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

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

No. 02 CR 0112
Judge Ruben Castillo

DEFENDANTS' MOTIONS FOR JUDGMENT OF ACQUITTAL, A NEW TRIAL, AND ARREST OF JUDGMENT

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Defendants Michael Segal ("Mr. Segal") and Near North Insurance Brokerage, Inc. ("Near North" or "NNIB"), pursuant to Federal Rules of Criminal Procedure 29, 33, and 34, move this Court to enter a judgment of acquittal, to order a new trial, to arrest any judgment against Mr. Segal and Near North, and to order any other relief that justice requires.[1]

I. LEGAL STANDARDS

A. Judgment of Acquittal under Rule 29

"[T]he court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). A defendant may renew a motion for judgment of acquittal within 7 days after the court discharges the jury "or within any other time the court sets during the 7-day period." Fed. R. Crim. P. 29(c). "If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed." Fed. R. Crim. P. 29(d)(1).

B. New Trial under Rule 33

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a); *United States v. Gonzalez*, 93 F.3d 311, 315 (7th Cir. 1996). "If the complete record, testimonial and physical, leaves a strong doubt as to the defendant's guilt, even though not so strong a doubt as to require a judgment of acquittal, the district judge may be obliged to grant a new trial." *United States v. Morales*, 910 F.2d 467, 468 (7th Cir. 1990). Moreover, the district court judge "has the power to set a verdict

[1] Before, during, and after trial, defendants filed motions, made objections, and raised numerous legal issues. While defendants do not intend to rehash those arguments in detail, defendants do not abandon or waive those arguments for purposes of these post-trial motions and expressly preserve and reassert all such arguments here. Thus, defendants adopt and incorporate by reference all arguments and objections that they have made throughout this case, including those made orally in open court or in a written filing. In addition, to the extent they have not already done so, each defendant adopts and incorporates by reference any argument or objection made by the other defendant.

aside, even if he does not think that he made an erroneous ruling at the trial." *United States v. Morales,* 902 F.2d 604, 606 (7th Cir. 1990), *modified by* 910 F.2d 467 (7th Cir. 1990).

C. Arrest of Judgment under Rule 34

The Court must arrest judgment if the indictment or information does not charge an offense. Fed. R. Crim. P. 34(a). A district court's arrest of judgment must be based solely on issues connected to the legal sufficiency of the indictment. *See, e.g., United States v. Esposito,* 492 F.2d 6, 9-10 (7th Cir. 1973).

II. ARGUMENT

A. Defendants Are Entitled To a Judgment of Acquittal on All Counts.

Defendants are entitled to a judgment of acquittal for the following reasons:[2]

1. There was Prejudicial Variance Between the Single Scheme Alleged in the Indictment and the Multiple Schemes Presented at Trial.

Defendants are entitled to a judgment of acquittal on Counts One through Fifteen because of the prejudicial variance between the single overarching scheme alleged in the indictment and the multiple schemes presented at trial. *See United States v. Horton*, 847 F.2d 313, 317 (6th Cir. 1988) ("If an indictment alleges one [scheme], but the evidence can reasonably be construed only as supporting a finding of multiple [schemes], the resulting variance . . . is reversible error if the appellant can show that he was prejudiced thereby."). The single scheme charged in Count One was incorporated in the remaining mail and wire fraud counts, Counts Two through Fourteen, and in the RICO count, Count Fifteen.

Paragraph (2) of Count One alleged that defendants obtained three things through a single scheme to defraud – money from the PFTA, money and credits due customers, and fraudulently

[2] Defendants adopt and incorporate by reference defendants' Motion for Judgment of Acquittal, and Supplemental Memorandum of Law in Support of Defendant Near North Insurance Brokerage, Inc.'s Motion for Judgment of Acquittal, filed on June 9, 2004. (Dkt. Entry No. 321, 322.)

obtained premium payments. Paragraph (2) alleged that the defendants had obtained all of these things through the same false representations and material omissions – for example, "that premiums paid by customers to NNIB for insurance would be held in trust, properly accounted for and timely transmitted to the appropriate Carriers."

The government's proof at trial, however, showed no connection among the three schemes. For example, the customers whose credits were allegedly "written off" were not shown to have known about Illinois PFTA requirements, let alone to have relied on false representations concerning them. (As noted in the next section of this memorandum, these customers were not in fact shown to have relied on false representations about anything.) Nor did the proof establish any other connection among the three alleged schemes. The claimed victims were distinct; the asserted injuries occurred at different times; and nothing in the government's evidence suggested that defendants had plotted the injuries at one time or as part of a single "scheme."

The remaining paragraphs of Count One compounded the difficulty. These paragraphs began "It was a part of the scheme" or "It was further part of the scheme." These paragraphs then alleged acts that could not have been the basis of independent mail fraud charges but that were highly prejudicial to the defendants – for example, that defendants had given discounts on insurance to some politicians and had improperly reimbursed NNIB employees for campaign contributions. The government's proof at trial showed no connection between any of these acts and any of the three schemes alleged in Paragraph (2).

At most, the government's proof indicated that the defendants' improper expenditures on things like insurance discounts and employee campaign contributions might have been "made possible" by withdrawals from the PFTA. Showing that, after a swindler committed a fraud, he spent money on groceries, dinners at fine restaurants, and campaign contributions, however,

would not make the swindler's post-crime expenditures "part of" his scheme to defraud. The danger of permitting prejudicial "bad character," "propensity," and "other crimes" evidence by treating every post-crime expenditure by every criminal as "part of" his crime is obvious.

The dangers of defendants' wide-ranging trial were further compounded by the fact that the government was allowed to introduce proof of still other acts that had not been mentioned in the indictment and that also had no connection to any of the alleged schemes – for example, that an NNIB employee had taken a continuing education course in place of Mr. Segal and that Mr. Segal had instructed his secretary to interrupt business meetings if various politicians called him. *See* Part II (C) *infra*.

The variance between the single scheme alleged in the indictment and the multiple schemes shown by the government's proof was highly prejudicial to both defendants. Most importantly, if the government had alleged the three schemes in separate counts prior to trial, the defendants could have sought a severance of these counts. The evidence supporting each of the counts would have been inadmissible (and highly prejudicial) in a separate trial of either of the other counts. The defendants plainly would have been entitled to the requested severance. *See, e.g.*, *United States v. Quinn*, 365 F.2d 256 (7th Cir. 1966); *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964). Only the indictment's unfulfilled promise to prove that the multiple schemes constituted a single crime prevented a severance in this case.

Defendants also were prejudiced because (a) "the evidence was . . . presented by the prosecution in a manner that lent itself to jury confusion," (b) "the volume and manner of presentation of the evidence created the likelihood of spillover: i.e., that the jury might have been unable to separate offenders and offenses," and (c) the government's presentation would have led to jury confusion on the adequacy of the alleged mailings and wire transfers, most of

which related only to particular schemes. *See United States v. Camiel*, 689 F.2d 31, 37-38 (3d Cir. 1982).

Treating three unrelated schemes as one, permitting proof of bad acts unrelated to any of the schemes as "parts of" the scheme, and permitting proof of still other unrelated acts had the effect of allowing the government to introduce evidence of virtually every unattractive thing it believed the defendants to have done over a twelve-year period. The result was to try Mr. Segal for the "crime" of having a profligate lifestyle and to try both defendants for the "crime" of currying favor with Chicago politicians. This Court should not allow the government to evade basic restrictions on the use of "propensity evidence" by alleging that all of a defendant's bad acts were part of a single scheme and then failing to deliver on its promise. The government has used the single-scheme indictment in this case as bait-and-switch advertising.

2. The Court Erred By Submitting to the Jury the Charge that Defendants Wrote Off Credits.

The variance noted in the preceding section was especially prejudicial because one of the three "schemes" alleged in Paragraph (2) of Count One was not a scheme to commit mail fraud or any other federal crime. This scheme could not properly have been submitted to the jury even if it had been alleged in a separate count and tried separately.

The crimes of mail and wire fraud require a scheme to deprive a victim of either of two things — property or the intangible right to honest services. Moreover, it is not enough to seek to deprive the victim of either of these things by stealth, trespass, threat, or conversion. Instead, the accused must seek to deprive the victim of property or an intangible right by fraud or deception, and the deception must be material. *See, e.g., United States v. Sawyer*, 85 F.3d 713, 732 (1st Cir. 1996) ("To establish mail fraud – in cases involving honest services fraud and

otherwise — the alleged scheme must involve deception in the deprivation of money, property, or the right to honest services.").

In this case, the Court erred by submitting to the jury the charge that the defendants "wrote off credits." Such conduct, if it occurred, constituted conversion rather than fraud. No customer who is alleged to have lost credits testified that he or she was deceived about anything. None of them even took the witness stand. The facts of this case are thus indistinguishable from those of *Richards v. Combined Ins. Co. of America*, 55 F.3d 247 (7th Cir. 1995). *Richards* was another case in which a defendant was accused of mail fraud for "writing off credits." The Seventh Circuit held that this conduct could not be punished on a RICO or mail fraud theory because the conduct constituted conversion rather than fraud. *Richards*, 55 F.3d at 252-53.

The prejudice resulting from the improper submission of this charge as part of a single scheme or artifice to defraud fatally tainted the jury's verdict on the mail fraud, wire fraud, and RICO counts.

The Court further erred in submitting to the jury the charge that Mr. Segal and Near North violated the Illinois anti-rebate statute. The government offered no proof that any customer of Near North was induced to purchase insurance as a consequence of receiving a discount. There was therefore no basis in fact for the government's assertion that Mr. Segal or Near North violated 215 ILCS 5/151(1). This issue should have been submitted to the jury.

