IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES OF AMERICA,

v.

MICHAEL SEGAL, DANIEL E. WATKINS, and NEAR NORTH INSURANCE BROKERAGE, INC.

Defendants.

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U.S. DISTRICT COURT

No. 02 CR 0112
Judge Ruben Castillo

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DEFENDANT MICHAEL SEGAL'S MOTION TO DISMISS COUNT NINE OF THE SECOND SUPERSEDING INDICTMENT FOR VINDICTIVENESS

Defendant, Michael Segal ("Mr. Segal"), by and through his counsel, respectfully moves this Court to dismiss count nine of the second superseding indictment for vindictiveness. In support of his motion, Mr. Segal submits the accompanying memorandum.

WHEREFORE, Defendant Michael Segal respectfully requests that this Court dismiss count nine of the second superseding indictment.

Dated: September 19, 2003

Respectfully submitted,

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DEFENDANT MICHAEL SEGAL'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS COUNT NINE OF THE SECOND SUPERSEDING INDICTMENT FOR VINDICTIVENESS

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Defendant Michael Segal respectfully submits this memorandum of law in support of his motion to dismiss Count Nine (RICO) of the Second Superseding Indictment. This motion arises out of the government's decision to charge Mr. Segal with a RICO offense and to name his company, Near North National Group and its subsidiaries, including Near North Insurance Brokerage, Inc. (collectively "Near North"), as a RICO enterprise. The government's RICO charging decision improperly exacts retribution against Mr. Segal for exercising his constitutional rights under the First Amendment to access the courts for legal wrongs he and his company have suffered, as set forth more fully below, and therefore Count Nine of the current indictment should be dismissed for prosecutorial vindictiveness.

INTRODUCTION

Prior to the return of the Superseding Indictment in this case on October 31, 2002, counsel for Mr. Segal and Near North met with the government on numerous occasions over several months to discuss the government's ongoing investigation. Counsel for both Mr. Segal and Near North repeatedly implored the government not to indict Near North, and if it determined to bring a RICO count, not to identify Near North as a RICO enterprise, because of the devastating harm those charging decisions would cause to the operations and value of Near North and to the approximately 800 Near North employees who depended on the company's continued vitality for their livelihoods.

In a series of meetings in September 2002, counsel from Near North met with the prosecution team and government agents to inform the government in advance of Near North's intent to file an amended complaint in state court against various individuals and corporations, including cooperating witnesses Matt Walsh and Dana Berry, confessed hacker and ex-Near North employee David Chelcy, and AON and USI (two competitors of Near North that had hired ex-Near North employees who were also cooperating witnesses). (Affidavit of Joshua Buchman

(attached as Exhibit A) at ¶¶ 2, 3.) At these September 2002 meetings, the prosecution team advised that the government's investigation had established that there was no connection among Cheley and its cooperating witnesses with respect to Cheley's hacking activities, and declared that Near North's draft allegations of a conspiracy between Cheley and its witnesses were unfounded. (*Id.*, ¶¶ 5-7.) The government then threatened that if Mr. Segal and Near North pursued the conspiracy allegations against its witnesses that were contained in the draft amended complaint, the government would take that into account in determining whether to charge Mr. Segal in a RICO count and name Near North as a RICO enterprise, or to charge Near North in a superseding indictment. (*Id.*, ¶¶ 6-10.)

Having strong evidence to support its claims, Near North and Mr. Segal moved on October 2, 2002 for leave to file an Amended Complaint in Illinois state court. The Amended Complaint contained allegations of a conspiracy among Cheley and certain cooperating witnesses, despite the government's threat of adverse prosecutorial charging consequences.[1] The next day, the government issued a grand jury subpoena to Near North, commanding the production of materials supporting the conspiracy allegations in the Amended Complaint. Only weeks later, the government made good on its threat, and on October 31, 2002 returned a superseding indictment charging Mr. Segal with RICO and naming Near North as a RICO enterprise.[2]

[1] The validity of Near North's allegations regarding the relationship between Cheley and the government's witnesses have since been borne out by a substantial body of evidentiary materials, including electronic materials obtained from AON's servers and from the government's files and its agents' own notes. Those evidentiary materials clearly demonstrate that the government's oft stated position that there was no connection between its witnesses and Cheley was flat out wrong, and that Near North's and Mr. Segal's allegations were in fact well founded.

