Computer Scientist Loveall II, this conclusion is faulty. Exhibit C, Loveall Decl. ¶¶ 17-18. But in any event, the digital evidence underlying this purported "finding" was known to Raniere at the time of trial. Indeed, it was undisputed at trial that the metadata associated with at least some of the files had various anomalies, including a "creation date" in 2003, a "modified" date in 2005, and an "accessed" date in 2010, and Raniere's counsel cross-examined FBI CART Senior Forensic Examiner Booth at length regarding these and other characteristics of the electronic data.[5] See, e.g., Exhibit B-012-019.

Raniere was also aware at the time of trial that law enforcement agents had accessed the camera card of the Canon EOS 20D camera without a write blocker on September 19, 2018, and Raniere's trial counsel cross-examined Senior Forensic Examiner Booth regarding that access.[6] See Exhibit B-020-021 (testimony acknowledging that the camera card had been accessed while in the custody of the FBI on September 19, 2018). Examiner Booth testified, on cross-examination, that the camera card had been accessed "while it was in the possession of the FBI." Exhibit B-020. Raniere's trial counsel, however, did not raise the issue with the Court or the government and made no attempt to question any law enforcement agents regarding the access, including the case agent who

NOTE: Access without a write blocker means the data was altered.

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[5] The child pornography images on the Western Digital Hard Drive were recovered by law enforcement over a decade after they were created, and were discovered on a computer drive onto which a Dell computer had apparently been backed up. The government put forth no evidence at trial regarding the way in which the images had been copied onto the Western Digital Hard Drive.

NOTE: There is no photo tech in the chain of custody

[6] This access was not the result of law enforcement "tampering," as Raniere's motion claims. Rather, having no reason to believe that the metadata of the contents of the Canon EOS 20D camera card had any evidentiary value, law enforcement agents directed that a photograph technician copy the photographs from the camera card in order to provide the photographs more expeditiously to defense counsel. Shortly thereafter, on September 25, 2018, the government provided Raniere with copies of the photographs from the camera.

testified after Examiner Booth. Nor did Raniere's trial counsel make any argument, in summation or otherwise, that the child pornography evidence had been fabricated or planted by law enforcement. Given the weight of the evidence against Raniere, it is not surprising that trial counsel made the strategic decision not to present such arguments to the jury. Rather, in summation, Raniere's trial counsel commented that "the FBI CART examiner . . . was very good at what he does, he's very smart, he's very experienced," but argued that there was "no testimony that these [photographs] were ever sent anywhere." Tr. 5516.

The remaining "key finding" highlighted in Raniere's motion is a complaint about purportedly improper handling of evidence. Rule 33 Mot. at 5. But again, the facts underlying this complaint were obviously known to trial counsel at the time of trial; indeed, as support for this "finding," Raniere cites to the trial transcript and a defense trial exhibit. Rule 33 Mot. at 5 (citing Tr. 4906-07, DX 945).

That the information and material relied upon in these so-called expert reports were provided and known to Raniere at the time of trial is fatal to Raniere's motion for a new trial. Courts in this Circuit have held that post-trial expert reports cannot constitute "newly discovered evidence" when such reports were based on materials "available to the defense before and during the trial." Pri-har v. United States, 83 F. Supp. 2d 393, 401 (S.D.N.Y. 2000), aff'd, 10 F. App'x 4 (2d Cir. 2001); see also United States v. Bout, 144 F. Supp. 3d 477, 487 (S.D.N.Y. 2015) ("Rule 33 does not allow for a new trial based on evidence that could have been discovered before trial, let alone evidence that was part of the trial record."), aff'd, 666 F. App'x 34 (2d Cir. 2016).

The district court's decision denying a motion for a new trial in Massaro v. United States is particularly instructive. No. 97-CV-2971 (MGC), 1998 WL 241625, at *1 (S.D.N.Y. May 12, 1998). In Massaro, the defendant filed a motion for a new trial under Rule 33 several years after his trial conviction, based in part on several post-trial expert reports. Id. Massaro was charged with, among other crimes, the murder of Lucchese associate Joseph Fiorito. On the day before opening statements in Massaro's trial, law enforcement recovered a bullet in Fiorito's car, where his body had been discovered three years earlier. Although Massaro's trial counsel was offered a continuance in order to perform tests on the bullet, Massaro declined. After trial, Massaro had the bullet subjected to expert tests that "purportedly show[ed] that the bullet was 'planted' to corroborate the prosecution's case." Id.; see Massaro Motion, No. 97-CV-2971, Docket Entry No. 2 (S.D.N.Y. 1997). The district court denied the motion, holding that the evidence was not "newly discovered" within the meaning of Rule 33. As the Honorable Miriam Cedarbaum explained:

