UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 73162/September 22, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-16142

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In the Matter of : **ANSWER AND REQUEST FOR STAY**

JOHN JORDAN, :

Respondent. :

_____X

ANSWER

COMES NOW, JORDAN, Respondent or Jordan herein, and hereby enters his Answer to the Order Instituting Administrative and Cease and Desist Proceedings, as follows:

1. As to Paragraph A1, Respondent admits he is 62 and is ordinarily a resident of Shingle Springs, California. Jordan objects to the allegation regarding "participated" in an offering as vague. Without waiver of said objection, Jordan admits that he was technically listed as the Chief Executive Officer, President, Chief Financial Officer and a member of the Board of Vida Life which is a penny stock, however, in reality, Jordan was not the "Financial Guy" but the "Fish Guy" and it was Doug Grobe, who was not charged with any offenses, who was the financial guy and the one who was briefed on the deal. Jordan admits that he was convicted and sentenced as set forth in court documentation and that he was ordered to pay a fine and to forfeit $16,000 and a pay a fine as set forth in court documentation. By way of further response, Jordan has appealed the conviction and sentence and a copy of his appeal and reply brief are attached hereto as if fully set forth herein. (**NB:** There is a typographical error in the appeal that indicates that English is Jordan's first language, which in fact it should say English is **NOT** Jordan's first language. Spanish is his first language as he was born and raised in Peru.)

2. As to Paragraph B1, Jordan objects to the term "kickback" as vague and to the extent it implies something necessarily illegal. Jordan denies that he knowingly intended to defraud and otherwise incorporates his above responses and appeal and reply as if fully

set forth herein including that the Agent spoke in code and deliberately hid the illegality of the scheme and was speaking to the person known as the "Fish Guy" who was not, in reality, the financial guy, but the operations guy and whose first language was Spanish.

3. As to Paragraph C1, Jordan objects to the term "kickback" as vague and to the extent it implies something necessarily illegal. Without waiver, Jordan denies that he knowingly intended to defraud and otherwise incorporates his appeal and reply and above responses as if fully set forth herein.

4. As to Paragraph C2, Jordan objects to the term "kickback" as vague and to the extent it implies something necessarily illegal. Without waiver, Jordan denies that he knowingly intended to defraud and otherwise incorporates his appeal and reply and above responses as if fully set forth herein.

5. As to Paragraph C3, Jordan objects to the term "kickback" as vague and to the extent it implies something necessarily illegal. Without waiver, Jordan denies that he knowingly intended to defraud or that he knowingly agreed to an illegal kickback scheme and otherwise incorporates his appeal and reply and above responses as if fully set forth herein and his above responses.

6. As to Paragraph C4, Jordan objects to the term "kickback" as vague and to the extent it implies something necessarily illegal. Without waiver, Jordan denies that he knowingly intended to defraud and otherwise incorporates his appeal and reply and above responses as if fully set forth herein.

7. As to Paragraph C5,Jordan objects to the term "kickback" as vague and to the extent it implies something necessarily illegal. Without waiver, Jordan denies that he knowingly intended to defraud and otherwise incorporates his appeal and reply and above responses as if fully set forth herein.

8. As to Paragraph C6, to the extent the allegations rely on documents, those documents speak for themselves and no response is required. Without waiver, Jordan denies that he knowingly intended to defraud or that this was an illegal kickback and otherwise incorporates his appeal and reply and above responses as if fully set forth herein.

9. As to Paragraph C7, Jordan objects to the term "kickback" as vague and to the extent it implies something necessarily illegal. Without waiver, Jordan denies that he knowingly intended to defraud or that this was an illegal kickback and otherwise incorporates his appeal and reply and above responses as if fully set forth herein. By way of further response, Jordan's bank had a $5,000 limit on the amount of a wire transfer pursuant to Jordan's bank rules, therefore, the different payments were because of the bank limit and for no other reasons.

10. As to Paragraph C8, Jordan denies that he knowingly intended to defraud or that this was an illegal kickback and otherwise incorporates his appeal and reply and above responses as if fully set forth herein.

11. Any allegation not expressly admitted should be deemed denied.

12. Jordan reserves the right to amend, modify and edit his answer.

WHEREFORE, Jordan requests that the Order be dismissed and that no action be taken against him, and, for such other and further relief as this administrative court deems just and necessary.

AFFIRMATIVE DEFENSES

Jordan interposes all affirmative defenses available and applicable under the law and in equity, including but not limited to, lack of fraudulent intent, good faith, entrapment, unclean hands, estoppel, waiver, laches, etc. by whatever name known, as well as interposing his appeal and reply brief as if fully set forth herein.

REQUEST FOR STAY

Jordan timely appealed his conviction and sentence. Oral argument on the appeal was heard before the First Circuit on July 29, 2014. A decision on that appeal has not been issued to date. In addition, Mr. Jordan is currently incarcerated in Taft, California. His expected release date is in September 25, 2015. His present counsel was his appointed counsel for his federal criminal case who is assisting him in order to preserve his rights until he can obtain a securities attorney. (She is not billing this under the Criminal Justice Act). Jordan requests that his case be stayed until the resolution of his appeal and until he is released or able to retain a securities attorney made more difficult by his being incarcerated and due to limited funds.

The hearing in this matter is currently set for October 27, 2014. If this matter is not stayed, at a minimum, a continuance of that hearing is required given that Jordan's present counsel is out of the state in Wyoming on litigation from October 20th through October 30th and, thus, she is not available on October 27, 2014. Counsel has been in touch with SEC counsel, Martin Healey, and has provided her availability. However, given that Jordan wishes to hire securities counsel and the appeal is still pending and Jordan is currently incarcerated, it is respectfully requested that these proceedings be stayed.

If a stay is not imposed, a continuance of the presently scheduled hearing is hereby requested for the reasons set forth above.

Jordan hereby consents to and waives his rights to any required administrative time periods.

Dated: October 16, 2014

For Respondent Jordan

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No. 13-2328

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee
v.
JOHN C. JORDAN,
Defendant - Appellant

ON APPEAL FROM CONVICTION AFTER JURY TRIAL AND SENTENCING BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLANT JORDAN

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dated: March 6, 2014

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This Court should hear oral argument. This case was a two week trial and involves complicated issues regarding submitting to the jury a copy of an indictment with a lengthy introductory statement and individuals who were not on trial and facts that were not presented at trial; permitting an agent to comment on the state of mind of the Appellant and explain his own state of mind and comment on legal and ultimate issues in the case; issues regarding the failure of the Court to credit the monies returned to the government and the value of the stock that was turned over to the government in determining the guideline range; and an enhancement for obstruction of documents arising from documents which were produced pursuant to subpoena. Counsel in this case has great familiarity with the record and can assist the Court in resolving these important issues.

JURISDICTIONAL STATEMENT

John C. Jordan (the Appellant or Mr. Jordan) appeals from a final judgment of conviction and sentence of the United States District Court for the District of Massachusetts (Gorton, J.) following a conviction after jury trial. (Add. 1-6). The District Court had jurisdiction under 18 U.S.C. § 3231. Mr. Jordan filed a timely Notice of Appeal. (V1:453). This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

(1) Did the district court abuse its discretion by permitting the jury to take the indictment back to the jury room which contained a lengthy factual introduction that involved co-defendants who were not on trial and facts that were not proven at trial including allegations against Mr. Jordan's attorney upon whom he was relying on an advice of counsel defense?

(2) Did the district court err when it refused to credit the amount of money returned to the government and the value of the stock in determining loss under the guidelines where the probation officer listed the value without objection from the government which would have resulted in a reduction of six points on Mr. Jordan's offense level?

(3) Did the district court err when it imposed a two-point enhancement for obstruction of justice for a document that was altered when it was sent to an attorney during the time of the offense and when it was provided to the government in response to a grand jury request for the purposes of complying with the subpoena?

(4) Did the district court abuse its discretion by permitting government witnesses to testify to: (1) the state of mind and intent of the defendants; (2) the witnesses' own state of mind and intent; and (3) legal issues and the ultimate issues in this case, thus invading the province of the jury?

(5) Did the court commit error in denying Mr. Jordan's motion for judgment of acquittal as the evidence was insufficient to prove beyond a reasonable doubt that Mr. Jordan was predisposed to commit the crimes?

STATEMENT OF THE CASE

1. Procedural History

Mr. Jordan was convicted after a ten day trial on six counts involving one count of securities fraud in violation of 18 U.S.C. §§ 1348, 1349 & 2, four counts of mail fraud in violation of 18 U.S.C. § 1341, and one count of wire fraud in violation of 18 U.S.C. § 1343. The jury deliberated for three days. Mr. Jordan was tried with co-defendant, James Prange, who was also convicted. At the completion of the evidence, both defendants moved for judgment of acquittal pursuant to Rule 29 F.R.Cr.P. arguing, among other things, that there was insufficient evidence to show predisposition. (V6:60)[1]. The district court denied their motions. (V6:61). Mr. Jordan filed a Motion for Judgment Notwithstanding the Verdict (V1:103) and a Motion for Retrial (V1:105) which were both denied. (V1:45-DOC:285) The other co-defendants, Steven Berman, Richard Kranitz and Karen Person, all believed to be attorneys, pled guilty prior to trial. (V1:30-DKT158; V1:31DKT175; V1:34-DKT195).

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[1] References to the Appendix are denoted by the volume number followed by the page number. Where references are made to the docket the page of the docket in Volume one is indicated followed by the docket number: DKT#. References to the Addendum are denoted by "Add." followed by the page number. References to Jordan's Joint Supplemental Appendix filed under seal are denoted by "JSA" followed by the page number.

At Mr. Jordan's sentencing on August 12, 2013, the district court imposed a sentence of 30 months custody on Mr. Jordan for each count to run concurrently, 12 months supervised release on each count to run concurrently, a $4000 fine, forfeiture of $16,000 and a $600 special assessment. (Add. 2). Mr. Jordan timely filed his Notice of Appeal on August 14, 2013. (V1:453). The district court entered the judgment and conviction on August 16, 2013 (V1:47-DKT#316) and in an abundance of caution, Mr. Jordan filed a subsequent notice of appeal on August 27, 2013. (V1:393).[2] Mr. Prange also appealed his conviction and sentence, (V1:395), and the two cases were consolidated by order of this Court on November 15, 2013.

2. Factual Background[3]

The case came about as a result of an undercover sting operation called operation Penny Pincher. (V4:343). Neither Mr. Jordan nor his company, a small but publicly traded company run by family and friends called Vida Life, were the target of the sting. (V4:484). Vida Life's primary product was fishmeal and fish oil. (V4:386). It had been an ongoing entity since 2006 and at one time its stock had traded at over a dollar a share (V4:362; V4:386). Mr. Jordan, a native of Peru, Argentina, handled the operations of the company, while Doug Grobe was

[2] This subsequent notice of appeal triggered the opening of a second appellate case which was voluntarily dismissed and Mr. Jordan proceeded solely under the first notice of appeal.

[3] More detailed facts related to the specific issue are provided in the analysis of each particular section.

responsible for financial side of the company, though Mr. Jordan was technically listed as the CFO. V4:34; V4:490).

On August 22, 2011, Mr. Jordan was introduced to "John Kelly," who claimed to be an investment manager with "SeaFin Capital, LLC," through co-defendant James Prange. (V3:356). Unbeknownst to either Mr. Jordan or Mr. Prange, Kelly was in reality an undercover agent (hereinafter "UA") with the Federal Bureau of Investigation ("FBI"). The FBI had set up a fake company called "Water's Edge" which did not exist, and "SeaFin" was a fake hedge fund that the FBI had created solely for the purpose of running the sting operation. (V4:72).

Neither Mr. Jordan nor Mr. Prange were targets of the sting operation. (V4:269). Mr. Prange became aware of the UA "Kelly" through a cooperating witness Edward Henderson who had been arrested and was bringing business men into the deal who needed financing pursuant to a plea agreement. Mr. Jordan was one of a number of individuals who were seeking capital for their companies who Mr. Prange introduced to the UA for funding.

The cooperator Henderson never had a meeting with Mr. Jordan. Prior to the August 22nd meeting, Mr. Jordan had never met with the UA. Mr. Prange himself was never specifically told that it was a stock fraud deal or that he was engaging in illegal conduct. (V4:295). When the UA asks Prange if Mr. Jordan is comfortable with the kickback, Prange tells the UA: "No, I think I'm gonna be straight up. I think he is. I think his partner, Doug, was he picked it up pretty

quick....I think he has had good conversation with J.C. and I think J.C. is now saying hey, let's , let's, let's see your guy out East." (V3:54).

