No. 18-13762

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MITCHELL J. STEIN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, D. CT. NO. 9:11-CR-80205 (HON. KENNETH A. MARRA)

BRIEF FOR THE UNITED STATES

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CERTIFICATE OF INTERESTED PERSONS
& CORPORATE DISCLOSURE STATEMENT
***United States* v. *Mitchell J. Stein*, Case No. 18-13762**

In compliance with Fed. R. App. P. 26.1, 11th Cir. R. 26.1-1, and 11th Cir. R. 26.1-3, the United States, through undersigned counsel and based in part upon the representations of Appellant's counsel,[1] hereby certifies that the following persons and entities may have an interest in the outcome of this case:

Corporations and Entities

A Clemens Trust

A Doris Trust

ARC Finance Group, LLC

ARC Blind Trust

A.R. Pacific Group

Athletes for Life Foundation

Battelle Memorial Institute

Beckring Investments S.A.

Briarwest International Inc.

Cardiac Hospital Management

Catch 83 General Partnership

Center on the Administration of Criminal Law

[1] See Appellant's Opening Brief (Dec. 21, 2018), at C-1–C-9.

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Clemmens Trust

C Roberto Trust

D Clemens Trust

Electrical Connections

Electrical Product Imports & Marketing LTD

Elliott Davis, LLC

Five Investments Partnership

Five Knights Partnership

Five Knights Revocable Trust

Houston Casualty Company

Innet Co., LTD

IT Healthcare

Jaymi Blind Trust

National Association for Public Defense

National Financial Services, LLC

National Securities Corporation

NPC Financial

Manufacturers Bank

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M&C Electrical Services MBC LLC

Miko Foods, Inc.

Miko Foods Enterprises, Inc.

Oak Tree Investments Blind Trust

Pacific West Securities, Inc.

Park Avenue Securities, LLC

Penson Financial Services, Inc.

Porter Advisory Group

Regal Securities, Inc.

Scottrade, Inc.

Signalife Inc. ("SGN"; "SGNX"; "SGNXXZ"; "SGAL"),
a.k.a. Heart Tronics, Inc. ("HRTT")

Silve Group

THS Blind Trust

U.S. Securities and Exchange Commission

WBT Investments Blind Trust

World Equity Group, Inc.

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Natural Persons

Albrecht, Richard—Submitted Victim Impact Statement

Allenbaugh, Mark H.—Attorney

Anand, Ajay K.—Principal, Silve Group

Atanasov, Sime—Submitted Victim Impact Statement

Bavolar, Edward—Submitted Victim Impact Statement

Becker, Dr. Chyhe—Expert for the United States

Bell, Gregory—Submitted Victim Impact Statement

Benczkowski, Brian—Assistant Attorney General

Bentsen, Derek S.—SEC Counsel

Binhak, Steven J.—Attorney

Black, Jennifer—Board Member, Signalife

Block, Hon. Robert M.—Federal Magistrate Judge, Related Civil Case

Boliek, Michael—Auditor

Bowman, Joanna K. W.—Counsel for the United States

Bryski, Chaim E.—Counsel for the United States

Bunes, Pamela—CEO, Signalife

Caldwell, Leslie R.—Assistant Attorney General (former)

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Carter, Martin B.—Co-CTO, Signalife

Christian, James W.—Expert for Defendant-Appellant

Clark, George P.—U.S. Postal Inspector

Clement, Paul D.—Attorney

Clifton, Brett—Submitted Victim Impact Statement

Collins, George—Submitted Victim Impact Statement

Cornell, Robert B.—Counsel for the United States

Cortes, Demetrio Sodi—Submitted Victim Impact Statement

Cottingham, Caitlin—Counsel for the United States

Crimmins, Brendan—Attorney

Cutter, Timothy—Government Witness

DelNido, Alexander—Attorney

Diller, Cheri—Submitted Victim Impact Statement

Dominguez, Leticia—Submitted Victim Impact Statement

Donnelly, Kenneth W.—SEC Counsel

Dowd, Sarah—Attorney

Drakulic, Dr. Budimir—CTO, Signalife

Eisner, Adam J.—SEC Counsel

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Ehrlichman, Lee B.—President, COO, Signalife

Ellis, Alan—Attorney

Feldman, James H.—Attorney

Ferrer, Wifredo A.—U.S. Attorney, S.D. Florida (former)

Fiedler, James N.—CEO and President of Heart Tronics, Inc.

Fisher, Jeffrey L.—Attorney

Fuduric, Joseph—Submitted Victim Impact Statement

Gault, Willie J.—President, Signalife

Gelfer, Stanley—Director of IT, Signalife

Gibson, Kevin—Submitted Victim Impact Statement

Gish, Ron—Submitted Victim Impact Statement

Goldsmith, Andrew—Attorney

Gray-Johnson, Melody—Submitted Victim Impact Statement

Grosnoff, Nicole—Counsel for the United States

Greene, Jane—VP of Marketing, Signalife

Gruenstein, Benjamin—Attorney

Handell, Joshua K.—Lead Counsel for the United States

Harmison, Dr. Lowell T.—CEO, Signalife (deceased)

CERTIFICATE OF INTERESTED PERSONS
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Harris, Bryan—Investor

Harris, David—Attorney

Harrison, Charles—Audit Committee Member, Board Member, Signalife

Hathaway, Jerry—Submitted Victim Impact Statement

Hayter, Dr. Anthony—Expert for Defendant-Appellant

Hendrix, Keith—Auditor

Hopkins, Hon. James M.—Federal Magistrate Judge

Huff, Timothy—Submitted Victim Impact Statement

Johnson, Dr. Charles - Board Member, Signalife

Johnson, Hon. Michael—United States District Judge, California

Jones, Tracy J.—Executive Assistant and Bookkeeper, Signalife

Kasen, Jonathan B.—CJA Appellate Counsel for Mr. Stein

Kierl, Philip—Investor and Consultant, Signalife

Klugh, Richard C.—Attorney

Koblin, Dr. Robert—Board Member, Signalife

Kolinek, Robert—Investor

Lackner, Lucas—Investor

LaCour, Edmund G.—Attorney

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Lagdan, Milan—Submitted Victim Impact Statement

Lantz, Don—Submitted Victim Impact Statement

Lieberman, Alan M.—SEC Counsel

Lucuski, John—Submitted Victim Impact Statement

Lundberg, Mark—Submitted Victim Impact Statement

Mahabadi, Paul—Submitted Victim Impact Statement

Mangiero, Dr. Susan—Expert for Defendant-Appellant

Marra, Hon. Kenneth A.—Federal District Court Judge

Mausner, Ian—Investor

McCullough, Darrin L.—Counsel for the United States

McEwin, Jennifer—Executive Director, Casino Collections for MGM Resorts

McMahan, William Ron—Investor

Melley, Peter J.—Non-Expert Sentencing Witness for the United States

Meltzer, Ellen—Counsel for the United States

Miner, Matthew—Deputy Assistant Attorney General

Moore, Janet—Co-Chair, Amicus Committee, National Association for Public Defense

Muhlendorf, Kevin B.—Counsel for the United States

Muscillo, Evie—Consultant, Signalife

CERTIFICATE OF INTERESTED PERSONS
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Nakazato, Hon. Arthur—Federal Magistrate Judge, Related Civil Case

Nevdahl, Mark C.—Stockbroker

Nonaka, Rachel E.—SEC Counsel

Noon, Khayyam—Submitted Victim Impact Statement

Olivia, Courtney—Executive Director, Center on the Administration of Criminal Law

O'Neal, Dr. Edward S.—Expert for Defendant-Appellant

Oppedisano, James—Submitted Victim Impact Statement

Orshan, Ariana Fajardo—U.S. Attorney's Office

Ossenberg (Hines), Laura—Submitted Victim Impact Statement

O'Toole, Timothy—Attorney

Paolillo, Jacqueline—Expert for Defendant-Appellant

Parrett, Robert—Submitted Victim Impact Statement

Pasano, Michael S.—Attorney

Pascucci, Michelle—Counsel for the United States

Perkins, Rowland—President, Signalife

Perlman, Philip—Submitted Victim Impact Statement

Phillips, Dr. Steven J.—Board Member, Signalife

Pickard, Kevin—CFO, Signalife

CERTIFICATE OF INTERESTED PERSONS
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Price, Lori—Submitted Victim Impact Statement

Provencio, Norma—Auditor, CPA, Board Member, Signalife

Rabkin, Leslie—Submitted Victim Impact Statement

Rauch, Ryan—Stock Promoter

Rayle, Steve—Submitted Victim Impact Statement

Rodriguez, Michelle—Submitted Victim Impact Statement

Salyer, Kathleen Mary—U.S. Attorney's Office

Scharf, Jared J.—Attorney

Schmid, Brian—Submitted Victim Impact Statement

Selna, Hon. James V.—Federal District Court Judge, Related Civil Case

Shapiro, Dr. Robert—Expert for Defendant-Appellant

Shepherd, Edward Lee—Submitted Victim Impact Statement

Smachetti, Emily M.—U.S. Attorney's Office

Small, Matthew—Submitted Victim Impact Statement

Stein, Mitchell J.—Defendant-Appellant

Stein, Tracey Hampton—Former wife of Mr. Stein and former majority shareholder, Signalife

Stieglitz, Albert B.—Counsel for the United States

Straker, Tim—Submitted Victim Impact Statement

CERTIFICATE OF INTERESTED PERSONS
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Suh, Sung-Hee—Deputy Assistant Attorney General (former)

Taylor, Mark—Investor

Thomas, Richard—Submitted Victim Impact Statement

Tracey, Donald—Submitted Victim Impact Statement

Tribou, Delores J.—President, Tribou Investment Co. Inc. and wife of Mr. Tribou

Tribou, Thomas R.—Founder, President at TZ Medical, Inc.

Udolf, Bruce L.—Attorney

Van Dyck, Henry—Counsel for the United States

Victims for Whom Restitution Was Ordered[2]

Vitunac, The Honorable Ann E.

Warren, Andrew H.—Counsel for the United States

White, Asfa—Submitted Victim Impact Statement

White, Charles G.—Attorney

Wilk, Richard—Trustee, THS Blind Trust

Windom, Dr. Robert E.—Board Member, Signalife

Wittenberg, Eric J.—Attorney

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[2] Listed individually in Attachment A to the United States' original Certificate of Interested Persons and Corporate Disclosure Statement (Sep. 24, 2018).

