

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :  
:  
- v. - :  
:  
GORDON FREEDMAN, :  
:  
Defendant. :  
:  
-----X

19 Cr. 249 (KMW)

**GOVERNMENT’S SENTENCING MEMORANDUM**

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**PRELIMINARY STATEMENT**

Defendant Gordon Freedman (the “defendant” or “Freedman”) is scheduled to be sentenced in the above-captioned matter (the “Diversion and Overdose Matter”) on July 8, 2021, immediately following Freedman’s sentencing proceeding in the separate case docketed as 18 Cr. 217 (KMW) (the “Insys Bribery Matter”). As stipulated in the defendant’s plea agreement in the Diversion and Overdose Matter and calculated by the Probation Department, the United States Sentencing Guidelines (“U.S.S.G.” or “the Guidelines”) sentencing range applicable to the defendant is 210 to 240 months’ imprisonment. For the reasons discussed below, the Government respectfully submits that a prison sentence within that range, to be served concurrently with the prison sentence imposed in the Insys Bribery Matter, and a fine within the recommended Guidelines range of \$40,000 to \$1,000,000 would be sufficient, but not greater than necessary, to serve the legitimate purposes of sentencing.

**STATEMENT OF FACTS**

As set forth in Indictment 19 Cr. 249 (KMW) (the “Indictment”), the Presentence Investigation Report revised on June 5, 2020 (“PSR”), and the record established during the defendant’s trial in the Insys Bribery Matter, the defendant prescribed massive quantities of

dangerous, highly addictive controlled substances to a single patient, Jeffrey Rosenthal, for no legitimate medical purpose. In May 2017, Rosenthal overdosed on a Freedman-prescribed fentanyl drug and died.

**I. Freedman Prescribes Rosenthal Staggering Quantities of Opioids**

At the time of the criminal offense at issue in this case, Gordon Freedman was a doctor, specializing in pain management and anesthesiology. He had a well-established private pain-management practice on the Upper East Side of Manhattan and served as an associate professor at Mount Sinai Hospital. (Indictment ¶ 1; PSR ¶ 11; Transcript of Insys Bribery Matter Trial (“Trial Tr.”) at 1399-1400). Jeffrey Rosenthal was his patient.

From approximately 2013 until approximately May 2017, Freedman prescribed Rosenthal numerous controlled substances, including fentanyl, hydromorphone, morphine, oxycodone, and oxymorphone. (Indictment ¶ 2). The prescriptions Freedman wrote for Rosenthal were remarkable not just for the number of controlled substances Rosenthal was taking at Freedman’s direction but for the truly disturbing quantities in which those controlled substances were prescribed.

In 2013 alone, Freedman prescribed Rosenthal approximately 85,427 oxycodone pills—an average of approximately 234 oxycodone pills *per day*—containing a total of approximately 2,422,435 mg of oxycodone. (PSR ¶ 11). As shocking as that 234 oxycodone pills-per-day statistic is, it *understates* the volume of opioids Freedman prescribed to Rosenthal for two significant reasons. First, oxycodone is available in pills as small as 5 mgs, but the roughly 234 pills per day that Freedman prescribed to Rosenthal throughout 2013 averaged approximately 28.36 mgs each, several times greater than the smallest available dose. Second, Freedman prescribed the oxycodone on top of high-dose prescriptions for other powerful opioids; indeed,

Freedman prescribed Rosenthal multiple Transmucosal Immediate Release Fentanyl (“TIRF”) products—a class of rapid-onset opioids that physicians are required to undergo special training and testing before prescribing—in exceptionally high quantities. (Indictment ¶¶ 4-5; Trial Tr. 1603).

In connection with the Insys Bribery Trial, Dr. Ajay Wasan, an expert in pain management, reviewed patient records associated with Freedman’s treatment of Rosenthal. Dr. Wasan testified that Freedman’s decision to prescribe multiple TIRF products to Rosenthal “doesn’t make any sense at all,” noting that “[t]here is no evidence that these products were helping the patient.” (Trial Tr. at 1155). Reviewing records from 2012, Dr. Wasan also testified that when all of the opioids prescribed to Rosenthal by Freedman were taken together, “when you add up all the morphine equivalence from all of the different opioids, my opinion [is] if the patient took these medications as prescribed they would be dead.” (Trial Tr. at 1156).

## **II. Freedman Ignores Rosenthal’s Drug-Seeking Behavior**

While Freedman was prescribing Rosenthal unnecessary and dangerous quantities of opioids, he was also turning a blind eye to warning signs that Rosenthal was becoming addicted to, and seeking out, these drugs.

