

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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|---------------------------|---|-------------------------|
| MARC E. BERCOON, | : | MOTION TO VACATE |
| Movant, | : | 28 U.S.C. § 2255 |
| | : | |
| v. | : | CRIMINAL ACTION NO. |
| | : | 1:15-CR-00022-LMM-RDC-1 |
| | : | |
| UNITED STATES OF AMERICA, | : | CIVIL ACTION NO. |
| Respondent. | : | 1:23-CV-00107-LMM-RDC |

FINAL REPORT AND RECOMMENDATION

Movant Marc E. Bercoon filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (Doc. 544.) Respondent filed a response in opposition to the motion. (Doc. 557.)

For the reasons stated below, it is **RECOMMENDED** that the instant motion to vacate (Doc. 544) be **DENIED**.

I. BACKGROUND

This case arises from Movant's convictions for various types of fraud relating to the stocks of Find.com Acquisition, Inc. ("Find.com") and MedCareers Group, Inc. ("MCGI"). As discussed by the Eleventh Circuit:

Defendants'[¹] convictions arise from two fraud schemes. The first was a "pump and dump" market-manipulation operation in March and May of 2010, which involved MCGI's publicly traded stock.

¹ Movant was tried with his codefendant William Goldstein, who is not a party to this § 2255 motion.

Defendants executed a plan to artificially inflate the price of MCGI stock (i.e., “pump” the stock) by obtaining control of shares, promoting the stock with mass emails and misleading press releases, and making numerous small trades to generate interest. Then, Defendants profited by selling the artificially inflated shares (i.e., by “dumping” the stock). The second scheme involved a plan to sell shares of the privately traded company Find.com via misleading and fraudulent representations. Defendants provided potential investors with written materials—including a “Confidential Investor Information” sheet and a “Confidential Private Placement Memorandum”—falsely stating that five million shares of Find.com were being offered at \$1.00 per share and that the proceeds (minus a selling commission of 12.5 cents per share) would be reinvested in the business. In fact, however, shares of Find.com had been sold for less than \$1.00 each, sales commissions were higher than 12.5 cents per share, and Defendants used the investment proceeds for their own benefit rather than investing them in the business.

United States v. Goldstein, 989 F.3d 1178, 1185–86 (11th Cir. 2021). The Eleventh

Circuit further explained:

The Atlanta SEC office started investigating Defendants’ manipulative trades of MCGI stock in the spring of 2010. On June 30, 2010, Atlanta SEC attorney Natalie Brunson called Goldstein for an informal interview in connection with the investigation. By the time of trial in this case, Brunson no longer recalled her discussion with Goldstein, but her notes regarding the conversation reflected that Goldstein said he had received no compensation or shares from MCGI and he did not know whether Peter Veugeler, a co-conspirator in the MCGI scheme, was associated with MCGI. Testimony at trial showed that Goldstein’s statements were untrue.

After the June 30 call, Brunson sent Goldstein a follow-up letter enclosing a copy of SEC Form 1662. The letter thanked Goldstein for “taking time today to speak . . . voluntarily, about [his] relationship with [MCGI]” and stated, “As I explained, this inquiry is nonpublic and confidential.” Form 1662 provided information about a witness’s rights, including the right to refuse to speak to the SEC, the right to contact an attorney, and the penalties for providing false information.

It also provided information about the routine uses of information gathered by the SEC during an informal investigation, stating that the SEC “often makes its files available to other governmental agencies, particularly United States Attorneys,” and that information supplied by a witness “will be made available to such agencies where appropriate.”

Id. at 1186 (alterations in original) (footnotes omitted). Additionally:

Brunson shared her notes with the Atlanta U.S. Attorney’s Office, which began a criminal investigation into the MCGI scheme in August 2010. Two confidential sources, CS-1 (Marc Rosenberg) and CS-2 (Alan Weiner), provided the FBI information during the initial investigation. Rosenberg was Goldstein’s personal assistant and worked for Goldstein and Bercoon for many years prior to the MCGI scheme. He told FBI agents that Bercoon had instructed him to open brokerage accounts to trade MCGI stock and to open a bank account in the name of HMRZ Consulting, LLC (“HMRZ”). Defendants controlled the trading in Rosenberg’s brokerage accounts, and they transferred proceeds from the sale of MCGI stock into the HMRZ bank account and their personal bank accounts.

In July 2010, Rosenberg discovered that he had incurred a substantial tax liability as a result of Defendants using his brokerage accounts to execute MCGI trades. Shortly thereafter, he retained a lawyer and agreed to cooperate with the FBI in the MCGI investigation. In recorded phone conversations in February, April, and May 2011, Rosenberg told Bercoon about his tax liability, and Bercoon tacitly acknowledged both that Defendants had used Rosenberg’s accounts to trade MCGI stock and that they were responsible for Rosenberg’s taxes.

CS-2 (Weiner) began working for Goldstein in 2009. In the summer of 2009, Weiner traveled to Florida with Goldstein to meet David and Donna Levy, two well-known stock promoters. Weiner reported that after this meeting, and on the advice of David Levy, Goldstein purchased a shell company that became MCGI. David Levy then introduced Goldstein to Peter Veugeler to promote MCGI’s launch and used third party Eric Cusimano to send email blasts to thousands of potential investors.

Weiner traveled with Goldstein to Florida to meet Veugeler in March 2010. During this trip, and with Weiner present, Goldstein and Veugeler spent several days trading MCGI stock, with Goldstein using Rosenberg's brokerage accounts. Weiner again accompanied Goldstein to meet Veugeler in Florida in May 2010, when the two traded MCGI stock a second time. This time, Veugeler told Weiner and Goldstein that, earlier that day, he had been served with an SEC civil complaint alleging market manipulation in a similar but unrelated scheme. Nevertheless, Goldstein and Veugeler proceeded to trade MCGI stock, coordinating their trades with Levy and Cusimano's press releases and marketing emails.

In addition to the information that Rosenberg and Weiner provided, the FBI obtained data from the SEC that showed the trading volume and price of MCGI shares between January 25, 2010 and April 8, 2011. The FBI's analysis of the data corroborated the information provided by Rosenberg and Weiner concerning the March and May 2010 market manipulations.

Finally, the FBI obtained information suggesting that Defendants engaged in another market manipulation of MCGI stock in late March 2011. On March 28, 2011, Hotstocked.com, a Bulgarian website that reported on penny stock manipulations, announced that MCGI was starting a new promotional campaign. Trading data during the relevant timeframe corroborated this reporting, showing that on March 28, 2011 MCGI's price increased by 108% and its trading volume increased by more than 8,000%. The reporting was further corroborated by telephone records showing a high volume of contacts between Goldstein, Bercoon, and Veugeler during the last week of March 2011, as well as numerous contacts around the same time between Goldstein and Gerard Adams, the target of another SEC "pump and dump" investigation.

After gathering the above information, the Government applied for and obtained four Title III wiretap orders authorizing agents to intercept calls on phones used by Bercoon and Veugeler. The orders were dated June 24, July 26, August 25, and October 3, 2011. Special Agent R. Wallace Taylor, Jr. submitted affidavits in support of the wiretap applications, and each application was granted by a different district court judge.

Agent Taylor's affidavit in support of the June 24, 2011 wiretap application explained that the FBI was investigating Bercoon, Goldstein, Veugeler, and others for participating in a market-manipulation conspiracy involving MCGI stock. Taylor disclosed in the affidavit that the facts asserted therein were based in part on the SEC's ongoing civil investigation of the market manipulation, including trading data provided by the SEC, and that the FBI and the SEC had "participated in joint interviews with cooperating witnesses." He also referenced a civil suit filed by the SEC against Bercoon and Goldstein in Los Angeles, which concerned a different stock fraud related to the company LADP Acquisitions, Inc. ("LADP").