The UA admitted that he relied on Prange to talk to Mr. Jordan but that Mr. Prange did not tell the UA what he said he only described it. Prange was not wearing a wire and was not cooperating. (V4:350-51). It was evident that Doug Grobe (Mr. Jordan's partner who was never charged) was the one Prange had explain it to Jordan. (V4:350-51). In fact, the UA admits that he never asked Prange what he actually told Mr. Jordan (V4:351).

During the meeting with the UA, it was agreed that Vida Life would sell 400,000 restricted shares for $32,000 to "SeaFin" ($0.08 per share—a price that the UA set). It was further agreed that Vida Life would then pay a kickback of $16,000 or 50 percent of the total investment, to "Water's Edge Group," a nominee company identified by the UA. The UA prepared a consulting invoice to facilitate this payment which was sent to Mr. Jordan to use in billing the company. (V1:148; V2:129). In that email, the UA advises "attached are the executed stock purchase agreement and an invoice from nominee company (please retain for future use as I will look to you complete for subsequent tranches and break-out for what makes most sense for your business)." (V1:148; V2:129).

On August 29th 2011 "SeaFin" wired $32,000.00 to Vida Life. Then, on August 30, 2011 Vida Life wired $16,000 to "Water's Edge" in four different

transfers as the limit on Bank of America website was $5,000 per wire.[4] Vida Life had the Transfer Agent deliver a stock certificate for 400,000 restricted shares to "SeaFin." (V4:221).

The UA claimed that he had made it "crystal clear" that this was an illegal operation (V4:296), because the commission for 50% which was so outrageous and obvious anyone would have known it was illegal. (V5:402-04). This rate was actually more attractive than other financing deals available.

Berman described these terms as more "attractive" and "doable" and "better than current terms" . (V3:86). He says that as a financing fee he would be pursuing it but if it clearly illegal he was not interested. (V4:368). UA admits that he was unaware that the cooperator had told Prange and Kranitz that he had done deals in the past that cost him 40 or 50 percent. (V4:403). Berman mentioned 44% and 50% figures. (V3:47). Co-defendant Karen Person who had a separate business, mentioned 90% figures. (V4:384). Although the UA claims 50% is outrageous, he admits that he was unaware that payday loans can go into the 400 and even 600% range. (V4:404-5). The UA was also unaware that the FDIC lending institution rate was in excess of 30 percent with an additional 19 percent default totaling up to 49 percent. (V:406-7).

The deal was also couched in terms of a loan to Jordan at times. When Prange tells the cooperator he sees Kelly as a lender with use of the restricted stock for collateral, Henderson does not correct him. (V3:79). Prange tells the UA that Doug has made it clear to JC meaning Mr. Jordan it is a **lender** of last resort (not a

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[4] The bank required a special PIN number for transfers over $5,000 so multiple wire transfers were made resulting in additional counts but were all for the same transaction. (*See* V1:270). Mr. Jordan fedexed the stock certificate to SeaFin which was the basis for the mail fraud charge.

fund of last resort) . (V3:360; emphasis added). Undercover Kelly does not correct him. (*See* V3:360-361). Lender means a loan and an expectation of paying back. In the UA's discussions he uses the term "collateral" and "security." (V5:196). The UA calls it a lender of last resort as well. (V4:409). If there had been true understanding of the stock fraud scheme the term lender would not have been on the table

Much of the prosecution's case to show that Mr. Jordan understood the illegal nature of the transaction revolved around the use of the word kickback but the UA admitted at trial he never used the word *illegal* kickback. (V4:415). The UA was not aware that illegal foreign kickbacks used to be tax deductible in the United States before 1970. (V4:415).

More sophisticated minds than Mr. Jordan like attorney Steven Berman, a co-defendant who ultimately pled guilty, saw this as a financing fee even when the UA and the informant used the word kickback. (V3:85-86). The UA admitted that it is not illegal to pay a financier a fee in the industry. (V4:363). The agent also admits that he never gave a definition of kickback or used the definition of kickback that involved bribery when speaking to Mr. Jordan. (V4:417). Mr. Jordan is originally from Peru. (V4:415). The UA admitted that he was not aware of the culture of kickbacks in other countries and certainly not in Peru where kickbacks are common. (V4:415-16) .

The government's own cooperator Henderson testified that when he was first approached by a different cooperator and was told it was a "kickback" Henderson did not think the scheme was illegal:

> Q. And you went to a meeting with John Kelly after all those conversations with the cooperating witness working against you, and you didn't realize it was an illegal deal, did you?
> A. It wasn't -- he didn't tell me all the points. He just said it was a kickback. Other than that, he didn't go into all the details that I was instructed to do. That's why I didn't fully understand it until John -- John Kelly fully explained it to me.
> Q. That's when you decided it was illegal? A. Yes. Q. So you will agree with me then that simply using the term "kickback" wasn't a red flag to you either, was it?
> A. It was a red flag, but that by itself didn't give me the whole thing. (V5:231-32).

During the UA's one meeting with Mr. Jordan, the UA did not describe the transaction as illegal. Instead, he used terms such as: expensive money (V3:458); you can find it cheaper (V3:451); you can use less risky sources (V3:451); it's counter intuitive (V3:461); it's risky (V3:375); it's outside of the traditional (V3:366); it's creative (V3:473; it's different (V3:458). However the UA admitted that these terms did not necessarily mean illegal. (V4:170,358; 444; V5:275). At no point did the UA advise Mr. Jordan that he was stealing from his hedge fund and he wanted Mr. Jordan to help him steal.

The one time undercover Kelly actually uses a word like "mislead" (not illegal or criminal) is when Mr. Jordan is putting away his many documents with

his head down by his satchel clearly not paying attention to what UA is saying that that time. It can be seen directly in the video of August 22, 2012 at 2:08:11. Although at one point the UA explains that when he says "risky" he means "illegal" he eventually admits on cross examination that "risky" does not mean illegal. (V4:358).

The UA conceded that the case relied on code rather than making it clear that this was an illegal operation. (V4:296). There were more explicit statements made by the confidential informant Henderson regarding the nature of the transaction as being illegal, but such disclosures were never made to Mr. Jordan who had no conversations with Henderson. (*See* V3:1-574). The UA eventually conceded that it was "crystal clear" when they changed the invoice and the dollar amounts and signed the consulting agreement." (V4:298). The UA admits that on the day that he met Mr. Jordan, August 22, 2013, there was no fraud at that time. (V4:345).

Not one person told Mr. Jordan that this was illegal. Not one person used the term securities fraud, stock fraud, mail fraud or wire fraud. The word crime was never used. (V4:418). The word cover-up was never used with Mr. Jordan, only "mask". (V4:418). Although the word fishmeal was used by Mr. Jordan nearly 80 times in that meeting, the word fraud was never said by the UA--not once. Instead, the government admits the undercover used code. He was using code with a

fishmeal guy born in Peru with English as his second language. Indeed, the UA backtracks and says "I *hope* I made it clear...." (V4:279) (emphasis added).

Mr. Jordan was not the sophisticated businessman; indeed he is referred to in the conversations at times as "that fish guy." (V3:568). It is Mr. Prange who says to the UA before Mr. Jordan even gets there that "I brought along a stock subscription agreement and I brought along a consulting agreement." (V3:361). In the video you can see Mr. Prange giving those to Mr. Jordan. Mr. Prange tells the UA "Rich helped put them together, Rich Kranitz." (V3:361). Krantiz was Mr. Jordan's attorney. Mr. Prange also advises the UA that "Rich has been doing things for [J.C.] over two years." (V3:361). The UA says "All right so just, ah, with Rich I think it's all right. I get a little concerned when people, all the people who else is involved with the deal, but Rich is...I have talked to Rich." (V3:362). Although Mr. Jordan directed the sending of the stock it was because he was told to do so by the UA and Attorney Kranitz. (*See* V3:361-3).

The prosecution put a lot of store on the fact that there was not going to be due diligence. ("I was clear that I wasn't performing any due diligence.") (V4:328). But unlike some of the other meetings with Berman and Person, UA never says to Mr. Jordan that he is not going to do due diligence on Vida Life. Instead, the UA simply talks about companies where he does four or five years of

due diligence as the time he uses the term in his meeting with Mr. Jordan. (V3:457).

On cross-examination the agent claimed that he had not received any due diligence before he met with Mr. Jordan on the 22nd but that was not true. (V4:384). Prior to the August 22nd meeting, Mr. Prange gives the undercover four single spaced pages about Mr. Jordan's background and Vida Life on fishmeal and the EB5 immigration investment program. (*See* V3:318-21). Indeed, the first 95 pages of transcript and more than the 90% of the August 22nd meeting with Mr. Jordan is about Mr. Jordan's background and the merits of the products, the heavy demand for fishmeal, the new products, etc. before any of the details of the program are mentioned by the undercover. (V3:356-446). The UA eventually admitted that during the trial. (V4:409). Likewise the UA admitted on cross examination that he never told Mr. Jordan to provide him with information to paper the file and that it was Mr. Jordan who brought that information to him without having been told to do so. (V4:401).

After 95 pages of Mr. Jordan discussing his background and his deals and Vida Life, the UA says "clearly you have an impressive background in understanding of this market. Ah, hold on one second. Ah but I but I have to, but I do have to ask and I know and I'm real sure Jim has told you, I'm sold, I'm sold." (V3:450). The UA says "I love that you have 20 some odd years experience in this

and, and, and the fact that this company has been around since 2006 and you self-funded and at least were able to keep it alive." (V3:450-51). The UA says during the interview "I met with Jim several times about and he has quoted me some information on you and your background and whatnot. And, um you now and, and having met you, you know act-before meeting you, I'm like all right this is a candidate for what it is I do." (V3:454). Whatever may have happened in the meetings with other companies, there is no reason why Mr. Jordan would not think that the UA knew a great deal about Mr. Jordan and his company and had done due diligence. The UA admitted that Vida Life was a legitimate company, registered with the SEC and publicly traded. (V4:445-46). It is Mr. Jordan who makes the UA aware that it is a publicly traded company. (V4:447-48).

Indeed, Mr. Jordan continued to try to sell the UA on the company and to make sure that the UA knew what an excellent opportunity Vida Life was even after they were in agreement on the terms of the investment. He loaded several gigabytes of information, market prices, demand, articles, etc. in a CD which Mr. Jordan handed to the UA. (V2:147). The UA tried to claim that he did not even look at it but he admits he did not tell Mr. Jordan that and that he said "Can I keep this?" and he kept the disk. (V4:395). Mr. Jordan brought this information without being told to do by the UA. (V4:401).

Even after there is an agreement about the terms of the money, Mr. Jordan continues to pitch the company and provide information to the UA. (V3:474-79). Even after the meeting information is being sent to the UA with Mr. Jordan continuing to provide information about the company to Kelly even though he had not asked for addition information to be sent. (V4:219;297; V2:135-37). The agent admits that Mr. Jordan essentially "buried" him in paper. (V4:297-98).

Tellingly, during the meeting with the UA, Mr. Jordan describes the technology his company has so that "you can see accounting in Minnesota (referring to CMO), you can see the regular CPAs in, in South Dakota (referring to Millo Belle). Anybody you can see at any given time after the closing day of yesterday in real time. ***Transparency is everything.***" (V3:471) (Emphasis added).

It is Mr. Jordan who brings up the 1099 and asks if "we as a corporation have to issue a 1099". (V3:463). The UA says "No." (V3:463). Mr. Jordan asks "so how do we go around that" and the agent mentions the nominee company (which are perfectly legitimate business enterprises). Mr. Jordan says so the nominee company would get something. (*See* V3:463). Indeed the UA says he will provide the EIN (V3:85) the tax number used to report income to the IRS. An individual in Mr. Jordan's position would have understood that this transaction had to be reported.

Mr. Jordan also makes clear to the agent that this is a public company; and says that if they have done well and their audits go through then "I'm sure that ours

will do the same" and that he has no issues. (V3:466). The UA says that the consulting agreement gives it legitimacy. (V3:466). The UA says "it might sound like I'm screwing them but they have done so well in the past that anything I do like this it is not gonna, *it's not gonna really hurt them*." (V3:468) (emphasis added). The UA tells Mr. Jordan that he, meaning the UA, is funding it. (V3:460) ("Then I realized I'm funding that.") He says it's "coming *from my pocket* or my investor's pocket and not yours". (V3:460) (emphasis added).

The government relied heavily on the place in the meeting where Mr. Jordan came up with the idea of saying the money is for fishmeal sales when they were talking about the press release. What Mr. Jordan actually says is that it will say they have money for the restarted fish meal sales; those are the sales he is telling Kelly about you can hear him telling Kelly about the Nigerian deal; it is not the tranches because the amounts are 85,000 and 130,000 which are fishmeal figures not Seafin figures. (V3:483). As further proof of his lack of understanding, Mr. Jordan actually called Seafin to introduce himself and to welcome the new and large shareholder (V3:56-9).

