

## ***Attachment #1 - Violations of Constitutional Due Process and DOJ Regulations in Segal Case (? Duplicate, if needed??)***

This document outlines evidence of multiple violations of due process including cyber-hacking, illegal taping of defense attorneys, material uncorrected misrepresentations, the hiding of exculpatory evidence and the failure to disclose benefits to government witnesses involved in the criminal prosecution of Michael Segal. Many of these issues were cited in a detailed June 2010 letter to Lanny Breuer, head of the DOJ Criminal Division and a subsequent letter in November 2011 to the Department of Justice that has not been answered one and half years later. As this document shows, the massive violations of due process that led to an unjust verdict in the trial and before the Seventh Circuit, continue to impede justice for Mr. Segal in forfeiture and restitution hearings.

### **THE GOVERNMENT'S REPLY TO SEGAL'S JUNE 2010 AND NOVEMBER 2011 REQUEST TO BE REVIEWED AS TO THE COMPLETE RECORD AS TO ISSUES AFFECTING THE REPUTATION OF THE U.S. DEPARTMENT OF JUSTICE AND MISCONDUCT OF A FEW**

The multiple misconduct and due process violation were not submitted to any court and are now being submitted as support for a request to investigate and redress these continuing violations up to the current forfeiture and restitution of Government filings and conduct.

The issue before the Seventh Circuit was "Vindictive Prosecution." The "hacking" was a small factual component of the argument and the fact that the materials involved attorney-client-privilege documents was not the basis for the argument. To establish "vindictive" prosecution, the defendant must establish that "vindictiveness" is the exclusive reason for bringing the prosecution. The Seventh Circuit failed to find that the hacking was the exclusive reason for bringing the prosecution. However, the Segal District Court did not find that the hacking didn't happen and did not address other potential prejudice to Segal (especially ACP prejudice.) — simply because it wasn't raised.

The attorney-client privilege hacking ethical and DOJ misconduct (which, rises to the level of separate criminal conduct and the interference of apprehension of a crime) was the proximate cause of a series of prejudicial acts (and omissions) by the Government:

- The civil suits by NNIB against the hacker triggered the RICO indictment and the indictment of NNIB
- The only viable reason for the FBI not aggressively pursuing an investigation and prosecution of the hackers was that the dragnet would have ensnared their own agents and ultimately Assistant U.S. Attorneys.
- The Federal Government contacted the Illinois authorities and told them to lay off the investigation and prosecution — that the federal government was going to handle it ~ effectively stopping a state

criminal investigation.

- The U.S. Attorney's Office & the trustee blocked two escrowed sales of NNIB pretrial (see the Winston & Strawn memorandum – attach or not??).
- In the need to steam-roller the prosecution, the government engaged in multiple instances of evidence manipulation and misrepresentation so as to ensure that their cybercrime activity got "buried."

Segal's prior 2010 DOJ filing does not specifically address the proven "materiality" of the specific prejudice resulting from the Attorney Client Privilege (ACP) hacking. While some of the prejudice is difficult to quantify, the following is several that demonstrate very specific prejudice.

**Closely related to the ACP "hacking" is the ACP "taping" of Harvey Silets the act which is parallel to the Miami case dismissed over the taping of defense counsel. The illegal taping of Silets which is supported in the Government's own records has never been raised in any forum.** Although the taping is touched in our DOJ memorandum, the presentation of that aspect could certainly be strengthened in follow up discussions and/or filings. I have attached some relevant material.

#### **GOVERNMENT'S OWN RECORD PROVIDES TIMELINE OF EVIDENCE AS TO THE RECORDING OF DEFENSE ATTORNEY SILETS AND FINANCIAL CONSULTANT WISH – SUPERVISED AND CONTROLLED BY FBI AGENT MURPHY**

November 16, 2001: Silets and Wish meet with Watkins as a follow up from the direction in the 10/23/01 email, and the agreement between Silets and Wish.

November 17, 2001: Government agent records Wish & Silets on a phone conversation discussing and revealing comments as to the draft of Watkins proposed statement, Wish further supports the referenced affidavit of Watkins as to Watkins statements from their meeting.

November 20, 2001: Tape recording, Attorney Silets & Wish meet in Watkins' office. Watkins reviews his draft statement and several handwritten corrections are made. It was agreed that the statement was to be retyped and submitted back to Silets. The government tape recording proves no changes of major facts were made and Watkins objects.

November 24, 2001: McNichols arranges for Watkins to meet with Murphy of FBI and confesses to embezzlement and becomes a government private agent. Government documentation is

murky as to when Watkins becomes agent. Watkins is the only witness to the alleged tax conspiracy, but the government never put Watkins on stand to testify.