Taylor asserted in the affidavit that there was probable cause to believe the wiretap requested by the Government would uncover critical facts concerning the MCGI market manipulation conspiracy, including information about its scope, its participants, and the distribution and location of proceeds. In support of that assertion, he described in detail the evidence set out above, including the information provided by CS-1 (Rosenberg) and CS-2 (Weiner), the corroborating MCGI trading data and phone records, and the reporting by Hotstocked.com suggesting that the conspiracy was "still ongoing" and that another market manipulation had occurred in March 2011.

In the necessity section of the affidavit, Taylor argued that a wiretap was necessary because other investigative techniques were not likely to succeed in accomplishing all the objectives of the investigation, including identifying all the co-conspirators and uncovering the contents of their conversations. Specifically, Taylor stated that surveillance was of limited value in revealing the substance of relevant conversations and that an undercover agent would not likely obtain any useful information because Defendants were hesitant to work with people they did not know. Taylor acknowledged that confidential informants and financial records had provided useful historical information, but he noted that CS-1 (Rosenberg) and CS-2 (Weiner) no longer worked with or were trusted by Defendants and that financial records could only provide information about past events. Taylor stated further that the use of interviews, grand jury subpoenas, and search warrants would not

identify all the co-conspirators or reveal the full scope of their criminal activity and would likely hamper the investigation by alerting targets to the investigation.

Based on the information provided in Taylor's June 24 affidavit, the district court granted the Government's Title III wiretap application. Different district court judges granted the follow-on wiretap applications filed on July 26, August 25, and October 3, which were supported by materially similar affidavits supplemented with new information about the content of incriminatory calls intercepted pursuant to the June 24 order. As evident from the July 26 and August 25 affidavits, the wiretaps uncovered evidence of the MCGI manipulations that occurred in March and May 2010 and of additional planned manipulations. For example, in four calls between June 29 and July 19, 2011, Bercoon and an individual with the initials T.A. discussed bringing SEC filings current, issuing press releases, and raising money from another MCGI manipulation. And on August 16, 2011, Veugeler and Bercoon discussed a market manipulation of another stock, GNZR.

Id. at 1186–88 (footnotes omitted).

In 2018, pursuant to a jury trial, Movant was convicted of conspiracy to commit mail and wire fraud as to Find.com (Count 1), in violation of 18 U.S.C. § 1349; two counts of mail fraud relating to Find.com (Counts 2–3), in violation of 18 U.S.C. § 1341; three counts of wire fraud relating to Find.com (Counts 4–6), in violation of 18 U.S.C. § 1343; conspiracy to commit wire and securities fraud as to MCGI (Count 8), in violation of 18 U.S.C. § 371; four counts of wire fraud relating to MCGI (Counts 9–12), in violation of 18 U.S.C. § 1343; and securities fraud relating to MCGI (Count 13), in violation of 18 U.S.C. § 78, and he was sentenced

to a total active term of 120 months of imprisonment. (Doc. 424.) On direct appeal,

Movant raised the following claims:

- (1) The Court erred in denying his motion to suppress evidence obtained from wiretaps;
- (2) The Court erred in denying an evidentiary hearing concerning alleged omissions from a wiretap affidavit;
- (3) The Court erred in ruling that the trial evidence did not materially vary from the indictment; and
- (4) The Court erred in entering a \$1.9 million forfeiture order.

Goldstein, 989 F.3d at 1185. The Eleventh Circuit affirmed Movant's convictions.

Goldstein, 989 F.3d 1178.

Movant subsequently filed the instant § 2255 motion raising the following claims:

- (1) Movant received ineffective assistance of trial counsel when counsel in his motion to suppress failed to argue that there were multiple false statements in the supporting affidavit that were known by the affiant to be false and made with reckless disregard for the truth;
- (2) Movant received ineffective assistance of trial counsel when counsel in his motion to suppress failed to argue that the Government did not avail itself of other investigative techniques that were less intrusive than a wiretap and a wiretap was therefore not necessary;
- (3) Movant received ineffective assistance of trial counsel when counsel failed to file a motion to reopen the wiretap suppression after the Government procured evidence in August 2017 that the Government knew the affiant falsely

stated a manipulation occurred in March 2011 and the criminal activity was ongoing;

- (4) Movant received ineffective assistance of trial counsel when counsel failed to file a motion for dismissal of Movant's case for Government interference with his Sixth Amendment right to counsel by having the Los Angeles Securities and Exchange Commission ("SEC") seek an ex parte asset freeze against Movant in an unrelated matter;
- (5) Movant received ineffective assistance of trial counsel when counsel failed to file a motion to dismiss the indictment based on prosecutorial misconduct in the grand jury proceeding when FBI Agent Cromer provided numerous instances of known false testimony and improper testimony;
- (6) Movant received ineffective assistance of trial counsel when counsel failed to impeach Peter Veugeler on cross-examination during his trial testimony by highlighting the inconsistencies between Veugeler's trial testimony and his plea hearing testimony; and
- (7) Movant received ineffective assistance of trial counsel when counsel failed to impeach Weiner on cross-examination during his trial testimony by highlighting the inconsistencies between Weiner's trial testimony, his testimony in the Levys' trial, and his government interviews.

(Doc. 544 at 4-16.)

II. DISCUSSION

A. Claim 1

To prevail on a claim of ineffective assistance of counsel, a prisoner must meet a two-part test established by *Strickland v. Washington*, 466 U.S. 668 (1984). First, he must show that "counsel's performance was deficient." *Khan v. United*

States, 928 F.3d 1264, 1272 (11th Cir. 2019). Counsel's performance is deficient only if it falls "below an objective standard of reasonableness." *Id.* (internal quotation marks omitted). "There is a strong presumption that counsel's conduct fell within the range of reasonable professional assistance, and, therefore, counsel's performance is deficient only if it falls below the wide range of competence demanded of lawyers in criminal cases." *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014); *see also Michael v. Crosby*, 430 F.3d 1310, 1320 (11th Cir. 2005) ("There is a strong presumption that counsel's performance was reasonable and adequate, with great deference being shown to choices dictated by reasonable strategy."). Second, a prisoner must show that he suffered prejudice as a result of counsel's deficient performance. *Osley*, 751 F.3d at 1222. To establish prejudice, a prisoner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (internal quotation marks omitted). A court need not address both prongs if a prisoner makes an insufficient showing on one. *Id.*

In Claim 1, Movant argues that he received ineffective assistance of trial counsel when counsel in his motion to suppress failed to argue that there were multiple false statements in the supporting affidavit that were known by the affiant to be false and made with reckless disregard for the truth. (Doc. 544 at 4,

18–40.) In particular, he raises 43 instances where counsel was allegedly ineffective on this point. (*Id.* at 18–40.)

Under the Fourth Amendment, “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. “Evidence obtained by wiretap is subject to the Fourth Amendment’s prohibition against unreasonable searches.” *United States v. Goldstein*, 989 F.3d 1178, 1192 (11th Cir. 2021). “An application for a wiretap must be supported by probable cause.” *United States v. Maxi*, 886 F.3d 1318, 1331 (11th Cir. 2018); *see also Goldstein*, 989 F.3d at 1192 (explaining that “a wiretap must be supported by the same probable cause necessary to obtain a search warrant”). “A wiretap is invalid if the supporting application contained deliberate false statements or misleading omissions, and without those statements or omissions, there would have been no probable cause.” *Maxi*, 886 F.3d at 1331. However, an omission that is not reckless but instead is merely “negligent, or insignificant and immaterial, will not invalidate the affidavit.” *Id.* (internal quotation marks omitted).