> The bullet was revealed before the close of the trial . . . and Massaro was offered a continuance in order to have tests performed on this evidence. Having learned of the bullet during trial, and having declined the opportunity to test the bullet during trial, Massaro cannot now contend that the post-trial tests conducted by his newly-retained experts qualify as newly discovered evidence permitting him to move for a new trial at this late date. Thus, to the extent that the motion for a new trial is based on evidence relating to the bullet found in Joseph Fiorito's car, it is untimely.
>
> Second, Massaro claims more generally that new expert tests on the government's forensic evidence, conducted after the trial, cast doubt on the reliability of the government's evidence. There is no claim, however, that these tests are based upon evidence that was not available during trial. Rather, the only thing that is "new" about this evidence is the team of experts reviewing it. Such

> evidence is not "newly discovered" within the meaning of Rule 33. To the extent that the motion for a new trial is based on this evidence, it is untimely.

1998 WL 241625, at *3.

Raniere concedes that the expert reports are based on information that was available to Raniere at the time of trial, Rule 33 Mot. at 23, but argues that he had insufficient time to conduct a review of the digital evidence in the case. But as in Massaro, Raniere was offered numerous opportunities to adjourn trial in order to allow Raniere additional time to conduct a forensic review of the child pornography evidence, offers that Raniere repeatedly refused. Indeed, on March 29, 2019, defendant Allison Mack submitted a letter requesting, with the government's consent, a 30-day adjournment of the trial date in order to conclude plea negotiations. ECF Docket Entry No. 481. The same day, Raniere filed a letter objecting to the adjournment and thanking the Court for "setting the firm trial date that has existed for months now." ECF Docket Entry No. 483. The Court thereafter sought assurances from Raniere's trial counsel that Raniere was prepared to proceed to trial, which Raniere's counsel provided. Exhibit B-010 ("I have Mr. Agnifilo's clear declaration that he and his client will be ready to go to trial."). Having repeatedly declined the opportunity for any further adjournment of trial for additional time to conduct a forensic review of the child pornography evidence, Raniere cannot now claim that he had insufficient time to review the evidence prior to trial.

Raniere's claim of "newly discovered" evidence is particularly disingenuous because even prior to Raniere's sentencing by this Court three years ago, Raniere apparently sought to make a motion that the evidence in his case had been fabricated, a motion that

Raniere's counsel at that time chose not to file. For instance, in an April 6, 2020 call with one of his supporters, Raniere referred to a "draft" of such a motion:

> RANIERE: . . . We have to get more granular. This report isn't granular enough. There are so many things that can't be seen, and there are pictures on that, that backup that [was] never . . . backed up. . . . Uh, it's, this seems so outlandish, so tampered with this disk, this, uh, drive, you know?
>
> CHAKRAVORTY: Yeah, absolutely.
>
> RANIERE: I would also like to know from Marc [Agnifilo] how, how long until that new motion is ready to go, even if he doesn't file it, I want to know when it's ready. I would love to see it if I could and then, of course, there's the jurisdictional motion and uh, a motion for new evidence[.]

Exhibit D-006. That Raniere apparently contemplated making a motion based on an allegedly "tampered . . . drive" over three years ago only underscores the fact that nothing in Raniere's motion is "newly discovered" within the meaning of Rule 33.

The Court should reject Raniere's attempt to circumvent the requirements of Rule 33. Forbes, 790 F.3d at 408 (observing that the Supreme Court has recognized that the "privilege" accorded to a defendant in permitting "more time in which to file a motion for a new trial based on newly discovered evidence" might "lend itself for use as a method of delaying enforcement of just sentences") (quoting United States v. Johnson, 327 U.S. 106, 112 (1946)). The government's timely objection to the filing of this Rule 33 motion "assure[s]" the government of the relief it seeks, that is, denial of the defendant's Rule 33 motion. United States v. Abad, No. 01-CR-831 (GBD), 2005 WL 3358480, at *1 (S.D.N.Y. Dec. 7, 2005) ("Where the government properly objects to an untimely Rule 33 motion, it is assured of relief. Because the government did so object in this case, the motion must be

dismissed.") (internal citations and quotation marks omitted), aff'd, 514 F.3d 271 (2d Cir. 2008); see also United States v. Casiano, No. 05-CR-195 (MRK), 2008 WL 1766576, at *1 (D. Conn. Apr. 11, 2008) ("[W]hile the Government may waive a timeliness objection by failing to raise the issue, the Court is obligated to grant relief to the Government provided it properly raises such an objection."). The purported expert reports are not "newly discovered evidence," and Raniere's Rule 33 motion should be denied as untimely.

