CIVIL RICO:

A MANUAL FOR FEDERAL PROSECUTORS

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PREFACE

This Manual has been prepared by the Organized Crime and Racketeering Section, Criminal Division, U.S. Department of Justice, to provide guidance to government attorneys in applying the RICO statute in civil cases. The opinions and advice expressed in these pages are informal discussions of policy and law. Nothing in this Manual is intended to be a statement of official policy or to be binding against the Federal Government in any way. The official policies of the Criminal Division with respect to RICO prosecutions and civil actions are set forth at Chapter 9-110 of the United States Attorneys' Manual. This Manual is intended to provide informal supplementary guidance; it does not supersede the United States Attorneys' Manual provisions, which must be adhered to in bringing a RICO prosecution or civil action. In addition, the advice and suggestions contained herein are subject to change; for the latest statements of guidance with respect to RICO prosecutions, contact the Organized Crime and Racketeering Section in Washington, D.C., at 633-1214.

The authors would like to express their appreciation to the Department's Civil Division, whose attorneys reviewed earlier drafts of this Manual and made invaluable suggestions for improving the discussions of several important issues.

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I. Introduction

Since the enactment of the Racketeer Influenced and Corrupt Organizations (RICO) statute in 1970, federal prosecutors have gradually come to realize that its criminal provisions are one of the most potent weapons available in combating organized crime and other groups or individuals who engage in patterns of criminal conduct. The criminal provisions in 18 U.S.C. §§ 1961-1963 carry a twenty-year penalty, in addition to fines and forfeiture of certain interests acquired or used in connection with racketeering activity. 1/

RICO also includes powerful civil provisions, codified at 18 U.S.C. §§ 1964-1968. These provisions were largely ignored by government attorneys and private attorneys alike for several years after their enactment. 2/ In the early 1980s, private plaintiffs "discovered" RICO actions for treble damages, and the number of such suits grew rapidly. 3/ The Federal Government also took some time to appreciate the potential uses of civil RICO suits. Although some experiments with the statute were carried out as early

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1/ For a detailed discussion of the criminal RICO provisions, see U.S. Department of Justice, Criminal Division, Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors (1986).

2/ See, e.g., Strafer, Massumi & Skolnick, Civil RICO in the Public Interest: "Everybody's Darling," 19 Am. Crim. L. Rev. 655, 662 n.54 (1982).

3/ See, e.g., Lacovara & Aronow, The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO, 21 New Eng. L. Rev. 1, 13 & n.84 (1986).

as 1974, federal prosecutors have only recently come to view civil RICO as a primary tool to achieve dramatic results in major cases. 4/

A major purpose of this Manual is to point out the advantages of using civil RICO along with, or, perhaps, instead of, criminal RICO (or other statutes) in certain situations. Although civil actions have obvious limitations, 5/ there are certain situations in which a properly constructed civil suit can result in more meaningful and long-lasting relief for criminal activity than a criminal prosecution. For example, in the landmark case of United States v. Local 560, International Brotherhood of Teamsters, 6/ the Department of Justice brought suit under RICO against the entire executive board of a Teamsters local that had been infiltrated and dominated by elements of organized crime over a period of many years. During a bench trial with 51 days of testimony, the Government introduced extensive evidence showing that elements of organized crime dominated the local and, through acts of violence, had intimidated the members so as to deprive them of their statutory rights under the federal

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4/ See Appendix A, infra, for a description of all government civil RICO suits that have been brought as of this writing.

5/ For a more complete discussion of the advantages and disadvantages of using civil RICO, see Section III, infra.

6/ 581 F. Supp. 279 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986).

labor laws. The evidence also showed that the local's executive board, through its failure to take corrective action and through its affirmative acts of support for union officials who committed crimes, contributed to the aura of domination by criminal elements. The district court held that the defendants, including the executive board, had violated RICO. The court removed the entire board from office and ordered the appointment of a trustee to supervise the affairs of the local until proper democratic elections could be held.

Following the dramatic success in the Local 560 case and its subsequent affirmance on appeal, federal prosecutors have begun to realize that, as the Third Circuit observed in that case, "in many ways, section 1964 is a more powerful provision than its criminal counterpart, section 1963." 7/ Since the Supreme Court's denial of certiorari in Local 560 in mid-1986, prosecutors in New York and Philadelphia have brought further civil RICO suits seeking to remove organized criminal influence from unions. 8/ Other such suits undoubtedly are being contemplated; some may have been brought by the time this Manual is distributed.

To date, the Government's major area of success with injunctive actions under civil RICO has been in connection with labor unions that are influenced by criminal elements,

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7/ United States v. Local 560, International Brotherhood of Teamsters, 780 F.2d 267, 296 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986).

8/ See Appendix A, infra.

although, in one recent case, the Government successfully obtained preliminary injunctive relief against individuals who were skimming money from a New York restaurant. 9/

There undoubtedly are many potential applications for government injunctive actions under RICO involving entities other than labor unions. For example, cases may arise in which the long-term supervision of a court of equity can purge criminal influences from businesses, such as casinos, that are vulnerable to organized crime infiltration. And, now that federal and state obscenity offenses have been added to the list of RICO predicate offenses, 10/ it may be desirable for United States Attorneys to proceed against dealers in obscene materials through civil RICO suits, rather than (or in addition to) pursuing such cases criminally. In any event, although labor racketeering is certainly a major area in which such suits are useful, it is by no means the only area where they should be considered.

The other prong of civil RICO is the action for treble damages under 18 U.S.C. § 1964(c). The Federal Government has only recently begun to realize the potential of such suits. 11/ One obvious factor limiting the number of such

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9/ United States v. Ianniello, 824 F.2d 203 (2d Cir. 1987).

10/ In 1984, Congress amended 18 U.S.C. § 1961 to add as predicate acts, inter alia, state obscenity offenses and federal obscenity offenses under 18 U.S.C. §§ 1461-65. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, § 1020, 98 Stat. 2143 (Oct. 12, 1984).

11/ See Appendix A, infra.

suits is that the Government can sue and recover treble damages under RICO only when it has been injured in its business or property; there is no provision for parens patriae suits by the Government on behalf of injured third parties. However, there have been some instances in which the Department of Justice has deemed it worthwhile to seek treble damages under RICO. The cases approved by the Department for filing as of mid-1987 involved fraud against the Department of Defense, fraud in connection with federally backed crime insurance, and fraud in connection with a federally insured credit union. 12/ Again, other such cases are being considered; United States Attorneys are encouraged to seek new areas in which to apply the powerful treble-damages provision.

The main purpose of this Manual is to provide enough discussion of legal and practical points concerning civil RICO to provide a good introduction for government attorneys who may have cases in which the statute's provisions could be useful. Obviously, it is impossible to discuss every aspect of this subject in a one-volume manual. For example, no attempt is made here to cover in detail the many aspects of federal civil procedure, although pertinent principles are discussed where appropriate, and Section VII provides a brief overview of federal civil procedure for the benefit of attorneys with little or no civil background. In fact, because of the complexity of that subject, it is virtually

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12/ See id.

essential that an experienced civil litigator be assigned to the trial team for any civil RICO case, even when the case originated from a criminal investigation.

This Manual also does not attempt to provide an explanation of the criminal provisions of RICO. An understanding of those provisions is critical, because a civil RICO suit must be based on an underlying violation of the criminal provisions in 18 U.S.C. §§ 1961-1963. A general introduction to the criminal RICO provisions is provided in the Criminal Division's manual on criminal RICO, which is available to government attorneys through the Organized Crime and Racketeering Section.

