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

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT [REDACTED]

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INTRODUCTION

The insider trading prosecution of William Walters resulted from extraordinary government misconduct. The government now concedes that after years investigating Walters' securities trades without uncovering any wrongdoing, the FBI agent leading the investigation, David Chaves, embarked upon a deliberate and systematic campaign to violate grand jury secrecy in order to revive the "dormant" investigation. For two years beginning in 2013, Chaves repeatedly disclosed secret grand jury information to the *Wall Street Journal* and *New York Times*, to generate a string of stories intended to bully a key witness into cooperating and stimulate conversations on a wiretap. Chaves also leaked to one reporter in exchange for information the reporter had. This illegal leaking and bartering of grand jury secrets was part of a broad pattern; it occurred in at least five other investigations Chaves was supervising.

Remarkably, after the U.S. Attorney and the head of the FBI Office in New York discovered the leaks, the government did nothing to stop them. Then-U.S. Attorney Preet Bharara personally learned about the leaks no later than May 2014 and characterized them as "outrageous" in an email to the FBI's top brass. But neither the FBI nor the USAO did anything to identify or punish the leaker. Instead, the government turned a blind eye, continued to reap the benefits of Chaves' illegal activity, and rewarded him with a promotion later in 2014. When

Walters sought a hearing on suspected leaks in 2016, the USAO—knowing full well what had occurred—misled the district court, denigrating the request as "a fishing expedition" supposedly based upon "false" and "baseless accusations."

The government only owned up to the leaks after the district court initially ordered a hearing. Even this belated confession left numerous questions unanswered: who was in on Chaves' scheme and just how pervasive was the misconduct? When did the USAO discover that grand jury secrecy had been violated? What information did the reporter supply to Chaves in exchange for leaked information? In what other ways did the leaks affect the investigation and taint the grand jury proceedings and trial? How many other cases are implicated and what did the USAO know or do in those cases? Walters moved to dismiss the indictment due to the misconduct and, in the alternative, sought an evidentiary hearing to answer these and other questions. The court denied the motion because Walters supposedly failed to show prejudice, and refused to hold a hearing that would have allowed an assessment of prejudice based upon a complete evidentiary record.

Though much about the leak plot remains a mystery, we do know that the leaks played a substantial role in star witness Tom Davis' decision to cooperate against Walters after insisting for 21 months that neither he nor Walters had done anything wrong. Davis was Walters' friend and a member of Dean Foods

Company's board of directors. The government believed Davis had supplied Walters, a sophisticated investor who frequently traded Dean Foods stock, with material nonpublic information about the company. As Davis repeatedly advised the government, that is not true. But the government learned from a 2015 SEC deposition that Davis had "financial trouble[s]." Soon thereafter, an article in the *Wall Street Journal* publicly identified Davis as a target of the investigation, costing him his job and sole source of income. Only then did Davis opt to cooperate.

After using the leaks to flip Davis, the government suborned his perjury. Davis' phone records undermine the claim that he tipped Walters during a crucial period of time, so he fabricated a story that he provided the tips using a prepaid "burner" cell phone that could not be traced, which he supposedly had (conveniently) discarded. The government spent months unsuccessfully trying to corroborate this story, and in the process, caught him in a lie that disproved it altogether, but elicited his testimony anyway. It even tacked on bogus charges of insider trading as to an unrelated company that Davis was not affiliated with but had learned that another investor was touting. The gambit worked. Walters was convicted and sentenced to five years' imprisonment, as well as millions in financial penalties, including legally flawed, vastly inflated amounts of forfeiture and restitution.

The government initiated this prosecution and won this conviction through blatant, egregious misconduct that undermines the rule of law and integrity of the criminal justice system. Unless this Court dismisses the indictment, grants a new trial, or at the very least, remands for an evidentiary hearing on the grand jury leaks, the message sent will be clear: the ends justify the means, and the government is above the very laws it is supposed to be enforcing.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. §3231. The judgment of conviction was entered on July 27, 2017. (SPA-29). Walters filed a notice of appeal on August 1, 2017. (A-1086). A forfeiture order was entered on September 20, 2017, and Walters filed a notice of appeal on October 3, 2017. (SPA-39, A-1197). A restitution order was entered on October 20, 2017, and Walters filed a notice of appeal on October 23, 2017. (SPA-42, A-1243). This Court consolidated the three appeals, and has jurisdiction pursuant to 28 U.S.C. §1291.

ISSUES PRESENTED

1. Is a defendant prejudiced by the illegal disclosure of secret grand jury information that revives a dormant investigation and induces the cooperation of an essential government witness?

2. Can an indictment be dismissed without a showing of prejudice where the government engaged in systematic and pervasive misconduct across multiple cases?

3. Does the government's purposeful elicitation of false testimony by a witness require a new trial where the government concedes that the testimony is "crucial"?

4. Under the misappropriation theory of insider trading, does a fiduciary or similar relationship arise between sophisticated parties operating at arms-length?

5. In a misappropriation case, can the government prove the tippee's knowledge that the tipper breached a duty owed to the source of the information where the tipper never said he had agreed to keep the information confidential?

6. Can a victim establish that legal fees were "necessary" under 18 U.S.C. §3663A(b) without revealing what services its counsel provided?

7. Can a corporate victim recover the entire salary of a board member as restitution under 18 U.S.C. §3663A(b) where the board member provided valuable services that benefited the corporation?

8. Must a forfeiture order in an amount vastly exceeding any reasonable estimate of the "proceeds," which was calculated based upon a theory that is arbitrary, illogical and inconsistent with the factual record, be vacated?

STATEMENT OF THE CASE

A. Procedural History

Walters appeals from the judgment of conviction and orders of forfeiture and restitution entered in the United States District Court for the Southern District of New York (Castel, J.), following a jury trial. The rulings at issue are unreported. (SPA-1, SPA-21, SPA-39, SPA-42).

The indictment charged Walters with conspiracy to commit securities fraud in violation of 18 U.S.C. §371 (Count One); conspiracy to commit wire fraud in violation of 18 U.S.C. §1349 (Count Two); securities fraud in violation of Section 10(b) of the Securities Exchange Act and SEC Rules 10b-5 and 10b5-2 (Counts Three through Six); and wire fraud in violation of 18 U.S.C. §1343 (Counts Seven through Ten).

The principal charges related to certain trades in Dean Foods stock, which the government alleged were based on inside information supplied by Walters' friend Tom Davis, who sat on the company's board of directors. The conspiracy supposedly began in 2008, but the government's main focus was trades placed between May and October 2012, which were the only Dean Foods trades charged as substantive counts.[1] The indictment also charged insider trading related to

[1] These trades occurred on May 8-9, July 13, 17, 18, 23, 24 and 31, September 17-19, and October 9 and 11, 2012.

Darden Restaurants, a company that Davis was not affiliated with, but had learned about through another investor, Barington Capital Group ("Barington").

Trial commenced on March 15, 2017 and lasted approximately three weeks. On April 7, 2017, the jury returned a verdict of guilty on all counts. (A-509–10/2988–89). On May 5, 2017, Walters filed a motion for a new trial. The district court denied the motion on July 6, 2017. (SPA-21).

On July 27, 2017, Walters was sentenced principally to 60 months' imprisonment, a $10 million fine, and forfeiture in an amount to be determined at a later date. (SPA-31–32, SPA-35–37). On September 20, 2017, the district court ordered Walters to forfeit $25,352,490. (SPA-40 ¶ 1). On October 20, 2017, Walters was ordered to pay restitution of $8,890,969.33, including $8,882,022.80 to Dean Foods. (SPA-42 ¶ 1).

B. Walters' Investment Background and Dean Foods Trading

Walters is a self-made businessman who overcame poverty and a difficult childhood to become a famous, successful professional sports gambler. In the early 1990s, he began to pursue more traditional forms of investing. (A-461–62/2136–38, A-463/2143, A-474/2321). Walters traded in "a range of different stocks" spanning "almost [every] industry that you can think of." (A-471/2303, A-486/2474; *accord* A-475/2326, A-485/2470). The amount he invested in any

particular stock ranged "between two and a hundred million" dollars. (A-475/2326).

Walters conducted stock transactions using established banks like Goldman Sachs, Barclays, and Wells Fargo. (A-475/2328, A-481/2431, A-482/2441, A-483/2461-63, A-484/2466). They characterize him as a "very, very sophisticated" investor with an "intellectual" approach. (A-469/2293-94, A-471/2303, A-484–85/2468-69). They also praise the "extraordinary amount of work" he performed in order to diligence his investments. (A-471/2303, A-469/2293, A-484–85/2468-69).

Indeed, Walters voraciously consumed information from public sources about his investments, including news, analyst and S&P reports that he reviewed daily. (A-470/2297–2300, A-471/2302, A-472/2305-07, A-474/2321-22, A-475/2327). The topics of Walters' research ran the gamut, and included "stock research," "price movement" and trading "volume," "the direction of interest rates," "research on commodities [and] commodity prices," "research on the economy" and events that affected "the overall market." (A-474/2321–2324, A-487/2483, A-491/2508). Walters also made "substantial effort[s]" to understand "th[e] industries" of the companies in which he invested. (A-471/2303). Walters spoke with representatives of major investment banks about his investments "very frequently," "five to ten times a day sometimes," and was "very interested in

[their] opinion." (A-473/2320, A-484–85/2465-69, A-490/2495, A-498/2642). They sent Walters "updates" "every day" about his investments. (A-499/2648). Walters also "had sophisticated computer systems" that analyzed stock performance and aided his investment decisions. (A-471/2303, A-475/2325).

Consequently, Walters "understood the companies that he invested in" and "the industries [they] were a part of," and "really got to understand the way a company operated, how [it] made money," and "how outside factors affected" it. (A-485/2472). According to a Barclays investment advisor, Walters' depth of knowledge made him "very much like ... the institutional investors" serviced by the bank. (*Id.*; *accord* A-480/2398). Through hard work and business acumen, Walters made hundreds of millions of dollars whose legitimacy is unquestioned. (A-462/2137-38). His investments and profits were scrutinized annually by the Walters Group's auditors and reflected in the company's books and records. (A-464/2146-47).

Dean Foods is a publicly-traded dairy manufacturer and supplier. Walters exhaustively researched Dean Foods using public sources, as he did for all of his investments. (*See, e.g.*, A-477/2338-39, A-479/2385, A-492/2567-68; A-698–99). Among numerous other types of research, Walters scrutinized news reports, analyst reports and his investment advisors' research on Dean Foods, and carefully tracked the price of both raw milk and fuel, which were the principal factors

affecting Dean Foods' profits. (*Id.*; A-488–489/2488–2490). Walters also spoke with JPMorgan's "analyst ... that covered Dean Foods" in order to get his take before making trades. (A-480/2397).

Neither the frequency nor the size of Walters' Dean Foods trades were any different from the trades he made in other stocks. (A-469/2293, A-475/2326, A-476/2335, A-485/2471, A-487/2484). Although Walters profited overall on Dean Foods, he lost money on some of his individual trades. (*See, e.g.*, A-399–400/569-72, A-460/2060, A-478/2346-47).

C. The Prosecution Was Brought After The Government Deliberately Violated Grand Jury Secrecy To Revive A "Dormant" Investigation

The government began investigating Walters in approximately July 2011. After nearly two years, however, it still had no case; the FBI agent in charge of the investigation, David Chaves, labeled it "dormant" in 2013. (A-220; *accord* A-318–20 (*New York Times* reporting that "people briefed on the matter who … were not authorized to discuss the investigation" admitted "a case has yet to materialize")). At that time, Chaves began strategically, and illegally, leaking secret grand jury information to the press.[2] (A-220). He was cozy with *New York*

[2] The following description of Chaves' misconduct is based upon limited, selective and self-serving disclosures by the government. (A-217-37). As explained below, the government's misconduct is almost certainly more extensive than what it has chosen to reveal.

Times and *Wall Street Journal* reporters, and arranged "lunch" and "dinner[s]" where he leaked the grand jury information. (A-220–21). He also texted the reporters and discussed the investigation with them by phone. (A-221).

The leaks generated numerous articles between 2014 and 2015. The articles provided detailed information concerning the investigation attributed to "people briefed on the matter" who "spoke anonymously because they were not authorized to discuss the investigation." (A-78–83, A-318–20). The articles disclosed when the investigation began, who the targets were and other detailed information about them, what stocks they traded, specific trades being investigated, when those trades occurred, that the FBI, SEC and USAO were working in tandem, what evidence they were examining (*e.g.*, "phone records"), investigative techniques they were "considering" including "electronic and human surveillance," and which "theor[ies]" the government was "exploring." (A-78–99, A-321–324).

As the government now concedes, "it is … an incontrovertible fact that FBI leaks occurred," "that such leaks resulted in confidential law enforcement information about the [i]nvestigation being given to reporters," and that the articles "contained a significant amount of confidential information about the [i]nvestigation." (A-217–18, A-226). These violations of grand jury secrecy likely constitute multiple crimes, including obstruction of justice (18 U.S.C. §1503(a))

and unlawful disclosure of a sealed wiretap (18 U.S.C. §§2518(8)(a)-(c), 2517(2) and 2520(g)).

One reason Chaves leaked this information was to illegally obtain investigative leads from the *Wall Street Journal*. Chaves had a *quid pro quo* with one reporter, Susan Pulliam, to exchange grand jury secrets for information that would assist the investigation. He asked her "to let him know if she came across information regarding Walters," and she subsequently called him "from time to time" to "describe what she was learning." (A-221). The government has not disclosed what specific information Chaves received. It appears that "*Times* reporters" were also feeding Chaves information, though the government has not disclosed the identity of those reporters or what they told Chaves. (*Id*.).

When conducting the leaks, Chaves was also apparently hunting for "a loose-lipped cooperating witness" who might spur the investigation (A-318) (one of government's tactics was to "scare [targets] into cooperating"), and trying to induce targets of the investigation to attempt "maneuvers [that] c[ould] cause them to get caught," including by "destroy[ing] evidence" (A-324). In addition, Chaves hoped articles resulting from the leaks would "tickle the wire," *i.e.*, spur conversations recorded on wiretap that might be used against targets.

Although the government has disclosed only Chaves' role in these leaks, there is strong evidence that he was not acting alone. For example, the articles

typically indicated that information had been obtained from multiple individuals with direct knowledge of the investigation. (*See, e.g.*, A-322–24 (information supplied to reporter by "*people* briefed on the probe") (emphasis supplied)). One *New York Times* reporter told the USAO that he had multiple "sources." (A-220). Chaves himself told the government that he was *not* the source of "all of the confidential information regarding the [i]nvestigation that appeared in th[e] newspapers." (A-220, A-227).

Nor did the government dispute that the misconduct here was part of an extensive pattern spanning numerous other insider trading investigations in which information was leaked to the same *Journal* and *Times* reporters. (A-281–85, A-329). Walters has identified at least five such investigations overseen by Chaves. (A-281–85). The resulting articles span an eight-year period from 2009 to 2016, and cover some of Bharara's most-touted insider trading prosecutions. (*Id.*). They reveal vast quantities of "inside information from the government" (A-326), including "the names of unindicted co-conspirators," their "statements to investigators" which "ha[d]n't previously been reported," nonpublic "subpoena[s]," "meetings with defense lawyers," whether a "probe" was "at an advanced stage," how the government was "preparing to present evidence to [the] grand jury," and the nature and expected timing of the "charges" the government was "preparing" (A-281–85). The government has not disclosed what, if anything,

it has done to investigate the leaks in these cases or identify other cases in which leaking occurred.

Government emails also demonstrate that, by May 2014, the FBI and USAO knew that at least one FBI agent with a "specific and aggressive agenda" was leaking grand jury secrets to the press. (A-223). These emails acknowledge how "reprehensible," "deplorable" and "astonishing" it was for an investigator to criminally leak and trade grand jury secrets with reporters. (A-235, A-237). The issue was immediately elevated to the highest ranks of both offices. (A-223). Bharara himself characterized the "leaks" as "outrageous" in one email. (A-236). In another email, the then-deputy U.S. Attorney recounted to Bharara and other USAO higher-ups his "good but astonishing conversation" with a *New York Times* reporter. He said that the reporter confirmed having a source at the FBI and described certain conversations with that source, whom the reporter described as "a bit threatening." (A-237). The deputy U.S. Attorney ended the email by stating, "I don't think this should be discussed generally right now for a number of reasons but obviously we need to … address this with the FBI." (*Id*.).

Nevertheless, the government did *nothing* to punish the leaker or bring him to justice, and Chaves continued leaking information. (A-225). Instead, in late-2014 Chaves was *promoted* to oversee all white-collar crime in the FBI's New York office, while another agent who complained about the leaks was transferred

out of New York. (A-229, A-235, A-342). At best, the higher-ups deliberately ignored the "outrageous" criminal undertaking orchestrated by the FBI and potentially other government agencies.

D. The Leaks Led Davis To Implicate Walters After 21 Months Of Denying Any Tips

The last article based on leaks, in August 2015, publicly identified Davis as a target of the investigation. (A-278–79). Prior to its publication, Davis had steadfastly maintained his innocence during interviews with the government and sworn testimony to the SEC, and had refused to cooperate. (A-430/997, A-431–32/1001-03, A-735–38). But that all changed after he was publicly identified as a target. This humiliating revelation caused Davis and his family to be "hounded by reporters." (A-439/1103-04). More importantly for Davis, it resulted in his ouster from the Dean Foods board, and the loss of his only source of income. (A-405/644, A-409/737, A-439/1103-04, A-769). Losing his $200,000 in annual director fees placed even greater strain on Davis' precarious financial situation.