[2] Approximately seven months later, on June 10, 2003, Mr. Segal filed his Motion for an Evidentiary Hearing in this matter. That motion aimed at rooting out whether certain ex-employees of Near North who are cooperating witnesses in this case were acting as government agents when they solicited and received reams of stolen, proprietary, and privileged material that had been hacked from Near North's computer systems by another former employee, David Cheley. Two days after Mr. Segal filed that motion, the government indicted Near North. The Second Superceding Indictment returned on June 12, 2003 charged Near North with all offenses previously alleged only against Mr. Segal, with the exception of the RICO count.

The Second Superseding Indictment's RICO charge against Mr. Segal seeks to punish Mr. Segal for continuing to assert, and to seek redress for, what the government repeatedly denied and even the government's own files have since proven true: that the government's key cooperating witnesses, including Matt Walsh, Dana Berry, and others, received stolen confidential, proprietary, and privileged information from another former ex-Near North employee, David Chelcy, and used at least some of that information in their cooperation with the government. The government made good on its threat to charge Mr. Segal with RICO and to identify Near North as a RICO enterprise if Mr. Segal went ahead with his civil suit against the former employees. Count Nine of the government's current indictment manifests an improper charging decision prompted by Mr. Segal's efforts to seek redress through the civil courts against persons who have unlawfully exploited Near North's and Segal's confidential and proprietary materials.

In short, the government went for Mr. Segal's jugular in charging him with RICO and identifying Near North as a RICO enterprise, after Mr. Segal would not desist from asserting his First Amendment rights. Under the Fifth Amendment, the government's addition of new charges and new allegations in retaliation for the exercise of a constitutionally protected right constitutes vindictive prosecution and is prohibited. The facts here create a presumption of vindictiveness under existing law, and are especially troubling given that the allegations in the civil suit that the government so strongly objected to have been substantiated with clear and irrefutable evidence of its witnesses' connection to the hacker and illegally seized evidence. If the government is unable to overcome the presumption of vindictiveness with objective evidence that its RICO charging decision was not improperly motivated, Count Nine of the Second Superseding Indictment should be dismissed.

STATEMENT OF FACTS

The facts of David Chelcy's theft of confidential and privileged information from Near North and Mr. Segal, and his handing it over surreptitiously to the government's cooperating witnesses, who in turn fed at least some of it to the government, have been previously presented to the Court, most comprehensively in briefing on Mr. Segal's Motion for an Evidentiary Hearing. A brief recounting here provides the backdrop to the government's improperly motivated charging decision.

Michael Segal was arrested by the FBI on January 26, 2002, on the day he was to fly to London for a business meeting with a large potential client of Near North. On February 14, 2002, Mr. Segal was indicted on one count of insurance fraud, 18 U.S.C. § 1033(b). At the time, although Mr. Segal served as CEO and president of Near North and was its sole shareholder, and although the government contended that Near North was essentially a personal fiefdom of Mr. Segal's, Near North was not charged with wrongdoing.

In March 2002, Near North correctly suspected that it was the victim of illegal hacking into its computer network. A monitoring program installed in April 2002 immediately detected a large number of unauthorized intrusions, ultimately traced to David Cheley, a former Near North information technology employee who had worked at Near North through August of 2001. From August 20, 2001 until April 24, 2002, Chelcy worked as a computer consultant at another insurance company ("Company"). During this time, Chelcy hacked Near North's computers repeatedly until, after his conduct was exposed, Company fired him on April 24, 2002.

Chelcy's technical prowess allowed him to steal vast amounts of confidential and privileged information belonging to Mr. Segal and to Near North, but he did not keep this information to himself. Almost from the very outset of his hacking, Cheley began sharing the information he had stolen from Mr. Segal and Near North with government witnesses Matt

Walsh and Dana Berry, both former high-level executives at Near North who had also left in the summer of 2001 to join Near North's chief rival, AON. This sluice of stolen information from Cheley to the government's witnesses operated from at least September 2001 until just before it was exposed by Near North's investigation in April 2002, nearly four months after Mr. Segal's arrest.