Finally, it is important to note that the points made in this Manual are subject to change; for the latest guidance on RICO issues, and for information about seeking approval of criminal and civil RICO actions, government attorneys should contact the Organized Crime and Racketeering Section in Washington, D.C., at 633-1214.

II. Overview of Civil RICO Provisions

A. Statutory Provisions

The civil RICO provisions are set forth at 18 U.S.C. §§ 1964-1968. These provisions are predicated on the general RICO provisions in 18 U.S.C. §§ 1961 and 1962. The heart of civil RICO is in the four subsections of Section 1964. Section 1964(a) gives federal district courts jurisdiction to grant injunctive and other equitable relief in order to prevent and restrain violations of section 1962. Section 1964(a) authorizes courts to provide such relief by issuing appropriate orders, including, but not limited to:

1. ordering any person to divest himself of any interest in an enterprise;

2. imposing reasonable restrictions on future activities or investments of any person, including prohibiting the person from engaging in the same kind of endeavor as the enterprise engaged in;

3. ordering dissolution or reorganization of any enterprise.

The three remedies described in § 1964(a) are only illustrative. As a result of the liberal construction clause in the statute enacting RICO, 13/ it is clear that courts should be given broad discretion in fashioning

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13/ Section 904(a) of Title IX of the Organized Crime Control Act of 1970 (Public Law 91-452, enacting RICO) states that "the provisions of this title shall be liberally construed to effectuate its remedial purposes." The Supreme Court emphasized the importance of this directive in the civil context in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), when it stated that "if Congress' liberal construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." Id. at 492 n.10.

remedies to provide equitable relief in cases where civil RICO jurisdiction exists.

Section 1964(b) grants authority to the Attorney General to institute civil RICO actions for equitable relief. 14/ This section also provides that the court may enter restraining orders or take other appropriate action pending a final determination of the case. This provision for pre-trial relief is very important and should be utilized by the Government whenever appropriate in civil RICO cases. Use of these provisions allows the Government to obtain relief from further RICO violations immediately upon filing the complaint. These provisions have been invoked by the Government to obtain a preliminary injunction to restrain defendants from further engaging in an illegal gambling operation, 15/ to enjoin convicted organized crime defendants from further participating in the affairs of a labor union, 16/ and to place a restaurant under the control of a receiver to prevent alleged skimming of receipts while a civil RICO lawsuit was pending. 17/ Factors to consider in pursuing preliminary relief and the

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14/ There is a difference of opinion as to whether equitable remedies are available to private RICO litigants. See Section IV(G)(1), infra.

15/ United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

16/ E.g., United States v. Local 6A, Cement and Concrete Workers, Laborers International Union, 663 F. Supp. 192 (S.D.N.Y. 1986).

17/ United States v. Ianniello, 824 F.2d 203 (2d Cir. 1987).

standards pertaining to the granting of preliminary relief will be discussed later. 18/

Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of Section 1962" may sue and recover treble damages, costs, and reasonable attorney's fees. The statute does not make it clear whether the United States is a "person" that is entitled to sue under this provision. In view of the broad remedial purposes of RICO, the Department of Justice has taken the position that the United States is a "person" for purposes of Section 1964(c). 19/

With respect to the attorney's-fee provision of Section 1964(c), one court has held that attorney's fees are available only to a plaintiff who has successfully recovered treble damages under that section; the fees are not available to a plaintiff who has obtained only injunctive relief or has settled the suit. 20/ However, the fees may be available when a default judgment is entered in favor of the plaintiff. 21/

18/ See Section IV(E)(4), infra.

19/ See Section IV(D)(1), infra.

20/ Aetna Casualty and Surety Co. v. Liebowitz, 730 F.2d 905 (2d Cir. 1984).

21/ See Thiem v. Sigler, 651 F. Supp. 460, 461 & n.3 (W.D. Pa. 1985).

In addition, the Equal Access to Justice Act, 28 U.S.C. § 2412, provides for an award of attorney's fees to a defendant in a government action in some instances. See U.S. Department of Justice, Office of Legal Policy, Award of Attorneys' Fees and Other Expenses in Judicial Proceedings Under the Equal Access to Justice Act

Section 1964(d) provides that a final judgment or decree rendered in favor of the United States in any criminal RICO proceeding estops the defendant from denying the essential allegations of the criminal offense in a subsequent civil RICO case brought by the Government. This provision is very useful to the Government when civil RICO cases are filed following a criminal prosecution. Basically, this provision will prevent a defendant from contesting any of the factual allegations that were proved in the criminal proceeding. As a result, if the civil RICO suit is based on essentially the same allegations as the criminal RICO prosecution, the Government should prevail on a motion for summary judgment against any defendants who were convicted in the criminal proceeding. 22/

Sections 1965-1968 contain provisions involving procedural aspects of civil RICO actions. Section 1965 discusses venue and service of process, and provides for more latitude as to venue requirements than does 28 U.S.C. § 1391, which governs civil actions in general. Section 1965(a) provides that any civil action brought under the RICO statute may be brought in the district court of the United States for any district in which such person "resides, is found, has an agent, or transacts his affairs." Additionally, Section 1965(b) permits the court to require

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(revised ed. 1985).

22/ See Section IV(B)(6), infra, for a further discussion of collateral estoppel in civil RICO cases.

other parties residing in any district to be brought before it if it is shown that the ends of justice so require. 23/ Section 1965(c), which applies only to suits brought by the Government, provides for nationwide service, subject only to the limitation that service of a subpoena upon a witness who resides outside of the district and more than 100 miles from the place of trial requires approval of a judge after a showing of good cause by the Government. Finally, Section 1965(d) allows for service of process on a person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

Section 1966 provides for expedited treatment of civil RICO lawsuits brought by the Government if the Attorney General files with the court a certificate stating that the case is of public importance. This provision originally called for immediate assignment of a judge who would "cause such action to be expedited in every way." However, a 1984 amendment to Title 28 removed this latter provision from the statute, so that the only remaining benefit is immediate designation of a judge to hear the action. 24/ Section

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23/ For nationwide service to be imposed under § 1965(b), the court must have jurisdiction over at least one of the defendants and the plaintiff must show that there is no other district in which a court would have personal jurisdiction over all of the defendants. Butcher's Union Local No. 498 v. SDC Investment, Inc., 788 F.2d 535, 539 (9th Cir. 1986). For a further discussion of venue in civil RICO cases, see Section IV(B)(2), infra.

24/ Pub. L. 98-620, 98 Stat. 3356 (1984) (codified as amended at 28 U.S.C. § 1657)(providing that each court "shall determine the order in which civil actions are heard and determined, except that the court shall

1967 provides that proceedings in or ancillary to civil RICO suits brought by the United States may be open or closed to the public "at the discretion of the court after consideration of the rights of affected persons." This provision apparently was intended to allow public depositions if the court permits. 25/

The last of the civil RICO provisions, Section 1968, provides detailed procedures for the issuance of civil investigative demands by the United States prior to the institution of criminal or civil proceedings. These provisions, modeled after the antitrust statutes in existence when RICO was enacted, have not been used as of this writing, but may become more useful as the volume of civil RICO suits brought by the Government increases. Civil investigative demands will be discussed in further detail below. 26/

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expedite the consideration of any action brought under chapter 153 or section 1826 of this title, any action for temporary or preliminary injunctive relief, or any other action if good cause therefor is shown").

25/ See Organized Crime Control: Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary on S. 30 and Related Proposals, 91st Cong., 2d Sess. 385, 402, 500, 559-60, 665 (1970); S. Rep. No. 91-617, 91st Cong., 1st Sess. 125, 161 (1969); Bradley, Racketeers, Congress, and the Courts: An Analysis of RICO, 65 Iowa L. Rev. 837, 843 n.32 (1980). It should be noted that Department of Justice regulations require government attorneys to oppose the closing of any court proceedings, including depositions, unless unusual circumstances are present. See 28 C.F.R. § 50.9.