3. There Is No Proof That the Blank License Renewal Forms Were Sent "For the Purpose of Executing" a Scheme To Defraud.

Defendants are entitled to a judgment of acquittal on Counts One, Two, Three, Six, Nine, Ten and Twelve because the government presented no evidence that the subject of those counts, blank license renewal application forms mailed routinely and automatically by the Illinois Department of Insurance ("DOI") to approximately 50,000 license holders, were sent "for the

purpose of executing" a scheme to defraud as required by 18 U.S.C. § 1341. Such routine government mailings cannot, as a matter of law, be deemed to have been mailed in furtherance of an alleged fraudulent scheme. *See Parr v. United States*, 363 U.S. 370 (1960) (finding that routine and legally-mandated mailings of tax assessment notices by school district were not in furtherance of fraudulent scheme); *see also United States v. Cross*, 128 F.3d 145, 149-52 (3d Cir. 1997) (reversing mail fraud conviction in case involving court notices of case dispositions because mailings were required by statute and were sent to parties in every case), *cert. denied*, 523 U.S. 1076 (1998); *United States v. Porcelli*, 865 F.2d 1352, 1359 (2d Cir. 1989) (the mailing of blank sales tax forms to a taxpayer who later uses them to file fraudulent returns cannot support the taxpayer's mail fraud convictions). The government offered no proof that might arguably support a contrary conclusion. There was no evidence that any employee or official of Near North took any action to trigger the routine mailings by the DOI, no suggestion that there were any falsehoods or misrepresentations in the blank forms sent by the state agency and no proof that any state official played any part in any alleged fraudulent scheme. Under the reasoning in *Parr* and its progeny, the blank forms cannot support a conviction under 18 U.S.C. § 1341.

These counts fail for a second reason. The inquiries on the form were an attempt to ensure that applicants were qualified to hold licenses. In other words, they were an attempt to detect and/or deter fraud or other wrongful conduct. The government does not suggest otherwise. Since mailings designed to defeat fraud cannot be construed as having been sent "for the purpose of executing" a fraudulent scheme, the blank forms cannot form the basis for a mail fraud conviction. *See, e.g., United States v. Merklinger*, 16 F.3d 670, 679 (6th Cir. 1994) (request for information sent by government official cannot serve as basis for mail fraud

conviction); *United States v. Castile*, 795 F.2d 1273, 1278-81 (6th Cir. 1986) (inquiry from insurance company cannot form basis for mail fraud charge); *United States v. LaFerriere*, 546 F.2d 182, 186 (5th Cir. 1977) (reversing conviction because letter was intended to deter fraud); *United States v. Staszcuk*, 502 F.2d 875, 880-81 (7th Cir. 1974), *cert. denied,* 423 U.S. 837 (1974) (public notices which conflicted with fraudulent scheme not proper basis for mail fraud charges).

Both of these reasons compel reversal of the mail fraud convictions on Counts One, Two, Three, Six, Nine, Ten and Twelve.

4. The Government Failed To Prove That Defendants Made a False Statement "In Connection With Any Financial Reports or Documents" as Required by 18 U.S.C. § 1033(a).

The government's proof at trial suffered from the same flaw that taints Counts Sixteen through Twenty-Two in the indictment: there is no allegation or proof that Mr. Segal or Near North made a false statement "in connection with any financial reports or documents presented to any insurance regulatory official" as required for a conviction under 18 U.S.C. § 1033(a). The complete failure of proof of this essential element of the offense requires reversal. *See, e.g., United States v. Locklear*, 97 F.3d 196, 199 (7th Cir. 1996).

Here, there is no dispute that a conviction under § 1033(a) requires a showing that the alleged false statement was made "in connection with any financial[3] reports or documents presented to any insurance regulatory official or agency or an agent or examiner appointed by such official or agency to examine the affairs of such person . . . ." 18 U.S.C. § 1033(a)(1)(A).[4]

[3] The word "financial" is distributive and modifies both "reports" and "documents." *See, e.g., Insurance Co. v. Dunn*, 86 U.S. 214, 224 (1873) (holding that adjective "final" in phrase "final hearing or trial" is distributive and modifies both "hearing" and "trial").

[4] The ***government*** proposed and the Court gave the following instruction with respect to this element of the offense: "[T]he government must prove the following propositions . . . [t]hird, that the false statement was made in connection with any financial reports or documents presented to the Illinois Department of Insurance. . . ." (Dkt. Entry No. 331 at p. 70.)

There was no such proof. The government offered no evidence that Mr. Segal or Near North submitted any records to the Illinois Insurance Department (or any other regulatory body) which might arguably qualify as "financial reports or documents" within the meaning of the statute.

The government's flip-flopping on this issue speaks volumes as to the weakness of its case. When confronted with this argument in defendants' motion to dismiss the indictment, the government argued that the § 1033(a) counts should be understood as referring to "the financial records [Segal] was required to maintain by law." (Gov't Resp. (Dkt. Entry No. 183) at 5.) Even if the indictment could somehow be construed as putting the defense on notice that this is what the grand jury charged (it cannot), there was absolutely no proof at trial that any such records (none were admitted into evidence) were ever "presented to any insurance regulatory official or agency" as required by the plain language in § 1033(a). To the contrary, the prosecutors took great pains to elicit from Nathaniel Shapo, the former Director of the DOI, that his agency decided not to "go in and do an exam immediately," (Tr. at 3094-95), and therefore did not acquire any financial information from Near North. (Tr. at 3104.)

Faced with this reality, the government reversed its position and argued in opposition to defendants' motion for judgment of acquittal that "the license itself is, on its face in the context of the facts proved, clearly a financial report or document . . . ." (Tr. at 5117.) Neither the evidence nor a plain reading of the form supports this assertion. The application form[5] does not contain any numerical data, financial representations, or calculations of any kind. Applicants are not asked to provide trust calculations or net worth or asset valuations. None of the "yes/no" questions on the form relates to financial matters. The government offered no testimony from

[5] The forms referenced in Counts Sixteen through Twenty-Two of the Fourth Superseding Indictment were introduced as Gov't Ex. Nos. 288-B, 290, 292, 277, 281, 282 and 283. For the Court's convenience, they are attached hereto as Group Exhibit A.

Mr. Shapo or from any other employee of the DOI which might arguably support a finding that the agency evaluated applicants' responses from a financial or economic perspective.[6] Nor was there any proof that any employee or representative of any financial division of the DOI reviewed or considered the applications prior to issuance of any license. Simply stated, there was no rational basis for a jury to conclude that the application form was a "financial" report or document for purposes of the statute.

Moreover, the legislative history surrounding the enactment of 18 U.S.C. § 1033 confirms that the statute was not intended to apply to license applications. A co-sponsor of the legislation, Rep. Earl Pomeroy, D-N.D., made clear in his remarks that insertion of the adjective "financial" would render license applications beyond the reach of the statute:

> A number of reports and documents are not explicitly "financial" in nature, but are nevertheless extremely important to effective insurance regulation. . . [T]here were abuses connected to such nonfinancial information as applications for licenses. . . With the addition of one word — "financial" — it is quite possible that fraudulent activities in these areas would not be covered as Federal offenses.

140 Cong. Rec. E8414 (Apr. 21, 1994) (extension of remarks by Earl Pomeroy). This comment by one of the co-sponsors of the bill confirms that § 1033(a) does not apply to non-"financial" documents such as the license applications that are at issue here.

In sum, the indictment failed to allege and the government failed to prove that Mr. Segal or Near North made a false statement "in connection with any financial reports or documents presented to any insurance regulatory official or agency" as required by 18 U.S.C. § 1033(a).[7]

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[6] In fact, insurance brokers like Near North have no financial reporting obligations under Illinois law; only insurance carriers have such responsibility. *See* 50 Ill. Admin. Code §§ 925.10-925.150.

[7] The failure of proof was exacerbated by the Court's refusal to specifically instruct the jury as to the meaning of "financial reports or documents," (Tr. at 59-60) or to permit the defense to argue to the jury that the government had not met its burden of proof on this issue. (Tr. at 5187.)

The failure of proof on this essential element of the offense requires an acquittal on Counts Sixteen through Twenty-Two.

5. The Government Failed To Prove that Mr. Segal and Near North Were Engaged in the "Business of Insurance" As Defined in 18 U.S.C. § 1033(f)(1).

Consistent with Congressional intent to protect against fraud affecting the solvency of the insurance companies that bore the risk of loss in the insurance transaction,[8] §§ 1033(a) and (b), by their own terms, apply only to persons who are engaged in the "business of insurance." Thus, to obtain a conviction under §§ 1033(a) and (b), the government must establish that Mr. Segal and Near North were "engaged in the business of insurance," a phrase statutorily defined as "the writing of insurance, or the reinsuring of risks, by an insurer,[9] including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons." 18 U.S.C. § 1033(f)(1).

Again, the government presented no evidence of this element. The government offered no evidence that either Mr. Segal or Near North ever wrote an insurance policy or were at any time involved in the business of writing insurance or the reinsurance of risks. There was no evidence that either of them was an officer, director, agent or employee of any insurance

[8] The legislative history demonstrates that the legislature's overriding concern was protecting against insurance company failures and ensuring that information used by state regulators to measure insurance company net worth is accurate. *See, e.g.*, 140 Cong. Rec. H. 1905 at H1914 (Mar. 23, 1994) (explaining that legislation makes it "a federal crime to defraud an insurance company"); H.R. Rep. No. 103-468, 103d Cong., 2d Sess. 2 (1994) (report by House Subcommittee on Oversight and Investigations which concludes that then existing remedies were ineffective against behaviors that drove insurance companies into insolvency); *see also* Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, Failed Promises: Insurance Company Insolvencies, 101st Cong., 2d Sess. 1 (1990) (summary report notes that committee was primarily concerned with "[a]n insurer's ability to pay — its solvency"). The government presented no evidence that Near North was ever licensed as an insurance carrier. As a broker, its solvency has no effect on an insurance carrier's ability to pay claims of insureds.

