17-2373(L)

17-3169(CON), 17-3425(CON)

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS C DAVIS,

Defendant,

WILLIAM T WALTERS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION

The government studiously avoids the most inconvenient facts about its "outrageous" campaign to leak grand jury secrets. Its brief gives no hint that a high-ranking FBI agent violated Rule 6(e) and obstructed justice by leaking and bartering grand jury secrets involving numerous cases over an eight-year period, or that he almost certainly was not acting alone. The government completely disregards that Chaves leaked information to the same *Times* and *Journal* reporters in at least *five* other criminal cases, and refuses to explain why it never investigated this extensive pattern of violations. (A-281-85). It is silent on the overwhelming evidence that others participated, including the articles' repeated reference to multiple "sources." (A-220, A-227, A-322-24). The government ignores that the leaks lasted nearly a decade, its concession below that the resulting articles "contained a significant amount of confidential information" (A-226), and its failure to bring Chaves or his accomplices to justice almost four years after it first acknowledged internally how "reprehensible" their misconduct was. (A-235).

Most disturbingly, on appeal the government continues to misrepresent key facts and deny responsibility. The government repeatedly misled the district court, claiming that Walters "cannot show that the source of the information contained in the articles was an agent or attorney for the Government." (A-206-07). The government now tries to blame these misrepresentations on turnover at the USAO,

even though many were made by the Assistant U.S. Attorney in charge when the leaks were discovered, who remains at the USAO and who participated in lengthy email discussions about the leaks with Preet Bharara, six other assistants and 15 FBI agents. (A-229-37). Also, to refute Chaves' concession that he initiated the leaks to revive a "dormant" investigation, the government misleadingly points to a *2014* wiretap, even though Chaves undisputedly began leaking information "in approximately April *2013*." (A-220) (emphasis added). Finally, the government strains to avoid an evidentiary hearing by pretending its disclosures below were "ample," when in reality the record consists only of its own unsworn letter and nine pages that it selected from among thousands of relevant documents that it reviewed but chose to withhold. (A-217-37).

What we already know about the leaks requires dismissal of the indictment. At a minimum, the Court should remand for an evidentiary hearing to determine the true scope of the misconduct and how it impacted this case.

The government's response to Walters' other points fares no better. It (1) ignores most of the evidence disproving the "Bat Phone" story in order to feign confusion about what actually happened, and misreads controlling precedent requiring a new trial; (2) ignores Davis' testimony that he never told Walters the Darden information was confidential and points to no evidence that Walters knew Davis was prohibited from sharing the information; (3) unsuccessfully tries to

defend the restitution award by improperly shifting the burden to Walters; and (4) effectively concedes that the rationale underlying the forfeiture calculation conflicts with the undisputed facts.

ARGUMENT

I. THE GOVERNMENT'S SYSTEMATIC AND PERVASIVE GRAND JURY LEAKS REQUIRE DISMISSAL, OR AT LEAST AN EVIDENTIARY HEARING

A. The Standard Of Review Is De Novo

It is well settled that this Court "review[s] a district court's decision denying a motion to dismiss an indictment *de novo*." *United States v. Yousef*, 327 F.3d 56, 137 (2d Cir. 2003); *accord United States v. Vilar*, 729 F.3d 62, 79 (2d Cir. 2013).

The government erroneously claims (GBr.29-30) that a more deferential standard of review applies to a motion for dismissal based upon government misconduct. That is simply untrue. *See, e.g.*, *United States v. Cessa*, 861 F.3d 121, 142 (5th Cir. 2017) ("The denial of a motion to dismiss the indictment for Governmental misconduct" under the district court's "supervisory power" "is reviewed *de novo*."). The issues here are (1) whether Walters was prejudiced, and (2) whether *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), authorizes dismissal absent prejudice. As to the first, "[a] court's determination of whether a petitioner was prejudiced" is "clearly a mixed question of law and fact" subject to "de novo" review. *Loliscio v. Goord*, 263 F.3d 178, 187 n.4 (2d Cir. 2001); *accord*

United States v. Gambino, 59 F.3d 353, 363 (2d Cir. 1995). The second involves a pure "conclusion[] of law" that is also reviewed de novo. *United States v. Bout*, 731 F.3d 233, 238 (2d Cir. 2013).[1]

B. The Leaks Were Highly Prejudicial

As explained (Br.40-42), the grand jury leaks prejudiced Walters by resuscitating a dormant investigation and precipitating Davis' cooperation and testimony, which were critical to the prosecution. The government's response misrepresents the facts and the controlling authorities. It (1) pretends that the leaks began a year later than they did, so it can claim that "the investigation was not dormant when" the leaks began; (2) argues that "the leaks did not precipitate Davis' cooperation," but ignores both Davis' testimony and the concessions his attorney made at his sentencing; and (3) conjures up a test requiring "that the misconduct corrupted the evidence presented to the grand jury" (GBr.31-35), which is nowhere to be found in *Bank of Nova Scotia* and contravenes well-settled harmless error analysis.