26/ See Section V(B), infra.

B. Differences from Criminal RICO Prosecutions

Obviously, there are many differences between criminal and civil cases brought by the United States under the RICO statute. The most obvious difference is that criminal RICO prosecution can result in fines, imprisonment, and forfeiture of interests connected to racketeering activity. Civil RICO suits can result only in treble damages or equitable relief, or both. Equitable relief can include an order of divestiture, requiring a defendant to sell his interest in an enterprise, but it cannot include the uncompensated forfeiture of assets that can result from a RICO prosecution.

In addition to the differences in available penalties or remedies, there are numerous procedural differences between criminal and civil RICO cases. For example, criminal RICO cases are governed by the Federal Rules of Criminal Procedure, with their strict standards of pleading an indictment and restricted use of discovery. Civil RICO cases are governed by the Federal Rules of Civil Procedure, which provide for, inter alia, extensive discovery on behalf of plaintiffs and defendants, 27/ and liberal rules of pleading, including the possibility of amending the complaint. 28/ The burden of proof in civil cases is a preponderance of the evidence, rather than beyond a

27/ See Fed. R. Civ. P. 26-37.

28/ Fed. R. Civ. P. 15.

reasonable doubt. 29/ While defendants in civil cases are not required to testify about matters that may incriminate them, if they refuse to testify they may be subject to an adverse inference or else may be immunized. Additionally, in a case where the Government seeks only equitable relief, the defendant generally is not entitled to a jury trial. 30/ The exclusionary rule for searches and seizures that violate the fourth amendment does not ordinarily apply in a civil proceeding by the United States if the illegal search was by state officials. 31/ However, the rule may apply if the search was by federal agents. 32/ The sixth amendment right to counsel applies only to criminal proceedings, so it should not apply in a civil RICO trial. 33/ All of these differences between civil and criminal suits may play a role in determining whether to use the civil or criminal RICO provisions.

29/ See United States v. Local 560, International Brotherhood Teamsters, 780 F.2d 267, 279 n.12 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986).

30/ See Section IV(E)(1), infra.

31/ United States v. Janis, 428 U.S. 433 (1976).

32/ See Tirado v. Commissioner of Internal Revenue, 689 F.2d 307 (2d Cir. 1982), cert. denied, 460 U.S. 1014 (1983) (rule did not apply where search was by federal drug agents, whose "zone of primary interest" did not extend to subsequent use in civil tax case); Pizzarello v. United States, 408 F.2d 579, 585-86 (2d Cir.), cert. denied, 396 U.S. 986 (1969) (rule did apply where search was by federal agents). See generally 1 W. LaFave, Search and Seizure § 1.7 (1987).

33/ See, e.g., Wolff v. McDonnell, 418 U.S. 539, 576 (1974).

C. Differences from Private Civil RICO Suits

Although most of the civil RICO provisions are applicable to both government and private civil RICO suits, there are certain differences that should be recognized. First, the Government clearly can obtain injunctive and other equitable relief under 18 U.S.C. § 1964(a) as well as treble damages under 18 U.S.C. § 1964(c), whereas private plaintiffs clearly can obtain treble damages but may not be entitled to equitable relief. 34/ Second, several provisions of the RICO statute apply only to suits brought by the Government. Section 1965(c) provides for nationwide service of process in suits brought by the United States. Section 1966 provides for a certain degree of expedited treatment of civil RICO suits brought by the Government. Section 1967 allows for public depositions in such cases if the court permits. Section 1968 provides for the Government to issue civil investigative demands.

Third, although not a "difference" from private civil RICO, it should be noted that there is no provision for parens patriae RICO damage suits by the Federal Government. Thus, the Government can bring suit for treble damages only in those relatively few instances in which the Government itself has been injured in its business or property.

III. Deciding When to Use Civil RICO

It is not particularly difficult to determine whether the civil RICO provisions apply to a given fact pattern.

34/ See Section IV(G)(1), infra.

The injunctive provisions are likely to be applicable in any situation in which the criminal provisions apply, at least where there is some chance of a continuing violation and, hence, some need for injunctive relief. The treble-damages provisions are likely to be applicable in any case where the criminal provisions apply and the United States has been injured in its business or property by reason of a violation of Section 1962.

The more difficult question is how to determine whether it is worthwhile for the Government to use civil RICO in a given case. This section of the Manual will discuss the advantages and disadvantages that should be taken into account in making that determination. The discussion will first address the general legal and procedural factors that are common to both treble-damages and injunctive actions, and then will address the factors that are specific to each of those categories.

A. General Considerations--Favorable

There are several general advantages to civil RICO over other remedies. (For purposes of this discussion, the primary alternative will be assumed to be criminal prosecution.) First, the burden of proof in a civil RICO suit is a preponderance of the evidence, rather than the criminal standard of proof beyond a reasonable doubt. 35/ Thus, in a case in which there is not sufficient evidence to proceed with a criminal prosecution, it may be possible to

35/ See Section IV(B)(5), infra.

seek alternative relief under civil RICO. It is not desirable, however, to attempt to salvage every unsuccessful criminal prosecution by re-packaging it as a civil RICO suit. This factor should be considered only in conjunction with the other factors discussed below.

A second general advantage of civil RICO is the liberal pleading rules of civil procedure. Unlike a criminal indictment, a civil complaint can be amended as the Government learns more about the facts of the case. 36/ Also, civil rules permit a more "bare-bones" type of pleading than is permitted for indictments, 37/ although the Organized Crime and Racketeering Section, in approving RICO complaints, may require more "criminal"-style pleadings than the courts would require. 38/

A third advantage of civil RICO over criminal prosecution is the broad range of pre-trial discovery available under the Federal Rules of Civil Procedure. Once the complaint has been filed, the Government may use depositions, interrogatories, requests for admission, and other discovery tools to strengthen the evidentiary basis of the case. 39/ One particular feature of such discovery that may be useful to government attorneys is that, even though a civil RICO defendant may assert his fifth amendment

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36/ See Section VII(A), infra.

37/ See Sections IV(B)(4), VII(A), infra.

38/ See Section IV(B)(4), infra.

39/ See Section VII(G)(3), infra.

privilege to refuse to provide answers that may incriminate him, the assertion of the privilege may give rise to a negative inference in the litigation. 40/ Similarly, if the Government obtains a court order conferring use immunity on a civil defendant, that defendant can no longer rely on the fifth amendment privilege. If an immunized defendant then testifies, he can still be subject to civil penalties based on his testimony, although he is immune from criminal prosecution based on that testimony. If the immunized defendant refuses to testify, he will be subject to contempt proceedings and sanctions. 41/

B. General Considerations--Unfavorable

There are several areas in which civil RICO actions in general may be less desirable than criminal actions. First, the remedies are different. Although civil RICO offers the powerful remedies of equitable relief and treble damages, it does not empower courts to impose the punitive measures available in a criminal RICO prosecution--namely, imprisonment, fines, and forfeiture. This is not a disadvantage in every case, because, depending on the circumstances, the civil remedies may afford more meaningful relief than criminal prosecution would. For example, if a labor union has been heavily infiltrated by organized crime, convicting various organized crime associates or union officials may not result in long-term correction of the

40/ See Section IV(B)(7), infra.