November 29, 2001: ID 31; Watkins as government private agent, records phone conversation with attorney Harvey Silets, and now states, "he does not agree with his prior agreed statements". Watkins states, "He is not comfortable and leaves Silets holding on the phone" Silets states, "everything in the statement is what you told me, what is in there that you don't agree with?" Watkins states, "He'll get back to Silets". Watkins excuse for refusing to sign is not credible, for the prior tape recordings of McNichols and Watkins confirm his original voluntary statement before McNichols and the FBI interfere.

Government turned over tapes that were transcribed by law firm of Jones Day and contained multiple issues of unexplained, blanked out and non-consequential order requiring extensive analysis as to looking for a needle in a haystack.

The "hacking" violations and "taping" violations demonstrate synergistic prejudice in that it is clear from the evidence, on its face that the Government manipulated the tapes and generated false FBI 302 statements (i.e. two "almost identical" FBI 302 statements) as part of their cover up and deflection activities. The taping of defense attorney Silets also demonstrates the Government's interference with Segal's right to investigate (through counsel) and obtain statements from witnesses -- the FBI's own tapes (included in this document) show agents attempting to convince Watkins, Government confessed petty cash embezzler, to change his statement to make it fit the Government's version of events. The FBI involvement in tampering with Watkins' statement would never have happened but for the ACP hacking and attorney taping violations and other misconduct.

The fact that the credibility of David Grossman, with his 26 years of experience with the FBI, went to the head of the FBI office in Chicago with the cybercrimes and laid everything out for them — but ended up with a stonewalled investigation is compelling, coincidentally a week after the meeting, FBI Murphy turned over partial 1A working notes that are shown to be incomplete and inaccurate, but provides partial disclosure of Government's knowledge of cybercrime and the takeover group's Government agents being in receipt of hacked material.

With all of the statements made by President Obama and AG Holder with respect to the importance of cyber security (see attached media reports), the involvement of AON, a Fortune 500 corporation, in the hacking of ACP documents from Segal and NNIB is just wild. Then add to that the trustee's dismissal of the civil suits against AON and Kemper — there was a giant crime, which generated huge tort liability for AON and Kemper, related to the ACP hacking activities. The inaction by the FBI relative to that separate crime makes a mockery of the President and

Attorney General's statements about the importance of cyber security ~ it is certainly contrary to current public policy.

### **CENTRAL ROLE OF CYBER HACKING IN DENYING SEGAL'S CONSTITUTIONAL DUE PROCESS WAS NOT ADDRESSED IN COURT**

The government continues to ignore, and uses as a line of defense, that the matter has already been adjudicated, and that they won. However, the doctrine of res judicata is only applicable when both the facts and the legal theory are identical. The district court considered only a subset of the facts separate from the full compilation of DOJ violations of constitutional rights.

The appellate court considered the hacking only as a remote parenthetical to an allegation of vindictive prosecution. In other words, this matter has not actually been litigated. The district court prevented the full litigation of the matter when it refused to hold an evidentiary hearing to develop the record.

The district court acknowledged and accepted all of the facts set forth by Segal with respect to the hacking including an acknowledgement that the government received stolen documents. However, in making its ruling the district court made two errors: 1) instead of considering whether the facts presented by Segal established a prima facie case to develop the record at an evidentiary hearing, the Court jumped to the question of whether Segal had offered proof sufficient to reach the ultimate question that was not yet properly before the court; and 2) in making its ruling, the Court took an exceptionally narrow view of the conduct of which Segal complained — looking only at the search activities of the government as related to late-stage hacking by protected hacker Cheley rather than evaluating whether Segal, over the course of multiple evidentiary submissions, had established that there was a need to fully develop the record to establish the existence/ nonexistence of an agency relationship between the hacker, the Takeover Group, and the United States.

### **U.S. ATTORNEY'S OFFICE MISLED INTO BECOMING THE BUSINESS TOOL FOR COMPETITORS OF SEGAL AND NEAR NORTH**

The pretrial record and defendant's case amply demonstrates that NNIB and Segal were victims of thousands of unlawful intrusions onto Near North's computer systems. The hacker unlawfully accessed NNIB's computer network on an almost daily basis from August 17, 2001 to April 23, 2002. The hacker was pervasive and targeted.

When the hacker accessed Segal's email account, the first screen that he accessed was the "in box" which contained an alphabetical list of all messages. The hacker methodically scrolled through the list in order to access email messages between Segal and various lawyers, including Near North's general counsel.

The privileged nature of the communications was apparent on their face. None the less, the hacker accessed those communications and delivered copies to government's cooperating

witnesses. From the government's own evidence, federal investigators were aware as early as January 14, 2002, 2 weeks prior to Segal's arrest that co-conspirators had received and were continuing to receive confidential information provided by the hacker. On reasonable belief, based on ex FBI supervisor David Grossman, the January 14 notes were incongruous and in conflict. The government later obtained copies of hacked material from cooperating witnesses as documented in several FBI (302) reports. Persons referenced in the hacked electronic messages and documents were called before the grand jury or were interviewed in connection with the government's investigation. It also must be noted, the number of frequent contacts between the take-over conspirators during the period of the hacking that were never documented. Complete four-page email is available.