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[1] *United States v. Fields*, 592 F.2d 638 (2d Cir. 1978), and *United States v. Palmisano*, 1996 WL 680774 (2d Cir. 1996) (cited GBr.29-30), are inapposite. *Bank of Nova Scotia* was not raised and prejudice was not meaningfully disputed in those cases.

1. The Investigation Was Dormant

Chaves readily admitted that he leaked grand jury secrets to revive a "dormant" investigation. (A-220). The government now tries to distance itself from this concession, pointing to the wiretap it initiated in "early 2014." (GBr.3 n.1, 31-32). But, as the government admitted below, the leaks began almost one year earlier, "in approximately April 2013." (A-220). There is no serious dispute that the investigation was dormant at that time.

The government also suggests that Chaves misstated the status of the investigation in order to "rationalize his behavior," and that the leaks actually impeded the investigation. (GBr.31-32). That is just not credible. A seasoned agent with two decades of experience, Chaves obviously would not have exposed himself to immense personal risk to do something that he thought *impeded* the investigation. And if the USAO truly disagreed with his strategy at the time, it would have done something to stop the leaks. Instead, all the USAO did was write internal emails feigning "outrage[]" and "astonish[ment]." (A-236-37). Even these emails reveal that the USAO had no intention of stopping the leaks, including the one from the deputy U.S. Attorney stating, "I don't think [the leaks] should be discussed generally right now for a number of reasons." (A-237). And the leaks

ultimately continued for over a year, because the USAO tacitly condoned Chaves' illicit efforts to revive the dormant investigation.[2]

2. The Leaks Precipitated Davis' Cooperation

The leaks also prompted Davis' cooperation with the government. (Br.41). The government does not dispute that the August 2015 *Journal* article had devastating consequences for Davis, yet refuses to acknowledge the article's role in his decision to cooperate.

The government points to the time between the *Journal* article and that decision (GBr. 33), but the article's ramifications were not instantaneous. First, Davis lost his board seat and the income that went with it. Then, as his club memberships were revoked and his friends distanced themselves, Davis came to grips with both his financial predicament and his ostracism from the community. (Br.15-16). Under these circumstances—and after professing his innocence for 21 months—it is unsurprising that it took several months for Davis to flip.

The government's claim that Davis cooperated because he thought the government was ready to indict him (GBr. 33) contradicts the explanation it elicited from Davis at trial: that, after decades of unrequited debauchery, he

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[2] The head of the NY FBI similarly confirmed that Chaves' purpose was to breathe life into a dead investigation: "If we don't have enough evidence by now it[']s over." (A-231).

experienced an epiphany following November 2015 surgery, after which he supposedly dedicated himself to pursuing a more virtuous life. (Tr. 612). Dubious on its face, this claim is refuted by Davis' own conduct after the surgery. He immediately resumed his illegal sports gambling and his regular junkets to Las Vegas, including a $50,000 Vegas blowout intended to "celebrate" Davis' cooperation agreement. (A-441/1123, Tr. 1226-30).

The government tellingly ignores that Davis' attorneys admitted at his sentencing that, without his cooperation, the government would have had "trouble bringing the case" and there would have been a "very different result." (A-1213-14). Obviously, Davis would not have anticipated an indictment before cooperating if his cooperation was necessary to indict.

3. Walters Was Prejudiced

The government's argument that Walters "must show that the misconduct *corrupted* the evidence" (GBr.34) misrepresents the law. The government appears to suggest that "corrupting" means evidence was falsified. But such a requirement is nowhere to be found in the controlling authorities and contradicts the government's own concession (and *Bank of Nova Scotia*, 487 U.S. at 255, which it quotes on this point) that courts employ "the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)." (GBr.37). An error is "prejudicial" under "Rule 52(a)" whenever it "affect[s] the outcome of the district court

proceedings," *United States v. Olano*, 507 U.S. 725, 734 (1993), regardless of whether evidence has been "corrupted." Indeed, courts routinely find that errors are prejudicial where, as here, the factfinder is presented with evidence that it would not have seen but for the error. *See, e.g.*, *United States v. Kaiser*, 609 F.3d 556, 572-73 (2d Cir. 2010) (erroneous admission of inadmissible hearsay); *United States v. Bruno*, 383 F.3d 65, 80 (2d Cir. 2004) (erroneous admission of plea allocution).

C. The Leaks Were Systematic And Pervasive

In any event, Walters has shown the kind of "systematic and pervasive" prosecutorial misconduct for which prejudice need not be shown. *Bank of Nova Scotia*, 487 U.S. at 256, 259. The government's response depends on a novel misinterpretation of *Bank of Nova Scotia*, unsupported by any of the cases construing it over the ensuing three decades, and some creative writing about the facts.