41/ See id.

situation, because other corrupt individuals can take the place of those who were convicted. An injunctive action under RICO, however, as in the Local 560 case, can remove the entire hierarchy of the union and place the union under a trusteeship to purge the criminal influence completely. There are many cases, however, in which the conduct is so egregious that fines and imprisonment are called for. And, where persons have profited from racketeering activity or have interests in enterprises that are tainted by racketeering activity, the situation may call for the punitive forfeiture provisions of criminal RICO.

The important point to note here is that civil RICO actions, like criminal RICO actions, are not appropriate for every situation involving a pattern of racketeering activity. There are many factors to be considered in determining which approach is likely to yield the best results in a given case. A checklist setting forth such factors appears below at the end of Section III.

A second factor that may bear unfavorably on the decision to bring a civil RICO suit is that the broad civil discovery provisions work in both directions. Defendants may make broad requests for documents, depose government witnesses, submit burdensome interrogatories, and otherwise strain the Government's resources. As will be discussed in more detail later, 42/ there are ways in which the Government may be able to limit such discovery, but the

42/ See Section VII(G)(5), infra.

possibility of broad disclosure must be taken into account when contemplating a RICO suit, particularly when informant files or other sensitive information may be at stake.

Related to the issue of broad discovery against the Government is the possibility of protracted litigation. The discovery phase may extend for months or even years; there is no Speedy Trial Act for civil cases as there is for criminal prosecutions. Moreover, civil suits may not receive the expedited treatment that criminal cases do.

Another factor to consider is the nature of venue and process, which are more limited in civil cases than in criminal prosecutions. Although RICO has special venue provisions in 18 U.S.C. § 1965 that are somewhat more liberal than normal civil venue provisions, they are not as liberal as the criminal venue provisions. Thus, it may not be possible to bring suit against all defendants in a single district, even though a RICO prosecution against all defendants could be brought in one district. Similarly, under 18 U.S.C. § 1965(c), witness subpoenas in civil RICO cases may not be served in another district at a place more than 100 miles from the court except on a showing of good cause, whereas, in a criminal prosecution, subpoenas may be served at any place within the United States. 43/

Also weighing against the use of civil RICO is the limited availability of pre-trial discovery. If the suit is being brought as a follow-up to a criminal investigation or

43/ Fed. R. Crim. P. 17(e)(1).

trial, there may be a problem with obtaining access to grand jury materials for use in the civil suit. 44/ If the action is being brought civilly ab initio, then the Government may not use the grand jury at all. Although RICO includes special provisions for obtaining investigative information through the use of civil investigative demands, those provisions are cumbersome, limited, and much less powerful than grand jury subpoenas, in that they can obtain only documents, and not testimony or other information that can be obtained through grand jury subpoenas. 45/ Of course, the availability of broad post-complaint discovery and the lesser burden of proof for civil cases are factors that lessen the handicap of proceeding without the grand jury.

Another general drawback to using civil RICO should be mentioned, although it is not a necessary or permanent negative factor. Because any civil RICO case must involve a violation of federal or state criminal provisions, most government RICO suits are likely to be developed by criminal prosecutors rather than civil litigators. Most federal prosecutors probably do not have much background in civil litigation, and, as a result, may be reluctant to undertake a civil RICO action or, having undertaken one, may not have the background to handle effectively all the procedural aspects of the case. It is hoped that this Manual will

44/ See Section V(A)(1), infra.

45/ See Section V(B), infra.

provide enough of a general introduction to the subject to encourage prosecutors to use the civil provisions where appropriate. However, because of the sharp differences between criminal and civil litigation, it is strongly recommended that any team of government attorneys handling a civil RICO suit include at least one experienced civil litigator.

C. Specific Considerations for Injunctive Suits

Apart from the general considerations discussed above, there are some particular characteristics of the two basic categories of civil RICO actions that should be taken into account. First, with respect to injunctive actions, there is a very wide variety of relief available. Within broad limits, the court has discretion to fashion relief that is tailored to correct the particular problem at issue. Thus, for example, the court can enjoin persons from engaging in certain conduct, appoint receivers or trustees, order reorganization or divestiture of an enterprise, remove persons from office, and order restitution. 46/ Within the limits of equitable power, the Government and the court can construct creative remedies that are designed to bring meaningful, long-lasting relief.

A second particular advantage of injunctive actions is that the defense is not entitled to a jury trial. 47/ This

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46/ These examples are illustrations; for a more complete discussion, see Section IV(E)(2), infra.

47/ See Section IV(E)(1), infra.

factor eliminates the danger of jury-tampering or any of the multitude of other problems that can arise when a jury is involved.

A third possible advantage of injunctive actions is that, at least in the view of the Criminal Division, there is no statute of limitations with respect to such suits brought by the Government. 48/ However, this advantage may be somewhat illusory, because, in order to obtain injunctive relief, there must be some showing of a likelihood of a future RICO violation, which would be difficult to show unless there was some proof of recent illegal activity.

D. Specific Considerations for Treble-Damages Suits

There are no particularly unusual features of treble-damages suits other than the general characteristics of civil RICO suits discussed earlier. A few points should be borne in mind when contemplating such a suit, however. First, a jury trial is available to the defense. Second, the Government must prove that it was injured in its business or property. Third, it has not yet been firmly settled in the courts that the Federal Government is a "person" entitled to sue for treble damages under 18 U.S.C. § 1964(c). Also, careful consideration should be given to whether other federal statutes, such as the False Claims Act, 49/ provide adequate legal remedies for the injury to

48/ See Section IV(B)(3), infra.

49/ See 31 U.S.C. §§ 3729-31. The False Claims Act generally provides for the recovery of multiple damages and civil penalties for the presentation of false claims to the Government, the presentation of false statements

the Government.

E. Checklists for Deciding Whether to Use Civil RICO

The following lists are not intended to be exhaustive or applicable to every possible case. They are intended, rather, as rough guides to assist government attorneys in making an initial determination whether to give serious consideration to bringing a civil RICO action in various factual situations. No checklist can be a substitute for a thorough evaluation of the issues in a given case.

The first checklist sets forth various attributes of civil RICO suits and criminal prosecutions; the second checklist sets forth various factual situations and indicates which civil RICO remedy, if any, is likely to be useful in addressing each situation. The entries in these lists are necessarily abbreviated; the full discussions in this Manual should be consulted for further guidance with respect to any given issue addressed in the lists.

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to get false claims paid or allowed, and conspiracy to submit false claims. Thus, where the underlying fact pattern involves the submission of false claims or false statements -- for example, in most cases of fraud on government contracts -- strong consideration should be given to the use of the False Claims Act. The Act now provides for treble damages in most circumstances. (For further information see the "Civil Fraud Monograph" of the Commercial Litigation Branch, Civil Division, or contact the Director of that Branch in Washington at 724-7129.) On the other hand, there may be fact patterns where the Government has been monetarily damaged by fraud or other criminal conduct, but where a claim for payment or other false statement cannot be identified. Such cases may be ripe for the use of civil RICO.

