. App. LEXIS 11484 (2d Cir. June 14, 2005). Rather, the participants here occupied distinct roles and provided separate services, reflecting roughly equal culpability (with the exception perhaps of Mr. Cleveland). In this situation, any role enhancement for Mr. Elgindy is improper. *See United States v. Greenfield*, 44 F.3d 1141, 1145-46 (2d Cir. 1995).

The evidence at trial made clear that it is Mr. Cleveland who planned and organized the securities fraud scheme, recruited accomplices like Agent Royer, Mr. Daws, Mr. Terrell and Mr. Elgindy, exercised control over the source of the information by directing Agent Royer to search the companies and individuals he chose, and exercised decision-making authority regarding how, when and to whom to disseminate inside information. Mr. Elgindy did none of these things. Mr. Cleveland introduced Agent Royer to Mr. Elgindy and was the one who gave Mr. Royer companies and names to search. (*See supra* Pt. II.B.2.) Mr. Elgindy never controlled Agent Royer or Mr. Cleveland or the flow of confidential information as Cleveland did. Mr. Elgindy never recruited anyone as Cleveland did. Mr. Cleveland, Mr. Terrell, and Mr. Hansen all testified at trial and none of these witnesses testified that Mr. Elgindy ever directed them to commit fraud or otherwise instructed them to carry out the criminal activities described at trial.

Mr. Elgindy likewise did not control anyone's trading decisions or make a claim to any greater portion of the proceeds of the activity. Each participant used the information from Agent Royer independently of one another, making their own trading decisions. Each maintained their

own brokerage account and decided when and how much to invest on any given trade. They did not even follow Mr. Elgindy's trades or trading calls. In fact, their trading patterns in the stocks in question are totally uncoordinated. This is particularly true of Mr. Cleveland and Mr. Daws, who acted independently of Mr. Elgindy and actually hid law enforcement and other information from Mr. Elgindy. (*See supra* Pts. II.B.2, II.C.2.b.ii.) Indeed, Mr. Daws, like Mr. Elgindy, ran his own web site, disseminating Agent Royer's information there.. (*See supra* Pt. II.C.2.b.ii.) And Mr. Elgindy made far from the largest share of the proceeds from insider trading. According to the government, Mr. Daws made the lion's share at five times what Mr. Elgindy made; together Mr. Daws, Mr. McGreggor, Mr. Spiegel and Mr. Thorpe (and their hedge funds) made approximately 90% of the overall profits alleged by the government. Thus, a four or three-level enhancement under § 3B1.1(a) or (b) is not warranted here.

ii. Extortion and Obstruction Conduct.

As for the extortion offenses, given that the only culpable participant other than Mr. Elgindy is Troy Peters and Troy Peters organized every aspect of the NSOL deal (and the FLOR deal – although FLOR should not be considered), Mr. Elgindy certainly should not be subject to any role enhancement for those offenses. At trial, the government presented evidence that several individuals were involved in the alleged extortion conduct: Mr. Elgindy, Troy Peters, Roland Chapin (Peters' Boss), David Slavney (who suggested Troy Peters to Paul Brown and AJ Nassar), Paul Brown, and AJ Nassar. There is no evidence that any of these people other than Troy Peters was a knowing, culpable participant in the extortion. Moreover, although the PSR states that Mr. Royer and Mr. Cleveland participated in the extortion of AJ Nassar and Paul Brown, there was no evidence of this at trial, and we are aware of none.

Basically, Troy Peters knew through David Slavney that these CEOs were concerned that Mr. Elgindy's activities would decrease the value of their stock and Peters used that perceived power to convince them to enter into an investment banking deal with him and to provide stock to cover Mr. Elgindy's outstanding short position. Peters made all the calls, set up all of the contacts, drafted the investment banking agreements, and negotiated the deals. Mr. Elgindy did what Peters asked him to do. Thus, Mr. Elgindy should receive no role enhancement on the extortion offenses.