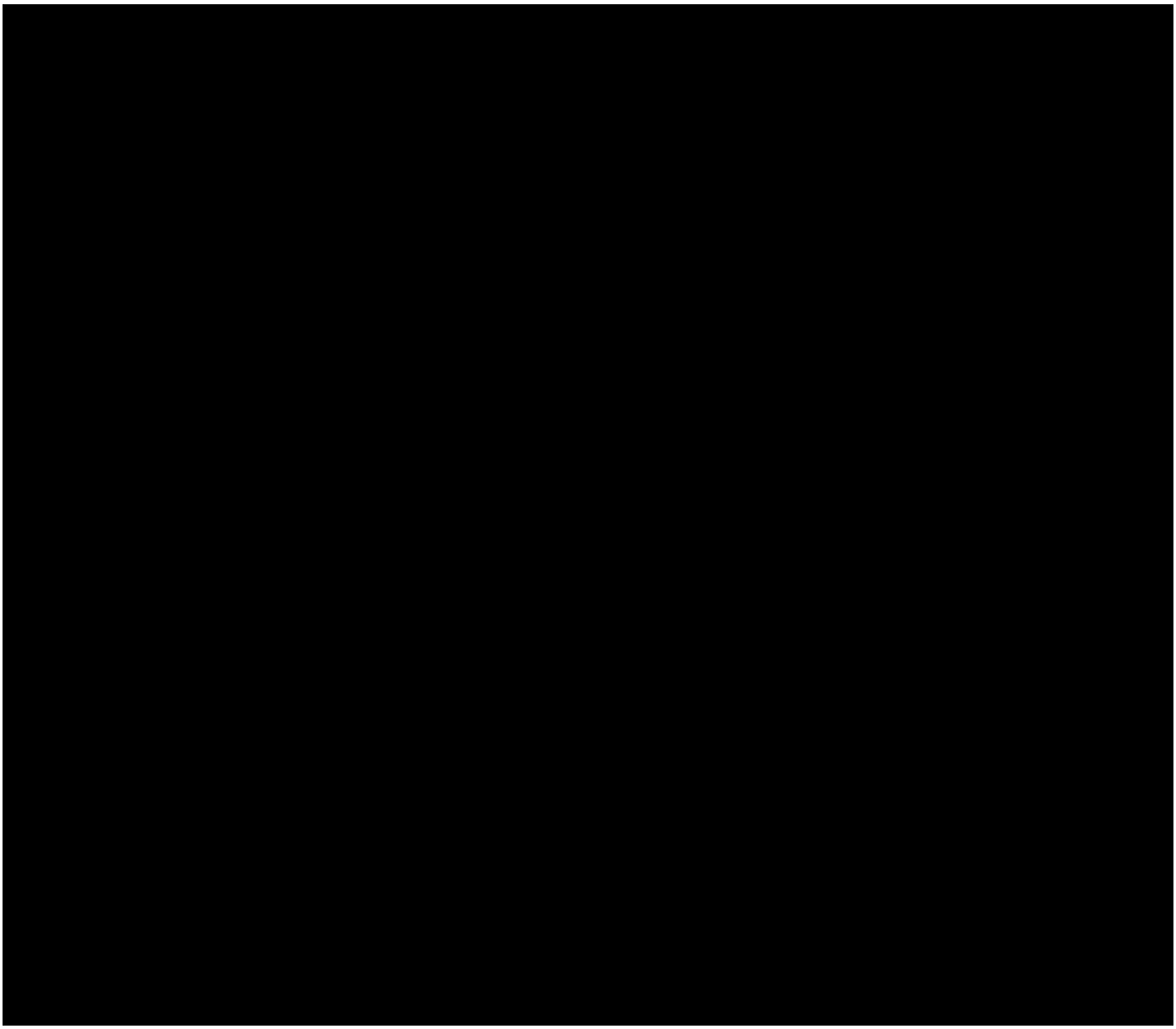
Though Davis presented himself as an upstanding member of the Dallas community, he was actually a gambling addict who refused to live within his means. Davis lived luxuriously, belonged to exclusive clubs, and took opulent vacations. (*See, e.g.*, A-415/817-18, A-441/1123-24, A-468/2285-87, A-1208–09, A-1233). At the same time, he racked up massive gambling debts during frequent jaunts to Las Vegas and his use of an illegal bookie in Dallas. (A-416/821). He

once lost $200,000 at the blackjack table on a single trip to Vegas. Unable to repay his casino debt, Davis stole $100,000 from a battered women's charity he ostensibly supported, and then orchestrated a cover-up, lying to the IRS about the charity's finances. (A-413/794-96). Davis subsequently stole an additional $25,000 from that same charity. (*See, e.g.*, A-414/813–16). Yet even the proceeds of these and Davis' other schemes apparently were insufficient to pay his debts. (*See, e.g.*, A-434–35/1026-30, A-436/1044-45, A-437/1062, A-438/1092).

Davis' May 2015 SEC deposition alerted the government to his "financial trouble." (A-343). The article identifying him as a target of the investigation appeared soon thereafter. The public exposure of his alleged involvement in an insider trading conspiracy resulted in his unemployment, ouster from his exclusive clubs, and ostracism from the Dallas community where he had once been prominent. (A-1221–22, A-1233). This pushed Davis to the breaking point. After 21 months of insisting that he never tipped Walters, including in sworn SEC testimony (*see, e.g.*, A-735–738), Davis changed his story in January 2016 and began pointing the finger at Walters (A-440/1114-15).

E. The Government Used The Fruits Of Its Illegal Leaks To Procure The Indictment

Davis sat for 13 proffer sessions prior to Walters' May 2016 indictment. (A-32, A-739–42). [redacted]



F. The Government Misled The District Court About The Leaks

In September 2016, before the trial, Walters raised suspicions about the grand jury leaks and moved for a hearing regarding potential violations of Federal Rule of Criminal Procedure 6(e). (A-125). Walters alleged that "the government engaged in a pattern of improper conduct, including ... leaking grand jury

information to the press, as part of a concerted effort to breathe life into a flagging investigation." (A-108).

At the time, the USAO knew that an FBI agent had leaked secret grand jury information, and had internally characterized those leaks "outrageous." (A-235–36). Yet in response to Walters' motion, the USAO falsely claimed, repeatedly, 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* A-186 (Walters "cannot support a finding that the source of the information was an attorney or agent for the Government"); A-201 (Walters "cannot demonstrate that the source of the information was 'likely' an agent or attorney for the Government"); A-209 ("the natural and logical inferences lead to the conclusion that the source was not a Government official")).

The government objected to holding a hearing and filed "a sworn declaration submitted by the prosecutor responsible for this investigation at the time of the published reports" which it claimed "persuasively rebuts [Walters'] argument," even though the leaks were well-known to that attorney and many others within the USAO. (A-198–99, A-230). The government further denigrated Walters' suspicions as "false," "baseless accusations [] undermined by the facts," and "a fishing expedition." (A-186). Later, the district court charitably

described the government's submission as an "artful opposition" that "never disclosed" the USAO's "high level concerns over FBI leaks." (A-391).

On November 17, 2016, the district court granted an evidentiary hearing. (A-214–15). Then, on the eve of this hearing, the government switched tacks. After concealing the leaks for over two years and misleading the district court, the USAO suddenly threw Agent Chaves under the bus, conceding that he had disclosed "significant amount[s] of confidential information relating to the investigation." (SPA-11). Nonetheless, the government maintained that in light of its own factfinding, no hearing was warranted and offered assurances that Chaves would be thoroughly "investigat[ed]."[3] (SPA-11, SPA-16).

Yet no charges have been filed against Chaves. Nor is it likely that the government has disclosed the full extent of the problem. For example, the government reviewed "*thousands* of emails and text messages" related to the leaks, but disclosed only *six* of them. (A-218–19). And this document review covered only three months (April-June 2014), even though the leaks occurred over a much longer period of time, from 2013 until at least late summer 2015. (A-218). The government says it interviewed witnesses, but has disclosed no witness statements

[3] The government has sent three one-page letters to the district court regarding the status of its alleged investigation, but their substance is completely redacted. (A-392, A-882, A-1191).

or otherwise explained what occurred at these interviews. Nor has the government revealed the specifics of Chaves' misconduct in other cases, who else was leaking, and how long the FBI and the USAO knew about all of this.

It is indeed curious that the government has chosen to single out Chaves despite the substantial evidence that he was not acting alone. Perhaps the government hopes to avoid additional scrutiny by attempting to confine the problem to him. It is noteworthy that four other FBI agents attended a May 27, 2014 meeting with a *Wall Street Journal* reporter, and two of them (including Chaves) insist that others besides Chaves disclosed "various aspects of the investigation" "in exchange for the *Journal* agreeing to hold publication of a story." (A-220, A-222–23). The remaining three agents in attendance apparently deny this. (A-223). But the fact that *five* representatives of the FBI conducted a secret meeting with the *Journal*, with conflicting accounts of what transpired, is itself further evidence that there is more to this than the government will admit.

Walters moved to dismiss the indictment based on the government's misconduct and, in the alternative, requested a hearing. The district court denied the motion without even holding the hearing it had previously ordered, asserting that Walters suffered no prejudice. (SPA-16, SPA-20).

G. The Trial

1. *Davis' False Claims About The 2008-2011 And 2013 Dean Foods Tips*

Though the trial focused on the 2012 Dean Foods trades, Davis also testified that he tipped Walters about Dean Foods between 2008 and 2011 and in 2013. His testimony does not make sense.

As an initial matter, there were long stretches of time between 2008 and 2011 during which Walters made very large trades for which there was no conceivable tip. Examples include: (1) from March to November 2009, Walters made 16 trades totaling over $72 million; (2) from June to September 2010, Walters made 11 trades totaling over $21 million; and (3) in 2011, Walters made five trades totaling over $16 million. (A-684–89). Davis and Walters were "good friend[s]" who spoke "frequently" over the phone. (A-404/632, A-505/2767, A-745). Yet the government points to no meeting or call coinciding with these trades, let alone a specific tip that prompted them.

And Davis' claims about the tips that allegedly did occur defy logic and common sense. The first tip supposedly involved Davis telling Walters on February 25, 2008 that Dean Foods planned to announce an equity offering four days later, and that the news "would be positively received by the shareholders." (A-406/682). The government claims Walters purchased $38 million worth of Dean Foods shares based on this tip. (A-684–89).

But an equity offering "dilute[s]" existing shareholders' stake in the company by increasing the total number of shares. (A-478/2346). This makes their shares "worth less" and causes "the price to decline." (A-478/2345-46). That is what happened here—when Dean Foods announced the offering, its shares declined 7%, and reduced the value of Walters' holdings by "several million dollars." (A-478/2346-47). Walters obviously did not buy $38 million worth of shares in anticipation of an event that would significantly diminish their value.

The government's other allegations for 2008-2011 are equally nonsensical. For example:

1. Davis testified he told Walters on September 13 or 14, 2008 that Dean Foods "looked really good, and [Davis] expected the remainder of the year to be as good as the first half of the year, that we were ahead of budget." (A-407/720). But Walters did not trade on this alleged tip; he did not make another trade until November 5, 2008, *after* Dean Foods' publicized its earnings. (A-551–56, A-684–89).

2. Davis claims to have tipped Walters about Dean Foods' earnings on November 5, 2008. (A-407/721). But Dean Foods publicly announced its earnings *the day before* that alleged tip. (A-551–56). Walters began trading *after* the public announcement, not beforehand; and he did not speak with Davis until *after* he began trading. (A-684–89). Davis could not have had inside information about earnings or guidance at this time, because Dean Foods had just made that information public in connection with the earnings release. (A-551–56).

3. Davis testified that he learned in connection with a May 21, 2009 board meeting that Dean Foods might purchase a company called Alpro, which Davis believed would have been a positive development. (A-408/729-730). Davis claims to have tipped

Walters about this, but Walters did not trade again until August 2009, *after* the Alpro acquisition was publicly announced. (A-684–89).

4. Davis testified that on April 9, 2010 he and Walters discussed "the outlook for the year," which Davis told Walters was "cloudy" and "not clear." (A-410/744-46). Davis knew that Dean Foods was having a poor year, and would "miss[]the bottom of [its] guidance range" for the first quarter of 2010. (A-528). Three days later, Walters *bought* over $25 million worth of Dean Foods shares. (A-684–89). The government claims that Walters traded on inside information, but he obviously would not have purchased Dean Foods based on the grim outlook Davis supposedly provided.

5. The government claimed that Walters sold Dean Foods shares on May 3, 2010 (a Monday) after Davis allegedly informed him during a call that took place on Sunday, May 2, about the company's poor first quarter earnings. (A-45–47 ¶ 23(d)-(e); A-411–12/764-65, A-458/1924-25). In fact, Walters placed this sell order with his broker on Friday, April 30, *before* speaking with Davis. (A-459/2052-53).

6. The government also argues that Davis sold Dean Foods stock in February 2013 based on more internal bad news, when in fact correspondence among Walters' advisors confirms that he sold "part of his position" in "Dean Foods" to pay for a "house" in California. (A-487/2636-37, A-697, A-707–08). Indeed, when these shares were sold, Walters retained most of his Dean Foods holdings (4.4 million shares), which he would not have done had he known the price was about to drop. (*See, e.g.*, A-497/2636, A-684–89).

In sum, none of these trades support the government's theory that Walters conspired with Davis to trade on inside information about Dean Foods. It appears that, instead, Davis attempted to "reverse engineer" alleged tips during his numerous proffers sessions based upon the phone records he reviewed there. But the story he told the government, like any such complex prevarication, was full of

holes and inconsistencies. Rather, the simplest and most logical explanation for these trades is that they were based on public information.

2. The WhiteWave Spinoff

The government's primary focus was the 2012 Dean Foods trades. (A-504/2760 (describing 2012 trades during summation as "crucial")). During this time, Walters bought Dean Foods stock primarily because he believed that the company would likely sell or spin off its "WhiteWave" business.

WhiteWave sells organic milk products and dairy alternatives like almond and soy milk. (A-394/62). These products had more potential for growth than Dean Foods' traditional dairy products because they were newer and gaining traction among consumers. (A-397/82-84).

WhiteWave began as a division of Dean Foods. On August 7, 2012, Dean Foods announced that WhiteWave would be spun off. (A-395/76). WhiteWave was subsequently incorporated as a separate entity that conducted an initial public offering on the New York Stock Exchange. (A-394/64). The spinoff benefited Dean Foods' shareholders because more than half of WhiteWave's stock was distributed to them as a dividend. (A-396/79).

Dean Foods began hinting at a WhiteWave spinoff in 2010 and 2011, and told investors in May 2012 that "it's something that our management and our board considers on a regular basis." (A-540; *see also* A-514–27, A-531–50, Tr. 168, 334,

348-49). Many investors were bullish on Dean Foods because they believed the spinoff would occur. They "focused on the fact that WhiteWave was a very important piece of Dean Foods" and that Dean Foods was likely to "do something to realize the value of WhiteWave that wasn't being reflected in the price of Dean Foods' stock." (A-494/2608). Davis himself conceded that "analysts had predicted the WhiteWave spin-off before May 2012" and that many investors on "the 'street' believed the WhiteWave spinoff was [going] to happen" in the summer of 2012. (A-433/1011, A-799).

Walters was one of these investors. Before the spinoff, Walters repeatedly discussed the likelihood of a spinoff with Robert Miller, his Barclays broker, and together they concluded based on public information that "the stock really wasn't reflecting value of WhiteWave," which is why Walters bought it. (A-495/2616-17, A-500/2717). One reason was that "Dean Foods had to get its debt ratio below a certain level in order for them to ultimately be able to ... sp[in] off" White Wave. (A-495/2617). Miller observed that "the debt ratio [was] falling," which increased the likelihood of a spinoff—an observation he communicated to Walters. (*Id.*). Miller himself purchased Dean Foods because he thought "people ... really didn't appreciate" WhiteWave and "as they started to appreciate it, the stock would go up." (A-496/2624-25).

3. Davis' Perjury About The "Bat Phone"

The spinoff ultimately did occur, increasing the Dean Foods shares' value and making Walters' 2012 transactions very profitable. The government believed that these trades were based on Davis' tips, but the documentary evidence did not support its theory. Walters' and Davis' phone records show that Walters' 2012 Dean Foods trades frequently did *not* occur around the time he had any conversation with Davis. (*See, e.g.*, A-504/2760, A-505/2767, A-680–82).

Davis thus faced a dilemma: how to explain how he supposedly tipped Walters about the crucial WhiteWave spinoff when the evidence undermined the government's theory. He resolved this problem by fabricating a story that Walters gave him a secret "burner" phone—one that left no records or bills to corroborate its existence—before the 2012 trades, to keep their communications about Dean Foods confidential. Davis claimed they called this secret phone the "Bat Phone." (A-417/834).

In reality, Davis' "Bat Phone" story was a lie. Davis claimed to have called Walters' "regular cell phone number" "once or twice a week" using this phone. (A-753). If that were true, Walters' telephone records would show the incoming calls from a number associated with a pre-paid account. Yet the government identified *no* incoming calls in Walters' cell phone records associated with the

"Bat Phone."[4] Davis said he couldn't remember the "Bat Phone"'s number. (A-824.) When the government asked Davis to produce the Bat Phone, he said he had thrown it into a "creek." (A-429/949). Yet when the government sent a diver into the creek, the "Bat Phone" wasn't there. (A-448/1574). Davis' wife Terie testified that when the Davis learned about the diver, he "smirked" and "said they'll never find the phone." (A-457/1855-56).

Davis refused the government's request to wear a wire and record his conversations with Walters, because he knew that if he mentioned a "Bat Phone" to Walters (A-402/608), Walters would have no idea what he was talking about. Davis also said that Walters told him to refer to Dean Foods using the code "Dallas Cowboys" when using the Bat Phone. (A-417/835, A-426/922). But it turned out that it was Davis, a Dallas native, who had consistently used "Cowboys" as his secret password for various other purposes. (A-734).

Davis needed some way to substantiate his story. So he provided a highly detailed account of a meeting at Dallas' "Love Field" airport when Walters supposedly gave him the "Bat Phone." (A-417/834, A-447/1352). He identified not only the airport, but (1) the specific terminal where he greeted Walters' private

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[4] The closest thing the government could identify was a prepaid phone purchased in Las Vegas in November 2012, *after* Walters conducted the WhiteWave trades, and which Davis denied was the Bat Phone. (A-802–07, A-824).

plane (Davis "remembered that the parking lot was directly in front of the [terminal] entrance" where he "walk[ed] up the stairs to the second floor"); (2) what time he arrived and what he was wearing; (3) the "2013 Mercedes-Benz 550 SC" that he drove to the airport; (4) the "chocolate-brown" color of Walters' plane; (5) the insignia on the tail of Walters' plane; (6) the identity of each passenger; (7) the precise purpose of their trip to Dallas (to meet with "banks"); (8) the duration of this airport meeting ("thirty to forty minutes"); and (9) what the weather was like, among other details. (A-417/834-36, A-445/1340-42, A-449/1582-83; A-751–72; A-758; A-773; A-775, A-777, A-779).