1. Checklist of General Factors

Factor	Government Injunctive Action	Government Treble-Damages Action	Criminal Prosecution
jury trial	no	yes	yes
burden of proof	preponderance	preponderance	beyond a reasonable doubt
principal pre-filing investigative tool	CID	CID	grand jury
negative inference from 5th amendment assertion	yes	yes	no
prison, fines, forfeiture	no	no	yes
expedition of action	limited	limited	Speedy Trial Act
long-term supervision by court after verdict	yes	no	no
amend charging document	yes	yes	no (although indictment may be superseded)
discovery	broad	broad	limited
broad range of equitable relief available	yes	no	no
statute of limitations	none (but note laches issue)	4 years or more	5 years

2. Checklist for Various Factual Situations

Situation	Government Injunctive Action	Government Treble-Damages Action
illegal gambling business	possible, but may not be worthwhile	no
union infiltrated by criminal elements	yes	no
major procurement fraud against Government	yes, if re-structuring of business called for	yes
variety of criminal activity by criminal group--*e.g.*, motorcycle gang, narcotics ring	not likely to be worthwhile	no
infiltration of legitimate business, such as casino, by criminal elements	yes	no
public corruption where enterprise is government agency	no	yes, if government agency suffered financial injury
public corruption where enterprise is legitimate business	possibly, if corruption is entrenched in business	yes, if Government suffered financial injury

IV. Legal Issues in Government Civil RICO Cases

A. Introduction

This section of the Manual will discuss some of the major legal issues that may arise in civil RICO actions for injunctive relief or treble damages brought by the Federal Government. With a few exceptions, this section will not address the general RICO issues that concern the substance of the RICO offense; those issues are treated in detail in the Criminal Division's manual on criminal RICO prosecutions. This section also will not discuss many general matters of civil procedure that are common to all federal civil litigation. 50/ Rather, this discussion will generally be confined to those particular legal issues that have arisen, or are likely to arise, in the specific context of civil RICO suits brought by the Government.

The discussion will first address major procedural and substantive issues common to all government RICO suits; it will then address certain issues specific either to injunctive or treble-damages actions. The discussion will then cover a few criminal RICO issues that are of particular interest for civil RICO litigation, primarily because most of the litigation concerning those issues has been in civil RICO cases. Finally, this section will discuss briefly some issues that arise in private RICO litigation but are not likely to arise in RICO suits brought by the Federal

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50/ An overview of federal civil procedure is set forth in Section VII, *infra*.

Government.

Before proceeding to the discussion of specific legal issues, however, one general point should be made about the differences between private civil suits and actions brought by the Government. Although there have been very few RICO suits brought by the Federal Government as of this writing, there have been hundreds of suits brought by other plaintiffs, mostly private entities or individuals. 51/ Although the Government does not have any direct interest in these private suits, the opinions issued by courts in connection with those suits often deal with issues that are applicable to all RICO actions, including those brought by the Government. Because of the wide use of RICO by private plaintiffs, often in contexts that appear far-removed from the original intent of Congress, and based on weak facts or theories, many such opinions have been unfavorable to the plaintiffs. 52/ Thus, it may be helpful for government attorneys to be able to distinguish these cases. There is not much precedent on this issue, but in one private RICO action 53/ the district court noted the distinction

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51/ See, e.g., Lacovara & Aronow, The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO, 21 New Eng. L. Rev. 1, 13-18 (1986).

52/ See, e.g., Entre Computer Centers, Inc. v. FMG of Kansas City, Inc., 819 F.2d 1279 (4th Cir. 1987); Elliott v. Chicago Motor Club Insurance, 809 F.2d 347 (7th Cir. 1986); Atkinson v. Anadarko Bank and Trust Co., 808 F.2d 438 (5th Cir. 1987).

53/ Shopping Mall Investors, N.V. v. Frances & Co., No. 84 Civ. 1469 (S.D.N.Y Jan. 30, 1987).

between RICO prosecutions, which are screened and approved by the Department of Justice, and private RICO actions, which may be brought by any plaintiff who desires to file one. The court said that RICO may be applied more liberally 54/ for criminal prosecutions that have been carefully screened by the Department of Justice than for private actions. Although the distinction made in that case was between criminal actions and private civil actions, the same rationale should apply for government civil actions, which are reviewed and screened by the Department of Justice just as carefully as are criminal RICO prosecutions. 55/

B. General Civil RICO Issues--Procedural

1. Subject Matter Jurisdiction

Original subject matter jurisdiction for civil RICO actions by the Government is conferred upon the federal district courts by 18 U.S.C. § 1964(a) (injunctive actions) and § 1964(c) (treble-damages actions). In addition, jurisdiction may be based on 28 U.S.C. § 1331 (federal questions) or § 1345 (civil actions brought by the United States). It is not clear whether the federal district courts have exclusive jurisdiction over federal RICO suits. 56/ One area in which subject matter jurisdiction in civil

54/ The "liberal-construction" clause that applies to RICO actions is discussed in note 13, supra.

55/ See also McLendon v. Continental Group, 602 F. Supp. 1492, 1511-12 (D.N.J. 1985) (holding that civil RICO action should be considered under different standards than criminal RICO prosecutions).

56/ The only federal appellate court to rule on this issue has held that federal and state courts share

RICO cases may be of controversy is the area of extraterritorial jurisdiction. One appellate court 57/ has ruled that a federal district court had jurisdiction to consider a private RICO claim where much of the alleged activity occurred overseas, because some of the conduct allegedly occurred within the United States. 58/

2. Venue and Service of Process

For criminal RICO prosecutions, venue is generally governed by 18 U.S.C. § 3237(a), which permits prosecution in any district in which the offense was begun, continued, or completed. Under this provision, a case involving acts and defendants from various districts can be prosecuted in any district where some of the acts occurred. See United States v. Pepe, 747 F.2d 632, 669 n.44 (11th Cir. 1984).

However, venue for civil RICO suits is governed by different statutory provisions, which embody different principles. The main civil RICO venue provision is 18 U.S.C. § 1965(a), which provides:

> Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States

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jurisdiction over suits under 18 U.S.C. § 1964(c). Lou v. Belzberg, No. 86-6057 (9th Cir. Nov. 12, 1987). Other courts, however, have held that federal jurisdiction is exclusive. See, e.g., Broadway v. San Antonio Shoe, Inc., 643 F. Supp. 584 (S.D. Tex. 1986).

57/ Republic of the Philippines v. Marcos, 818 F.2d 1473, 1477-78 (9th Cir. 1987).

58/ The topic of the district court's jurisdiction over the person of civil RICO defendants is covered in the general discussion of civil procedure in Section VII(B), infra.

> for any district in which such person resides, is found, has an agent, or transacts his affairs.

While this provision governs venue in civil RICO cases, courts have agreed that this provision was meant to supplement, and not to supplant, the general venue provisions obtaining in federal question and diversity cases. See, e.g., Miller Brewing v. Landau, 616 F. Supp. 1285, 1291 (E.D. Wis. 1985); So-Comm, Inc. v. Reynolds, 607 F. Supp. 663, 665-66 (N.D. Ill. 1985); Van Schaick v. Church of Scientology, 535 F. Supp. 1125, 1133 n.6 (D. Mass. 1982) Consonant with this view, the propriety of venue in a RICO case may be tested under either § 1965(a), or the general venue provision for federal question cases, 28 U.S.C. § 1391(b), or the special venue provision for cases involving corporate defendants, 28 U.S.C. § 1391(c). 59/

According to the legislative history, RICO's "broad venue provisions and process powers" were modeled after antitrust legislation and "are required by the nationwide nature of the activity of organized crime in its infiltration efforts." S. Rep. No. 91-617, 91st Cong., 1st Sess. 160-61 (1969). See Transunion Corp. v. Pepsico, Inc., 811 F.2d 127, 129 (2d Cir. 1987). A few courts have construed § 1965(a) to require significant contacts with the district by each individual defendant or his personal agent, and to require that venue be proper as to each individual

59/ The topic of venue is discussed in more detail in the general discussion of civil procedure in Section VII(C), infra.

defendant. See, e.g., Sunray Enterprises v. David C. Bouza & Associates, 606 F. Supp. 116 (S.D.N.Y. 1984) (venue improper under § 1965(a) where defendant's only contact with district was attendance at occasional trade fair); Payne v. Marketing Showcase, Inc., No. 84-C-6645 (N.D. Ill. 1985) (venue must be proper as to each defendant; plaintiff must show venue for each defendant due to his own contacts with the district, rather than those of a co-defendant). However, several recent cases have ruled that such contacts by each defendant are not required under the special "ends of justice" venue provision under RICO, in § 1965(b). That provision states:

> In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

This provision, which actually deals not with venue but with service of process, has been invoked when there is no single district in which venue would ordinarily be proper as to all defendants. In such cases, courts have held that if venue is improper as to a particular defendant, the court may order that defendant summoned if the action is properly venued as to at least one defendant already in the suit. See, e.g., Soltex Polymer Corp. v. Fortex Industries, Inc., 590 F. Supp. 1453, 1459 (E.D.N.Y. 1984); Farmers Bank v.

