VINSON & ELKINS L.L.P.
Matthew J. Jacobs (CSB 171149)
Email: mjacobs@velaw.com
Erica Connolly (CSB 288822)
Email: econnolly@velaw.com
Christopher W. James (CSB 289047)
Email: cjames@velaw.com
555 Mission Street, Suite 2000
San Francisco, CA 94105
Telephone: +1.415.979.6900
Facsimile: +1.415.651.8786

Craig P. Seebald (*admitted pro hac vice*)
Email: cseebald@velaw.com
2200 Pennsylvania Avenue NW, Suite 500 West
Washington, DC 20037-1701
Telephone: 202.639.6500
Facsimile: 202.756.8087

Attorneys for Defendant
JOSEPH J. GIRAUDO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH J. GIRAUDO,

Defendant.

Case No. CR 14-00534 CRB

DEFENDANT JOSEPH GIRAUDO'S REPLY TO UNITED STATES' SENTENCING RESPONSE

I. The Government's Document Dump Is Untimely and Insufficient in Any Event

The government's response to the claim that it failed to meet its evidentiary burden regarding volume of commerce and role in the offense was to dump a massive data load on the Defense and the Court one court day before the hearing. The government's reply includes a ***37-gigabyte*** submission that was apparently so large it could not be uploaded through the Court's electronic filing system. Document vendors say that 37 gigabytes is the equivalent of 3.2 million pages of email. Procedurally, it would be error to rely on a set of materials so vast that it would be physically impossible to review and respond in the one court day. Substantively, the government has still not met its burden.

The Court set sentencing deadlines nearly eight months ago. It is thus inconceivable why the government would think it appropriate to wait to submit actual evidence until a week ***after*** the Court's sentencing hearing on April 26 (Memoranda were due on April 19), and one court day before the instant Guideline hearing. Here, the Court should understand that the government declined (in violation of Crim. L.R. 32-3(c)) to tell the Defense what, if any, materials it was providing to the Probation Office or would otherwise rely on in the sentencing of Mr. Giraudo.[1] We still do not know whether the 37 gigabytes were previously provided to the Probation Officer. The government will undoubtedly say that the material was produced in discovery. We have not had time to verify this assertion. In any case, it was surely not the job of the Defense to ***guess*** what evidence on which the government might choose to rely.

The government had multiple opportunities to provide specific evidence to the Court and the Defense, during the PSR process, and in its sentencing memorandum. Having failed to do so, the government cannot remedy its error by parking an 18-wheeler on the steps of the Courthouse on the eve of the hearing and saying that the answer is somewhere inside the truck. The Court should disregard this 37-gigabyte submission or risk violating Mr. Giraudo's rights of due process. *See*

[1] Upon learning the government had submitted materials to the Probation Office without informing the Defense, we requested the information by phone and letter on January 31, 2018, explaining the government's obligation to identify the materials under the local rules. *See* Exhibit 1 to Def. Giraudo's Reply to US Response ("Gir. Reply Ex. 1") (1/31/18 Letter from Connolly to Greene and Mast). The government refused. *See* Gir. Reply Ex. 2 (1/31/18 Letter from Mast to Connolly).

United States v. Hanna, 49 F.3d 572, 577 (9th Cir. 1995) ("constitutional guarantee of due process is fully applicable at sentencing"); *United States v. Giltner*, 889 F.2d 1004, 1008 (11th Cir. 1989) ("due process requires [] that the defendant be given an opportunity to refute . . . . any information presented at sentencing"); *United States v. SKW Metals & Alloys, Inc.*, 6 F. App'x 65, 66 (2d Cir. 2001) (upholding decision to disregard untimely VOC evidence at sentencing).

Substantively, even if the Court were to consider the thousands of unorganized documents that have been dropped into its lap, the government has still failed to meet its burden. The government's obligation was to come forward with ***specific*** and ***credible*** evidence of the volume of commerce it claims was affected, and to show how it was calculated. Three points are critical.