Much more sophisticated people with law degrees were told even more explicit terms, including inappropriate and "in my mind illegal" like Steve Berman did not think it was illegal at the outset. (V3:84). Berman specifically told Henderson that if it was illegal he wanted no part of it but that he would run it by his attorney Mr. Kranitz who is also Mr. Jordan's attorney. (V3:84-5). After running by Kranitz, Mr. Berman too signed the deal.

Karen Person did not think it was illegal even after having gone through the so-called vetting by Henderson whom the government claims was not speaking

code. (V3:571-72). She considered it a consulting fee. (V3:571). Although she eventually pled guilty, her statements on the recordings prior to her arrest expressly indicate that she did not think it was illegal at that time. (*See* V3:5571-74).

Not only did Karen Person think it was legal, she threatened to call the FBI because she wanted her stock back when the undercover did not make the payments he promised. (V3:571). That call was in October 2011 four months after her tranche and three months after Mr. Jordan's tranche. (V3:559).

Karen Person was a sophisticated "renaissance" woman who purportedly went to law school and held herself out as a lawyer. (V3:103-04;110;178). She was seen as a savvy and highly educated person who was born in this country. (V3:103-04; 178). She has multiple companies in her business conglomerate SBCO. (V3:562).

Even as late as two weeks after the August 22nd meeting, Prange has a conversation with the UA about concerns whether Mr. Jordan is getting it because Mr. Jordan is quibbling over the price for stock for the next tranche telling them that 12 cents per stock is too low. (V4:244) The UA admits that he thought arguing over the 12 cents for the stock was ridiculous. (V4:352-53). If Mr. Jordan knew that this was an illegal deal of stock fraud, it would make no sense for Mr. Jordan argue about stock price. This compels a conversation between the UA and Prange:

> UA: Ah, before I called you, I tried reaching, um, out to J.C. [Jordan]. Ah, have you...[t]alked to him at all today?
>
> JP: I talked to Doug, his partner, today....I mean Doug felt what you proposed was fine. I saw what J.C. cam back with....hoping it would be little more than 12 cents. Ah, from my end to yours, he can live with that, if you know what I mean.
>
> UA: Yeah. Well you know I hope so. I, that's why I talked to talk to him cause I, I must say he kind of pissed me off all day today, ah with (UI) that

email.....he has got to appreciate, correct me if I'm wrong, you know this is, this isn't exactly easy for me. This is kind of risk for me burying this in. And, and getting him up to this dollar amount so fast....I mean he get that, right? And I don't understand that---

JP: He on you know again his familiarity is, is only you know the meeting we have had and discussions that I have had with him. Doug gets it better than him. Doug does the financial stuff. J.C. is you know J.C. is the operator. So again I'll have a good talk with him regarding that. And, and I have had to do this with Doug, Doug talks to J.C. and then everything is fine. Same situation....Doug is perfectly fine with what you proposed....

UA: J.C. ....Sounds like you'll, you'll have a chat with him.

(V3:501-05).

This conversation occurred on September 7, 2012; two weeks after the meeting on August 22, 2012 and after $32,000 had been received and the $16,000 given back.

SUMMARY OF THE ARGUMENT

First, the district court abused its discretion by permitting the government's undercover agent to testify to: (1) the state of mind and intent of the defendants; (2) the agent's own state of mind and intent; and (3) the ultimate issues in this case, thus invading the province of the jury. Repeatedly and over counsel's objection, the agent was permitted to testify as to what he understood or believed Mr. Jordan meant or what his state of mind was. Repeatedly and over counsel's objection, the agent was permitted to testify as to what the agent meant when he said things to Mr. Jordan. The agent was not explaining slang or industry terms. He was

permitted to say what he meant. The agent was also permitted to make statements over objection as to the ultimate finding in the case that Mr. Jordan and Mr. Prange had committed stock fraud invading the province of the jury and contrary to Federal Rule of Evidence 704(b).

Second, the district court abused its discretion by permitting the jury to take the indictment back to the jury room. This was not a simple indictment which tracked the language of the statute and set forth the elements. It was 24 pages with the first 11 containing facts and information about other defendants not on trial and one of those defendants was Richard Kranitz who was the attorney upon which Mr. Jordan relied for his reliance of counsel defense. (V1:52-75). Submitting that even with a covering instruction was incurable prejudice. No instruction could cure what was in that indictment. The district court should have redacted the indictment and just put in the counts charged as requested by the defense. Instead, facts that were not presented at trial and which could not be cross examined by the defense were given to the jury.

Third, the district court committed error when it refused to credit the amount of money returned to the government and the value of the stock in determining loss under the guidelines. This was a case where it was uncontested that Mr. Jordan had returned $16,000 and that 400,000 in stock had been provided to the government. The judge erred in applying the intended loss in such a situation. The

facts at trial and the probation officer had a fair value for the stock at the time. With that fair value the amount of loss would have been less than $5,000 and thus there would have been no increase in offense level. Instead the court used the full $32,000 amount which increased Mr. Jordan's guidelines by six points and more than doubled his guidelines range. The application notes to U.S.S.G. 2B1.1 Application Note 3(E) Credits Against Loss states that "the loss *shall* be reduced by the fair market value of the property returned and the services rendered by the defendant...") (emphasis added). 2B1.1 comment. (n.3(E)). By refusing to do so, the district court committed clear error and the sentence must be vacated.

Fourth, the district court erred when it imposed a two-point enhancement for obstruction of justice for a document that was altered when it was sent to an attorney during the time of the offense and when it was provided to the government in response to a grand jury request for the purposes of complying with the subpoena. This enhancement requires that Mr. Jordan had the intent to obstruct justice by providing the information. Mr. Jordan had no such intent. The document was part of his email files. He produced the document in response to a subpoena. The district court's enhancement results in an untenable position for the defendant. If he fails to provide the documents he will be found to have obstructed justice. The production of the documents actually assisted the government in their case in chief and became evidence against Mr. Jordan. It makes no sense that he

would have created the documents to give to the government and give them inconsistent emails to use against him at trial. Responding to a subpoena should not result in an enhancement for obstruction of justice.

Fifth, the evidence was insufficient on the issue of predisposition such that no reasonable juror could find beyond a reasonable doubt that Mr. Jordan was predisposed to commit the crimes charged. The government conceded that no fraud had been committed when Mr. Jordan came to the one meeting on August 22, 2012. Mr. Jordan actions show quite clearly that he did not understand that this was a stock fraud scheme including continuing to pitch the company to the agent after they agreed on the terms, and Mr. Jordan's subsequent actions including contacting the hedge fund and arguing that the stock price was too low. Even if Mr. Jordan finally "got it" with the invoices, etc., that was after he had been entrapped. The fact that he was predisposed to obtaining financing is not the same thing as being predisposed to commit stock fraud through the mail and wire transfers. No reasonable juror could find beyond a reasonable doubt that Mr. Jordan was predisposed to commit a crime and the conviction should be vacated.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY PERMITTED GOVERNMENT WITNESSES TO TESTIFY ON THE STATE OF MIND AND INTENT OF MR. JORDAN, THEIR OWN STATE OF

MIND AND INTENT, ON LEGAL QUESTIONS AND THE ULTIMATE ISSUES IN THE CASE IMPROPERLY INTERFERING WITH THE PROVINCE OF THE JURY

A. Standard of Review

Evidentiary rulings are reviewed under an abuse of discretion standard. *See United States v. Cotto-Aponte,* 30 F.3d 4, 6 (1st Cir. 1994). Abuse of discretion is not a "monolithic standard." *See United States v. Carrasco-De-Jesus*, 589 F.3d 22, 26-27 (1st Cir. 2009). As the First Circuit explained "[w]ithin its margins, embedded issues may receive attention under more narrowly focused standards. Thus, embedded questions of law engender de novo review and embedded findings of fact engender clear-error review." *Id.* (citing *See Nat'l Ass'n of Chain Drug Stores v. New Eng. Carps. Health Benefits Fund,* 582 F.3d 30, 45 (1st Cir.2009); *see also United States v. Snyder,* 136 F.3d 65, 67 (1st Cir.1998) (explaining that review of legal error is non-deferential and that a district court perforce abuses its discretion when it commits a material error of law)). In this case, the permitting this testimony over objection was an error of law and subject to de novo review.

B. Witness Erroneously Permitted to Give Opinions on Mr. Jordan's State of Mind and Intent

The district court repeatedly permitted the government witnesses in this case to comment and opine their opinions on the state of mind and intent of Mr. Jordan. The record is replete with incidences of the case agent telling the jury what he

understood to be Mr. Jordan's state of mind and intent. (*See generally*, V4:157-251;457-58). The following are some of the many examples found in those sections.

When asked over objection what was his understanding of what Mr. Prange said with respect to "J.C. gets it" the agent was permitted to respond: "My understanding is that John Jordan knew why he was there to meet me that day, and that was to talk about a stock fraud deal." (V4:104). When asked over objection what his understanding of what Mr. Prange was saying when he said "do things properly" he was permitted to answer "It's my understanding that Mr. Prange had told Mr. Jordan that he wants to make sure that – to abide by the rules that I put in place for this stock fraud deal. That involves a subscription agreement, a kickback and a consulting agreement." (V4:104-05).

The agent was permitted to answer over objection what his understanding of what Mr. Prange was telling him as to paperwork to which he answers: "I understood Mr. Prange to be telling me that even though we're going to agree to a $5 million deal, a stock fraud deal, netting John Jordan two and a half million, and two and a half million getting kicked back to me, that if something happens to me there's no contract to that effect. They're not – they're not going to see that in writing anywhere." (V4:164). Mr. Jordan asked "do we as a corporation have to issue a 1099" the agent says no and Mr. Jordan asks how do we get around that.

Over objection the agent is permitted to testify "It was my understanding that he's engaging me now on how to best cover up the kickback payment." (V4:150).

Mr. Jordan says on the type I like this so far and the agent is permitted to testify over objection what his understanding was of what Mr. Jordan said who answered "[i]t's my understanding that Mr. Jordan's willing to forward with the deal." (V4:182).

Mr. Jordan says "dollar amount" to be on the invoice and over objection the agent is permitted to testify that the agent "understood Mr. Jordan to acknowledge the fact that he know that the invoices for the installments of money that I would get him under the deal were never going to say "50 percent" they were always going to be a dollar amount that happened to be 50 percent of the money that he just received." (V4:183).

When Mr. Jordan says "If they have done well and their audits go through then I'm sure ours". Over objection the agent is permitted to testify that he understood Mr. Jordan to be telling him "that the consulting agreement – phony consulting agreement and the fake invoices, if they passed audits from companies that have already done these stock deal – frauds with, then he thinks that it will pass his as well." (V4:185).

When Mr. Jordan says "I have no issues", over objection the agent was permitted to testify that he was his understanding "that Mr. Jordan was clear that this was an illegal stock deal and he was willing to participate." (V4:183).

When the agent says on the tape "I'm screwing my investors on the hedge fund side." He is permitted to testify over objection as to why he is telling Mr. Jordan this so "I can make clear to Mr. Jordan this is not a legitimate transaction." (V4:185).

There is a discussion regarding pension money in the California system. Over objection the agent is permitted to tell the jury what he understood Mr. Jordan to mean when he says his wife does not work for the state and also whether he has pangs of conscience to which Mr. Jordan says "no" and the agent is permitted to tell the jury over objection that "I understand Mr. Jordan had no problem with what I was doing by screwing my investors." (Tr.2:148-49).[5]

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[5] As made evident above, defense counsel was required to object to nearly every question asked. Although defense counsel sought a standing objection outside the presence of the jury but the request was denied. (V4:113). Defense counsel sought to have the jury instructed that it was counsel's obligation to protect the record and that the jury should not hold that against counsel who is doing her job. (V4:187). The judge refused to instruct the jury advising that he would do so at the end of the trial but not during the period when counsel was compelled to object to nearly every question given its impropriety and prejudice to the client. (V4:264).

When Mr. Jordan writes in an email "Payment for your invoice has been done" the UA is permitted to say "I understood that to mean that John Jordan paid the kickback to me." (V4:218-19).