CERTIFICATE OF INTERESTED PERSONS
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Woodbury, John—Securities Counsel, Signalife

Wylie, John—Attorney

Yafa, Jamie—Government Witness

Yarbrough, Joseph—Submitted Victim Impact Statement

STATEMENT REGARDING ORAL ARGUMENT

The government does not request oral argument, as this case can be decided upon the briefs and the record, and oral argument would not materially assist the Court.

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INTRODUCTION

The government adduced overwhelming evidence that defendant-appellant Mitchell Stein spent years stealing from his employer, Signalife, and defrauding investors by falsifying the company's sales information. Relying on ambiguous evidence regarding one payment allegedly connected to one purchase order—which was produced to Stein, was stipulated to at trial, and does not contradict the government's theory of wrongdoing—Stein asserts that his due-process rights were violated through the presentation of false testimony. This Court rejected that claim two years ago, and the same result should obtain here. The Court should likewise reject Stein's belated attempt to vacate a forfeiture order that he did not challenge during his first appeal and affirm the outcome of the district court's resentencing proceedings, which cured both errors that occasioned vacatur in 2017.

STATEMENT OF JURISDICTION

Stein appeals from a judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. § 3231. The amended judgment was entered on August 29, 2018, DE.564,[1] and Stein filed a timely notice of appeal on September 4, 2018, DE.567. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

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[1] "DE" refers to the Docket Entry for No. 9:11-CR-80205; the page number follows the colon. "GX" refers to the government's trial exhibits.

STATEMENT OF THE ISSUES

1. Whether this Court erred during Stein's initial appeal in determining that certain trial testimony and prosecutorial statements did not violate his due-process rights.

2. Whether the district court committed reversible error in a forfeiture order that Stein did not challenge during his initial appeal.

3. Whether the district court clearly erred in quantifying the loss attributable to Stein's fraud when recalculating his advisory Sentencing Guidelines range and restitution amount on remand.

STATEMENT OF THE CASE

I. Procedural History

In December 2011, Stein was charged with one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1349; three counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2; three counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2; three counts of securities fraud, in violation of 18 U.S.C. §§ 1348 and 2; three counts of money laundering, in violation of 18 U.S.C. §§ 1957 and 2; and one count of conspiracy to obstruct justice, in violation of 18 U.S.C. § 371. DE.3. In May 2013, a jury convicted Stein on all counts. DE.209, 212. Stein filed a series of post-trial motions claiming that the government had committed numerous discovery violations and engaged in prosecutorial misconduct by making false statements to the court and the jury. See DE.260, 264, 279-81, 312-13, 355. The court denied the motions, DE.340, 388, and sentenced Stein to 204 months' imprisonment and two

years' supervised release. DE.407. The court also ordered Stein to forfeit $5,378,581.61, DE.400, and pay restitution of $13,186,025.85, DE.461.

Stein appealed his judgment of conviction and sentence. DE.416. He reasserted many of the purported constitutional violations alleged in his post-trial motions, including that the government knowingly used false testimony to secure his conviction and withheld exculpatory and impeachment evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972). Stein also challenged his sentence and restitution, arguing, *inter alia*, that the government had not established causation and reliance with respect to the $13.2 million in losses identified by the district court. He did not raise any objection to the forfeiture order.

While his appeal was pending, Stein filed a new-trial motion in the district court "to preserve the record regarding new developments in the case … that reveal additional evidence of prosecutorial misconduct and related violations of law." DE.479:1-2. He later supplemented this motion twice. DE.490:2; DE.529:5.

In a published decision, this Court affirmed Stein's convictions but vacated the sentence and restitution order and remanded. *United States* v. *Stein*, 846 F.3d 1135 (11th Cir. 2017) (*Stein I*). The Court concluded that Stein had "failed to identify … any materially false testimony" that would undermine his convictions. *Id.* at 1140. However, the Court vacated his sentence after identifying two reversible errors in the district court's loss calculation: first, that "the circumstantial evidence in the record [was] far too limited to support a finding that 2,415 investors relied on the fraudulent

information" Stein provided, *id.* at 1154; and second, that "[t]he district court failed to consider" whether "Signalife stock value declined in part because of" factors independent of Stein's fraud, namely "the short selling of over 22 million shares of Signalife stock and the across-the-board stock market decline of 2008," *id.* at 1155-56.

Stein petitioned for a writ of certiorari from the Supreme Court, 2017 WL 3575743 (Aug. 14, 2017), contending that this Court "accepted that the government knowingly used false, material testimony to convict" him and that the Due Process Clause does not "excuse[] the government's knowing use of false testimony where the government does not also suppress evidence indicating that the testimony was false," *id.* at *i. The Supreme Court denied his petition. 138 S.Ct. 556 (2017).

On remand, the parties filed new sentencing memoranda and expert reports. DE.532, 533. The district court held a two-day sentencing hearing, during which the government called four witnesses and Stein called one. DE.551:254; 552:123. The court found a loss of $1,029,570 to 616 victims, DE.561:1-2, and imposed a revised sentence of 150 months' imprisonment, three years' supervised release, and $1,029,570 in restitution. DE.564.

The same day it issued the sentencing order, the district court denied the new-trial motion that Stein had filed while his case was first on appeal to this Court. DE.562. The court likewise denied Stein's motion to vacate the forfeiture order, reasoning that it could not "deviate from the appellate mandate" because Stein "did not challenge the forfeiture on appeal." DE.561:2. This appeal followed.

II. Statement of Facts

For years, Stein treated Signalife, a publicly traded medical-device company, as his personal slush fund. He routinely caused Signalife to make fraudulent payments based on sham consulting agreements and issue stock to co-conspirators so they could funnel the proceeds back to him. While stealing millions of dollars from the company, Stein engaged in a scheme to artificially inflate the price of Signalife stock and otherwise prop up the failing venture by creating the false impression of sales activity.

A. Stein's Relationship with Signalife

Signalife was a South Carolina corporation that sold electronic heart monitors, including a supposedly state-of-the-art device called the Fidelity 100. As a publicly traded company, Signalife was required to file annual (10-K) and quarterly (10-Q) reports with the SEC. DE.240:51-52.

Stein served as legal counsel for Signalife. DE.240:84; see DE.240:54 (Stein was the "de facto general counsel"). His ex-wife was a significant minority shareholder of Signalife stock through her ownership of ARC Finance Group ("ARC"). Although Stein was not an executive officer, he exerted significant control over the company. DE.240:148. For example, all major legal matters under the purview of Signalife's securities attorney, John Woodbury, went through Stein. DE.240:54, 191.

B. Stein's Theft from Signalife

Stein exploited that control for his own unjust enrichment. Between 2005 and 2008, Stein used at least two associates—Martin Carter and Ajay Anand—to steal millions of dollars from Signalife through sham contracts and baseless stock issuances.

1. Martin Carter

Carter was a Florida handyman who met Stein in October 2005, when he installed a generator at Stein's home. DE.244:12. Stein told Carter that he had a heart-monitor company and asked whether Carter would be interested in helping with cables. DE.244:13. Carter was neither a licensed electrician nor an engineer. DE.244:12-14. Nevertheless, Stein promised Carter that he "was going to make more money than [he had ever] made before." DE.244:14. For about $300 cash each day, Stein hired Carter to be his driver, DE.244:16-18, and occasional bodyguard, DE.244:34.

On January 20, 2008, Carter signed a consulting agreement with Signalife at Stein's home on behalf of Electrical Connections, a company that Stein told him to establish. DE.244:61-69; GX.96. Under the agreement, Carter would be paid $700,000 to consult on cables for heart-monitoring technologies; the development of a new Fidelity heart module; and Signalife's manufacturing facilities and processes. DE.240:135-136; DE.244:62-64; GX.96:9-10. Carter—who lacked any specialized knowledge or experience in electrical engineering or medical devices—never performed any of these functions or did any work whatsoever for Signalife. DE.244:63-70.

Nevertheless, Stein told him to create a series of invoices that falsely represented that he had developed cables for the company. DE.244:69-71; GX.31. After Carter gave the invoices to Stein, Carter began receiving payment from Signalife in cash and stock. DE.244:72-73. Stein told Signalife employees that the company was issuing so many shares to Carter because he was working on the company's crucial next product, the Fidelity 1000. DE.241:47-49. Carter deposited the certificates in a brokerage account that Stein told him to open. DE.244:73-75, 84.

In addition to the stock issuances, Signalife repeatedly wired cash to Carter, including $486,000 in the two months after a November 2007 email from the company's CFO advising that Signalife's cash balance was unhealthy. DE.244:96-97; DE.246:27-28, 33; GX.84. After receiving the wires, Carter sent most of the money to Stein, "wherever he directed [Carter] to send it to." DE.244:97. For example, Stein sent Carter an email on November 12, 2007, informing him that Signalife was sending a wire for $105,300 to Carter's M&C Electrical Services account at Wachovia Bank. At Stein's request, Carter kept $1,000 and wired the rest to Stein's broker. DE.244:39-40.

The same pattern held with respect to proceeds from the stock issuances. In 2008, Carter received more than six million shares of Signalife stock valued at $1,473,900. DE.245:187; GX.263. Stein often directed Carter to sell shares in Carter's brokerage account and transfer the proceeds to Stein. DE.244:80, 84-85; DE.246:13-19; GX.255 (Carter sold shares valued at $36,387 and transferred $34,000 to Stein); GX.256 (Carter sold shares valued at $115,820 and transferred $105,000 to

Stein). Although this activity struck Carter as suspicious—particularly since Stein directed Carter "not to say anything to anybody" about it—Carter testified that "whatever [Stein] would tell me to do, I followed him." DE.244:87-88.

2. **Ajay Anand**

During this same timeframe, Stein also used Anand, whom he knew from a "prior deal" involving another medical "company that was investigated," DE.242:166, to misappropriate Signalife's assets. Because "people got in trouble" during their last joint undertaking, Stein "didn't want [Anand's] name associated" with Signalife. DE.242:166. Instead, much as he had directed Carter to create a Potemkin consulting business, Stein had Anand establish an entity called "The Silve Group" ostensibly to promote international sales of the Fidelity 100. DE.242:181-182.

In late 2005, Anand reached out to prospective customers in India for Signalife, receiving as compensation a million shares that he later sold for a $70,000 profit. DE.242:173-174. In January 2007, Anand used the alias "Sameer Gulati" to enter into an international-sales-representation agreement with Signalife on behalf of The Silve Group. DE.242:159-160, 182; GX.43. Stein negotiated the agreement and controlled The Silve Group's relationship with Signalife. DE.242:183-185, 217.