Bell Mortgage Corp., 452 F. Supp. 1278 (D. Del. 1978). 60/

There has not been any reported litigation of venue issues in connection with RICO suits brought by the Government. Thus, it is not clear to what extent the case law that has developed in connection with private litigation will apply to government actions. It is more likely that the "ends of justice" provision of 18 U.S.C. § 1965(b) would be found applicable in cases brought by the Government than in private actions.

3. Limitations and Laches

The RICO statute does not contain any provision setting forth a particular limitations period. For criminal cases, it is clear that the five-year statute of limitations in 18 U.S.C. § 3282 applies. 61/ For civil cases, the considerations are different for different types of actions. For private RICO actions seeking treble damages, the Supreme Court has ruled that a four-year limitations period applies, borrowed from the Clayton Act in the antitrust field. 62/ Although the Court used broad language in that opinion that could be read to mean that the four-year period applies to

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60/ See also Butchers Union Local 498 v. SDC Investment, Inc., 788 F.2d 535 (9th Cir. 1986) (finding that § 1965(b) did not confer personal jurisdiction over certain out-of-state defendants); Goldwater v. Alston & Bird, 664 F.2d 403, 408 (S.D. Ill. 1986) (finding venue proper under Section 1965(b) where defendants had minimal contacts with district).

61/ See, e.g., United States v. Walsh, 700 F.2d 846, 851 (2d Cir.), cert. denied, 464 U.S. 825 (1983).

62/ Agency Holding Corp. v. Malley-Duff & Associates, Inc., 107 S. Ct. 2759 (1987).

all civil RICO suits, 63/ it is clear from the context of the opinion that the ruling applies only to private actions for treble damages under 18 U.S.C. § 1964(c). The Malley-Duff case itself involved a private treble-damages suit, and the Court, in adopting the Clayton Act limitations period, noted that both the RICO provision and the Clayton Act provision permit suits for treble damages by "private attorneys general." 64/ Thus, the Court was focusing on the policies and Congressional intent underlying private actions under RICO; the Court did not discuss the appropriate limitations period for civil RICO actions brought by the Federal Government.

It is not clear what period a federal court would choose as the appropriate limitations period for government treble-damages suits under 18 U.S.C. § 1964(c). Perhaps courts would extend the Supreme Court's holding in Malley-Duff to apply to actions by the Federal Government. There is some support for doing so, because 15 U.S.C. § 15b, the four-year statute of limitations for Clayton Act private actions under 15 U.S.C. § 15, also applies to suits for damages by the United States under 15 U.S.C. § 15a. Still, it is not entirely clear that the four-year period would be borrowed for government RICO actions under 18 U.S.C. §

63/ For example, the Court noted that the case presented the "question of the appropriate statute of limitations for civil enforcement actions brought under RICO." 107 S. Ct. at 2762.

64/ Id. at 2764.

1964(c).

Generally, the United States is not subject to any limitations period in suits enforcing its rights, unless Congress has specifically provided otherwise. Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Glenn Electric Co. v. Donovan, 755 F.2d 1028, 1033 (3d Cir. 1986); United States v. Podell, 572 F.2d 31, 35 n.7 (2d Cir. 1978). However, although RICO does not set forth a limitations period, there is a general statute of limitations for suits by the Government. That statute, 28 U.S.C. § 2415, establishes a six-year limitations period for damages actions based on an express or implied contract, and a three-year period, in most cases, for damages actions based on a tort. Until this issue has been litigated, the appropriate period will remain unsettled. However, there is a strong argument for relying upon the six-year period of 28 U.S.C. § 2415(a) for cases involving express or implied contracts. Thus, for cases involving procurement fraud, and, perhaps, for most government treble-damages suits, the six-year period appears to be appropriate. 65/

For government injunctive and equitable actions under 18 U.S.C. § 1964(a) and (b), there is little or no precedent under RICO with respect to the appropriate limitations

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65/ See also 31 U.S.C. § 3731(b)(6-year limitations period for civil suits by the United States under the False Claims Act). On the other hand, a court might rule that, because RICO predicate acts are in the nature of torts, the three-year period of Section 2415(b) should apply. Attorneys should proceed with caution with respect to this issue.

period. As noted above, the United States is not bound by any statute of limitations unless Congress so provides. There is no such provision in RICO, and no general statute of limitations for government injunctive actions. Moreover, in Malley-Duff, the Supreme Court, in explaining why an earlier version of the bill that became RICO contained no limitations provision, noted that "the new bill included no private treble damages remedy, and thus obviously had no need for a limitations period." Slip op. at 12.

The proper view appears to be that there is no specific statute of limitations governing RICO injunctive actions brought by the United States under 18 U.S.C. § 1964(a) and (b). Another principle that might apply to such injunctive actions is that of laches, the doctrine that a plaintiff may have delayed too long in bringing an equitable action to be permitted to proceed. Again, the general rule is that laches is not available as a defense to a suit brought by the United States to enforce a public right or protect the public interest. See, e.g., United States v. Ruby Co., 588 F.2d 697, 705 n.10 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979).

However, other principles will ensure that the Government does not delay too long in bringing a suit for equitable relief. In actions for this sort of relief, the Government must establish a substantial likelihood that the underlying RICO violation will recur if the relief is not

granted. 66/ Thus, unless the Government can show fairly recent illegal conduct, it is unlikely that it will be able to establish the likelihood that such conduct will occur in the future unless the requested relief is granted.

4. Pleading

Pleading in a civil RICO complaint presents some special problems. 67/ Every civil RICO suit, whether for treble damages or for equitable relief, must be based on one or more violations of the RICO offenses set forth in 18 U.S.C. § 1962. Those offenses, in turn, must be based upon a pattern of racketeering activity involving two or more state or federal crimes, or one or more collections of unlawful debt. 68/ Thus, any civil RICO complaint must plead criminal violations as well as civil allegations.

As is the case with most civil RICO issues, most

66/ See United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 336-37 (D.N.J. 1984) (granting equitable relief), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986); United States v. Winstead, 421 F. Supp. 295 (N.D. Ill. 1976) (denying Government's motion for temporary restraining order under § 1964; holding that evidence of gambling activities six months earlier did not justify finding that such activity would continue in the future). See also United States v. Local 6A, Cement and Concrete Workers, Laborers International Union, 663 F. Supp. 192, 194-96 (S.D.N.Y 1986) (district court in civil RICO action by United States rejected defense argument that suit was "untimely" where Government asserted that it had proof of continuing misconduct).

67/ For a general discussion of pleading requirements in federal civil litigation, see Section VII, infra.

68/ For a full discussion of the elements of a RICO violation under 18 U.S.C. § 1962, see the latest edition of the Criminal Division's manual on RICO prosecutions.

litigation to date concerning pleading requirements has occurred in connection with private suits. As discussed earlier, 69/ government attorneys may point to strong distinctions between private suits and government suits, so the precedents in private suits may not be fully applicable to suits by the United States. However, because the pleading requirements are designed to ensure that defendants receive sufficient notice of the claims against them, it is advisable to follow these requirements in any event.