First, *Bank of Nova Scotia* says prejudice is not required when misconduct is sufficiently "systematic and pervasive"—*i.e.*, "span[s] multiple cases"—such that it may be considered "fundamental." 487 U.S. at 259. The government claims this language refers to the cases involving racial and gender bias in selecting grand jurors, so the "systematic and pervasive" exception applies only to misconduct "akin to racial or gender bias in grand juror selection." (GBr.39-40). But that is

not what the Supreme Court said. Its "systematic and pervasive" passage neither cites nor otherwise refers to the racial and gender bias cases. Those cases are discussed elsewhere in the opinion, and that separate discussion does not suggest that they turned on whether the bias was "systematic and pervasive." The Court instead provided other reasons why a showing of prejudice was not required in those cases: because "other remedies were impractical" and "it could be presumed that a discriminatorily selected grand jury would treat defendants unfairly." 487 U.S. at 257.

The government identifies no case adopting its strained reading of *Bank of Nova Scotia*. Rather, this Court has twice recognized the "systematic and pervasive" exception without suggesting that the misconduct must also be "akin to racial or gender bias in grand juror selection" in order to qualify. *United States v. Restrepo*, 547 F. App'x 34, 44 (2d Cir. 2013); *United States v. Brito*, 907 F.2d 392, 394 (2d Cir. 1990); *see also United States v. Anderson*, 61 F.3d 1290, 1296 n.4 (7th Cir. 1995) ("systematic and pervasive" language gives rise to standalone exception); *United States v. Silver*, 103 F. Supp. 3d 370, 380–81 (S.D.N.Y. 2015) (same). The government acknowledges as much, and offers no valid justification to depart from this controlling precedent.[3]

[3] *United States v. Williams*, 504 U.S. 36 (1992) (cited GBr.39 n.10), does not preclude courts from using their supervisory authority to dismiss an

The government's denial that the misconduct here was systematic and pervasive fares no better. The government simply ignores the critical facts: (1) Chaves deliberately leaked grand jury secrets over a two-year period in this case (A-220); (2) he exchanged those secrets with reporters for their assistance in the investigation (A-221); (3) the numerous articles resulting from the leaks contained, in the government's words, "a significant amount of confidential information" (A-217-18, A-226); (4) strong evidence Chaves was not acting alone (A-322-24, A-220, A-227); and (5) most importantly, the extensive pattern spanning numerous other investigations over an eight-year period (A-281-85).

Instead of addressing this misconduct, the government claims Chaves "was not the case agent" and characterizes him as "rogue." (GBr.32, 36). But the government concedes that Chaves "oversaw" not only this investigation but all white collar crime in the FBI's New York office, and he was "widely recognized as the chief strategist" for its white collar investigations. (*See* Br.38-39; A-219). When the guy in charge systematically violates the law, that is not "rogue"; it is the *policy* of the unit he runs. In any event, there is no legal authority remotely suggesting that illegal acts of a federal government agent that taint a prosecution are not attributed to the United States in a criminal case, and for good reason: any

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indictment. Subsequently, this Court has reaffirmed the principles in *Brito* and *Bank of Nova Scotia*. *See Restrepo*, 547 F. App'x at 44.

such "rogue" agent exception would simply invite the government to evade the consequences by throwing one individual under the bus.

The government also ignores the substantial evidence that Chaves had accomplices, including the *Times* reporter's statement that he had multiple "sources," the *Journal*'s express reliance on "*people* briefed on the probe," and Chaves' insistence that he was not the sole leaker. (A-322-24, A-220, A-227). The government further disregards the May 2014 meeting between a *Journal* reporter and *five* FBI agents, two of whom now concede that others besides Chaves disclosed "various aspects of the investigation." (A-220, A-222-23).

The government cannot whitewash the obvious fact that both the FBI and the USAO were complicit in the leaks. (*See* Br.14-15). It undertook no investigation, and took no steps to ensure the leakers would be held accountable; the emails by the U.S. Attorney and FBI higher-ups in May 2014 were plainly sent just to paper the record. Indeed, the government promoted Chaves and demoted the agent who complained about the leaks. (A-225, A-229, A-235, A-342). And that is just what happened in *this* case; there were numerous articles written by the same *Journal* and *Times* reporters revealing reams of confidential information about at least five other high-profile securities fraud investigations. (A-281-285). The government's brief ignores these articles, because it can neither deny that it

was aware of the leaks in the other cases nor explain why it failed to investigate them either.

When Walters expressed concern about the leaks, the government misled the district court, repeatedly claiming that Walters "cannot show that the source of the information contained in the articles was an agent or attorney for the government." (A-206-07; *accord*, *e.g.*, A-201, 207-09). The government's attempt to blame these misstatements on turnover at the USAO (GBr.21) is blatantly disingenuous. The leaks were well-known throughout the ranks, as reflected in contemporaneous email exchanges copying Bharara and his top deputies. (A-235-37). Even more critically, the government's misleading submission below was based upon the declaration of Telemachus Kasulis, who was "the principal AUSA responsible for the investigation" at the time of the leaks, is still at the USAO, and participated in those exchanges. (*Id.*; Dkt. 44 ¶ 2). That is why the district court itself chastised "the government's artful opposition" to Walters' motion. (SPA-20).