[9] "Insurer" is, in turn, defined as "any entity the business activity of which is the writing of insurance or the reinsuring of risks, and includes any person who acts as, or is, an officer, director, agent, or employee of that business." 18 U.S.C. § 1033(f)(2).

company or reinsurance company or that either was specifically authorized to act on behalf of any insurance carrier for any purpose. No representative of any insurance carrier was called to testify and no employee of Near North confirmed an agency or other relationship between Near North and any particular carrier. To the contrary, the government went out of its way to suggest to the jury that Near North had no authority to bind any carrier and implied that Near North thereby placed its customers at a serious risk of loss. (Tr. at 3171-75.)

Having chosen to pursue a conviction by arguing that Near North and Mr. Segal had no authority to bind insurance carriers, the government cannot also seek to hold the defendants responsible as agents for those same carriers. The government simply cannot have it both ways. Nor can the existence of an agency relationship be assumed as the government seems to suggest.[10] The lack of proof that Mr. Segal or Near North was in the "business of insurance" requires a reversal of Counts Sixteen through Twenty-Five.

6. The Government Failed To Prove Any Conspiracy in Count Twenty Eight.

The Third Superseding Indictment, returned more than two years after Mr. Segal's arrest, charged Mr. Segal with a conspiracy under 18 U.S.C. § 371. *See* Count Twenty-Eight. Mr. Segal should be acquitted of Count Twenty Eight because the government presented no evidence of an agreement between Mr. Segal and Mr. Watkins to defraud the United States. Despite Mr. Watkins' plea agreement that compels him to cooperate with the government and places him under the government's control, the government never called Watkins to testify at trial. Instead, to satisfy the agreement element, the government relied entirely on a single 1989 memo purportedly drafted by Mr. Watkins to Mr. Segal (although no evidence established its

[10] In response to the Court's inquiry concerning this argument which was raised in the defense motion for judgment of acquittal, the prosecutor vaguely responded: "Judge, clearly, Mr. Segal, as an individual person, as a human being, acts in connection with the writing of insurance and reinsuring and he acts as an agent and he takes action as a human being with respect to seeing to it that insurance is written." (Tr. at 5118)

authorship, its creation, or how it has been maintained) regarding the posting of certain weekly and monthly petty cash withdrawals to postage. (*See* Gov't Ex. 5.) This exhibit alone cannot satisfy the agreement element of Count Twenty Eight. Even if the jury determined that the scribble on this exhibit was written by Mr. Segal, the document cannot establish any agreement between Segal and Watkins to defraud the United States. Even if it could, the evidence is too tenuous for the jury to return a guilty verdict on Count Twenty-Eight. *See United States v. Meadows*, 91 F.3d 851 (7th Cir. 1996). Thus, the Court should enter a judgment of acquittal on Count Twenty-Eight.

7. The Mail Fraud, Wire Fraud, Honest Services, and RICO Statutes Are Unconstitutional.

The mail fraud statute, 18 U.S.C. § 1341, the wire fraud statute, § 1343, and the honest services statute, § 1346, are unconstitutionally vague on their face and as applied to defendants. *See, e.g. United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), *constitutional holding overruled in United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003), *cert. filed* 72 USLW 3634 (Mar 29, 2004) (No. 03-1375). The mail and wire fraud statutes violate due process by failing to provide fair warning of illegal conduct in that terms such as "fraud," "property," and "honest services" are not defined. *See, e.g., Kolender v. Lawson,* 461 U.S. 352, 357 (1983); *United States v. Martin,* 195 F.3d 961, 965 (7th Cir. 1999). Courts of appeals disagree on the definition of "honest services." Attempts to fashion "honest services" definitions have engendered circuit disputes on various points, including the requisite *mens rea* requirement; whether the defendant must cause actual tangible harm; the duty that must be breached; and the source of that duty. *See, e.g., Rybicki,* 354 F.3d at 163; *United States v. Hausmann*, 345 F. 3d 952, 956 (7th Cir.

2003).[11] The fact that the courts cannot agree on what § 1346 proscribes underscores the statute's constitutional vagueness. "How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?" *Id.* at 160; *see also Martin,* 195 F.3d at 965 ("[c]oncern has long been expressed that the failure of the mail fraud statute to define 'fraud' invites prosecutorial overreaching."); *Handakas*, 286 F.3d at 104 ("honest services" statute unconstitutional as applied, and panel would declare the statute void-for–vagueness if it were writing on a clean slate); *United States v. Brumley*, 116 F.3d 728, 746 (5th Cir. 1997) (Jolly and DeMoss, JJ., dissenting) (§ 1346 is "a truly extraordinary statute, in which the substantive force of the statute varie[s] in each judicial circuit").

In addition, the mail fraud statute is unconstitutional because it allows undue federal intrusion into local affairs. *See Cleveland v. United States*, 531 U.S. 12, 25-27 (2000) ("Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States.")

The RICO statute, charged in Count Fifteen, is also unconstitutionally vague, and fails to give fair notice of proscribed conduct or establish objective standards. *See, e.g., H.J. Inc v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 255-56 (1989) (Scalia, C.J., O'Connor, and Kennedy JJ., concurring) ("No constitutional challenge to [the RICO statute] has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when

[11] In *Hausmann*, the Seventh Circuit rejected a vagueness challenge to 18 U.S.C. § 1346 (deprivation of "the intangible right to honest services"), but only as applied to defendants whose cases arose after *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998). The critical conduct in this case occurred prior to *Bloom*.

that challenge is presented.") Due to the unconstitutionality of these statutes, defendants are entitled to a judgment of acquittal and arrest of judgment.

B. The Court Erred In Denying Defendants' Motions to Dismiss.

1. Mail Fraud Counts

The Court erred in denying defendants' motion to dismiss certain mail fraud counts (Counts One, Two, Three, Six, Nine, Ten and Twelve) based on the mailing of blank license renewal applications automatically sent by the DOI to all license holders. As stated above, blank license renewal applications are not legally sufficient to sustain a mail fraud count, as the forms were caused to be mailed under command of state law. *See Parr*, 363 U.S. at 390; *Porcelli*, 865 F.2d at 1359 (the mailing of blank sales tax forms to a taxpayer who later uses them to file fraudulent returns cannot support the taxpayer's mail fraud convictions). Additionally, the blank forms were an attempt to defeat rather than promote fraud and cannot, therefore, form the basis for a mail fraud conviction. *See United States v. Merklinger*, 16 F.3d 670, 679 (6th Cir. 1994) (mailings designed to detect and deter fraud cannot be construed as having been sent "for the purpose of executing" a fraudulent scheme).

2. 18 U.S.C. § 1033 Counts

The Court erred in denying defendants' motion to dismiss the indictment's false statement counts under 18 U.S.C. § 1033(a). (*See* Counts Sixteen through Twenty-Two.) The indictment does not allege that defendants made a false statement "in connection with any financial reports or documents" as required by 18 U.S.C. § 1033(a)(1). Moreover, the Court erred in denying the motion to dismiss all of the 18 U.S.C. § 1033 counts because licensed insurance brokers like Mr. Segal and NNIB were not "engaged in the business of insurance," an element required to sustain a conviction under § 1033(a) and (b). (*See* Counts Sixteen through Twenty-Five.)

3. RICO Count

The Court erred in denying Mr. Segal's motion to dismiss Count Fifteen, the RICO count. Count Fifteen should have been dismissed because it fails to adequately allege a pattern of racketeering activity or an associated-in-fact enterprise.

Additionally, the Court erred in refusing to dismiss the RICO count based on vindictive prosecution. Mr. Segal provided unrebutted sworn testimony that the government advised Near North's criminal counsel that if Near North pursued a civil claim linking a computer hacker who had repeatedly hacked into Near North's computer system with some of the government's cooperating witnesses, the government would take that into account in deciding whether to charge Near North in a superseding indictment or name Near North as a RICO enterprise. (*See* Affidavit of Joshua Buchman, attached as Ex. B.) This occurred during a meeting in which Near North voluntarily notified the government of Near North's intent to amend its claims against certain cooperating witnesses and others. The day after Near North decided to amend the suit and pursue its well-founded claims, the government served a subpoena on Near North seeking all documents relating to allegations made in the civil suit. A few weeks later, the government followed through on its earlier threat and charged the existence of a Near North National Insurance Enterprise. By punishing Mr. Segal and Near North for exercising their constitutional rights to seek redress of legal wrongs, the government acted vindictively. Thus, Count Fifteen should have been dismissed. *See, e.g., United States v. Goodwin*, 457 U.S. 368, 372 (1982).

C. Defendants Are Entitled to a New Trial.

1. The Court Erred in Admitting a Substantial Amount of Inadmissible Evidence.

(1) Hearsay

The Court erred in admitting a substantial amount of hearsay that did not fit within any exceptions to the hearsay rule, all in violation of the defendants' Sixth Amendment rights. For instance, the Court admitted hearsay from several Near North employees who never testified at trial and whom defendants never had an opportunity to cross-examine, including Bill Hines, Daniel Watkins, Michael Mackey, Dana Berry, Matt Walsh, Tim Gallagher, and Devra Gerber. In addition, the Court admitted hearsay from several outside consultants of Near North, including Deloitte & Touche, McGladrey & Pullen, and Hales & Co.

None of these out-of-court statements qualifies as an agent's statement under Fed. R. Evid. 801(d)(2)(D). The statements of Near North employees cannot be admissible against Mr. Segal under Rule 801(d)(2)(D) because none of them was employed by Mr. Segal personally. Furthermore, the government did not make the necessary showing that all of the statements made by the Near North employees were within the scope of their employment when they made the statements.

Similarly, a company's outside consultants are not considered agents of the company for purposes of Rule 801(d)(2)(D). *See Murrey v. United States*, 73 F.3d 1448, 1455-56 (7th Cir. 1996) (admissions by outside medical auditors who were not employed by a company were not admissible against the company under Rule 801(d)(2)(D)); *see also Swanson v. Leggett & Platt, Inc.*, 1996 U.S. Dist. LEXIS 15637, *50 (N.D. Ill. Oct. 22, 1996) (defendant company's outside auditors, Ernst & Young, were not agents of the company for purposes of Rule 801(d)(2)(D)). If a company's outside consultants are not agents of the company for the purposes of Rule

801(d)(2)(D), then they plainly cannot be considered the agents of an officer of the company. Thus, all of the hearsay from the outside consultants should have been excluded.