Then Davis claims to have met privately with Walters in the airport parking lot near Davis' car, where Walters allegedly delivered the "Bat Phone." (A-417/834). Davis said Walters instructed him "to use this phone" to provide "nonpublic information" about "Dean." (A-417/835). Davis testified that this meeting happened in 2011 or early 2012, after which he used the Bat Phone "frequently" to provide Walters with "a lot of detailed information about ... Dean Foods." (A-401/605, A-417/836).

The problem with this story is that it cannot be true. Other than the part about the Bat Phone, all of the details Davis supplied about the meeting match perfectly a trip Walters actually made to Dallas, where he met Davis at the Love Field airport. (*See, e.g.*, A-445–46/1342-44, A-465/2214, A-466/2265-67, A-

467/2270-72, A-700–06, A-709–31, A-732–34). But that trip happened in *December 2012*, *after* Davis supposedly tipped Walters using the "Bat Phone." (*Id.*).

The government discovered this discrepancy long before trial. It devoted substantial resources over many months in a futile attempt to reconcile Davis' story with the evidence about when and where he actually met with Walters. The government obtained records from the airport, from the company that owned Walters' plane and the separate company that supplied its pilot, searching for evidence of another possible meeting. (A-762). There was no such evidence. The government repeatedly interviewed the pilot to determine when he flew Walters to Dallas, confirming that no other flight matched Davis' story. (A-789–93). The government had Davis take agents to the Love Field parking lot where the exchange supposedly occurred in an unsuccessful attempt to jog his "memory" that the exchange happened elsewhere. (A-445/1341, A-449/1582-83; A-771). And it went over Davis' story at numerous proffer sessions and meetings with Davis in preparation for trial. (A-739–42). During these sessions, after Davis had already committed to the story about Love Field, the government unsuccessfully tried to posit alternative meetings he might have had with Walters. Davis responded that he had a "clear recollection" and was "very confident" that Walters gave him the

phone at "Dallas Love Field Terminal 1." (A-762, A-773; *accord* A-747–48, A-786, A-815–34).

And the government was aware of numerous other problems with Davis' story. For example, in an early proffer session, Davis said he "kept the 'bat-phone' in [his] briefcase." (A-749). Davis later said he "kept the bat-phone in the console of [his] car." (A-753). Then, at trial, Davis changed his story yet again, attempting to conform his testimony with Terie's. Terie Davis testified that she once found a "burgundy" colored cell phone "in [their] laundry room." (A-453/1834-35). Thus, when asked at trial where he kept the "Bat Phone," Davis testified that he "kept [the phone] in [his] laundry room."[5] (A-417/836).

Davis claimed during proffer sessions that he "used the bat-phone once or twice a week when [he] initially received [it]" in 2011. (A-753). He contradicted this claim at another proffer session, claiming he "did not remember using the bat phone in 2011." (A-798). Davis also said he never re-upped the minutes on the "Bat Phone's" account, which meant that they would have automatically expired long before most of the alleged tips about WhiteWave. (A-450/1611, A-749).

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[5] Davis also recanted his claim during proffer sessions that the phone was "black" (*e.g.*, A-749) and testified at trial that it was a reddish color similar to the phone Terie allegedly found. (A-427/933).

Davis' story about when (not where or how) he received the Bat Phone also changed constantly. During one proffer, he said he "believed that [he] first received the bat-phone from Walters in the Spring of 2012." (A-798). Less than a week later, he said he received the phone "after June 2011." (A-752). Then he claimed to have received the phone in "the fall of 2011." (A-748). At trial, Davis offered yet another version, testifying that he received the phone in "the summer or the fall ... of 2011." (A-401/605, A-417/836).

Davis also misled the government in other ways. He was a philanderer who frequented female escort services. (A-415/817-18, Tr. 2285-87; A-427–28/935-39; A-453/1835-36). His desire to use a separate phone for these illicit meetings would explain why Davis had the burgundy cell phone that Terie said she found in their laundry room. Yet, Davis concealed his use of escort services from the government, and thus failed to disclose his ulterior motive for having a separate phone when he supposedly tipped Walters about WhiteWave.[6] (A-1216). Davis also concealed that he had committed insurance fraud by misleading an insurance company about Terie's employment in order to boost a payout. (A-434/1026-30).

[6] Davis may also have used a burner phone to place illegal bets with his Dallas bookie.

4. The Government Emphasized Davis' Perjurious Bat Phone Testimony In Summation

The government not only elicited Davis' false testimony about the "Bat Phone" (*see, e.g.*, A-401/604-05, A-402/609, A-403/618, A-417–18/834-37, A-419/847, A-420/854, A-425/900); it emphasized to the jury why that testimony was so important. The government admitted in closing that it mostly lacked evidence of communications on "either of the defendant's registered phones." (A-504/2760). But a "burner" phone is different, the prosecutors told the jury, because the government "c[a]n't get records" for burner phones. (*Id.*). This is what made it "significant" that Walters "gave Tom Davis a burner phone" (A-502/2755)—it explained how Davis tipped Walters during "the crucial period" in "the summer of 2012." (A-504/2760). The government argued that the reason Walters wanted to use the "secret phones" was to "hide his access to Davis" from the authorities. (A-504/2762). It also told the jury that "[p]eople don't use burner phones to have legitimate legal conversations about investments. They use them when they're trying to cover their tracks" (A-501/2729); that Walters' supposed insistence on using "burner phones" made the "evidence" of his guilt "overwhelming" (A-503/2758); and that "the information that was being passed over the burner phones" left "no doubt" that Walters was guilty (A-505/2767). The government even argued that use of "burner phones" *by itself* constituted "proof beyond a reasonable doubt" that Walters was guilty. (A-507/2777).

The district court denied Walters' motion for a new trial based on Davis' perjury. The Court concluded, with no support, that Davis testified truthfully. (A-887). In the alternative, despite the government's emphasis on the "Bat Phone," the court concluded the perjury was immaterial because Walters' counsel cross-examined Davis about the "Bat Phone" and discussed that testimony during summation. (A-888–89).

5. Davis' Testimony About The Darden "Tip," Even if True, Establishes No Crime

The other substantive counts involved an alleged tip from Davis about a different company, Darden Restaurants, in August 2013. (A-66–69 ¶¶ 55, 57). Unlike Dean Foods, Davis had no affiliation with Darden. Rather, a friend at an investment fund, Barington, which had a 1% stake in Darden, asked Davis to co-invest. (A-421–22/879-84). Davis signed a confidentiality agreement with Barington (A-630–32) and received two presentations about Darden that Barington had prepared. (A-422/881-83; A-633–78). Though marked "confidential," these documents presented only "the opinions of Barington, whose analysis [wa]s based solely on publicly available information" about Darden. (A-444/1338).

Davis admitted he never sent these presentations to Walters during proffer sessions with the government. (A-442/1330). Then, at trial, he claimed he had sent one by mail (without specifying which presentation he supposedly sent). (A-423/886). Even then Davis conceded that he never told Walters he had agreed to

keep the presentations confidential, or that he breached any obligation to Barington by making the alleged disclosure. (A-423/887). Walters' broker, Robert Miller, performed independent research on Darden, concluding that it "had a lot of really attractive assets including real estate that was underappreciated." (A-497/2638). On August 20 and 21, 2013, after extensive discussions with Miller, Walters purchased Darden stock. (A-683). Miller himself bought Darden shares and recommended Darden to his other clients. (A-497–98/2638-40).

SUMMARY OF ARGUMENT

1. The FBI's longstanding pattern of illegal grand jury leaks, the USAO's years-long complicity in this misconduct, and its obfuscation before the district court are not in dispute. The only question on appeal is, did the district court err in refusing to provide *any* remedy for the government's serial abuse of grand jury secrecy without even conducting the hearing it had originally scheduled to determine the extent of the prosecutorial misconduct? The answer is plainly yes. The court ignored the reasons why the leaks prejudiced Walters and the controlling authority that an indictment should be dismissed "without a particular assessment of the prejudicial impact" where, as here, there is "a history of prosecutorial misconduct" "spanning several cases" that is "systematic and pervasive." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256, 259 (1988). The current record reveals misconduct so flagrant and far-reaching that no remedy

short of dismissal would suffice, either to cure the specific harm to Walters or to adequately deter the government from pursuing these types of illegal tactics in the future. At a minimum, this Court should remand for an evidentiary hearing to determine the full scope of the misconduct and how it impacted the prosecution.

2. Walters is at least entitled to a new trial free of Davis' false testimony about the "Bat Phone." "Reversal is virtually automatic" where, as here, "the government knowingly permitted the introduction of false testimony." *Drake v. Portuondo*, 553 F.3d 230, 241 (2d Cir. 2009) (quotations omitted). The government discovered long before trial that Davis was lying about a critical aspect of his testimony—how he allegedly tipped Walters—but elicited the testimony anyway, because the case depended on it. The district court erroneously held that, even after the government elicited this testimony, put the weight of the USAO behind it, and repeatedly emphasized its importance to the jury, there was no reasonable likelihood that the testimony influenced the jury. That analysis does not withstand scrutiny.

3. The Darden-related counts must be dismissed because the evidence was legally insufficient to establish that those trades were criminal. The government relied on the misappropriation theory of insider trading, which required it to prove that Davis breached a fiduciary or similar duty to Barington when he allegedly sent Barington's presentation to Walters, and that Walters knew

about this breach. But the evidence did not establish the existence of any such duty, much less that Walters knew of any such breach.

4. Even if the conviction is not reversed or vacated, the orders of restitution and forfeiture should be vacated. As to restitution, Dean Foods had the burden to show that it was entitled to recover "necessary" legal fees, but the district court made no effort to determine whether that burden was met. Indeed, Dean Foods supplied *no* evidence to support most of the $8.9 million restitution award. The district court thus violated its statutory obligation to ensure that the restitution it awarded was "necessary." And it further erred by ordering Walters to reimburse Dean Foods for Davis' director compensation and for *Davis'* legal fees, which Dean Foods had advanced, even though Davis pled guilty to multiple crimes and used three different law firms for the 29 proffer sessions it took to get his story straight.

5. The forfeiture order, which was two times greater than the reasonable estimate Walters proposed based upon a methodology adopted in another complex insider trading case, vastly exceeded the scope of the district court's authority. It was premised upon an arbitrary methodology—using the closing price of the trading days following a public announcement—with no support in the criminal law that led to a grossly inflated estimate of unrealized gains. In addition, the district court rejected Walters' proposed methodology based upon the false

assumption that Walters had sold large volumes of shares on the dates being used for the calculation. In fact, on the vast majority of those dates, he had not traded.

ARGUMENT

I. THE SYSTEMATIC AND PERVASIVE PROSECUTORIAL MISCONDUCT REQUIRES DISMISSAL OF THE INDICTMENT OR, AT A MINIMUM, AN EVIDENTIARY HEARING

"The Supreme Court has consistently recognized that the proper functioning of the grand jury system depends upon the secrecy of its proceedings." *United States v. Sobotka*, 623 F.2d 764, 766 (2d Cir. 1980) (citing *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979)). Rule 6(e) "implements this policy of secrecy by requiring that 'all records, orders, and subpoenas relating to grand jury proceedings [must] be sealed.'" *United States v. Ulbricht*, 858 F.3d 71, 106–07 (2d Cir. 2017) (emphasis omitted) (quoting *In re Grand Jury Subpoena*, 103 F.3d 234, 237 (2d Cir. 1996)). Consequently, the government is "forbidden to disclose matters occurring before the grand jury." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983).

To reverse a conviction based upon a "breach of grand jury secrecy," the defendant typically must show that the breach "jeopardiz[ed] [his] right to a fair trial before a petit jury." *United States v. Eisen*, 974 F.2d 246, 261 (2d Cir. 1992). A defendant prejudiced by grand jury leaks is entitled to "dismissal of the indictment." *Bank of Nova Scotia*, 487 U.S. at 257.

However, "prejudice need not be shown" when the government's misconduct has "so compromised" the proceedings "as to render the[m] fundamentally unfair.'" *United States v. Anderson*, 61 F.3d 1290, 1296 n.4 (7th Cir. 1995). This occurs when there is "a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process." *Bank of Nova Scotia*, 487 U.S. at 259. Systematic and pervasive misconduct thus requires the "indictment [to be] dismissed[] without a particular assessment of the prejudicial impact." *Id*. at 256; *accord United States v. Restrepo*, 547 F. App'x 34, 44 (2d Cir. 2013) ("systematic and pervasive prosecutorial misconduct" "require[s] a dismissal of the indictment"); *United States v. Brito*, 907 F.2d 392, 394 (2d Cir. 1990) (same).

This Court reviews both a decision denying a motion to dismiss and "the question of prejudice *de novo*." *United States v. Gambino*, 59 F.3d 353, 363 (2d Cir. 1995).

The government admits that the FBI's deliberate and systematic campaign to compromise grand jury secrecy was "reprehensible," "astonishing," "deplorable" and "appall[ing]." Chaves was "a senior FBI Agent" who was "widely recognized as the chief strategist" for the FBI New York Division's

"securities fraud program."[7] It is outrageous that he leaked and bartered secret grand jury information to resuscitate a moribund investigation. And his misconduct was repeated in numerous other investigations, and ultimately became the *de facto* policy of the FBI division that he ran.

Most disturbingly, Chaves acted with the tacit consent of the FBI's top brass and the U.S. Attorney. Both the FBI and the USAO discovered the leaks early on and, at best, did nothing to stop them. The FBI instead *promoted* Chaves soon after discovering the leaks and *transferred* the agent who had complained about them. And when Walters later presented his suspicions to the district court, the USAO misled the court to keep the misconduct under wraps.

The government admits that "[t]here should be serious consequences" for the "improper and inexcusable leaking of information to the media." (A-334–36). But it discovered the leaks over three years ago and there have been no consequences. Chaves has not been prosecuted. It is unclear what, if anything, the government has done to identify any co-conspirators, let alone bring them to justice. And the government refuses to acknowledge its own complicity or explain

[7] Jeff Jacobson Agency, *Biography of David Chaves*, available at http://www.jeffjacobsonagency.com/speaker/david-chaves/.

why it allowed the criminal misconduct being perpetrated from within its own ranks to continue unabated after it discovered the problem.

The district court erred by denying Walters' motion to dismiss. At a minimum, it should have granted an evidentiary hearing and decided the motion upon a complete factual record.

A. The Leaks Were Highly Prejudicial

The leaks prejudiced Walters by resuscitating a dormant investigation and precipitating Davis' cooperation and testimony, which was critical to the prosecution.

First, Chaves conceded that the investigation was "dormant" until his leaks revived it, which is why he leaked the information in the first place. (A-220). Thus, by the leaker's own reckoning, there would have been no prosecution but for his misconduct. As the Assistant Director in charge of the FBI's New York Office also conceded in one of the May 2014 internal emails about the leaks: "If we don't have enough evidence by now it[']s over." (A-231). Davis' attorneys similarly acknowledge that the government had "trouble bringing the case" before Davis' decision to cooperate, without which there would have been a "very different result." (A-1213–14). That is why the government allowed the leaks to continue long after Bharara himself acknowledged how "outrageous" they were. (A-236).

Second, the August 2015 *Wall Street Journal* article revealing that Davis was a target precipitated his cooperation and testimony against Walters. Presumably this was the government's purpose in revealing the information to the *Wall Street Journal* reporter. Until then, Davis had "refused to assist in the investigation" and confirmed during multiple interviews and sworn testimony that he never tipped Walters. (*See, e.g.*, A-340, A-342, A-430/997, A-431–32/1001-03, A-735–38). But that testimony revealed Davis' "financial trouble[s]" (A-343), a weakness on which the government capitalized. The *Journal* article appeared soon thereafter, costing him his board seat at Dean Foods and the income that went with it. This left Davis "unemployed" at a time when he could scarcely afford to lose his only source of income and placed tremendous strain on Davis and his family. Davis also lost his membership at his clubs and found himself ostracized and deprived of his prized status within the Dallas community. (A-439/1103-05).

The district court concluded that there was no prejudice, but failed to meaningfully address the substantial prejudice identified above; indeed, the court made *no* factual findings at all. (SPA-12–16). All the court's opinion says is that the effect of the leaks was "necessarily limited" and that "[i]f the newspaper articles had never been published, there is no reason to think that Davis would not have been indicted." (SPA-13, SPA-15). The court never substantiated these

conclusions, addressed Chaves' characterization of the investigation as "dormant," or considered why the leaks prompted Davis' cooperation.

At a minimum, any doubts about whether or how the leaks affected this case should have been resolved at an evidentiary hearing. It was wholly improper for the district court to engage in speculation instead of acknowledging the facts or establishing the metes and bounds of prejudice on a fully developed factual record.

B. The Leaks Were Systematic And Pervasive

Furthermore, Walters has shown the kind of "systematic and pervasive prosecutorial misconduct" for which no prejudice need be shown. *Brito*, 907 F.2d at 395; *see also Restrepo*, 547 F. App'x at 44; *United States v. Silver*, 103 F. Supp. 3d 370, 380–81 (S.D.N.Y. 2015) ("dismissal might be appropriate in instances where the defendant can show ... misconduct, spanning several cases, that is [] systematic and pervasive.") (quotations omitted). The district court "agree[d] ... that the potential for a pattern of leaks is concerning." (SPA-17). But it held that under *Bank of Nova Scotia*, defendants alleging "systematic and pervasive misconduct" must still show prejudice. (SPA-16–18).

The district court misconstrued *Bank of Nova Scotia*, and ignored this Court's precedents reinforcing it. The Supreme Court "distinguished" motions to dismiss an indictment for non-constitutional errors from cases "in which indictments are dismissed, without a particular assessment of the prejudicial impact

of the errors in each case, because the errors are deemed fundamental." 487 U.S. at 256. Where the proceedings have been rendered "fundamentally unfair," a "presumption of prejudice" is allowed. *Id.* at 257. Before assessing prejudice, the Court carefully noted that it was not "faced with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process." *Id.* at 259.

To require prejudice even where the misconduct is "systematic and pervasive" would render the distinction that the Supreme Court drew superfluous. That is why this Court has twice acknowledged "systematic and pervasive" misconduct as a separate basis for dismissal, without ever suggesting that prejudice was required. *See Restrepo*, 547 F. App'x at 44; *Brito*, 907 F.2d at 394; *see also Anderson*, 61 F.3d at 1296 n.4 ("[P]rejudice need not be shown when 'the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair ....'").