If the misconduct here does not qualify as "systematic and pervasive, across multiple cases," it is difficult to imagine what kind of misconduct would. Dismissal is the only remedy sufficient to "deter [the] pattern of demonstrated and

… continuous official misconduct." *United States v. Broward*, 594 F.2d 345, 351 (2d Cir. 1979).[4]

D. The Government's Misconduct Was "Outrageous"

The district court also should have dismissed the indictment because the government's misconduct was, in the U.S. Attorney's own words, "outrageous" and thus violated "common notions of fairness and decency." *United States v. Schmidt*, 105 F.3d 82, 91 (2d Cir. 1997); A-236 (Bharara email). The government argues that dismissal on due process grounds is limited to "coercion" or "violation of defendant's person" (GBr.43), but those are merely examples of misconduct that may qualify. The government ignores the precedent supporting dismissal for other types of "outrageous investigatory conduct," including where, as here, the investigators' actions were "criminal." *United States v. Rahman*, 189 F.3d 88, 131 (2d Cir. 1999).

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[4] The government's attempt to distinguish *Broward* and the related cases (cited Br.44) is unpersuasive. It is irrelevant that *Broward* and *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972), predated *Bank of Nova Scotia*. And, contrary to the government's suggestion, *United States v. Long*, 2016 WL 5400416, at *3 (M.D.N.C. Sept. 27, 2016), "dismissed" the indictment to "deter the Government from future violations."

E. At A Minimum, An Evidentiary Hearing Is Required

The Court should at least remand for an evidentiary hearing. (Br.45-47). The government claims that the evidentiary record was "ample" because it "gathered" thousands of documents and "interviewed 14 people." (GBr.44). It neglects to mention, however, that it *produced* only six of these documents (A-217-237), and disclosed *no* interview recordings or witness statements. The government did not even submit a single affidavit or declaration attesting to its version of events (once the original Kasulis declaration was exposed as false). The shortcomings in the government's disclosures do not end there. Even though the leaks here spanned over two years, the government's document review and interviews covered only three months (April to June 2014); the government has not tried to identify the other leakers; and there has been no investigation of the numerous other cases in which leaks occurred. (Br.45-46).

The government also questions the "utility" of a hearing because Chaves might invoke the Fifth Amendment. (GBr.45-46). But even if he did, there is a mountain of evidence yet to be disclosed that could bear on the extent of the leaks, who else was involved, and how they caused prejudice: at least the thousands of documents from which the USAO plucked only six; Chaves' phone records and the witness statements or recordings of the lengthy interviews he conducted with the USAO; the documents and witness statements for the FBI agents who met with the

Wall Street Journal in 2014 for undisclosed reasons; documents and witness statements for the deputy U.S. Attorney who spoke with the *New York Times* reporter; and discovery concerning leaks in the other cases. Also, the USAO inexplicably limited its inquiry to a three-month period in 2014 even though the leaks started a year earlier and continued for a full year after the reviewed period. There are likely to be numerous material documents pertaining to the earlier and later leaks.

In light of this, the government's contention that "any facts to support" Walters' motion "are already known" is fatuous. (GBr.46). The vast majority of the relevant information remains *unknown* (*see* Br. 19-20, 45-47), and what we do know is limited to the government's own self-serving disclosures. Given the government's pattern of deceit in this case, the Court can have no confidence in its mere say-so. Its appellate brief reflects yet more dissembling. For example, as explained, the government points to a *2014* wiretap to deny that the investigation was "dormant" in *2013*. (GBr.3 n.1). The government also tries to argue that, despite overseeing the case, Chaves was insufficiently familiar with the investigation to know whether or not it was dormant. His documents would undoubtedly shed light on whether the government can credibly maintain that position.

Finally, the government's professed concerns about protecting information related to the investigation are bogus at this stage. (GBr.46-47). Unlike in the cited cases, there is no active criminal investigation that could be compromised. The sole purpose of a hearing would be to get to the bottom of the government's "outrageous" misconduct and how it impacted the case, and there is no longer any *legitimate* law enforcement concern that could be thwarted by a hearing.

II. DAVIS' PERJURY DEPRIVED WALTERS OF A FAIR TRIAL

At a minimum, Walters is entitled to a new trial because the government elicited Davis' false testimony about the "Bat Phone." (Br.47-54). The government largely ignores the evidence undermining Davis' testimony, and its treatment of the remainder is superficial and misleading. It also misconstrues the cases that require it to correct materially false testimony to avoid a retrial.

A. Davis Testified Falsely

Davis falsely testified that Walters gave him the "Bat Phone" at Dallas Love Field and used it to tip Walters about WhiteWave in the summer of 2012. The meeting at Dallas Love Field did not occur until *December* 2012, months after the supposed WhiteWave tips. Davis otherwise remembers that meeting in excruciating detail, and simply made up the part about Walters giving him the "Bat Phone"—and there was no alternative meeting predating the WhiteWave tips where the handoff plausibly could have occurred. (*See* Br.27-28). Yet the

government chose to credit Davis' testimony because it was necessary to preserve the most critical and compelling part of the government's case. (*Id.* 28-29).