In total, Anand sold one Fidelity 100 unit. DE.242:189. Nevertheless, between January and March 2007, Stein ordered the transfer of more than one million shares to The Silve Group, which Anand then sold. DE.241:43-46; DE.242:188-189. When the shares were issued, Stein asked Anand "to take care of him," which meant to "pay

[Stein] in cash, or … make transfers or checks, things of the nature." DE.242:189-193; DE.243:71 (payment was a "[k]ickback … [f]or the sweet deal I got from Mr. Stein."); *e.g.*, GX.50 ($8,400 wire transfer from The Silve Group to Stein); GX.59 ($28,500 from The Silve Group to Stein). Stein told Anand to keep transfers and withdrawals under $10,000 to avoid suspicion. DE.242:196.

Overall, Stein received $1,823,283 from Carter (from cash Carter received from Signalife and from Carter's sale of stock) and $478,600 from Anand and The Silve Group, in addition to substantial sums that Stein received directly from Signalife. DE.246:9-13, 24-26; GX.258-259.

C. Stein's Attempts to Fraudulently Prop Up Signalife

As Stein was depleting its coffers of millions of dollars through self-dealing transactions and sham consulting agreements, Signalife's financial position grew increasingly precarious. The company had not achieved significant market penetration for its Fidelity 100 heart monitor; its pricey international-sales-representation agreement with Anand was a bust; and Carter had yet to hone his chauffeuring skills into a technological breakthrough in the form of the Fidelity 1000. But exposing the weak demand for Signalife's product would threaten the flow of capital to the company and, by extension, to Stein's pockets. Stein's solution was to lie to investors.

1. The False Press Releases

Stein drafted Signalife's press releases about sales and marketing, and Woodbury ensured that they were publicly disseminated. DE.240:56-57, 150.

On September 20, 2007, Stein sent a press release to Woodbury that he asserted was "a fact" and backed up by a purchase order. He asked Woodbury to make sure "it is released before market opens." DE.240:59-60; GX.68. The release announced that Signalife had sold $1.98 million of Fidelity 100 units "in its initial sales push being led by new management" and that Signalife "anticipate[d] additional sales resulting from its current efforts." GX.68. Because Woodbury believed that Stein was involved in sales efforts with Signalife's new CEO, Lowell Harmison, he had no reason to question the legitimacy of the representations. DE.240:62-63.

On September 24, 2007, Stein emailed another press release to Woodbury that announced "Signalife Receives Another $3.3 Million Sales Orders" for Fidelity 100 units. DE.240:64-66; GX.71. Woodbury believed that Stein was actively involved in negotiating sales orders and did not ask for supporting documentation. DE.240:66-67. Woodbury issued the release the next day. DE.240:67-68, 219; GX.72.

On October 9, 2007, at 11:04 p.m., Stein sent a third press release to Woodbury, instructing that it "[m]ust be out before market opens." DE.240:68-69; GX.75. The release announced that Signalife had "received additional sales orders in excess of half million dollars ($551,500 to be exact)" and that "the company anticipate[d] achieving break[-]even by the end of January, 2008." DE.240:70; GX.75. As with the earlier releases, Woodbury "had no reason to doubt that this was not real," and he issued the release to the public on October 10. DE.240:70-72; GX.76.

The $5 million in purchase orders was a "huge deal" for Signalife. DE.240:97. As Woodbury noted, "[a]ll of a sudden they had over $5 million in sales. This goes out to the public. This company goes from an R&D company to all of a sudden a big revenue[-]generating company. It's huge." *Ibid.*; see also DE.241:132 (Former CFO Kevin Pickard: "Signalife had minimal revenue up to this point, so getting purchase orders for $5 million-worth of product was a big deal for the company.").

Woodbury later asked Stein for additional information about the sales orders, and Stein emailed three purchase orders to Woodbury that Stein claimed Harmison was "now fulfilling." DE.240:73-79; GX.78. These included a $1.98-million purchase order dated September 14, 2007, for a company called Cardiac Hospital Management ("CHM"), GX.64; a $3.3-million purchase order dated September 24, 2007, for a company called IT Healthcare, GX.70; and a second purchase order for IT Healthcare for $564,000, dated October 4, 2007, GX.74. The orders did not specify addresses for the companies but indicated that the information was "on file."

2. The False SEC Reports

Signalife's second quarterly report for 2007 was due to be filed with the SEC shortly after Stein sent the purchase orders to Woodbury. When Woodbury described the three orders "from hospital/medical group[s]" in the report, he used the same language that Stein had earlier approved for a disclosure to the American Stock Exchange about them. DE.240:89-96. Woodbury also used identical language for all subsequent annual and interim SEC reports because it "had been approved and vetted

through Mr. Stein." DE.240:92. While preparing the reports, Woodbury communicated with Stein about items like contracts and share issuances, and he circulated the drafts to Stein, who normally commented on them; Stein "was always in the loop" and was "intimately involved in the whole process." DE.240:111-114.

D. Stein's Efforts to Cover His Tracks

1. Using Carter

In December 2007, Stein emailed Carter a template for change-of-address letters for delivery of Fidelity 100 units to Israel and Japan. DE.244:52-53; GX.89. At Stein's direction, Carter fabricated two letters addressed to Harmison, one dated January 7, 2008, from "Yossie H. Keret" at IT Healthcare, changing its address for "product delivery" to Netanya, Israel; and the other dated December 31, 2007, from "Toni Nonoy" at CHM, changing its address to Tokyo, Japan. DE.244:56-59, 111; GX.94. Carter gave the completed letters to Stein, and Stein forwarded them to Harmison.

In March 2008, when Woodbury was preparing Signalife's 10-K for 2007, he needed to confirm the continued validity of the several-months-old purchase orders. DE.240:100-101. Woodbury drafted confirmation letters, and Stein provided Woodbury with the names "Tony Nony," the purported purchasing agent for CHM, and "Yossi Keret," the purported manager for IT Healthcare, along with their alleged fax numbers—which had, in fact, been fabricated by Carter at Stein's request. DE.240:101-107. Stein then gave Carter confirmation letters allegedly signed by "Nony" and "Keret" and directed Carter to fax them to Woodbury. DE.240:104;

DE.244:99-110; GX.129-130, 293. After he received the letters, Woodbury included the information about the purchase orders in Signalife's annual report. DE.240:106.

In June 2008, Stein instructed Carter to create a letter purportedly from "Yossie Keret" at IT Healthcare to Woodbury canceling IT's purchase order because "it is obvious that Signalife is going to be unable to place our order" as a result of "delays." After Woodbury received the letter, Stein assured him that he would follow up and see if he could resuscitate the transaction. DE.240:125-127.

Later that summer, Stein asked Carter to go to Japan and mail a letter back to the United States. DE.244:113-114. Stein gave Carter a Ziploc bag containing a letter and instructed Carter to wear gloves when he mailed it "so [he] left no fingerprints." DE.244:114. Stein did not explain what the letter contained but "just told [Carter] he wanted [him] to go to Japan and mail [it] back." DE.244:114. Carter flew to Japan, put on a glove, mailed the letter from a post office, and flew back home. DE.244:115.

2. **Using Anand**

During the summer of 2007, Stein showed Anand two purchase orders purportedly from IT Healthcare and asked Anand to travel to Texas and submit the orders on behalf of The Silve Group. DE.242:196, 199; GX.70. The Silve Group had nothing to do with any entity called IT Healthcare, and when Anand asked if the purchase orders were real, Stein responded that it "doesn't matter if it's real or not." DE.242:199-200. Anand declined to do as Stein asked. DE.242:200.

Despite refusing Stein's request, Anand later learned that Signalife's third-quarter-2007 10-Q falsely attributed purchases by IT Healthcare and other prospective sales to The Silve Group. DE.242:200-203, 210; GX.73:16. In early 2008, Stein called Anand and said he had a way for Anand "to get out of these phony sales." DE.242:213. Stein told Anand to create an email address, use the name "Yossi Keret," and send a letter to Signalife stating that IT Healthcare had moved to Israel. DE.242:213-214. Anand complied and sent a change-of-address letter to Stein and Harmison, which was similar to one that Carter had created. DE.242:213-214; GX.94.

Several months later, Stein asked Anand to write a letter canceling IT Healthcare's orders. Anand drafted a letter similar to the one Carter had faxed to Woodbury and sent it to Stein and Harmison. DE.242:215-216; GX.151.

3. **Lying to the SEC**

In 2009, the SEC began investigating Signalife. GX.216:4. Stein falsely testified that, *inter alia*, he was not familiar with CHM and IT Healthcare, GX.217:22, 32-33; he never had direct communications with The Silve Group and did not know who owned it, GX.217:25, 27; he did not know who Tony Nony was, GX.219:14; he did not know who Yossi Keret was, GX.217:43; GX.219:27; he had "never really been involved in public filings" with the SEC, GX.219:23; and he did not receive money from Signalife, GX.216:119.

E. The Criminal Case

In December 2011, a federal grand jury returned a fourteen-count indictment against Stein relating to his fraudulent activities as Signalife's legal counsel. DE.3.

Stein represented himself in the two-week trial that followed. Among the government witnesses were Carter and Anand, who described the efforts they undertook at Stein's behest to make the CHM and IT Healthcare purchase orders appear legitimate and to misappropriate company assets and funnel the proceeds back to Stein. Woodbury also took the stand and stated, *inter alia*, that when he was preparing Signalife's interim SEC report for the nine months ending September 30, 2007, "[he] got all [his] information [about the CHM and IT Healthcare purchase orders] from Mr. Stein." DE.240:96. Tracy Jones, the assistant to Signalife's CEO, testified that she considered the CHM and IT Healthcare orders to be "phantom purchase orders because [she] never received any backup or anything on them." DE.241:117.

Near the end of trial, Stein sought to introduce an October 24, 2007 email from Signalife board member Norma Provencio to Woodbury, DE.264-3, and a copy of a check attached to that email, DE.264-4. The email's subject was "[Fwd: Emailing: Tribou payment]"; its text identified the attachment as "the $50K deposit on the 9-14 purchase order," and reflected that the check had been forwarded to Provencio from Jones under the file name "Tribou payment." The check was made out to Signalife in the amount of $50,000 from the account of Delores and Thomas Tribou, and the memo section included the September 14 purchase order number and the notation "Tribou &

Assoc." DE.246-4. Neither the email nor the check mentioned "CHM" or "Cardiac Hospital Management."