Between April and September 2002, Near North built on its discovery of Cheley's illegal hacking activities (to which Cheley had by then confessed) and began to establish irrefutable evidence of the connection between Cheley and government witnesses Matt Walsh and Dana Berry, among others. Mr. Segal and Near North, through counsel, took their findings to the government in the summer of 2002, advising the government of an apparent conspiracy between these government's witnesses and Cheley to acquire confidential, proprietary, and privileged Near North information by illegal means in order to harm Near North and Mr. Segal. By September 2002, in an exercise of Mr. Segal's and his company's First Amendment right of access to the courts, Near North was prepared to file an amended complaint in the Circuit Court of Cook County against Walsh, Berry, AON, and USI, among others, alleging such a conspiracy.

On September 17, 2002, prior to filing the amended complaint, Near North's outside counsel met with the government to discuss the filing of the proposed amended complaint, and to provide the government with a draft copy in advance. (Exhibit A) at ¶¶ 3-4.) During the meeting, AUSA's Virginia Kendall and William Hogan strongly objected to the allegations in the draft complaint that the government's witnesses and Cheley had conspired to obtain stolen e-mails and other proprietary and privileged electronic information from Near North's computers. (*Id.* at ¶ 6.) The government cast the Cheley-cooperating witness conspiracy allegations in pejorative terms, and declared that the allegations were false because, the government said, the

government's investigation had established that there was no connection whatsoever between Cheley and the cooperating witnesses.[3] (*Id.* at ¶¶ 6-7.)

Although professing to be disinclined to interfere with civil litigation by Near North, the government issued the following statements, which contained an unmistakable threat: The government believed that any allegation asserting a conspiracy between Cheley and the government's witnesses was false and unfounded. If Mr. Segal and Near North filed an amended complaint that made allegations regarding Cheley and the cooperating witnesses that the government believed to be false, or made without sufficient basis in fact (*i.e.*, an allegation of a conspiracy between Cheley and the cooperating witnesses), *the government would take that into account in determining whether to name Near North as a RICO enterprise in a new charge against Mr. Segal, or to charge Near North in a superseding indictment.* (*Id.* at ¶¶ 6-10.)

In possession of compelling evidence to support its claims, Near North and Mr. Segal nevertheless sought and obtained leave to file an Amended Complaint in Cook County Circuit Court on October 2, 2002. Although Near North and Segal had made a number of edits to the draft pleading based on discussions with the government, the Amended Complaint still included allegations that Cheley had acted in concert with specifically identified persons (including some of the government's witnesses) to obtain and use materials unlawfully stolen from Near North's and Mr. Segal's computer system. The very next day, the government issued a grand jury subpoena to Near North on October 3, 2003 commanding production of any and all evidence in

[3] At the September 17, 2002 meeting, the government's prosecution team stated that its investigation had revealed that there was "no connection whatsoever" between Cheley and government witnesses. (Ex. A, at ¶ 7.) One of the FBI case agents present at the meeting then noted that he recalled an unsolicited e-mail that one cooperating witness had received in the fall of 2001 from an unidentified sender. (*Id.*, ¶ 8.) Subsequent to the September 17 meeting, the agent provided Near North's counsel with additional details of "unsolicited" e-mails received by government witnesses from "unknown" sources in the fall of 2001 and in March 2002. (*Id.* ¶¶ 11-14.) However, at no time up through July 16, 2003 did any government agent reveal the substance of information contained in what the government has described as a "separate set of notes" from a January 14, 2002 interview with three government witnesses regarding Cheley and "e-mail sent by hacker" to the government's witnesses. Those FBI notes were produced to the defense in July 2003, in connection with briefing on Mr. Segal's Motion For an Evidentiary Hearing, and the Government's Motion to Correct Response to Motion for Evidentiary Hearing.

Near North's possession that supported the conspiracy allegations in the Amended Complaint. (*Id.* at ¶ 17.)

On October 30, 2002, in a meeting between the government and Mr. Segal's counsel at which Mr. Segal's counsel argued against indicting Near North or naming it as a RICO enterprise, the government accused Mr. Segal again of witness intimidation through his continued pursuit of civil litigation against its witnesses. The government stated that Near North had to deal with the consequences of conducting business in this fashion, a veiled, yet still obvious, reiteration of its threat to charge Mr. Segal with a RICO violation and to name Near North as a RICO enterprise, or to indict Near North, for filing the amended complaint. One day later, on October 31, 2002, the government made good on the first prong of its September 17, 2002 threat, obtaining an indictment that for the first time charged Mr. Segal with racketeering and identified Near North as a RICO enterprise.