And finally, as for the obstruction offenses, Mr. Elgindy, unlike Mr. Royer and Ms. Wingate, was acquitted of obstruction of justice. Agent Royer accessed information about the investigation, directed Ms. Wingate to access information after he left the FBI, and informed Mr. Cleveland about the investigation. Mr. Elgindy is not alleged to have told anyone to do anything about the EDNY investigation. Thus, even if the obstruction of justice count were appropriately included in the calculation – which it is not – Mr. Elgindy is not subject to a role enhancement.

e. Objection to the Use of Alleged Pre-Arrest Obstruction of Justice Conduct as Relevant Conduct or as an Enhancement

The PSR calculates the Guidelines for a separate count of obstruction of justice and applies an upward adjustment to all of the counts of conviction under USSG § 3C1.1, all based on the acquitted conduct alleged at trial, specifically, that Agents Royer and Wingate accessed government computer systems for information concerning the EDNY grand jury investigation that Mr. Elgindy is alleged to have obstructed and other investigations, that Agent Royer provided information about the EDNY investigation to Mr. Elgindy, and that Mr. Elgindy prepared to flee the country. (PSR ¶¶ 49-57 (description of offense conduct), 117, 123, 129

(obstruction adjustments for securities fraud counts and extortion counts).) First, the Court should not even consider this acquitted conduct for purposes of sentencing. (*See supra* Pt. II.C.1.a.)

Second, the government cannot prove even by a preponderance of the evidence (and surely not beyond a reasonable doubt) that Agent Royer or anyone else ever gave Mr. Elgindy any information about the EDNY grand jury investigation that Mr. Elgindy is alleged to have obstructed. Cleveland and Royer both testified that they never gave Mr. Elgindy any such information and Cleveland's sudden memory on the eve of trial that Mr. Royer said he told Mr. Elgindy "a little bit" about the investigation is utterly unreliable. (*See* Tr. 8464-66 (Mr. Elgindy's summation).). Mr. Elgindy simply did not know about the investigation. "[A] person lacking knowledge of a pending proceeding necessarily lacked the evil intent to obstruct." *United States v. Aguilar*, 515 U.S, 593, 599 (1995) (citing *Pettibone v. United States*, 148 U.S. 197, 207 (1898)); *see United States v. Genao*, 343 F.3d 578, 585 (2d Cir. 2003); *United States v. Reed*, 49 F.3d 895, 900 (2d Cir. 1995) (obstruction adjustment is appropriate only if "the defendant consciously acted with the purpose of obstructing justice.").

Third, even if Mr. Elgindy had been informed of the investigation, he was not preparing to flee and his conduct at the time makes that clear. He was building a home and paid $305,000 in taxes; he broadcast that he was in Lebanon in November 2001 all over the internet; when asked where he had been he told his probation officer about Lebanon and then requested permission to return. (*See* Tr. 8472-75, 8478-79 (Mr. Elgindy's summation).) Opening a bank account and purchasing an apartment in Lebanon, and traveling there on several occasions, only to return to the United States each time, was completely unrelated to any knowledge of the EDNY investigation. This conduct quite simply does not support an inference of flight and does not have the requisite nexus to the investigation to support an obstruction conviction or

enhancement. In other words, his conduct cannot be "said to have the 'natural and probable effect' of interfering with that judicial proceeding." *Aguilar*, 515 U.S. at 599-601.

And fourth, even if he were preparing to flee, that conduct does not provide a basis for a finding of obstruction of justice or for an obstruction of justice enhancement under § 3C1.1. *See United States v. Stroud*, 893 F.2d 504, 507 n.2 (2d Cir. 1990) ("18 U.S.C. § 1503 has never been interpreted to apply to flight from arrest" and other criminal statutes draw distinction between flight and obstruction of justice); *United States v. Bliss*, No. 04CR1163, 2005 U.S. App. LEXIS 25259, at *22-23 (2d Cir. Nov. 23, 2005) (holding that "flight itself is insufficient to support the [§ 3C1.1] enhancement . . . ."); USSG § 3C1.1, comment. (n.5(d)) ("avoiding or fleeing from arrest" is not ordinarily appropriate as grounds for enhancement); *see also United States v. Brown*, 321 F.3d 327, 349, 351-52 (2d Cir. 2003) (flight alone insufficient for § 3C1.1); *United States v. Woodward*, 239 F.3d 159, 162 (2d Cir. 2001) (willfully leaving the jurisdiction is insufficient for § 3C1.1)). In *Bliss*, the defendant learned that the police had searched his home and fled the jurisdiction, avoiding detection for over a year. This flight "amounted to little more than simply disappearing to avoid arrest," and cannot support a § 3C1.1 enhancement. 2005 U.S. App. LEXIS 25259, at *22 (citation omitted; internal quotation marks omitted).