While the government agreed that Tribou had made a payment to Signalife, it objected to the admission of the documents because they were hearsay and it was unclear who wrote the purchase order number on the check. DE.247:18, 42. The government contended that, based on interview memoranda in Stein's possession, Tribou would testify that he had signed a blank purchase order at Stein's urging but that he had no connection to CHM, the entity reflected on the ultimate order. DE.247:40-41. The government suggested that Stein bring in Tribou or Provencio to lay a proper foundation for admission, DE.247:6, and it offered to arrange travel for Tribou to testify, DE.247:51-52, but Stein declined, DE.247:52. Instead, the prosecutors telephoned Tribou and advised the court that Tribou "doesn't deny having made a $50,000 payment," but was "skeptical that that could be his handwriting with this [purchase order] number" and "indicated … he's not familiar with" an entity called Tribou & Associates. DE.247:54-57. At the court's suggestion, DE.247:48-50, the parties stipulated that "[o]n or about September 27, 2007, an individual named Thomas Tribou paid Signalife $50,000 for goods he expected to receive," DE.247:71. Stein called no witnesses about the check or email.

At closing, Stein argued, based on the stipulation, that the CHM purchase order was non-fraudulent. DE.248:107-108. In rebuttal, the government maintained that the CHM order was "fake"; pointed out that "CHM," an entity apparently unknown to

Tribou, was listed as the purchaser of the Fidelity 100 units; and noted that Tribou's contracts with Signalife never mentioned CHM. DE.248:114-17. The government also cited Stein's SEC testimony, where he had denied knowledge of a connection between Tribou and CHM. DE.248:117-18.

The jury convicted Stein on all counts. DE.212.

SUMMARY OF ARGUMENT

There are a few things that a defendant cannot do the second time his conviction is up on appeal. First, absent material new evidence or an intervening development in the law, he cannot relitigate a claim that has already been rejected by this Court. Second, he cannot raise for the first time a claim that was ripe but unraised at the time of his last appeal. In fact, following the limited remand, the only questions before this Court pertain to the district court's imposition of a new sentence.

1. Nevertheless, Stein again asks (Br. 1) this Court to reverse his convictions on the ground that the "government knowingly relied on false testimony to convict." Because this Court already considered and rejected the same argument in Stein's 2015 appeal, it is foreclosed on this go-around. In any event, Stein's argument is meritless for the same reasons that this Court denied relief two years ago: the government did not rely on material false testimony, and Stein possessed the necessary evidence to rebut any inconsistencies at trial.

2. Stein also asks—for the first time—that this Court vacate the district court's forfeiture order, which had been entered before he filed his 2015 appeal.

Because he did not raise any timely objection in the district court or in his earlier appeal, that challenge is waived. Regardless, the forfeiture order does not conflict with *Honeycutt* v. *United States*, 137 S.Ct. 1626 (2017).

3. Finally, Stein challenges the district court's recalculation of the loss attributable to his conduct. Unlike the other two issues presented for review, the entry of a new sentence at least places this question squarely before this Court. But Stein's argument is meritless because the record demonstrates that the district court remedied both the reliance and causation errors that this Court identified.

ARGUMENT

I. As This Court Concluded in 2017, No Due-Process Violation Occurred Below.

Stein argues (Br. 23-37) that this Court erred in affirming his conviction two years ago by rejecting his contention that "the government's knowing use of false evidence violated due process." His attempt to reopen that decided question is foreclosed by the mandate rule and the law-of-the-case doctrine, and he has not established that an exception applies here. In any event, this Court's prior determination that no material false testimony violated Stein's due-process rights remains legally sound and factually correct.

A. Standard of Review

Whether a due-process violation occurred is typically reviewed *de novo*. *Ali* v. *U.S. Att'y Gen.*, 443 F.3d 804, 808 (11th Cir. 2006). Accordingly, in *Stein I*, this Court

applied *de novo* review to Stein's due-process claim. 846 F.3d at 1145. However, when the court of appeals has already reviewed a claim and rejected it on the merits, the defendant must make a heightened showing to evade preclusion under the law-of-the-case doctrine—in this case, see *infra*, demonstrating that the earlier decision was '"clearly erroneous and would work manifest injustice."' *Lebron* v. *Sec'y of Fla. Dep't of Children & Families*, 772 F.3d 1352, 1360 (11th Cir. 2014) (citation omitted).

When challenged on appeal, the denial of a new-trial motion is reviewed for abuse of discretion. *United States* v. *Perez-Oliveros*, 479 F.3d 779, 782 (11th Cir. 2007).

B. Background

In *Stein I*, this Court concluded that Stein had "failed to identify … any materially false testimony on which the government relied, purportedly in violation of *Giglio*." 846 F.3d at 1140. This Court discussed two "categories of statements [Stein] contend[ed] were false": "(1) statements the prosecutor made to the court and during his closing argument regarding Thomas Tribou and (2) testimony of Ms. Jones and Mr. Woodbury about the bogus purchase orders." *Id.* at 1148. Stein's assertion of falsity was premised on the $50,000 check from Tribou, which had been forwarded from Jones to Provencio to Woodbury. *Ibid.*

This Court rejected Stein's contention that the prosecutor lied when he "told the jury that the CHM purchase order was 'all made up' and 'fake.'" 846 F.3d at 1149. The Court explained that, even if Tribou's signature appeared on the order and he paid Signalife $50,000, "[t]he fact that Mr. Stein obtained Mr. Tribou's signature and check

does not rule out the possibility that he also fabricated the purchase order." *Ibid.* "Indeed," this Court observed, "the government made th[e] argument … that regardless of any signatures Mr. Stein obtained, the purchase orders were fake." *Id.* at 1150. And "the record contained overwhelming evidence that Mr. Stein fabricated supporting documentation for the purchase orders and used arbitrary names for companies and individuals supposedly purchasing Signalife products." *Ibid.*

This Court also rejected Stein's contention that the prosecutor had lied to the district court during the discussion of the email and check. 846 F.3d at 1148-50. The prosecutor told the court that, if Tribou were called to testify, he would state that he "never received any product and was not a Signalife reseller." *Id.* at 1148. That statement, this Court explained, was not false because Tribou's SEC testimony "in no way indicates [that Tribou] would have testified that he actually received Signalife products" or that he "considered himself a Signalife reseller." *Id.* at 1149. As this Court observed, and Stein did not dispute, the government advised the district court that "Tribou likely would testify that he had no connection with CHM and that he agreed to Mr. Stein's request to sign a blank purchase order." *Id.* at 1148 n.11. This Court likewise concluded that the prosecutor did not lie when he advised the court that Tribou claimed to be "unfamiliar with Tribou & Associates." *Id.* at 1149. Although Tribou had elsewhere stated that he was familiar with the name, the Court explained that "a prior statement that is merely inconsistent with a government witness's testimony is insufficient to establish prosecutorial misconduct." *Ibid.* (citation omitted). This Court

also deemed the statement immaterial, observing that the district court had ruled the email and check inadmissible before the prosecutor's statement. *Ibid.*

Finally, this Court addressed Stein's claims that Jones "lied when she characterized the three purchase orders as 'phantom purchase orders' simply because she lacked supporting documentation" and that Woodbury "lied when he said he got all his information about the purchase orders from Mr. Stein." 846 F.3d at 1150. Stein contended that those statements were untrue because both Jones and Woodbury had received the Provencio email attaching the Tribou check. *Ibid.* This Court concluded that this "allegedly false testimony" did not violate *Giglio* because "the record show[ed] that Mr. Stein located the email and the check before trial and even produced them to the government" and because the prosecutor had not "capitalized" on the challenged testimony during the trial. *Ibid.*

After remand, the district court denied the Rule 33 motion that Stein had filed during the pendency of his first appeal. In that motion and its two supplements, Stein contended that a new trial was warranted in light of "new developments" that buttressed his false-testimony claim, including (1) purported contradictions between the government's theory at trial and positions taken in its appellate brief, DE.479:7-13; (2) the government's statement at oral argument that, while the prosecutor "did not recall the check" at the time, the Tribou check had been within the government's files during trial, DE.490:2; and (3) a declaration from Thomas Tribou (the "Tribou Declaration")

that, *inter alia*, his wife signed the check and wrote the purchase order number in the memo section, DE.529-1.

C. Discussion

As a threshold matter, Stein's successive challenge to his convictions is not properly before this Court. Because this Court already considered and rejected his due-process arguments during his initial appeal, that claim was outside the scope of the mandate on remand for resentencing. See *Cambridge Univ. Press* v. *Albert*, 906 F.3d 1290, 1299 (11th Cir. 2018) ("[W]hen acting under an appellate court's mandate, [the district court] cannot vary it … or give any other or further relief" (citation omitted)). The only procedural mechanism under which Stein could further litigate his due-process claim was by asserting "newly discovered evidence" in a new-trial motion. Fed. R. Crim. P. 33. He tried that, DE.479, and lost, DE.562, and nowhere in his brief to this Court does he assert that the district court abused its discretion in denying that motion.[2] He has thus waived the claim. See *United States* v. *Levy*, 379 F.3d 1241, 1242 (11th Cir. 2004).

Instead—at least when he is not pretending as if this Court's previous decision never happened[3]—Stein attacks legal and factual conclusions that this Court reached or affirmed two years ago. See, *e.g.*, Br. 24-25. But *Stein I* established the law of the case

[2] Regardless, the purported "new evidence" was immaterial. See pp. 27-30, *infra*.

[3] See, *e.g.*, Br. 19 ("This Court reviews *de novo* alleged constitutional due process violations." (citation omitted)).

with respect to those questions, and Stein cannot show that any exception to that doctrine permits this successive appeal of his correctly affirmed convictions.

1. The Law-of-the-Case Doctrine Bars Relitigation of Stein's Due-Process Claim.

Stein's contention (Br. 24) that "the government's knowing use of false evidence violated due process" is precisely the same argument he raised in his prior appeal. See Stein 2015 Br. 24 ("[A] due process violation occurs where the prosecutor knew or should have known the evidence was false."). What he characterizes as false statements are the same testimony he challenged in his prior appeal. Compare Br. 23 ("Jones testified that the IT and Cardiac Healthcare orders were fake 'because [she] never received any backup or anything on them.'"); *ibid.* ("Similarly, the government introduced testimony from Woodbury that he 'got all [his] information from Mr. Stein.'"), with Stein 2015 Br. 31 ("[T]he prosecutors presented the testimony of Tracy Jones and John Woodbury in arguing that all information about the three purchase orders came through Stein and there was no back-up for them."). He offers no reason that *Stein II* should reopen issues settled by *Stein I*.

a. This Court's Judgment Affirming Stein's Convictions Established the Law of the Case.