The government contends that being cornered by a good friend in an airport parking lot, and being instructed to use a "Bat Phone" to commit federal crimes, wasn't sufficiently memorable or "shocking" for Davis to recall where or when it happened. (GBr.53-54). But the government itself elicited Davis' testimony that he was "taken [a]back." (A-417/835). Moreover, the government ignores its failure to identify *any* alternative meeting at which the handoff might have taken place. After Davis said it happened at Dallas Love Field in 2011 or 2012, the government obtained records from the airport, the owner of Walters' plane and the company supplying his pilot. But these records neither corroborated Davis' story nor reflected any alternative location for the handoff. (Br.29, A-762). Then the government twice interviewed Walters' pilot, who confirmed what was reflected in the records. (A-789-93). So the government sent Davis to Love Field, and repeatedly asked him to retell his story, hoping that he would "remember" a different meeting, but that did not work either. (A-758, A-773, A-798). The government thus knew that there was *no* alternative meeting at which the handoff might have occurred.

The government also ignores most of the other evidence undermining Davis' testimony, including: Davis constantly changed his story about when he received

the "Bat Phone," where he kept it, and how often he used it (*see* Br.30); the "Bat Phone's" minutes would have automatically expired long before most of the alleged tips occurred (*id.*); Davis didn't even know the "Bat Phone's" number (A-824); Davis refused to confirm the "Bat Phone's" existence by wearing a wire (A-402/608); and "Cowboys" was Davis' secret password, not Walters' (A-734).

What the government does say about this evidence is wholly unpersuasive. The government claims it failed to identify the "Bat Phone" in Walters' call logs because Davis couldn't remember the phone's number. (GBr.52-53). But the government has not identified any number in the toll records that *conceivably could have been* the Bat Phone, *i.e.*, a number from an unidentified caller whose calls coincided with Davis' discovery of material nonpublic information or Walters' trading.

The government also exaggerates the difficulties it encountered during its unsuccessful attempts to retrieve the "Bat Phone." Davis claims to have thrown it into a "creek" near his house, not the Mississippi River. (A-429/949). If finding the phone was "like pulling a needle from a haystack," as the government now claims (GBr.53), then it undoubtedly would not have wasted taxpayer money on such a futile endeavor.

Nor does the supposedly "corroborating evidence" help the government. (GBr.51-52). The government claims that "an SEC subpoena requesting

[Walters'] phone numbers in the summer of 2011" put Walters "on notice of the need to start using prepaid phones," and Walters "himself used a burner phone." (*Id*. 52). But Walters had used burner phones to protect the confidentiality of his sports betting long before the subpoena. (A-450/1608). Moreover, that Walters had his own burner phone does not somehow prove that he gave a different one to Davis before the critical summer of 2012, when the evidence shows that that never happened. Finally, the government's theory about why and how Walters and Davis used the burner phones is nonsensical. It claims that "if [Walters] wanted to get in touch with Davis about Dean Foods, he would call Davis on his regular cellphone" and have Davis "call him back on the bat phone." (GBr.17). But if their purpose was to avoid leaving a record of "Walters' access to Davis" on their regular phones, they would not have initiated these "secret" calls using their regular phones, because that would leave the very record they supposedly were trying to avoid creating.

Terie Davis' testimony is equally unhelpful to the government. (Br.51). The government fails to parry the argument that it knowingly elicited false testimony from her about the "Bat Phone." (Br.50-51). It also disregards her testimony *disproving* the "Bat Phone" story: (1) the phone she found was "burgundy," not "black" like the alleged "Bat Phone" (A-749; A-453/1834-35); (2) the number she gave for that phone could not have been the "Bat Phone's" number

(A-454/1838-40; A455-56); and (3) Davis "smirked" and told her "they'll never find the phone" after providing the government with its supposed location (A-457/1855-56).

B. The "Bat Phone" Testimony Was Material

The government called Davis' "Bat Phone" testimony "significant" in summation because there was no other way to explain how Davis tipped Walters during the "crucial" 2012 period. (*See* Br.51-52; A-502/2755, A-504/2760). Now the government downplays that testimony and claims that "trading and phone records" independently support the conviction. (GBr.55). That is neither relevant nor true. It is irrelevant because, even if other evidence was technically "sufficient to uphold the jury conviction … without [Davis'] testimony," which it was not, there is still a "reasonable likelihood" that the jury accepted the government's own characterization of the "Bat Phone" as "significant" to any conviction. *Su v. Filion*, 335 F.3d 119, 129 (2d Cir. 2003).

And the government is vague as to what documentary evidence would independently support a conviction, because there is none. Notably, the government had all of this documentary evidence before Davis flipped, but didn't indict then—because it knew that evidence was insufficient. Our opening brief identified numerous trades for which documentary evidence directly contradicts

the government's allegations of insider trading. (*See, e.g.*, Br.21-23). The government disregards all of these examples, because it has no response.