In addition, the government did not present sufficient evidence to render the hearsay admissible under Rule 801(d)(2)(E) as co-conspirator statements. Indeed, despite defendants' request in their motion for a bill of particulars and in response to the government's *Santiago* proffer, the government never even identified which, if any, of the approximately 22 witnesses identified in its *Santiago* proffer the government believed to be joint venturers or co-conspirators. Therefore, Rule 801(d)(2)(E) cannot apply.

Moreover, the admission of the hearsay statements violated defendants' Sixth Amendment rights. The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Supreme Court recently made clear that testimonial statements may not be admitted in a criminal case unless the accused has had an opportunity to cross-examine the maker of the statement. *Crawford v. Washington*, 124 S. Ct. 1354, 1374 (2004). Here, the government was permitted to offer accusations of wrongdoing by various out-of-court declarants, including Matt Walsh, Dana Berry, and Jeff Ludwig, for their truth and without affording the defense the opportunity to cross-examine the declarants and thereby expose their bias, prejudice and self-interest. Most strikingly, the government was allowed to offer into evidence a letter that the non-testifying declarants co-authored dated April 20, 2001. (*See* Gov't Ex. 216.) The letter, among other things, accused Mr. Segal of criminal conduct and arranging for a political "fix" and was described by the prosecutor as the "one thing that sums up the evidence in this case." (Tr. at 5322.) Other out-of-court statements by Messrs. Walsh, Berry, and Ludwig were also introduced for their truth. (*See, e.g.*, Tr. at 2889 (Dennis Poggenburg

testified, "Mr. Walsh expressed his concerns about the trust deficit . . . he cited the Illinois Department of Insurance Code that because he was an officer of the company and he was aware of this deficit, that he, I believe could be charged with a felony..."); Tr. at 2421 (Cindy Niehus testified that Mr. Berry told her that he had received approval to get reimbursed for a particular political contribution); Tr. at 2557-58 (Tom McNichols testified that Messrs. Walsh and Berry told him that "they had concerns about the practice [of writing off credits] and that if they ever had a chance, they were going to put a stop to it"); Tr. at 2578-79 (McNichols testified that Mr. Ludwig told him "that a group of the managing directors, most of them, met with Mr. Segal and confronted him on the issue and received assurance that he was going to change and that he was going to take steps to correct the problem"); and Tr. at 2621 (McNichols testified that Ludwig told him "he was fired for refusing to sign certifications for a particular state").)

The government's tax case against Mr. Segal was based almost exclusively on information provided to IRS agents by Dan Watkins, who also was never called to testify. The government's strategy of basing its case on the statements and declarations of out-of-court witnesses without calling those witnesses at trial eviscerates defendants' Sixth Amendment right. *See Crawford*, 124 S. Ct. at 1374; *see also United States v. Silva*, No. 03-3628, 2004 U.S. App. LEXIS 17188 (7th Cir. Aug. 18, 2004) (reversing conviction based on hearsay evidence). Because defendants were convicted on the basis of hearsay from declarants that defendants never had an opportunity to cross-examine, defendants are entitled to a new trial.

(2) Testimony of Nathaniel Shapo

The Court also erred in admitting prejudicial hearsay and other speculative testimony from Nat Shapo. Mr. Shapo was the Director of the Illinois Department of Insurance ("DOI") from 1999 until 2003. At trial, the government elicited from Mr. Shapo testimony about two out-of-court telephone conversations between Shapo and former Governor George Ryan that

purportedly occurred around the time that Near North self-reported its PFTA situation to the DOI in August 2001. In addition, the Court allowed Mr. Shapo to speculate as to why former Governor Ryan placed these calls to Shapo. Without any personal knowledge that Mr. Segal had contacted Governor Ryan, Mr. Shapo was allowed to testify that he viewed the call from former Governor Ryan as an attempt by Mr. Segal to apply improper political pressure on the DOI. (Tr. at 3011-12.)

The government offered these out-of-court telephone conversations between Shapo and former Governor Ryan to prove the truth of the matters asserted. None of the admitted statements fit within any exception to the hearsay rule. Furthermore, Mr. Shapo's testimony regarding former Governor Ryan's motivation for making phone calls to Mr. Shapo was speculative, lacked foundation, and should have been excluded under Fed. R. Evid. 602 because Shapo had no personal knowledge that Mr. Segal ever contacted former Governor Ryan.

This error was significant. The government went to great lengths to paint Near North's self-reporting to the DOI as a political fix. The government characterized Mr. Shapo as former Governor Ryan's "bag carrier" and "political flunkie," even though Mr. Shapo testified that his decision not to take any action against Near North in the short term was unaffected by former Governor Ryan's phone calls and premised entirely upon the advice of his senior staff (who knew nothing about any calls from the governor) and the absence of any consumer harm.[12]

(3) "Other Acts" Evidence

The Court erred in allowing the government to present certain "other acts" evidence under Rule 404(b) for which the government did not provide adequate notice to the defense.

[12] In addition, the Court erred in denying defendants' pre-trial Motion to Strike Allegations Regarding Improper Political Pressure from the Third Superseding Indictment. (Dkt. Entry No. 224.) Fed. R. Crim. P. 7(d).

Fed. R. Evid. 404 (b) ("[T]he prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of an such evidence it intends to introduce at trial.")

For instance, the government relied heavily on Allen Jackson's testimony that he took several of Mr. Segal's insurance certification continuing education exams. (*See, e.g.,* Tr. at 3479-3492.) No such allegation appears in any of the five indictments in this case. The evidence was neither relevant nor intricately related to the charged offenses. Fed. R. Evid. 402. Moreover, Mr. Jackson testified that he never even spoke to Mr. Segal about taking his continuing education courses. (Tr. at 3501.) At best, this evidence amounted to "other wrongs or acts" evidence governed by Fed. R. Evid. 404(b). The same is true for the "ghost payroller" testimony that the government elicited through Angela Amaro. (*See, e.g.*, Tr. at 1817-1818.)

The government waived its right to present any Rule 404(b) evidence by not disclosing such evidence by the Court-set deadline of February 19, 2004. (*See* Minute Order requiring government to turn over 404(b) evidence 60 days before trial filed 10/01/03 (Dkt. Entry No. 159).)

Because this prejudicial evidence was erroneously admitted at trial and heavily relied upon by the government, defendants should receive a new trial. (Tr. at 3501.)

(4) Irrelevant Evidence, and Evidence That Should Have Been Excluded under Rule 403

The Court admitted a substantial amount of irrelevant evidence, or evidence that, at a minimum, should have been excluded under Fed. R. Evid. 403. For instance, the government was allowed to cherry-pick and stress to the jury the most prejudicial expenditures that the government argued were traceable to the PFTA, such as the reimbursement of employees' political contributions, loans given or consulting fees paid to politicians or former politicians,

and discounted insurance that Near North gave to certain customers. This evidence was irrelevant to the charged offenses. Fed. R. Evid. 402. In addition, its probative value, if any, was substantially outweighed by the danger of its unfair prejudice. Fed. R. Evid. 403. (*See* Defs.' Mot. *in Limine* at 7-9, Dkt. Entry No. 236.) Admission of this evidence deprived defendants of a fair trial.

In addition, the Court erred in admitting several inflammatory, blow-up photographs of cash and other items observed by FBI agents at Mr. Segal's downtown condominium on January 26, 2002. (*See* Gov't Exs. 463A-E, and 464.) The gigantic glossy photos, which measure approximately three feet in height and four feet in width, were irrelevant. The government offered no proof that the cash captured in these photographs was traceable to any cash that Mr. Segal received from Near North. Even if the government had such proof, the presence of the cash had no probative value because Mr. Segal did not dispute that he received cash from Near North, and he even offered to stipulate to the amounts of cash that the agents observed at his residence. (Tr. at 4693.) These blow-up photographs were offered solely to inflame the jury. One of the photographs is particularly telling of the government's motivation, as it captures several stacks of bills that FBI agents had neatly and carefully fanned out on a mattress for the purpose of being photographed. This irrelevant and highly prejudicial evidence should have been excluded under Fed. R. Evid. 402 or, at a minimum, under Fed. R. Evid. 403.

(5) Legal Opinions

The Court allowed several witnesses to offer their legal opinions to the jury. For instance, the Court permitted former Near North CFO, Norm Pater, to explain to the jury: (1) his understanding of the Illinois PFTA regulations; (2) his understanding of a treatise's view on the subject; (3) what a Ponzi scheme is; (4) how Near North's operations were similar to a Ponzi scheme; and (5) whether a Ponzi scheme is considered fraud. (Tr. at 643-47.) Another instance

occurred during Marie Heinrichs' examination, where Ms. Heinrichs testified repeatedly that it was illegal to give insurance discounts or rebates under Illinois law. (*Id.* at 3520-21.) Finally, the IRS revenue agent, Pat Morgan, testified that the lack of records maintained by Mr. Segal impeded and impaired her ability to perform calculations necessary to the tax component of this case in violation of federal law. (*Id.* at 4808.) (Count Twenty-Eight of the indictment charged Mr. Segal with conspiring to defraud the United States by "impeding and impairing" the IRS in carrying out its lawful function.) It was prejudicial error for the jury to hear these and any other legal opinions or conclusions from non-expert witnesses. *See United States v. Espino*, 32 F.3d 253, 257-58 (7th Cir. 1994); *United States v. Baskes*, 649 F.2d 471, 478 (7th Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981). Thus, defendants are entitled to a new trial.