The district court offered no justification for its departure from this precedent, because there is none. And it only incentivized the government to continue abusing its powers. In light of the egregiousness of the misconduct, its breadth, the length of time it continued, what amounts to a cover-up, and the government's repeated refusal to accept any blame, dismissal of the indictment is

the only remedy sufficient to preserve judicial integrity and "deter [the] pattern of demonstrated and longstanding widespread [and] continuous official misconduct." *United States v. Broward*, 594 F.2d 345, 351 (2d Cir. 1979); *see also United States v. Long*, No. 1:16CR91-1, 2016 WL 5400416, at *3 (M.D.N.C. Sept. 27, 2016) (dismissing indictments in part to "deter[] future prosecutorial misconduct"); *Schoenauer v. United States*, 759 F. Supp. 2d 1090, 1106 (S.D. Iowa 2010 (dismissing counts for same reason); *United States v. Aaronoff*, No. 91 CR. 221 (CSH), 1992 WL 30680, at *11 (S.D.N.Y. Feb. 10, 1992) (court may "dismiss[] an indictment for deterrence purposes" if "the course of official misconduct is a demonstrated, long-standing one"), *aff'd*, 990 F.2d 622 (2d Cir. 1993). Only "a reversal with instructions to dismiss the indictment" will "translate the assurances" of the government into actual "performance" consistent with its legal obligations. *United States v. Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972).

C. The Government's Misconduct Was "Outrageous"

Dismissal based upon "outrageous" government conduct is warranted where "common notions of fairness and decency would be offended were judicial processes invoked to obtain a conviction against the accused." *United States v. Schmidt*, 105 F.3d 82, 91 (2d Cir. 1997); *accord United States v. Cuervelo*, 949 F.2d 559, 565 (2d Cir. 1991). Here, the government violated bedrock principles of grand jury secrecy, obstructed justice, used the fruits of these illicit activities to

obtain an indictment and conviction, concealed the misconduct for years, and then deceived the district court about the conduct. *United States v. Rahman*, 189 F.3d 88, 131 (2d Cir. 1999) ("Government involvement in criminal activity" may warrant dismissal even where "the defendant[] [was] not entrapped by the Government."). Because the U.S. Attorney himself admitted that the government's misconduct was "outrageous" (A-236), the district court erred by refusing to dismiss the indictment for this additional reason. (A-389–90).

D. At A Minimum There Should Be An Evidentiary Hearing

The misconduct is described here based on *the government's* version of what happened, contained in a single letter supported by a handpicked set of redacted emails. (A-217). Even this limited and self-serving disclosure reveals misconduct sufficiently flagrant to warrant dismissal. But, as the government concedes, "much about the scope and content" of the leaks "remains unclear." (A-219). If this Court does not order dismissal, it should at least remand for an evidentiary hearing to ensure that Walters' motion is decided upon a fulsome record.

The government's disclosures are patently deficient. It reviewed "thousands of emails[,] text messages and records of phone calls" related to the leaks, but volunteered only six of them. (A-217–23). The government's document review covered only a three-month period, even though the leaks in this case spanned over two years. (A-218–19). The government admits it only interviewed FBI and

USAO employees it says were "likely to have had contact with the press" during that same three-month period. (A-218). The government produced no interview recordings or witness statements. We don't know how the government determined who was "likely to have had contact with the press" or whether there are other potential witnesses outside the three-month window who would qualify.[8]

Furthermore, it remains unclear exactly what was leaked and what information the reporters supplied to Chaves to aid the investigation. The identity of leakers other than Chaves remains unknown. Though it is clear that leaks occurred in other cases, we know little about who perpetrated them and how pervasive the misconduct truly is. And we don't know when the USAO first learned of the leaks in any of these cases, whether it did anything to facilitate them, or why nothing was done to stop them.

"[A] hearing is the preferred course of action where disputed factual issues exist" concerning prosecutorial misconduct and how it affected the case. *Cuervelo*, 949 F.2d at 561, 567 (remanding for a "hearing to be held" concerning "the role of the government" in alleged prosecutorial misconduct); *see also Bank of Nova Scotia*, 487 U.S. at 252 (factual record developed over ten days of evidentiary

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[8] Indeed, it is not clear why anyone at the FBI was "likely to have had contact with the press" at all, or how any informal, nonpublic contact with the press could have been permitted.

hearings); *United States v. Busch*, 795 F. Supp. 866, 868 (N.D. Ill. 1992) (ordering evidentiary hearing on *Bank of Nova Scotia* prejudice).

Here, the parties dispute whether the misconduct prejudiced Walters. The development of a more complete factual record would identify additional evidence that was a product of or tainted by the government misconduct. For example, a hearing would reveal what information the reporters gave Chaves and how it advanced the investigation. And a hearing is all the more appropriate where, as here, the government has made clear through its own concealment of the misconduct that it cannot be trusted to make accurate and comprehensive disclosures.

If this Court does not dismiss, a hearing may also show that a remedy short of dismissal is warranted, such as suppression of tainted evidence, preclusion of government arguments relying on such evidence, instructions to the jury, and/or permitting the defense to elicit evidence of the government's misconduct. But it is impossible to say what remedy might be appropriate while the government continues to conceal critical information about the leaks and their impact on the case.

II. Davis' Perjury Deprived Walters Of A Fair Trial

"[A] conviction obtained through testimony the prosecutor knows to be false is repugnant to the Constitution." *Su v. Filion*, 335 F.3d 119, 126 (2d Cir. 2003).

In determining whether to order a new trial when a witness may have testified falsely, this Court asks "(1) whether false testimony was introduced, (2) whether that testimony either was or should have been known to the prosecution to be false, (3) whether the testimony went uncorrected, and (4) whether the false testimony was prejudicial." *Id.* at 127; *accord United States v. Cromitie*, 727 F.3d 194, 221 (2d Cir. 2013). False testimony is "prejudicial" unless there is no "reasonable likelihood that [it] could have affected the judgment of the jury." *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) (quotations omitted). If "the government knowingly permitted the introduction of false testimony reversal is virtually automatic." *Drake*, 553 F.3d at 241 (quotations omitted).

Reversal should be "virtually automatic" here because the government elicited false testimony from its star witness about a crucial matter: the "Bat Phone."

1. Davis simply lied to the jury about the "Bat Phone." Not a single call from the "Bat Phone" is in the records of Walter's incoming calls. After Davis claimed to have thrown the "Bat Phone" into a creek, a government diver could not locate it there, prompting Davis to "smirk[]" and tell his wife that "they'll never find the phone." (A-457/1855-56). Most significantly, Davis provided a highly detailed account of the airport meeting where he supposedly received the "Bat

Phone"—a meeting that indisputably occurred months *after* the alleged tips. Davis fabricated the part of that meeting where Walters gave him the "Bat Phone."

In denying Walters' new trial motion, the district court advanced another theory: "that Davis testified accurately that he received the phone from Walters in 2011, and that he misremembered the precise circumstances ... or mistakenly confused the meeting at which he received the 'bat phone' with a later meeting." (SPA-25–26). But this explanation defies reason. If you met a close friend outside Yankee Stadium, where he unexpectedly handed you a gun, you would not later "misremember" that this meeting happened a year later at Fenway Park. Likewise, if Davis unexpectedly received the infamous "Bat Phone" from his good friend on a golf course, with instructions to commit serious federal crimes using this device, that is not something Davis would "misremember." Davis certainly would not "misremember" that this shocking incident occurred one year later in an airport parking lot where the incident could not possibly have occurred—particularly when Davis' recollection of that trip to the airport is otherwise highly detailed and accurate.

2. Of course the government knew that the testimony was false. All of its efforts to corroborate Davis' story underscored his dishonesty. The government searched the creek for the phone, checked Walters' cell phone records, subpoenaed documents detailing the movements of Walters' plane and its pilot, conducted

interviews, and tried to posit alternative meetings at which the phone might have been delivered. One after the next, these efforts failed. That is because the "Bat Phone" story was a lie, and the government knew it.

The district court speculated that evidence not introduced at trial theoretically might show that Davis met Walters "at an airport in Dallas on a different date." (SPA-26). But the district court failed to explain how Walters and Davis (who lived over 1,000 miles apart) could have managed to meet without booking any flight, without leaving a single record, without telling a soul and without a single witness to the encounter, and without its cooperating witness having any memory of this hypothetical alternative meeting. The government identified no such evidence because there is none.

3. Rather than jeopardize its case, the government proceeded with Davis' falsified testimony because it was so critical. Indeed, the government took the lie one step further, bolstering it with testimony from Terie Davis that the government also knew was false. Terie says she found a "burgundy" cell phone in their home that supposedly had a call to Walters (A-453/1835), even though Davis repeatedly told prosecutors that the "Bat Phone" was "black" and that he did not keep it in his house. (A-427/933-34, A-749, A-753). The government elicited Terie's testimony that, because she was concerned that Davis used the phone to commit adultery, she stored its number in the "contact[s] [page] for [her] husband" on her own cell

phone. (A-454/1838). Terie testified that the number was one of two displayed on the contacts page, which the government introduced as an exhibit. (A-454/1838-40, A-511–13). The government knew this testimony was false. As it was aware, and as Terie admitted on cross-examination, the two numbers she identified were Davis' *work* numbers. (A-455–56/1845-51, A-691–96). *None* of the numbers on the contacts page could possibly have been the "Bat Phone." (A-454/1838, A-455–56/1845-51). Tellingly, the government did *not* introduce Terie Davis' phone records, which would have reflected the "Bat Phone's" number had it been used to call Terie's phone.

The perjurious Bat Phone testimony was devastating to Walters' defense. The government concedes that registered cell phone and other records it subpoenaed frequently did not match Walters' trading during the "crucial" 2012 timeframe (A-504/2760) and, for many of these trades, there were "no ... communications between" Davis and Walters remotely close in time to the trades. (A-874). But it was Walters' trading on these dates that formed the basis of the substantive counts and most of the alleged "overt acts" in the conspiracy charge. That is why the government characterized the "Bat Phone" as "crucial" and relied so heavily on this evidence during summation. (A-501/2729, A-502/2755, A-503/2758, A-504/2760-62, A-505/2767, A-507/2777). Indeed, the government told the jury that the "Bat Phone" is what made the "evidence" of Walters' guilt

"overwhelming," that it left "no doubt" that Walters should be convicted, and that it constituted "proof beyond a reasonable doubt" of Walters' guilt. (A-503/2758, A-505/2767, A-507/2777).

The government cannot credibly argue, as it must to avoid a new trial, that there is "no reasonable likelihood that the false testimony could have affected the judgment of the jury." *Filion*, 335 F.3d at 127 (quotations omitted). In holding otherwise, the district court concluded that "[t]he government presented overwhelming circumstantial evidence of Walters' guilt, including trading records and phone records (*i.e.*, not from the 'bat phone')." (SPA-27). But the court did not substantiate this conclusion or reconcile it with the government's jury arguments which confirmed the "Bat Phone's" importance. As explained (*supra* at 26), the trading and phone records actually *contradict* the government's theory, and the district court did not explain how it arrived at a contrary conclusion. Davis' attorneys also confirmed at his sentencing that the "Bat Phone" was "devastating" evidence that "fundamentally changed the trial" and "resulted in a swift conviction of Mr. Walters," and the district court *concurred*. (A-1212, A-1214–15, A-1231).

The district court also observed that Walters was able to cross-examine Davis about the "Bat Phone" and discuss it on summation, apparently assuming that would be sufficient to "disclose[]" his perjury. (SPA-28). The court cited no

authority to support this assumption, and ignored the binding precedent that refutes it. *See, e.g.*, *Filion*, 335 F.3d at 129 n.5 (perjury was "still quite troublesome" even where defendant "attack[ed] [the witness'] credibility at summation"); *Jenkins v. Artuz*, 294 F.3d 284, 293-94 (2d Cir. 2002) (same where defendant "cross examin[ed]" witness about perjured testimony); *Wallach*, 935 F.2d at 456-57 (same); *see also United States v. Freeman*, 650 F.3d 673, 681 (7th Cir. 2011) (rejecting "argu[ment] that since [the witness] was cross-examined extensively" about "his false testimony" it "could not have affected the jury").

Wallach is instructive. There, cooperating witness Anthony Guariglia was a company insider. The defendant was a lobbyist who allegedly aided the company's commission of securities fraud. Guariglia's testimony was "critical" to the prosecution. 935 F.2d at 455. He "testified [on direct] that he had not gambled from the summer of 1988 to the time of the trial in June 1989." *Id.* However, "[o]n cross-examination, Guariglia admitted that he had signed gambling markers" in large amounts during that time period, after which "the prosecution sought to rehabilitate the witness on redirect." *Id* at 456. Despite the government's post-trial admission that the witness committed perjury, the district court denied the defendant's motion for a new trial, because "Guariglia's gambling ... did not bear on the defendants' guilt or innocence only [sic] on Guariglia's credibility" and

represented only a "cumulative addition[] to the massive mound of discredit heaped upon Guariglia." *Id*. at 456-57.

This Court reversed and ordered a new trial. It held that "given the inconsistencies in [Guariglia's] statements the government should have been on notice that Guariglia was perjuring himself," and criticized the government for "eliciting his rather dubious explanation of what had happened." *Id*. at 457. Nor did it matter that the witness was cross-examined about the false testimony or that it was unrelated to the defendant's guilt. *Id*. Because Guariglia "was the centerpiece of the government's case," "his entire testimony may have been rejected by the jury" "[h]ad it been brought to the attention of the jury that Guariglia was lying." *Id*. The Court expressed concern "that given the importance of Guriglia's testimony to the case, the prosecutors may have consciously avoided recognizing the obvious—that is, that Guariglia was not telling the truth." *Id*.

The same is true here. Indeed, unlike in *Wallach*, Davis' false testimony was *critical* to the prosecution, making the case for reversal all the more compelling. The government was obligated to present a "truthful case to the jury, not to win at any cost." *Filion*, 335 F.3d at 126. "When a prosecutor throws his or her weight behind a falsely testifying witness" instead of meeting this obligation, that will necessarily "affect[] the judgment of the jury," requiring a new trial. *Jenkins*, 294 F.3d at 295-96.

III. THE EVIDENCE ON DARDEN WAS INSUFFICIENT

The government elicited only a few pages of testimony from Davis about Darden and addressed it "very briefly" in summation. (A-421–24/880-89; A-506/2768-70). Davis testified that he received two presentations about Darden that were prepared by Barington, and mailed one of them to Walters. (A-423/886-87). Though the presentations were labeled "confidential," they included only the "opinions of Barington" which were "based solely on publicly available information" about Darden. (A-444/1338). Thus, the only thing conceivably "confidential" about these presentations were the views expressed by Barington. Davis signed a confidentiality agreement with Barington (A-630–32), but didn't "think [he] disclosed that" to Walters (A-423/887).

This Court reviews sufficiency of the evidence *de novo*, and must reverse if a reasonable juror could not have found that the government proved its case beyond a reasonable doubt. *See*, *e.g.*, *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012). The Darden evidence, viewed most favorably to the government, is legally insufficient to support a conviction of the indictment's Darden-related counts. The Supreme Court has recognized that a defendant may be liable for the "misappropriat[ion] [of] confidential information for securities trading purposes," but only if he "breach[es] a duty owed to the source of the information." *United States v. O'Hagan*, 521 U.S. 642, 652 (1997). "Under this [misappropriation]

theory, a person violates Rule 10b-5 when he misappropriates material nonpublic information in breach of a fiduciary or similar relationship of trust and confidence and uses that information in a securities transaction." *United States v. Chestman*, 947 F.2d 551, 566 (2d Cir. 1991). "A 'similar relationship of trust and confidence' ... must be the functional equivalent of a fiduciary relationship." *Id*. at 568. If the defendant is a tippee who receives a tip from the misappropriator, the government must "prove a breach by ... the tipper[] of a duty owed to the owner of the misappropriated information, and the defendant's knowledge that the tipper had breached the duty." *United States v. Falcone*, 257 F.3d 226, 234 (2d Cir. 2001); *accord S.E.C. v. Obus*, 693 F.3d 276, 285 (2d Cir. 2012).

Here, the government's theory appears to be that Davis misappropriated the confidential "opinions" of Barington by conveying them to Walters in violation of the nondisclosure agreement. But the government failed to prove that Davis breached the requisite duty to Barington or that Walters knew of any such breach.

First, Davis and Barington did not have a "fiduciary or similar relationship of trust and confidence." They were sophisticated parties operating at arm's length while negotiating Davis' prospective investment in Darden. That is the *antithesis* of a fiduciary relationship. *See, e.g. Weinberger v. Kendrick*, 698 F.2d 61, 79 (2d Cir. 1982) ("fiduciary principles" do not apply to "arm's-length bargaining"). Because Davis was simply acting "for his own benefit" in an ordinary business

transaction, he owed no fiduciary or similar duty to his counterparty, Barington. *Chestman*, 947 F.2d at 568.[9]

Second, and most importantly, Walters was unaware of any duty that Davis might have owed. (*See* A-509/2948-49 (jury instructed that government must prove "Walters knew that Davis disclosed the material, non-public information in breach of a duty of trust and confidence")). The government concedes that Davis never informed Walters of such a duty, and claims instead that Walters should have inferred one because the presentation was labeled "confidential." (A-506/2769-70). But Barington could not "unilaterally" impose a duty on Davis "by entrusting [him] with confidential information." *Chestman*, 947 F.2d at 567; *accord Falcone*, 257 F.3d at 234. "The fact that the information was confidential" therefore "did nothing, in and of itself, to change the relationship between" Barington and Davis into a fiduciary or similar relationship. *Id*. (quotations

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[9] The confidentiality agreement does not impose such a duty because it did purport to transform the parties' arms-length relationship into the requisite fiduciary or similar relationship of trust and confidence. To the extent SEC Rule 10b-5(2) suggests otherwise, it exceeds the SEC's authority under Exchange Act Section 10(b). *See United States v. Kim*, 184 F. Supp. 2d 1006, 1015 (N.D. Cal. 2002) (Under Rule 10b-5(2), "an express agreement can provide the basis for misappropriation liability only if the express agreement sets forth a fiduciary relationship with the hallmarks of a fiduciary relationship detailed" in *Chestman*); *accord Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472-73 (1977) (the SEC "cannot exceed the power granted the Commission by Congress under §10(b)").

omitted). From Walters' standpoint, the critical component was missing—Davis' *acceptance* of a duty. At most, Walters knew only of Barington's "unilateral[]" expectation of confidentiality, which is insufficient as a matter of law to impose a duty on Davis. *See United States v. Cassese*, 273 F. Supp. 2d 481, 485 (S.D.N.Y. 2003) (dismissing insider trading charge based upon a "unilateral[]" expectation of confidentiality as "legally deficient"). Because Walters did not know Davis had any duty to maintain the confidentiality of the Barington presentation—let alone a fiduciary or similar duty—his conviction on the Darden-related counts must be reversed.