In addition, "[f]or a defendant's conduct to qualify as obstruction of justice, it must have the 'potential to impede' the investigation, prosecution, or sentencing of the defendant." *United States v. Khimchiachvili*, 372 F.3d 75, 80 (2d Cir. 2004) (quoting *United States v. McKay*, 183 F.3d 89, 95 (2d Cir. 1999)). A general conclusion that the conduct at issue was "*motivated by* the instant federal offense [is insufficient because] motivation alone does not equate to materiality." *Zagari*, 111 F.3d at 329; *see Khimchiachvili*, 372 F.3d at 80 ("[T]he 'conclusion that "obstruct," in this [§ 3C1.1] context, relates to anything that can make it more difficult to carry out a just result in a criminal case [is] erroneous as a matter of law.'") (quoting

Stroud, 893 F.2d at 507. By this same token, the use of an alias in *Bliss* was found insufficient because there was no showing of materiality, or that the conduct "'actually resulted in a significant hindrance to the investigation or prosecution of the instant offense.'" *Id.* at *24 (quoting § 3C1.1, comment. (n.5(a)). If actually fleeing the jurisdiction to avoid arrest and using an alias to avoid detection for almost a year is not a material enough hindrance to an investigation or prosecution to provide the basis for an obstruction enhancement, Mr. Elgindy's alleged *preparation* to flee to Lebanon certainly does not provide a basis for such an enhancement.[39]

4. Guidelines Calculation for The False Statements Case

We agree with the PSR's calculation of the offense level for the false statements case, except to the extent that it fails to include a downward adjustment for acceptance of responsibility.[40] In paragraph 103, the only paragraph addressing acceptance of responsibility, the PSR states that Mr. Elgindy "put the Government to its burden of proof at trial" and "chose to make no statement relative to his participation in the instant offense during the presentence interview." Based on those facts, the PSR concludes that a reduction for acceptance of responsibility is not applicable. Those facts, however, apply only to the securities fraud case as

[39] We note that the PSR also applies a § 3C1.1 enhancement to the obstruction of justice "count" based on Mr. Elgindy's conduct at MacArthur Airport. (PSR ¶ 134.) As shown, that "count" should not be included as relevant conduct because it is acquitted conduct and cannot be proved even by a preponderance of the evidence. In any event, the suggestion that Mr. Elgindy's conduct at MacArthur Airport supports an enhancement for obstruction of justice is incorrect for the same reasons that his pre-arrest conduct does not support such an enhancement. *See Bliss*, 2005 U.S.App. LEXIS 25259, at *23 n.11 (whether the alleged flight occurred before or after arrest "is not terribly relevant" to the analysis).

[40] We also disagree with the PSR's apparent conclusion that a violation under 18 U.S.C. § 3147 constitutes a separate offense. The three level enhancement to the substantive false statement counts under USSG § 2J1.7 for committing the offenses while on pretrial release fully accounts for the violation of § 3147. In order to comply with § 3147, the Court must assign a portion of the total sentence imposed as consecutive time attributable to the § 3147 violation. § 2J1.7, comment. (n.2). This does not change the PSR's Guidelines calculation.

Mr. Elgindy pled guilty to the charges in the false statements case, and is entitled to a reduction for acceptance of responsibility with regard to that advisory Guidelines calculation.

With that in mind, we calculate the offense level for the false statements case as level 7. As stated in the PSR, the offense conduct guideline for the two 18 U.S.C. § 1001 convictions is § 2B1.1(a)(2) and the base offense level is 6. Also as stated in the PSR, per § 2J1.7, three levels are added because Mr. Elgindy committed these offenses while on pretrial release. These levels are added "as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release." USSG § 2J1.7. The offense level before adjustments is therefore level 9. Mr. Elgindy plead guilty to these counts and is therefore entitled to a two level downward adjustment for acceptance of responsibility. USSG § 3E1.1(a). Thus, the adjusted offense level is 7. The two counts are grouped pursuant to USSG § 3D1.2(b) and the Group offense level is 7.