2. The Court Erred In Ruling on the Parties' Motions *in Limine*.

The Court erred in barring defendants from presenting evidence of the collateral impact and financial devastation suffered by Near North. Near North, once a large and vibrant organization with more than 850 employees, was reduced to a shell of its former self and a non-force in the insurance industry in the two-plus years between Mr. Segal's arrest and the conclusion of the trial. Proof of the decimation of Near North's business would not have been offered to elicit sympathy from the jury, but rather to establish defense theories in the case and to expose the bias and self-interest of certain cooperating witnesses. Importantly, these cooperating witnesses, none of whom testified at trial but whose statements were admitted through other witnesses, threatened to destroy defendants by exposing irregularities with Near North's PFTA if Mr. Segal refused to capitulate to their unreasonable demands for control of and equity in Near North. The execution of this plan, and the financial gains that they may have acquired in the course of destroying Near North, including the acquisition of significant customer accounts that migrated from Near North in the wake of the allegations of wrongdoing, were directly relevant to

the defense's version of the events giving rise to the charges in this case. Exclusion of this evidence deprived defendants of "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Such a right is a fundamental element of the constitutional guarantee of due process. *See Washington v. Texas*, 388 U.S. 14, 19 (1967).

The Court also erred by denying defendants' motion *in limine* to bar the government from highlighting certain prejudicial expenditures from the PFTA.[13] For instance, the government devoted considerable time and argument at trial to Near North's reimbursement of certain employees' political contributions, to discounts that Near North gave to certain politicians and others, and to loans or consulting fees that Near North paid to certain politicians. This evidence was irrelevant to the charged offenses, and should have been excluded under Fed. R. Evid. 402, or, at a minimum, Rule 403. The government offered no proof that any of these expenditures were drawn directly from the PFTA. If the government's theory was that the PFTA indirectly financed these expenditures by supplying funds to Near North's operating accounts, only the transfer of the funds from the PFTA to the operating accounts would arguably be relevant. What happened to the funds from that point on is irrelevant, because there are no restrictions on expenditures from a non-PFTA account and, under the government's theory, the money already had been unlawfully withdrawn from the PFTA. This evidence should have been excluded. Instead, it fueled one of the government's primary objectives at trial: to portray defendants as being politically-connected and thereby generate an emotional bias against defendants.

The Court also erred in denying defendants' motion *in limine* to bar the government from suggesting that defendants' alleged failure to maintain Near North's PFTA properly placed a risk

[13] See Defendants' Motion *in Limine* To Bar the Government from Introducing Evidence Regarding the Nature of Specific Expenditures Allegedly Withdrawn from or Traceable to the Premium Fund Trust Account, Dkt. Entry No. 236, filed on March 19, 2004.

of loss on consumers. In Illinois, once insurance is bound through a broker like Near North, the insured customer is covered whether the broker forwards the premium to the carrier or not. (*See* Dkt. Entry No. 235, filed on March 19, 2004.)

3. The Court Erred in Barring Defendants from Arguing That the Government Did Not Prove Certain Elements of the § 1033 Offenses.

Counts Sixteen through Twenty-Two charge defendants with violating 18 U.S.C. § 1033(a). To convict a defendant under § 1033(a), the government must prove beyond a reasonable doubt that Mr. Segal and Near North, among other things, knowingly made a false statement "in connection with any financial reports or documents . . . ." 18 U.S.C. § 1033(a)(1)(A). Before trial, defendants moved to dismiss these counts because the alleged false statements appeared in licensing renewal applications that had no connection to "any financial reports or documents." The Court denied this motion and ruled that it was a question of fact for the jury to decide. (*See* Mem. Op. and Order, Dkt. Entry No. 192, dated January 12, 2004, at 11) ("[I]t would be premature for this Court to dismiss these counts without affording the government the opportunity to prove that Defendants made a false statement in connection with a financial report or document that was presented to an insurance regulator").

Counts Twenty-Three through Twenty-Five charged defendants with violating 18 U.S.C. § 1033(b). To convict a defendant under § 1033(a) or (b), the government must prove beyond a reasonable doubt, among other things, that Mr. Segal and Near North were "engaged in the business of insurance," as that phrase is defined under 18 U.S.C. § 1033(f).

At trial, the Court barred defendants from arguing that any statements made in the license renewal applications were not "in connection with any financial reports or documents," and that defendants were not engaged in "the business of insurance":

> NNIB COUNSEL: Just briefly, we seek clarification on the point we proposed in our theory of defense instructions an argument

> concerning the business of insurance and another argument concerning financial reports or documents.
>
> THE COURT: Right.
>
> NNIB COUNSEL: Are we permitted to make those arguments to the jury or --.
>
> THE COURT: You are not permitted to make those arguments to the jury. The next place you'll make those arguments, if you're not successful, will be somewhere else. That's what I can say about that. (Tr. at 5187.)

This ruling, which prohibited the defense from challenging the government's proof concerning essential elements of the offense, was the equivalent of an impermissible directed verdict on those elements. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977) ("[t]he trial judge . . . is barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused"); *United States v. White Horse*, 807 F.2d 1426, 1430-32 (8th Cir. 1986) (trial judge may not invade jury's domain by deciding that element of offense has been established); *see also United States v. Gaudin*, 515 U.S. 506, 522 (1995) ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.") Defendants should not have been precluded from arguing that the government had not proven these elements beyond a reasonable doubt. For this reason alone, defendants are entitled to a new trial.

4. The Court Erred in Denying Defendants' Motions for an Evidentiary Hearing.

The Court erred in denying defendants' pretrial motions for an evidentiary hearing and to suppress illegally seized evidence. Defendants presented evidence that certain cooperating witnesses solicited and/or received information from a computer hacker that the hacker had stolen from Near North. Defendants further demonstrated that a cooperating witness forwarded

some of this information to the government. Defendants sought an evidentiary hearing to resolve certain factual issues necessary to determine whether these cooperating witnesses were acting as "instruments or agents" of the government in violation of the defendants' Fourth Amendment rights. Where a resolution of factual issues is necessary in deciding whether evidence was obtained in violation of the Fourth Amendment, courts should conduct an evidentiary hearing. *See United States v. Sims*, 879 F. Supp. 883, 888 (N.D. Ill. 1995).

This Court denied defendants' motions for an evidentiary hearing, despite defendants' "definite, specific, detailed, and non-conjectural" showing that they were entitled to such a hearing. *Id.* Defendants demonstrated that at least one of the government's key witnesses solicited information from the hacker, and then forwarded at least some of this stolen information to the government. Defendants also proved that the government knew, before Mr. Segal's arrest and indictment, the hacker's name, where he lived, that he was sending hacked information to cooperating witnesses, and that the cooperating witnesses forwarded at least some of the hacked information to the government. In addition, defendants presented evidence that the government consistently rewarded and protected its cooperating witnesses throughout this case and investigation by: (1) maintaining a hostile attitude toward the civil suit brought by Near North against these witnesses *before* Mr. Segal's arrest, and going so far as to describe the civil suit in a bill of particulars as "retaliatory litigation"; (2) not charging the computer hacker or others to whom he sent stolen and hacked information with any federal offense, despite Near North's prompt and full cooperation with law enforcement authorities; and (3) moving to quash a Rule 17 subpoena that defendant had served on these cooperating witnesses' counsel, when the cooperating witnesses' counsel was prepared to produce the subpoenaed material to defendants. Defendants also presented evidence that cooperating witnesses had advance notice of certain FBI

witness interviews, and, in turn, used this knowledge as leverage in urging at least one Near North business partner to leave Near North.[14]

Moreover, defendants presented evidence that the government used other cooperating witnesses, namely Tom McNichols and Daniel Watkins, to conduct warrantless searches of Near North by directing them to seize Near North documents while they were cooperating with the government and simultaneously working at Near North. At a minimum, defendants were entitled to an evidentiary hearing to explore these issues and develop a more complete record of whether and how the government used its cooperating witnesses to gather evidence against defendants. This error entitles defendants to a new trial. *See United States v. Berkowitz*, 927 F.2d 1376, 1388 (7th Cir. 1991) (remanding case because the district court failed to conduct an evidentiary hearing).

The Court further erred by not granting defendants' request for an evidentiary hearing on the vindictive prosecution issue. (*See* Defendant Segal's Motion To Dismiss Count Nine of the Second Superseding Indictment for Vindictiveness, Dkt. Entry No. 146, filed September 19, 2003, at 18.)

5. The Court Erred in Not Excluding the Fruits of the Government's Review of Defendants' Attorney-Client Privileged Communications.

On January 26, 2002, the day of Mr. Segal's arrest, the government seized an enormous amount of computer data from defendants. When FBI agents later reviewed the material on these computers, they violated both Justice Department guidelines and defendants' Fourth Amendment rights in failing to take reasonable measures to screen out defendants'

[14] Moreover, defendants did not receive from the government any written recording of hundreds of phone calls placed to the FBI by cooperating witnesses McNichols, Walsh, Berry, and Gallagher during the government's investigation and prosecution of defendants. This is yet another reason why defendants needed an evidentiary hearing: to determine what information was transmitted to the government during these apparently unmemorialized conversations.

attorney-client privileged communications. The Court's ruling that the government could introduce the "fruits" of this improper examination as long as it did not introduce the privileged communications themselves was erroneous. (Dkt. Entry No. 261.) Further, the government's mere *exposure* to the privileged information tainted the prosecution. *See United States v. Hubbell*, 530 U.S. 27, 45-46 (2000) (indictment dismissed due to prosecution's exposure to immunized information).

6. The Court Erred in Denying Defendants' Renewed Motions for a Bill of Particulars.

Defendants moved for a bill of particulars after the return of the First Superseding Indictment. The Court granted this motion, and the government provided some particulars regarding the credits allegations, the reimbursement of political contributions, and the discounting of insurance premiums. (*See* Order dated 2/5/03, Dkt. Entry No. 72.) When the grand jury returned a Second and a Third Superseding Indictment, defendants renewed their motions for a bill of particulars, asking that the government update its bill of particulars with respect to any allegations contained in the First Superseding Indictment, and to provide particulars on certain new allegations in the Second and Third Superseding Indictments. *See, e.g., United States v. Vasquez-Ruiz*, 136 F. Supp. 2d 941, 943 (N.D. Ill. 2001). The Court denied defendants' renewed motions for a bill of particulars. (*See* Order dated 1/12/04, Dkt. Entry No. 192.) The government never updated its original bill of particulars.