IV. THE DISTRICT COURT'S RESTITUTION AWARD WAS AN IMPROPER WINDFALL TO DEAN FOODS

The district court erroneously awarded Dean Foods the full amount of its restitution request—$8,882,022.80. The award should be vacated for two reasons. First, it included millions of dollars in legal fees, but Dean Foods supplied *no* billing detail substantiating those fees, which are only recoverable, if at all, to the extent "necessary" during "participation in the investigation or prosecution of the offense." 18 U.S.C. §3663A(b)(4). Second, it required Walters to repay Dean Foods for *all* of Davis' director compensation from 2008 to 2014, and failed to account for the value Davis provided the company during these years.

A. Standard of Review

Restitution awards are reviewed for abuse of discretion. *United States v. Thompson*, 792 F.3d 273, 276–77 (2d Cir. 2015). A ruling that "rests on an error of law, a clearly erroneous finding of fact, or otherwise cannot be located within the range of permissible decisions" is an abuse of discretion. *Id.* at 277.

B. The Restitution Proceedings

The Mandatory Victim Restitution Act ("MVRA"), 18 U.S.C. §3663A, provides restitution for victims who were "directly and proximately harmed as a result of the commission of [the] offense." *Id*. §3663A(a)(2). Reimbursement for attorneys' fees is allowed only when they were "necessary ... expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense," *id*. §3663A(b)(4), and victims may recover a small percentage of the compensation paid to a defendant as "the loss or destruction of property." *id*. §3663A(b)(1). "[T]he MVRA limits restitution" to a victim's "actual, *provable*, loss." *United States v. Finazzo*, 850 F.3d 94, 117 (2d Cir. 2017) (emphasis supplied) (quotations omitted).

Dean Foods initially requested $9,272,971.88 in restitution. Its request included: (1) $2,386,618.17 million in legal fees paid to Wilmer Cutler Pickering Hale and Dorr ("WilmerHale"), which represents Dean Foods and certain of its officers; (2) $3,644,972.74 paid to Davis' counsel Fish & Richardson, Winston &

Strawn, and Latham & Watkins, pursuant to Davis' indemnification agreement; (3) $1,840,213.00 paid to Davis between 2008 and 2014 for his service as a Dean Foods director; (4) $1,359,479,97 for data-hosting services; and (5) $41,688.00 for document review services. (A-1092–96). Walters objected that the fees requested were insufficiently documented and needlessly incurred, and objected to Dean Foods' request for all of Davis' compensation. (A-977–79, A-1025–27).

The district court preliminarily ordered restitution "except as to legal fees incurred in the defense of Thomas Davis after May 19, 2016, the date of his guilty plea," but reserved on the amount of restitution. (SPA-38). In response, Dean Foods purported to remove the legal fees post-dating Davis' guilty plea. (A-1204 ¶5). Additionally, due to this Court's intervening decision in *United States v. Cuti*, No. 16-3159-CR, 2017 WL 4176218, at *3 (2d Cir. Sept. 21, 2017), Dean Foods subtracted $46,780.59 in fees incurred for "monitoring" Walters' trial, "generating summaries of trial events, and drafting press releases." (A-1204 ¶8). Without explanation, and over Walters' renewed objection, the district court granted the modified request for $8,882,022.80 in full. (SPA-39 ¶1).

C. The Legal Fees Were Not Properly Supported

The MVRA permits restitution only for statutorily-covered harms; "unlisted harms are not compensable in restitution." *United States v. Maynard*, 743 F.3d 374, 379 (2d Cir. 2014). Courts may not "award[] the victim a windfall, *i.e.*, more

in restitution than he actually lost." *Thompson*, 792 F.3d at 277 (quotations and modification omitted). The government bears the burden of proving the amount of loss sustained by a victim. 18 U.S.C. §3664(e). A "lack of clarity in the record" as to the recoverability of legal fees must be construed in favor of the defendant. *United States v. Cuti*, 778 F.3d 83, 96 (2d Cir. 2014).

Additionally, while this Circuit has held that certain attorneys' fees are recoverable, *see, e.g., United States v. Amato*, 540 F.3d 153, 159–60 (2d Cir. 2008), others have found that such fees are "consequential damages" unavailable in restitution. *See United States v. Arvanitis*, 902 F.2d 489, 497 (7th Cir. 1990). Moreover, the canon of ejusdem generis dictates that the Court should construe the general term "necessary ... other expenses" in light of the specific preceding terms "lost income," "child care," and "transportation." The list of specific terms has one clear commonality: they all represent expenses incurred in the physical participation in the investigation and proceedings. "[L]ost income" occurs from missing work to attend a hearing; "child care" expenses are incurred to pay a sitter to watch one's children while attending the hearing; and "transportation" costs ensue when one has to pay for a taxi, bus, or gas to get to the hearing. It is nonsensical to equate bus fare and a babysitter with the millions of dollars in legal fees charged by some of the most expensive law firms in the world, whose bill details have not been provided to show how their work was even necessary.

Accordingly, we urge the Court to invoke its mini en banc procedure, *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016), to reconsider its position regarding the recoverability of attorneys' fees, and we preserve this issue for a potential rehearing or certiorari petition if necessary.

If legal fees are recoverable under the MVRA, recovery is permitted only to the extent fees were "necessary to the investigation or prosecution" of the criminal case. *Cuti*, 778 F.3d at 95; *see also Amato*, 540 F.3d at 159–60 ("The [MVRA] requires that the included [legal] expenses be 'necessary.'"). In order to ensure the attorneys' work was actually necessary to the investigation or prosecution, and that the district court is acting within its statutory authority—the court must "carefully parse[] the legal fees paid." *Cuti*, 778 F.3d at 93, 95 (vacating and remanding for more detailed analysis of attorneys' billing records); *United States v. Gupta*, 925 F. Supp. 2d 581, 587 (S.D.N.Y. 2013) ("[T]ime entries [must] specify the work performed with sufficient particularity to assess what was done, how it was done, and why it was done.").

The billing records for Dean Foods and Davis' attorneys are inadequate. First, they are entirely unclear as to what legal fees Dean Foods incurred for the criminal investigation as opposed to the parallel SEC action. The plain language of the MVRA limits expenses recovered under this provision to those "necessary" to the criminal "investigation or prosecution"; the SEC's parallel investigation,

which the government has asserted was independent of the criminal investigation, plainly does not qualify.[10] Indeed, the government has insisted that "the two agencies did not strategize about what charges they intended to bring, or which defendants each would charge, but instead independently evaluated their separate evidence to make independent investigatory and charging decisions consistent with their separate mandates[;] there [was] no joint investigation." (A-183).

Moreover, where the billing records reveal that legal fees are "excessive," "duplicative," or otherwise 'unnecessary," the award must be reduced. *See United States v. Ebrahim*, No. 12 CR. 471 JPO, 2013 WL 2216580, at *4 (S.D.N.Y. May 21, 2013) (reducing award where "review of Sullivan & Cromwell['s] … billing records suggests" some bills were "excessive" and involved "an unnecessary amount of lawyers involved in certain tasks"); *Gupta*, 925 F. Supp. 2d at 587–88 (same where the "number of attorneys staffed on a task … exceeded what was reasonably necessary under the MVRA").

Here, the district court did not parse, much less "carefully parse" the $5.9 million in "legal fees paid" to WilmerHale and the three firms representing Davis. *Cuti*, 778 F.3d at 93. In support of its restitution claim, Dean Foods supplied *no*

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[10] This Court once affirmed a restitution award for fees related to an SEC investigation in an unpublished, non-binding order. *See United States v. Skowron*, 529 F. App'x. 71, 75 (2d Cir. 2013).

billing detail that would support a claim that the fees it paid were "necessary." For its own lawyers at WilmerHale, Dean Foods submitted only monthly invoices reflecting the "total amount due." (A-1097–1130). There is no indication as to what tasks were performed, how many lawyers were used, nor any other details to assess whether any of the work was actually "necessary" to the government's investigation or prosecution. For Davis' three firms, Dean Foods provided records from its own accounting system showing monthly totals but without the supporting detail. (A-1148–90).

Dean Foods is not entitled to such enormous restitution on such an incomplete record. *Compare United States v. Battista*, 575 F.3d 226, 234 (2d Cir. 2009) (affirming restitution award because "[t]he district court meticulously parsed out the fees and costs submitted"); *with Cuti*, 778 F.3d at 95–96 (reversing restitution award where district court did not parse legal fees with enough specificity). It is simply not plausible that the district court was able to determine which of the law firms' millions of dollars' worth of fees and expenses were actually "necessary" to the investigation or prosecution of the offense based on the summary invoices that were submitted. Without any indication of what the attorneys were doing with their billed time, it is impossible to know whether their work was even related to the investigation or prosecution, let alone "necessary."

Indeed, it is hard to understand how Dean Foods and Davis together could have run up a $6 million bill if the work their lawyers performed was truly limited to what was "necessary." Dean Foods was forced to remove certain fees from its request because, after initially including them, this Court issued its opinion in *Cuti*, which happened to confirm those fees were unnecessary. (A-1206). It is almost certain that other parts of the bill would not withstand scrutiny if the billing detail were disclosed. For instance, large firms commonly staff multiple lawyers on a task that one could perform, use inefficient but expensive junior associates for legal research, and charge clients for associates' meals and cab fare home when working late. It is hard to imagine how a first-year associate's $40 sushi order would be "necessary" to the government's investigation.

The problem is particularly acute for Davis. He cycled through *three* law firms, and the lack of billing detail prevented the district court from "consider[ing] at least whether the claimed expenditures by [one firm] were redundant or duplicative of the expenses incurred" by another, including whether a firm merely provided "a second opinion" or different firms "work[ed] in tandem [to] create[] additional, needless administrative costs." *Cuti*, 778 F.3d at 95–96.

Moreover, it was an abuse of discretion to charge Walters for *any* of Davis' legal fees. Davis apparently had to meet with the government 29 times to get his story straight before he received his cooperation agreement. Why should Walters

have to pay for Davis' lawyers' to attend those meetings and negotiate his agreement? Although Dean Foods advanced Davis' legal fees, Davis is legally obligated to repay them (*see, e.g.*, A-1138–39 §10), and should not get a windfall because Walters is a "deep pocket" due to his own hard work and legitimately accumulated wealth. And Dean Foods did not advance Davis' fees because they were "necessary ... [to their] participation in the investigation or prosecution of the offense." It paid Davis' fees because he was a director. Unlike Davis, Walters owed no fiduciary duty to Dean Foods. The district court abused its discretion by allowing Davis to avoid the consequences of his breach of duty to Dean Foods by ordering Walters to pay Davis' fees.

Because the government failed to prove that Dean Foods was entitled to restitution of its and Davis' legal fees, those amounts should be deducted from the award. At a minimum, this Court should remand and instruct the district court to (1) order Dean Foods to produce detailed documentation supporting the request for legal fees, and (2) review the billing detail to determine which fees were truly "necessary" to its "participation" in the criminal investigation and prosecution.

D. Dean Foods Cannot Recover All of Davis' Compensation

The district court also lacked statutory authority to order Walters to repay all of Davis' director compensation for 2008 through 2014. This order was absurd—Davis, not Walters, was the Dean Foods employee who breached a duty to Dean

Foods. And the most Dean Foods could receive from either Davis or Walters was a mere fraction of Davis' compensation. Although an employer may receive restitution when it "pays for honest services but receives something less" from a defendant, this Court has repeatedly confirmed that even in that context, the employer receives *some* benefits from the employee's services. *United States v. Bahel*, 662 F.3d 610, 649 (2d Cir. 2011). The Court has *never* upheld an award for an employee's entire salary.

Indeed, an employer is typically awarded restitution of at most a small percentage of the employee's compensation. This Court has recognized that the proper calculation is "the difference in the value of the services that [were rendered] ... and the value of the services that an honest [director] would have rendered." *Bahel*, 662 F.3d at 650 (affirming restitution award of less than 10% of employee's total salary) (quotations omitted); *see also Skowron*, 529 F. App'x. at 74 (affirming restitution award of 20% of defendant's salary). For example, in *Bahel* the award was limited to the salary the employer paid to the defendant-employee while he was suspended pending investigation, a time period in which "he 'performed no services at all.'" 662 F.3d at 650. The employer did not receive *any* restitution for the salary it paid the defendant while he was an active employee.

This practice ensures that the employer does not receive a windfall in the form of years' worth of free labor, when the vast majority of the work was

unaffected by the charged conduct. Dean Foods does not suggest that Davis provided it with no services or value from 2008 through 2014. In fact, Dean Foods offers no explanation about how Davis' charged conduct affected his performance as a director, and has therefore failed to prove that it is entitled to *any* of Davis' compensation. Thus, the restitution award improperly bestowed a windfall on Dean Foods and contravened binding Circuit precedent. Davis' salary should be deducted or, at a minimum, the Court should remand with instructions to reduce that portion of the award.[11]

V. THE FORFEITURE ORDER SHOULD BE VACATED

The district court adopted the government's calculation and ordered forfeiture of $25,352,490, more than double the amount that Walters proposed based on methodology suggested by Judge Richard J. Sullivan in a similarly complex insider trading case. This amount exceeded the scope of the court's authority because it was vastly overstated and was not a "reasonable estimate" of Walters' "proceeds" from the alleged insider trading. The amount was determined

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[11] This Court has concluded that judicial fact-finding by a preponderance of the restitution amount does not violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See, e.g.*, *United States v. Bengis*, 783 F.3d 407, 412 (2d Cir. 2015). However, *S. Union Co. v. United States*, 567 U.S. 343, 348–51 (2012), undermines that conclusion. Walters preserves for any petition for rehearing en banc or certiorari the argument that the restitution order violated his Fifth and Sixth Amendment rights because it was not based on facts found by a jury beyond a reasonable doubt.

based on an arbitrary methodology, and justified by a counterfactual, nonsensical argument. The order should be vacated and the amount lowered to $12,651,727.67, the more reasonable figure Walters proposed.

A. The Proceedings Below

Forfeiture is limited to "the proceeds traceable to [the] violation." 18 U.S.C. §981(a)(1)(C). In insider trading cases, "proceeds" is defined as "the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services." *United States v. Contorinis*, 692 F.3d 136, 145 (2d Cir. 2012). Calculating the precise amount of gains or proceeds is not possible in a complex case like this one. While the district court may employ a "reasonable estimate," *e.g.*, *United States v. Vilar*, 729 F.3d 62, 96 (2d Cir. 2013), the forfeiture award cannot exceed the amount of the defendant's "ill-gotten gains," *Contorinis*, 692 F.3d at 146. Moreover, because a defendant should not be "subjected to punishment that is not clearly prescribed" by statute, *United States v. Santos*, 553 U.S. 507, 513 (2008), the rule of lenity requires any "ambiguity over which penalty should apply" to be resolved in favor of the least severe penalty, *United States v. Canales*, 91 F.3d 363, 367 (2d Cir. 1996).

The parties presented competing methodologies for calculating "gain" under the sentencing guidelines.[12] The trades occurred over a multi-year period, and Walters consistently held large positions and often did not trade immediately after a public announcement. Accordingly, with certain exceptions described below, both sides proposed methods to estimate the amount of unrealized gains that could reasonably be attributed to the value of the purported inside information.

For all of the trades except three instances in which Walters sold some of his shares on the day of an announcement, the government estimated unrealized gains using the closing price at the end of the first trading day following the public announcement of the information allegedly tipped to Walters. (*See* A-679, A-682, A-690).[13] The government's only justifications for this method were that (1) it has been used in some civil SEC cases, and (2) Walters traded in such large volume that, when he sold his stock, he single-handedly depressed the stock price. (A-994, A-1037). Based on this theory, the government sought $25,352,490 in forfeiture. (A-1089–90).

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12 Walters is not appealing the guidelines calculation, because the sentence was below the guidelines range that would have applied under his calculation.

13 Those trades occurred on April 30, 2008, June 25, 2008, and February 11, 2009, and account for less than one-third of the forfeiture amount.

Walters urged the district court to adopt the methodology Judge Sullivan had employed in *Contorinis*.[14] Recognizing that myriad market forces impact a stock's price throughout a trading day, rendering it nearly impossible to pinpoint the effect of a disclosure, Judge Sullivan opted to use "whatever the price during the day that results in the least loss … in the interest of being conservative." Sentencing Hearing, *United States v. Contorinis*, 09 Cr. 1083 (RJS), (S.D.N.Y. Dec. 17, 2010), Tr., 59:9–13.[15] Employing the *Contorinis* method would reduce the forfeiture award from $25,352,490 to $12,651,727.67.

At sentencing, the government argued that Judge Sullivan's method would give Walters "a windfall" because "he's trading in huge volumes [and] he himself is actually moving the market … in numerous situations" and thus "can cause a depreciation of the stock price, and thus he gets the benefit of his own sales in this calculation." (A-1037). The government did not specify which "situations" it was referring to, and ignored that in all but three instances, Walters did not sell shares

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14 The *Contorinis* forfeiture order was reversed because the defendant never actually received any proceeds. 692 F.3d at 148. However, this Court did not address how to calculate proceeds in complex insider trading cases, and has yet to provide specific guidance on that question.

15 Judge Sullivan used this methodology to calculate losses avoided (the only issue before him), but he did not limit its use to losses avoided, and there is no reason to do so. This Court has since clarified, and the government concedes, that losses avoided are not subject to forfeiture. *Contorinis*, 692 F.3d at 145 n.3.

on the trading days used for the calculations, and thus could not possibly have caused any depreciation in stock price. Nonetheless, the district court found the government's methodology "most appropriate in this case," without explaining why, and concluded that it was inappropriate to use "intraday trading" because of the "size of the trades by Mr. Walters." (A-1040). After supplemental briefing, and without providing any further rationale, the district court ordered Walters to forfeit $25,352,490. (SPA-39).