With respect to the false statements case, Mr. Elgindy is in Criminal History Category II, based on 2 points for his Texas conviction for which he served four months, § 4A1.1(b), and one point for having been convicted but not yet sentenced on the securities fraud case, § 4A1.1(c). With an offense level of 7 and criminal history category of II, the Guidelines provide a sentencing range of 2 to 8 months, some portion of which must be assigned to the 18 U.S.C. § 3147 violation.

D. § 3553(a)(6): Avoiding Unwarranted Disparities Among Similarly Situated Defendants

Section 3553(a)(6) requires, after *Booker*, that the Court separately consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). *Booker* and its progeny thus allow the Court to consider the goal of reducing disparity among sentences for any defendants found guilty

of similar conduct, including codefendants. *See, e.g.*, *United States v. Jaber*, 362 F. Supp. 2d 365, 381-83 (D. Mass. 2005) (sentence of cooperator warranted lower sentence for less culpable non-cooperating defendant); *United States v. Hensley*, 363 F. Supp. 2d 843, 844-45 (W.D. Va. 2005) (disparity between sentences *suggested* by government for similarly situated defendant and pleading codefendant warranted lower sentence for defendant); *United States v. Ortiz-Zayas*, No. 02CR0837, 2005 WL 1430489, at *2-3 (S.D.N.Y. June 17, 2005) (codefendant's sentence, which was five time less severe than defendant's Guidelines sentence, created unwarranted disparity despite difference in criminal history); *United States v. Strange*, 370 F. Supp. 2d 644, 651 (N.D. Ohio 2005) (even where disparity was largely due to other codefendants' cooperation, disparity warranted lower sentence); *see also Ferrara v. United States*, 372 F. Supp. 2d 108, 129 (D. Mass. 2005); *Simon v. United States*, 361 F. Supp. 2d 35, 48-49 (E.D.N.Y. 2005).

The most glaring example of disparate treatment of similarly situated defendants in this case is the government's proposed sentence for codefendant Jonathan Daws. As noted earlier in this submission, much like Mr. Elgindy, Mr. Daws was charged in this case with being a manager/supervisor in a RICO conspiracy including insider trading, market manipulation, and extortion. Mr. Daws is described by the government and Probation as someone who profited through alleged insider trading to the tune of between *5.5 and 6.2 million dollars* (Gov't Forfeiture Mem. Exs. C&D; PSR ¶ 90). He admitted at times that he received information directly from Agent Royer and Derrick Cleveland and that he disseminated that information – as well as other information – to other traders completely independently of Mr. Elgindy (Daws Plea Tr. at 21-22), through RC Chat, which was kept hidden from Mr. Elgindy.

As the government argued to the Court in its second *in limine* motion, Mr. Daws, "known on the RC Site as 'Archer,' 'Trebuche[t]' and 'Trebear,' offered a variety of manipulative suggestions" and discussed using Mr. Elgindy and other members of the Anthonypacific.com site

without their knowledge. (Gov't Second *In Limine* Motion at 29-39). In addition, it is RC Chat, not Anthonypacific.com, that discusses "carpet bombing," "price walls," and "painting the tape" (*id.*); yet all are erroneously referenced in Mr. Elgindy's PSR as something Mr. Elgindy engaged in (PSR ¶¶ 37-39). Here are some examples from the government's brief:

January 24, 2001 RC Chat log (note "carpet bombing" and participation of Mr. Slotnick ("hemo"), Mr. McGreggor ("leto"), and Mr. Spiegel ("jjs64")):

[14:11] <Trebuchet> PVII is a terrific idea
[14:11] <jjs64> always
[14:11] <SH> I've only followed it recently since its been running up
[14:11] <Trebuchet> Please let me know when you are completely filled

[14:12] <Trebuchet> Then I will begin carpet bombing

[14:15] <hemo> Would like to start PVII, pls holler when you gents are done

[14:18] <Trebuchet> Go ahead of me hemo
[14:18] <Trebuchet> I want to be the last one