First, it is without contravention that the figures proffered by DOJ are unreliable in key respects. For example, Mo Rezaian told agents that he was inconsistent about the way he kept the records, failed to recall key details when he wrote the notes, made errors in recording information about payoffs, and ***inflated*** payoffs in his records because he was defrauding his own investors into paying him more money. *See* ECF 307, Ex. M at 5-6, Ex. O at 1-2. Nowhere in the government's papers does it say (apparently agents and prosecutors never asked him) ***which*** payoffs were fabricated or in error. Rezaian further told the FBI that he would use Mr. Giraudo's name with other bidders or joint venture partners even where Mr. Giraudo was not involved because it felt it gave him credibility. ECF 307, Ex. O at 5. And in the short time since we received DOJ's "reply" brief, we have identified 13 additional properties that are part of the government's VOC calculation where the records actually indicate Mr. Giraudo made no payoff, did not participate in the joint venture regarding that property, did not pay money toward the purchase, and/or did not receive any proceeds from the ultimate re-sale.[2] In fact, two of the properties in the government's VOC calculation (650 2nd St 201 and 434 Hanover St) were either cancelled or redeemed by the IRS.

[2] The properties are 362 Imperial Dr.; 365 Mina Ln; 950 S Fremont St; 35 Rockford Ave; 2345 Menalto Ave; 122 Alta Vista Way; 373-375 Capp St; 65 Reddy St; 650 2nd St. 201; 1357 Plymouth Ave; 1193 Ingalls St; 1788 45th Ave; 434 Hanover St. *See, e.g.*, ECF 358, Ex. Y (1788 45th Ave: NDRE-ABSG-EMAIL-001858, Joint venture agreement not listing Mr. Giraudo; NDRE-MR-VP-000090, Rezaian's records of purchase and payoff not listing Mr. Giraudo); Gir. Reply Ex. 3 (NDRE-RG-08-011227, Joint venture agreement for 362 Imperial Dr. among Grinsell, Rezaian, Rosenbledt, and Cullinane. Remarkably, the government submitted documents regarding this property, but ***excluded*** documents showing Mr. Giraudo had no involvement in the transaction).

Second, the government cites the number of transactions for the proposition that Mr. Giraudo was more culpable than any other person. Yet DOJ never addresses the point made in Mr. Grinsell's brief that the government twisted the figures by excluding properties from the VOC calculation of people who agreed to plead guilty to mail fraud even though they knew those persons had made payoffs on those properties. *See* ECF 324 at 5. Rezaian's own records—which, as noted, inflate Mr. Giraudo's role—show they were involved in roughly the same number of tainted transactions. *See* ECF 319 at 5 n.4.

Third and most important, the government has not made any effort to remedy the point in our opening brief that it is relying on disputed statements of witnesses that have not been subject to cross-examination. The government could have sought to put those witnesses on the stand so that the Court could evaluate the credibility of the testimony. In the absence of that testimony, it would be error for the Court to rely on those untested statements which lack indicia of reliability.[3] *Hanna*, 49 F.3d at 577 (defendant has "due process right[]" not to be sentenced on the basis of "materially false or unreliable information."); *United States v. McGowan*, 668 F.3d 601, 607-08 (9th Cir. 2012) (court abused discretion by relying on "uncorroborated" and "conflicting" interview statements).

II. The Government's VOC Is Arbitrary, Unsupported, and Contrary to Law and Facts

The Court's initial impression that VOC is a morass is accurate. A fair and just sentence can be reached without considering VOC.[4]

It is striking that the government failed to cite a single decision holding that their proposed methodology is the proper one. It would be better if the government simply admitted that there is no legal precedent. Instead, DOJ adopts the current convention in Washington that merely repeating a thing with increasing vehemence will somehow make it so.

[3] The government is so sloppy in its calculations that it offers a different restitution figure in its response than the PSR or its own submitted calculations. *Compare* ECF 358 at 16 (citing $248,799.44); *and* ECF 290 at ¶ 23; *and* ECF 307, Ex. A (both citing $232,132.77).

[4] The 9th Circuit has held that district courts may find it "unnecessary to calculate the applicable Guidelines range." *United States v. Cantrell*, 433 F.3d 1269, 1279 n. 3 (9th Cir. 2006); *see also United States v. Haack*, 403 F.3d 997, 1003 (8th Cir. 2005) (explaining "that there may be situations where sentencing factors may be so complex, or other § 3553(a) factors may so predominate, that the determination of a precise sentencing range may not be necessary or practical").