Fundamentally, "[t]he doctrine of the law of the case 'preclude[s] courts from revisiting issues that were [already] decided.'" *Cambridge Univ. Press*, 906 F.3d at 1299 (citation omitted). In practice, this means that "'findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same

case in the trial court or on a later appeal.'" *Transamerica Leasing, Inc.* v. *Inst. of London Underwriters*, 430 F.3d 1326, 1331 (11th Cir. 2005) (citation omitted). Under the doctrine, issues are "decided" when a judgment is entered on appeal, and they remain "decided" until and unless that judgment is later vacated by the panel that entered it, the court of appeals sitting *en banc*, or the Supreme Court on a writ of certiorari. See, *e.g.*, *Johnson* v. *Bd. of Educ. of City of Chicago*, 457 U.S. 52, 53-54 (1982).

Stein contends that "the law of the case doctrine 'applies only where there has been a final judgment,'" and argues (Br. 25 n.2) that, "[b]ecause [his] motion for a new trial … was pending when this Court last considered this case, and because this Court has jurisdiction here, the Court can revise its prior decision based on Stein's new evidence." But Stein ignores the fact that there *has* been a final judgment as to his convictions: the district court entered a judgment of conviction in 2014, DE.407, and this Court affirmed that conviction in 2017, 846 F.3d at 1140.

That, between those two moments, Stein filed a motion, DE.479, in a court that lacked jurisdiction to overturn his convictions at that time has no bearing on whether this Court established the law of the case with respect to his due-process claim. See 11 Fed. Prac. & Proc. Civ. § 2821 (3d ed.) ("[I]f a notice of appeal is given, the subsequent filing of a motion for a new trial, even if otherwise timely, is ineffective because jurisdiction of the case is no longer in the district court."); cf. DE.483:3 (Rule 33 "precludes the Court from granting a motion for a new trial while a defendant's appeal is pending."). To hold otherwise would turn the traditional jurisdictional division-of-

labor between the district and appellate courts on its head by divesting this Court of authority to enter a "final judgment" whenever the defendant has, during the pendency of his appeal, moved the district court for a new trial that it lacked jurisdiction to grant. That argument runs headlong into Stein's acknowledgment in 2015 that "[t]his Court ha[d] jurisdiction over the direct appeal" because a "final decision[] and sentence[] of [the] United States district court[]" had issued. Stein 2015 Br. xvii.

The final judgment requirement is an offshoot of the "final judgment rule," which "prohibits appellate review of a pretrial order in a criminal case 'until conviction and imposition of sentence.'" See *United States* v. *Shalhoub*, 855 F.3d 1255, 1260 (11th Cir. 2017) (citation omitted). This is the sense in which Stein's only cited authority—*Vintilla* v. *United States*, 931 F.2d 1444 (11th Cir. 1991)—uses the term. There, the defendants "argue[d] that the district court's initial denial of the government's motion to dismiss the case amount[ed] to an assumption of jurisdiction" that precluded the court's later determination, at the summary-judgment stage, that it lacked jurisdiction. *Id.* at 1447. This Court held otherwise: because the case remained at all times "within the jurisdiction of the district court" and "the district court's denial of the government's initial motion to dismiss was not a final judgment," the district court was free to "reconsider" its prior ruling without contravening the law of the case. *Ibid.*[4] Here, by

[4] This Court's decisions citing *Vintilla* have likewise concerned interlocutory orders of the district court, not the conclusive effect of appellate decisions. See, *e.g.*,

contrast, Stein's due-process claim has been heard and decided on the merits by two courts, and jurisdiction has thrice changed hands since this Court last rejected his argument—first to the Supreme Court following Stein's filing of a petition for certiorari[5]; then, following denial of that petition, back to the district court on this Court's remand for resentencing; and finally, once again to this Court following Stein's second notice of appeal. The window for reconsidering Stein's due-process claim closed with this Court's affirmance of his conviction two years ago.

b. No Exception to the Law-of-the-Case Doctrine Applies.

This Court's "precedent recognizes three exceptions to the law of the case doctrine: 'when (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue,

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Alsobrook v. *Alvarado*, 656 F.App'x 489, 493 n.3 (11th Cir. 2016); *Mathis* v. *United States*, 609 F.App'x 990, 993 (11th Cir. 2015).

[5] Stein implies that a position the government took in opposition to certiorari supports his contention that the law of the case was not established when this Court affirmed his conviction. Br. 25 n.2 (citing Gov't Cert. Opp. 24). He is mistaken. The government primarily argued that this Court "correctly rejected [Stein's] false-testimony claim." See Gov't Cert. Opp. 13-23. Briefly, the government also suggested that the Supreme Court should decline review until *all* proceedings below had run their course—including "resentencing," any further "questions that may arise on remand," and disposition of Stein's latest motion. *Id.* at 23-24. The government never suggested that the Rule 33 motion was timely, justiciable, or meritorious—only that it had been filed and "remain[ed] pending," along with other proceedings yet to take place. The Supreme Court's preference "to examine cases on a full record" so as "to consider all of the issues raised by a single case or controversy at one time," *id.* at 24, does not prevent this Court from establishing the law of the case as to certain issues (*e.g.*, Stein's convictions) while others (*e.g.*, Stein's sentence and restitution) remain undecided.

or (3) the prior decision was clearly erroneous and would work manifest injustice.'" *Lebron*, 772 F.3d at 1360. Stein does not invoke any development in "controlling authority" that would abrogate this Court's 2017 decision as a matter of law.

Nor does he contend (Br. 25 n.2), in resisting the application of the law-of-the-case doctrine, that the new-evidence exception applies, as there was no "subsequent trial" on remand that could have given rise to "substantially different evidence." Elsewhere in his brief, however, Stein obliquely suggests that "new evidence" supports his contention that the government engaged in knowing deception during his trial. *E.g.*, Br. 13 (asserting "new evidence showing that the government had relied on evidence it knew to be false to secure a conviction" and citing the Tribou Declaration); Br. 23 n.1 (alluding to "additional evidence in the record" and citing the Tribou Declaration). The only purported "new evidence" on which he relies is the one-page Tribou Declaration,[6] DE.529-1, which does not establish knowing, material falsity in the witness testimony or the government's representations.

First, the Tribou Declaration confirms certain representations that were made to the district court following prosecutors' telephone call with Tribou in May 2013. For example, Tribou acknowledges that the purchase order he signed "was blank except for

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[6] Stein does not press the other "new developments" cited in his new-trial motion, see pp. 21-22, *supra*; but for the sake of completeness, both the government's 2015 appellate brief and its statements at oral argument in 2016 were, obviously, before this Court when it rejected Stein's due-process claim in 2017 and thus cannot constitute "substantially different evidence." See, *e.g.*, Stein 2015 Reply 8-11 (discussing the purported "new theory" raised in appellee's brief).

the number of units and the cost," DE.529-1 ¶ 2, and that his "wife, Delores Tribou, prepared a check" and "wrote [the purchase order number] on the check," *id.* ¶¶ 2, 5. Compare DE.247:54-55 (Prosecutor: Tribou was "skeptical that that could be his handwriting with this number"; Stein: "[W]hen he says it's not his handwriting, it's signed by Dolores Tribou, his wife, and she obviously wrote the check because she signed it."). And contrary to Stein's argument below, the Tribou Declaration does not assert that the prosecutors' May 2013 "telephone call never happened," DE.529:4-5; instead, it merely states that Tribou "recall[s] receiving one or more telephone calls from a female government representative" concerning "travel to Florida for [his] testimony," DE.529-1 ¶ 4, which confirms the government's contemporaneous offer to "hav[e] our travel folks put [Tribou's transportation] together," DE.247:54.

In fact, the only aspect of the Tribou Declaration that contradicts a prior representation by the government is Tribou's statement that he "did not ever tell any prosecutor or government agent in a telephone call in May 2013 that I am not familiar with Tribou & Associates." DE.529-1 ¶ 6; compare DE.247:57 ("[The check] furthermore says Tribou & Associates. Mr. Tribou indicated on the phone he's not familiar with what that even is."). Simply put, a non-witness's out-of-court recollection five years after the relevant conversation is not substantial evidence that the government knowingly misrepresented the conversation in its earlier report to the district court. See *Stein I*, 846 F.3d at 1149 ("'[A] prior statement that is merely inconsistent with a government witness's testimony is insufficient to establish prosecutorial misconduct.'"

(citation omitted)). And even if the record plainly showed that Tribou is now speaking truthfully and that his recollection of a brief five-year-old conversation is flawless and that the prosecutor knowingly and deliberately misled the court as to the contents of that conversation at the time, no conceivable harm could have resulted from that purported misstatement. After all, the government informed the court that Tribou "doesn't deny having made a $50,000 payment, and nor do we," DE.247:54, and the parties stipulated as much in front of the jury, DE.247:71.

Importantly, the Tribou Declaration does not challenge the government's theory with respect to the CHM purchase order: that, even though Tribou paid some money to Signalife at the time, the representation that the order arose from "Cardiac Hospital Management"—a legitimate "hospital/medical group purchasing organization," in the words of Signalife's quarterly filing, GX.159:21—was fraudulent. Indeed, Tribou never mentions CHM in his declaration; does not dispute that Stein was the one who filled out the purchase order, including by appending CHM's name; and does not explain, for instance, whether Tribou knew a "Toni Nonoy"/"Tony Nony," CHM's purported purchasing agent, or authorized anyone to send communications on CHM's behalf in that person's name. See pp. 12-13, *supra*. A bare-bones declaration that does not contradict any theory of wrongdoing or material statement to the court is not the kind of "substantially different evidence" that would justify setting aside the law of the case.

Perhaps attuned to the flimsiness of this "new evidence," Stein instead hinges his successive challenge on the catch-all principle that "[t]he law-of-the-case doctrine

… should yield where 'a prior holding … is clearly erroneous and would work a manifest injustice.'" Br. 25 n.2 (citation omitted). Because, as detailed *infra*, this Court's 2017 decision was not erroneous, much less "clearly" so, Stein cannot evade the preclusive effect of that ruling.

2. This Court's 2017 Decision Was Correct.

On the merits, Stein contends (Br. 27) that this Court "mistakenly merged the government's duty under *Brady* to provide exculpatory evidence with its distinct duty under *Napue* [v. *Illinois*, 360 U.S. 264 (1959)] not to knowingly introduce false evidence." For two reasons, this Court's 2017 decision correctly rejected Stein's due-process claims and does not warrant reconsideration.

a. There Was No False Testimony.