Given the plethora of collateral constitutional violations, the cumulative impact of those violations additionally constitutes an additional constitutional violation: a violation of substantive due process through the right to a fair trial and post forfeiture and restitution filings and procedures.

The facts underlying the cybercrimes are well developed. Because these facts have been pled by reputable counsel in district court filings they can be considered well-vetted along with support of forensic experts and ex-Secret Service agents. Segal will provide further discrete linkages between events, documents, actions, communications, and reactions.

Segal's potential "smoking gun" witness is ex-FBI Grossman who was engaged by Segal/Near North. Grossman was intimately involved in the investigation of the hacking. Grossman personally interacted with the FBI cybercrimes agents and with the FBI Station Chief in this matter. Because Grossman was recently-retired FBI, he was intimately familiar with FBI protocols with respect to cybercrimes and other investigative procedures.

In the prosecution of ex-Senator Ted Stevens, it was an FBI Agent who was disgusted with the government's behavior who became impossible to ignore. In Segal's case, Grossman's former FBI supervisor pedigree makes him a "whistleblower" who is difficult to ignore — his reputation and integrity are first rate, as is his specific knowledge of what happened here. It is also highly unlikely that the -FBI agents with whom he interacted would dispute his account of the events (i.e. the FBI stonewalling) that pervaded the FBI cybercrimes non-investigation of Cheley.

## **MATERIAL BENEFITS TO GOVERNMENT WITNESSES UNDISCLOSED TO THE COURT AND JURY**

When the e-mail communications between the parties, the telephone calls between the parties, and the hacking activities of Cheley are overlaid on a single timeline, it is apparent that the activities of Cheley are not independent from the activities of the other parties. The content of certain e-mail messages confirms that the parties are related.

The federal government provided confessed hacker David Cheley with considerable benefits

including:

- immunity from federal prosecution;
- federal influence in nonprosecution by Illinois prosecutors;
- federal influence (both directly with the Illinois court and indirectly through the RICO indictment of Segal) to thwart Illinois civil litigation against Cheley.

The federal government provided benefits to AON, USI and their Takeover Group employees, including:

- immunity from federal prosecution for conspiracy to breach the security of a secure computing system;
- federal influence (both directly with the Illinois court and indirectly through the RICO indictment of Segal and Near North) to thwart Illinois civil litigation against AON and members of the Takeover Group;
- advance knowledge of court filings & Segal's arrest to allow AON, USI and the Takeover group to leverage that knowledge for competitive business advantage.

The Takeover Group provided benefits to the government including:

- a "prepackaged" false regulatory and accounting prosecution of Segal and Near North;
- access to confidential and privileged documents held by Near North and Segal without the hassles of obtaining a search warrant;
- a "managed leak" of government-supportive case information to the press ~ avoiding having the government's "fingerprints" on confidential information provided to the media;
- high profile case providing career advancement

Each provision and receipt of consideration between the parties was not an independent act. The parties' entanglement was so complete that it is impossible to determine that a specific act by one party resulted in a quid pro quo with another specific act. Rather, each party to the conspiracy contributed and, received a "package" of consideration from their participation in the conspiracy. In other words, this was not a two-party contract arrangement ~ this was a conspiracy in which each member of the conspiracy committed overt acts in support of the aim of the conspiracy -- and each member of the conspiracy received benefits from the conspiracy of a different sort. Although the conspiracy had a common purpose, it was founded on the premise of "from each according to their abilities, to each according to their needs." Everybody involved got what was important to them — in addition to their common purpose of the destruction of Segal and Near North.

**The public disclosure of the hacking activity marked a major decision-point in the hacking conspiracy. At that point, the government needed to either: 1) pursue the criminal prosecution of the hackers; or 2) close ranks with the hacking conspirators and become a full-partner in the hacking conspiracy. Prosecution of the hackers and his primary co-conspirators would have severely damaged the prosecution of Segal and Near North. However, the government went far beyond the mere "nonprosecution" of the hacker and his co-conspirators. The government instead reconfirmed its full membership in the conspiracy - interfering with criminal and civil processes of the sovereign State of Illinois Courts. Through such interference, the government precluded Segal and Near North from exercising their constitutional privilege of seeking redress in the courts ~ a privilege which applies to both federal and state forums. As a "full" member of the hacking conspiracy, each government attorney and law enforcement agent became culpable for the illegal penetration of Near North's computer systems and the theft of information from those systems and the clear violations of professional and ethical standards.**

The Government agents became so involved in covering up the misdeeds of their agents and witnesses that they steamrolled Segal in court. While the appellate court declined to find that the cybercrimes had resulted in the "selective prosecution" of Segal, no court has ever addressed the due process violation of the undisclosed non-prosecution and cover up of the criminal conduct of the Takeover Group through their participation in a conspiracy to illegally penetrate Near North's computer systems. Also undisclosed was the full extent of the economic benefits that the Takeover Group would be allowed to retain, as the fruits of their participation in an illegal computer hacking conspiracy, through their retention and provision of confidential documents to AON in violation of Illinois trade secrets law. In addition, no court has ruled upon the participation and cover up of government parties involved in this criminal enterprise. Hogan's violations in the Segal case clearly mirror his misconduct in the notorious Boyd case where he was the principal prosecutor and led to his termination as AUSA.