A defendant is entitled to a hearing under *Franks v. Delaware*, 438 U.S. 154, 155 (1978), when he “makes a substantial preliminary showing that statements or omissions made in an affidavit supporting a wiretap are deliberately false or made with reckless disregard for the truth.” *Goldstein*, 989 F.3d at 1197. The

required “substantial preliminary showing” is “not lightly met.” *United States v. Arbolaez*, 450 F.3d 1283, 1294 (11th Cir. 2006). A “defendant must not only show that the affiant made false statements or omissions intentionally or with reckless disregard for the truth, but also that the false statements or omissions were necessary to the finding of probable cause.” *Goldstein*, 989 F.3d at 1197 (internal quotation marks omitted). As a result, “[i]f a wiretap order would be supported by probable cause even after setting aside the alleged misrepresentations or considering the information allegedly omitted, no hearing is required.” *Id.*

An affidavit supporting a search warrant is presumed to be valid. *Franks*, 438 U.S. at 171. To show entitlement to a hearing, “the challenger’s attack must be more than conclusory and must be supported by more than a mere desire to cross-examine.” *Id.* Not only must there be “allegations of deliberate falsehood or of reckless disregard for the truth,” but “those allegations must be accompanied by an offer of proof.” *Id.* Furthermore, these allegations “should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.” *Id.* In addition, it is only the affiant’s “deliberate falsity or reckless disregard whose impeachment is permitted” rather than that “of any nongovernmental informant.” *Id.*

Here, four wiretap orders were issued with respect to Movant's case. (Docs. 497-2, 497-5, 497-8, 497-11.) R. Wallace Taylor, Jr., a Federal Bureau of Investigation ("FBI") special agent, submitted affidavits for each application. (Docs. 497-1, 497-4, 497-7, 497-10.)

As noted earlier, Movant raises 43 instances where counsel was allegedly ineffective for failing to argue in his motion to suppress that there were multiple false statements in the supporting affidavit that were known by the affiant to be false and made with reckless disregard for the truth. (Doc. 544 at 18-40.)

In Issue 1, Movant claims that the affidavit "fails to mention that Bercoon and Goldstein did not assume the officer positions" at MCGI mentioned in the affidavit "until September 2010," after the events for which Movant was convicted. (*Id.* at 18.) However, Movant fails to show how this was an omission, as the affidavit referred to an SEC filing from March 11, 2011, that listed Movant and Goldstein as officers. (Doc. 497-1 at 10 n.2.) Thus, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issues 2-5, Movant claims that the affidavit improperly insinuates that Movant and Goldstein failed to report their trades in MCGI stock, a company registered under 15 U.S.C. § 78g, when they were not required to do so because MCGI was actually not registered pursuant to 15 U.S.C. § 78g, and therefore the

disclosure requirements under 15 U.S.C. § 78p did not apply to MCGI. (Doc. 544 at 18–20; *see* Doc. 497-1 at 12–16.) In particular, Movant argues in Issue 2 that the affidavit falsely states that Movant and Goldstein violated securities law by failing to file forms that did not need to be filed; in Issue 3, that the noted disclosure requirements did not apply to MCGI; in Issue 4, that the affidavit falsely accuses Movant and Goldstein of using third parties to avoid disclosing their trades when there was no requirement for them to disclose their trades to begin with; and in Issue 5, that once again there were no disclosures required by law despite the affidavit’s statement to the contrary. (Doc. 544 at 18–20.)

Movant has not shown that the affiant intentionally or recklessly made any misstatements. These statements relate to a highly technical area of securities law, and even if these statements are incorrect, Movant has shown at most only negligent misstatements. *See Maxi*, 886 F.3d at 1331. In any event, these alleged misstatements do not undermine confidence in the overall showing of probable cause. *See Goldstein*, 989 F.3d at 1197. Movant and Goldstein’s use of nominees and refusal to hold MCGI stock in their own name is inherently suspicious. Ultimately, Movant has not shown that counsel was ineffective for failing to challenge any alleged misstatements about MCGI’s registration requirements or Movant’s failure to file disclosures on the basis that they resulted in the deprivation of probable cause. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 6, Movant claims that paragraph 33 of the affidavit improperly stated that Rosenberg attempted to open a brokerage account at Schwab to deposit a certificate with MCGI shares because the shares were actually in the name of “RX Scripted” rather than MCGI. (Doc. 544 at 20; *see* Doc. 497-1 at 19–20.) However, this detail is immaterial to the overall finding of probable cause, and counsel was not ineffective for failing to argue this point. *See Maxi*, 886 F.3d at 1331; *Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issues 7 and 8, Movant challenges the affidavit’s statement in in paragraph 34 that Movant made a “fictitious” or “fake” bill of sale conveying \$45,000 of MCGI stock for Rosenberg. (Doc. 544 at 20–22; *see* Doc. 497-1 at 20 & n.11.) Movant argues that the affidavit lacks a basis for claiming that the bill of sale was fake. (Doc. 544 at 21.) According to Movant, “[u]nbeknownst to Affiant, the shares in question were acquired from third parties who had no reason to transfer shares to Rosenberg for no consideration.” (*Id.*) However, taking Movant’s statement as true, this undermines his ultimate claim that the affiant made an intentional or reckless misstatement given that the affiant did not know about these third parties. By Movant’s own logic, the affiant would have acted negligently at most in failing to conduct a more thorough investigation before claiming that the bill of sale at issue was fake. *See Maxi*, 886 F.3d at 1331.

Accordingly, counsel was not ineffective for failing to raise these issues. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 9, Movant claims that paragraph 37 of the affidavit improperly stated that both MCGI and GNZR were controlled by Movant and Goldstein. (Doc. 544 at 22; *see* Doc. 497-1 at 21.) However, Goldstein's counsel raised this argument before the Court in his motion to suppress and for a *Franks* hearing, which the Court rejected. (Doc. 118 at 34–35; Docs. 144, 182, 248.) As a result, it would not have made a difference if Movant's counsel had raised this argument, and consequently, counsel was not ineffective failing to argue this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222; *Pinkney v. Sec'y, DOC*, 876 F.3d 1290, 1297 (11th Cir. 2017) (holding that “an attorney will not be held to have performed deficiently for failing to perform a futile act, one that would not have gotten his client any relief”).