During the time he was being treated by Freedman, Rosenthal did not present in the way one might expect of someone being prescribed such quantities of pain medication. He was mobile. (Trial Tr. at 1641). He was not bedridden at home, nor being treated in a hospital or hospice facility. (*Id.*). Far from it: Rosenthal routinely traveled to Dubai, at times taking multi-week trips abroad. (Trial Tr. at 1640-42; GX 2046).

Even more troubling, Freedman learned on one occasion that Rosenthal had tested positive for cocaine. (Trial Tr. at 1449). Rosenthal denied using cocaine—hardly out of

character for someone addicted to narcotics—and blamed the positive test result on his girlfriend, who he said could have laced his cigarettes with cocaine without telling him. (*Id.* at 1449-50). Freedman claimed to believe Rosenthal and continued treating him. (*Id.* at 1450). On another occasion, Rosenthal was caught attempting to steal a prescription pad from Freedman’s office. (*Id.* at 1647). Rosenthal said he had merely been “joking,” and Freedman, once again, accepted Rosenthal’s explanation. (*Id.*) On more than one occasion while under Freedman’s care, Rosenthal began the process of seeking treatment for drug addiction. (*Id.* at 1642-44). Though Rosenthal never went through with such treatment, Freedman kept prescribing him dangerous quantities of opioids.

### **III. Freedman Requests Inappropriate Favors from Rosenthal**

During the period in which Freedman was prescribing Rosenthal massive quantities of opioids, despite warning signs about Rosenthal’s use of those opioids, Freedman was also pushing Rosenthal to provide personal favors in the forms of job assistance for his family.

In March of 2014, for example, Freedman began corresponding with Rosenthal by text message about help securing Freedman’s son a job. (Trial Tr. at 1647-48). Rosenthal had offered to assist Freedman’s son by connecting him to personal friends in journalism. (*Id.* at 1648). While Freedman dismissed the significance of this both in his testimony in the Insys Bribery Matter trial and in his submission to the Court in connection with sentencing (*id.*; Def. Stmt. at 5 (analogizing “minor offers of kindness” from Rosenthal to “food and gifts” from patients given at “holiday times”)), he in fact followed up with Rosenthal repeatedly over the course of more than a year in an effort to get Rosenthal’s assistance for his son (Trial Tr. at 1648-1663). Indeed, by March of 2015, Freedman was also seeking Rosenthal’s assistance in securing Freedman’s wife a new job. (*Id.* at 1657-59). Just a few months later—after Rosenthal

had tested positive for cocaine—Freedman again asked for help for his son, this time inquiring whether Rosenthal could get his son an interview with Sports Illustrated. (*Id.* at 1661-63; GX 2129).

**IV. The April 2017 Prescription and Rosenthal’s Fatal Overdose**

On April 13, 2017, after years of prescribing Rosenthal massive quantities of controlled substances, Freedman wrote his patient prescriptions for approximately 150 doses of drugs containing fentanyl and for approximately 950 oxycodone pills. (PSR ¶ 11). Three weeks later, Rosenthal was dead. (*Id.* ¶ 12). His death was caused by an overdose of fentanyl, prescribed by his longtime doctor, Freedman. (*Id.*).

**PROCEDURAL HISTORY & SENTENCING GUIDELINES CALCULATION**

**I. Arrest and Guilty Plea**

Freedman was arrested on the charges in the Indictment on April 11, 2019. (PSR ¶ 12).

On December 18, 2019, following his conviction at trial in the Insys Bribery Matter, Freedman pled guilty to distribution and possession with the intent to distribute, for no legitimate medical purpose and outside the course of sound professional practice, (i) a quantity of mixtures and substances containing a detectable amount of fentanyl, and (ii) a quantity of mixtures and substances containing a detectable amount of oxycodone, in violation of 21 U.S.C.

§ 841(b)(1)(C). In connection with Freedman’s plea to this lesser-included offense charged in Count Sixteen of the Indictment, the parties agreed, under U.S.S.G. §§ 1B1.2(a) and (c), that the defendant’s distribution of controlled substances resulted in Rosenthal’s death and constituted part of the offense of conviction. (PSR ¶ 6(c)).