B. The Forfeiture Amount Was Vastly Overstated

The forfeiture order cannot exceed Walters' purported "ill-gotten gains." Here, the government did not (and could not) assert that its number represented Walters' actual "proceeds" from the alleged insider trading, and the amount forfeited was more than double the more conservative figure yielded by Judge Sullivan's methodology. Given the massive variance between the two calculations, adopting the higher calculation cannot be a "reasonable estimate," particularly since any "tie must go to the defendant." *Santos*, 533 U.S. at 514.

The district court's rationale for adopting the government's methodology was indefensible. First, the court never explained why it found the government's method "appropriate." And the government's method—using the closing price on the first trading day following the announcement—is completely arbitrary. Why the closing price? Stocks frequently change in price throughout the course of the

day after the market has absorbed new information. How is the closing price a more accurate way to capture the value of the information released before the market opened than, for instance, the price at the opening? Or two hours after the opening, if additional time is needed to fully absorb the information's significance? And what if, several hours of the announcement, there is some other news that could affect the share price, such as a drop in the price of a key commodity? Or what if the price averages $12 for most of the day but rises sharply to close $1 higher? Why should the rise at the end of the day be considered part of the "ill-gotten gains" even though the market must already have absorbed the information?[16]

Second, and most importantly, the court's rationale for rejecting Walters' proposal made no sense and was contradicted by the record. Although it is possible that sometimes Walters was a "market mover" because of the volume of his trades, in the vast majority of situations driving the gain number, he did *not* sell on the trading day following the announcements. For example, the 2012 trades represented the lion's share of his gains, and he never sold any shares on the trading day following any announcements that year. Indeed, more than two-thirds

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[16] The court did not mention the civil disgorgement cases the government cited, but they are irrelevant, particularly since there is no statutory limit on (or authority for) disgorgement. *See generally Kokesh v. SEC*, 137 S. Ct. 1635, 1642 n.3 (2017).

of the government's $25 million figure is based on closing prices on days that Walters did not sell any stock at all. He could not possibly have driven the price down on those days, and there was no reason to conclude, as the court did, that he would have gotten some "windfall" because his own trading depreciated the share price.

The government's end-of-day approach to calculating forfeiture is arbitrary, unsupported, and entirely irrelevant to this case. The government offered no legitimate justification for its methodology, and the district court gave no reason at all for adopting it. Also, the stated basis for rejecting Judge Sullivan's approach was counter-factual and illogical. The district court should have followed longstanding principles of lenity and adopted Judge Sullivan's approach. The forfeiture award should be reduced to $12,651,727.67.[17]

CONCLUSION

The judgment should be reversed and the indictment dismissed. Alternatively, the judgment should be vacated and the case remanded for a new

[17] The Supreme Court held in *Libretti v. United States*, 516 U.S. 29, 49 (1995), that criminal defendants have no constitutional right to a jury determination on forfeiture. This Court has held that criminal forfeiture is not subject to the *Apprendi* doctrine. *United States v. Stevenson*, 834 F.3d 80, 85, (2d Cir. 2016). But *Southern Union Co.* undermines *Stevenson*. Walters preserves for any petition for rehearing en banc or certiorari the argument that the forfeiture order violated his Fifth and Sixth Amendment rights because it was not based on facts found by a jury beyond a reasonable doubt.

trial and/or an evidentiary hearing regarding the grand jury leaks. At a minimum, the Darden convictions should be reversed, the restitution and forfeiture orders vacated, and the case remanded for resentencing.

Dated: New York, New York
November 13, 2017

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

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 17,011 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font of Times New Roman.

Dated: November 13, 2017

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,

16-cr-338 (PKC)

-against-

MEMORANDUM
AND ORDER

WILLIAM WALTERS,

Defendant.
----------x

CASTEL, U.S.D.J.

David Chaves, a Supervisory Special Agent of the Federal Bureau of Investigation ("FBI"), acting without authorization, leaked sensitive information regarding a criminal insider trading investigation to reporters at the *Wall Street Journal* and *New York Times*. The reporters revealed details of the investigation in several newspaper articles. The existence of internal leaks was suspected near contemporaneously by the Assistant Director in Charge of the FBI's New York Field Office and the United States Attorney. Despite warnings initiated by them, Chaves continued the unauthorized disclosures to the media.

This Court granted defendant William Walters' motion for an evidentiary hearing on the possibility of leaks. (Memorandum and Order, Nov. 17, 2016, Dkt. No. 46.) Chaves did not disclose his role in the unauthorized leaks until confronted by prosecutors preparing for the hearing.

The leaks at issue began in April 2013 and ended at the earliest in June 2014, but may have continued as late as August 2015. The grand jury returned its indictment against Walters on May 17, 2016, charging him with wire fraud, securities fraud, and conspiracy to commit wire and securities fraud.

Walters moves to dismiss the indictment based on government misconduct. The government has, for the purpose of this motion, conceded that Rule 6(e), Fed. R. Crim. P., which ensures secrecy in grand jury proceedings, has been violated. For reasons to be explained, Walters' motion is denied.

Chaves is currently the subject of a criminal investigation led by the Department of Justice's Public Integrity Section. (Gov.'s Mem. in Opp., Jan. 30, 2017, Dkt. No. 82 at 1-2.) The Court directs the United States Attorney for this district to report to the Court in writing on the status of all investigations and proceedings against Special Agent Chaves or any other person making or concealing unauthorized disclosures related to insider trading investigations within 14 days of this Memorandum and Order and, thereafter, within 14 days of the close of every calendar quarter until further ordered.

BACKGROUND

A. The Insider Trading Investigation Begins.

In July 2011, the FBI, along with the Office of the United States Attorney for this district ("USAO"), began investigating suspicious trading in shares of the Clorox Company in advance of an announcement of a potential acquisition of Clorox by another company. (Id. at 4.) The USAO requested and received access to documents gathered by the Securities and Exchange Commission ("SEC"), which had been conducting a civil investigation into the Clorox trading. (Id.) Walters was a target of both the USAO and SEC investigations. (Id.) By April 2013, approximately 30 grand jury subpoenas had been issued in connection with the investigation, including for phone, bank, and trading records, as well as credit reports. (Id.) Special Agent Matthew Thoresen of the FBI was assigned to the investigation and his work was supervised by Supervisory Special Agent Chaves. (Id.)

On April 26, 2013, the Financial Industry Regulatory Authority ("FINRA") brought to the SEC's attention trading in Dean Foods by Walters and others shortly before an August 2012 announcement that Dean Foods intended to spin off its dairy business, WhiteWave. (Id. at 5.) The SEC received information and documents from FINRA, which it shared with the USAO and FBI on May 17, 2013. (Id.) At this point it came to light that Walters had been friends with Thomas Davis, who served on the board of directors of Dean Foods, for fifteen years. (Id.) The FBI thus expanded its investigation to include Davis and others in close communication with him around the time of significant Dean Foods trades. (Id.)

The government asserts that the subpoena returns in the remainder of 2013 and early 2014 provided a circumstantial case of securities fraud in connection with Walters' trading in Clorox, Dean Foods, and another company. (Id. at 6.)

B. The Leaks.

As will be apparent, not all communications between Chaves and newspaper reporters were unauthorized or concealed from others within the FBI. Nor did all communications relate to grand jury proceedings or sealed wiretaps.

Chaves admitted that he leaked information regarding the investigation to reporters between approximately April 2013 and June 2014. (See Gov. Ltr., Jan. 4, 2017, Dkt. No. 65-1 at 4, 9.) During this time he disclosed information to Matthew Goldstein and Ben Protess of the *New York Times* and Susan Pulliam and Michael Rothfeld of the *Wall Street Journal*. (Id. at 3.)

According to Chaves, in April 2013 he met Goldstein and Protess for dinner, during which he discussed the investigation into the Clorox trading, mentioning Walters by name. (Id. at 4.) Chaves says he also disclosed information regarding the investigation during

lunch with Pulliam in late 2013, and asked her "to let him know if she came across any information regarding Walters." (Id. at 5.) From that time on, Chaves claims to have discussed the investigation during periodic telephone calls with Pulliam. (Id.) Pulliam also emailed articles to Chaves' personal email account. (Id.) Chaves claims that he ceased contact with Pulliam around April 2014. (Id.) However, around that time, Chaves had dinner with Goldstein and Protess, where he continued to discuss the investigation, informing them that the investigation had expanded to trading in stocks besides Clorox. (Id.) Chaves likely continued his discussions with Protess following the meeting during multiple phone calls later in April. (Id.)

Pulliam invited J. Peter Donald, then an FBI New York Field Office media representative, to meet for coffee on May 6, 2014. (Id.) The context of the invitation is not clear from any of the government's submissions. Donald invited Chaves to attend and both men met with Pulliam. (Id.) Pulliam inquired about the Walters investigation, about which she already had detailed information. (Id.) Pulliam stated that she planned to publish a piece on the investigation and Donald requested that she wait to do so. (Id. at 6.) On May 8, 2014, the FBI informed the USAO that the *Journal* planned to publish an article on the investigation. (Decl. of Telemachus Kasulis, Dkt. No. 44 at ¶ 11.)

On May 13, 2014, Donald spoke with persons at the *Journal* who agreed to hold the story at least until May 22, 2014. (Gov. Ltr., Jan. 4, 2017 at 6.) Sometime after May 13 the *Journal* asked to meet with the FBI to discuss the continued holding of the story; the FBI and USAO discussed available options, with the FBI ultimately deciding to go forward with a meeting. (Id.) On May 27, 2014, Chaves, Donald, and several other FBI personnel met with Pulliam, Rothfeld, and a *Journal* editor. (Id.) There are contradictory descriptions of this

meeting, with Chaves claiming that the FBI confirmed certain information unrelated to the grand jury or wire intercepts in exchange for the *Journal* continuing to hold its story, while other FBI personnel present claim that no information was given to the reporters. (Id. at 6-7.) However, multiple witnesses corroborate that the FBI agreed to tell the *Journal* if the FBI learned that another news organization was looking into a similar story. (Id. at 7.)

That same day, the USAO learned from the SEC that one or more *Times* reporters had reached out to an SEC lawyer regarding the Walters investigation. (Id.) The USAO notified the FBI, which in turn notified the *Journal*. (Id.) In a May 28, 2014 email to Chaves, Special Agent Thoresen wrote, in reference to the Walters investigation: "Whomever is leaking[] apparently has a specific and aggressive agenda in that they are now going to other media outlets in an effort to derail this investigation." (Id.; id. at Ex. A.)

In light of the imminent publication of information regarding the investigation, the FBI decided further covert surveillance was useless and approached Davis and another person on May 29, 2014. (See Gov.'s Mem. in Opp., Jan. 30, 2017 at 7.) Both insisted they were innocent of any wrongdoing. (See id.)

Also on May 29, 2014, Rothfeld of the *Journal* called then Deputy United States Attorney Richard Zabel, telling him that he knew that Walters and others were being investigated, and that the "whole thing began with Clorox." (See Gov. Ltr., Jan. 4, 2017 at Ex. B.) Zabel did not disclose any information. (Id.)

On May 30, 2014, the *Journal* published an online story regarding the government's investigation into the Clorox trading. (Id. at 8.) The article identified Walters, Phil Mickelson, and Carl Icahn as targets, and provided details of the investigation. (See Schoeman Decl. in Supp., Jan. 13, 2017, Dkt. No. 69 at Ex. H.) The article also mentioned that

federal authorities were looking into Walters' and Mickelson's trading of Dean Foods stock and detailed the business and personal connections between the three men. (Id.)

The *Times* published a similar online story regarding the Walters investigation that same day. (See id. at Ex. B; Gov. Ltr., Jan. 4, 2017 at 8.) Around the time of the publication, Donald, an FBI media representative, spoke with the *Times*, and based on the conversation believed that the *Times* knew about the FBI's agreement with the *Journal* to inform the *Journal* if the FBI discovered that another media outlet was investigating the story. (Id.) According to the government's recent investigation, the *Times* reporters appeared to know something about the government's wiretap, though it is unclear what. (Id.)

That evening, George Venizelos, then Assistant Director in Charge of the FBI's New York Field Office, emailed Donald, Chaves, and others, asking: "[h]ow did [the reporter] find out about [the] agent approaching [a target] on thursday [sic]. I don't buy that [the target] told them." (Id. at Ex. C.) He instructed Chaves and other FBI personnel to cease contact with the *Journal* reporters, stating that if he found out anyone continued to speak to the reporters, "there will be reassignments immediately." (Id.)

On May 31, 2014, the *Times* published another article on the Walters investigation, which largely repeated information included in the articles from the previous day. (Id. at 8.) On June 1, 2014, the *Journal* published its second article on the investigation. (Id.; Schoeman Decl. in Supp., Jan. 13, 2017 at Ex. L.) This article noted that making the investigation public had compromised the government's secret wiretaps. (See Schoeman Decl. in Supp., Jan. 13, 2017 at Ex. L.) The article also disclosed additional details of the investigation, including roadblocks the government faced in gathering evidence. (See id.)

On the day the *Journal* article was published, Special Agent Thoresen forwarded it to the Assistant United States Attorney primarily responsible for the investigation, describing the article as "deplorable and reprehensible." (Gov. Ltr., Jan. 4, 2017 at Ex. D.) Also on June 1, United States Attorney Preet Bharara forwarded a link to the online version of the article to Venizelos, stating, "I know you agree these leaks are outrageous and harmful. Let me know what action you want to take together." (Id. at Ex. E.) Venizelos forwarded the link and Bharara's email to Donald, Chaves, and others, stating that, "This new article takes a 'not good' situation to a 'bad' one. This is now an embarrassment to this office." (Id.) Venizelos instructed Donald, Chaves, and others to meet with him the next morning, concluding that "[w]e have issues to deal with and they will be address [sic] appropriately." (Id.) At the meeting, on June 2, Venizelos expressed anger about the leaks and again directed the special agents to not speak with the reporters involved with the stories. (Id. at 9.)

Despite the June 2 meeting with Venizelos, Chaves continued to communicate with reporters regarding the investigation. (Id.) He ceased using his FBI-issued cell phone and gave the *Times* reporters his personal cell phone number. (Id.) Chaves spoke to the *Times* reporters on his personal cell phone sometime between June 2 and June 11, 2014, and does not remember if he spoke to them on his personal cell phone again after that time. (Id.) Around this time Chaves deleted a personal email account in part because he did not want Pulliam to be able to contact him at that address. (Id.)

On June 11, 2014, the *Times* published another article about the investigations, addressing erroneous statements in previous reporting regarding Mickelson's purported trading in Clorox. (Schoeman Decl. in Supp., Jan. 13, 2017 at Ex. Q.) The article reported that in reality the FBI had no evidence that Mickelson traded Clorox shares in the lead up to Icahn's attempted

acquisition of the company, and maintained that its source acknowledged the mistake. (Id.) On June 12, 2014, Zabel had a telephone conversation with Protess of the *Times*, who was "upset to have to walk back his story and blames an FBI person (and it sounds like an agent) who[]. . . lied to the [*Times*] and some other news org[anizations]." (Gov. Ltr., Jan. 4, 2017 at Ex. F.) In a subsequent email to the United States Attorney and others Zabel stated: "I don't think this should be discussed generally right now for a number of reasons but obviously we need to discuss and will need to address this with the FBI." (Id.)

On June 23, 2014, both the *Times* and the *Journal* published articles principally to disclose that Dean Foods had received a subpoena. (Id. at 10; Schoeman Decl. in Supp., Jan. 13, 2017 at Exs. S, T.)

Walters alleges that an August 12, 2015 *Journal* article, in which Davis was named publically for the first time in connection with the investigation, was also the result of leaks by the FBI. (See Def.'s Mem. in Supp., Jan. 13, 2017, Dkt. No. 68 at 34-35.) The article reported that the portion of the investigation related to Icahn and Clorox had become dormant. (Schoeman Decl. in Supp., Jan. 13, 2017 at Ex. V.) The government is unable to dispute that this article contained information leaked by Chaves. (Gov.'s Mem. in Opp., Jan. 30, 2017 at 25 n.20.)

In early 2015 the SEC subpoenaed documents from Davis, including bank records, emails, and calendar entries, which Davis then voluntarily provided to the USAO. (Id. at 10.) On March 27, 2015, the SEC noticed Davis for an examination. (Id.) On May 18, 2015, Davis appeared before the SEC and testified. (Id.)

The government alleges that Davis made false statements at this examination, including that he did not know Walters owned Dean Foods stock, that he did not discuss the

WhiteWave spinoff with Walters, and that he did not knowingly make phone calls to Walters after important board meetings or announcements. (Id.) The government also alleges that Davis was unable to adequately explain his finances, including a loan he sought from Walters. (Id.)

In February 2016, (id. at 11), approximately six months after the publication of the last article which defendant contends contained leaked information and nine months after the SEC examination, Davis indicated that he wished to cooperate with the government. On May 16, 2016, Davis pled guilty to, among other crimes, securities and wire fraud, obstruction of justice, and perjury. (Id.)

C. The Indictment.

The government has submitted to the Court a transcript of the grand jury testimony leading to Walters' indictment and provided the same to Walters. (See Dkt. No. 83.) The testimony was given on May 17, 2016, nine months after the last article allegedly containing leaked information was published, and almost two years after the bulk of the leaked information was publically disclosed. Chaves did not testify before the grand jury and no evidence specific to Chaves was presented. That same day the grand jury returned an indictment charging Walters with wire fraud, securities fraud, and conspiracy to commit wire and securities fraud. On May 18, 2016 Walters was arrested. (Gov. Mem. in Opp., Jan. 30, 2017 at 13.) The indictment was unsealed on May 19, 2016. Trial is set for March 13, 2017, more than one year and seven months since the last article disclosing leaked information was published.

D. Defendant's Motions Regarding Government Misconduct.

On September 23, 2016, before Chaves' admissions, Walters moved for, among other things, a pretrial hearing to address possible government misconduct during the investigation leading up to the indictment, alleging that false statements were made in support of

Title III wiretap applications and that one or more members of the prosecution team leaked grand jury information, resulting in the above described articles. (Dkt. Nos. 40, 42.) The Court granted defendant's motion for an evidentiary hearing, based in part on the timing and content of the newspaper articles that were suggestive of a leak of grand jury subpoenas protected under Rule 6(e), Fed. R. Crim. P. (Dkt. No. 46.)