In Issue 10, Movant claims that paragraph 38 of the affidavit improperly stated that Movant and Goldstein controlled the trading activity of MCGI and GNZR. (Doc. 544 at 22–23; *see* Doc. 497-1 at 22.) Movant acknowledges that “Rosenberg stated that he was told what to do by Bercoon and/or Goldstein.” (Doc. 544 at 22.) Nevertheless, according to Movant, Peter Veugeler actually “controlled all of the trading activity and instructed and directed Goldstein on what to do.” (*Id.* at 22–23.) However, this is an unfair reading of a small portion

of the affidavit, and it is clear from a reading of the affidavit as a whole that Movant and Goldstein hired Veugeler to manage the trading of stock due to his past experience in manipulating markets. (*See, e.g.*, Doc. 497-1 at 32–37.) In addition, it is clear from a reading of paragraph 38 of the affidavit as a whole that the control discussed in the paragraph refers to Movant and Goldstein’s control of Rosenberg’s Scottrade account. (*See id.* at 22.) As a result, there is no misstatement, and Movant has failed to show that counsel was ineffective for failing to raise this point. *See Maxi*, 886 F.3d at 1331; *Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 11, Movant claims that paragraph 40 of the affidavit falsely stated that Rosenberg had not been paid since October 2008 when he told the Government that he was paid \$80,000 prior to July 2010. (Doc. 544 at 23; *see* Doc. 497-1 at 22–23.) However, Movant has failed to show a misstatement. According to Rosenberg’s interview with the FBI, he was originally hired in 2006 as an employee at one of Goldstein’s companies, One Travel Holdings, although he did work for several of Goldstein’s companies and Goldstein personally. (Doc. 544 at 151.) After One Travel Holdings went bankrupt, Rosenberg was hired by Goldstein to work at another company he controlled, nPorta. (*Id.*) Rosenberg stated that to his knowledge, he was still an employee at nPorta, although he had not been paid since October 2008. (*Id.*) Rosenberg additionally stated that

Goldstein made him take a cash advance of \$50,000 from his personal credit cards, and he made two loans of \$135,000 and \$100,000 to Movant and Goldstein. (*Id.* at 152.) During the MCGI stock manipulation scheme, Rosenberg demanded to be repaid some of the money before allowing them to continue using his brokerage account, and he received \$80,000. (*Id.* at 155.) Based on these facts, there is no particular reason to believe that the \$80,000 Rosenberg received was for back wages rather than for repayment of the money he loaned to Movant and Goldstein, and thus, the affiant did not intentionally or recklessly make a misstatement.² *See Maxi*, 886 F.3d at 1331; *see also United States v. Arbolaez*, 450 F.3d 1283, 1294 (11th Cir. 2006) (holding that the defendant failed to show entitlement to a *Franks* hearing because he “relies entirely upon the government’s report of a statement by Perez’s attorney that Perez denied having made the statements and that he would refuse to testify any further out of fear of reprisal by [the defendant]. There is no affidavit or otherwise sworn statement alleging that Crispin knowingly or recklessly included false statements in the search warrant affidavit.”). Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

² In any event, it is not readily apparent why the purpose of repayment would affect any finding of probable cause.

In Issues 12–16, Movant complains about the affidavit’s characterization of an income tax liability arising from Rosenberg’s stock trades, as well as a statement that Rosenberg was never paid for his role in the fraud. (Doc. 544 at 23–26; *see* Doc. 497-1 at 23–29.) With respect to the latter, even if true, this statement is immaterial to the finding of probable cause given that Movant was being investigated for committing fraud, not for failing to pay his associates involved in the fraud. *See Maxi*, 886 F.3d at 1331; (Doc. 544 at 153.) With respect to Rosenberg’s tax liability, this line of argument similarly is immaterial to the overall justification provided by the affiant that Movant, in his discussions with Rosenberg, acted in a manner that showed that he did in fact direct Rosenberg’s stock trades and took responsibility in trying to minimize Rosenberg’s tax liability. *See Maxi*, 886 F.3d at 1331; (Doc. 497-1 at 25–26.) In other words, whether Movant actually had a “legitimate” method of reducing Rosenberg’s tax liability is irrelevant to the finding of probable cause. (*See* Doc. 544 at 24.) Accordingly, Movant has failed to show that counsel was ineffective for failing to raise these issues. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 17, Movant claims that paragraph 54 of the affidavit improperly states that the Levys are “two well-known stock promoters” when Weiner did not state this. (Doc. 544 at 26; *see* Doc. 497-1 at 31.) However, this is not a misstatement, as the affidavit does not claim that this information came from Weiner.

Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this issue. *See Maxi*, 886 F.3d at 1331; *Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issues 18–19, Movant claims that the affidavit improperly relates inaccurate information from Weiner regarding how MCGI formed from a reverse merger involving a shell company purchased from another person. (Doc. 544 at 27; *see* Doc. 497-1 at 30–31; Doc. 544 at 164.) According to Movant, readily available public documents do not show that the shell company was a public company, nor that MCGI formed from a reverse merger, and the affiant therefore did not actually corroborate Weiner’s statements. (Doc. 544 at 27.) However, Movant has shown a negligent misstatement by the affiant at best in failing to corroborate Weiner’s statements, and in any event, given that how MCGI precisely formed is irrelevant to the question of whether Movant later committed fraud involving MCGI, this issue is not material to the finding of probable cause. *See Maxi*, 886 F.3d at 1331. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 20, Movant claims that paragraph 56 of the affidavit falsely states that according to Weiner, Movant and Goldstein met Peter Veugeler in Las Vegas in July 2009 when pen register data show there was no contact with Veugeler until October 2009. (Doc. 544 at 27–28; *see* Doc. 497-1 at 32–33.) However, pen register

records show only contact through telephones and do not preclude meetings in person. As a result, without more, Movant has not shown that Weiner's statement is false, nor has he shown that the affiant intentionally or recklessly made a misstatement in relying Weiner's statements on this point. *See Maxi*, 886 F.3d at 1331. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this issue. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 21, Movant claims that paragraph 58 of the affidavit similarly improperly relates inaccurate information from Weiner, as Weiner could not have possibly seen Rosenberg trading MCGI stock out of his Scottrade account in early March 2010 given that Rosenberg's Scottrade statements show no MCGI trading activity during that period, all of Rosenberg's trades during that time were done through his Morgan Stanley account, and his Morgan Stanley account was not set up for online trading at that time. (Doc. 544 at 28–29; *see* Doc. 497-1 at 33–34; Doc. 544 at 167–70.) However, Movant has not shown that the affiant made an intentional or reckless misstatement. A brokerage statement shows only completed trades, and it is possible that Weiner observed Rosenberg using his Scottrade account without actually completing any trades. Movant has not provided an affidavit or other evidence squarely contradicting Weiner's observations. *See Arbolaez*, 450 F.3d at 1294. Without more, the affiant's recounting of Weiner's statements does not constitute misconduct. Furthermore, although

Movant claims that the Government knew that Rosenberg's Morgan Stanley account did not have online trading capabilities at the time, he references a letter sent to the SEC, not the FBI or other criminal authorities, and he has not shown that the FBI was aware of the letter at the time. (*See* Doc. 544 at 171.) In any event, the status of Rosenberg's Morgan Stanley account does not affect Weiner's claim that he saw Rosenberg trading out of his Scottrade account. Thus, Movant has not made a substantial preliminary showing that the affiant made an intentional or reckless misstatement. *See Goldstein*, 989 F.3d at 1197; *Maxi*, 886 F.3d at 1331. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 22, Movant claims that the paragraph 59 of the affidavit improperly states that Goldstein's and Veugeler's coordinated trading constituted fraud. (Doc. 544 at 29; *see* Doc. 497-1 at 34.) However, both Goldstein and Veugeler were subsequently convicted of fraud-related charges as a result of these activities, and there was therefore no misrepresentation. *See Maxi*, 886 F.3d at 1331. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 23, Movant claims that paragraphs 60–64 of the affidavit falsely state various details of the May 2010 “market making” event with Veugeler and Goldstein. (Doc. 544 at 29–31; *see* Doc. 497-1 at 34–36.) Movant appears to take

issue, at least in part, with the affiant's attempts to reconcile Weiner's memory of events with other evidence. (*See* Doc. 544 at 30 ("The Affiant then concludes that Weiner erred in his recall and that this May 2010 activity actually began on May 10 rather than May 4, 2010. Affiant never speaks to Weiner to confirm this conclusion.")) However, the fact that the affiant attempted to resolve these inconsistencies itself is proof against a claim that the affiant intentionally or recklessly made a misstatement. *See Maxi*, 886 F.3d at 1331. The Eleventh Circuit rejected a virtually identical argument raised by Movant in his motion to dismiss the indictment, ruling:

Here, many of Bercoon's arguments rely upon an unfair reading of the grand jury transcript. For example, Bercoon contends that the prosecutor must have known that Weiner's story was false based on evidence contradicting aspects of his account, and thus that Agent Cromer testified falsely when he related to the grand jury what Weiner had told law enforcement. But Bercoon ignores the fact that the prosecutor elicited testimony from Cromer about parts of Weiner's testimony "that sound not quite right," highlighting certain inconsistencies in Weiner's description of the scheme.