In what appears to be a further effort to discredit Near North's and Mr. Segal's allegations that Cheley and the government's witnesses were connected in the theft and dissemination of Near North's and Mr. Segal's confidential and often privileged electronic information, and to provide wider protection to its witnesses from their conduct in this regard, the government included specific language in its RICO charge against Mr. Segal regarding the civil litigation by Near North and Mr. Segal. In language without precedent known to defense counsel for RICO drafting purposes, the government for the first time charged that Mr. Segal used his resources "to threaten to and to conduct expensive retaliatory litigation against those who would oppose his will, questions his decisions or expose his unlawful and unethical conduct." (Second Superseding Indictment, Count Nine, ¶ 4(b).) In its response to the Court-ordered Bill of Particulars, the government identified only one lawsuit as supporting its allegation of "retaliatory litigation." That suit is, of course, the civil lawsuit by Near North and Mr. Segal against the

government's witnesses and others alleging that they were connected to and received the fruits of Cheley's hacking into Near North's electronic information system.[4] (*See* Gov't Resp. to Bill of Particulars, filed February 20, 2003, at 7.)

Thanks to documents only recently revealed by the government, it is now clear that for a substantial time in this investigation, the government, at least the FBI agents who have been intimately involved in every stage of this case, knew or should have known for a fact what the government repeatedly denied in meetings and in court documents, even as it threatened Near North and Mr. Segal with charges in an indictment for asserting it: namely, that the allegations of Near North's civil lawsuit regarding a connection between Cheley and the cooperating witnesses are well founded and true, and that David Cheley provided the government's cooperating witnesses with stolen confidential, proprietary, and privileged information from Near North's computer system. Moreover, with respect to at least some of that hacked material, the government's recent disclosures demonstrate *that the witnesses in turn provided the fruits of that hacked information to the government*, even before Mr. Segal was arrested.

On July 16, 2003, the government revealed what it described as a "separate set of notes" taken by one of its case agents that were prepared as a result of meeting with three government witnesses on January 14, 2002, 12 days before Mr. Segal's arrest. (*See* Motion to Correct Government's Response to Motion For Evidentiary Hearing, at 1.) The government's agent recorded the fact that one or more of the witnesses was obtaining e-mails from a "hacker" named "Dave Chiele" or "Shiele." Even more importantly, the government agent transcribed the gist of one of the hacked e-mails, a ***privileged communication*** between Mr. Segal and one of his civil

[4] Thus, not only did the government deliver on its threat to indict Mr. Segal for a RICO violation and to name Near North as the alleged enterprise, but the government made the unusual allegation that Mr. Segal filed "retaliatory" litigation as part of his alleged RICO activities. So, after the RICO was filed against Mr. Segal, the government's witnesses were free to, and did, argue and represent to others that the grand jury and the federal prosecutors had concluded that Near North's allegations were merely "retaliatory" litigation and part of a pattern of racketeering activity by Mr. Segal.

attorneys, adding the notation "***e-mail sent by hacker***." Finally, the government agent who took these notes was present at the meetings in 2002 with counsel for Near North and Mr. Segal, at which the government had repeatedly reiterated its assertion that there was no connection among Cheley, its witnesses, and the government. (*See* Ex. A, at ¶¶ 3, 13.) Nevertheless, the government's case agent remained silent, and at no time revealed the damning evidence of just such a connection contained in the government's own file. (*Id.*, at ¶ 16.)

The motivation behind the government's animus in bringing a RICO charge against Mr. Segal, which named Near North as a RICO enterprise, after Near North and Mr. Segal filed an Amended Complaint, has now become clear: whether due to benign error or malign intent, the government's repeated denials of Mr. Segal's allegations of a flow of stolen information from Cheley to the cooperating witnesses, and then in some instances to the government, were false. Because that falsity threatened to impugn the government's witnesses, to embarrass the government, or worse, to damage its case against Mr. Segal, the government had ample motive to punish Mr. Segal for his continued efforts to establish the truth of allegations regarding a conspiracy among Cheley and the government's cooperating witnesses.

ARGUMENT

I. Mr. Segal Is Entitled To A Presumption Of Prosecutorial Vindictiveness.

"To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372, 102 S. Ct. 2485, 2488, 73 L. Ed. 2d 74 (1982). The broad discretion accorded prosecutors in deciding whom to prosecute is not "unfettered," and a decision to prosecute may not be deliberately based upon the exercise of protected statutory or constitutional rights. *Wayte v. United States*, 470 U.S. 598, 614, 105 S. Ct. 1524, 1534, 84 L. Ed. 2d 547 (1985), *citing Goodwin*, 457 U.S. at 372.