In a letter to the Court dated December 16, 2016, the government disclosed that an FBI agent had admitted to being a significant source of confidential information leaked to reporters at the *Times* and *Journal* during a December 6, 2016 interview conducted by the USAO in preparation for the evidentiary hearing. (Dkt. No. 53.) The government further stated that before this interview the agent had hidden these communications from the USAO and others within the FBI. (Id.) The government conceded that defendant had made out a *prima facie* case of a Rule 6(e) violation which it could not rebut. (Id.)

That same day, the government submitted ex parte and under seal additional information uncovered during its investigation into the leaks, including that the person responsible for the leaks was Chaves. This submission was later filed on the public docket with redactions. (See Dkt. No. 65.) Chaves' identity as the leaker was made known to defendant on December 20, 2016. (See Dkt. No. 61, Transcript of December 21, 2016 Hearing, 3-4; Dkt. No. 65.) On December 21, 2016, the Court heard the parties regarding the now conceded leaks. The Court set a briefing schedule for Walters' motion to dismiss the indictment.

Defendant argues that dismissal is appropriate under the Court's supervisory authority as discussed in Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988), and in the alternative, that the continued prosecution of defendant in light of the government's misconduct would violate due process. (See Def.'s Mem. in Supp., Jan. 13, 2017 at 3.)

Defendant further argues that in the event the Court is not prepared to grant the requested relief, an evidentiary hearing would be appropriate to further develop the record and resolve factual disputes between defendant and the government. (See id. at 60-61.)

E. Possible Violation of Rule 6(e), Fed. R. Crim. P.

The government interviewed Chaves on December 6 and 8, 2016. (Gov.'s Mem. in Opp., Jan. 30, 2017 at 15-16.) He was scheduled to return for a third interview, but canceled the interview and refused to answer further questions, invoking his Fifth Amendment privilege against self-incrimination. (Id. at 16.) During the interviews, Chaves confirmed that he provided some of the confidential information appearing in the *Times* and *Journal* articles. (Gov. Ltr., Jan. 4, 2017 at 10.) The government "attempted to question Chaves about whether he was the source of each piece of confidential information reported in the articles." (Id.) The government describes Chaves' responses to this line of questioning:

> His responses were clear and certain as to whether he had disclosed certain pieces of information and vague or contradictory as to others. In certain instances, his recollection was corroborated by text messages, phone logs, or other witnesses, but in others it was not. And, in some cases, his denials about having provided specific pieces of information that facially appeared to be from a law enforcement source did not ring true in light of other admissions he made.

(Id.) Chaves could not remember whether he had disclosed certain other pieces of information to reporters. (Id. at 11.) For those reasons, among others, the government does not stand behind the representations Chaves made during the interviews. (Id. at 10.)

The government acknowledges that the *Times* and *Journal* articles contained a significant amount of confidential information relating to the investigation. (Id.) Among the confidential information disclosed were the subjects of the investigation, particular stock trades and tipping chains, potential illegal trading profits, and the use of particular investigative

techniques. (Id.) The government acknowledges that some of the confidential information disclosed may have come from grand jury subpoenas in violation of Rule 6(e), Fed. R. Crim. P. (See id. at 11.) The government concedes that specific disclosures in the articles about particular trading and phone patterns by certain target subjects under investigation suggest a leak by someone with access to the trading and phone records gathered by grand jury subpoena. (See id.)

"Rule 6(e) of the Federal Rules of Criminal Procedure prohibits, with certain specified exceptions, the disclosure of 'matters occurring before the grand jury.'" DiLeo v. Commissioner, 959 F.2d 16, 18 (2d Cir. 1992) (quoting Rule 6(e), Fed. R. Crim. P.) Based on its interrogation of Chaves, the Government states that it cannot rebut Walters' *prima facie* case of a Rule 6(e) violation and submits that the Court should assume such a violation occurred. (Id. at 11-12.)

DISCUSSION

A. Defendant was not Prejudiced by any Illegally Leaks.

Both parties agree that, as an exercise of a district court's supervisory authority to remedy government misconduct in connection with a criminal prosecution, "dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." Bank of Nova Scotia, 487 U.S. at 256 (quoting United States v. Mechanik, 475 U.S. 66, 78 (1986)). According to the Court, "a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." Id. at 254.

While Walters has made an unrebutted *prima facie* case of grand jury leaks, he has failed to show, despite efforts, that he was prejudiced. Walters points to the actions of his alleged co-conspirator Davis upon learning about the investigation. Specifically, Davis destroyed a cell phone he allegedly used to communicate material non-public information to Walters, abandoned his protestations that he and Walters were innocent, and agreed to cooperate with the government against Walters. (See Def.'s Mem. in Supp., Jan. 13, 2017 at 52.)

Davis' conduct is not causally related to the government misconduct. Nor is it cognizable legal prejudice. When Davis learned through newspaper reports that he and Walters were targets of investigations, he first sought to conceal his actions by destroying the cell phone but later reconsidered and admitted his crime and became a cooperator. Walters' theory fails to adequately take account of Davis' likely conduct in the absence of leaks – he would have learned of the grand jury's investigation through subpoenas directed to him or to persons or entities close to him. His first reaction – conceal and deny – and his reconsidered reaction – admit and cooperate – may well have been the same.

Davis has admitted his guilt. In this Circuit, juries are routinely instructed that they may "draw no conclusions or inferences of any kind about the guilt of the defendant on trial from the fact that a prosecution witness pled guilty to similar charges. That witness' decision to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant on trial here." United States v. Ramirez, 973 F.2d 102, 104 (2d Cir. 1992). The instruction is not just aspirational and precautionary: it reflects the judgment that such a decision is, indeed, a personal choice of the individual based upon a variety of considerations, including genuine remorse. If the newspaper articles had never been published, there is no reason to think that Davis would not have been indicted. Reading the

indictment may have prompted the same reaction that Walters attributes to his reading the newspaper articles. Attributing Davis' choice to newspaper reports six or more months earlier, on this record, is sheer speculation.

A conspiracy to trade on inside information requires an insider, who is the tipper, and one or more tippees or remote tippees. A person could not qualify as a tippee unless that person traded in the window of time between the tipper learning the information and public disclosure of that information. Walters will have the ability to cross-examine Davis at trial to endeavor to establish that the published information was sufficient to construct a false narrative. There is not, however, any basis to conclude that the newspaper articles had any impact whatsoever on the grand jury's decision to indict.

Defendant argues that the cell phone contained exculpatory evidence that would have been available for his defense but for the illegal leaks, which caused Davis to destroy the phone. (See Def.'s Mem. in Supp., Jan. 13, 2017 at 33-34.) However, Walters does not argue that the destruction of the cell phone in any way prejudiced him at the grand jury proceedings, at which he has no right to present exculpatory evidence. Further, he has not shown prejudice at trial, as Walters acknowledges that Davis destroyed the phone "around May or June 2014, *after the FBI visited [his] home*. . ." (Id. at 33 (emphasis in original).) This suggests that Davis destroyed the phone in response to the FBI contacting him rather than because of any leaked information that appeared in the press.

Not only has defendant failed to demonstrate that the phone would not have been destroyed but for the leaks, neither has he demonstrated that access to the phone would in any way further his defense. Defendant claims that Davis' story of defendant's participation in illegal activity is fabricated. It is thus completely consistent with defendant's theory of Davis'

trustworthiness that Davis is lying about destroying the phone and that there was never any phone to begin with. In other words, if Davis is lying about giving Walters tips on the phone he threw in the river he could just as easily lie about giving Walters tips on a phone that never existed. In the end, the jury will either believe Davis or not believe Davis.

Walters also points out that the grand jury was informed that Walters had made a loan to Davis, and Davis made his first payment on that loan shortly after the *Journal* articles were published in late May and early June. (See Def.'s Reply to Gov.'s Mem. in Opp., Feb. 6, 2017, Dkt. No. 92 at 9-10.) Walters argues that this media coverage prompted by the leaks caused an innocent payment by Davis appear inculpatory. (See id.) However, Walters cannot show that any illegally leaked grand jury or wiretap materials specifically caused this allegedly innocent payment to look like part of a criminal scheme. The mere disclosure that there was a government investigation into Walters and Davis with respect to trades in Dean Foods, which Walters does not contend would have violated any law, (see Def.'s Mem. in Supp., Jan. 13, 2017 at 26 n.9), would have also made the payment look culpable.

Walters' speculation regarding Davis' decision to cooperate, and then the effect of that cooperation upon the grand jury's decision to indict, does not raise "grave doubt that the decision to indict was free from the substantial influence" of any illegally leaked information. Bank of Nova Scotia, 487 U.S. at 256. Neither are such doubts raised by speculation as to whether Davis would have destroyed the cell phone or repaid the loan from Walters had the articles never been published.

Moreover, the FBI's investigation into Walters' allegedly illegal activities has been long and complex, involving many FBI agents and many targets. The necessarily limited effect of the leaks on such a complex investigation that required gathering a wealth of evidence

weighs against dismissal. See id. at 263 (standard for dismissal not met when government misconduct "occurred as isolated episodes in the course of a 20-month investigation, an investigation involving dozens of witnesses and thousands of documents").

The Court in Bank of Nova Scotia found that violations of Rule 6(e), Fed. R. Crim. P., "can be remedied adequately by means other than dismissal," such as by a contempt punishment for the violator. 487 U.S. at 263. As mentioned previously, Chaves' contact with reporters is now the subject of a criminal investigation. Further, if Davis testifies, defendant may cross examine him, including by impeaching him with his prior affirmations of he and defendant's innocence. Defendant may also impeach Davis with evidence of the plea agreement he made with the government. Defendant may argue to the jury that Davis is a liar who changed his story in order to obtain a lighter sentence for himself. Ultimately the jury will decide whether Davis is telling the truth.

A further evidentiary hearing is not necessary. Chaves has indicated that he will refuse to answer questions pursuant to his Fifth Amendment privilege against self-incrimination. In any event, the Court has been provided sufficient evidence by the parties in order to make a ruling.

B. Dismissal is not Appropriate Based on a Purported History of Prosecutorial Misconduct.

Defendant argues that under Bank of Nova Scotia, an indictment may also be dismissed upon a showing that there is "a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment." 487 U.S. at 259; see United States v. Brito, 907 F.2d 392, 394 (2d Cir. 1990). Defendant argues that no prejudice need be shown under this second Bank of Nova Scotia test on the grounds that otherwise it

would be subsumed by the first Bank of Nova Scotia test, improperly rendering some of the language of the Supreme Court's opinion meaningless. (See Def.'s Reply to Gov.'s Mem. in Opp., Feb. 6, 2017 at 13.)

As an initial matter, the Court is not aware of any case in which an indictment was dismissed based on the authority of the cited language from Bank of Nova Scotia. The language Walters refers to is dicta, and was prefaced with the following words: "we note that we are *not* faced with a history of prosecutorial misconduct, spanning several cases. . . ." 487 U.S. at 259 (emphasis added). However, even if this Bank of Nova Scotia test is not dictum, the Court does not agree with defendant's contention that he need not be prejudiced for dismissal to be appropriate. The Supreme Court explicitly stated that "a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." Id. at 254. The Court's reasoning that "a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by" Rule 52(a), Fed. R. Crim. P., which provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights [must] be disregarded," and that "federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions," holds true in circumstances involving a history of misconduct as well as when only one instance of misconduct is at issue.

Defendant highlights similar leaked information reported in articles about past white collar cases that Chaves worked on, written by some of the same reporters to whom Chaves admitted leaking information about the Walters investigation. (See Def.'s Mem. in Supp., Jan. 13, 2017 at 37-42.) The Court agrees with defendant that the potential for a pattern of leaks is concerning. However, for the reasons discussed, even if these articles evidenced a

pattern of illegal leaks by the FBI, that pattern would not raise such serious questions about the fundamental fairness of the process that resulted in *this* indictment as to warrant dismissal, and thus the Court will decline to break new ground on the facts before it. These other articles and the role of Chaves and possibly other special agents in leaks ought to be the subject of the pending criminal investigation.

C. Defendant's Continued Prosecution does not Violate Due Process.

Lastly, defendant argues that the indictment must be dismissed because the government misconduct at issue here rises to such a level that defendant cannot be prosecuted on the indictment consistent with due process. "In federal court, if the government violates a protected right of the defendant, due process principles may bar the government from invoking the judicial process to obtain a conviction if the government's conduct reach[ed] a demonstrable level of outrageousness." United States v. Cuervelo, 949 F.2d 559, 565 (2d Cir. 1991) (alterations in original; internal quotation marks and citations omitted). "[T]he existence of a due process violation must turn on whether the governmental conduct, standing alone, is so offensive that it 'shocks the conscience'. . . ." United States v. Chin, 934 F.2d 393, 398 (2d Cir. 1991) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).

This rule, stemming from the Supreme Court's holding in Brown v. Mississippi, 297 U.S. 278, 281, 287 (1936) that the admission into evidence at a criminal trial of confessions obtained through torture violates due process, cannot reasonably be applied to the facts of this case. More recent applications of this doctrine under the Fifth and Fourteenth Amendments expand it beyond the context of torture confessions, but all still involve stunning invasions of bodily integrity, see, e.g., Rochin, 342 U.S. at 172, or truly egregious conduct by government investigators who manipulated attorney-client privilege, see e.g., United States v. Marshank, 777

F. Supp. 1507, 1524 (N.D. Cal. 1991), or themselves brought about the illegal conduct charged in the indictment, see Cuervelo, 949 F.2d at 564. This case does not fall within the category of cases in which dismissal on such grounds would be appropriate.

No evidence has been presented indicating that others besides Chaves were illegally sharing information with the press. The proper remedy here is to investigate and, if appropriate, prosecute the offender, rather than dismiss the indictment based on the grand jury investigation that was the subject of the leaks.

CONCLUSION

But for the grant of defendant's initial motion directed to the leaks, the misconduct at issue may never have come to light. Thankfully, the outing of the leaker may serve to deter other faithless federal agents.

Federal prosecutors rely upon federal investigative agencies, such as the FBI, to bring to their attention investigations that may mature into prosecutions worthy of pursuit. This requires a prosecutor's office to have a reputation of trust, accommodation, and cooperation with the special agents engaged in the investigation. A known willingness to refer special agents for investigation and prosecution for their own misconduct may be bad for business, but it is essential to the federal prosecutor's role in seeing that justice is done according to a process that respects the rights of others. See R. Jackson, The Federal Prosecutor, 24 J. Am. Jud. Soc'y 18 (1940).

In fairness, the government correctly notes that when information came to the attention of the United States Attorney in May 2014, he immediately contacted the Assistant Director of the FBI's New York Field Office describing the press reports as the result of "leaks." (Gov. Ltr., Jan. 4, 2017 at Ex. E.) The Assistant Director, consistent with a belief that the source

of leaks was within, met with special agents working on the investigation and expressed anger about the leaks. (Id. at 9; see also id. at Ex. C.) While the government's artful opposition to Walters' initial motion contained no affirmative statements that were false, it confined itself to denials from limited sources and never disclosed high level concerns over FBI leaks. (Gov. Mem. in Opp. to Def.'s Mot. for a Bill of Particulars, *Brady* Material, and a Hearing, Oct. 21, 2016, Dkt. No. 43 ("he cannot demonstrate that the source of the information was 'likely' an agent or attorney for the Government").)[1]

The conduct on the part of at least one special agent of the FBI in leaking grand jury material is worthy of the full measure of the Department of Justice's investigative and, if appropriate, prosecutorial resources. The Court trusts that these resources will be devoted to this matter.

The absence of a showing of cognizable prejudice to Walters dooms his motion. Defendant's motion to dismiss the indictment (Dkt. No. 67) is DENIED.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
March 1, 2017

[1] In its more recent submission, the government also points out that it has aggressively pursued wrongdoing by investigative agents in other contexts and that the investigation of Walters was harmed rather than helped by the leaks. (See Gov. Mem. in Opp., Jan. 30, 2017 at 23-24, 37.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,

16-cr-338 (PKC)

-against-

MEMORANDUM
AND ORDER

WILLIAM WALTERS,

Defendant.
----------x
CASTEL, U.S.D.J.

Defendant William Walters moves the Court to set aside a jury's verdict and grant him a new trial pursuant to Rule 33, Fed. R. Crim. P. On April 7, 2017, a jury found Walters guilty on all counts of the indictment charging four counts of securities fraud, four counts of wire fraud, one count of conspiracy to commit securities fraud, and one count of conspiracy to commit wire fraud. At trial, the government presented voluminous documentary evidence, including phone and trading records, as well as testimony from various witnesses, including Tom Davis, a former member of the board of directors of Dean Foods, Co. ("Dean Foods"), and a government cooperator. On May 5, 2017, Walters moved for a new trial, arguing that the government knowingly introduced, and then failed to correct, material perjured testimony by Davis. For reasons to be explained, the motion is denied.

BACKGROUND

Numerous witnesses testified during the government's case, including multiple brokers who worked with Walters at various times relevant to the indictment, the former CEO and chairman of the board of Dean Foods, and another former CEO of Dean Foods. Trading data and phone records were offered by the government and admitted into evidence. This

testimony and documentary evidence convincingly demonstrated a pattern: members of the Dean Foods Board of Directors, including Davis, would receive material, nonpublic information, closely followed by a phone call from Davis to Walters, closely followed by Walters initiating purchases or sales of Dean Foods stock consistent with the material, non-public information that had been provided to members of the board. Documentary evidence demonstrated that Walters extended approximately $1 million in loans to Davis, which Davis never fully repaid. Taken as a whole, this circumstantial evidence convincingly demonstrated an insider tipping scheme between Walters and Davis.

Tom Davis, the former board member and then chairman of the board of Dean Foods, testified over five days regarding an insider trading scheme whereby he tipped Walters with material, non-public information related to Dean Foods. Davis testified that he received approximately $1 million in loans from Walters, a substantial portion of which were never paid back. This testimony corroborated the testimony of the other witnesses and the documentary evidence. Davis testified that he had provided Walters with material, non-public information regarding Dean Foods since at latest 2008. (Tr. at 674.) Davis, a sports gambling enthusiast, testified that in the beginning his motivations for providing Walters with the information were not thoroughly thought out, but that he was "enamored" with Walters, a famous sports gambler, and "wanted to develop a relationship with him." (Tr. at 602-03, 766.) He traveled to Kentucky and California to golf with Walters. (Tr. 692-93, 717-19.) Davis testified that on two occasions he asked Walters for loans, which Walters extended and Davis never fully repaid. (Tr. 741-45, 757-58, 798-801.) Davis also testified that he provided material, non-public information regarding Darden Restaurants, Inc. to Walters in 2013. (Tr. 880, 886-87).