Freedman entered his guilty plea before the Honorable Alison J. Nathan, United States District Judge, to whom the Diversion and Overdose Matter was initially assigned. On

December 20, 2019, the Diversion and Overdose Matter was reassigned, at Freedman's request and with the consent of Judge Nathan and Your Honor, to this Court, which presided over Freedman's trial in the Insys Bribery Matter. (Dkt. 16).

## **II. Sentencing Guidelines Calculation**

Freedman pled guilty pursuant to a plea agreement in which the parties stipulated that his offense level is 37 and that his Criminal History Category is I,<sup>1</sup> resulting in a recommended Guidelines range of 210 months' imprisonment to the statutory maximum 240 months' imprisonment and a recommended fine range of \$40,000 to \$1,000,000. (PSR ¶¶ 6(a)-(h)). The plea agreement in this case incorporates increases in the base offense level resulting from Freedman's abuse of a position of public or private trust in a manner that significantly facilitated the commission of the offense, specifically, his role as a medical doctor, *see* U.S.S.G. § 3B1.3, from Freedman's distribution of controlled substances resulting in Rosenthal's death, *see* U.S.S.G. §§ 2D1.1(a)(2) and 1B1.2.

In the PSR, the Probation Department concurs with the parties' Guidelines calculations, (PSR ¶¶ 17-31, 83-85), and recommends that the Court sentence Freedman principally to 180 months' imprisonment, to be served consecutively to the sentence imposed in the Insys Bribery Matter, (PSR at 37). The Probation Department also recommends that the Court impose a \$40,000 fine. (*Id.*).

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<sup>1</sup> The parties agreed that Freedman was in Criminal History Category I because at the time they entered into the plea agreement he had one criminal history point as a result of his convictions in the Insys Bribery Matter, for which he had not yet been sentenced, *see* U.S.S.G. §§ 4A1.1(c) and 4A1.2(a)(4).

## DISCUSSION

### **I. The Court Should Sentence Freedman to a Prison Term Within the Guidelines Range of 210 to 240 Months.**

A Guidelines sentence of 210 to 240 months' imprisonment, to run concurrently with the sentence imposed in the Insys Bribery Matter, is warranted in this case, based on all of the factors the Court must consider, particularly the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, and afford adequate deterrence.<sup>2</sup>

The Guidelines still provide important guidance following *United States v. Booker*, 543 U.S. 220 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). The Guidelines provide the “starting point and the initial benchmark” in sentencing proceedings. *Gall v. United States*, 552 U.S. 38, 49 (2007). After that calculation, the Court must consider the factors outlined in 18 U.S.C. § 3553(a), which include, among other things, the nature and circumstances of the offense and the need to deter criminal conduct and promote respect for the law. *Id.* at 49-50 & n.6.<sup>3</sup>

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<sup>2</sup> The PSR recommends the imposition of a sentence to run consecutive to that imposed in the Insys Bribery Matter. (PSR at 37). The question of whether to impose consecutive or concurrent sentences is one as to which this Court has “broad discretion.” *United States v. Martinez-Salazar*, 318 F. Supp. 2d 127, 129-30 (2d Cir. 2004) (noting that the Guidelines provide for the imposition of concurrent or consecutive sentences only in the “narrow situations they specifically address” and otherwise permit the Court discretion); U.S.S.G. § 5G1.3(d) (“In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.”). Here, where sentences in the Insys Bribery Matter and the Diversion and Overdose Matter are to be imposed on the same day, and where the Government seeks a sentence in the Diversion and Overdose Matter involving a significant term of imprisonment, the Government submits that concurrent sentences are appropriate.

<sup>3</sup> The factors outlined in Section 3553(a) are: (1) “the nature and circumstances of the offense and the history and characteristics of the defendant”; (2) the four legitimate purposes of sentencing, namely, the need (a) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,” (b) “to afford adequate deterrence to criminal conduct,” (c) “to protect the public from further crimes of the defendant,” and (d) “to

**A. Nature and Circumstances of the Offense and the Need to Reflect the Seriousness of the Offense, Promote Respect for the Law, and Provide Just Punishment**

The defendant's criminal conduct in this case is egregious. His offense, which resulted in the loss of a man's life, could not be more serious. A sentence within the Guidelines range is necessary to justly punish this terrible crime.

The defendant prescribed medically unnecessary opioids to a patient who repeatedly showed signs of dependency on narcotics. The prescriptions he wrote were for quantities of oxycodone and other opioids that truly shock the conscience. This is not an exaggeration, nor is it abstract. Over the course of an entire year, Freedman, a well-credentialed, well-trained medical professional, wrote Jeffrey Rosenthal prescriptions for an average of 234 oxycodone pills per day. He did so even when Rosenthal was already taking numerous other powerful narcotic painkillers. He did so with no medical purpose.