The agent should not have been permitted to testify as to what he understood was Mr. Jordan's intent or state of mind. Even if the agent was being used as some type of expert it was error to permit him to opine on Mr. Jordan's state of mind in his capacity as a special agent, as it was interfering with the province of the jury. *See, e.g., Holmes Grp., Inc. v. RPS Prods., Inc.,* No. 03–40146, 2010 WL 7867756, *5 (D.Mass. June 25, 2010) (cited in *U.S. ex rel. Dyer v. Raytheon Co.*, 2013 WL 5348571 (D. Mass 2013)). ("An expert may not testify to another person's intent. No level of experience or expertise will make an expert witness a mind-reader.").

Although in an entrapment case, an agent might be permitted to explain the meaning of industry terms, *see United States v. Santiago*, 566 F.3d 65, 69 (1st Cir. 2009), the agent in this was not explaining what a particular term meant, like tranches, for example. The UA was being asked to tell the jury what he understood Mr. Jordan meant. The UA was also being asked to tell the jury what he meant when he said certain things; not what the term meant. There is a great deal of difference between asking the agent what the term "tranche" means in the industry, and asking when you use the term "tranche" what do you mean and the agent says I used the word tranche to show that this was an illegal kickback scheme that

involved stock fraud and wire fraud. There are additional examples throughout the testimony of the UA with respect to Mr. Jordan demonstrating these errors.

C. Witnesses Erroneously Permitted to Testify as to the Witnesses' State of Mind

The district court also permitted the agent to comment on his own state of mind, and what he "meant" rather than what he said, this too is objectionable as both irrelevant and unfairly prejudicial. For example, the special agent was permitted to testify over objection as to why he was having a meeting with Mr. Prange and Mr. Jordan. He testified, "I was having this meeting with Mr. Prange to make sure that John Jordan, who he was introduced to me that day, had an understanding that what he was about to talk about in the meeting with me was a stock fraud deal, and that he understood that and he was willing to participate in that." (V4:161). Indeed, this exchange, which occurs throughout the agent's testimony, covers all three bases for objection: defendant's state of mind, agent's state of mind and the legal and ultimate issues on the case.

Asked yet again with objection why he was meeting with Mr. Jordan, the agent is permitted to testify that "I was meeting with him to discuss entering into a stock fraud deal." (V4:165). He is asked why he makes a particular statement and despite objection is allowed to testify that: "I'm letting Mr. Jordan know

that...there's no pressure for him to do this deal...I'm paying him a compliment, letting him know that he doesn't have to do this. He doesn't I'm giving him the impression that he doesn't fit the category of the type of company that I usually do these illegal deals with, that he can – he may have a chance to go elsewhere. So I'm making sure that there's no pressure here on him." (V4:170).

When asked why he was perfectly comfortable committing to do business with Jordan, over objection, he is permitted to testify that "It's an illegal deal to me, so I'm ready to commit. If he's willing to do the deal, I'm willing to do the deal." (V4:170). When asked over objection what he means by that he says "I mean by that, that the deal that I'm talking about is an illegal deal and it requires a kickback of 50 percent." (V4:170). When asked what he means by "risky" over objection he is permitted to testify that he means "illegal." (V4:170-71). Asked what he means when he uses the term cheap money, again, over objection he stated "I'm pressing upon John Jordan that there's no hard sell here. He does not have to enter into this fraud stock deal." (V4:171).

There is a discussion with the agent about what the agent does for his day job and he is asked over objection what he meant by that, he is permitted to testify that: "I'm giving Mr. Jordan the understanding that I do legitimate deals, and I do these deals we're talking about right here, the illegitimate deals." (V4:172). Defense counsel further moves to strike and is again overruled and the agent is

further permitted to explain why he uses the words legitimate clients to which he responds: "I'm impressing upon Mr. Jordan that what we're about to talk about here in this meeting is not a legitimate deal." (V4:172). The agent is asked what he means by a five year forecast decision, over objection he is permitted to respond "I'm letting him know that in my legitimate deals, this is part of the due diligence process that I would have to go through." When asked over objection why he told this to Mr. Jordan, the agent is permitted to respond: "[t]o provide a red flag to him, to Mr. Jordan, that this is not a legitimate deal." (V4:173).

Asked about his statement regarding confidentiality, the agent is asked over objection to explain why and he stated: "[t]his is another glaring red flag that I provided to Mr. Jordan, and Mr. Prange who was in the meeting, that this is not legitimate. My fund doesn't know, they can't know, and we have to keep this confidential." (V4:177). The UA conceded that confidentiality is an important concept in the business community. (V4:413). Asked why he says papering the file on something to Jordan and he is permitted to respond over objection that "I'm telling Mr. Jordan and Mr. Prange that I'm not going to do any due diligence." (V4:176-77). Asked about justifying overpaying and asked to explain over objection, he stated "I'm providing Mr. Jordan another red flag....I'm providing Mr. Jordan another red flag that is not a legitimate deal. It makes no economic sense to overpay for this type of stock....I told Mr. Jordan this because this is not a

legitimate transaction, that my" (V4:178). When he says on the tape my company, they don't need to know. I don't what them to know", the agent explained what he meant over objection that "I told Mr. Jordan this because this is not a legitimate transaction...." (V4:178).

The agent is permitted to say over objection why he told Mr. Jordan "[t]o avoid a glaring red flag that this is not a legitimate deal." In discussing a 50 percent kickback and why he told what he told to Mr. Jordan he is permitted to testify over objection that he said that "to make it clear that this is not a legitimate deal; that he's going to have to pay a kickback amounting to 50 percent."

The agent testified over objection as to why he was good with the kickback, with the 50 percent" the agent was permitted to respond "I said that to Mr. Prange because I wanted, again, to make sure that he understood that this was not a legitimate transaction, and that before I met with Mr. Jordan, I wanted an understanding that he knew that he was going to have to pay a 50 percent kickback." (V4:163).

When asked why he used the term lender of last resort over objection, the agent testified "This is my way of making sure Mr. Prange and others I met with knew that this is not a legal transaction, that if they had other avenues elsewhere, they may want to pursue that." (V4:162).

The agent says on the tape give the appearance of legitimacy by sending a consulting agreement, he was permitted to testify over objection that he was "making it clear to Mr. Jordan that this is not legitimate and that we're going to cover it up with a consulting agreement and fake invoice to give the appearance that the kickback payment is, in fact, legitimate." (V4:184).

What the officer intended or meant is not relevant. The state of mind of Mr. Jordan is relevant. To the extent the officer's actions might have affected Mr. Jordan's state of mind or knowledge, the only relevant actions or statement are those that actually occurred rather than the ones the officer meant to do or say.

Even the government admits that they are offering testimony of what the agent meant to show state of mind of the defendant even though what the agent meant when he said something would have no bearing on the state of mind of a defendant unless it was actually said. (V4:112) ("why the agent said thing to the defendants about this illegal transaction is directly relevant to their state of mind in Mr. Prange's case and also Mr. Jordan's case.") (V4:112). Why the agent said things to the defendants about this illegal transaction is actually irrelevant to Mr. Jordan or Mr. Prange's state of mind. Although it might very well reveal the agent's state of mind, his state of mind in this criminal case, is not relevant as to Mr. Jordan's state of mind.

Furthermore, it invades the province of the jury. It is the jury who must determine whether Mr. Jordan had an understanding and whether Mr. Jordan would have known from the statements that were actually said (not what was in the head of the agent) whether he understood the nature of the transaction.

D. Witness Erroneously Permitted to Testify on Legal Issues and the Ultimate Issues in the Case

The district court also erred in permitting the agent to invade the province of the jury by opining on the ultimate issue in the case with respect to Mr. Jordan. Federal Rule of Evidence 704(b) provides that "an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." In the examples above, the agent repeatedly commented on legal questions as to whether Mr. Jordan committed stock fraud or otherwise violated the law. Indeed, when asked how the agent knew Mr. Prange and Mr. Jordan the UA answered "Mr. Prange and Mr. Jordan both participated in stock fraud deals that we had done." (V4:61). The defense objected but the objection was overruled. (V4:61). It is "well established that the law is the exclusive domain of the judge and is not a proper subject for expert testimony."

See Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92, 99-100 (1st Cir. 1997) (cited in *Dyer, supra*).

E. Errors Resulted in Prejudice to Mr. Jordan

The district court abused its discretion in permitting the agent to testify as to Mr. Jordan's intent, the agent's own state of mind and the ultimate issues that are the province of the jury. That error was harmful. This was a close case where the jury deliberated for nearly three days. Much of the case came down to what Mr. Jordan understood and what was Mr. Jordan's intent and his understanding of the illegality of the operation and whether he was acting in good faith and whether he was entrapped or relied on the advice of counsel. By permitting the agent to opine as to Mr. Jordan's state of mind, to provide his state of mind and to give opinions on legal and ultimate issues in the case, were errors that were highly prejudicial and the conviction must be overturned.

II. THE DISTRICT COURT COMMITTED CLEAR ERROR BY SUBMITTING THE FULL SUPERSEDING INDICTMENT TO THE JURY WHICH CONTAINED UNPROVEN FACTS, CO-DEFENDANTS WHO WERE NOT ON TRIAL INCLUDING MR. JORDAN'S ATTORNEY WHO WAS THE ATTORNEY FOR MR. JORDAN'S RELIANCE ON COUNSEL DEFENSE RESULTING IN AN ABUSE OF DISCRETION

A. Standard of Review.

An appellate court reviews a district court's decision whether to submit an indictment to a jury under an abuse of discretion standard. *See United States v. Medina*, 761 F.2d 12 (1st Cir. 1985) (holding that subject to a proper covering instruction, submission of an indictment to the jury is within the discretion of the trial court). Abuse of discretion is not a "monolithic standard." *See United States v. Carrasco-De-Jesus*, 589 F.3d 22, 26-27 (1st Cir. 2009). As the First Circuit explained "[w]ithin its margins, embedded issues may receive attention under more narrowly focused standards. Thus, embedded questions of law engender de novo review and embedded findings of fact engender clear-error review." *Id.* (citing *See Nat'l Ass'n of Chain Drug Stores v. New Eng. Carps. Health Benefits Fund,* 582 F.3d 30, 45 (1st Cir.2009); *see also United States v. Snyder,* 136 F.3d 65, 67 (1st Cir.1998) (explaining that review of legal error is non-deferential and that a district court perforce abuses its discretion when it commits a material error of law)). In this case, the submission of the full Superseding Indictment is an error of law and subject to de novo review and harmless error analysis.

B. It Was as Abuse of Discretion for the District Court to Submit the Entire Superseding Indictment to the Jury

It is true that a district court has discretion to submit an indictment to the jury with a proper covering instruction, *see, United States v. Medina*, 761 F.2d 12,

21-22 (1st Cir. 1985). But under the circumstances of this case, submission was an abuse of that discretion and no covering instruction could counter that prejudice.

The indictment in this case was not an ordinary indictment, and it is apparent that the government is now including "background" and "introduction" facts routinely and presumably strategically to present assertions before the jury that need not be proven at trial. The superseding indictment is a 24-page document that contains 11 pages of "Introduction" which consisted of asserted facts as to all of the defendants charged, even those who were not on trial and those that had not been proved at trial. (V1:52-75). Those facts included that Richard Kranitz, Vida Life's attorney, had been indicted for fraud as well as assertions of allegations related to those charges against Kranitz and other defendants who were not on trial and evidence that was not submitted to the jury. For example, at paragraph 15, 25-33 of the Superseding Indictment, both Berman and Kranitz are alleged to have been involved in a conspiracy for fraud with numerous detail as to their involvement that were not part of the trial. (V1:54, 57-59).

Given that Mr. Jordan and Mr. Prange were asserting a reliance on counsel defense with Kranitz as the attorney, the inclusion of these facts related to Kranitz were particularly prejudicial to Mr. Jordan and Mr. Prange on this issue. If the purpose of the indictment is to inform the jury of the charges, and the concern is that they use it for any other purpose other than as an accusation, a redacted

version as requested by the defendants could have been submitted. The inclusion of the pages of facts beyond what was set forth in the specific Counts, was an abuse of discretion.

Furthermore, the defense was concerned about the facts that were submitted that were not subject to cross examination through witness testimony in addition to facts of other parties in the case that were not on trial. The defense was concerned that the inclusion of the term "nominee" in quotes (paragraphs 23, 45) (V1:56,61), was a form of testimony as well that was not subject to cross-examination and at a minimum "nominee" should have been struck.

The defense objected to the submission of the entire Superseding Indictment but did not object to submission of the actual charges that were handed down by the grand jury; only the factual statements that were put in the indictment. The district court overruled the objections and permitted the entire Superseding Indictment to be presented to the jury, which was an abuse of discretion.