Instead, the government points to a few additional trades that, like the others, were entirely proper. For example, the government claims that Davis tipped Walters ahead of Dean Foods' announcement raising its guidance for the second quarter of 2008 (GBr.13), but Davis didn't "specifically kn[ow]" the guidance would be raised and "d[idn't] recall … specifically" telling Walters it would be. (Tr. 712-713). Moreover, Walters and Davis, who were close friends, had *14* phone calls in June 2008. (Add. 7-9). Obviously they may sometimes have spoken around the time of a trade, because they spoke all the time. Here, as elsewhere, the government cherry-picked a call that occurred close in time to a trade, and ignored the rest. (*See also* Add. 31-36 (most calls occurred *after* trading in July 2012)). And the confidential information Davis allegedly disclosed on the call was revealed to him at least a week beforehand (Tr. 703); the government never explained why, given how frequently the two spoke, Davis would have taken so long to convey the alleged tip.

The government needed Davis' "Bat Phone" testimony because it could not prove its case using the documentary evidence, which largely contradicted its allegations. The "Bat Phone" was the only way to explain the critical WhiteWave-related trades. Tellingly, the government also ignores Davis' attorneys'

confirmation at his sentencing that the "Bat Phone" was "devastating" evidence that "fundamentally changed the trial" and "resulted in a swift conviction of Mr. Walters." (A-1212, A-1214–15). The "Bat Phone" was "no extraneous matter"; it was "significant" evidence that could have, and did, "affect[] the judgment of the jury." *Drake v. Portuondo*, 553 F.3d 230, 247 (2d Cir. 2009).

C. The False Testimony Went Uncorrected

The government erroneously claims that the prejudice was cured when Walters questioned Davis' veracity during trial (GBr.55-57). As explained (Br.53-54), a defense lawyer's mere "invitation to doubt" false testimony does not cure prejudice arising from the prosecution's insistence that the witness "testified truthfully." *Filion*, 335 F.3d at 129 n.5 (perjury was "still quite troublesome" even where defendant "attack[ed] [the witness'] credibility"); *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991). Where "a prosecutor throws his or her weight behind a falsely testifying witness," that by itself necessarily "affect[s] the judgment of the jury." *Jenkins v. Artuz*, 294 F.3d 284, 295-96 (2d Cir. 2002). This is why reversal is "virtually automatic" where, as here, "the government knowingly permit[s] the introduction of false testimony." *Drake*, 553 F.3d at 241; *accord United States v. Freeman*, 650 F.3d 673, 681 (7th Cir. 2011).

The government claims that aspects of the perjury were withheld from the jury in these cases. But the government either misconstrues the cases or overstates

its argument. In *Wallach*, for example, after the witness misrepresented that he "had not gambled" between 1988 and 1989, he "admitted" on cross examination that "he had signed gambling markers." 935 F.2d at 456. In *Freeman*, the government actually "stipulated" that the testimony at issue was false, and even then the Seventh Circuit determined that the stipulation "did not cure the false testimony." 650 F.3d at 681.

Nor does the government cite contrary authority. The cases it does cite (GBr.56) declined to order a new trial because the testimony at issue "was not shown to be false," *United States v. Josephberg*, 562 F.3d 478, 496 (2d Cir. 2009); *accord United States v. Zichettello*, 208 F.3d 72, 102 (2d Cir. 2000) (defendants had "not established that [the witness] committed perjury"), or because almost none of the perjured testimony "related to the defendants' offense conduct" and there was "no likelihood at all" that the jury believed it. *United States v. Cromitie*, 727 F.3d 194, 223–25 (2d Cir. 2013). And in *United States v. Blair*, 958 F.2d 26 (2d Cir. 1992), the prosecution entered "a stipulation" that the testimony at issue was false, and "the defense introduced" the stipulation at trial. *Id*. at 28. Here, of course, the government never stipulated that the "Bat Phone" testimony was false; the government instead "thr[ew] [its] weight behind a falsely testifying witness," which is precisely what "affected the judgment of the jury," and requires a new trial. *Jenkins*, 294 F.3d 295-96; *accord Filion*, 335 F.3d at 126 (question is

whether "the testimony went uncorrected" by the prosecution, not whether defense merely disclosed its concerns).

III. THE EVIDENCE ON DARDEN WAS INSUFFICIENT

The Darden-related counts should be dismissed. (Br.55-58). The government needed to show that Davis and Barington had "the functional equivalent of a fiduciary relationship," *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (en banc), and that Walters "kn[ew] that [Davis] had breach[ed] [a] duty" of confidentiality he owed to Barington, *United States v. Falcone*, 257 F.3d 226, 234 (2d Cir. 2001). The government made neither showing and, tellingly, ignores Davis' concession that he never told Walters that the Darden information was subject to a non-disclosure agreement.

The government does not seriously suggest that Davis and Barington, as arms-length contractual counterparties, shared a "fiduciary or similar relationship of trust and confidence." *Chestman*, 947 F.2d at 567. Relying on *Falcone*, it claims (GBr.61) that an ordinary contractual relationship may qualify. But *Falcone* confirms that "[q]ualifying relationships are marked by the fact that the party in whom confidence is reposed … acts to serve the interests of the party entrusting him or her" with confidential information—in other words, the type of "fiduciary relationship" or "its functional equivalent" that is plainly lacking here.