The Seventh Circuit has held in the Boyd case below where the principal prosecutor below was William Hogan, Segal's prosecutor:

*The second way of invoking Brady is by showing that although there was no quid pro quo, the state, as in our Boyd and Williams cases, United States v. Boud, 55 F.3d 239, 239-45 (7th Cir. 1995); United States V. Williams, 81 F.3d 1434, 1438 (7th Cir. 1996); see also United States v. Sive, 388 F.3d 471, 488-90 (5th Cir. 2004); United States v. Soto-Beniazuez, 356F.3d, 41 (1st Cir. 2004), had lavished benefits (sex, free long- distance calls, cash, or what have you) on its witnesses in the hope of making them feel part of the states' team and as a result inclined out of gratitude, friendship, or loyalty, to testify in support of the prosecution.*

Not only was Segal's Fifth Amendment right violated through the Government's nondisclosure of the secret benefits provided to the Government Takeover Witnesses with respect to their conspiracy to illegally penetrate Near North's computer systems and steal and retain the benefits from attorney-client- privilege document not disclosed to Segal.

**Another example of Segal's Sixth Amendment right to effective cross examination of the Government's most important witnesses was compromised by the Government's nondisclosure of the full range of criminal and economic benefits that were provided to the Takeover Group.**

The benefit to the Government from the unrestrained use of attorney-client privilege materials was not limited to the fruits of the illegal penetration of Near North's computer systems. In January of 2002, Segal's attorney-client privilege was compromised as a result of the search of Segal's home and Near North's offices. During this search, documents were seized from the office of Near North's General Counsel, computer records were seized from Near North's offices containing privileged communications, and a personal laptop containing attorney client-privilege work product was seized from Segal's home. Contrary to DOJ and FBI guidelines, an appropriate "taint team" was not used to identify and sequester attorney-client privilege documents. In addition, Segal's home and personal computers were taken and never returned, which precluded further evidence of use and view of attorney client privilege. After a series of pretrial motions, this Court eventually ordered the Government to make no further use of attorney-client-privilege documents. However, by the time the order was made, the horse had left the barn — much of the damage was irreversible.

**The protected 8 month cybercrime scheme enabled the Government had been able to review Segal's discussion of his defense strategy with counsel.** Just as importantly, by analyzing the focus of the topics of discussion and inquiry, the Government could deduce the exact nature of Segal's defense strategy and take steps to counter the strategy. Through the identification of witnesses that Segal intended to call to his defense, the Government was able to use its superior resources to make first-contact and "conform" the testimony of these witnesses to the requirements of the Government's case.

Another example, at least ten witnesses whose initial statements were beneficial to Segal, but eventually "conformed" their testimony to benefit the Government. For instance, at Tr. 747, material Government witness Pater denies that the condition of the books and records at Near North were not in proper reconciliation, testimony supportive of the Government's case. However, at Tr. 817, Pater was forced to admit that he had testified to the grand jury that the books were not in good shape. Somehow, in the intervening interval, Pater's testimony had been "conformed."

### **Segal Taping Parallels Misconduct in Miami Case Which DOJ Acknowledged and Rebuked The Fruits of the Unlawful Taping in Segal Case Resulted in Further Proven Misconduct**

The Government did not limit its quest for privileged communications to documents and computer data. The Government's own cover surveillance audiotapes record conversations with Segal's attorney Harvey Silets. Tape ID 19 is a FBI recording made by Takeover Witness McNichols of a meeting with Silets on November 11, 2001. See transcript excerpt attached as Exhibit B. A second FBI recording, Tape ID 31, was made by Watkins, confessed embezzler, on



November 29, 2001 of a meeting between Watkins and Silets. **See transcript excerpt attached.**

Government does not disclose their own private agent Watkins total amounts of 18 years embezzlement. They do not have him testify at trial and basically states that any money not attributed to Watkins, Segal stole for himself. Watkins ultimately receives a very short home confinement as punishment for embezzlement.

The topic under discussion in each of these meetings was Near North's petty cash accounting ~ the source of funds for Watkins' embezzlement from Near North. One of Segal's critical defense strategies at trial was showing that the problems with petty cash at Near North resulted from Watkins' embezzlement --both directly in terms of missing cash that went to Watkins and indirectly in terms of Watkins' miscoding and non-recording of Segal's withdrawals from petty cash — which were used by Watkins as a smokescreen to cover up his own theft of funds from Near North.