The basic pleading requirements for a civil RICO suit are straightforward. For a claim based on a violation of 18 U.S.C. § 1962(c), the most common RICO allegation, it is necessary to allege that the defendant, (1) being employed by or associated with (2) an enterprise engaged in or affecting interstate or foreign commerce, (3) conducted or participated in the conduct of the affairs of the enterprise (4) through a pattern (5) of racketeering activity (or through collection of an unlawful debt). 70/ The first and third of these elements have not been matters of particular controversy in litigation concerning civil RICO pleading. 71/ Certain aspects of the "enterprise" and "pattern"

69/ See Section IV(A), supra.

70/ See Villafane v. Segarra, 797 F.2d 1 (1st Cir. 1986). Of course, the complaint also must set forth other matters, such as the statement of jurisdiction, claim for relief, and the like. These matters are not particularly related to the RICO cause of action; such general pleading principles are discussed in Section VII, infra.

71/ But see Averbach v. Rival Manufacturing Co., 809 F.2d 1016, 1018 (3d Cir. 1987) (complaint failed to

elements, however, have caused considerable difficulty to RICO plaintiffs.

One unusual aspect of civil RICO suits is that civil liability must be based on underlying violations of criminal statutes. Other statutory schemes, such as those in the antitrust 72/ and securities 73/ areas, provide for both criminal and civil penalties and remedies for violations, but RICO is unique in that the civil action is based on criminal offenses, such as mail fraud, wire fraud, robbery, murder, and the like that do not themselves give rise to civil causes of action. Thus, in a RICO suit, unlike other civil actions, the plaintiff must allege and prove a purely criminal offense as part of the civil lawsuit.

The obvious question that arises is whether the acts of racketeering activity in a civil RICO suit should be pleaded according to the liberal "notice pleading" standards of federal civil procedure or according to the stricter standards that apply to the pleading of criminal indictments. There is not much direct precedent on this issue. The Eighth Circuit, holding that the mail fraud allegations in a RICO count were pleaded with insufficient detail, said that criminal statutes are to be construed strictly, even when they are incorporated in a claim for

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allege the "conduct or participate" element properly).

72/ See, e.g., 15 U.S.C. §§ 1-36.

73/ See, e.g., 15 U.S.C. §§ 77a-77aa.

civil recovery. 74/ Another court found that racketeering acts involving theft from interstate shipments under 18 U.S.C. § 659 were insufficient for failure to allege that the goods allegedly stolen were part of an interstate shipment, failure to clearly allege whether the defendant himself violated Section 659, and failure to allege the value of the goods allegedly stolen by the defendant. 75/ In another case, the court dismissed a RICO count alleging that the supervisors of a stockbroker were liable for his predicate acts through their failure to supervise him and their reckless disregard of his wrongdoing. The court held that, because RICO predicate acts must be crimes, the complaint would have to plead the violation according to the criminal standard under the securities laws, that is, that the defendants "knowingly" used the broker to commit the illegal acts. 76/

Besides the criminal nature of all RICO predicates,

74/ Flowers v. Continental Grain Co., 775 F.2d 1051, 1054 (8th Cir. 1985) (citing I.S. Joseph Co. v. J. Lauritzen A/S, 751 F.2d 265 (8th Cir. 1984)).

75/ Acampora v. Boise Cascade Corp., 635 F. Supp. 66, 68 (D.N.J. 1986).

76/ Frota v. Prudential-Bache Securities, Inc., 639 F. Supp. 1186 (S.D.N.Y. 1986). See also Trane Co. v. O'Connor Securities, 718 F.2d 26, 29 & n.4 (2d Cir. 1983) (noting that only "willful" violations of the securities laws can be RICO predicates); Dan River, Inc. v. Icahn, 701 F.2d 278, 291 (4th Cir. 1983) (criminal intent must be shown for mail fraud or securities fraud predicates); Allington v. Carpenter, 619 F. Supp. 474, 477 (C.D. Cal. 1985)("Specific intent must be pleaded in an indictment for mail or wire fraud, . . . and the same rule should apply to civil complaints alleging the same offense.").

another important consideration for civil RICO pleading is that many civil RICO suits, particularly those seeking treble damages, are likely to be based in large part on predicate acts involving fraud, usually mail fraud under 18 U.S.C. § 1341 or wire fraud under 18 U.S.C. § 1343. The complaint in such a case must conform to the requirements of Fed. R. Civ. P. 9(b), which requires that all averments of fraud be stated with particularity. 77/ In the context of private treble-damages suits, several courts have outlined how this standard is to be met. The complaint must set forth:

(1) precisely what statements were made in what documents or oral representations or what omissions were made;

(2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) the same;

(3) the content of such statements and the manner in which they misled the plaintiff; and

(4) what the defendants obtained as a consequence of the fraud. 78/

In addition, the complaint must "provide some factual basis for conclusory allegations as to state of mind." 79/ Other courts have set forth somewhat less formal statements of the

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77/ Rule 9(b) provides, in part: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity . . . ."

78/ See, e.g., Beck v. Manufacturers Hanover Trust Co., 645 F. Supp. 675, 682 (S.D.N.Y. 1986); Conan Properties, Inc. v. Mattel, Inc., 619 F. Supp. 1167, 1172 (S.D.N.Y. 1985).

79/ Beck v. Manufacturers Hanover Trust Co., 645 F. Supp. 675, 682 (S.D.N.Y. 1986)(quoting Soper v. Simmons Int'l, Ltd., 632 F. Supp. 244, 249 (S.D.N.Y. 1986).

requirements for pleading allegations of mail fraud and wire fraud in the context of a civil RICO claim. 80/ Courts have not hesitated, in several cases, to dismiss RICO claims for failure to satisfy the requirements of Rule 9(b). 81/ Other courts have found pleadings of mail fraud and wire fraud to be sufficient. 82/

Obviously, there are competing considerations with respect to determining how much detail must be included in the predicate acts underlying a civil RICO claim. On the one hand, the Federal Rules of Civil Procedure permit a liberal form of "notice pleading"; on the other hand, the

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80/ See, e.g., Ray v. Karris, 780 F.2d 636, 644 (7th Cir. 1985) (complaint "must at the minimum supply a general allegation of at least the nature of the mailings or wire communications so that the court can determine that a cause of action has been pleaded"); Zahra v. Charles, 639 F. Supp. 1405, 1409 (E.D. Mich. 1986) (complaint "must at least provide the defendant with a 'brief sketch' of the alleged scheme, outlining the time, place, method, and participants").

81/ E.g., Zahra v. Charles, 639 F. Supp. 1405, 1409 (E.D. Mich. 1986) (allegations were made "in the most perfunctory manner"); Frota v. Prudential-Bache Securities, Inc., 639 F. Supp. 1186, 1192 (S.D.N.Y. 1986)(allegations "merely track the language of the mail and wire fraud statutes"; complaint fails to allege "the specifics of any use of the mails or wires"); Ichiyasu v. Christie, Manson & Woods International, Inc., 637 F. Supp. 187, 198 (N.D. Ill. 1986)(mail and wire fraud allegations failed to specify dates or contents of communications or how the communications related to the general fraud).