257 F.3d at 234-35; *accord United States v. Kim*, 184 F. Supp. 2d 1006, 1015 (N.D. Cal. 2002).

More importantly, the government presented *no* evidence that Walters knew that Davis had accepted any duty to keep the Barington presentations confidential. (*See* Br.57-58). The government argues that because Walters is "sophisticated," he "cannot credibly suggest that he might have believed that Barington" would "disclose[] the Darden information to Davis without first securing Davis's agreement to keep it quiet." (GBr.62). But the government does not explain why the information was so sensitive that Davis necessarily entered such an agreement. *Cf. United States v. Cassese*, 273 F. Supp. 2d 481, 485 (S.D.N.Y. 2003) (public companies engaged in extensive merger talks even though NDA never fully executed). Activist investors like Barington routinely publicize their intentions—indeed, Barington eventually did just that for Darden, despite previously requesting that Davis keep the information confidential. (Tr. 1469-70). And Barington expected Davis to convey the information to others because it asked him to recruit "co-invest[ors]." (Tr. 1458). Moreover, it is not Walters' burden to "suggest" anything; it is *the government*'s burden "to prove … the defendant's knowledge that the tipper had breached the duty." *Falcone*, 257 F.3d at 234. The government still points to no evidence showing that Walters had this knowledge, and ignores Davis' own testimony disclaiming that he told Walters about his NDA. Mere

"speculation and surmise" does not qualify. *United States v. Coplan*, 703 F.3d 46, 76 (2d Cir. 2012). The government failed to meet its burden on the Darden-related counts.

IV. THE UNSUPPORTED RESTITUTION AWARD VIOLATED THE MVRA

A. The Legal Fees Were Insufficiently Documented

The government failed to establish that Dean Foods' requested legal fees were "necessary" under the MVRA. (*See* Br.58-66). The government's efforts to salvage the inflated restitution award by (1) reading the word "necessary" out of the statute and (2) improperly shifting the burden of proof to Walters (GBr.65-69), are unavailing.

First, the MVRA authorizes restitution only for "necessary" expenses. 18 U.S.C. §3663A(b)(4). The government pays lip service to this requirement, maintaining that expenses are recoverable so long as the "purpose of the expense" is merely "*related* to investigation or prosecution of the offense." (GBr.65 (emphasis added)). But this Court has already rejected this argument, holding that "to be 'necessary' for restitution, it is not enough that the expenses incurred

'*helped* the investigation.'" *United States v. Cuti*, 778 F.3d 83, 95 (2d Cir. 2014) (emphasis in original).[5]

Second, the government erroneously purports to place the burden on Walters to disprove necessity. Even though Dean Foods supplied *no* billing detail to support the $6 million legal fee award, the government argues that it was incumbent upon *Walters* to somehow "challenge the veracity" of that barebones request. (GBr.67). But *the government* must establish that the restitution sought was "necessary," 18 U.S.C. §3664(e); in the case of legal fees, this means the victim must supply the billing detail so the court can "carefully parse[] the … fees." *Cuti*, 778 F.3d at 93; *accord United States v. Battista*, 575 F.3d 226, 234 (2d Cir. 2009) (affirming award where district court "meticulously parsed out the fees"); *United States v. Gupta*, 925 F. Supp. 581, 587 (S.D.N.Y. 2013).

The government cites *Gupta* (GBr.67) to rationalize its improper burden-shifting. But in stark contrast to Dean Foods, the victim there provided "a voluminous disclosure of its legal fees" that "specif[ied] the work performed with sufficient particularity to assess what was done, how it was done, and why." 925

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[5] *United States v. Maynard*, 743 F.3d 374 (2d Cir. 2014) (cited GBr.65), does not support the government's definition of "necessary." *Maynard* affirmed the common-sense understanding of "necessary" as including "expenses the victim was *required to incur* to advance the investigation or prosecution of the offense." *Id.* at 381 (emphasis added).

F. Supp. 2d at 587. Even then, the court carefully analyzed the billing records and excluded certain fees where "the number of attorneys staffed on a task … exceeded what was reasonably necessary." *Id.* Only after the *Gupta* victim provided its detailed billing statements did the defendant bear any burden to challenge "the veracity of the records." *Id.* That is precisely what should have happened here—Dean Foods should have supplied the requisite billing detail, so that Walters (and the government) could review it and challenge any problematic entries, and the district court had the information required to determine whether the fees were actually necessary.[6]

As explained (Br.65-66), the problem is particularly acute with respect to Davis. The government's assertion that this "was not a case where costs had to be allocated between compensable and non-compensable proceedings" is irrelevant. (GBr.68). What matters under this Court's precedents is whether the firms incurred "redundant or duplicative … expenses" and "needless administrative costs." *Cuti*, 778 F.3d at 95–96. Even without access to the detailed records, it is clear that there must have been redundancies with three law firms representing the same cooperating witness in the same proceedings. *Id.*

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[6] Among a host of other "unnecessary" expenses, fees related to the SEC's parallel investigation are unrecoverable because the government concedes that was a completely separate investigation. (Br.62-63). The government offers no substantive justification for including such fees in the award.