[14:19] <hemo> Danka Treb, Bricking

[14:29] <Trebuchet> I will wait till the very last so everyone tell me when they complete PVII
[14:30] <Trebuchet> That is probably the best way to handle these, because if we find one that eats through my offers and keeps running, we are in some trouble
[14:30] <Trebuchet> Or at least in for a bit more fight than we are used to
[14:30] <leto> thx treb

[14:31] <jjs64> my order is in on PVII

[14:31] <jjs64> fire away
[14:31] <hemo> all clear here, thanks gents

[14:33] <TeamTi> I tossed out a brick at 6. Don't back off on my account though leto treb
[14:33] <N-tilde> PVII: short interest in December was 0.2%. Lots of float.
[14:33] <Trebuchet> I think this is a good protocal for us to use going forward
[14:34] <Trebuchet> We are a small enough group we can coordinate
[14:34] <leto> i like the fact we can coordinate to stop a run
[14:35] <leto> Above information for entertainment purposes only.
[14:35] *** hemo changes topic to 'RetiredChatters: Operation Desert Storm '
[14:35] <Trebuchet> Too late, log already forwarded to appropriate authorities
[14:36] <hemo> Any similarities to real persons is purely coincidental
[14:36] <DukeCallz> All data is trading simulation.
[14:37] <SH> Testing the efficient market hypothesis

January 12, 2001 RC Chat: (note use of AP site members):

[15:22] <Trebuchet> AP/Pluvia love to put out reports

[15:22] <Trebuchet> And they will take all the heat

[15:25] <CB> I don't like giving AP a preview because his sheeple will wreck the position.

[15:25] <Trebuchet> We would have our position on before giving it to AP

March 30, 2001 RC Chat: (note mention of Daws "close friend Derrick," and reminder to keep RC information from AP)

[14:55] <nuvolari> Today Achen first mentioned EMEX. Then your close friend Derrick said something about it being thin and up 3 days in a row, and then Tony hit it.
[14:56] <Archer> OK, hard to keep a good short off everyone's radar
[14:56] <Archer> But I do want to re-emphasis the need to be discreet on ideas this group or its members are working on
[14:57] <surelock> "

February 12, 2001 RC Chat: (note carpet bombing, painting the tape "red," "RC manipulation" and hemo and leto's participation):

[15:34] <Archer> I am going to get a little rough with GSFT
[15:35] <CB> get nasty

[15:49] <Archer> GSFT carpet bombing about to commence
[15:50] <CapSS> thought you already started
[15:50] <Archer> See how well they absorb this
[15:50] <SH> Let em **fire Arch**
[15:50] <Archer> Just put in the order

[15:56] <Archer> If any of you have a little GSFT ammo, I suggest you use it
[15:56] <SH> Excellent chart forming Archer
[15:56] <Archer> A red close would really help the cause
[15:56] <leto> firing

[15:59] <Archer> At least it will close well below the gap
[15:59] <Archer> Somebody really holding it at 2.75
[16:00] <leto> i feed him some at 2.75
[16:00] <hemo> If 2.75 breaks, candle says Bye Bye
[16:00] <surelock> arch i don't have recording ability yet, can you tape the prav call, or anyone else?
[16:00] <Archer> But, I think this will put some erode their resolve
[16:00] <hemo> they will try to hold it

[16:03] <Archer> congrats to RC manipulation
[16:04] <Archer> I show GSFT -1/32
[16:04] <leto> ^^^^5's
[16:04] <TeamTi> Correct. Thx big brickers
[16:04] <hemo> Nice Charting
[16:04] <Archer> Nice and red
[16:04] <CapSS> great work Arch
[16:04] <surelock> wow, nice close
[16:04] <leto> "
[16:04] <CB> great close

February 21, 2001 RC Chat: (note "crim stock manipulators" and leto's participation)

[09:55] <leto> timing would be killer for GSFT today
[09:55] <Archer> I totally agree with leto on the timing
[09:55] <Archer> Should put out what we have today
[09:56] <Archer> They are **vulnerable**
[09:56] <surelock> i just need 15 or 20 minutes
[09:56] <leto> right now would be killer as the stock is weakened (after archer's paint job last night)

[15:47] <leto> it's over
[15:47] <leto> for GSFT
[15:48] <TeamTi> Just confirmed his email and fax

[15:48] <Archer> High fives for all us Crim stock manipulators
[15:48] <CB> HIGH FIVE
[15:48] <SH> *High Five*
[15:48] <leto> ^^^^^^^^5's
[15:48] <CB> great retiredChatter masonry
[15:49] <TeamTi> Nice tagteam effort
[15:49] <DukeAMZQ> Big high five to the boiler rooms that pumped it to $3.