In *Goodwin*, the Court discussed its precedents regarding vindictive prosecution and illuminated when a presumption of prosecutorial vindictiveness should apply and when it should not. Where prosecutorial action detrimental to a defendant has been taken after the exercise of a legal right, the Court has found it necessary to presume vindictiveness when, under the circumstances, a reasonable likelihood of vindictiveness exists. *Goodwin*, 457 U.S. at 373.

As the *Goodwin* court noted, 457 U.S. at 372, the governing authority up to that time analyzing the circumstances in which a "reasonable likelihood" of vindictiveness exists consisted of the Court's decisions in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2089, 40 L. Ed. 2d 628 (1974), and *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). Those cases set forth the principles that govern in this case.

In *Pearce*, a trial judge imposed a harsher sentence on retrial after a criminal defendant successfully attacked his initial conviction on appeal. In *Blackledge*, a defendant who had been convicted of misdemeanor assault exercised his statutory right to a trial *de novo* in the superior court and was charged with (and later convicted of) a felony. In both *Pearce* and *Blackledge*, the Court found that a reasonable likelihood of vindictiveness existed, warranting a presumption of vindictiveness. *Pearce*, 395 U.S. at 725; *Blackledge*, 417 U.S. at 27-28. In both cases, the "reasonable likelihood" was based upon the stake the relevant authority (the trial court in *Pearce* and the prosecutor in *Blackledge*) had in discouraging a defendant from exercising a statutory or constitutionally protected right. *Pearce*, 395 U.S. at 725, n.20; *Blackledge*, 417 U.S. at 27; *see also Goodwin*, 457 U.S. at 373-376 (discussing cases). For example, in *Pearce*, it was deemed reasonably likely that a judge might punish a defendant who succeeded in getting his original conviction set aside. The Court found that a presumption of vindictiveness was warranted so that a defendant could be "freed of apprehension of such a retaliatory motivation," in order that the

defendant not be deterred from exercising his right to appeal or to collateral attack. *Pearce*, 395 U.S. at 725; *see also Goodwin*, 457 U.S. at 373. In *Blackledge*, the Court concluded that "[a] prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* . . . since such an appeal will clearly require increased expenditures of prosecutorial resources. . . and may even result in a formerly convicted defendant's going free." *Blackledge*, 417 U.S. at 27-28; *see also Goodwin*, 457 U.S. at 375-376. The Court noted the likelihood of prosecutors "upping the ante" through increased charges where doing so would deter all but the bravest defendants from exercising their statutory right to a new trial. *Id.*; *see also Goodwin*, 457 U.S. at 376.

By contrast, in *Bordenkircher* the Court found that a reasonable likelihood of vindictiveness did not exist when, in the context of plea negotiations, a prosecutor threatened to return to the grand jury to obtain significantly increased charges against a defendant unless he pleaded guilty. Distinguishing *Pearce* and *Blackledge*, the Court noted that the due process violation in those cases "lay not in the possibility that a defendant might be deterred from the exercise of a legal right...but rather in the danger that the State might be retaliating against the accused" for the lawful exercise of such a right. *Bordenkircher*, 434 U.S. at 363; *see also Goodwin*, 457 U.S. at 378. While a defendant may be deterred from exercising his right to trial due to the possibility of increased charges, the Court found that to be inherent in the plea bargaining process, the nature of which is negotiation, not punishment. *Bordenkircher*, 434 U.S. at 365; *see also Goodwin*, 457 U.S. at 378-380.

The rationale in *Bordenkircher* controlled the Court's analysis in *Goodwin*, a case in which a defendant who had been charged with a misdemeanor and who would have faced a bench trial, elected to proceed to trial by jury in the wake of aborted plea discussions. Those discussions had not included a threat of increased charges to influence defendant's conduct, and

the defendant was then indicted on a felony. The *Goodwin* court noted that in *Bordenkircher*, the Court decided not to apply a presumption of vindictiveness, but still left open the possibility for the defendant to show actual vindictiveness by competent evidence. The Court contrasted that to the situation in *Goodwin*, where absent any threat by the prosecutor, the defendant could prevail only if vindictiveness were presumed by the circumstances of the increased charge. *Goodwin*, 457 U.S. at 380, n.12 and 381.