The Guidelines provide that affected commerce includes only the "goods or services" that were "affected" and "done by" the defendant. U.S.S.G. § 2R1.1(b)(2). Again, the government bears the burden of proving to the Court that its methodology is factually and legally supportable. *United States v. Treadwell*, 593 F.3d 990, 1000 (9th Cir. 2010). On every transaction, there was only a small amount that by definition could have been affected by a payoff because the bank would not sell below that amount. The government does not address this point.[5]

Instead, the government's answer is to say that dozens of people pled guilty and accepted this calculation in their pleas, *see* ECF 358 at 4—but surely that cannot be the right answer because those same people pled guilty to mail fraud despite the fact that no such crime occurred. The government also points to the sentencings of Judges Hamilton and Donato. But this VOC methodology was not contested and those judges promptly ignored VOC in imposing the actual sentences. *See, e.g.*, *United States v. Shiells*, No. 14-cr-571 PJH, Dkt. 58 (Def.'s Sent'g Memo) (mounting no challenge to VOC) & Dkt. 65 (Judgment) (sentencing defendant to non-custodial sentence).

The government then suggests that Mr. Giraudo should be thankful for DOJ's beneficence because VOC could have been higher. For example, the prosecutors suggest that they could have included every purchase at an auction made by Mr. Giraudo even if there was no payoff, and could have included properties with which Mr. Giraudo had no involvement. ECF 358 at 5 n.6. That actually proves too much because it shows how utterly random is the government's methodology; if it could just as easily have included house purchases where no one made or threatened a payoff, then the methodology really is whatever the government decides.[6]

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[5] The government asserts that the total amount of payoffs is the same as "loss" under the fraud Guidelines. In fact, banks would have only theoretically received the additional amount a ***single*** bidder would have bid above the purchase price—approximated by the payoff they received. Only one such bidder could have won the auction, so if Mr. Giraudo had to pay 3 different bidders $2,000, the loss to the bank is not $6,000, but only $2,000. Even this assumes that all bidders were actually interested in buying the property, which clearly wasn't the case. *See, e.g.*, ECF 307, Ex. D at 6 (individual admitted to confidential FBI source that he attended auctions not to bid, but to enter payoff agreements for extra cash to spend on vacations).

[6] The government tries mightily to evade the point about statutes of limitation, but its efforts to distinguish *Kokesh v. SEC*, 137 S.Ct. 1635 (2017), are unavailing in two respects. First, the facts in the instant case are clear that every transaction was different with unique partners, bidders and dynamics. So the description of one overarching uber-conspiracy is questionable at best. Second, the implication of *Kokesh* is that a statute of limitations should be strictly applied regardless of whether there was a conspiracy. In *Kokesh*, there was a continuing fraudulent scheme, but the

The government also tries to distinguish its standard practice regarding proportional ownership by saying that its agreements with Mitsubishi and J.P. Morgan are inapplicable because those are corporate defendants. ECF 358 at 7 n.9. It is truly astonishing that the Justice Department would suggest—in a court filing—that its approach to fining corporate defendants that affected hundreds of millions in commerce should be more lenient than its treatment in pushing for a custodial sentence of an 80 year old individual.[7]

III. The Role in the Offense Enhancement Is Inconsistent and Inadequately Supported

Without addressing the many inconsistencies and contradictions in the 302s of Laith Salma and Mo Rezaian (*see* ECF 319 at 7-9),[8] the government continues to rely on the same statements. Even taking the evidence at face value, there is no basis for the government's suggestion that Rezaian should receive a lesser enhancement than Mr. Giraudo, other than to effectuate the Antitrust Division's policy of encouraging people to plead early and get a better deal (even if it means pleading to a crime that didn't occur). Rezaian was the poster child for intimidation, threats and bribes, and was the architect of the Big 5. ECF 319 at 12-13. The government insists Mr. Giraudo's "mentorship" of Rezaian is an adequate basis for a larger enhancement. ECF 358 at 14. There is no legal authority for the proposition that "mentorship"—whatever that means—is a basis for a four-level leadership enhancement. Even after nearly 40 pages of government briefing, there is no credible evidence that Mr. Giraudo devised or organized the payoffs, exercised control or

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Court still excluded conduct prior to five years. *Id.* at 1643-44. There is no logical reason why a person who conspired with someone else should have less protection from being prosecuted for stale crimes than a person who carried out a scheme entirely by herself. And of course, the idea that a limitations period should be more strictly interpreted in a civil SEC case than a criminal prosecution (as the government suggests here) flies in the face of every principle about protecting the rights of criminal defendants and the rule of lenity. *See United States v. Marion*, 404 U.S. 307, 321 & n.14 (1971) (criminal statute of limitations are "the primary guarantee against bringing overly stale criminal charges," and "should be liberally interpreted in favor of repose").