The Court should have adopted the defense request and permitted the counts to go into the jury but should have struck the extraneous facts as they were highly prejudicial and the ones regarding Kravitz and the co-defendants were largely unproven at trial. The First Circuit has approved this type of disposition: "The rule is not an all or nothing alternative: in his or her discretion the judge may determine that the most just approach is to expose the jury to only certain portions

of the indictment. ...We find no fault with the exercise of the court's discretion in this manner unless the defendant can show unfair prejudice as a result of the court's approach." *See United States v. Glantz*, 847 F.2d 1, 10 (1st Cir. 1988). Indeed, the district court in *Glantz* "decided not to include the entire indictment with the charge because such a procedure would be incurably prejudicial." In this case, the submission of the entire Superseding Indictment was not necessary and was unfairly and incurably prejudicial.

The district court in this case "remind[ed the jury] that an Indictment is not evidence of any kind against the defendant. It is simply the formal method that our constitution provides for charging someone with the commission of a crime. I will send a copy of the Superseding Indictment to the jury room with you to aid you in your deliberations." [Tr.8-113] Given the inherent prejudice, in particular to the issue of reliance on counsel, no covering instruction could cure the prejudice from those additional facts.

Court decisions upholding the submission of the indictment do not appear to have been faced with this level of extraneous and collateral assertions that are present in this case. For example, in *United States v. MacFarlane*, 491 F.3d 53 (1st Cir. 2007) the indictment in McFarlane charged simply that: "on or about April 28, 2005, at Brockton, in the District of Massachusetts, CLIVE MCFARLANE, the defendant herein, having previously been convicted in a court of a crime

punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, ammunition, to wit: six rounds of assorted .38 caliber ammunition. All in violation of Title 18, United States Code, 922(g)(1)." (*United States v. McFarlane*, 05 Cr. 10130 RWZ (DOC. 1)). It should be pointed out as well that in *McFarlane*, the appellate court was operating under a plain error review due to the fact that there had been no objection at trial as to the admission. Although the *McFarlane* court observed that it was "long settled" that a judge could submit an indictment to the jury, the indictments consisted of the charges and not the recitation of facts through an "introduction" that was submitted in this case. *McFarlane*, 491 F.3d at 60.

C. The Error Was Harmful and the Conviction Must Be Overturned.

In *United States v. Forzese*, 756 F.2d 217 (1st Cir. 1985), the failure to strike overt acts that were not proven at trial was considered error subject to a harmless error standard. In this case, any error is far from harmless given the reliance on counsel defense and the fact that this was a close case where the jury deliberated for a number of days before finally coming back with a guilty verdict. Instead, this is a situation where the submission is "incurably prejudicial." Accordingly, the conviction must be vacated.

III. THE DISTRICT COURT COMMITTED CLEAR ERROR WHEN DETERMINING MR. JORDAN'S LOSS CALCULATIONS BY FAILING TO CREDIT THE RETURN OF PROPERTY AND RENDERING OF SERVICES AS REQUIRED BY 2B1.1 APPLICATION NOTE 3(E) CREDITS AGAINST LOSS.

A. Standard of Review

This Court has provided that the standard of review of an error in the calculation of a sentence is whether the district court's actions resulted in clear error. *United States v. Coviello*, 225 F.3d 54, 61 (1st Cir. 2000). To the extent the failure to apply the credits against loss as provided in Application Note 3(E)(i) is a procedural error, it result in an unreasonable sentence. "Reasonableness correlates with the abuse of discretion standard and incorporates two review components—discerning whether the challenged sentence is procedurally sound and substantively reasonable. *Procedural soundness requires that the district court must not have committed a procedural error in arriving at the sentence*." *United States v. Gallardo-Ortiz*, 666 F.3d 808, 811 (1st Cir. 2012) (citations and internal quotations omitted; emphasis added).

B. The District Court Committed Clear Error in Failing to Apply the Credits Against Loss

The district court found that the "loss" was $32,000, the total amount of money that "SeaFin" invested in Vida Life which included a six-level enhancement for an amount in excess of $30,000, making a Total Adjusted Offense Level of 19 and producing an advisory range of 30 to 37

months. (V1:410). The defense objected to the six point enhancement given that $16,000 was returned and that the government received 400,000 shares which was valued by the Probation Department at .04 to .05 per stock (JSA:10;PSR¶26) and within the range testified to by the government's expert (V5:31), such that the amount of loss was less than $5,000. (The government did not object to the PSR. (JSA:27). A loss less than $5,000 would result in no increase since there is no adjustment beyond the starting offense level of seven under USSG § 2B1.1(b)(1)(A). The six-level enhancement was thus applied in clear error.

Specifically, the district court's loss calculation erroneously failed to credit the fact that while "SeaFin" paid $32,000, it received 400,000 shares of restricted stock in Vida Life in return for its investment and that the stock was valued at .04 to .05 by the probation department without objection from the government. (*See* JSA:10, 27;PSR¶26). Indeed the stock had sold at one time in its history at $12 a share. (V4:286). Unlike the shares of the other defendants' companies, these shares had value and Vida Life had a recent history of shares trading as high as $1.45. (V1:239). The government's expert testified that the closing price on August 23, 2011 was five cents per share. (V4-507).

There is no dispute that the government received the value of the stock and $16,000 was returned. Thus, the loss was not $32,000; rather it was at most $4,000 after crediting the value of the stock that was sent to Seafin/the government. The point is, the probation officer's determination that it was .04 to .05 was corroborated by the government's own expert and the government did not object to that figure. No one testified that the stocks lacked any value and there was

testimony by the government's expert that this was a "buy and hold deal" so that the issue of restrictive shares was irrelevant to the value. The UA admitted that the liquidity was not relevant. (V:285). Throughout the case the government's witnesses worked off the value of .03 to .05 when comparing that to the price paid by the UA. (V4:505, 507, 508)

It is undisputed that Mr. Jordan returned $16,000 and that the government ("Seafin") was issued 400,000 Vida Life shares. This results in a credit of 400,000 shares at .04 to .05 (PSR ¶ 26) is $16,000 to $20,000 credit.[6] Rather than credit these amounts, the district advised that "[t]he Court is going to overrule this objection and find that the loss was, in fact, $32,000, the full amount of the transaction, and not some netted out amount responsible – or reflective of *alleged value* of the transferred stock." (V1:410; emphasis added) The district court's failure to credit the amounts returned and the amount of the value of the services provided (the 400,000 shares) was in error.

The alleged value of the stock was based on the probation report and corroborated by calculations of the government's expert. The government never objected to that assessment of the value of the stock in the PSR; only to the defense's position as to value when it became apparent that it would reduce the amount of loss. The guidelines require that that the fair market value of the property returned and the fair market value of the services

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[6] Just the stock value alone would have reduced the amount of loss for services rendered by $16,000 to $20,000 resulting at a minimum of a two point reduction for losses between $10,000 and $30,000. USSG §2B1.1(b)(1)(B)&(C).

rendered should be credited. *See* 2B1.1 Application Note 3(E) Credits Against Loss. Under that application note, it provides very clear that "the loss ***shall*** be reduced by the fair market value of the property returned and the services rendered by the defendant....". *Id.* (emphasis added).

Crediting the $16,000 loss figure for the amount Mr. Jordan returned and crediting the value of the stock against that amount as services received by the government results in no loss and even a possible gain of $4,000 if the value of the stock was .05 at the time. As a result, Mr. Jordan receives no increase from the loss under 2B1.1(b)(1)(A) as losses under $5,000 do not trigger an enhancement. The six point enhancement was clear error. In the absence of the six point enhancement, the final guideline range would have been a level 13 from the guideline level calculated by the district court. At a level 13 the guideline range for Mr. Jordan would be 12-18 months.

This guideline range reflects the nature of the type of fraud involved where there are actually services provided and monies returned. In *United States v. Blastos*, 258 F.3d 25, 30 (1st Cir. 2001) the First Circuit explained how there are difference between outright theft and those who provide something of value:

> [T]here are two types of fraud: The first type of fraud implicates the "true con artist," who never intends to perform the undertaking, such as the terms of the contract or loan repayments, but who intends to pocket the money without rendering any service in return. The second type involves a person who would not have attained the contract or loan ***but for the fraud***, but who fully intends to perform.

Id. (quoting *United States v. Haggert*, 980 F.2d 8, 12 (1st Cir. 1992), and citing

United States v. Schneider, 930 F.2d 555, 558 (7th Cir. 1991) (Posner, J.)) (emphasis added). The First Circuit described it in a simple hypothetical: A thief who steals $100,000 is more culpable than a salesman who obtains $100,000 by selling a victim an $80,000 house he fraudulently represents as being worth $100,000. *See Haggert*, 980 F.2d at 13 n.4 (quoting *United States v. Smith*, 951 F.2d 1164 (10th Cir. 1991)).

Judge Posner's decision in *United States v. Schneider*, 930 F.2d 555, 558 (7th Cir. 1991), cited in *Blastos,* provides further guidance. In *Schneider*, the defendant was an experienced contractor who submitted a fraudulent bid for federal government contracts in which he falsely denied that he had never been charged with any criminal offense when, in fact, he had been convicted of forgery. Schneider was the low bidder and won the contract; however, when the government discovered his misrepresentation, it cancelled the contract and awarded the job to a different company with a higher bid. Schneider was convicted, and at sentencing, the government argued that the total value of the contract was the loss to the government, because but for his fraud, the government would never have worked with Schneider. The Seventh Circuit rejected that approach as "simple" but "irrational." *Id.* at 559.

> [The government's suggested method for calculating loss] would mean that the Schneider[] would (other things being equal) be punished as severely as a con artist who intended to winkle $142,400 . . . from a senile old lady.

Id.

In this case, the district court's calculation is not only contrary to the Application Notes of the Guidelines, but would be treating Mr. Jordan as if this

involved outright theft as opposed to a situation where the "victim" received value. *Blastos*, 258 F.3d at 30.

Although this Circuit has stated that calculating the amount of loss is "more an art than a science", *see United States v. Rostoff*, 53 F.3d 398, 407 (1st Cir. 1995) (citations omitted), in this case the numbers are not only concrete but came from government sources and actually can be used in a scientific manner. The amount to be credited easily meets a preponderance of the evidence standard required for such findings. *See United States v. Acosta*, 303 F.3d 78, 82 (1st Cir. 2002). The amount of credits against loss is also based on "sufficient indicia of reliability to support its probable accuracy." *Id.* In contrast, the failure to credit results in an inaccurate and erroneous calculation.

What is clearly erroneous about the Court's refusal to credit the amount of the value of the stock or the monies returned is that the district court describes it as an "alleged value" of the transferred stock. (V1:410). The irony in this case is that the figures used by the defense are those that were provided by the government's expert and found by the probation department without objection from the government. While this Court has warned that a "party dissatisfied with the sentencing court's quantification of the amount of loss in a particular case must go a long way to demonstrate that the finding is clearly erroneous", *see Rostoff*, 53 F.3d at 407, again, given the concrete numbers, the fact that there is no dispute that the money and stock were given to the government/Seafin, Mr. Jordan met that burden and it was clear error for the Court to fail to credit those amounts against the loss and procedural error to disregard the application notes resulting in an unreasonable sentence of 30 months on a 12-18 months guideline.

As a result, the sentence should be vacated.

Furthermore, given the return of the money and the rendering of value, the sentence of 30 months was not a reasonable sentence and the amount of loss overstated the seriousness of Mr. Jordan's offense as compared with the outright theft of money without any return of anything of value further requiring that the sentence be vacated. Mr. Jordan's sentence was greater than necessary to comply with the purposes set forth in Paragraph 2 of 18 U.S.C. § 3553(a)(2) and rendered Mr. Jordan's sentence unreasonable.

IV. THE DISTRICT COURT COMMITTED CLEAR ERROR WHEN IT IMPOSED A TWO-POINT ENHANCEMENT FOR OBSTRUCTION OF JUSTICE FOR A DOCUMENT THAT WAS ALTERED WHEN IT WAS SENT TO AN ATTORNEY DURING THE TIME OF THE OFFENSE AND WHEN IT WAS PROVIDED TO THE GOVERNMENT IN RESPONSE TO A GRAND JURY REQUEST FOR THE PURPOSES OF COMPLYING WITH THE SUBPOENA.

A. Standard of Review

This Court has provided that the standard of review of an error in the calculation of a sentence is whether the district court's actions resulted in clear error. *United States v. Coviello*, 225 F.3d 54, 61 (1st Cir. 2000).