Davis testified that in 2011 Walters provided him with a disposable cell phone, or "burner" phone, that Davis nicknamed the "bat phone," to be used for communications related to Dean Foods. (Tr. 834-36.) Davis testified that he disposed of the "bat phone" in a body of water near his home shortly after being contacted by the FBI in May 2014. (Tr. 899-901.) The "bat phone" was never recovered. (Tr. 1581.)

Davis admitted in his testimony under oath that while he remembered certain events clearly, he did not recall the details of all his communications and interactions with Walters that related to Dean Foods. (Tr. 602, 616, 630-31, 651.) The government reiterated this in its summation to the jury. (Tr. 2755-56, 2921.)

On cross-examination, Davis' veracity both on the stand and in his prior proffers to the government was repeatedly challenged by the defendant. (See e.g., Tr. 977 ("That was a lie, sir, wasn't it?"); Tr. at 1045 ("I ask you again, sir, that was a lie, wasn't it, sir?"); Tr. 981 ("Are you being as truthful about that as everything else in your testimony?") Accusing Davis of fabricating his story, especially his description of his receipt and use of the "bat phone," factored prominently in both the defendant's opening and closing arguments. (Tr. 33-35, 2848-52, 2856-60.)

LEGAL STANDARD

Rule 33, Fed. R. Crim. P., provides that, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Rule 33(a), Fed R. Crim. P. Although granting such a motion is within the court's discretion, "that discretion should be exercised sparingly." United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992). "[M]otions for a new trial are disfavored in [the Second] Circuit." United States v. Gambino, 59 F.3d 353, 364 (2d Cir. 1995). "The ultimate test is whether letting a guilty verdict

stand would be a manifest injustice . . . . There must be a real concern that an innocent person may have been convicted." United States v. Canova, 412 F.3d 331, 349 (2d Cir. 2005) (internal quotation marks omitted; omissions in original).

"In order to be granted a new trial on the ground that a witness committed perjury, the defendant must show that (i) the witness actually committed perjury; (ii) the alleged perjury was material; (iii) the government knew or should have known of the perjury at [the] time of trial; and (iv) the perjured testimony remained undisclosed during trial." United States v. Cromitie, 727 F.3d 194, 221 (2d Cir. 2013) (alteration in original).

DISCUSSION

I. Defendant has Presented Insufficient Evidence that Davis Committed Perjury.

"A witness commits perjury if he gives false testimony concerning a material matter with the willful intent to provide false testimony, as distinguished from incorrect testimony resulting from confusion, mistake, or faulty memory. Simple inaccuracies or inconsistencies in testimony do not rise to the level of perjury." United States v. Monteleone, 257 F.3d 210, 219 (2d Cir. 2001) (internal citation omitted) (upholding denial of Rule 33 motion for a new trial).

Defendant argues that Davis committed perjury when he testified that "he used the 'bat phone' to provide Mr. Walters with information in late 2011 and early 2012." (Def.'s Mem. in Supp., May 5, 2017, Dkt. 170 at 19.) Defendant's theory is that Davis could not have been using the "bat phone" during this time period, because "the meeting where Mr. Davis supposedly received the 'bat phone' could have occurred only on December 18, 2012." (Id.) Defendant bases this argument on several pieces of evidence presented at trial. Davis testified that he was given the phone by Walters in the parking lot of Signature Aviation at Love Field in

Dallas when Walters had been in town "to meet with some banks," and was accompanied by Mike Luce and Susan Walters. (Id. at 4-5; Tr. 834, 1342.) Davis thought he had seen Walters' private plane, having noted the initials on the tail, and remembered that the weather had been good on that day. (Def.'s Mem. in Supp. at 4-6; Tr. 1352.)

Flight logs showed that Mike Luce, Susan Walters, and William Walters arrived at Love Field on December 18, 2012 for the purpose of meeting with a bank. (Def.'s Mem. in Supp. at 5-6.) Evidence was presented that the temperature at Love Field on that day was 80 degrees Fahrenheit and that "Mr. Davis' cell phone called Mr. Walters' cell phone twice on December 18, 2012, with a cell location in or about Dallas Love Field Airport." (Id. at 5 (internal quotation marks omitted).) Defendant contends that this meeting conforms perfectly to Davis' description of the circumstances surrounding his meeting with Walters at which he received the "bat phone," and that he could only be describing this meeting. (Def.'s Mem. in Supp. at 5-6.)

From this apparent inconsistency between Davis' testimony and the documentary evidence, defendant draws the conclusion that Davis' testimony at trial accurately reflected the surrounding circumstances of his meeting with Walters on the day he received the "bat phone," but inaccurately reflected the approximate date on which he received the phone. The Court disagrees with defendant's conclusion, and finds that, assuming there is a genuine irreconcilable inconsistency between Davis' testimony and the documentary evidence regarding the surrounding circumstances and approximate date on which Davis received the "bat phone" from Walters, it is more likely that Davis testified accurately that he received the phone from Walters in 2011, and that he misremembered the precise circumstances under which he received the "bat phone," or mistakenly confused the meeting at which he received the "bat phone" with a later

meeting with Walters at Love Field. While Davis did indicate that his memory of the circumstances under which he received the phone were clear, (Tr. 1352), throughout his testimony he indicated trouble recalling the specifics of his interactions with Walters, (Tr. 602, 616, 630-31, 651.)

Even if Davis testified accurately regarding receiving the "bat phone" in an airport parking lot and that Mike Luce and Susan Walters were with the defendant in Dallas on the occasion of this meeting, the Court would still not be convinced that Davis was committing perjury when he testified that he received the phone in 2011. Defendant insists that testimony from the pilot of defendant's private plane, as well as documentary evidence including flight logs and cell tower data, demonstrate that the only date on which Davis could have received the "bat phone" was December 18, 2012. (Def.'s Mem. in Supp. 5-6.) However, Walter's movements were not exhaustively catalogued. None of the evidence presented shows that it was impossible, or even unlikely, that Walters met Davis at an airport in Dallas on a different date.

The defendant's contention that a Verizon Wireless "prepay" phone activated in November 2012 with the number 214-883-9924 was, in fact, the "bat phone," is pure speculation. (Id. at 8-9.) The fact that on the day before defendant sold a significant number of shares of Dean Foods stock this number called defendant shortly after Davis' primary cell phone placed a brief call to defendant's primary cell phone, (id. at 9-10), without a pattern of such calls, proves nothing.

II. Any Perjured Testimony was not Material.

"[P]erjury is material if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Cromitie, 727 F.3d at 221-22 (internal quotation marks omitted).

The government presented overwhelming circumstantial evidence of Walters' guilt, including trading records and phone records (i.e., not from the "bat phone") showing calls between Davis and Walters shortly after the Dean Foods Board of Directors learned of information material to Dean Foods' stock price and shortly before Walters either bought or sold Dean Foods stock consistent with this information, as well as documentation of the loans Walters made to Davis. Davis' testimony simply corroborated this pattern that strongly supported the conclusion that Walters received and traded upon material non-public information provided by Davis. Because a reasonable jury would likely have convicted even if Davis had not testified, his testimony was not material.

III. The Government Lacked Knowledge of any Perjured Testimony.

As noted above, Walters has failed to establish that Davis' testimony was perjured. However, even if such perjury were proven, none of the evidence presented suggests that the government knew, or should have known, of the perjury. Defendant suggests that it is indisputably obvious that Davis' memory regarding the circumstances surrounding his receipt of the "bat phone" was perfectly sound, and that the "bat phone" transaction thus must have occurred on December 18, 2012, when this theory is rather a less likely possibility among many possibilities. If Davis was lying, there is no reason to believe that the government believed, as Walters does, that Walters' December 18, 2012 trip to Dallas was Walters' only conceivable opportunity to provide Davis with the "bat phone" consistent with Davis' recollection. There is also no reason to suspect that the government believed Davis to be lying rather than simply misremembering events that occurred years in the past.

IV. The Government Acknowledged Inconsistencies in Davis' Testimony.

The government acknowledged in its summation and rebuttal that Davis' testimony regarding receiving the "bat phone" was not completely consistent with the rest of the evidence presented in the case. (Tr. 2755-56, 2921.) Instead, the government pointed the jury to the weightier evidence suggesting that Davis had received the "bat phone" in late 2011 or early 2012. (Tr. 2755-56.) Walters vigorously cross-examined Davis, illustrating the inconsistencies between Davis' testimony regarding the circumstances surrounding his receipt of the "bat phone" and the documentary evidence. Defendant highlighted this evidence for the jury in closing, presenting the same arguments that he presents here. Throughout the trial defense counsel referred to Davis as a liar, and argued to the jury that Davis was knowingly testifying falsely to serve his own ends. If Davis' testimony was a lie, defendant cannot argue that these lies were not disclosed.

CONCLUSION

Ultimately, this is not a case where there is "a real concern that an innocent person may have been convicted." United States v. Cacace, 796 F.3d 176, 191 (2d Cir. 2015). Because Walters has failed to show that the government knowingly presented materially false testimony, defendant's motion for a new trial (Dkt. No. 169) is DENIED.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
July 6, 2017

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
WILLIAM T. WALTERS

JUDGMENT IN A CRIMINAL CASE

Case Number: 1: S1 16 CR 00338-02 (PKC)

USM Number: 25880-048

Barry H. Berke, Esq. (Brooke Cucinella, AUSA)
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 371	Conspiracy to Commit Securities Fraud	12/31/2014	1
18 USC 1349	Conspiracy to Commit Wire Fraud	12/31/2014	2
15 USC 78(j)(b) and 15 USC 78ff	Securities Fraud	8/21/2013	3-6

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 7/27/17

7/27/2017
Date of Imposition of Judgment

Signature of Judge

Hon. P. Kevin Castel, U.S.D.J.
Name and Title of Judge

7-27-17
Date

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: WILLIAM T. WALTERS
CASE NUMBER: 1: S1 16 CR 00338-02 (PKC)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 1343	Wire Fraud	8/21/2013	7-10

AO 245B (Rev. 11/16) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: WILLIAM T. WALTERS
CASE NUMBER: 1: S1 16 CR 00338-02 (PKC)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

sixty (60) months.

☑ The court makes the following recommendations to the Bureau of Prisons:

The defendant be imprisoned at FPC Pensacola in Florida.

☐ The defendant is remanded to the custody of the United States Marshal.

☑ The defendant shall surrender to the United States Marshal for this district:

☑ at 02:00 ☐ a.m. ☑ p.m. on 10/10/2017 .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: WILLIAM T. WALTERS
CASE NUMBER: 1: S1 16 CR 00338-02 (PKC)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

one year.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☑ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 3A — Supervised Release

DEFENDANT: WILLIAM T. WALTERS
CASE NUMBER: 1: S1 16 CR 00338-02 (PKC)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

AO 245B(Rev. 11/16) Judgment in a Criminal Case
Sheet 3D — Supervised Release

DEFENDANT: WILLIAM T. WALTERS
CASE NUMBER: 1: S1 16 CR 00338-02 (PKC)

SPECIAL CONDITIONS OF SUPERVISION

You must provide the probation officer with access to any requested financial information

You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless unless you are in compliance with the installment payment schedule.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: WILLIAM T. WALTERS
CASE NUMBER: 1: S1 16 CR 00338-02 (PKC)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 1,000.00	$	$ 10,000,000.00	$

☑ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination. 10/25/2017

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 5A — Criminal Monetary Penalties

DEFENDANT: WILLIAM T. WALTERS
CASE NUMBER: 1: S1 16 CR 00338-02 (PKC)

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

The amounts of Restitution and Forfeiture deferred for up to 90 days (October 25, 2017).

$10,000,000 fine due in full 120 days from the entry of written judgment.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: WILLIAM T. WALTERS
CASE NUMBER: 1: S1 16 CR 00338-02 (PKC)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 1,000.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
Forfeiture Order to follow.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,

16-cr-338 (PKC)

-against-

ORDER

WILLIAM WALTERS,

Defendant.
----------x
CASTEL, SENIOR DISTRICT JUDGE:

Having reviewed the parties' submissions, the Court rules as follows:

1. Restitution is GRANTED, except as to legal fees incurred in the defense of Thomas Davis after May 19, 2016, the date of his guilty plea, and prejudgment interest.
2. Walters' application to stay the award of restitution pending appeal pursuant to Rule 38(e)(1), Fed. R. Crim. P., is DENIED.
3. The government is directed to submit a proposed order of restitution consistent with the forgoing within the next 7 days.
4. The government is directed to submit a proposed order of forfeiture within the next 7 days.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
September 19, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v.-

WILLIAM T. WALTERS,
a/k/a "Billy,"

Defendant.

PRELIMINARY ORDER OF FORFEITURE/MONEY JUDGMENT

S1 16 Cr. 338 (PKC)

WHEREAS, on May 19, 2016, WILLIAM T. WALTERS, a/k/a "Billy," (the "Defendant") was charged in a ten-count Superseding Indictment, S1 16 Cr. 338 (PKC) (the "Indictment"), with conspiracy to commit securities fraud, in violation of Title 18, United States Code, Section 371 (Count One); conspiracy to commit wire fraud, in violation of Title 18, United States Code, Section 1349 (Count Two); securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Sections 240.10b5 and 240.10b5-2; and Title 18, United States Code, Section 2 (Counts Three through Six); and wire fraud, in violation of Title 18, United States Code, Sections 1343 and 2 (Counts Seven through Ten);

WHEREAS, the Indictment included a forfeiture allegation as to Counts One through Ten of the Indictment seeking, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461, the forfeiture of any and all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the offenses alleged in Counts One through Ten of the Indictment;

WHEREAS, on April 7, 2017, the Defendant was found guilty, following a jury trial, of Counts One through Ten of the Indictment;

WHEREAS, on July 27, 2017, the Defendant was sentenced and ordered to forfeit the amount of proceeds traceable to the commission of the offenses charged in Counts One through Ten of the Indictment; and

WHEREAS, on September 19, 2017, the Court ordered that the amount of proceeds traceable to the commission of the offenses charged in Counts One through Ten of the Indictment was $25,352,490.00 in United States currency;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. As a result of the offenses charged in Counts One through Ten of the Indictment, to which the Defendant was found guilty, a money judgment in the amount of $25,352,490.00 in United States currency (the "Money Judgment") shall be entered against the Defendant.

2. Pursuant to Rule 32.2(b)(4) of the Federal Rules of Criminal Procedure, upon entry of this Preliminary Order of Forfeiture/Money Judgment, this Preliminary Order of Forfeiture/Money Judgment is final as to the Defendant, and shall be deemed part of the sentence of the Defendant, and shall be included in the judgment of conviction therewith.

3. All payments on the outstanding Money Judgment shall be made by wire transfer to the United States Marshals Service or its designee in the manner directed by the United States Attorney's Office.

4. Upon execution of this Preliminary Order of Forfeiture/Money Judgment and pursuant to Title 21, United States Code, Section 853, the United States Marshals Service shall be authorized to deposit the payments on the Money Judgment in the Assets Forfeiture Fund, and the United States shall have clear title to such forfeited property.

5. Pursuant to Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure, upon entry of this Preliminary Order of Forfeiture/Money Judgment, the United States Attorney's Office is authorized to conduct any discovery needed to identify, locate or dispose of forfeitable property, including depositions, interrogatories, requests for production of documents, and the issuance of subpoenas, pursuant to Rule 45 of the Federal Rules of Civil Procedure.

6. The Court shall retain jurisdiction to enforce this Preliminary Order of Forfeiture/Money Judgment, and to amend it as necessary, pursuant to Rule 32.2(e) of the Federal Rules of Criminal Procedure.

7. The Clerk of the Court shall forward three certified copies of this Preliminary Order of Forfeiture/Money Judgment to Assistant United States Attorney Alexander J. Wilson, Co-Chief, Money Laundering and Asset Forfeiture Unit, One St. Andrew's Plaza, New York, New York 10007.

Dated: New York, New York
Sept. 20, 2017

SO ORDERED:

HONORABLE P. KEVIN CASTEL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v-	:	ORDER OF RESTITUTION
WILLIAM T. WALTERS, a/k/a "Billy,"	:	16 Cr. 338 (PKC)
Defendant.	:	

Upon the application of the United States of America, by its attorney, Joon H. Kim, Acting United States Attorney for the Southern District of New York, Daniel S. Goldman, Brooke E. Cucinella and Michael Ferrara, Assistant United States Attorneys, of counsel; the presentence report; the Defendant's conviction on Counts One through Ten of the above Indictment; the Court's order dated September 19, 2017, and all other proceedings in this case, it is hereby ORDERED that:

1. **Amount of Restitution.** WILLIAM T. WALTERS shall pay restitution in the total amount of $8,890,969.33 to the Dean Foods Company and Barington Capital Group, the victims of the offenses charged in Counts One through Ten of the Indictment. The names, addresses, and specific amounts owed to the victims are set forth in the Schedule of Victims attached hereto. Upon advice of a victim change of address, the Clerk of the Court is authorized to send payments to the new address without further order of this Court.

2. **Terms of Restitution.** Defendant's liability for restitution shall be joint and several with that of any other defendant ordered to make restitution for the offenses in this matter, including, but not limited to, Thomas C. Davis, who was charged and convicted in this matter. Defendant's liability for restitution shall continue unabated until Defendant has paid the full amount of restitution ordered herein. No further payment shall be required after the sum of the amounts actually paid by all defendants has fully covered all the compensable injuries. Any payment made by the defendant shall be divided among the victims named in proportion to their compensable injuries. In the event that a victim receives compensation resulting from insurance or any other source with respect to losses resulting from the offenses in this matter, Defendant must complete restitution to the victims before any restitution is paid to any insurance companies or other sources.

3. **Payment Schedule.** The defendant shall make restitution to victims payable to the Clerk of Court, U.S. District Court. Restitution shall be paid in full no later than 60 days from the date of this order.

4. **Change of Address.** The defendant shall notify the U.S. Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

Dated: New York, New York
10-19, 2017

SO ORDERED:

HONORABLE P. KEVIN CASTEL
UNITED STATES DISTRICT JUDGE