April 9, 2001 RC Chat: (note use of AP site and participation of leto)

[10:18] <CB> GSFT could definitely us a kickstart
[10:18] <CB> us->use
[10:18] <Archer> Want me to call it?
[10:18] <surelock> arch, we need to use that carefully imo
[10:18] <CB> PRAV is doing alright IMO.. drip drip drip
[10:18] <Archer> If I mention it, it will get pressured down
[10:18] <Archer> I agree surelock
[10:19] <surelock> gsft is liquid and is dying a slow death
[10:19] <N-tilde> Save your silver bullets
[10:19] <leto> GSFT could use a kickstart, a little concentrated push may be all that's needed on that one, since the promote is over
[10:19] <Archer> It is a nice tool to have, but shouldnt be used to hurt the AP site members
[10:20] <surelock> agreed, it should be used to call a good short when we are loaded
[10:20] <Archer> Yes
[10:20] <CB> a GSFT mention couldn't hurt
[10:20] <leto> everyone is loaded on GSFT
[10:20] <surelock> but if it isn't based on some piece of news or action on the stock, then the call may appear suspect
[10:22] <Archer> I could just mention I am short GSFT and AP should take a look at it

Notwithstanding the government's broad-based indictment of Mr. Daws, the numerous examples of self-incriminating statements from RC Chat, Mr. Daws' own admissions in connection with his plea of guilty, and the millions of dollars in trading profits attributed to him. the government has stipulated and recommends by its plea deal that Mr. Daws be sentenced to a mere 18-24 months in prison (Daws Plea Tr. at 19). Moreover, as part of Mr. Daws' plea, the government apparently agreed to attribute to him for purposes of *his sentence* a gain of at most $200,000 (which closely conforms to his insider trading profits using our method of calculation). (*See supra* Pt. II.C.2.b.ii.) And he is not to be held responsible as a manager or supervisor, or for any other enhancement such as multiple victims or sophisticated means.

Even accounting for Mr. Elgindy's different criminal history category of III and no adjustment for acceptance of responsibility because he chose to go to trial, if Mr. Elgindy were otherwise treated the same as Mr. Daws (despite the fact that his gain from the offense was

significantly less than that of Mr. Daws), his Guidelines sentence range would be 33 to 41 months. And even taking account of the extortion conviction, if Mr. Elgindy were otherwise treated the same as Mr. Daws, his Guidelines sentence range would be 41 to 51 months. Yet for Mr. Elgindy, the PSR calculates and recommends life. This is precisely the type of unwarranted disparity that § 3553(a)(6) proscribes. Failing to eliminate this egregious disparity would undermine the purposes of sentencing.[41]

Nor is the potential "unwarranted disparity" issue limited to co-conspirator Daws. As noted above in Part II.B.2., Derrick Cleveland conceived of, planned, and then controlled the insider trading scheme for which he, Mr. Daws, Mr. Hansen, Mr. Terrell and Mr. Elgindy were convicted. As noted in Parts II.B.2 and II.C.2.b.ii., Mr. Cleveland, like Mr. Daws, on many occasions acted independently of Mr. Elgindy and without Mr. Elgindy's knowledge in receiving, disseminating, and trading on law enforcement information. In fact, Cleveland, like Daws, hid law enforcement and other stock-related information from Mr. Elgindy and disparaged Mr. Elgindy behind his back in "Tony-bashing" sites such as Michael Grasso (aka Bear)'s, site. (*See supra* Pts. II.B.2, II.C.2.b.ii and II.C.3.d.i.)