B. Obstruction of Justice Enhancement was Clearly Erroneous

The government subpoenaed records of the corporation with respect to the advice of counsel argument and Mr. Jordan complied. There were two emails

which were essentially identical with one showing quotation marks around the word and one without the quotation marks. (V2:266, 269). Mr. Jordan resent the email to Attorney Kranitz which is when he took out the quotations marks; not when they were sent to the government. Kranitz admits in his sentencing memorandum that he received emails from Mr. Jordan and replied to them. Both emails were provided to the government pursuant to a subpoena. The dates on both of the emails were prior to the trial and during the course of the offense of conviction. The government relied heavily on both emails at trial to show knowledge of the fraud.

The Court found obstruction of justice and applied a two-point enhancement. Applying an enhancement for responding to a subpoena and providing emails that were part of the offense itself is clear error. Put simply, the emails were not altered to send to the government. If they had been altered, it would make far more sense to put back in the quotation marks so that the emails were identical. Why would Mr. Jordan deliberately change the emails to give to the government to provide them with two different emails to be used against him at trial? How does this obstruct justice when they were incriminating against Mr. Jordan and they were provided pursuant to a subpoena?

Furthermore, these documents were between Mr. Jordan and Attorney Kranitz and had to do with how Attorney Kranitz was advising Mr. Jordan on how these transactions should be conducted and advised Mr. Jordan on how to proceed and what to draft at a time when the government claims was the conspiracy. Mr. Jordan should not be given additional points for relying on his counsel's advice

and for complying with a subpoena. Had Mr. Jordan neglected to turn over the two different emails or only turned over one which would have improved his case—the government would no doubt have sought obstruction of justice for failure to comply.

The Application Note 4(C) to U.S.S.G. 3C1.1 provides an example of obstruction of justice for "producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding" which was the government's basis for seeking the enhancement which was adopted by the Court. But the document had already been altered when sent to Mr. Jordan's attorney yet was correspondence that was responsive to the subpoena and Mr. Jordan was required to produce it. It was not an email directed to the government. The purpose of providing the documents was to be in compliance with the subpoena; not to obstruct justice. Indeed, production of the documents provided useful evidence against Mr. Jordan and the government's repeated use of it is proof.

To satisfy the requirements of this enhancement, the defendant's obstructive conduct must have been willful, meaning that he must have "consciously act[ed] with the purpose of obstructing justice." *United States v. Romulus,* 949 F.2d 713, 717 (4th Cir.1991) (quoting *United States v. Stroud,* 893 F.2d 504, 507 (2d Cir.1990)). Thus, if a document had been falsified as part of the offense of conviction but *before* any investigation, the defendant's production of the falsified document in response to a subpoena would not support this enhancement, unless it were shown that the falsification was "purposefully calculated, and likely, to

thwart the investigation or prosecution of the offense of conviction." U.S.S.G. § 3C1.1 cmt. 1.

As the Fourth Circuit went on to explain: "[t]he willfulness element is essential. Not only is it explicitly included in the language of the Guidelines, but to impose the enhancement without that element would lead to making any production of falsified documents an automatic basis for the enhancement, creating an unacceptable dilemma for a defendant." *United States v. Thorson*, 633 F.3d 312, 320-21 (4th Cir. 2011). As was stated repeatedly by the defense in this case, Mr. Jordan did not submit those documents to obstruct justice, he submitted them in response to a subpoena and had he not submitted them he would have been subject to obstruction of justice charge on that basis. To punish him with obstruction of justice is to put him in an unacceptable dilemma.

The willfulness element requires that "either in producing or attempting to produce fabricated documents in the course of an investigation, a defendant must consciously act with the purpose of obstructing justice." *Id.* Turning over those documents was not to obstruct justice. In *Thorson*, the Court upheld the enhancement where the defendant created the documents during the IRS investigation with the intention of thwarting the investigation by intending to attach them to his IRS audit and give them to government investigators. *Id.* at 321. No such willfulness was evident here where the documents were created during the offense vis-à-vis the attorney and were submitted in response to a subpoena.

The Fourth Circuit had previously reviewed this catch–22 which Mr. Jordan faced in *United States v. Coleman,* 1989 WL 50286 (4th Cir.1989) (unpublished)

(cited in *Thorson, supra*). In *Coleman,* the defendant back-dated certain documents and placed them in a personnel file to give the impression that the defendant's actions were lawful. *Id.* at *2. The government subsequently subpoenaed the file, and the defendant produced the file without making any alteration to it. *Id.* at *3. The government argued that the defendant should also be convicted for obstruction of a grand jury investigation even though the documents as part of the crime had already been created. The Fourth Circuit rejected this argument on the grounds that the simple act of producing documents requested by a subpoena could not, without more, support a conviction for obstruction of justice:

> Were we today to sanction such an approach, the result would be to discourage litigants from tendering subpoenaed documents and would naturally cause a chilling effect on the swift and complete compliance with grand jury subpoenas. We do not believe that in pursuing this conviction the government intended such a result. Nor would such a result be proper.

Id.

It is supremely ironic that having had to turn over this evidence which was a key part of the government's case—perhaps the very key at the end of the day, Mr. Jordan was penalized with a two-point enhancement for obstruction of justice charges which was clearly erroneous. Furthermore, this enhancement increased Mr. Jordan's sentence to a level that was greater than necessary to comply with the purposes set forth in Paragraph 2 of 18 U.S.C. § 3553(a)(2) and rendered Mr. Jordan's sentence unreasonable. Accordingly, Mr. Jordan's final guidelines should have been reduced by two points and his sentence should be vacated.

V. JOINDER IN CO-APPELLANT'S ENTRAPMENT POINT IN THAT THE COURT ALSO ERRED IN DENYING MR. JORDAN'S MOTION FOR JUDGMENT OF ACQUITTAL BASED UPON ENTRAPMENT WHERE THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. JORDAN WAS PREDISPOSED TO COMMIT THE CRIMES

Mr. Jordan joins in the legal analysis set forth in Mr. Prange's Appellant Brief on this issue. As to the specific facts regarding Mr. Jordan's predisposition, no reasonable juror could find that Mr. Jordan was predisposed to commit a crime. Although this standard of review exhibits great respect for the jury's verdict, an inquiring court must nonetheless avoid "evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative." *Magras v. Roden*, 2014 WL 563471 (1st Cir. February 14, 2014) (citing *United States v. Spinney,* 65 F.3d 231, 234 (1st Cir.1995)).

Even taking the evidence in a light favorable to the prosecution, Mr. Jordan clearly did not understand the nature of the transaction and the government agent deliberately used code words knowing Mr. Jordan was from Peru. Mr. Jordan was not as financially sophisticated as others in the case or as sophisticated as his partner, Doug Grobe, who was the one who "got" what was going on and handled the financials. The agent admits that no crime was committed on August 22, 2012, the day he met with Mr. Jordan.

Neither Mr. Jordan nor his company were targets of the investigation. The UA admitted that Vida Life was a legitimate company. The government did more than provide an opportunity to commit the crime. As set forth in Mr. Prange's brief, they were dealing with very desperate microcap companies and they took advantage of that fact. The agent used coded words to lure Mr. Jordan into believing that these deals were legitimate. The agent actually tells Mr. Jordan that by using the invoice it will make the transaction legitimate. The agent provided the invoices and many of the template documents. Mr. Jordan was predisposed to get financing through the sale of stock of a company he believed was going to become very successful and provide a high rate of return for Sea Fin. He was not predisposed to commit a crime; his goal was to gain financing for his company and believed Sea Fin was making a good investment. Mr. Jordan brought reams of material for the agent to review—inconsistent with someone who knows that it is not about the pitching the value of the company but predisposed to commit fraud.

Even reviewing in the evidence in the prosecution's favor, it is undisputed that Mr. Jordan was unhappy with a 12 cents price on the second tranche believing that it was too low for the true value of Vida Life. (V4:244, 352-53). In fact, the agent was "pissed off" by his behavior and questioned whether Mr. Jordan understood what was going on. (V3:502). Mr. Prange admits that it is Doug Grobe who gets it and that Jordan will need more talking to. The agent tells Mr.

Prange he is going to have a chat with him. (V3:505). If Mr. Jordan had been predisposed to commit a crime, he would not have cared whether the stock was valued at 1 cent or 1 dollar. He certainly would not have argued about the 12 cent price or continued to pitch the company hard at the meeting and well after the meeting.

Perhaps the most telling fact which is not disputed is that Mr. Jordan tried to call Sea Fin which is completely inconsistent with understanding that he is going to engage in a crime and in the words of the prosecution "steal" from Sea Fin. (V3:56-9). Although Mr. Jordan ultimately took the money and was convicted of the crime and engaged in altering documents after the fact, the crime itself was the result of the government's entrapment and no rational trier of fact could have found otherwise even reviewing the evidence in the most favorable light to the prosecution. Accordingly, Mr. Jordan's conviction should be vacated.

CONCLUSION

For the foregoing reasons, it is hereby respectfully requested that this Court vacate Mr. Jordan's conviction and sentence and remand for retrial and/or resentencing, and for such other and further relief as this Court deems just and necessary.

John C. Jordan
By his CJA attorney

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Certificate of Compliance With Rule 35 and Rule 40

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,306 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 2000 in fourteen point Times New Roman.

/s/ Inga L. Parsons
Inga L. Parsons

ADDENDUM

AO 245B(05-MA) (Rev. 06/05) Judgment in a Criminal Case
Sheet 1 - D. Massachusetts - 10/05

UNITED STATES DISTRICT COURT
District of Massachusetts

UNITED STATES OF AMERICA
V.
JOHN C. JORDAN

JUDGMENT IN A CRIMINAL CASE

Case Number: **1: 11 CR 10415 - 5 - NMG**

USM Number: 68057-097

Inga L. Parsons, Esq.
Defendant's Attorney

☐ Additional documents attached

☐

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) 7s, 8s, 9s, 10s, 11s, 12s after a plea of not guilty.

The defendant is adjudicated guilty of these offenses: Additional Counts - See continuation page ☑

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §1349 and 18 USC §1348	Conspiracy to Commit Securities Fraud	11/30/11	7s
18 USC §1343 and 18 USC §1349	Wire Fraud	09/02/11	8s
18 USC §1343 and 18	Wire Fraud	09/02/11	9s

The defendant is sentenced as provided in pages 2 through 13 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.

08/12/13
Date of Imposition of Judgment

/s/ Nathaniel M. Gorton
Signature of Judge

The Honorable Nathaniel M. Gorton
U.S. District Judge
Name and Title of Judge

8/16/13
Date

DEFENDANT: **JOHN C. JORDAN**
CASE NUMBER: **1: 11 CR 10415 - 5 - NMG**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
USC §1349			
18 USC §1343 and	Wire Fraud	09/02/11	10s
18 USC §1349			
18 USC §1343 and	Wire Fraud	09/02/11	11s
18 USC §1349			
18 USC §1341 and	Mail Fraud	09/07/11	12s
18 USC §1349			
18 USC §981(a)(1)	Forfeiture Allegation		
(C)			

DEFENDANT: **JOHN C. JORDAN**
CASE NUMBER: **1: 11 CR 10415 - 5 - NMG**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 30 month(s)

which term consists of 30 months on each count, all to be served concurrently.

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

That defendant be housed at a facility closest to his home in CA, if deemed to be the appropriate security level.

☐ 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 _____ ☐ a.m. ☐ p.m. on _____.

☐ 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 09/23/13.

☐ 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

DEFENDANT: **JOHN C. JORDAN**
CASE NUMBER: **1: 11 CR 10415 - 5 - NMG**

SUPERVISED RELEASE

☑ See continuation page

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 12 month(s)

which term consists of 12 months on each count, all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 50 tests per year, as directed by the probation officer.

☑ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **JOHN C. JORDAN**
CASE NUMBER: **1: 11 CR 10415 - 5 - NMG**

ADDITIONAL ☑ SUPERVISED RELEASE ☐ PROBATION TERMS

1. The defendant is prohibited from possessing a firearm, destructive device, or other dangerous weapon.
2. The defendant is to pay $2,000 of the fine imposed by no later than 30 days after sentencing.
3. The defendant is to pay the balance of any fine or restitution imposed according to a court-ordered repayment schedule.
4. The defendant is prohibited from incurring new credit charges or opening additional lines of credit without the approval of the Probation Office while any financial obligations remain outstanding.
5. The defendant is to provide the Probation Office access to any requested financial information, which may be shared with the Financial Litigation Unit of the U.S. Attorney's Office.

Continuation of Conditions of ☐ Supervised Release ☐ Probation

DEFENDANT: **JOHN C. JORDAN**
CASE NUMBER: **1: 11 CR 10415 - 5 - NMG**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$ $600.00	$ $4,000.00	$

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

☐ 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

☐ See Continuation Page

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:

* 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.