Citing *Giglio*, this Court recognized that a prosecutor's knowing use of materially false testimony violates due process. 846 F.3d at 1147. That established prohibition was not violated here because this Court explicitly determined that Stein "failed to identify … any materially false testimony on which the government relied." *Id.* at 1140. The Court's determination plainly encompassed the testimony of Jones and Woodbury, which was the only allegedly false testimony discussed in its opinion. *Id.* at 1150.

Stein contends that because Jones and Woodbury both received the Provencio email with the Tribou check attached, Jones testified falsely when she described the purchase orders as "phantom purchase orders" and stated that she "never received any backup or anything on them," and Woodbury testified falsely when he said that he "got

all [his] information from Stein" in preparing certain SEC filings. Br. 23 (citation and emphasis omitted). Stein cannot demonstrate (Br. 20) that these statements were false, much less "perjured." Indeed, the record supports Jones's characterization of the purchase orders as "phantom purchase orders." With respect to her statement concerning "backup," there is no evidence that she received any supporting documentation for the two IT Healthcare purchase orders. And, given the lack of a clear connection between CHM and Tribou, Jones may not have considered the email and check to be bona fide "backup" for the CHM purchase order.

Similarly, there is no basis for concluding that Woodbury lied when he stated that, in preparing Signalife's third-quarter-2007 10-Q, "[he] got all [his] information from Mr. Stein." There is no evidence that he relied on any other source in preparing that filing. Although he had received the email and check, he may not have thought about them in connection with the filing; even if he did, he may not have viewed them as independent of the information he received directly from Stein. Nor is there any reason to conclude that the *government* should have considered the challenged testimony to be false: the prosecutors were aware that Tribou had denied having any connection with CHM, that Stein had Tribou sign a blank purchase order, and that Tribou doubted he had written the purchase order number on the check. 846 F.3d at 1148-49 & n.11.

In any event, any inaccuracy in the challenged testimony of Jones and Woodbury was not material because acknowledgment that they received the email and check could not have supported a plausible inference that the CHM purchase order was non-

fraudulent. While the email and check show that Tribou made a $50,000 payment to Signalife in exchange for goods Tribou expected to receive, the jury learned that fact through the parties' stipulation. Acknowledgment of receipt of these items by Jones and Woodbury would not have established that CHM existed, that CHM had any connection to Tribou, or that CHM made the purchase purportedly reflected in the purchase order, which is why this Court correctly concluded that the prosecutor did not lie when he called the CHM purchase order "all made up" and "fake" in his closing argument. 846 F.3d at 1149-50.

As the evidence showed and the government emphasized during rebuttal closing, CHM, not Tribou, was listed as the purchaser on the purchase order; Tribou's contracts with Signalife did not even mention CHM; and Stein expressly denied in his SEC testimony knowledge of any connection between CHM and Tribou. See DE.248:117-118. Finally, as this Court correctly determined, the record contains "overwhelming evidence that Mr. Stein fabricated supporting documentation for the purchase orders," including letters requesting address changes and containing "arbitrary names" and made-up addresses, and caused those letters to be sent to Signalife, all in an effort to maintain the false impression that the purchase orders were genuine. 846 F.3d at 1150. There is no reasonable likelihood that the jury would have viewed the CHM purchase order as non-fraudulent based on acknowledgement by Jones and Woodbury that they received the email and check, much less that it would have

concluded that Stein's broader scheme—involving the creation of numerous fictitious documents, addresses, and people—was not fraudulent.

b. Stein Had the Means and Opportunity to Expose Any Inconsistencies in the Trial Testimony.

It is undisputed that Stein possessed the email and check before and during trial but nonetheless failed to challenge or clarify either Jones's or Woodbury's testimony. This Court did not err in concluding that, in addition to the absence of material false testimony, Stein's opportunity and failure to do so foreclosed his due-process claim.

Nothing in *Napue* or its progeny suggests that a defendant is entitled to a new trial where, as here, he had the means and opportunity to challenge purportedly false testimony at the time of its admission but did not object or attempt to impeach or clarify the testimony through cross-examination. Indeed, since *Napue*, the courts of appeals that have addressed the issue have held that, absent certain extenuating circumstances, "'[t]here is no violation of due process resulting from prosecutorial non-disclosure of false testimony if defense counsel is aware of it and fails to object.'" *Stein I*, 846 F.3d at 1147 (citation omitted); see, *e.g.*, *United States* v. *Mangual-Garcia*, 505 F.3d 1, 10-11 (1st Cir. 2007); *United States* v. *Helmsley*, 985 F.2d 1202, 1205-1208 (2d Cir. 1993); *United States* v. *Harris*, 498 F.2d 1164, 1170 (3d Cir. 1974); *United States* v. *Decker*, 543 F.2d 1102, 1105 (5th Cir. 1976); *United States* v. *Iverson*, 648 F.2d 737, 738 (D.C. Cir. 1981). The courts have based that general rule on the settled, common-sense proposition that "'[a] defendant may not sit idly by in the face of obvious error and later take advantage

of a situation which by his inaction he has helped to create.'" *Harris*, 498 F.2d at 1170 (citation omitted).

This rule is consistent with the Supreme Court's observation in *Brady* that *Napue* was an "exten[sion]" of the decision in *Mooney* v. *Holohan*, 294 U.S. 103 (1935), about when "nondisclosure by a prosecutor violates due process." *Brady*, 373 U.S. at 86-87. The underlying principle "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Id.* at 87. Thus, whether a claimed nondisclosure involves the failure to correct false testimony or the suppression of other information, the defendant's entitlement to relief turns on whether, "'in the context of the entire record,'" the result of the proceeding might have been different had the information been disclosed. *Turner* v. *United States*, 137 S.Ct. 1885, 1894 (2017) (citation omitted). Absent aggravating circumstances not present here—such as "witness eva[sion]," *United States* v. *LaPage*, 231 F.3d 488, 492 (9th Cir. 2000), or the court's repetition of the falsehood to the jury, *United States* v. *Foster*, 874 F.2d 491, 495 (8th Cir. 1988)—a defendant like Stein, who possessed all the relevant information but failed to utilize it, cannot later complain that he did not receive a fair trial. Cf. *Briscoe* v. *LaHue*, 460 U.S. 325, 333-34 (1983) ("[T]he truth-finding process is better served if the witness's testimony is submitted to the crucible of the judicial process so that the factfinder may consider it[] after cross-examination.").

II. Stein Failed to Challenge His Forfeiture Order in 2015 and Cannot Demonstrate Error Now.

A. Standard of Review

This Court generally "'review[s] *de novo* the district court's legal conclusions regarding forfeiture and the court's findings of fact for clear error.'" *United States* v. *Elbeblawy*, 899 F.3d 925, 933 (11th Cir. 2018) (citation omitted). An objection to forfeiture not timely raised below is reviewed for plain error. *United States* v. *Sosa*, 782 F.3d 630, 637 (11th Cir. 2015). And where the defendant "failed to pursue the issue of forfeiture on first appeal to this Court, [he] has waived [his] right" and is "barred from challenging the forfeiture order." *United States* v. *Guerra*, 307 F.App'x 283, 286 (11th Cir. 2009); cf. *Watkins* v. *Elmore*, 745 F.App'x 100, 103 (11th Cir. 2018) ("'[C]laim preclusion bars relitigation not only of claims raised but also claims that could have been raised.'" (citation omitted)).

B. Background

Prior to Stein's initial sentencing, the government moved for a preliminary order of forfeiture in the amount of $5,378,581.61, which represented $3,222,581.61 that Stein received directly from the scheme and $2,156,000 that Carter received, of which Carter remitted at least 85% percent—$1,823,283—to Stein. DE.525:2.[7] At the initial sentencing, the court ordered a money judgment of $5,378,581.61. Stein appealed his convictions and sentence but did not challenge the forfeiture order.

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[7] Thus, Stein personally received $5,045,864.61 from his wrongdoing.

Nonetheless, on remand, Stein asked the court to vacate forfeiture on two grounds: (1) the government did not establish that his ill-gotten gains were "traceable to" his offenses of conviction; and (2) under the Supreme Court's decision in *Honeycutt*, *supra*, the forfeiture of funds retained by Stein's co-conspirator was erroneous. DE.524. Because forfeiture fell outside the mandate on remand, the district court denied Stein's motion. DE.561:2.

C. Discussion

Stein reiterates both objections (Br. 50-56) he raised during the limited remand.

His first argument is both meritless and foreclosed. Although Stein summarily argued in 2013 "that the Government failed to establish the requisite nexus between the funds and the crime," DE.262:3, the government forcefully rebutted that contention below, demonstrating, item-by-item, that all of the forfeited funds had a but-for connection to his criminal scheme. DE.289:4-9. On the basis of "the evidence adduced at trial and the record," the district court "determined that $5,378,581.61 was derived from or involved in the offenses" of conviction. DE.400:1. Then, as Stein acknowledges (Br. 48), "[i]n his prior appeal, [he] did not object to the forfeiture order." He does not assert that he was unable to challenge traceability in his initial appeal. Consequently, he is barred from doing so now. See *Shurick* v. *Boeing Co.*, 623 F.3d 1114, 1118 (11th Cir. 2010) ("[F]or res judicata purposes, claims that could have been brought are claims in existence at the time the original [action] [was] filed.").

Stein's second argument is likewise both waived and incorrect. Stein not only failed to challenge the forfeiture order on appeal but also never raised any objection regarding joint and several liability for co-conspirators (the issue addressed in *Honeycutt*) before the district court prior to that appeal—despite the fact that no Circuit authority addressed the issue in the context of the forfeiture provisions invoked here, and there was at the time a Circuit split on the question, see *United States* v. *Pickel*, 863 F.3d 1240, 1260 (10th Cir. 2017). When he finally raised the issue on limited remand, the district court correctly declined to exceed the scope of its mandate. DE.561:2. Contrary to Stein's contention (Br. 48), the entry of an amended judgment that did not disturb the earlier forfeiture order does not vitiate application of the mandate rule and the preclusive effect thereof. See *United States* v. *Teel*, 691 F.3d 578, 584 n.6 (5th Cir. 2012) ("Even if the mandate rule did not foreclose Appellants' arguments, we need not address them here because they were never raised at trial or in the initial appeal."). As multiple courts of appeals have held over the last year, a defendant's belated invocation of *Honeycutt* is not properly before the court of appeals where the issue of joint and several liability was not raised in the district court or at the first opportunity on appeal. See, *e.g.*, *United States* v. *Haro*, 753 F.App'x 250, 260 n.4 (5th Cir. 2018); *United States* v. *Alquza*, 722 F.App'x 348, 349 (4th Cir. 2018).