In deciding whether or not to apply a presumption of vindictiveness, the *Goodwin* Court deemed the context of plea negotiations which had been addressed in *Bordenkircher* to be crucial. "Since charges brought in an original indictment may be abandoned by the prosecutor in the course of plea negotiation -- in often what is clearly a 'benefit' to the defendant -- changes in the charging decision that occur *in the context of a plea negotiation* are an inaccurate measure of improper prosecutorial 'vindictiveness.'" *Goodwin*, 457 U.S. at 379-380 (emphasis supplied). Thus, the *Goodwin* Court reasoned, in *Bordenkircher*, no presumption of vindictiveness was warranted to guard against a likelihood that defendant would be deterred from exercising a constitutional or statutory right. Although the prosecutor had explicitly threatened defendant in *Goodwin*, this "did not prove that the action threatened was not permissible; the prosecutor's conduct did not establish that the additional charges were brought solely to 'penalize' the defendant and could not be justified as a proper exercise of prosecutorial discretion." *Goodwin*, 457 U.S. at 380, n.12.

The *Goodwin* Court began its analysis by noting that it is unrealistic to presume vindictiveness *every time* a defendant invokes routine procedural rights, since these inevitably impose some burden that a prosecutor would normally expect to bear. *Goodwin*, 457 U.S. at 381. It relied on the fact that in *Bordenkircher*, the Court had made clear that "the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to

warrant a presumption that subsequent changes in the charging decision are unjustified." *Goodwin*, 457 U.S. at 382-383. Hence, the *Goodwin* court refused to apply such a presumption merely on the basis of the additional fact that respondent had forced the government to make its case to a jury. *Id.* The relative difference in the burden imposed by a bench versus a jury trial was slight, and being put to its proof was a normal, and indeed an inherent, burden faced by prosecutors that did not suggest a likelihood that prosecutors would act vindictively if forced to do so; because there was no reason for the prosecution to engage in "self-vindication," no presumption of vindictiveness was warranted. *Goodwin*, 457 U.S. at 383. Again, the Court left open the door for respondent to prove actual vindictiveness through objective evidence. *Goodwin*, 457 U.S. at 384.

Subsequent cases in the Seventh Circuit and in other circuits have followed *Goodwin* and its antecedents in recognizing that the Constitution forbids prosecutorial retaliation for the exercise of a statutory or constitutional right. A presumption of vindictiveness is warranted where there is a reasonable likelihood of vindictive prosecution; absent the presumption, a defendant may still show actual vindictiveness by objective evidence, and the presumption is not usually warranted where charges are increased in routine pretrial and plea negotiation settings. *See, e.g.*, *United States v. Dickerson*, 975 F.2d 1245 (7th Cir. 1992); *United States v. Whaley*, 830 F.2d 1469 (7th Cir. 1987); *United States v. Mebust*, 857 F. Supp. 609 (N.D. Ill. 1994). The D.C. Circuit has recognized that in all cases where the circumstances -- pretrial or post-trial -- suggest a realistic likelihood of vindictive prosecution, a presumption of vindictiveness will lie. *See United States v. Meyer*, 810 F.2d 1242 (D.C. Cir. 1987).[5]

[5] In *Meyer*, the D.C. Circuit reasoned as follows in finding that a presumption of vindictiveness obtained in the pretrial setting presented in that case. "The Supreme Court in *Goodwin* declined to adopt a per se rule applicable in the pretrial context that a prosecutor 'ups the ante' following a defendant's exercise of a legal right. *See Goodwin* 457 U.S. at 381, 102 S. Ct. at 2492 ('There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting.'). But the Court also declined to adopt a per se rule that in the pretrial context no presumption of vindictiveness will ever lie. The lesson of *Goodwin* is that proof of a

The instant case is analogous to the *Pearce* and *Blackledge* line of cases, and is distinguishable from *Bordenkircher* and *Goodwin*. There is ample reason here to invoke a presumption of vindictiveness, and there is substantial evidence of actual vindictiveness. First and foremost, the government's RICO charge against Mr. Segal, and its identification of Near North as a racketeering enterprise, after Mr. Segal and Near North filed its amended complaint against the government's cooperating witnesses, constituted punishment aimed at Mr. Segal for exercising his constitutionally-protected rights.[6] That the government's action was expressly related to Mr. Segal's exercise of his right of access to the courts is manifest in the government's threat, first made directly to Near North's attorney and then obliquely to Mr. Segal's, to do exactly what the government ultimately did when Mr. Segal filed his amended complaint.