The denial of defendants' renewed motions for a bill of particulars was harmful error. *See United States v. Davidoff*, 845 F.2d 1151, 1154 (2d Cir. 1988) (reversing conviction because the district court failed to order a bill of particulars, prohibiting defendant from properly preparing for the testimony offered against him). The Court allowed the government to present evidence regarding credits allegations that went beyond the evidence outlined in the

government's bill of particulars. For example, Roger Torneden, a former CEO of NNIB-California, testified about certain alleged customer credits in the California office that had purportedly been written off at Mr. Segal's direction. (Tr. at 2212-22) The government's bill of particulars makes no mention of any credits in NNIB's California office. Similarly, Kathy Lund was permitted to offer vague testimony concerning a credit allegedly written off in the 1980s although this item was not identified in the bill of particulars. (Tr. at 2799-2802.) Defendants suffered harm by the admission of this testimony, and it should have been included in the bill of particulars.

7. The Court Should Have Ordered a Mistrial.

The Court erred in denying defendants' two motions for a mistrial. The first followed the testimony of government witness, Angela Amaro, who worked on the insurance side of Near North's accounting department from 1983 to 1998. During Ms. Amaro's redirect examination, the government questioned Ms. Amaro about the government's investigation of Dan Rostenkowski several years ago, and Mr. Rostenkowski's misuse of a postage account, even though the investigation and prosecution of Mr. Rostenkowski has no connection whatsoever to this case:

> THE GOVERNMENT: Mr. Segal had a list of each and every person that was interviewed by the FBI during the Rostenkowski investigation, correct?
>
> MS. AMARO: That was my understanding, yes.
>
> THE GOVERNMENT: And you were one of those people?
>
> MS. AMARO: Yes.
>
> THE GOVERNMENT: And it was during that time that you learned it was illegal for Near North to be rebating its VIP list with discounted insurance, right?
>
> MS. AMARO: Correct.

> THE GOVERNMENT: And in spite of Mr. Segal knowing that you were interviewed and about the investigation, he never stopped the practice of rebating insurance during the time that you were there, correct?
>
> MS. AMARO: Correct.
>
> THE GOVERNMENT: And Mr. Rostenkowski, in fact, was convicted for stealing from a postage fund, wasn't he?
>
> MS. AMARO: I don't know.
>
> MR. SEGAL'S COUNSEL: Your Honor, objection.
>
> NEAR NORTH'S COUNSEL: Objection. Move that it be stricken.
>
> THE COURT: The objection is sustained. The jury is instructed to disregard. I can tell the jury that that particular matter has nothing to do with this matter.

(Tr. at 1864-65). Although the Court sustained defense counsel's objections and instructed the jury to disregard the question, its prejudicial effect was incurable. There is only one reasonable explanation for why the government posed this question to Ms. Amaro: to lead the jury to believe that, if Mr. Rostenkowski was convicted for stealing from a postage fund, then so should Mr. Segal. Although the Court ultimately read an additional "curative" instruction (modified from one that Mr. Segal tendered after the Court denied his motion for a mistrial) (Tr. 1879-80), no curative instruction would have been adequate. After this exchange, defendants could not have received a fair trial. The sole effective remedy was to declare a mistrial.

Additionally, the Court erred in denying defendants' motion for a mistrial based on statements made during the rebuttal portion of the government's closing argument. The government improperly argued that Mr. Segal retained criminal counsel in late 2001 after he learned that Near North accountant and co-defendant Daniel Watkins had been booking Mr. Segal's personal expenses to a Near North postage account:

> GOVERNMENT: What happens? What happens? Give me control. Watkins is running petty cash. This doesn't look good. It could be a tax problem. I'm concerned. He tells him stay out of it. I'll take care of it and does nothing because he knows who his co-conspirator is. It's not Tom McNichols. It's Dan Watkins. When does he do something? When does he do something? When the whistle gets blown and the crisis management team goes into effect and Ernie Wish and Hales get hired and Harvey Silets gets hired. So think about the arguments the defense made with respect to how it reflects on his state of mind. Who does he run to after the misappropriation of trust funds through fraudulent means is likely to be exposed if one wrong move is made? He goes to one of the best criminal defense lawyers in the city.
>
> DEFENSE: Your Honor, there's no evidence --
>
> GOVERNMENT: That was in the evidence.
>
> THE COURT: The objection is sustained.
>
> GOVERNMENT: I believe it was in the evidence.
>
> DEFENSE: It's not in the evidence.
>
> GOVERNMENT: All right. And why does he do that? It's perfectly appropriate.
>
> DEFENSE: Your Honor, I object to him arguing why he did that after you sustained the objection.
>
> THE COURT: Okay. The objection is sustained. Why don't you move to a different area.

(Tr. at 5784-85).

The argument that Mr. Segal retained "one of the best criminal defense lawyers in the city" because his "misappropriation of trust funds [was] likely to be exposed" was improper, unsupported by the record, and incurable. This argument (like the government's gratuitous reference to Mr. Rostenkowski's conviction for "stealing from a postage account") irreparably harmed defendants and instantly deprived them of a fair trial.[15]

[15] In arguing whether the government's comment merited a mistrial, there was discussion outside of the jury's presence as to whether the record contained any evidence of Mr. Silets being a criminal defense lawyer. The

8. The Court Erred by Not Admitting Government Exhibit 38 In Its Entirety.

Defendants sought to introduce an unredacted version of government Exhibit 38, a memorandum drafted by Deloitte & Touche auditor Heidi Morlock on August 16, 1996 (the "Morlock memo"). The Morlock memo was crucial to the defense as it represented that premium monies, or "fiduciary funds," could be used for operating purposes. The Morlock memo indicated that one of Deloitte & Touche's own insurance experts had advised that there were no restrictions on using fiduciary funds for operating purposes, and that Deloitte & Touche had confirmed this understanding with Near North's outside counsel. The Morlock memo further established that it was Deloitte & Touche -- not Mr. Segal -- who supplied the language in Gov't Exhibit 48, a management representation letter prepared by Deloitte and signed by Mr. Segal indicating that Near North was not prohibited from using premium monies for operating purposes. The Court sustained the government's objection to the Morlock memo and admitted a redacted version of the memo. (The references to Ms. Morlock's conversations with Deloitte & Touche's insurance expert and Near North's outside counsel were redacted.) The Court found that the redacted statements were being offered for the truth, and that an unredacted version of the memo would mislead the jury. (Tr. at 1123.)

(continued...)

defense cannot find any such evidence after a diligent search of the trial transcript. Excluding opening statements and closing arguments, Mr. Silets' name surfaced briefly in the examinations of only two witnesses: (1) the cross-examination of Shari Schindler, one of the government's tax witnesses; and (2) the government's cross-examination of Denise Mayo, a defense witness. Ms. Schindler testified merely that she knew from government agents that Mr. Silets was Mr. Segal's lawyer and that Mr. Silets had confronted Mr. Watkins in October of 2001 about his handling of petty cash. (Trial Tr. at 4547.) Ms. Mayo testified merely that Mr. Rob Martin represented her in this case, and when the government asked Ms. Mayo if Mr. Martin and Mr. Silets were former law partners, Ms. Mayo replied: "I don't know that." (Trial Tr. at 4935.) Suffice it to say, neither excerpt provides sufficient evidence for the government to have argued to the jury that Mr. Segal retained "one of the best criminal defense lawyers in the city . . . after the misappropriation of trust funds through fraudulent means [was] likely to be exposed."

The Court should have admitted the redacted portions of the Morlock memo for at least two reasons. First, defendants were not offering the redacted statements to prove the truth of the matters asserted, (*i.e.*, that Near North could use premium monies for operating purposes), but merely to show that confusion existed at the time as to the legality of using premium monies for operating purposes, and also to explain to the jury why Deloitte & Touche drafted the management representation letter the way that it did. *See, e.g., Alexander v. CIT Technology Financing Servs.*, 217 F. Supp. 2d 867, 881 (N.D. Ill. 2002) (hearsay statement admissible to show basis for belief). Second, even if the redacted portions were offered for the truth, they are a record of Deloitte & Touche's regularly conducted activity under Fed. R. Evid. 803(6). Although there is potential for "double hearsay" in the context of a business record when the record is prepared by an employee with information supplied by another person, "[i]f both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6)." *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 271 (5th Cir. 1991). Because the redacted portion of the Morlock memo was supplied by another Deloitte employee acting in the regular course of business, and because it is a regular activity for outside auditors to gather information from third parties, the memo should have been admitted in its entirety.

9. The Court Erred In Instructing the Jury.

(1) Intent to defraud

The Court erred in refusing to instruct the jury that it could consider the absence of a loss as proof that defendants had no intent to defraud. *See generally United States v. Ethridge*, 948 F.2d 1215 (11th Cir. 1991) (reversing mail fraud conviction to allow defendants to introduce evidence that victim suffered no loss to show defendants' lack of intent); *United States v. Thomas*, 32 F.3d 418 (9th Cir. 1994) (reversing mail fraud conviction because district court erred

in limiting new evidence, proffered by defendant to show lack of intent, that not all of the alleged victims of the scheme suffered loss); *United States v. Foshee*, 569 F.2d 410, *modified* 578 F.2d 629, 631 (5th Cir. 1978) (holding that defendant could properly argue that defendant, who made certain that no victim suffered loss, did not have the "critical intent to defraud" in mail fraud prosecution.) Given the numerous instructions that no proof of loss is required for a mail fraud conviction, the jury should at a minimum have been instructed that evidence of no loss may also be proof that defendants lacked intent to defraud.