And Stein could not prevail even if he had not waived the issue, as *Honeycutt* does not apply to money-laundering co-conspirators whose property is forfeited under 18 U.S.C. § 982(a)(1). *Honeycutt* considered 21 U.S.C. § 853(a)(1), which mandates the

forfeiture of "any proceeds the person obtained, directly or indirectly, as the result of a violation of" drug-trafficking laws. In restricting forfeiture to "property the defendant himself actually acquired," the Supreme Court highlighted Section 853(a)(1)'s textual requirement that a defendant "obtain" the proceeds, which evidenced the statute's focus on personal possession or use. 137 S.Ct. at 1632.

By contrast, Section 982(a)(1) does not use Section 853(a)(1)'s limiting language that the defendant forfeit proceeds that "the person obtained," and instead more broadly requires forfeiture of any property "involved in [the] offense." Rather than defining forfeitable property with reference to a particular "person," Section 982(a)(1) references the entire "offense," which, particularly for a conspiracy, naturally encompasses the reasonable-foreseeability principle. See *United States* v. *Bermudez*, 413 F.3d 304, 306 (2d Cir. 2005) (because Section 982(a)(1) requires forfeiture of funds "involved in the offense," rejecting argument that forfeiture is limited to proceeds that the defendant obtained); *Alquza*, 722 F.App'x at 349 (same).

Stein argues (Br. 53-54) that this textual distinction "is of no moment" because "other subsections of § 982 … incorporate many of the provisions on which *Honeycutt* relied." But in fact, those provisions—and Section 982(b) in particular—support interpreting money-laundering forfeitures to extend beyond the funds that a particular defendant obtained. Subsection (b)(1) provides that the substitute-asset provisions of Section 853(p) apply to Section 982(a)(1) forfeitures. In *Honeycutt*, the Supreme Court interpreted Section 853(p) as reinforcing its conclusion that Section 853(a) did not

permit imposing joint and several liability for all funds attributable to a drug conspiracy. But in doing so, it relied on Section 853(p)'s textual limitation to "any property described in subsection (a) [of Section 853]," leading the Court to conclude that "it authorized the Government to confiscate assets only from the defendant who initially acquired the property and who bears responsibility for its dissipation." 137 S.Ct. at 1634. Although Section 982(b)(2) incorporates Section 853(p)'s procedures for obtaining substitute assets, it does not incorporate Section 853(p)'s limitation to forfeiture of "property described in subsection (a) [of Section 853]." That would be nonsensical. *Bermudez*, 413 F.3d at 306 ("the 'proceeds' limitation of § 853(a)(1) has no logical connection to § 982(a)(1) forfeitures"). Rather, "in the money laundering context, § 853(p) defines what assets may be substituted for assets forfeitable under § 982(a)(1)," which are the funds "'involved in [the] offense.'" *Ibid.* Therefore, for purposes of Section 982(a)(1) forfeitures, Section 982(b)(1)'s reference to Section 853(p) does not support imposing *Honeycutt*'s limitation to funds a defendant obtained.

Moreover, Section 982(b)(2) indicates that *Honeycutt* does not apply to Section 982(a)(1) forfeitures, as it provides a safe harbor for certain low-level money launderers, who will not be subject to the substitute-asset provisions "where such defendant acted merely as an intermediary who handled but did not retain the property." 18 U.S.C. § 982(b)(2). Because Stein was not a "mere[] … intermediary" in this conspiracy—but was, by all accounts, the kingpin—he does not benefit from this carve-out, and is

subject to conspiracy-wide forfeiture. At the very least, Stein does not show—as he must, given his waiver of the issue below and on first appeal—that any error is "plain."[8]

III. Resentencing Cured Both Errors that Occasioned Vacatur in 2017.

A. Standard of Review

"[T]he government bore the burden at sentencing of proving [the] loss amount by a preponderance." *United States* v. *Brunot*, 294 F.App'x 546, 547 (11th Cir. 2008). This Court reviews the method of calculating loss *de novo* and determination of the amount for clear error. *United States* v. *Rodriguez*, 751 F.3d 1244, 1255 (11th Cir. 2014).

B. Background

In 2017, this Court remanded with guidance that "the government must show that the investors relied on Mr. Stein's fraudulent information to satisfy the 'but for' causation requirement under U.S.S.G. § 2B1.1." 846 F.3d at 1153. The evidence the government presented during the first sentencing—which largely relied on victim-impact statements—was not enough, in the Court's view, to support an "inference that *all* 2,415 investors relied on Mr. Stein's fraudulent information when deciding to purchase Signalife stock." *Id.* at 1154. The Court also noted that Stein "pointed to intervening events that may have affected the stock price"—namely, "the short selling

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[8] In the event this Court concludes that Stein has not waived his forfeiture challenge, the appropriate outcome is a limited remand to the district court to determine whether the $332,717 retained by Carter, DE.525:8 n.5, is subject to forfeiture under Section 982(a)(1), which is unaffected by *Honeycutt*, or instead falls under Section 981, which generally does not permit joint and several liability.

of over 22 million shares of Signalife" and the "stock market decline of 2008"—and instructed the district court to determine on remand "whether these intervening events affected Signalife's stock price during the fraudulent period and, if so, whether they nonetheless were reasonably foreseeable to Mr. Stein." *Id.* at 1155-56.

C. Discussion

Under the Guidelines, "[a]ctual loss," the measure that the government proved below, is the "reasonably foreseeable pecuniary harm that resulted from the offense." U.S.S.G. § 2B1.1 cmt. n.3(A)(i). In arriving at a loss figure, the court "need only make a reasonable estimate of the loss" based on "available information," *id.* n.3(C); "[t]he determination of loss need not be made 'with precision,'" *United States* v. *Wilson*, 993 F.2d 214, 218 (11th Cir. 1993). See also *United States* v. *Orton*, 73 F.3d 331, 335 (11th Cir. 1996) ("Where detailed information is not available, a detailed estimate is not required."); *United States* v. *Olis*, 429 F.3d 540, 547 (5th Cir. 2005) ("[G]iven the time and evidentiary constraints on the sentencing process, the methods adopted in these cases are necessarily less exact than the measure of damage applicable in civil securities litigation.").

On remand, the government offered robust expert evidence in support of both investor reliance and legal causation, thereby remedying both deficiencies that this Court identified in its 2017 decision vacating the previous sentence. Stein offered competing expert testimony, and his brief largely reiterates the disagreements between his expert and the government's. But after considering the in-court testimony and

submitted reports, the court found that the government's expert provided "[a] competent and reliable method for calculating the loss to investors in Signalife stock during the relevant time period" and "accept[ed] as credible and reliable" her conclusions. DE.561:1. Because, "[i]n the ultimate analysis, the trier of fact is the final arbiter as between experts whose opinions may differ as to precise causes," the sentence and restitution order should be affirmed. *Pittman* v. *Gilmore*, 556 F.2d 1259, 1261 (5th Cir. 1977).

1. The Government Adduced Specific Circumstantial Evidence of Market-Wide Reliance.

As this Court recognized, "requiring individualized proof of reliance for each investor is often infeasible or impossible." *Stein I*, 846 F.3d at 1153. Thus, "in cases such as this one involving numerous investors, the government may instead offer specific circumstantial evidence from which the district court may reasonably conclude that all of the investors relied on the defendant's fraudulent information." *Id.* at 1153-54. In addition to the victim statements adduced during the previous sentencing proceedings, the government newly offered specific circumstantial evidence in three forms: Dr. Chyhe Becker's event study showing a statistically significant correlation between Signalife's share price and its reporting of the purchase orders; her testimony that news regarding Signalife sales would have been important to investors; and the showing (conceded by Stein) that the only information about Signalife available to the

market was the company's own statements about its performance. Taken together, this evidence demonstrated that investors relied on Stein's falsified sales reports.

a. Dr. Becker's Event Study

The concurrence to this Court's 2017 decision expressly envisioned that expert testimony could underlie a determination that investors market-wide relied on Signalife's falsified sales figures in assessing the value of the company's stock. 846 F.3d at 1158 (Pryor, J., concurring) (suggesting "expert testimony" as a "type[] of specific circumstantial evidence" by which "the government may … establish reliance"). That allowance comports with the consensus view that securities-fraud litigants may adduce "a methodologically sound event study prepared by an expert witness" to demonstrate the existence of "price impact"—a showing that a particular piece of information either did or did not matter to investors. 1 McLaughlin on Class Actions § 5:26 (15th ed.).

The government produced an event study from Dr. Becker of the SEC's Division of Economic Risk and Analysis. Dr. Becker analyzed Signalife's share price over time and identified "abnormal returns" on certain dates—the portion of the share-price fluctuation attributable to company-specific news, such as misleading or corrective disclosures. Dr. Becker testified that she found a "statistical[ly] significant" "abnormal return of 18 percent" on September 25, 2007, "the date that Signalife had disclosed its $3.3 million purchase order." DE.551:44. After reviewing investor chat rooms and a market-news aggregator to ensure that no other company-specific news could have occasioned that day's significant appreciation, DE.551:43, Dr. Becker

treated this 18% return as the amount of "inflation" in Signalife's share price "starting on September 25th and going forward" until the fraud was revealed. DE.551:49.

For the purposes of Dr. Becker's event study, the government identified two dates on which aspects of the fraud were partially disclosed: April 14, 2008, and August 15, 2008. On April 14, Signalife held an investor call led by Harmison, who Signalife promised would provide updates on, *inter alia*, "pending orders and production" and "the Company's immediate, positive financial prospects." DE.533:4. Surprisingly to investors, Harmison did not provide an update on the three major purchase orders that Stein had fabricated. As Signalife investor Mark Taylor testified, the fraudulent purchase orders were a significant factor in his decision to invest, DE.551:10 ("[I]t was tangible evidence that there was real revenue to be recognized, and the company was going forth with a business plan."), and thus the absence of information about those purchase orders in the April 2008 investor call was troubling, DE.551:16-17. Shortly after the investor call, Signalife's stock tanked—from a closing price of $1.34 per share on the last trading day before the call to $1.00 per share on the first trading day after. DE.533:4. Dr. Becker found a -12.7% abnormal return in response to the April 14 partial disclosure, effectively correcting for over 70% of the inflationary impact beginning on September 25. DE.533:12. While the failure to update investors as to the purchase orders certainly spooked the market, the final admission came in Signalife's quarterly 10-Q filing on August 15, when the company stated that it "ha[d] not recognized any revenues to date" from those orders. DE.533:4-5 (citations omitted).