In contrast to *Bordenkircher* and *Goodwin*, there is nothing "normal" or "routine" about the pretrial circumstances in this case, and this Court is not dealing with "routine invocations of procedure" by Mr. Segal. Instead, Mr. Segal has sought redress through a separate, civil lawsuit (initiated in January 2002, before this prosecution even commenced), and has invoked the extraordinary procedure of moving for an evidentiary hearing in this Court. In these circumstances, the government has obvious motive to engage in the sort of "self-vindication"

(continued...)

prosecutorial decision to increase charges after a defendant has exercised a legal right does not alone give rise to a presumption in the pretrial context. The rationale supporting the Court's teaching is that this sequence of events, taken by itself, does not present a 'realistic likelihood of vindictiveness.' *See id.* at 381-84, 102 S. Ct. at 2492-94. But when additional facts combine with this sequence of events to create such a realistic likelihood, a presumption will lie in the pretrial context. Several post-*Goodwin* courts have adopted this view. (citations omitted) They have recognized, as we do today, that a presumption of vindictiveness will lie in the pretrial setting if the defendant presents facts sufficient to show a realistic likelihood of vindictiveness. The critical question in this case, as in all others, is whether the defendants have presented such facts - whether the defendants have shown that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness and therefore give rise to a presumption." *Meyer*, 810 F.2d at 1246.

[6] The right to have access to the courts to obtain redress of legal wrongs is fundamentally protected under the First, Fifth, and Fourteenth Amendments, *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142 (1907); *see also Harrell v. Cook*, 169 F.3d 428 (7th Cir. 1999); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), and an infringement of that right can form the basis of a claim under 42 U.S.C. § 1983 for a retaliatory prosecution claim. *Russoli v. Salisbury Township*, 126 F. Supp. 2d 821 (E.D. Pa. 2000).

referred to by the Court in *Goodwin*, because (1) Mr. Segal has directly raised the inference that the government turned a blind eye to its cooperating witnesses' receipt of illegally seized evidence, so as to render them government agents for purposes of conducting an illegal search, (2) the government had hotly and repeatedly denied *any connection* whatsoever[7] between its witnesses and the information hacked by Cheley, to the point of basing its charging threats against Mr. Segal and Near North on these denials, (3) the government has, in its bill of particulars, gone so far as to spotlight Mr. Segal's lawsuit against the cooperating witnesses as the basis for an allegation that Mr. Segal has engaged in "retaliatory litigation," and yet (4) at the time it was undertaking all of these actions and making good on its threat, the government knew or should have known that Mr. Segal's allegations were indeed well founded and that the government's denials were demonstrably false.

Indeed, it is demonstrative of the government's desire for "self-vindication" that it keeps taking additional bites at the apple in increasing the charges against Mr. Segal and his company. The Seventh Circuit has noted that "the extent to which the government had obtained its evidence prior to the defendant's assertion of some right is one of the key indicia scrutinized by courts when confronted with a claim of vindictive prosecution." *United States v. Napue*, 834 F.2d 1311, 1330 (7th Cir. 1987) (internal quotation marks and citations omitted); *see also Blackledge*, 417 U.S. at 29 ("This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset."). The government could, for example, have charged Near North as a defendant last fall, when it obtained the first

[7] Up until July 2003, the government had acknowledged only a very limited connection between Cheley and its witnesses, which it characterized as "unsolicited" e-mails from an "unknown" sender received by two of its witnesses in the fall of 2001 and in March 2002, with no indication to the government that the e-mails were obtained through unlawful hacking activity. Subsequent materials obtained by Near North and Mr. Segal from AON's server and other sources, and the government's belatedly produced "separate set of notes" from a January 14, 2002 interview of three of its witnesses, have demonstrated that there was a substantial connection between Cheley and the government's witnesses, and that the government knew or should have known of that connection and that its witnesses were providing at least some information that derived from illegally seized evidence.

superseding indictment charging Mr. Segal with RICO and identifying Near North as a RICO enterprise. Yet, only when Mr. Segal exercised his right to persist in pointing the finger at the government witnesses for their involvement with Cheley in his hacking activity (and the government persisted in its incorrect denials) did the government pile on by naming Near North as a defendant in June 2003.