Notwithstanding these facts that Mr. Cleveland, like Mr. Daws, acted independently and without Mr. Elgindy's knowledge in receiving, disseminating, and trading on law enforcement information, it appears that the government is seeking no forfeiture from Mr. Cleveland (or from

[41] Such sentencing disparity can also create the appearance of unfairness. *See, e.g.,* "A year and a day for Lil' Kim," July 7, 2005 (at http://www.cnn.com/2005/LAW/07/07/ctv.lilkim/) (noting that, in sentencing African-American music star Kimberly Young ("Lil' Kim") to one year in prison following a conviction for perjury, Southern District Judge Lynch considered the fact that the government was seeking a much more severe sentence (33 to 41 months) than was imposed against Martha Stewart, who was convicted for lying to the government and sentenced to 4 months prison and 4 months home confinement, and quoting Judge Lynch as asking the government: "Do you think I could justify to the newspaper-reading public why [Jones] gets a sentence seven to eight times higher?").

Mr. Daws) for his own trading profits or any trading profits of those he (or Daws) allegedly tipped. Instead, the government has asked this Court to order that Mr. Elgindy forfeit his own, Mr. Cleveland's, Mr. Daws', and all of their tippees' trading profits.

Although the PSR claims that Mr. Elgindy "received the largest share of the proceeds from the various criminal activities committed by members of this enterprise" (PSR ¶ 73), in fact, as the government's forfeiture memorandum makes clear, Messrs. Daws, McGreggor, Spiegel and Thorpe, and their hedge funds Gryphon, Highgate Master Fund, Spinner and Langley, account for close to 90% of the trading profits attributed to the alleged criminal activity. Yet McGreggor, Spiegel and Thorpe escaped all charges, Daws faces only 18-24 months in prison, and none of them are being asked to forfeit any of their trading proceeds, while Mr. Elgindy faces claims that he should spend the rest of his life in prison and forfeit some $11 million.[42] Such a result -- shifting blame and responsibility to Mr. Elgindy -- was, ironically, exactly what Messrs. Daws and McGreggor expressly hoped for, as the following two excerpts from the March 12, 2001 RC Chat show:

[12:04] <Archer> I like the idea of AP being the **lightning** rod

[42] The following table presents a picture of the disparate treatment of alleged coconspirators who allegedly traded on law enforcement information in this case:

Alleged coconspirator	*Gov't Alleged Personal Gains from GX 2574-98*	*Forfeiture Demand*	*Proposed Sentence*
Jonathan Daws	**$ 6,255,564.18**	**$0**	**18-24 months**
Derrick Cleveland	$ 77,696.79	$0	n/a
Robert Hansen	$ 151,768.96	$0	n/a
Kent Terrell	$ 83,985.07	$0	n/a
Kendall McGreggor	$ 1,846,171.60	$0	NONE/No charges
Joseph Spiegel	$ 780,293.69	$0	NONE/No charges
Jeff Thorpe	$ 493,282.72	$0	NONE/No charges
David Slotnick	$ 165,167.38	$0	NONE/No charges
Anthony Elgindy	**$ 826,272.53**	**$11.8 million**	**LIFE IN PRISON**

[12:10] <leto> Y, let AP take the heat, eff the glory, we just want to make $

In sum, the record before this Court provides ample basis for Mr. Elgindy to be concerned that he is being singled out at sentencing for disparate treatment, and that the recommended punishment is not being fairly and equitably imposed among the various co-conspirators.

III. A SENTENCE OF LESS THAN FIVE (5) YEARS IN PRISON IS APPROPRIATE, REASONABLE AND SUFFICIENT TO ACHIEVE THE SENTENCING GOALS THAT CONGRESS ENUMERATED

Whether analyzed primarily through the lens of the Guidelines or under the broader considerations set forth in § 3553(a), we submit that on the basis of all of the facts, circumstances and arguments laid out in the preceding pages, a sentence of imprisonment of less than five years in prison would be fair and just and a punishment that is "sufficient, but not greater than necessary," 18 U.S.C. § 3553(a), to achieve the congressionally enumerated goals of sentencing.