While the tape recordings were an affront to attorney-client privilege, at the same time, the contents of those recordings clearly demonstrate that Segal was not guilty of a Klein tax conspiracy at any time ~ and most specifically at any time during November of 2001. The Government's eventual disclosure of the attorney-client-privilege breach, buried within 700+ hours of recordings which were never used at trial, could do nothing to dissipate the taint of the Government's intimate knowledge of Segal's defense strategy. Hiding the needle within the haystack, then disclosing the haystack without mention of the needle's existence hardly constitutes disclosure."

**Had there been an isolated incident of the violation of attorney-client privilege in a case of the magnitude of the prosecution of Segal and Near North it might be found to be an oversight. However, when the violation of attorney-client privilege is accomplished through multiple means: 1) illegal penetration , of the corporate computer system through computer "hacking;" 2) disregard-for, established procedures to sequester attorney-client-privilege materials obtained through a search warrant; and 3) multiple covert audio recordings made by' government "private agents" of meetings with defense counsel — it is apparent that the violation of attorney-client privilege is willful and pervasive.**

Whether any single instance of the violation of privilege requires review is not the issue – the office of the DOJ should find it difficult not to be concerned for its reputation not its impact. In combination with the other Fifth and Sixth Amendment violations, have denied Segal his right to a fair trial pursuant to the Fifth Amendment. More concerning is the ongoing is ongoing pattern in the forfeiture and restitution matters, separate from the conviction itself.

## **ANOTHER MATERIAL EXAMPLE OF HACKED EMAIL EXPOSING EXCULPATORY FACTS AND UNLAWFUL CONDUCT AS TO THE CORE OF SEGAL'S PROSECUTION BY TAKEOVER GROUP AND OTHER GOVERNMENT PARTIES**

Although the "privileged" status of spousal communications is subtly different from attorney-client privilege, the privilege is recognized in the federal courts nonetheless. This should be especially true when the contents of the communication directly address the core strategic elements of what will become a criminal prosecution.

On September 3, 2001, months before the arrest of Mike Segal, he sent an e-mail message to his wife, Joy Segal. This email was proven to be one of the hundreds of stolen emails discovered on AON's computer servers which were part of the eight month hacking of all of Segal's emails as confirmed by independent forensic experts. Although there was no pending criminal action (at least as far as Segal knew), the contents of the message clearly contain strategic, confidential, and privileged information that was directly relevant to ongoing civil litigation at Near North.

**The four page single spaced e-mail message from Segal to his wife lays out strategic legal positions that Near North will take with respect to ongoing and potential future litigation and the takeover group conduct and its attempted control and economic destruction.** The e-mail additionally contemporaneously memorializes multiple legal and factual defenses that Segal will ultimately rely on in defending himself and Near North against the future federal criminal charges.

This e-mail message literally provided the Takeover Group and the Government with a "blueprint" of Segal's defense strategy. The hacked e-mail message from Segal to his wife provided the Takeover Group (who were acting as "private agents" of the government) and the government with the blueprint showing the weaknesses of their case. As a result of receiving this e-mail, the government knew: 1) which witnesses the government needed to leverage to get the witnesses to conform their testimony to the government's theory of the case; 2) which weaknesses of their exhibits needed to be deflected to effectively blunt defense attempts at impeachment; and 3) what holes in their case (including the very fact of the extensive hacking itself) needed to be covered up and kept from the jury.

Rather than provide the government with a blueprint for blunting Segal's defense, the government's receipt of this illegally hacked document should have raised red flags and set off alarm bells in the U.S. Attorney's Office. Segal's e-mail was sent prior to the initiation of any federal investigation of Segal and Near North. It therefore could not possibly be construed as Segal's response to an "investigation." Segal's contemporaneous memorialization of serious management issues with Walsh, Berry, Gallagher, Ludwig, and Mackey should have put the government on notice to treat their receipt of a "pre-packaged" prosecution case against Segal by those individuals as highly suspect ~ requiring extraordinary accounting due diligence before moving forward.

However, rather than pay attention to the obvious interest and bias of the Takeover Group in bringing down Segal and Near North to advance their own personal and financial interests (through benefits to be received from their new employer, AON), the Government simply adopted the Takeover Group's theory of prosecution, embellished the facts, covered up misconduct (such as the hacking), and deflected consideration of the interest and bias of their cooperating witnesses.

### **ADDITIONAL MATERIAL PROOF OF USE AND COVER UP OF ILLEGAL SEARCH AND SEIZURES**

The January 26, 2002, search of Near North's offices and Segal's residence, although based on warrants, were the "fruit of the poisonous tree" as set forth in Wong Sun. The applications for the warrants were tainted by the fruits of previous warrantless searches conducted in violation of the Fourth Amendment. Unfortunately, because the evidence of the predicate 4th Amendment violations trickled into the defense, the Court never considered the issue as a coherent whole in addition, to the separate but related violations by the DOJ.