II. Raniere's Motion and the Kiper Report Are Inaccurate and Misleading

Even if Raniere were able to meet the requirements of newly discovered evidence, which he cannot, his motion would not provide the basis for relief because Raniere's accusations are baseless and the conclusions contained in the purported expert reports on which he relies are wrong.

The central premise of the Kiper Report is that because the metadata associated with some of the electronic evidence on the Western Digital Hard Drive had various anomalies, and because those anomalies "happen to align with the government's narrative . . . any reasonable person would conclude that evidence tampering had taken place." Kiper Report, ECF Docket Entry No. 1169-1 at 195. But, as indicated in the declaration of FBI Senior Computer Scientist David Loveall II, many of the findings in the Kiper Report are "misleading or erroneous," and the Kiper Report "repeatedly ignores plausible explanations for observed phenomena in favor of allegations of tampering." Exhibit C, Loveall Decl. ¶ 4. Raniere's claim, for example, that the camera card was "undoubtedly tampered with, as the thumbnails of a brunette impossibly became thumbnails of a blonde," Rule 33 Mot. at 5, is incorrect, because the use of digital forensic tools to recover deleted files can "routinely produce results like those observed here." Exhibit C,

Loveall Decl. ¶ 5. Similarly, Raniere's claim that "files were added to the CF Card, apparently between 4/11/19 and 6/11/19," Rule 33 Mot. at 15, is misleading because the two reports of the camera card were created on those dates, using different configurations and setting options. Exhibit C, Loveall Decl. ¶ 9. Raniere's remaining arguments, based on the Kiper Report, that certain other characteristics of the electronic evidence is attributable to manual alteration by law enforcement, Rule 33 Mot. at 16, are similarly faulty. Exhibit C, Loveall Decl. ¶¶ 11-18.

Many of the so-called expert "findings" are simply arguments regarding the evidence or testimony adduced at trial that should have been raised, or were in fact raised, during cross-examination at trial. As one example, Raniere claims that the government "elicit[ed] false testimony from [Senior Forensic Examiner] Booth, specifically that EXIF data, once embedded in a picture is very hard to remove no matter how many times it is moved between devices, that commercial software will not touch EXIF software, and that EXIF data was purposefully designed to make it more difficult to alter . . . ." Rule 33 Mot. at 14. The Kiper Report characterizes Examiner Booth's testimony, on direct examination, that EXIF data is more difficult to alter than other types of metadata, see, e.g., Tr. at 4820, as a "miscarriage of justice" and accuses the government of misleading and lying to the jury. Kiper Report, ECF Docket Entry No. 1169-1 at 240. But even if these complaints about the content of Examiner Booth's testimony could be proper grounds for a motion for a new trial, which they are not, Raniere fails to mention that Raniere's trial counsel cross-examined Examiner Booth regarding the reliability of EXIF data. Counsel elicited testimony from Examiner Booth that EXIF data, like other metadata, could be changed and altered:

COUNSEL:	You agree that any metadata, whether it's EXIF data or other data can be changed and altered; correct?
SFE BOOTH:	Yes, EXIF data can be altered.
COUNSEL:	And there's a variety of different way that that can happen; correct?
SFE BOOTH:	Yes, it can.
COUNSEL:	Companies can remove—if you send a photo to Facebook, do they take off that data?
SFE BOOTH:	Yes, they actually strip off the data.

Tr. 4987-88. Similarly, Raniere's various complaints regarding the chain of custody and evidence handling procedures are "not evidence, newly discovered or otherwise," and must be rejected. United States v. Bourke, No. 05-CR-510 (SAS), 2011 WL 6376711, at *10 (S.D.N.Y. Dec. 15, 2011), aff'd, 488 F. App'x 528 (2d Cir. 2012).