Mr. Segal sought redress and to protect his rights as he was entitled to do under the Constitution, and did so in a non-routine pretrial setting where the government had reason to engage in "self-vindication." Mr. Segal has been punished by the government in its charging decisions as a consequence. Accordingly, this Court should apply a presumption of vindictiveness and, absent objective evidence establishing that Count Nine of the Second Superseding Indictment was not the product of vindictiveness, should dismiss Count Nine.

II. The Court Should Apply A Presumption Of Vindictiveness In The Government's RICO Charging Decision; If The Court Does Not Apply That Presumption, The Court Should Allow Discovery On Defendant's Claim Of Prosecutorial Vindictiveness.

While a presumption of vindictiveness is plainly warranted in this case, the facts and circumstances are also clearly sufficient to find actual vindictiveness, and to order discovery in the event the presumption is not deemed to apply. "To prove actual vindictiveness, there must be objective evidence of some kind of genuine prosecutorial animus," that is, "objective evidence that a prosecutor acted in order to punish the defendant for standing on his legal rights." *Dickerson*, 975 F.2d at 1250 (internal citations omitted). To compel discovery on a claim of prosecutorial vindictiveness, the Seventh Circuit has established a "*relatively low burden* [which] recognizes that 'most of the relevant proof in [such] cases will normally be in the Government's hands.'" *United States v. Heidecke*, 900 F.2d 1155, 1158 (7th Cir. 1990) (emphasis added) (quoting *Wayte v. United States*, 470 U.S. 598, 624, 105 S. Ct. 1524, 1539, 84 L. Ed. 2d 547

(1985) (Marshall J., dissenting)). To be entitled to a hearing on a claim of vindictive prosecution, the defendants need only offer "sufficient evidence to raise a reasonable doubt that the government acted properly in seeking the [superseding] indictment." *Heidecke*, 900 F.2d at 1160. Moreover, to compel further discovery the defendants must meet an even lesser burden of showing "a colorable basis for the claim" of vindictiveness, which merely means "some evidence tending to show the essential elements of the claim" such that the claim rises "beyond the level of unsupported allegations." *Id.* at 1159.

In this case, the evidence shows much more than "a colorable basis for the claim" of prosecutorial vindictiveness. The government's explicit threat to indict Mr. Segal under RICO and to identify Near North as a RICO enterprise if Mr. Segal and Near North filed an Amended Complaint with conspiracy allegations is sufficient, standing alone, to establish actual vindictiveness. It is difficult to imagine any more direct evidence of vindictiveness than this threat. It is also difficult to demonstrate better direct evidence of a motive for vindictiveness than the government's repeated denials that its witnesses were connected to the hacker, which denials are now belied by the FBI's own files.

The sequence is clear: Mr. Segal and Near North announced an intention to exercise a protected right to seek redress in civil court. The government declared (incorrectly) that Mr. Segal's allegations in that lawsuit were unfounded, and threatened adverse charging consequences if Mr. Segal and Near North pursued their allegations. Near North and Mr. Segal exercised their right and filed an Amended Complaint in civil court. The government made good on its threat — it indicted Mr. Segal under RICO and named Near North as a RICO enterprise in a superceding indictment. The motivation underlying the government's charging decision in Count Nine of the Second Superseding Indictment could not be more manifestly plain, and the proof of this lies in the government's own words and actions.

CONCLUSION

For the reasons set forth above, Defendant Michael Segal respectfully requests that this Court apply a presumption of vindictiveness to the government's charging decisions here with respect to Count Nine. If vindictiveness is presumed on the current record, the Court should then require the government to come forward with objective evidence that Count Nine of the Second Superceding Indictment was not motivated by vindictiveness, and then hold an appropriate hearing to determine whether Count Nine should be dismissed. If the government fails to come forward with objective evidence demonstrating non-vindictiveness, the Court should dismiss Count Nine of the Second Superceding Indictment.

If the Court does not apply a presumption of vindictiveness, Mr. Segal respectfully requests that the Court find that actual vindictiveness exists or, in the alternative, that a colorable basis for Mr. Segal's claim of vindictiveness exists, and that the Court then allow for appropriate discovery to be had of the government's motivation in charging Count Nine of the Second Superceding Indictment, followed by a hearing to determine whether Count Nine should be dismissed.

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Respectfully submitted,

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See Case File For Exhibits