On the day of that filing, Dr. Becker identified a -9% abnormal return that eliminated the rest of the inflation. DE.533:12.

Based on Dr. Becker's analysis of the inflation on each day of the fraudulent period, and after excluding investors who had divested of Signalife before disclosure, DE.557, the government identified $1,029,570 in losses across 616 victims, DE.558:1.[9]

b. The Government's Expert Testimony.

Dr. Becker went beyond proving statistical correlation to show how and why the relevant shifts in share price were *caused by* Stein's fraudulent conduct. Contrary to Stein's contention (Br. 39) that the district court "engage[d] in … baseless speculation" on this front, the court reasonably relied on Dr. Becker's testimony establishing that investors would have placed preeminent importance on Signalife's sales information in determining the company's value. As Dr. Becker elaborated at resentencing,

> Sales can impact company revenues—for many companies, including for Signalife, sales and revenues would sort of be the two words for the same exact thing. For some kinds of bigger companies in different situations, you can have revenues that are different from sales, because they can make

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[9] Stein does not assert that an event study such as Dr. Becker's is inappropriate for estimating loss in the securities-fraud context. To the contrary, Stein's expert testified that he has conducted a number of event studies in similar circumstances, DE.552:30-32, and he conceded that Dr. Becker "applied the economic methodology correctly," DE.551:227. Moreover, this is precisely the same method that this Court approved in *FindWhat Inv'r Grp.* v. *FindWhat.com*, 658 F.3d 1282 (11th Cir. 2011), where the defendant corporation falsely asserted that it "did not rely on click fraud to generate Internet traffic," before eventually admitting otherwise, *id.* at 1317; in the period between the misrepresentation and the disclosure, this Court observed, "investors purchased … [defendant's] stock at inflated prices," only to "los[e] the inflationary component of [the] purchase price … when the revelation of the truth caused the market to drain the inflation from the stock price," *ibid.*

> money in other ways, like by selling a line of business, and there are other ways to generate money. But for Signalife, it was all about selling its product.

DE.551:46-47. Dr. Becker also noted that, since "Signalife had generated no revenues for the years 2001 through 2005, and … in 2006 it had generated $190,170[,] … revenues in 2007 would have been very important to investors, because investors would have been wondering about overall market demand for Signalife's product." DE.551:47-48. The expert opinion that the market would have considered sales information to be a critical data point—particularly for a company of Signalife's size and situation, and particularly during the period when Stein fabricated Signalife's sales—supports the inference that investors relied on that fraudulent sales information.

Dr. Becker's conclusion that Signalife's self-reported, fraudulent sales data informed the market's valuation of the company is further confirmed by the undisputed testimony that, during the relevant period, virtually all public information about Signalife was coming from the company itself. Dr. Becker reviewed "chat rooms and a new source called Factiva that pulls news from lots and lots of different sources" to determine whether "there was other news" on the dates of the press releases, the webcast, and the 10-Q; she found no reportage independent of Signalife's self-disclosures. ER 551:43. Even Stein acknowledged at resentencing that Signalife was "a stock for which there were no analyst reports. There's no news about it. The only thing, the only news there is [is] in the securities filings." DE.552:81.

The conceded absence of alternative information upon which investors might have relied in evaluating Signalife is compelling circumstantial evidence that the market relied on the fraudulent sales data. Cf. *Guinn* v. *AstraZeneca Pharm. LP*, 602 F.3d 1245, 1253 (11th Cir. 2010) ("[A]n expert must provide a reasonable explanation as to why he or she has concluded that any alternative cause suggested by the defense was not the sole cause of the plaintiff's injury." (quotation marks, citations, and alterations omitted)). Here, where Stein has not even sketched out a theory for how investors evaluated Signalife independent of its fraudulent sales data, the dearth of other market-facing information supports Dr. Becker's conclusion that Signalife's investors relied on Stein's misrepresentations.

2. The Government Isolated the Price Impact of the Sales Information from Other Market Forces.

Finally, the government adduced expert testimony that excluded other market forces as "intervening events that may have contributed to investors' losses," *Stein I*, 846 F.3d at 1154—thereby curing the second error this Court identified during the first appeal. Specifically, Dr. Becker conducted regression analyses of, *inter alia*, "the financial crisis of 2008; short-selling activity; … [and] the alleged illiquidity of Signalife's stock," and concluded that none "contribute[d] to the decline in Signalife stock during the relevant period." DE.533:12-13.

With respect to the financial crisis, Dr. Becker testified that she examined the movements of three values from January 2007 through September 2008: (1) a "market

index consist[ing] of … all exchange-listed stocks in the United States," (2) an "industry index" consisting of "stocks that operate in the medical equipment industry," and (3) Signalife's share price. DE.551:52-53. While Dr. Becker determined that "the market and the industry are correlated with each other," and thus that the industry was affected by the downturn, she did not observe any "correlation … between Signalife's returns and the market and the industry returns," and thus found "no evidence that the market [and] the industry caused Signalife's returns to decline during the same time period." DE.551:53-54. Indeed, Dr. Becker's regression analysis returned a correlation coefficient between Signalife and the market index of -0.717, indicating that "Signalife and the market were typically moving opposite each other"; she found a smaller negative coefficient between Signalife and the industry index, suggesting no "statistically significant" relationship whatsoever. DE.551:55-56.

Dr. Becker likewise testified that she "did not find any evidence that short selling caused the decline in Signalife stock during the relevant period." DE.551:63. She offered two data points in support of this determination: first, "that during time periods where Signalife's stock price was rising, there was typically more short selling than there was during time periods where Signalife's stock price was falling," which is the opposite of what she would expect if short-selling were indeed driving the declines, DE.551:63-64; and second, that "Signalife's short selling volume" as a percentage of its total trading volume over the first eight months of 2008 "was actually less than the

average short selling volume for" a sample of 350 stocks listed on the New York Stock Exchange, DE.551:65.

3. Stein's Competing Expert Testimony Did Not Overcome the Government's Evidence.

Stein produced expert testimony of his own, from Dr. Edward O'Neal, who quantified the total "loss to attribute to the fraud" as $525,000.[10] DE.551:250. On appeal, Stein largely echoes (Br. 37-45) the disagreements that Dr. O'Neal expressed at resentencing, including that omissions (such as the April 14 partial disclosure) do not constitute corrective disclosures, DE.551:235; accord Br. 39-40; and that an event study is only "an accurate way to look at the impact of a particular news event if the market for that stock is efficient," DE.551:231; accord Br. 41-42 n.4. But on cross-examination below, Dr. O'Neal acknowledged that it is possible for an omission to constitute a corrective disclosure, DE.552:17; and that he has personally conducted a number of event studies without establishing market efficiency, DE.552:30-32.

Stein does not rebut on appeal Dr. Becker's reliance testimony. At resentencing, Stein cited (1) Dr. O'Neal's opinion that "information about earnings would be more

[10] Notably, the government's estimate was 35% *lower* than the loss that Dr. O'Neal attributed to the 10-Q. See DE.551:245 (estimating loss of $1.58 million). But Dr. O'Neal arbitrarily reduced his estimate by two-thirds based on his assertion that the 10-Q contained "three pieces of new or important information" that equally depressed share price. DE.551:250. As detailed *infra*, the other two data points were intrinsically related to the fraudulent orders, and as such, should be considered direct effects of the fraud. Thus, Dr. O'Neal's original figure confirms that the method used by the government resulted in "a conservative estimate of loss." DE.533:13.

important to a shareholder than about sales, about these purchase orders," DE.551:127, and (2) a survey in which "financial executives identified revenues as the second most important company performance measure," after earnings, *ibid.* But that rejoinder buttressed Dr. Becker's conclusion about the importance of sales information, because earnings necessarily incorporate revenues, and—as Dr. Becker testified—"for Signalife, sales and revenues would sort of be two words for the same exact thing." DE.551:46. Thus, whether investors were motivated principally by sales, by revenue (in Signalife's case, the proceeds from sales), or by earnings (in Signalife's case, the proceeds from sales minus expenses), the underlying deception as to Signalife's sales remains the driving force behind the market's valuation of the company.

With respect to legal causation, Dr. O'Neal testified that the 10-Q disclosed "two other … pieces of information that … would have been important to investors"—namely, a "very large quarterly loss" and a "negative stockholders' equity." DE.551:247. But Dr. O'Neal conceded on cross-examination that both the large quarterly loss and the negative shareholder equity were potentially related to the fact that "Signalife had not recognized revenues of over 5 million from various [fraudulent] purchase orders." DE.552:25. Indeed, as the district court suggested in its questioning, both items would have been effectively wiped out had Signalife in fact realized the revenues that it had promised were forthcoming from the fraudulent purchase orders. DE.552:45 ("There's a drop in [revenue] or a negative shareholder equity. I mean, aren't those as a result of not having the revenue from the purchase orders?").

Finally, Stein asserts (Br. 44) that "the district court ignored … extensive defense evidence concerning the effect of short-selling and the 2008 stock market decline." The record reflects otherwise: the court actively questioned each expert who took the stand, including—over the course of seven transcript pages, DE.552:40-46—asking Dr. O'Neal to elaborate on his views of loss causation and the event study's "assumption that the market reaction [in Signalife's share price] is due to the fraud," DE.552:44. Moreover, Dr. O'Neal, the only expert that Stein called, offered no testimony whatsoever on short-selling or its supposed price impact; the expert reports that Stein submitted on that score were not backed up by in-court testimony or exposed to cross-examination. This Court has held that it is well within the purview of the district court to "weigh competing expert testimony," so long as it does "not arbitrarily ignore expert testimony." *Knight* v. *Thompson*, 797 F.3d 934, 942 (11th Cir. 2015). That the court ultimately rendered a credibility judgment in favor of Dr. Becker does not indicate that it "arbitrarily ignored" the competing view. Stein's assertion to the contrary "incorrectly assumes that all expert opinion is entitled to equal weight, and virtually ignores the function of the trier of fact in evaluating conflicting testimony." *W. Air Lines* v. *Criswell*, 472 U.S. 400, 423 (1985).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 32(a)(7)(C) and Eleventh Circuit Rule 28-1(m), I hereby certify that the foregoing brief of the United States complies with (1) the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) because it was written in Garamond, 14-point font and (2) the type-volume limitations contained in Federal Rule of Appellate Procedure 32(a)(7)(B)(i), because it contains 13,000 words, excluding those parts of the brief excluded from the word count under Eleventh Circuit Rule 32-4.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of the United States was filed electronically with the Court's CM-ECF system on March 25, 2019. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

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