The unlawful acquired evidence was divided into:

- 1) an initial batch of evidentiary materials with respect to hacking by confessed hacker Cheley, et. al. that formed the basis for a Motion to Suppress;
- 2) a supplemental batch of evidentiary materials related to the hacking activity that formed the basis for a revised Government Response and the defense's Reply brief with respect to the Motion to Suppress;
- 3) tape recordings of confessed embezzler and private agent Watkins and FBI Agent Murphy memorializing the transfer from Watkins to the FBI massive quantities of documents taken from Near North, which formed the basis of a Supplemental Memorandum to the Motion to Suppress; and
- 4) an FBI 302 statement of investigation of 11/24/2001 (transcribed 12/14/2001) memorializing the transfer from Watkins to FBI Agent Murphy of laptop computer and zip disk containing documents from Near North, which appears to have not been litigated.

The piecemeal consideration of these items deprived Segal of proper consideration of the cumulative effect of all of these illegally obtained materials as the foundation for the January 26, 2002 search warrant.

The facts surrounding the hacked documents and physical documents provided by Watkins to Murphy are thoroughly memorialized in the Motion to Suppress, the Reply, and the Supplement. The facts memorialized in the FBI 302 are not, however, well memorialized.

FBI Agent Murphy's 302 report states that the laptop in question was Government agent Watkins' "personally owned laptop computer." This is believed to be false ~ the laptop actually belonged to Near North. However, in this circumstance, the legal title to the computer hardware is really an irrelevancy. What is relevant is the ownership of the information on the laptop hard disk and the associated zip disk.

**Forensic analysis of Watkins' desktop computer at Near North demonstrates that for a period of time prior to providing the electronic records to the FBI, Watkins was systematically obtaining documents going back several years and scanning them into his computer. These documents were not documents that "came across Watkins' desk" in the ordinary course of his job performance. There was nothing "contemporaneous" about the scanning.**

The FBI 302 statement memorializing the turnover of the computer is irregular. Although the computer and zip disk were ostensibly turned over on November 24, 2001, the FBI 302 memorializing the event was not dictated until December 12, 2001 -- weeks later. The 302 statement is uncharacteristically (for the FBI) imprecise with respect to the laptop ~ the normal procedure for an FBI agent would include memorializing the make, model, and serial number of the laptop computer in question.

**In the end, the search of Near North's offices was nothing more than a cover story for the documents that the FBI had already obtained illegally obtained through computer hacking and employee theft.**

#### **FURTHER EVIDENCE OF GOVERNMENT'S USE, KNOWLEDGE AND SUPPORT OF ATTORNEY-CLIENT PRIVILEGE VIOLATIONS**

The Government admitted pretrial that they were aware that a "hacker" sent stolen e-mail documents to three government witnesses even before Segal's arrest.

The evidence of the hacking was largely found through civil discovery in Segal's and Near North's lawsuit against AON and the Takeover Group ~ located on AON's computer servers. Pretrial, Segal and the Government disputed the extent of the Government's involvement and direction of the hacking activity. What has never previously been considered is the Government's use of attorney-client privilege materials obtained through the computer hacking and covert surveillance.

**Documents found on AON's servers, and ultimately provided to the FBI and the U.S. Attorney's Office included: 1) attorney-client-privilege work product pertaining to previous civil litigation between Near North and AON; 2) attorney- client privilege work product relevant to the then-current civil suit between Near North and AON; and 3) attorney-client work product relating to Segal's criminal case.**

**It should be noted that the Takeover group's civil attorney, fees paid by AON, and one of AON's civil lawyers admitted to representing Takeover group, months before Segal's arrest**

**and testified at a civil hearing that his clients did not use the receipt of the stolen emails for any trade secret purposes and implied that the content was used for the Government.**

**The Government's perversion of attorney-client privilege did not stop with computer hacking. The Government: 1) systematically set aside established procedures to identify and quarantine documents seized during the execution of search warrants; and 2) used Government witnesses as agents to record conversations with Segal's counsel on behalf of the FBI. 3) The government interfered and intimidated corporate and outside counsel while withholding reporting of attempted contacts.**

When Segal first got wind of the fact that Near North's computer systems had been illegally penetrated by hacking, Segal began an investigation using private resources. The private investigation, contrary to later allegations by the Government, did not delay the reporting of the hacking activity to law enforcement. One of the independent experts, David Grossman, an ex-FBI supervisor of impeccable integrity, immediately went to the FBI cybercrimes unit and reported the hacking. Grossman was informed by members of the FBI cybercrimes unit, who he knew personally from his prior employment by the FBI, that they had been directed to "open a file" on the matter, but to not actually conduct an investigation.

Tracking and documenting the illegal activities of the Takeover Group was a key component of Segal's trial strategy. As a direct consequence of the compromised attorney-client privilege communications which found their way into the hands of the prosecutors through illegal computer hacking, the Government was able to remediate and cover up the illegal conduct of its witnesses. The Government was privy to the details of Segal's exculpatory evidence, allowing the Government to blunt the impact of the evidence.