After *Booker*, as the Court knows, there are at least three different kinds of sentencing analyses, each of which supports imposing a sentence of imprisonment of less than five years here. First, the Court should impose a sentence of less than five years in prison by adopting Mr. Elgindy's calculation of the Guidelines sentence for the securities fraud case of (at most) 41 to 51 months in prison, and for the airport/false statements case of 2 to 8 months. Second, the Court may depart downwardly from that calculated Guidelines range. And third, the Court may decide to impose a non-Guidelines sentence below that range based on a full consideration of the factors set forth in § 3553(a).

Accordingly, while the Court need not depart downward or impose a non-Guidelines sentence to reach a result under five years, the record here provides multiple and substantial

arguments to do both, and Mr. Elgindy most respectfully moves for downward departures and a non-Guidelines sentence on the grounds highlighted here and throughout this submission, both individually and collectively.[43] We summarize now the most relevant factors that we believe support imposition of a "reasonable" sentence of five years or less, analyzed through the lenses of both § 3553(a) most broadly and the Guidelines and the departure authority more specifically (and where applicable).

1. Mr. Elgindy has already been punished severely. He already has spent over two full years in federal prison over 3000 miles away from his family. He has been emotionally devastated, attempted to commit suicide and has been physically and violently attacked in prison. Mr. Elgindy's public reputation has been ruined. His entire life's savings has been seized by the government and he has been financially bankrupted. *See* 18 U.S.C. § 3553(a)(2)(A)-(C).

2. Mr. Elgindy's wife and his three young sons have been emotionally and financially devastated by his absence and will continue to be deprived of a desperately needed father as long as he remains incarcerated. *See, e.g., United States v. Galante*, 111 F.3d 1029 (2d Cir. 1997) (downward departure warranted in cases of "extraordinary" family circumstances).

3. Mr. Elgindy and his extended family have been tarred with the stigmas of unfounded and unproven accusations of association with September 11th and terrorism. Among other ramifications, the fact of the September 11th-related allegations renders Mr. Elgindy vulnerable to abuse and more severe punishment within the federal prison system. *See United States v. Lara*, 905 F.2d 599, 603-05 (2d Cir. 1990) (downward departure may be warranted where defendant is more susceptible to abuse in prison).

4. Notwithstanding the crimes of which he stands convicted, Mr. Elgindy and his Anthonypacific.com web site made significant contributions to exposing numerous fraudulent companies and causing their stock prices to move down, away from their inflated levels and close to their true values.

5. Mr. Elgindy has done much public good over the course of his life, from his public efforts to fight corruption on Wall Street to his significant and repeated assistance to

[43] We note in these respects that the most recent statistics from the United States Sentencing Commission, dated December 1, 2005, show that within the Second Circuit, and outside the context of substantial assistance and other government-sponsored departures, the district courts are imposing sentences below the Guidelines-calculated range, either through downward departures or non-Guidelines sentences, in roughly 25% of the cases. *See* U.S. Sentencing Commission Special Post-Booker Coding Project, at 8 (December 1, 2005).

the government over many years (including during the period of charged conduct in this case) to his extraordinary humanitarian efforts on behalf of Kosovar refugees.

6. Mr. Elgindy has struggled throughout his life with bipolar disorder, and his mental illness both helps to explain certain behavior, particularly following his arrest and through trial, and counsels strongly in favor of a lower sentence and a designation that would provide as low-stress an environment as possible.

7. Coconspirators such as Jonathan Daws face dramatically and inexplicably less severe punishment and raise the specter of unfair and unwarranted disparities in sentencing. *See* 18 U.S.C. § 3553(a)(6) (requiring consideration of "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct").

CONCLUSION

For all of the reasons set forth above, we most respectfully urge the Court to sentence Mr. Elgindy to a term of imprisonment at or below (a) 41 months on the securities fraud case and (b) two months on the airport/false statements case, a sentence that would be "reasonable" and "sufficient, but not greater than necessary" to satisfy the goals of sentencing as enumerated in 18 U.S.C. § 3553(a) and that would allow Mr. Elgindy's children to be reunited with and supported by their father for some substantial part of their remaining critical years of development.

Dated: New York, New York
December 23, 2005

Respectfully submitted,

/s/ Barry H. Berke

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