(2) Illinois State law and Regulations

In addition, the Court erred by placing undue emphasis on Illinois state law and regulations in the jury instructions. Furthermore, the Court erred in refusing to instruct the jury that the intent to violate a state statute does not suffice for intent to commit mail and wire fraud.[16] The instructions that the Court provided to the jury used state law as the limiting principle for "honest services" mail fraud. This Circuit, however, has rejected the use of state law as the § 1346 limiting principle. *See Bloom*, 149 F.3d at 654. "Honest services" mail fraud has drawn criticism because it permits federal prosecutors to set standards for state government. *See McNally v. United States*, 483 U.S. 350, 360 (1987). In *Cleveland*, the Supreme Court stated, "[a]bsent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States." 531 U.S. at 25-27. Allowing state law violations to serve as the predicates for an "honest services" mail fraud offense threatens to turn every state crime into a federal offense. *See United*

[16] The Court did read a modified version of a proposed defense instruction, advising the jury that defendants were charged with violations of federal law, not state law, and that the jury should not find defendants guilty unless the government proved all of the elements of the charged federal crimes beyond a reasonable doubt. (*See* Tr. at 5839.) The Court omitted, however, a critical portion of the proposed defense instruction, *i.e.*, that the specific intent required under the federal mail and wire fraud statutes is the intent to defraud, not the intent to violate a state law.

States v. Murphy, 323 F.3d 102, 117 (3d Cir. 2003) (rejecting the use of a state bribe as a predicate for a fiduciary duty "because all criminal activity would breach a duty to the public not to break the law that could then form the basis of a mail fraud conviction").

The government repeatedly referred to state law requirements throughout its case. The Court permitted witnesses to offer their understanding of state law requirements and their opinion as to whether state law was violated and allowed the government to read portions of the state regulations into the record. In light of this overwhelming emphasis on state law, the jury should have been explicitly instructed that the intent to violate state law does not equal the intent to commit mail fraud.

(3) "Pattern" of Racketeering Activity

The Court erred by refusing defendants' proposed instruction that a multiplicity of mailings may not establish the "pattern" of racketeering activity required by RICO.

(4) The *Hausmann* Instructions

Defendants renew their objections to the reading of any government-proposed instructions that relied on *Hausmann*, 345 F.3d at 952. Defendants recognize that *Hausmann* is binding authority on this Court, but respectfully disagree with the principles of law espoused in *Hausmann* regarding the "honest services" statute, 18 U.S.C. § 1346.

10. The Court Erred in Allowing the Government To Monitor Defense Inspection of Documents.

As part of its raid on January 26, 2002, the government "seized" thousands of boxes of Near North documents at an off-site storage facility. The government did not remove the documents from the facility, but instead began paying the monthly rent for storing the documents there. To prepare for trial, defendants needed to obtain certain documents from the off-site facility. When defendants had copies made of certain documents, it is the defense's

understanding that the government received a copy of the same documents or at least knew which documents defendants had sought. The Court erred by denying defendants' motion to stop the government from monitoring the defense attorneys' inspection of the seized business records. Defendant had no comparable opportunity to monitor the government's inspection of the same seized records. The government's monitoring of defendants' investigation and trial preparation violated defendants' Sixth Amendment right to counsel and Fifth Amendment due process rights by providing the government with a road map of defendants' trial strategies and mental processes. Defendants hereby incorporate by reference and specifically reallege the arguments contained in Defendants' Motion to Limit the Government's Monitoring of Trial Preparation by the Defendants' Attorneys (Dkt. Entry No. 291), filed on May 6, 2004.

11. The Court Erred By Barring Mr. Segal from Offering Cost-of-Capital Evidence During the Forfeiture Proceeding.

The Court erred by preventing Mr. Segal from offering evidence on the amount of interest Near North would have owed over the years had it borrowed the amount of money that government witnesses indicated the PFTA was in deficit from the early 1990s through 2001. Andrew Lotts, an outside accounting consultant to Near North, testified on this subject. The Court had already admitted his interest calculations (Lotts Ex. 1) into evidence and Mr. Lotts had started to testify about the subject when the government objected on relevance grounds. The Court sustained the government's objection and the defense made an offer of proof. (Tr. at 5938-41.)

Evidence concerning the amount of interest that would have accrued on any funds unlawfully withdrawn from the PFTA was relevant as a reasonable alternative for the jury to consider in determining the amount of proceeds subject to forfeiture under § 1963(a). Fed. R. Evid. 402. Indeed, despite its objection, the government conceded the relevance of this evidence

on at least two occasions during its closing argument in the forfeiture proceeding. First, the government argued that Mr. Segal's and Near North's use of the PFTA was an interest-free loan. Trying to distinguish Near North from a "mom and pop" coffee shop, the government argued that if "mom and pop" wanted to expand their operations, they would have to do so either from the income they had generated or by loaning the money:

> "Pop says I'll open up another coffee shop. We're going to expand. . . How do they do that? Either they make enough money to go and open up that second shop from their proceeds that they've earned, or they walk into a bank and they ask for a loan, right? We know about loans to Mr. Segal, don't we? Mr. Segal never took out a loan until it was damage control time because when you take out a loan, you have to put down on the line all of your assets, all of your liabilities. Maybe mom and pop have to put the coffee shop up as collateral, maybe their house to do this, to buy another coffee shop. It's such a simple concept, but think about how the enterprise grew because Mr. Segal never had to that." (Tr. at 6081.)

Then, in its rebuttal argument of the forfeiture proceeding, the government alluded to the "rate-of-return" on "stolen money" (*i.e.*, money withdrawn from a PFTA in deficit), and argued that the jury "could" include it as forfeitable proceeds. (*See* Tr. at 6138 ("So we're not asking you to calculate a rate of return on his stolen money, but you could. Not only the stolen money, but the rate of return on the stolen money.").)

The government essentially had it both ways on this issue. The government was able to argue to the jury that Mr. Segal and Near North derived proceeds by using the PFTA as an interest-free loan, yet at the same time barred the defense from presenting evidence of just how much interest would have accrued based on the annual deficit amounts in the record. This imputed interest figure would have been especially persuasive to the jury in light of the undisputed fact that Mr. Segal and Near North injected funds into NNIB in 2001, and in effect, "repaid" the "principal," or the PFTA deficit amount that the government argued was the

appropriate measure of forfeitable proceeds. Because of this error, Mr. Segal is entitled to a new trial on forfeiture issues in which this evidence is admitted and considered by the Court.

12. The Government Waived Any Objection to Forfeiture Instruction No. 4, and the Court Erred By Modifying It After Defendant's Closing Argument and Before the Government's Rebuttal.

On June 22, 2004, the defense tendered to the Court Defendants' Proposed Forfeiture Jury Instruction No. 4, which provided: "Only those proceeds received by the defendant can be subject to forfeiture. Proceeds received by the enterprise, but not by the defendant, are not subject to forfeiture." The government objected to Instruction No. 4. (Tr. at 5989.) The Court took the proposed instruction under advisement. (*Id.* at 5990.)

Later in the day, the government and the defense reached agreement on the language of Instruction No. 4 without judicial intervention. (*Id.* at 6069 (The government: "I believe, Judge, that we have reached agreement on the two proposed instructions that the defendant has presented to you this morning.").) The government then read to the Court the parties agreed-upon language for Instruction No. 4: "Only those proceeds received by the defendant can be subject to forfeiture. Income, revenue, or proceeds received by the enterprise but not by the defendant are not subject to forfeiture pursuant to subsections (a)(1) and (a)(3)." *Id.*

With the issue resolved, the defense relied upon the agreed-upon instruction during its closing argument, and even read it verbatim to the jury as the very first instruction it asked the jury to focus on in deliberations. (*See* Tr. at 6099-6100 ("And why do I want you to focus on the words 'received by Michael Segal'? Well, you're going to hear an instruction from the Court that says this: 'Only those proceeds received by the defendant can be subject to forfeiture. Income, revenue or the proceeds received by the enterprise [. . .] but not by the defendant are not subject to forfeiture pursuant to subsections (a)(1) and (a)(3) . . . .'").) The defense went on to argue, consistent with the undisputed facts, that all of the PFTA deficit withdrawal "proceeds"

identified by the government were in fact received by the enterprise, not by Mr. Segal, and thus not properly subject to forfeiture.

After defense counsel finished its argument, the government sought to modify the instruction to which it previously agreed and read aloud to the Court. Specifically, the government asked the Court to add the phrase "directly or indirectly" after the phrase "received by the defendant." The Court modified the instruction over defense counsel's objection. (*See* Tr. at 6123 ("[w]e would object to any changes to that instruction now, since the government agreed to it beforehand.").) Following a break, and before the government gave its rebuttal argument, the defense asked the Court to reconsider its change to the instruction. (*Id.* at 6127.) The Court refused. *Id.*

In its rebuttal argument, the government referred multiple times to the revised instruction and the "directly or indirectly" language. The government also referred to defense counsel's argument regarding this instruction:

> And one of the instructions that deals with this is only those proceeds received by the defendant, directly or indirectly, can be subject to forfeiture. Now, Mr. McNulty made arguments about the second part of this instruction which says income, revenue, proceeds received by the enterprise but not the defendant are not subject to forfeiture pursuant to subsections (a)(1) and (a)(3). And what that's talking about is directly or indirectly . . . So when income, revenue proceeds received by the enterprise but not the defendant are the words that are used, what the judge is talking about, what he's going to instruct you is that we can only ask you to forfeit those proceeds received by the defendant, directly or indirectly. (Tr. at 6134.)

In *United States v. Sloan*, a Court of Appeals stated:

> It is difficult to conceive of a more critical stage of a jury trial than the preparation and delivery of the charge. The charge effectively converts the jury from a collection of citizens ignorant of the law into true judges of the facts. Thus, trial courts must be painstaking in superintending the process of conversion.