Freedman's irresponsible and harmful conduct in this case did not take place in a vacuum. Jeffrey Rosenthal died in the midst of a nationwide opioid epidemic that has left many other lives wasted and, as a result, raised awareness among medical professionals and the public at large about the dangers of opioids and the risks of addiction. Freedman, who had spent his long career studying and practicing in the field of pain management, should have understood those risks better than most. Yet he continued to prescribe massive quantities of opioids to Rosenthal, for no legitimate medical purpose, month after month, over a period of years. At so many points, Freedman could have used his medical training and the trust placed in him by his

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provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"; (3) "the kinds of sentences available"; (4) the Guidelines range itself; (5) any relevant policy statement by the Sentencing Commission; (6) "the need to avoid unwarranted sentence disparities among defendants"; and (7) "the need to provide restitution to any victims." 18 U.S.C. § 3553(a)(1)-(7).

patient to try to help; he could have encouraged Rosenthal to seek treatment, reduced dosages drastically, attempted to wean Rosenthal off some of the dangerous drugs he had been taking for so long. Freedman did not choose any of those paths. Instead, he continued his criminal conduct, writing prescriptions until he was stopped only by his victim's death.

The criminal conduct here is that much worse because of the trusted role Freedman played in Rosenthal's life, and in the lives of all his patients. Each of us has, undoubtedly, found ourselves, or a loved one, at one point or another, forced to put our trust in medical professionals. We are forced to assume, and to hope, that these professionals know better than we do and will bring their training, expertise, and commitment to do no harm to helping us or our loved ones get better. Freedman abused that trust. He sought personal favors from Rosenthal, even while looking the other way with regard to Rosenthal's drug-seeking behavior. And he "treated" Rosenthal in a way that, as Dr. Wasan put it, didn't "make any sense at all." (Trial Tr. at 1155).

Ultimately—and, sadly, not surprisingly—Freedman handed Rosenthal a prescription for the weapon that killed him. Jeffrey Rosenthal was only 53 years old when he died of an overdose of fentanyl. He should have had many, many years ahead of him, time in which he might have finally obtained treatment for his addiction, found solid ground in his professional or personal life, or repaired his relationship with his family. Because of the defendant, none of that came to pass. Certainly, Jeffrey Rosenthal must be front of mind when the Court imposes sentence in this case.

Rosenthal's mother, Suzanne Belzer, has submitted a powerful letter to the Court about her and her son's experience with the defendant. She writes, "When I received the phone call informing me that Jeff was found dead, my first thought was 'Thank God, he is finally at peace.' My second thought was that Gordon Freedman was involved in his death." (Ex. A. at 1).

Indeed, Ms. Belzer lost her son to opioid addiction—addiction fueled and facilitated by the defendant—well before he died. Her letter describes how she watched her son grow increasingly dependent on opioids provided by the defendant, how she saw those opioids change her son, and how she tried in vain to help:

A number of years before the time frame involved in this case, Jeff was referred to Dr. Freedman by his internist for the management of back pain. I was receiving his health insurance statements and early on I began seeing that he was being prescribed large amounts of opiates by the defendant. I checked his credentials and they were impeccable. I confronted Jeffrey, to no avail.

It wasn't long before I saw marked changes in Jeffrey's behavior. His life was becoming out of control. After a few years of virtual hell, I knew that I could no longer continue to help him. I began to attend Al-Anon meetings and I came to realize that the only way for me to survive was to let go of my son and to pray that he found his own way. As we well know, he never did.

As a result, Jeff and I had little contact during the last years of his life. Every time we did speak, I could sense his desperation, knowing there was nothing that I could do to help him. I saw him for the last time a few months before his death. I will live with the awful memory of seeing what my boy had become.

All those years, Gordon Freedman, (obviously with full knowledge of Jeff's addiction) continued to prescribe him huge amounts of drugs.

Jeffrey died alone. He had no family. He had no friends. I lost my son ... Gordon Freedman is responsible.

*(Id.)*. Ms. Belzer watched her son suffer because of the medical “treatment” provided by the defendant. She saw the tragic end to his life coming. Gordon Freedman, an award-winning doctor, must surely have observed the same decline and seen the same warning signs. Not only did the defendant not help his patient; he continued to lead him down the road that killed him, prescribing the strongest and most powerful doses of controlled substances.