III. The Evidence that Raniere Created and Possessed Child Pornography Images of Camila Is Overwhelming

Lastly, Raniere does not and cannot assert any grounds upon which to conclude that "it would be a manifest injustice to let the guilty verdict stand," because there is no concern that "an innocent person may have been convicted." Sanchez, 969 F.2d at 1414. Raniere was convicted of all seven counts and all eleven racketeering acts submitted to the jury. Raniere's motion does not contend that Raniere is innocent of the child exploitation racketeering acts or that he did not take photographs of Camila constituting child pornography. Raniere does not appear to dispute that he was in a sexual relationship with Camila or that she was 15 when his sexual abuse began. Indeed—even without consideration of any digital forensic evidence contested by Raniere—the evidence adduced

at trial that Raniere created and possessed child pornography images of Camila in 2005 was overwhelming, including the following:

- Substantial evidence that Raniere began sexually abusing Camila in September 2005, two months before he took child pornography photographs of her, including messages referencing the beginning of their sexual relationship as September 2005. See GX 301-R-679 (Camila referring to herself as an "inexperienced 15 year old"); GX 301-R-17; Tr. at 3462-65.

- Communications reflecting that Raniere took sexually explicit photographs of Camila when she was 15 years old, including Raniere's statement to Camila that he "guard[ed] the other pictures" of her from "way back[.]" GX 302-R-44.

- The child pornography photographs themselves, which indicate a contemporaneous sexual relationship with Camila.[7]

- Daniela's testimony that she had a conversation with Raniere about his sexual relationship with Camila, and that the conversation took place at some point prior to the Fall of 2006. (Tr. 2472–74 ("I asked him if he was having sex with my sister [Camila]. He asked me if I minded.")).

- The "Studies" folder in which the child pornography was recovered contained nude photographs of eleven other women with whom Raniere had a sexual relationship in 2005, including Lauren Salzman and Daniela.[8]

- Lauren Salzman's testimony that in approximately 2005, Raniere took what she described as "up-close crotch shot" photographs of her at 8 Hale Drive. Tr. 1534-36.

- Daniela's testimony that in 2005, Raniere approached her with a Canon camera and insisted on taking a naked photograph of her. Tr. 2422-2424.

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[7] The photographs depict Camila lying naked on a bed, and several photographs depict close-ups of Camila's genitals. Camila's photographs do not show an appendectomy scar, and other evidence admitted at trial reflected that Camila had a scar from appendix surgery in 2007.

[8] Each subfolder was titled with the initials of the woman (or her nickname) and a date. The collection of images were similar in content. Each folder contained images of a nude woman on a bed and close-up photographs of the woman's public hair and vaginal area. Raniere does not appear to dispute that he had a sexual relationship in 2005 with each of the women depicted in the "Studies" folder.

Raniere told Daniela to spread her legs and gave Daniela instructions as to how to position herself.

- Camila's gynecological records, which reflected that in 2011, Camila reported to medical professionals that she had been with the same sexual partner for "five years." GX539-18; Tr. 3312-13.

- Daniela's testimony confirming that a sanitized version of one of the child pornography images depicted her sister. Tr. 2477 ("That's my sister [Camila]."); GX 929.

After Raniere filed the instant motion for a new trial, Camila reviewed the images of child pornography that were recovered from the Western Digital Hard Drive and admitted at trial as Government Exhibits 518A-U. Exhibit A ¶¶ 4-5. She has submitted a sworn declaration stating that after "reviewing the exhibits, I can state with certainty that I am the subject in each photograph, which were taken in 2005 by Keith Raniere, in the loft at Raniere's so-called 'Executive Library,' which was located at 8 Hale Drive in Clifton Park, New York." Id. Camila's declaration states that she "vividly recall[s]" being photographed by Raniere in 2005 and that it was an "unforgettably humiliating and degrading experience." Exhibit A ¶ 8. Camila's declaration further states that "[e]ach exhibit, GX 518-A to GX 518-U, is a photograph of me. I recognize my body, and I recall one of the poses he placed me in and where he was with the camera in relation to my body. I recognize the surroundings, and I remember the feelings of shame and confusion, not understanding why he was doing that to me." Exhibit A ¶ 9.

In light of the overwhelming evidence of Raniere's guilt, Raniere cannot show that "it would be a manifest injustice to let the guilty verdict stand," as required under the law, and his motion for a new trial must be denied.