[7] The analogy to joint and several liability is also amiss. Even if civil liability principles applied, joint and several liability allows the full recovery of damages from any participant, but not multiple recoveries of the same damages from every defendants. Here the government seeks to punish each person for the full value of the purchase price even though they only owned a small share. The equivalent in a civil liability case would be if each defendant in a four-defendant conspiracy had to pay full recovery, resulting in a quadruple payment to the plaintiff.

[8] In fact, the government points to only one consistency in the statements—Salma's use of the nickname "King," a nickname mentioned by no other witnesses, heard on no recordings, and admittedly irrelevant to the U.S.S.G. § 3B1.1 determination. *See* ECF 307 at 12 n.11.

coercive authority, went out and recruited people to the scheme (other than Mr. Appenrodt briefly),[9] or directed a vast criminal scheme. The government fails to address the inconvenient truth that thousands of very similar corrupt transactions happened to occur in San Mateo and elsewhere without any participation whatsoever of Mr. Giraudo.

IV. The Government Has Totally Abandoned Its Role in Seeking Justice

Like its sentencing memorandum, the government's reply fails to even acknowledge that the person before the Court for sentencing is 80 years old, is physically frail, and has positively influenced the lives of countless people.

Nor is there any acknowledgement or recognition of the extraordinary circumstances that made it necessary for Mr. Giraudo to plead open, given the history of misadventure, misjudgment and miscalculation that has marked this lengthy investigation. We are only here because of the government's unwillingness for nearly a decade to even consider a reasonable disposition.

The government equates disagreement with its prosecutors' calculations as lack of acceptance. That could not be further from the truth. If the government is not willing to provide proper context to the Court, then the Defense has no choice but to attempt to do so.[10]

Here, justice would best be served by a significant fine and probation. Mr. Giraudo has substantial assets even after the clarification provided to the Court about double counting in the PSR. Should the Court determine that a fine above the $2 million statutory maximum is

[9] There can also be no serious suggestion that Mr. Giraudo controlled the other partners. All were sophisticated real estate investors who were knowledgeable of the market, did their own research and were equal participants in transactions. *See* ECF 319 at 11. Mr. Rezaian represented a number of investors. Ray Grinsell owned his own real estate agency—Founder's Realty. And Kevin Cullinane founded and ran S&C Properties managing hundreds of real estate properties in San Mateo, where he was considered an expert in property values. *See* ECF 307, Ex. E at 8.

[10] For example, the government does not address the evidence that Mr. Giraudo's bidding led to higher prices for banks, and helped struggling neighborhoods recover by rehabilitating and re-selling homes where the banks had forced the original owners to vacate. In one instance described in the attached Exhibit 4, Wells Fargo Bank (d/b/a Wachovia) (a bank currently under federal and state criminal investigation) foreclosed on an owner whose total outstanding overdue debt was $592. When Mr. Giraudo and his partners learned of the incredibly small amount owed, they quitclaimed the property back to the original owner. *See* Gir. Reply Ex. 4.

appropriate, it could impose a fine pursuant to 18 U.S.C. § 3571(d) based on the profit Mr. Giraudo received on properties purchased at auction.[11]

Respectfully submitted,

DATED: May 7, 2018

VINSON & ELKINS L.L.P.

By: *Matthew J. Jacobs*
Matthew J. Jacobs
Attorneys for Defendant JOSEPH J. GIRAUDO

CERTIFICATE OF SERVICE

The undersigned certifies that on May 7, 2018, the foregoing document was electronically filed with the Clerk of the Court for the UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, using the Court's Electronic Case Filing (ECF) system. The ECF system routinely sends a "Notice of Electronic Filing" to all attorneys of record who have consented to accept this notice as service of this document by electronic means.

VINSON & ELKINS L.L.P.

By: */s/ Matthew J. Jacobs*
Matthew J. Jacobs
Attorneys for Defendant JOSEPH J. GIRAUDO

[11] Section 3571(d) allows the Court to impose an "alternative fine" of up to twice the pecuniary gain to the defendant from the offense. Mr. Giraudo's records reflect he received a (proportional) profit on the sale of 88 properties in the Government's list, which were rehabilitated and sold, amounting to approximately $2.9 million.