Goldstein, 989 F.3d at 1204 (citation omitted). Ultimately, Movant appears to be motivated by a "mere desire to cross-examine" Weiner, which is insufficient to support a showing that he is entitled to a *Franks* hearing. *See Franks*, 438 U.S. at 171. Similarly, Movant's impeachment of Weiner's statements fails to state a claim to a *Franks* hearing. *See id.* ("The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any

nongovernmental informant.”). Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 24, Movant claims that paragraph 65 of the affidavit falsely states various details with regard to Weiner’s understanding of how the market manipulation scheme carried out by Veugeler and Goldstein worked, as Weiner’s recounting is inconsistent with the theory presented by the Government at trial. (Doc. 544 at 31–32; *see* Doc. 497-1 at 36–37.) However, Movant has failed to show that Weiner, let alone the affiant, made a material intentional or reckless misstatement central to the finding of probable cause. *See Franks*, 438 U.S. at 171; *Maxi*, 886 F.3d at 1331. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 25, Movant claims that paragraphs 67–68 of the affidavit, concerning the interpretation of text messages on Rosenberg’s phone, rely on false information from Weiner. (Doc. 544 at 32; *see* Doc. 497-1 at 38–39.) However, Movant’s allegation is conclusory, and he has failed to show that the affiant made a material intentional or reckless misstatement central to the finding of probable cause. *See Franks*, 438 U.S. at 171; *Maxi*, 886 F.3d at 1331. Accordingly, Movant has

failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 26, Movant claims that paragraph 78 of the affidavit improperly stated that Veugeler had no legitimate business reason for buying additional MCGI stock, as none of the conspirators had stated this. (Doc. 544 at 32; *see* Doc. 497-1 at 46.) However, the affiant is not limited to recounting only statements from others, and Movant has failed to show why the affiant could not draw this conclusion on his own. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Maxi*, 886 F.3d at 1331; *Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 27, Movant claims that footnote 22 of paragraph 79 of the affidavit improperly states that Veugeler and Goldstein traded through nominee accounts when the accounts were not actually nominee accounts but accounts controlled through a shell company by Veugeler or his wife. (Doc. 544 at 32–33; *see* Doc. 497-1 at 46–47.) However, Movant has failed to show how this is a material misstatement or how this affects the finding of probable cause. *See Franks*, 438 U.S. at 171; *Maxi*, 886 F.3d at 1331. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this issue. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 28, Movant claims that the affidavit fails to explain that Rosenberg was no longer allowing trades through his brokerage account during the March 2011 market manipulation and that Tim Armes was in control of MCGI. (Doc. 544 at 33; *see id.* at 174–76.) However, the affidavit did not state that Rosenberg’s accounts traded MCGI stock in March 2011. Furthermore, the fact that another person ostensibly controlled MCGI is consistent with Movant’s *modus operandi* of hiding his actions behind others. As a result, Movant has not shown a lack of probable cause. *See Franks*, 438 U.S. at 171; *Maxi*, 886 F.3d at 1331. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 29, Movant repeats Issue 24 and claims that paragraph 82 of the affidavit falsely states that trading data corroborate Weiner’s account of the May 2010 market manipulation scheme carried out by Veugeler and Goldstein. (Doc. 544 at 34; *see* Doc. 497-1 at 48–49.) However, as with Issue 24, Movant has failed to show that Weiner, let alone the affiant, made a material intentional or reckless misstatement central to the finding of probable cause. *See Franks*, 438 U.S. at 171; *Maxi*, 886 F.3d at 1331. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 30, Movant repeats Issue 2 and claims that paragraph 83 of the affidavit improperly stated that Movant and Goldstein violated securities law by failing to file forms that did not need to be filed. (Doc. 544 at 34; *see* Doc. 497-1 at 49.) However, as with Issue 2, even if this statement was incorrect, Movant has shown at most only a negligent misstatement. And in any event, the alleged misstatement does not undermine confidence in the overall showing of probable cause. *See Maxi*, 886 F.3d at 1331; *Goldstein*, 989 F.3d at 1197. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 31, Movant repeats Issue 20 and claims that paragraphs 84–91 of the affidavit fail to state that pen register data show there was no contact with Veugeler until October 2009, contradicting Weiner’s statement that Movant and Goldstein met Peter Veugeler in Las Vegas in July 2009. (Doc. 544 at 34; *see* Doc. 497-1 at 49–52.) However, as with Issue 20, pen register records show only contact through telephones and do not preclude meetings in person. As a result, without more, Movant has not shown that Weiner’s statement is false, nor has he shown that the affiant intentionally or recklessly made a misstatement in relying Weiner’s statements on this point. *See Maxi*, 886 F.3d at 1331. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this issue. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 32, Movant claims that paragraph 92 of the affidavit falsely states that a wiretap is necessary. (Doc. 544 at 34–35; *see* Doc. 497-1 at 52.) A wiretap must be necessary. *Goldstein*, 989 F.3d at 1192. In particular, an applicant for a wiretap must show that “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.” 18 U.S.C. § 2519(3)(c). “To show necessity, the affidavit need not, however, show a comprehensive exhaustion of all possible techniques, but must simply explain the retroactive or prospective failure of several investigative techniques that reasonably suggest themselves.” *Maxi*, 886 F.3d at 1331 (internal quotation marks omitted); *see also United States v. Hawkins*, 934 F.3d 1251, 1258 (11th Cir. 2019) (noting that “the statute does not foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted” (internal quotation marks omitted)). “In evaluating whether the Government met its burden, courts must read supporting affidavits in a practical and commonsense fashion, and the district court is clothed with broad discretion in its consideration of the application.” *Goldstein*, 989 F.3d at 1192 (internal quotation marks omitted). However, with respect to this issue, both Movant and Goldstein extensively litigated the issue of necessity throughout the criminal case, and both this Court and the Eleventh Circuit rejected their arguments. *See, e.g., id.* at 1195–96. Accordingly, Movant has failed to show that counsel was ineffective

for failing to raise this point. *See Maxi*, 886 F.3d at 1331; *Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 33, Movant claims that paragraph 96 of the affidavit states that Rosenberg was a reliable source of information even though Rosenberg said he was viewed as an errand boy and was not included in meetings or discussions with Movant and Goldstein. (Doc. 544 at 35–36; *see* Doc. 497-1 at 54.) However, Movant has failed to show how this is a material misstatement or how this affects the finding of probable cause. *See Franks*, 438 U.S. at 171; *Maxi*, 886 F.3d at 1331. Moreover, Goldstein’s counsel raised this argument before the Court in his motion to suppress and for a *Franks* hearing, which the Court rejected. (Doc. 118 at 34–35; Docs. 144, 182, 248.) Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222; *Pinkney*, 876 F.3d at 1297.