The defendant seeks a combined sentence in the Insys Bribery Matter and the instant case of 66 months' imprisonment—144 months below the bottom of the applicable Guidelines range in this case. Nothing in the record of the defendant's crimes justifies such a dramatic downward variance. Such a low sentence, or anything close to it, would totally fail to adequately address the seriousness of the Diversion and Overdose Matter and the need for a just punishment. The defendant's actions deprived a man of his life and a mother of her son. A serious and substantial sentence—one far, far longer than 66 months—must be imposed to acknowledge the harm the defendant has caused.

**B. Need to Deter Criminal Conduct**

A sentence within the Guidelines range is also necessary to deter criminal conduct by others in the defendant's position.

The need for general deterrence is particularly acute in this case. The opioid epidemic continues to rage on. The number of fatal drug overdoses in the United States rose between 2018 and 2019. *See* "Drug Overdose Deaths Remain High," Centers for Disease Control and Prevention, *available at* <https://www.cdc.gov/drugoverdose/deaths/index.html> (last visited June 29, 2021). In 2019, nearly 50,000 people in the United States died of overdoses involving opioids; 70% of all drug overdose deaths that year involved an opioid. *See* "The Drug Overdose Epidemic: Behind the Numbers," Centers for Disease Control and Prevention, *available at* <https://www.cdc.gov/opioids/data/index.html> (last visited June 29, 2021).

Overdose deaths are often the result of addictions that begin with a prescription pad. The law places a great deal of trust in doctors, authorizing them to determine when prescribing dangerous and addictive opioids is medically appropriate and relying on them to stop prescribing when that is in the best interests of a patient. Doctors are no doubt tempted at times to abandon the gatekeeper function they are entrusted with, a function that can require them to turn down

patients' requests, to refuse financial benefits, or to ask difficult questions. Because cases like this one are difficult to prove, that temptation comes with the knowledge that a medical professional's judgment can be difficult to question, that what "causes" addiction, or death, often cannot be clearly answered. A significant sentence of incarceration is necessary to deter those doctors from making the same criminal choice the defendant made and to show them that a medical license—even one backed by the impressive credentials Freedman accumulated during his education and career—is not a license to break the law.

The defendant argues that the national coverage of the Insys-related cases—and of Freedman's case in particular—has already satisfied the goals of deterrence and that a prison sentence greater than 66 months would not lead to any corresponding increase in deterrent value. (Def. Mem. at 5). But that this and related cases have been the focus of public attention only highlights the need to consider the general deterrent effect of whatever sentence is imposed here. The defendant faces a Guidelines range of 121 to 151 months' imprisonment in the Insys Bribery Matter and 210 to 240 months' imprisonment in the instant case. A total prison sentence of 66 months—12 years below the bottom of the applicable Guidelines range in this case—would send the clear message that the illegal distribution of controlled substances, when carried out by a doctor, is less serious and less deserving of punishment than in more traditional cases. Such a sentence would not only miss an opportunity to deter future criminals, to the great detriment of the public at large, but send a dangerous message to those considering a course of criminal conduct.

### **C. History and Characteristics of the Defendant**

Unlike many defendants facing sentence in this courthouse, Gordon Freedman is not before this Court as a result of a single bad decision, an act of desperation, or a life lacking in opportunity or support. Freedman's background is a far cry from that of many of the individuals

who stand before this Court for sentencing on narcotics-related offenses. Freedman came from an intact family that did not struggle financially. (PSR ¶¶ 36, 41). He attended one of the best high schools in the country, Bronx High School of Science, and graduated from an Ivy League college, the University of Pennsylvania. (PSR ¶ 58). He earned his medical degree (PSR ¶¶ 59-60), accumulated a slew of impressive credentials (PSR ¶¶ 62-73), and, at the time he committed the instant crimes, was an accomplished doctor with his own private practice (PSR ¶ 11). During the period relevant to this case, Freedman was remarried and lived in a million-dollar home in Westchester. (PSR ¶¶ 44, 77). Greed and callousness, not desperation, drove Freedman to commit crimes.<sup>4</sup>

Moreover, Freedman's conviction in this case is not the result of a single bad decision or lapse in judgment. His illegal distribution of controlled substances to his patient took place over a period of years. It was part of pattern of misconduct that included prescribing Subsys to various patients in exchange for kickbacks from Insys. While these two courses of illegal conduct are to be sentenced separately,<sup>5</sup> the Court can and should consider how Freedman's

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<sup>4</sup> The defendant argues that the "host of other penalties" imposed upon him as a result of his conduct, including those related to his professional fall, such as his firing from his private practice, loss of income, and loss of medical license, help justify a significantly below-Guidelines sentence. (Def. Mem. at 5-6). To the contrary, that the defendant once led such a privileged and comfortable life indicates that his choices were just that—choices—to disregard his patients' well-being, to prioritize his own greed and hubris, and to turn to crime. The fact that the defendant thus may have fallen further than others economically or socially does not entitle him to a lower sentence.