811 F.2d 1359, 1362 (10th Cir. 1987). "The court must inform the parties before closing arguments how it intends to rule on the requested [jury] instructions." Fed. R. Crim. P. 30(b). The purpose of this rule is to enable the parties to make informed closing arguments. *United States v. Gaskins*, 849 F.2d 454, 457 (9th Cir. 1988); *United States v. Harvill*, 501 F.2d 295, 297 (9th Cir. 1974); *United States v. Bass*, 425 F.2d 161, 163 (7th Cir. 1970). The right to closing argument is protected by the Due Process Clause. *See Herring v. New York*, 422 U.S. 853, 858-859 (1975). This right is compromised when counsel delivers its closing argument not knowing the content of the final jury instructions, or worse, relying on "agreed" instructions that are significantly modified after defense counsel's closing argument and before the government's rebuttal. *See Gaskins*, 849 F.2d at 460; *cf. United States v. Ienco*, 92 F.3d 564 (7th Cir. 1996) (error occurred where the judge announced during trial that he would not give a Pinkerton instruction but changed his mind after most of the examinations had been completed).

Here, Mr. Segal suffered harm when the Court modified the instruction after his closing argument in the forfeiture proceeding. Mr. Segal relied on the agreed instruction that the government read aloud to the Court, and the government waived any objection to the instruction by not raising the issue before Mr. Segal's closing argument. If the government had second thoughts about the agreed-upon language, it should have made them known *before* defense counsel argued. Raising them after Mr. Segal's closing argument was too late. By changing the instruction after Mr. Segal's closing, the jury easily could have thought that defense counsel had misread the instruction, or, worse yet, intentionally omitted a key phrase from the instruction in an effort to misdirect the jury on the law it should use in its deliberations. This error was not harmless, and it undermines the jury's forfeiture verdict. This error, standing alone, requires the

Court to vacate the jury's forfeiture verdict and the preliminary order of forfeiture, and to conduct further proceedings to arrive at an appropriate forfeiture order.

13. There Is Insufficient Evidence To Support the Jury's Finding That $30 Million Is Subject To Forfeiture

The government asked the jury to find that $35 million dollars was subject to forfeiture.[17] How the government arrived at the $35 million figure is no secret. Thirty-five million dollars, the government argued, is "what was needed to plug the hole" in the Premium Fund Trust Account. (Tr. at 6091; *see also* Tr. at 5893 ("We are going to be seeking that you find $35 million is forfeitable from Mr. Segal, $35 million that he took based upon the violation that you have found unanimously that he committed, the racketeering count"); 6094 ("$35 million is a number that Sandy Prescott chart shows you he needed to plug the hole . . . .") and 6137 (". . . the fair measure that he used inside his company, the fair measure that he took when he decided to replenish the PFTA. And this is, I think the evidence shows, can be fairly attributable to Mr. Segal's own decision making was he put about $35 million into the company.").)

The government called one witness in the forfeiture proceeding: Sandy Prescott, a financial analyst with the FBI. Ms. Prescott testified that she created a chart -- government Exhibit 551 -- that purported to show the depositing of certain funds into NNIB's "old" PFTA from approximately June through November 2001.[18] Based on Government Exhibit 551, Ms. Prescott testified that $30 million was deposited into the "old" PFTA and $5.6 million into Near North's operating account during this time period. On cross-examination, Ms. Prescott conceded that:

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[17] Defendants adopt and incorporate by reference Defendant Mike Segal's Objections to the Preliminary Forfeiture Order Entered on July 1, 2004, filed on August 4, 2004.

[18] NNIB's "old" PFTA refers to the PFTA in existence before September 1, 2001. There is no dispute that NNIB created a "new" PFTA on September 1, 2001, and thereafter "ran off" any premiums owed to insurance companies from the "old" PFTA.

- she only tracked money deposited into the "old" PFTA (Tr. at 5909-10);
- she did not track money going out of the "old" PFTA to pay premiums (*id.*);
- she did not know what was done with the money that was deposited into the "old" PFTA (*id.* at 5910);
- she could not tell how much of the money that went into the old PFTA was ultimately transferred to an operating account rather than paid on premiums (*id.* at 5911);
- to figure out the deficit in the old PFTA, one would need to know how much money was withdrawn from that account to pay premiums for policies where premium funds from customers were received pre-September 1, 2001 (*id.*);
- she could have performed that analysis, but no one asked her to do so (*id.*); and
- she did not "have any idea how much of the money that went into the old PFTA was spent in order to make up for a deficit in that PFTA" (*id.* at 5914).

On this insufficient evidence, no reasonable jury could have found that $30 million was needed to "plug the hole" in the old PFTA and, therefore (under the government's argument), was subject to forfeiture.[19] As Ms. Prescott admitted, she did not have "any idea how much of the money that went into the old PFTA was spent in order to make up for a deficit in that PFTA." (Tr. at 5914.) Indeed, Ms. Maggie Martensen, the acting Near North CFO since July of 2002, testified that of the $30 million that was deposited into the PFTA, several million dollars were never used to pay premiums attributable to the old PFTA. For instance, Ms. Martensen testified that several million dollars was used to pay premiums that should have been paid from the "new" PFTA, and more than a million dollars had been transferred from the "old" PFTA to NNIB's operating account to pay for operating expenses (*i.e.*, non-premium payments). Thus, the jury's

[19] The government's argument that NNIB's PFTA deficit was an appropriate measure for forfeiture purposes is completely at odds with the law on forfeiture, which requires the jury here to determine "only the amount of proceeds received by the defendant" from racketeering activity. Any "proceeds" from NNIB's PFTA withdrawals were received not by Mr. Segal, but by NNIB, and to the extent received "indirectly" by Mr. Segal are completely neutralized by a forfeiture of a percentage of his interest in NNNG or NNIB.

finding that $30 million is subject to forfeiture, lacks sufficient evidence and, therefore, should be set aside.

14. Defendants Were Prejudiced by the Variance between the Charged Scheme and the Scheme Submitted to the Jury.

The grand jury returned an indictment charging defendants with a scheme to defraud the PFTA, among other victims. The Court agreed with the defense objection that the PFTA is merely a bank account and cannot be the victim of a scheme. Ultimately, the government properly removed from the indictment submitted to the jury all references to the PFTA as a victim of the alleged scheme. However, the variance between the scheme as charged and the scheme that was submitted to the jury prejudiced defendants in that it is not clear that the grand jury would have returned an indictment without reference to the PFTA as a victim.

15. The Court Erred By Refusing To Require Special Verdicts on the Three Distinct Schemes Alleged in the Indictment.

The Court erred by refusing to require special verdicts on the three distinct charges alleged as a single scheme in Count One of the Indictment. The government's proof showed that these charges were not part of the same scheme and were entirely unrelated. As such, refusal to treat them as separate was prejudicial.

16. The Totality of Circumstances Surrounding This Prosecution Violates the Constitutional Due Process Guarantee.

In its effort to secure a conviction, the government manipulated the truth-seeking process, stretched the rules of evidence and exploited every opportunity to portray Mr. Segal and Near North as wealthy, powerful, and thereby deserving of punishment, all in violation of basic notions of fundamental fairness and due process. Among other things, the government:

- Followed through on a vindictive threat to file additional charges against defendants if they exercised their constitutional right to assert claims against the government's cooperating witnesses in a civil suit.

- Polluted the record and poisoned the jury with its accusation that Mr. Segal lied to federal investigators (*see, e.g.*, Tr. at 347-40) only to withdraw that charge at the close of its case.

- Intentionally invoked the conviction of former Congressman Rostenkowksi, (Tr. at 1864), and Mr. Segal's retention of "one of the best criminal defense lawyers in the city," (*id.* at 5785), even though neither fact is relevant or admissible in this proceeding.

- Based its case in part on hearsay accusations by former employees of Near North without ever exposing the bias, prejudice and self-interest of those employees to cross-examination, all in violation of the Sixth Amendment's Confrontation Clause, *see Washington v. Crawford*, 124 S. Ct. 1354 (2004).

- Offered inadmissible lay opinions concerning alleged violations of Illinois state law even though such crimes were not charged in the indictment.

- Singled out and exploited defendants' relationship with local politicians and other well-known customers in an effort to portray Mr. Segal and Near North as "politically connected" and therefore deserving of punishment.

- Monitored defense counsel's review of documents made available by the prosecutors pursuant to their discovery obligations.

- Knowingly accepted from its cooperating witnesses information that had been unlawfully "hacked" from Near North's computer system.

Each of these abuses prejudiced the defense; viewed in their totality, they deprived defendants of the right to a fair trial guaranteed by the Fifth Amendment.

D. The Court Should Arrest Any Judgment Against Mr. Segal and Near North

For all of the reasons identified above, the Court should arrest any judgment against Mr. Segal and Near North on all counts. Fed. R. Crim. P. 34.

In addition, judgment on Counts Sixteen through Twenty-Five should be arrested because there is, at a minimum, reasonable doubt as to whether 18 U.S.C. § 1033 even applies to an insurance brokerage and its owner. *See generally United States v. Bramblett*, 120 F. Supp. 857 (D.D.C. 1954) (granting motion for arrest of judgment because of reasonable doubt of applicability of statute to defendant). The defense cannot locate a single case involving the

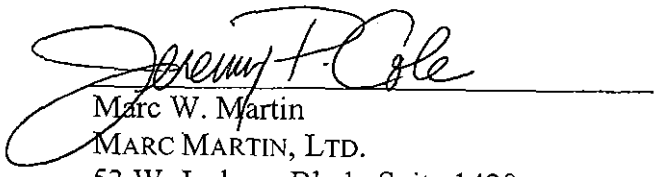
prosecution of an insurance brokerage or its owner under 18 U.S.C. § 1033 for PFTA-related conduct or for making false statements on license renewal applications presented to a state regulatory body.[20] Therefore, arrest of judgment on Counts Sixteen through Twenty-Five is appropriate.

III. CONCLUSION

For the reasons set forth above, Defendants Michael Segal and Near North Insurance Brokerage, Inc. respectfully request that this Court vacate the verdicts in this case, enter a judgment of acquittal, order a new trial, arrest any judgment against defendants, and grant any other equitable and appropriate relief.

Dated: August 23, 2004

Respectfully submitted,



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[20] As Norm Pater testified, several states do not even have premium fund trust requirements. (Tr. at 715-16.)

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