In Issue 34, Movant claims that Rosenberg in his August 2010 interview with the Government stated that Goldstein told him that he was one of two MCGI shareholders with tradeable stock, yet the Government had evidence that by May 2010, there were at least 200 shareholders and Veugeler and Rosenberg together had sold over 1 million shares of stock to third parties. (Doc. 544 at 36; *see id.* at 155.) However, an attack solely on Rosenberg’s statement does not state a claim for relief under *Franks*. *See Franks*, 438 U.S. at 171. Movant has failed to show how

this is a material misstatement by affiant or how this affects the finding of probable cause. *See id.*; *Maxi*, 886 F.3d at 1331. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222; *Pinkney*, 876 F.3d at 1297.

In Issue 35, Movant claims that the affiant falsely stated that a wiretap was necessary to corroborate information provided by Weiner, yet the information provided by Weiner could easily have been shown to be false through other data, such as pen registers and brokerage statements, and the affiant had already stated that he had corroborated some of Weiner's information. (Doc. 544 at 36; *see* Doc. 497-1 at 30 n.13, 55–56.) However, this is an unfair reading of a small portion of the affidavit. *See Maxi*, 886 F.3d at 1331. More fundamentally, Movant's essential argument that the Government must exhaust all other investigative techniques before seeking a wiretap has been expressly rejected by the Eleventh Circuit. *See Maxi*, 886 F.3d at 1331 ("To show necessity, the affidavit need not, however, show a comprehensive exhaustion of all possible techniques, but must simply explain the retroactive or prospective failure of several investigative techniques that reasonably suggest themselves." (internal quotation marks omitted)); *Hawkins*, 934 F.3d at 1258 (noting that "the statute does not foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted" (internal quotation marks omitted)). Accordingly, Movant has failed

to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 36, Movant claims that paragraph 101 of the affidavit falsely stated that undercover work was not a viable option in lieu of a wiretap because Movant and Goldstein were reluctant to associate with people whom they do not know, yet they had associated with people they did not know as part of the market manipulation scheme. (Doc. 544 at 37; *see* Doc. 497-1 at 56.) This is a variation of Claim 2, which, as further discussed below, is meritless. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 37, Movant claims that paragraph 106 of the affidavit improperly stated that interviews with witnesses or participants would not be fruitful and would tip off Movant and Goldstein about the investigation, despite the fact that the Atlanta SEC had contacted Goldstein in June 2010 and had sent a notice about a nonpublic inquiry involving MCGI more than a year before the affidavit. (Doc. 544 at 37; *see* Doc. 497-1 at 58–59.) However, many defendants do in fact alter their activities when they learn they are the subject of a criminal investigation. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issue 38, Movant claims that the affiant acknowledged that the evidence gathered by the SEC was circumstantial and not revealing of intent, yet stated at various points of the affidavit that various coconspirators had intent to commit fraud. (Doc. 544 at 38; *see* Doc. 497-1 at 32–33.) However, this is a nonspecific, conclusory argument that fails to make a substantial preliminary showing that the affiant made a material intentional or reckless misstatement central to the finding of probable cause. *See Franks*, 438 U.S. at 171; *Goldstein*, 989 F.3d at 1197; *Maxi*, 886 F.3d at 1331. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise this point. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

In Issues 39–40, Movant complains about various aspects of the application for the wiretap. (Doc. 544 at 38–39; *see* Doc. 497-1 at 32–33.) However, such complaints about defects in an application for the wiretap rather than the affidavit fail to state a claim for relief under *Franks*. *See Franks*, 438 U.S. at 171; *Maxi*, 886 F.3d at 1331. Accordingly, Movant has failed to show that counsel was ineffective for failing to raise these issues. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

B. Claim 2

In Claim 2, Movant argues that he received ineffective assistance of counsel when counsel in his motion to suppress failed to argue that the Government did not avail itself of other investigative techniques that were less intrusive than a wiretap and a wiretap was therefore not necessary. (Doc. 544 at 5.) In particular,

according to Movant, on September 30, 2010, the Government interviewed a businessman who was involved in a possible transaction with Movant and Goldstein. (*Id.*) Movant states that the businessman allowed the FBI to place a wire on him to record a subsequent lunch meeting with Movant and Goldstein in which the two discussed acquiring the businessman's company in a public company and hiring him as an executive. (*Id.*) Movant argues that the Government easily could have had an undercover agent attend the meeting as an advisor to the businessman and asked any questions desired, given that the businessman had no experience with public companies and would have wanted to know everything about public markets, stock trading, stock promotion, and so on. (*Id.*) As a result, the businessman would have been able to provide all the information that the Government needed without a wiretap. (*Id.*)

Movant has failed to show that a wiretap was not necessary. According to the Government, the businessman was not an FBI informant, and Movant's description of the businessman's involvement is inaccurate on numerous fronts. (Doc. 557 at 56-57.) Yet even if the businessman had been recruited as an informant, it is simply not believable that the businessman or an undercover agent could have acquired all the information revealed through the wiretap in a business meeting with people with whom they had no prior relationship. (*See* Doc. 497-4 at 108-23; Doc. 497-7 at 57-66; Doc. 497-10 at 51-59; *see, e.g.*, Doc. 497-7 at 64

("BERCOON responds, 'You stole it from the market. I mean, that's the whole point.'").) As thoroughly discussed by the Government, Movant's modus operandi was not to recruit honest businessmen to join his scheme. (Doc. 557 at 67-68.) Consequently, counsel did not act deficiently in failing to raise this argument. Furthermore, even if counsel had raised the argument proffered by Movant, there is no reasonable probability that the Court would have found a wiretap unnecessary. As a result, Movant has not shown prejudice. Accordingly, Movant has failed to show that counsel was ineffective, and Movant is not entitled to relief on this claim. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

C. Claim 3

In Claim 3, Movant argues that he received ineffective assistance of trial counsel when counsel failed to file a motion to reopen the wiretap suppression after the Government procured evidence in August 2017 that the Government knew the affiant falsely stated a manipulation occurred in March 2011 and the criminal activity was ongoing. (Doc. 544 at 7, 41-42.) In particular, Movant argues that Special Agent William Cromer's comments to the grand jury contradict Special Agent R. Wallace Taylor, Jr.'s affidavit for the wiretap applications and therefore the affidavit must be false. (*Id.* at 41-42.)

Movant has not shown that counsel was ineffective. Contrary to Movant's argument, there is no contradiction between Agents Cromer's and Taylor's

comments. Agent Cromer's comments to the grand jury were meant to summarize information obtained from the wiretaps about the March and May 2010 manipulation events. (*See* Doc. 544-1 at 61.) As shown by the context of Agent Cromer's comments, they were not meant to conclusively state that there were no additional manipulations, such as the March 2011 manipulation. (*See id.* at 60–61, 64; Doc. 497-1 at 10–11.) Moreover, regardless of whether there was a contradiction, there is no reason to believe that these two agents must draw the same conclusions based on their individual interpretations of the information gathered. A different conclusion from Agent Cromer versus Agent Taylor does not necessarily mean Agent Taylor must have been lying. Ultimately, Movant's argument rests on an unfair reading of the grand jury transcript. *See Goldstein*, 989 F.3d at 1204 (“Here, many of Bercoon's arguments rely upon an unfair reading of the grand jury transcript.”). As a result, Movant has failed to show that counsel was deficient on this point. Nor has Movant shown prejudice, as there is no reasonable probability that the Court would have granted a motion to suppress based on Movant's argument. Accordingly, Movant has failed to show that counsel was ineffective, and Movant is not entitled to relief on this claim. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

D. Claim 4

In Claim 4, Movant argues that he received ineffective assistance of trial counsel when counsel failed to file a motion for dismissal of Movant's case for Government interference with his Sixth Amendment right to counsel by having the Los Angeles Securities and Exchange Commission ("SEC") seek an ex parte asset freeze against Movant in an unrelated matter. (Doc. 544 at 8, 43); *see SEC v. LADP Acquisition, Inc.*, No. 2:10-cv-06835-RGK-JCG (C.D. Cal. filed Sept. 14, 2010).