**Through the review of attorney-client privilege communications obtained by illegal computer penetration, the Government was forewarned to Segal's legal strategy of filing suit against the Takeover Group — which had the potential to disclose a mountain of exculpatory and impeachment evidence to Segal through civil discovery and seriously impugn the integrity of the Government's Takeover Group witnesses. Segal's defense strategy became an open book to Government prosecutors.**

### **The existence of the Cybercrimes "raised the stakes" in Segal's Prosecution**

Once aware the Segal had discovered that his computer systems had been compromised, the Prosecutors were potentially exposed to massive repercussions in the court of public opinion. The Government was forced, because of their knowledge of the illegal activities, to interfere with Segal's private investigation of the crimes against Segal and Near North. The Government dispensed with the "public" investigation and prosecution of the hacking based on the outrageous legal theory that attorney-client-privilege does not apply to documents sent across the Internet — even when encrypted.

Private investigator and ex-FBI Supervisor Grossman furnished an affidavit, which is part of the

record in this case, memorializing his immediate report of the hacking activity to the FBI cybercrimes unit. Grossman additionally personally visited with the FBI Chicago Station Manager and related the cybercrimes to him ~ stressing the inaction by the FBI cybercrimes unit. The FBI station manager agreed to personally follow up.

Shortly thereafter, the Government filed a motion to amend its answer in this Court with respect to the cybercrimes because they had "just recently discovered" a file of FBI 1A notes that had been mysteriously unavailable for the preceding 18 months. In the 1A notes of 1-14-2002, the identity of the computer hacker is disclosed with a misspelled name and a vague address -- giving the false impression that the Takeover Group didn't know the hacker.

**Subsequently, when AUSA Hogan met with Near North's criminal attorneys, Hogan's statement was that his witnesses "had no connection with the hacking for the government did their own investigation and their witnesses had no connection with the hacking."** (The support of Hogan's statement is contained in a court record affidavit by an ex AUSA defense attorney.) In the room at the time was FBI Agent Murphy, whom the record eventually shows received a copy of a stolen e-mail, the contents of which refers to the prior receipt of other stolen e-mails — all sent to FBI Agent Murphy's personal e-mail account. Even though, the stolen email sent to FBI Agent Murphy indicated previous email contact, Murphy denied remembering that he received it. This puts Murphy on notice as an FBI Agent failing to pursue a proven cybercrime, at minimum. (See possible attachment)

### **KLEIN TAX CONSPIRACY AS CONFLUENCE OF VIOLATION ISSUES AND EXAMPLE OF FALSE AND UNCORRECTED PROSECUTION**

The Klein Tax Conspiracy highlights a unique confluence of issues. There is a synergy created by this confluence that creates a far greater total impact on the prosecution of Segal than any one of the issues by itself.

The three issues are:

- 1) The hacking of the 10/23/2001 e-mail from Segal to Wish provided the government with knowledge of Segal's efforts to uncover the nature of the petty cash anomalies vis. a vis. Watkins. (Aside from demonstrating Segal's repudiation of the anomalies.) As memorialized in the tapes, Wish refuses to share the 10/23 e-mail message with McNichols. However, McNichols and the government had immediate access to the e-mail message through David Cheley's hacking activities.
- 2) The taping of attorney Silets provided the government with two major benefits: A) Knowledge that Watkins had made exculpatory statements with respect to Segal not being responsible for certain petty cash anomalies; and B) Strategic information concerning counsel's efforts to memorialize Watkins' statements in a sworn affidavit allowed

government agents to interfere with counsel's efforts to memorialize Watkins' statements and extended to the FBI instructing Watkins to modify certain portions of his statement to inculcate Segal.

- 3) Exhibit #5, the Watkins "postage" memo; is not genuine. On tape, Watkins is clear that he never put anything in writing to "protect" himself. Rogas' IRS Memorandum memorializes that Watkins has no recollection of having created Exhibit #5. At trial, Mayo (the only witness to examine the "squiggle" as to its maker) testified that the squiggle was not Segal's. Three other trial witnesses, who testified that Segal's initials looked like a "squiggle" were not asked to specifically testify about the "squiggle" on Exhibit #5. Although Exhibit #5 was submitted to both IRS and FBI forensic laboratory analysis, there is no record whatsoever of any laboratory report resulting from such examination. Although AUSA Hogan told defense counsel Reidy pretrial that "indentation analysis" of Exhibit #5 was inculpatory to Segal, no such analysis was presented at trial, and no report of such analysis was ever turned over in the discovery materials.