B. Davis' Entire Compensation Was Not Recoverable

This Court has repeatedly confirmed that where an employee provided services that benefited his company, the employer is entitled to restitution of only a fraction of his salary. *See, e.g.*, *United States v. Bahel*, 662 F.3d 610, 649 (2d Cir. 2011). The government attempts to justify awarding restitution for all of Davis' director fees by claiming that he performed no work that benefited the company. (GBr.69). That is demonstrably false. Both Davis and Dean Foods' CEO Gregg Engles testified about the extensive work Davis performed as a Dean Foods director, which was, in fact, so highly valued that he was chosen to become Dean Foods' chairman in 2013. (Tr. 1201-02).

The Dean Foods board, like that of any public company, reviewed and approved major corporate decisions, oversaw management, prepared for and attended meetings of both the board and its subcommittees, and reviewed and approved lengthy public filings. (*See, e.g.*, Tr. 625). The board met to address these and other issues 6-7 times per year. (Tr. 637-38). The board also reviewed quarterly financials, received "litigation update[s]," and had "executive session[s] where the board would meet by themselves without management." (*Id*). Davis also served, at various times, on the audit committee, the compensation committee,

and the executive committee. (Tr. 636). Davis further reviewed and approved, in the aggregate, over 2,000 pages of SEC filings between 2008 and 2014.[7]

Additionally, Davis went above and beyond his normal board duties by engaging in "fairly commonplace" off-the-record discussions with Engles. (Tr. 660). Engles testified that Davis was a director that he "s[aw] more often" than other directors and "whose opinion [he] valued," (Tr. 125), and that Engles would "seek [Davis'] advice" if he was "considering a significant financial matter or transaction." (Tr. 126).

Dean Foods received ample value from Davis' services as a director. Restitution of his entire compensation would give the company a substantial windfall. In similar circumstances, companies have only been awarded a fraction of the person's compensation. *See, e.g.*, *Bahel*, 662 F.3d at 650 (less than 10% of salary); *United States v. Skowron*, 529 F. App'x 71, 74 (2d Cir. 2013) (20% of salary).

V. THE FORFEITURE ORDER SHOULD BE VACATED

The government similarly fails to justify the erroneous forfeiture calculation. Indeed, it has now abandoned the counterfactual argument that it persuaded the

[7] *See* https://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0000931336&type=&dateb=&owner=exclude&start=0&count=40.

district court to adopt. At sentencing, the government asserted that Judge Sullivan's method would give Walters "a windfall" because he would "get[] the benefit of his own sales," which it claimed "cause[d] a depreciation of the stock price" in Walters' favor. (A-1037). Now the government acknowledges that "Walters did not always or even often sell his stock." (GBr.73). Forfeiture must be limited to the "proceeds traceable to [the] violation," 18 U.S.C. §981(a)(1)(C), and the district court abused its discretion by predicating its calculation on an incorrect understanding of the facts. (Br.73-74).

The government nevertheless seeks to justify the calculation on different grounds, claiming: (1) the end-of-day methodology is "common" and (2) uses a "reasonable assumption" that the market "takes about a day" to incorporate information into the stock price. (GBr.72). But these belated justifications were not the bases for the district court's calculation and, in any event, are completely meritless.

The government's improper methodology is not "common." The government cannot point to a single criminal case in which it was used. The government is able to muster only a single *civil* case as an example. (GBr.71 (*SEC v. Wyly*, 788 F. Supp. 2d 92, 100–01 (S.D.N.Y. 2011)). But one inapposite district court case about a questionable equitable remedy never authorized or defined by

Congress, *see Koresh v. SEC*, 137 S. Ct. 1635, 1642 n.3 (2017), does not make an approach a "common" way to assess a statutorily-defined criminal penalty.

Moreover, the government's "assumption" about how the market absorbs information is entirely unsupported and contrary to law. As explained (Br.72-73), the market quickly incorporates new information into the stock price, and waiting until the end of the day risks having unrelated news affect the price. The government offers nothing to support its contrary "assumption." To the extent there is "ambiguity" about when the stock price reflects new information, the rule of lenity requires that it be resolved in Walters' favor. *United States v. Canales*, 91 F.3d 363, 367 (2d Cir. 1996). The forfeiture award should be vacated and reduced to $12,651,727.67.

CONCLUSION

The indictment should be dismissed, or the case remanded for a new trial and/or an evidentiary hearing. At a minimum, the Court should reverse the Darden convictions, vacate the restitution and forfeiture orders, and remand for resentencing.

Dated: New York, New York
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1. The undersigned counsel of record for Defendant-Appellant William T. Walters certifies pursuant to Federal Rules of Appellate Procedure 32(g) and Local Rule 32.1 that the foregoing brief contains 6,980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word 2016.

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Dated: January 11, 2018

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