Movant has failed to show that counsel was ineffective. "The Sixth Amendment right of the accused to assistance of counsel in all criminal prosecutions is limited by its terms: it does not attach until a prosecution is commenced." *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (footnote and internal quotation marks omitted). The commencement of prosecution is determined by "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* (internal quotation marks omitted).

Here, Movant was initially indicted in January 2015, many years after the SEC civil action began. (*See* Doc. 1.) Thus, Movant's Sixth Amendment right to counsel had not yet attached and therefore was not violated, and counsel consequently was not deficient for failing to make this argument. *See Rothgery*, 554 U.S. at 198; *Khan*, 928 F.3d at 1272. In any event, even if the Sixth Amendment

right to counsel applied, both this Court and the Eleventh Circuit have rejected the general thrust of Movant's and Goldstein's argument in a related claim that the SEC's civil proceeding was improperly intertwined with the Government's criminal prosecution of Movant. (*See* Docs. 203, 247); *Goldstein*, 989 F.3d at 1202. As a result, Movant also has failed to show prejudice. *See Osley*, 751 F.3d at 1222. Accordingly, Movant has failed to show that counsel was ineffective, and Movant is not entitled to relief on this claim.

E. Claim 5

In Claim 5, Movant argues that he received ineffective assistance of trial counsel when counsel failed to file a motion to dismiss the indictment based on prosecutorial misconduct in the grand jury proceeding when FBI Agent Cromer provided numerous instances of known false testimony and improper testimony. (Doc. 544 at 13, 44–68.) In particular, he raises 52 instances where counsel was allegedly ineffective on this point. (*Id.* at 44–68.)

Movant has failed to show that counsel was ineffective. During his direct appeal, Movant filed a *pro se* motion to dismiss the indictment, which the Eleventh Circuit rejected on the merits. *United States v. Goldstein*, No. 18-13321, Doc. 87 (11th Circ. Sept. 1, 2020); *Goldstein*, 989 F.3d at 1205. The claims raised in his motion are functionally identical to the underlying issues raised in this claim. *Compare*

Goldstein, No. 18-13321, Doc. 87, *with* (Doc. 544 at 44–68). In denying Movant’s motion to dismiss the indictment, the Eleventh Circuit ruled the following:

Here, many of Bercoon’s arguments rely upon an unfair reading of the grand jury transcript. For example, Bercoon contends that the prosecutor must have known that Weiner’s story was false based on evidence contradicting aspects of his account, and thus that Agent Cromer testified falsely when he related to the grand jury what Weiner had told law enforcement. But Bercoon ignores the fact that the prosecutor elicited testimony from Cromer about parts of Weiner’s testimony “that sound not quite right,” highlighting certain inconsistencies in Weiner’s description of the scheme. Similarly, Bercoon’s argument that Cromer falsely testified that he had personally observed Goldstein trading out of one of Rosenberg’s accounts unfairly reads Cromer’s response to a compound question, which, given the context, any reasonable person would interpret as a statement about what Weiner had seen.

Other arguments that Bercoon makes lack any legal basis that could support a finding of plain error. For example, Bercoon cites no authority suggesting that the prosecutor acted improperly when, after numerous interruptions, she requested that jurors hold questions until the end to facilitate the presentation of evidence. Notably, the request was not unreasonable under the circumstances, and, as Bercoon acknowledges, the prosecutor later solicited and received juror questions. Further, the “opinion” testimony that Bercoon challenges was clearly not prejudicial in context. For example, despite acknowledging that MCGI “was known to be a start-up,” Bercoon argues that Cromer testified improperly when, in response to a grand juror’s question about whether MCGI was a real company, he opined that it was never a fully functional business. Even assuming this statement constituted improper opinion testimony, the prosecutor elicited foundational testimony about MCGI’s limited business dealings that fully supported Cromer’s generalization, rendering it harmless. Bercoon also focuses on Cromer’s allegedly false testimony that the Levys had already been convicted for “participating in numerous stock manipulations over many years, including the activities related to this MedCareers’ stock.” But even assuming Bercoon is right that the Levys were not

convicted for manipulating MCGI stock in particular, this incidental comment was harmless. Cromer's testimony was not part of the Government's affirmative case and was instead prompted by a juror question about who the Levys were and why Weiner and Goldstein had met with them. Further, Cromer couched his response in uncertainty, stating "I'm not sure exactly," which provided the grand jury with enough information to weigh Cromer's stated belief about the Levys.

In short, the transcript reveals that the grand jury proceeding was a miniature version of the real trial, with Agent Cromer presenting the core evidence that the Government ultimately offered at trial. We discern no misconduct by the Government at either proceeding. Moreover, given the overwhelming evidence presented against Defendants both during the grand jury proceedings and at trial—including, among other things, Weiner's and Rosenberg's detailed description of the scheme, the wiretap recordings, the SEC's analyses of MCGI trading activity, and the financial analysis of bank accounts under Defendants' control—we are convinced that the grand jury's decision to indict was not substantially influenced by any improper testimony. Accordingly, we find no basis to dismiss the indictment, and we deny Bercoon's motion to that effect.

Goldstein, 989 F.3d at 1204–05 (citations omitted).

Having counsel move to dismiss the indictment on claims that the Eleventh Circuit rejected would not have changed the outcome, and "an attorney will not be held to have performed deficiently for failing to perform a futile act, one that would not have gotten his client any relief." *Pinkney v. Sec'y, DOC*, 876 F.3d 1290, 1297 (11th Cir. 2017). Accordingly, Movant has failed to show that counsel was ineffective, and Movant is not entitled to relief on this claim. *See Khan*, 928 F.3d at 1272; *Osley*, 751 F.3d at 1222.

F. Claim 6

In Claim 6, Movant argues that he received ineffective assistance of trial counsel when counsel failed to impeach Peter Veugeler on cross-examination during his trial testimony by highlighting the inconsistencies between Veugeler's trial testimony and his plea hearing testimony. (Doc. 544 at 14; Doc. 544-2 at 65–69.)

“The decision as to whether to cross-examine a witness is a tactical one well within the discretion of a defense attorney.” *Fugate v. Head*, 261 F.3d 1206, 1219 (11th Cir. 2001) (internal quotation marks omitted). Ultimately, “counsel will not be deemed unconstitutionally deficient because of tactical decisions.” *Michael v. Crosby*, 430 F.3d 1310, 1320 (11th Cir. 2005) (brackets and internal quotation marks omitted). “Claims that an attorney should have cross-examined further on inconsequential matters do not establish constitutionally deficient performance.” *Johnson v. Alabama*, 256 F.3d 1156, 1186 (11th Cir. 2001). Furthermore, when counsel “substantially impeaches the witness, no claim for ineffectiveness can succeed unless the petitioner comes forward with specific information which would have added to the impeachment of the State’s witnesses.” *Id.* (brackets and internal quotation marks omitted).