DEFENDANT: **JOHN C. JORDAN**
CASE NUMBER: **1: 11 CR 10415 - 5 - NMG**

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

It is further ordered that the defendant shall make a lump sum payment of $2,000 which is due within 30 days of sentencing. Payment of the fine balance is to begin immediately according to the requirements of the Federal Bureau of Prisons' Inmate Financial Responsibility Program while the defendant is incarcerated and according to a court-ordered repayment schedule during the term of supervised release.
Any fine imposed is to be continued to be paid until the full amount, including any interest required by law, is paid. All fine payments shall be made to the Clerk, U.S. District Court. The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the fine remains unpaid.

DEFENDANT: **JOHN C. JORDAN**
CASE NUMBER: **1: 11 CR 10415 - 5 - NMG**

SCHEDULE OF PAYMENTS

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

A [X] Lump sum payment of $ $600.00 due immediately, balance due

[ ] not later than _____, or
[X] in accordance [ ] C, [ ] D, [ ] E, or [X] 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 [X] Special instructions regarding the payment of criminal monetary penalties:

See Page 7.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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

[ ] See Continuation Page

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:

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) penalties, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: **JOHN C. JORDAN**
CASE NUMBER: **1: 11 CR 10415 - 5 - NMG**

ADDITIONAL FORFEITED PROPERTY

$16,000 in United States currency

No. 13-2328

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee
v.
JOHN C. JORDAN,
Defendant - Appellant

ON APPEAL FROM CONVICTION AFTER JURY TRIAL AND SENTENCING BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR APPELLANT JORDAN

For Appellant Jordan

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dated: July 24, 2014

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THE DISTRICT COURT ERRONEOUSLY PERMITTED GOVERNMENT WITNESSES TO TESTIFY ON THE STATE OF MIND AND INTENT OF MR. JORDAN, THEIR OWN STATE OF MIND AND INTENT, ON LEGAL QUESTIONS, AND ON THE ULTIMATE ISSUES IN THE CASE

The government proclaims that it was not using the agent as an expert under F.R.E. 702 but rather as a lay person under F.R.E. 701. Given the government's claim of industry terms the F.R.E. 702 expert designation should apply and the arguments detailed in Mr. Jordan's main brief apply. To the extent this Court determines that F.R.E. 701 is the proper standard, the government's concession also requires a retrial.

Because the agent offered an opinion about what he understood Mr. Jordan to mean "he was indirectly offering his opinion about what [Mr. Jordan] knew." *See United States v. Garcia*, 291 F.3d 127, 141 (2d. Cir. 2002) cited in the government's brief. (*See* Gov. Br. at 31). Although the Garcia court has advised that this not in itself impermissible, the testimony must first establish a proper foundation which was not done in this case.

The agent claimed he was speaking in code. However, the agent did not testify how Mr. Jordan would know he was speaking in code or that Mr. Jordan was speaking in code. The agent did not testify that Mr. Jordan and he had a prior

agreement to speak in code or that they had discussed this possibility. In fact, neither the agent nor any other law enforcement officer or informant had prior meetings or phone calls with Mr. Jordan.

As described by the Second Circuit: "[w]hen a witness has not identified the objective bases for his opinion, the proffered opinion obviously fails completely to meet the requirements of Rule 701 – because there is no way for the court to assess whether it is rationally based on the witness's perceptions." *United States v. Rea,* 958 F.2d 1206, 1215 (2d Cir. 1992). This foundational requirement goes to the admissibility of the evidence, not merely its weight." *Garcia*, 291 F.3d at 140.

More to the point, neither the agent nor Mr. Jordan spoke in code. Their statements were logical and coherent. There was no reason for interpretation whether expert or lay interpretation. In *Garcia*, the court concluded that because the government did not lay a foundation for the agent's testimony expressing his lay opinion of the defendant's knowledge and understanding, the court abused its discretion in allowing the testimony. *Garcia.* at 142.

This is not a case where the investigator became intimately familiar with the "unusual manner of communicating used by these conspirators" because Mr. Jordan did not have an unusual manner of communicating per se and the agent had absolutely no prior familiarity with Mr. Jordan at all. *See, United States v. Rollins*, 544 F.3d 820, 832 (7th Cir 2008), cited by the Government at 34. Unlike in

Rollins, here there were no telephone calls with Mr. Jordan or any contact prior to the meeting with the agent which he was "interpreting" for the jury in no better position than the lay juror. In *Rollins*, the agent listened to every intercepted conversation. The problem here is there are no other conversations involving Mr. Jordan. To the extent the agent relied on his experience as an agent in the securities industry, his opinion are expert opinions and he should not have been permitted to give those opinions or make the conclusions as set out in Mr. Jordan's main brief.

In addition, the government did not lay a foundation for why the lay witness's opinion would be "helpful". Although the government deliberately hid the illegal nature of the enterprise, the words used were everyday words and made sense contextually and were not confusing and disjointed. The fact that the agent chose to explain the deal with non-criminal terms did not make it unclear; in fact it made it very clear that it was portrayed as not illegal.

Furthermore, the agent was not "clarifying" what a particular term meant; he was explaining a meaning not related to the term he claims needed clarifying. This was not a drug dealer's code; this was not an industry that was inherently illegal and required codes. This is not a case about oblique statements to help the jury, as discussed in *United States v. Albertelli,* 687 F.3d 439, 445 (1st Cir. 2012) (cited in Gov. Br. at 30). This is not a drug, organized crime or terrorism case. The

government argues that "at no point did Jordan express confusion with the vernacular or its significance" but speculated that a lay juror "might" which is hardly showing a need or laying a foundation. *See* Gov. Br. at 34.

What the agent in this case did was to "draw inferences that counsel could do but with the advantages as to timing, repetition and the imprimatur of testifying as a law enforcement officer;" "usurp the jury's function by effectively testifying as to guilt rather than merely providing building blocks for the jury to draw its own conclusion"; did not "point to any rational basis for the interpretation offered or be doing nothing more than speculating" and acted "as a summary witness without meeting the usual requirements." *Id.* at 447. The agent in this case did not explain the basis for his specific interpretations. Furthermore, the cautionary instruction by the judge which is just a general instruction regarding law enforcement testimony and the cross examination is not sufficient to dispel the dangers.

The error was harmful. This was a very close case. The jury deliberated for three whole days. The evidence against Mr. Jordan was weak. The agent's description of non-coded words and his comments on the knowledge and understanding of Mr. Jordan without a proper foundation had a direct effect on the verdict and particularly on issues of predisposition and intent related to the entrapment defense. Certainly the error in this case is more harmful than that in *Garcia*, where there were three kilograms of cocaine present and occurred on

Garcia's property and there was one witness tying Garcia to the cocaine and this Circuit still found harmful error.

As in *Garcia*, "testimony about the conversation and the meaning of its coded words was central to the government's case and was the principal evidence against [the defendant]." *Garcia*, 291 F.3d 144. This Court, like it did in *Garcia*, cannot conclude that the testimony was "unimportant in relation to everything else the jury considered on the issue in question, as is revealed in the record." The evidence in this case was far from overwhelming and the error was harmful.

II.

THE DISTRICT COURT COMMITTED CLEAR ERROR BY SUBMITTING THE FULL SUPERSEDING INDICTMENT TO THE JURY

The indictment is presumably not proof of anything because its purpose is to allege the charges. The superseding indictment in this case goes well beyond that. Increasingly indictments read like someone's graduate dissertation citing statistics, law review articles, policy memoranda, etc. rather than a brief description of the charges as prosecutors exploit the submission of the indictment to the jury.

As the Ninth Circuit has explained after observing the common practice of sending an indictment to the jury: "We assume that it would have been within the

district court's discretion to submit a properly redacted indictment to the jury in this case. We note, however, that *this practice often carries significant risks and has few corresponding benefits*." *United States v. Roy*, 473 F.3d 1232, 1235 n. 2. (9th Cir. 2007) (emphasis added).

In *United States v. Shafer*, 455 F.2d 1167,1170 (5th Cir. 1972) the court determined that the erroneous introduction of a hotel bill and a copy of the indictment that was submitted to the jury showing substantive charges which had been dismissed, required reversal.

This indictment contained allegations regarding untried co-defendants that were not brought out at trial and the word nominee was in quotes. The indictment was not subject to cross examination and was a form of testimony. It is certainly not cured by the general standard instruction that the indictment is not evidence of any kind. Indeed in *Roy*, the Circuit upheld the verdict but because in that case the judge "did not simply direct the juror to disregard the language in the incorrect indictment – a curative instruction a juror might, perhaps, have chosen to ignore; instead he repeatedly and emphatically explained to them that the problematic information in the indictment." *Id.* at 1235. The court also found that the evidence in *Roy* was very strong, unlike the evidence in Mr. Jordan's case. *Id.*

In this case, the district court refused to redact anything from the indictment including the evidence that had not been presented at trial regarding Berman and

Kranitz and the very objectional "nominee" language which went right to the heart of the issues before the jury and the error was not harmless.

III.

THE DISTRICT COURT COMMITTED CLEAR ERROR WHEN DETERMINING MR. JORDAN'S LOSS CALCULATIONS BY FAILING TO CREDIT THE RETURN OF PROPERTY AND RENDERING OF SERVICES AS REQUIRED BY 2B1.1 APPLICATION NOTE 3(E) CREDITS AGAINST LOSS.

The government's claim that the reduction in the amount involved should not have been made is based on a "mistaken premise" that the shares of Vida Life were "wholly unvaluable." (Gov. Br. at 48). That was contradicted by their own expert as to the trading amounts. They claim that because it is restricted that it has no value. That is not true. Restricted stock can be converted to unrestricted stock after a certain passing of time. In the case of *Edwin Singer v. Commissioner of Internal Revenue*, 1944 WL 6988 (Tax Court 1944) a determined of the value of gifted stocks was made that restricted the stock to small blocks. In that case, for example, a determination was made that the value of restricted stock was $100 per share and the value of unrestricted stock was $180 per share. Although they might have less value that unrestricted at the outset, the claim that it was "wholly unvaluable" by the government discredits their entire point. As a result, the stock (which the government still has by the way) which went to the actual fund

(whether imagined or not) should be deducted for all of the reasons set forth in detail in Mr. Jordan's main brief.

Likewise the $16,000 returned to the government should be deducted. The government claims Mr. Jordan believed he was harming the investors. The evidence does not support that, in fact the evidence shows that Mr. Jordan did not believe he was harming investors because the agent in this case made it perfectly clear that everyone was going to get money including the hedge fund. The government says that Jordan reported no concerns about screwing Kelly's investors. (Gov. Br. at 49) Jordan reported no such thing. On the contrary the agent says "it might sound like I'm screwing them but they have done so well in the past that anything I do like this it is not gonna, *it's not gonna really hurt them.*" (V3:468) (emphasis added). The agent tells Mr. Jordan that he, meaning the agent, is funding it. (V3:460) ("Then I realized I'm funding that.") He says it's "coming *from my pocket* or my investor's pocket and not yours". (V3:460) (emphasis added). The amount that was returned should reduce the loss as set forth in detail in Mr. Jordan's main brief.

A sentence of 30 months is not reasonable. The government asserts that Jordan openly discussed evading tax reporting and public auditing requirements but that is not a fair or accurate reading of the transcript. It was actually Mr. Jordan who asked who had to send the 1099 to (further evidence that he was not

getting it). The invoices were created at the request of the agent who provided the templates. Do not forget that this is the same John Jordan who wanted to contact the actual hedge fund to introduce himself and get to know him as a new client. As set forth in detail in Mr. Jordan's main brief, these credit should have been applied and Mr. Jordan's guideline range and sentence reduced.

IV.
THE DISTRICT COURT COMMITTED CLEAR ERROR WHEN IT IMPOSED A TWO-POINT ENHANCEMENT FOR OBSTRUCTION OF JUSTICE

Mr. Jordan did not obstruct justice; he complied with a subpoena. Do not forget that it was not Mr. Jordan who introduced the emails; it was the government. The two point enhancement must not be imposed for the reasons set forth at length in Mr. Jordan's main brief highlighting that because Mr. Jordan had no choice once the subpoena was issued except to comply. The government does not adequately address the subpoena issue.

It is critical to understand that the two emails were sent to his attorney during the course of the so-called crime. He provided the documents he intended to use in a reliance on counsel defense as he was asked to do. Once a subpoena was issued he was compelled by court to comply with all documents he had related to his attorney which is when he sent the other email. Had Mr. Jordan refused to

comply with the subpoena, the argument would have been that he was obstructing justice and he would have received the two points.

Indeed, it really does not matter what his intentions were with respect to having two different emails he sent to his attorney—even though benign. Having to comply with the subpoena resulted in evidence the government used repeatedly in their case and was arguably the most useful to the government for their case. To then increase Mr. Jordan's sentence on evidence received because Mr. Jordan complied with the subpoena is highly unjust.