#### **AUSA HOGAN ACTS TO PROTECT WITNESSES AND THEIR OWN MISCONDUCT -- INTERFERING WITH AND DISMISSING CIVIL LITIGATION**

On Page 20 of the June 2010 DOJ complaint, the "protection" of the computer hackers through non prosecution is explored. The "protection" of the hackers went beyond non prosecution, however. The Government's conduct with respect to the civil suits against the computer hackers did not just result in the protection of the perpetrators of the hacking from criminal prosecution. **The Government's conduct directly impacted the ongoing forfeiture proceedings through the dissipation of assets that could have been used to satisfy Segal's personal forfeiture.**

The private Government agents (a.k.a. the "hackers" or the "Takeover Group") had significant civil liability exposure. The corporate backer of the Takeover Group, AON, had serious civil liability exposure. The hacker's employer, Kemper, had serious liability exposure. There was enough evidence (i.e. hacked e-mails sent to FBI Agent Murphy's e-mail account) to directly implicate Government agents in both criminal conduct and tortious civil action.

The Government did not stop with the indictments in terms of interference with the civil proceedings. It is strongly believed (although not conclusively proven) that the FBI approached the Judge to stop the civil proceeding. What is of record is that attorney Branfonbrener, representing the Takeover Group (and paid by AON), managed to convince the Court to discontinue all discovery until after Segal's trial.

When depositions in the case resumed, after the first member of the Takeover Group (Berry) was deposed, the Government Trustee overseeing the forfeiture of Near North contacted Near

North's civil attorney and instructed him to drop the suit. The Trustee told Prendergast: 1) the suit was a good suit; 2) the litigation was meritorious and likely to result in a financial recovery; but 3) the decision to discontinue the suit was out of his hands.

Segal's civil attorney told the Trustee that discontinuing the suit didn't make any sense and that the bulk of the work on the suit was already completed and that maintaining the suit was not costing Near North any money because he was willing to continue prosecuting the suit purely on a contingency basis. The Trustee, however, was insistent, emphasizing that the decision was not his. When Segal's civil attorney questioned the Trustee about the source of the decision, the Trustee stated that he had been directed to discontinue the suit by the AUSA's office. Segal's civil attorney therefore contacted the AUSA handling the forfeiture with Hogan. The AUSA assisting Hogan told Segal's civil attorney that she had little knowledge of the instruction to discontinue the suit and implied that he should talk to Hogan.

Significantly, the civil recovery from this suit would have been enormous-likely satisfying Segal's civil forfeiture in its entirety. But that would have denied the Government the media blitz associated with seizing Segal's house and other assets to satisfy the forfeiture.

#### **PROSECUTORS UNLAWFULLY BLOCK ESCROW PRE-SALE OF NNIB BLOCKING MULTI-MILLION DOLLAR FUNDS TO US TREASURY**

At forfeiture, one of the unsupported and proven false arguments advanced by AUSA Hogan in support of Segal's \$30 Million personal forfeiture was that Segal had raided the corporate assets of NNIB pretrial and that the \$30 Million represented money that should be clawed back from Segal through personal forfeiture. Had prosecutors not torpedoed two proposed pretrial escrowed sales of NNIB, AUSA Hogan's claw back argument would have been foreclosed. The true value of NNIB would have been established through an arms-length sale to a disinterested third party.

Pretrial, prosecutors torpedoed two proposed escrowed sales of Near North. Although the "untainted" value of NNIB Near North would have been approximately \$260 million (see Winston & Strawn Memorandum, attached at), the value of the company had decreased by over \$100 million following Segal's indictment. At a meeting between the AUSA's and attorneys constructing the proposed sale of assets, the AUSA's made clear the Government's lack of interest in the economic value of the corporation. AUSA Polales stated that the Government would "go to war" (id. at p.3) if the company did not obtain permission for the proposed sale of assets. Prosecutors further stated that the "deterrent value [of proceeding against the Company] is hard to value" and that Mr. Segal needs to understand that, like Arthur Andersen, Segal can be made an example of if he chooses not to cooperate. Id. at p. 4. AUSA Polales reiterated that the Government was prepared to take a "scorched earth" approach to dealing with the Company. Id. at p. 5. AUSA Polales informed counsel that Fitzgerald is an aggressive minded prosecutor and that he "wouldn't bat an eye to do another Arthur Andersen." Id. at p.6. Although there were no ongoing plea negotiations, AUSA Hogan added that the chance for a sale of the Company was much higher if it was part of a package, i.e., with Mr. Segal's plea and



full cooperation.

**Hogan claimed that Segal did not cooperate, but at the same time, Segal who ignored against the advice of counsel, did participate in three two and a half hour proffer sessions answering a wide variety of questions** by four different Government parties on subjects having nothing to do with Segal's prosecution. Government attorneys informed Segal's counsel that they believed that Segal had been completely truthful in answers he provided to their questions.

In blocking the escrowed sale of Near North, the Government passed up \$90 million (according to contract documents provided to the Government by Winston & Strawn) in escrowed cash that would have been to the U.S. Treasury through forfeiture in exchange for the publicity value of publicly destroying the corporation.