Movant has failed to show that counsel was ineffective. Counsel thoroughly cross-examined Veugeler. (See Doc. 483 at 62–99, 166–68.) For example, he

impeached Veugeler's credibility by pointing out that Veugeler had previously claimed that he was not involved in manipulating MCGI's stock. (*Id.* at 71–72.) This squarely contradicts Movant's allegation that "Kish pursued no line of questioning that pointedly showed that Veugeler testified falsely." (Doc. 544-2 at 68). "[C]ounsel plainly cannot be deficient for failing to raise an issue that he did, in fact raise." *Taylor v. Holt*, No. 1:17-CV-2331-TWT, 2018 WL 3640607, at *7 (N.D. Ga. June 12, 2018), *report and recommendation adopted*, No. 1:17-CV-2331-TWT, 2018 WL 3632436 (N.D. Ga. July 31, 2018).

Nevertheless, Movant points to various questions that he contends counsel should have asked during his cross-examination of Veugeler. (Doc. 544-2 at 66–67.) Among other things, he states that:

Mr. Kish should have asked Veugeler whether the thought of having to remain held in Atlanta Federal Prison, notoriously one of the worst holding facilities in the federal prison system, from early February 2016 until what turned out to be two years, until trial, had any effect on his decision to plea.

(*Id.* at 67.) However, counsel did not act deficiently in failing to ask these kinds of inconsequential questions. *See Khan*, 928 F.3d at 1272. Movant's criticisms of counsel's performance amount to—as he himself acknowledges—"after the fact second-guessing." (Doc. 544-2 at 67); *see Chandler v. United States*, 218 F.3d 1305, 1314 n.14 (11th Cir. 2000) (en banc) (admonishing that "a court must not second-guess counsel's strategy"). In essence, Movant, nitpicking counsel's cross-

examination, faults him for rendering assistance that could have been even better. But “[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003); accord *Jenkins v. Comm’r, Ala. Dep’t of Corr.*, 963 F.3d 1248, 1270 (11th Cir. 2020) (“The test for ineffectiveness is not whether counsel could have done more.” (internal quotation marks omitted)); *Dingle v. Sec’y for Dep’t of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) (“Even if counsel’s decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was so patently unreasonable that no competent attorney would have chosen it.” (internal quotation marks omitted)). Movant has established mere disagreement with counsel’s course of action, which is insufficient to prevail on a claim of ineffective assistance of counsel. See *Galin v. Sec’y, Dep’t of Corr.*, No. 8:08-CV-254-T-23TBM, 2013 WL 1233125, at *9 (M.D. Fla. Mar. 27, 2013) (“A defendant’s disagreements with counsel’s tactics or strategies will not support a claim of ineffective assistance of counsel.”). Consequently, Movant has not shown that counsel’s performance was deficient.

Nor has Movant shown prejudice, as there is no reasonable probability that the outcome of his trial would have been different had counsel asked the questions Movant claims counsel should have asked. See *Osley*, 751 F.3d at 1222. Indeed, the Eleventh Circuit noted numerous times that there was

“overwhelming evidence” of Movant’s guilt. *See, e.g., Goldstein*, 989 F.3d at 1190, 1200, 1205. It strains credulity to believe that had counsel worded his cross-examination slightly differently or asked a few additional questions, Movant would have been acquitted. *See Jones v. United States*, No. 1:10-CR-0453-ODE-JFK, 2015 WL 2169236, at *11 (N.D. Ga. May 8, 2015) (concluding that “[h]ad a different cross-examination of Price made it clear that Price was the person seen by Taylor, the outcome would have been the same because other evidence was sufficient to find Movant guilty”). Consequently, Movant has not shown prejudice. Because Movant has failed to show that counsel was ineffective, he is not entitled to relief on this claim.

G. *Claim 7*

In Claim 7, Movant argues that he received ineffective assistance of trial counsel when counsel failed to impeach Weiner on cross-examination during his trial testimony by highlighting the inconsistencies between Weiner’s trial testimony, his testimony in the Levys’ trial, and his government interviews. (Doc. 544 at 16, 69–72.) He points to various questions that he contends counsel should have asked during his cross-examination of Weiner. (*Id.* at 70–71.)

Movant has failed to show that counsel was ineffective. As with his cross-examination of Veugeler, counsel thoroughly cross-examined Weiner. (*See* Doc. 479 at 129–82, 246–48.) Furthermore, contrary to Movant’s allegation, counsel did

in fact use Weiner's prior testimony in the Levys' trial to impeach Weiner. (*Id.* at 131-32, 139-40, 160-61.) Similarly, counsel questioned Weiner on whether the May 2010 manipulation occurred in Orlando or Clearwater. (*Id.* at 163-64.) As previously noted, "counsel plainly cannot be deficient for failing to raise an issue that he did, in fact raise." *Taylor*, 2018 WL 3640607, at *7. Moreover, as shown by Weiner's testimony, having counsel ask the questions proffered by Movant would not have been effective, given that, for example, Weiner was able to explain the discrepancy regarding the location of the May 2010 manipulation. (Doc. 479 at 163-64.) As with Claim 6, "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 8; accord *Jenkins*, 963 F.3d at 1270 ("The test for ineffectiveness is not whether counsel could have done more." (internal quotation marks omitted)). In the end, Movant has not shown that counsel's performance was deficient.

Movant has also failed to show prejudice, as once again there is no reasonable probability that the outcome of his trial would have been different had counsel asked the questions Movant claims counsel should have asked. *See Osley*, 751 F.3d at 1222. Movant's obstinate fixation on whether the manipulation occurred in Orlando or Clearwater is ultimately irrelevant. It is the fact that Movant engaged in stock market manipulation, not the fact that he did it in

Clearwater, that led to his conviction. As with Claim 6, the Eleventh Circuit noted numerous times that there was “overwhelming evidence” of Movant’s guilt. *See, e.g., Goldstein*, 989 F.3d at 1190, 1200, 1205. Movant’s assertion that “[v]irtually every piece of information Weiner provided was objectively false,” (Doc. 544-2 at 72), falls flat. And once again, there is nothing to suggest that had counsel worded his cross-examination slightly differently or asked a few additional questions, Movant would have been acquitted. *See Jones*, 2015 WL 2169236, at *11 (concluding that “[h]ad a different cross-examination of Price made it clear that Price was the person seen by Taylor, the outcome would have been the same because other evidence was sufficient to find Movant guilty”). Consequently, Movant has not shown prejudice. Because Movant has failed to show that counsel was ineffective, he is not entitled to relief on this claim.

III. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11 of the Rules Governing Section 2255 Cases, “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).” Section 2253(c)(2) states that a certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” A substantial showing of the denial of a constitutional right

“includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim . . . a certificate of appealability should issue only when the prisoner shows both that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Jimenez v. Quarterman, 555 U.S. 113, 118 n.3 (2009) (citing *Slack*, 529 U.S. at 484) (internal quotation marks omitted).

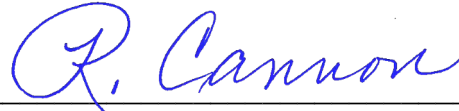
It is **RECOMMENDED** that a certificate of appealability be **DENIED** because resolution of the issues presented is not debatable. If the District Judge adopts this recommendation and denies a certificate of appealability, Movant is advised that he “may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.” 28 U.S.C. foll. § 2255, Rule 11(a).

IV. CONCLUSION

For the reasons stated above, it is **RECOMMENDED** that the instant motion to vacate (Doc. 544) be **DENIED**.

The Clerk is **DIRECTED** to terminate the referral to the undersigned.

IT IS SO RECOMMENDED, this 7th day of April, 2025.



REGINA D. CANNON
UNITED STATES MAGISTRATE JUDGE