<sup>5</sup> It bears noting that while Freedman's conduct in the Insys Bribery Matter is reflected in the Guidelines calculation set forth in the PSR, because that conduct had not yet resulted in the imposition of sentence at the time of the calculation, it resulted in only a single criminal history point. A Guidelines calculation that reflected the impact of the Insys Bribery Matter conviction after sentence had been imposed would almost certainly have led to a higher Criminal History Category, and thus an increase in the applicable Guidelines range. *See* U.S.S.G. §§ 4A1.1(a), (b) (providing for the allotment of three points for each prior sentence of imprisonment exceeding one year and one month and of two points for each prior sentence of imprisonment of at least sixty days not otherwise counted).

corrupt bargain with Insys sheds light of his history and characteristics. It demonstrates that Freedman's conduct with respect to Rosenthal was not an isolated incident or a lapse in judgment as to one particular patient; it was part and parcel of a larger betrayal of his training, his oath, and his patients.

## **II. The Court Should Impose a Fine.**

As noted above, the defendant's recommended Guidelines fine range is \$40,000 to \$1,000,000. (PSR ¶¶ 6(h), 92). The Government respectfully submits that the Court should impose a fine within that range.

Title 18, United States Code, Section 3572(a) sets forth the factors to be considered by the Court before imposing a fine, in addition to the factors set forth in Section 3553(a). Such factors include: (1) the defendant's income, earning capacity, and financial resources; (2) the burden that the fine will impose upon the defendant and any of his dependents; (3) any pecuniary loss inflicted upon others as a result of the offenses; (4) whether restitution is ordered; (5) the need to deprive the defendant of illegally obtained gains from the offenses; and (6) the expected costs to the government of any imprisonment. 18 U.S.C. § 3572(a). The Guidelines provide that the Court "shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." U.S.S.G. § 5E1.2(a).

In determining the size of any fine, the Court must consider:

- (1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;
- (2) any evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;
- (3) the burden that the fine places on the defendant and his dependents relative to alternative punishments;
- (4) any restitution or reparation that the defendant has made or is obligated to make;
- (5) any collateral consequences of conviction, including civil obligations arising from the defendant's conduct;
- (6) whether the defendant previously has been fined for a similar offense;
- (7) the expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed; and
- (8) any other pertinent equitable considerations.

U.S.S.G. § 5E1.2(d). The Guidelines further provide that “[t]he amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive.” *Id.* The defendant bears the burden of demonstrating an inability to pay a fine. *See United States v. Camargo*, 393 F. App’x 796, 798 (2d Cir. 2010); *United States v. Salameh*, 261 F.3d 271, 276 (2d Cir. 2001).

To satisfy the need for just punishment and adequate deterrence, the sentence imposed should include a financial penalty in addition to the period of incarceration the Government has requested. The Government is not seeking forfeiture from Freedman in the Diversion and Overdose Matter, and Rosenthal’s mother has declined to seek restitution from Freedman for her son’s death. But Freedman profited considerably from the same medical training and career that

he abused by diverting controlled substances and causing Rosenthal's death, and he is plainly capable of paying a fine. The PSR calculates Freedman's total net worth as exceeding \$1.5 million. (PSR ¶ 76). Even if the Court imposes the financial penalty the Government has requested in the Insys Bribery Matter—namely, forfeiture of \$308,600, the total speaker fees Freedman received from Insys—Freedman will have sufficient assets remaining to pay a fine within the Guidelines range in this Diversion and Overdose Matter.

### CONCLUSION

For the reasons set forth above, the Government respectfully submits that a prison sentence within the Guidelines range of 210 to 240 months' imprisonment, to run concurrently with any sentence imposed in the Insys Bribery Matter, and a fine within the Guidelines range of \$40,000 to \$1,000,000 would be sufficient, but not greater than necessary, to serve the legitimate purposes of sentencing.

Respectfully submitted,

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