V.

JOINDER IN CO-DEFENDANTS ENTRAPMENT ARGUMENT AND HOW THE COURT ERRED IN DENYING MR. JORDAN'S MOTION FOR JUDGMENT OF ACQUITTAL BASED UPON ENTRAPMENT

Entrapment arose out of Congress's assumption of (1) the government's "*abuse*" of its crime "detection" and law "enforcement" efforts by "instigati[ng]" the criminal behavior and "lur[ing]" to commit the crime (2) persons who are "*otherwise innocent.*" *Sorrells v. United States,* 287 U.S. 435, 448 (1932) cited in *United States v. Gendron*, 18 F.3d 955, 960 (1st Cir. 2003) (emphasis in *Gendron*). As a result, the entrapment doctrine forbids punishment of an "*otherwise innocent*" person whose "alleged offense" is "the *product of the creative activity*" of government officials. *Id.*(citing Sorrells 287 U.S. at 451 (emphasis in *Gendron*). As the Supreme Court has iterated:

> When the Government's quest for conviction leads to the apprehension of an *otherwise law-abiding citizen* who, *if left to his own devices,* likely would have never run afoul of the law, the courts should intervene.

Jacobson v. United States, 503 U.S. 540, 553 (1992), cited in *Gendron* (emphasis added in Gendron). The rational view of the evidence is that Mr. Jordan believed he was at a meeting to obtain financing. The government is that they deliberately masked the criminal nature of the transaction. Mr. Jordan's own conduct and the statements of the agent to Mr. Prange make clear that Mr. Jordan did not have a clear understanding of the criminality of the transaction; Mr. Jordan was an "otherwise innocent person".

The government created this crime out of whole cloth and took advantage of a desperate businessman. Is there not enough real crime actually being committed so that the government has to invent crimes and lure and entice legitimate but desperate businessmen to take part in these types of deals?

An entrapment defense involves "two elements: (1) government inducement of the accused to engage in criminal conduct, and (2) the accused's lack of predisposition to engage in such conduct." *See United States v.* Tom, 330 F.3d 83, 89 (1st Cir. 2003). As this Circuit has explained, "[o]nce a defendant has made a sufficient threshold showing to raise the question of entrapment, the burden shifts to the government to prove beyond a reasonable doubt either that there was no inducement or that the defendant was predisposed to commit the offense." *Id.*

In Mr. Jordan's case, the government deliberately obscured the criminal nature of the deal to lure Mr. Jordan into believing that the transaction was legit; and hiding the criminal nature until Mr. Jordan was hooked by the government's snare. The government also took advantage of the financial straits of Vida Life, Mr. Jordan's company. This case goes well beyond simply providing an opportunity to commit a crime as asserted by the government. An essential difference in this case is that it did not involve something inherently criminal such as drugs, bank robbery, theft etc. Paying high fees for financing is part of the price for obtaining legitimate financing in the penny stock market as was shown at trial and is not inherently illegal.

The government also took advantage of Mr. Jordan's company's desperation. The government gives short shrift to this claim by merely asserting that this was not the type of severe situational pressure identified in Gendron. (Gov. Br. at 23). So while the Government suggests what it did was just provide an opportunity to commit a crime, what it in fact did was strategically take advantage of and exploit the vulnerabilities of company executives desperate to keep companies alive. The government's assertion that employing more obvious terms like illegal and fraud would have blown the agent's cover (Gov. Br. at 33)– its absolutely absurd. If the agent were playing a corrupt hedge fund manager what cover was there to blow, especially with unsophisticated businessmen with no prior

illegal dealings in the business world. The only thing it would have served to do is make sure that those who came on board knew they were getting into a criminal deal.

The government argued that because Jordan transferred money to his own account and family members that this shows he was not trying to grow the business. (Gov. Br. at). The money was transferred to pay off the personal debt that had been accumulated because of the use of his own personal funds and the money owed to family members who had made payments on behalf of Vida Life because Vida Life had no money. The government's assertion that the "purported psychological stresses of trying to save a failing enterprise did not affect his decision" is an assertion that is not a reasonable inference of the facts. Vida Life was not dormant; the government's own expert testified that it had activity within the previous months and had a true stock value. (V5:31).

Inferences in favor of the government do not require the court to allow for complete inconsistencies. An inquiring court must avoid "evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative." *Magras v. Roden*, 2014 WL 563471 (1st Cir. February 14, 2014) (citing *United States v. Spinney,* 65 F.3d 231, 234 (1st Cir.1995)).

The government tries to have it both ways: Vida Life was not a company of any value but somehow it had enough value that it was not in dire straits to be a

basis for exploitation. The financial pictures as described by the government's own expert belies the government's position even viewing the testimony in a light favorable to the verdict and the statements of Mr. Jordan during that time makes clear their desperation, including the fact that he was willing to pay a 50% fee on the financing.

The governments cites *United States v. Gendron*, 18 F.3d 955, 960 (1st Cir. 2003) in listing examples of improper inducement. (Gov. Br. at 22). The list, as a set of examples, is not exhaustive. Likewise in *United States v. El-Gawli*, 837 F.2d 132 (1st Cir. 1977) the court approved an instruction that the definition of inducement included "persuasion, fraudulent representation, threats, coercive tactics, harassment, promises of reward or please based on need, sympathy or friendship" nothing this which is an "exemplary list" and not a "finite group of possibilities." 872 F.2d at 150

The agent admitted that these companies and individuals were not government targets and that as far as the government was concerned were legitimate businesses. This is not a situation where the government designed a trap to catch "the kind of defendant who (without a "sting") might well be out committing crimes of the sort that a "sting" seeks to stop. *See Gendron* (citing *Russell,* 411 U.S. at 434, 93 S.Ct. at 1644.) There is nothing in the record to show that at the outset these gentlemen sought anything but legitimate funding and in

Mr. Jordan's case, it was his belief that this was legitimate financing which was emphasized by the way the government explained the financing arrangement and Mr. Jordan's reactions to those arrangements.

The Government's sets forth the wrong burden of proof on the issue of predisposition, claiming that "the defendant must additionally demonstrate "a lack of predisposition . . . to engage in the criminal conduct. Gov't Brief at 25, *citing Mathews v. United States*, 485 U.S. 58, 63 (1988). The correct standard, as set forth in the *Matthews* case cited by the government, is that the *Government* must prove beyond a reasonable doubt that the defendant was predisposed to commit the offense once the defendant has successfully raised that defense. *Id.* (emphasis added). The defense successfully raised the issue at trial and Judge Gorton agreed and gave the instruction on entrapment including predisposition. In fact, the government likewise sought the entrapment instruction to be fully given in the case.

There is not one shred of evidence that Mr. Jordan ever was involved in any kind of illegal financing in any manner. The agent conceded that the company was legitimate. In addition there was much evidence at trial that the fees in this financing were actually better terms than had been offered by other legitimate sources.

Even viewing the record in favor of the government, Mr. Jordan was not predisposed to commit a crime. He came to the meeting to obtain financing. The government is confusing the notion of being willing and eager to obtain financing with being willing and eager to commit a crime. Once again there is a difference when the nature of the so called crime is not inherently illegal.

As the court in *United States v. Coady*, 809 F.2d 119 (1st Cir. 1987) described (only in part by the government):

> Entrapment does not blossom whenever a person succumbs to his own greed or to the lure of easy money: it blooms only when the crime for which the miscreant is subsequently charged was instigated by minions of the law *and* the offender had no previous disposition towards commission of the deed.

Id. at 122 (emphasis added).

In this case the government created a crime through its "minons of the law" and they brought in and enticed and lured Mr. Jordan who was not predisposed to commit a crime exploiting his desperation. The government overlooks the harder issue that a reading of the record even in the government's favor is that these businessmen, including Mr. Jordan, were trying to get legitimate financing. Ultimately Mr. Jordan played the government's game, but he did so as a result of the actions and exploitation by the government.

A very critical distinction is that Mr. Jordan did not have conversations about the deal with the informant Henderson. Henderson was explicit at times and

said expressly that the deal was illegal. The agent concedes that Mr. Jordan was not part of those conversation or any conversations with Henderson. Indeed, the agent himself was unconvinced even after the meeting and even after Mr. Jordan had provided the paperwork that Mr. Jordan understood that this was an illegal deal and sought out Mr. Prange to talk to Jordan whose actions were inconsistent with this being a crime. Why would Mr. Jordan try to call the agent at the office of the actual hedge fund if he got it that the hedge fund was the victim of fraud.

The Government cites *United States v. Dyke*, 718 F.3d 1282, 1286 (10th Cir. 2013), to claim that there is a distinction between specific intent and predisposition is a curious choice. *See* Gov't Brief at 24. In Dyke, the Circuit Court cited *United States v. Russell*, 411 U.S. 423, 429 (1973) where the Supreme Court held that the entrapment defense is based in state and "focus[es] on the intent or predisposition of the defendant" rather than on a judgment about the propriety of the conduct of government agents. Intent is directly a part of predisposition

The government also tries to combine "Prange and Jordan's" responses in assessing predisposition. There are no taped conversations between Prange and Jordan. There are no conversations between Jordan and Henderson. There are no conversations between Jordan and any other co-defendant or so-called co-conspirator. Guilt must be individualized.

In *United States v. Sanchez-Barrios,* 424 F.3d 65, 77 (1st Cir. 2005), cited by

the government, the defendant was told "over and over" again that he did not have to participate. No such repetition is in the record with respect to Mr. Jordan. Once again, Sanchez was a drug case where the illegality of the venture was obvious. The government puts great store in the fact that Mr. Jordan brought documents to be signed. The record shows those documents were prepared by Mr. Jordan's attorney and were given to Mr. Prange who gave them to Mr. Jordan. (V3:361).

The government also dwells on the timing claiming that Jordan "swiftly and enthusiastically" joined the scheme. But the scheme was deliberately not made out to look criminal and was discussed in code to a man whose first language was Spanish. The government cited *Tom* for the proposition that predisposition can be shown where a defendant promptly available himself of a government-provided opportunity to commit a crime; but if the opportunity is not discernible as a crime there is no proof of predisposition. *Tom,* as with most of the government's cases, involved drugs, specifically heroin and crack cocaine. Similarly, the government relies on *United States v. Turner*, 501 F.3d 59, 71 (1st Cir. 2007) to describe an "eager" participant. A desperate businessman eager to obtain financing to save his company is quite different from the "experienced criminal" like Turner eager to take on any role in a bank robbery.

The government also puts great store on the fact that Jordan flew across the country to finalize the deal. The rational view of the evidence is that Mr. Jordan

clearly was flying out believing that he was obtaining financing for his company. It was Prange who paid for the ticket.

The government keeps saying that Mr. Jordan did not have a problem with the agent screwing the investors as if that was Mr. Jordan's quote. It was not. The records shows that agent says "it might sound like I'm screwing them but they have done so well in the past that anything I do like this it is not gonna, *it's not gonna really hurt them*." (V3:468) (emphasis added). He asked Mr. Jordan, whose main language is Spanish if he had pangs of conscious, but Mr. Jordan replies disconnectedly that his wife is not in the program as if his to dispel that Mr. Jordan does not have a conflict of interest. (V.2:148-49).

The government relies almost exclusively on what Mr. Jordan did after he came to the meeting that was required by the agent in the case in order for Mr. Jordan to get the money. Indeed the agent makes clear on that stand that there was no fraud before the meeting.

The government cites *United States v. Acosta*, 67 F.3d 334, 339 (1st Cir. 1995) (Gov. Br. at 27) to justify its use of the defendant's own behavior "after" he was approached by the agent. However, *Acosta,* relying on *Jacobson*, make clear that such predisposition does not count if it is itself the product of improper government conduct. Here the agent repeatedly obscured the criminal aspects of the transaction with code and ambiguous and vague reference and provided Mr.

Jordan, whose first language was English and was the "fish guy" with assurances that everyone was going to make money—even the hedge fund. The agent actually tells Mr. Jordan that by using the invoice it will make the transaction legitimate. If Mr. Jordan exhibited predisposition during the meeting and afterwards, "the government instilled it." *See Jacobson*, 503 U.S. at 553 cited in *Acosta*, 67 F.3d at 339. Accordingly, Mr. Jordan's conviction should be vacated.

CONCLUSION

For the foregoing reasons, it is hereby respectfully requested that this Court vacate Mr. Jordan's conviction and sentence and remand for retrial and/or resentencing, and for such other and further relief as this Court deems just and necessary.

/s/ Inga L. Parsons
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