82/ E.g., Vietnam Veterans of America, Inc. v. Guerdon Industries, Inc., 644 F. Supp. 951, 958-59 (D. Del. 1986) (setting forth details of RICO allegations concerning fraud in sales of mobile homes and finding these allegations sufficient under Rule 9(b)); Conan Properties, Inc. v. Mattel, Inc., 619 F. Supp. 1167, 1172 (S.D.N.Y. 1985).

predicate acts are violations of criminal statutes and therefore must be alleged with particularity, and, in the case of fraud allegations, Fed. R. Civ. P. 9(b) requires particularity in pleading. 83/

In view of the developing case law and general principles of pleading, it is the policy of the Criminal Division that civil RICO actions by the Federal Government should be pleaded as much like criminal RICO indictments as possible, unless there is a particularly compelling reason to deviate from that practice. Thus, the underlying violation(s) of 18 U.S.C. § 1962 should allege all elements of the offense in the proper statutory language. In particular, each predicate act should be alleged as if it were a count in a criminal indictment, including all elements of the offense, dates, venue, participants, and other appropriate details. If some of the predicate acts previously resulted in criminal convictions, the complaint should either re-allege those acts in full in the exact language of the earlier indictment, or should set forth a brief, separate description of each act and incorporate the full allegations of the appropriate counts of the indictment, which may be appended to the complaint as an

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83/ See Ray v. Karris, 780 F.2d 636, 645 (7th Cir. 1985) (noting the tension between pleading criminal offenses and the more liberal notice pleading of civil procedure; concluding that dismissal of RICO claim should be without prejudice so plaintiffs could amend complaint; noting that the federal rules regarding sufficiency of pleading are not to be used as a "post-Sedima barrier to RICO suits in the federal courts").

exhibit. Each racketeering act should be individually numbered and clearly identified as a separate racketeering act.

If some racketeering acts have multiple sub-parts because of the single-episode issue, 84/ the overall act should be numbered as, for example, "Racketeering Act #5," and each sub-act should be designated with a letter. Thus, the sub-acts might be designated "5(a)," "5(b)," and "5(c)." 85/

5. Burden of Proof

An action under 18 U.S.C. § 1964, although it requires proof of violations of the criminal provisions, is clearly a civil action. Because the action is civil in nature, the courts have held that the plaintiff's burden of proof is a preponderance of the evidence, rather than clear and convincing evidence or proof beyond a reasonable doubt. 86/

84/ See the substantive discussion of the single-episode issue in Section IV(F)(2), infra.

85/ The concept of sub-acts can be confusing to persons who have not previously encountered it, but it has worked well in numerous RICO prosecutions. The Organized Crime and Racketeering Section can provide detailed guidance about its practical application, and can provide sample pleadings.

86/ Liquid Air Corp. v. Rogers, No. 86-3001 (7th Cir. Nov. 13, 1987); United States v. Local 560, International Brotherhood of Teamsters, 780 F.2d 267, 279 n.12 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978); Heinold Commodities, Inc. v. McCarty, 513 F. Supp. 311, 313 (N.D. Ill. 1979). See also Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 (1985) ("We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under 18 U.S.C.

6. Collateral Estoppel

In suits brought by the United States, the special provision of 18 U.S.C. § 1964(d) operates to estop a defendant from denying the essential allegations of a prior criminal proceeding that resulted in a RICO conviction for the same conduct. 87/ This provision has not been the subject of much litigation. In one government RICO action for equitable relief following a criminal RICO conviction, the district court held that, "[a]pplying the estoppel machinery of § 1964(d)," two defendants "are no longer in a position to deny" certain facts that were established in the criminal case. 88/ In another case, the district court held that two defendants who had been convicted under RICO were not "in a position" to deny the Government's related civil RICO allegations. 89/

Although Section 1964(d) is a powerful provision, it

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§ 1964(c)."). Cf. United States v. Schine Chain Theatres, Inc., 63 F. Supp. 229, 235 (W.D.N.Y. 1945) (antitrust suit), aff'd in part, rev'd in part on other grounds, 334 U.S. 110 (1948).

87/ Section 1964(d) provides:

> A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

88/ United States v. Ianniello, No. 86 Civ. 1552 (S.D.N.Y April 16, 1986), slip op. at 11.

89/ United States v. Local 6A, Cement and Concrete Workers, Laborers International Union, 663 F. Supp. 192, 194 (S.D.N.Y. 1986).

may not provide any benefit to the Government beyond the common-law doctrine of collateral estoppel. 90/ Even without such a provision, there is substantial precedent for the proposition that a criminal conviction estops the defendant from denying the essential allegations of the criminal case in a subsequent civil action brought against him by the Government. 91/ Thus, the Government can rely not only on RICO convictions under Section 1964(d), but also on convictions of underlying predicate acts under general principles of collateral estoppel. 92/ The prior

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90/ However, it is quite beneficial in one sense to have this provision in the RICO statute. The antitrust statutes, on which RICO was based to a large extent, provide that a prior civil or criminal judgment in favor of the United States is prima facie evidence against the defendant in a subsequent proceeding. 15 U.S.C. § 16(a). Courts construing an earlier version of this provision held that it pre-empted the law of collateral estoppel, so that prior judgments could have no more than prima facie evidentiary effect. State of Illinois v. General Paving Co., 590 F.2d 680 (7th Cir.), cert. denied, 444 U.S. 879 (1979); United States v. Grinnell Corp., 307 F. Supp. 1097 (1969). Section 16(a) subsequently was amended to provide that it did not impose any limitations on the doctrine of collateral estoppel. Under the clear language of Section 1964(d), there appears to be no danger that courts would place any limitations on the applicability of collateral estoppel in civil RICO actions by the Government.

91/ E.g., Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951); Gray v. Commissioner of Internal Revenue, 708 F.2d 243 (6th Cir. 1983), cert. denied, 464 U.S. 993 (1984); Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978); United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978); Securities and Exchange Commission v. Everest Management Corp., 466 F. Supp. 167, 172-73 (S.D.N.Y. 1979).

92/ However, if the collateral estoppel establishes only the predicate acts, the Government still must prove the other elements of RICO. See Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 644 (D. Alaska 1982).

conviction may be by general jury verdict 93/ or by guilty plea. 94/ However, a plea of nolo contendere will not have a collateral estoppel effect in a subsequent civil proceeding. 95/ Even if the civil suit is one for damages, in which the defendant ordinarily would be entitled to a jury trial, the use of collateral estoppel does not violate the seventh amendment right to a jury trial. 96/

The exact effect of the prior judgment may not be immediately evident, because it may not be clear exactly what the jury found or what the defendant pleaded guilty to. For this reason, it is particularly important to seek special jury verdicts in criminal RICO prosecutions (where they are important in any event because of the need to establish on appeal which racketeering acts the jury relied on). 97/ For a guilty plea, it is important to ensure that

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93/ See, e.g., Chisholm v. Defense Logistics Agency, 656 F.2d 42, 48 (3d Cir. 1981); United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978); Securities and Exchange Commission v. Everest Management Corp., 466 F. Supp. 167, 173 (S.D.N.Y. 1979).

94/ See, e.g., Gray v. Commissioner of Internal Revenue, 708 F.2d 243 (6th Cir. 1983), cert. denied, 464 U.S. 993 (1984); Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978); United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978); United States v. DiBona, 614 F. Supp. 40 (E.D. Pa. 1984); Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 641 (D. Alaska 1982).

95/ See United States v. Brzoticky, 588 F.2d 773, 776 (10th Cir. 1978) (concurring opinion); United States v. Dorman, 496 F.2d 438, 440 (4th Cir.), cert. denied, 419 U.S. 945 (1974).

96/ Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

97/ See, e.g., United States v. Ruggiero, 726 F.2d 913 (2d Cir.), cert. denied, 105 S. Ct. 118 (1984).

the record reflects in detail the facts that the defendant is admitting.

In general, in determining the collateral estoppel effect of a prior judgment,

> [i]t is the task of the trial judge in the subsequent civil proceedings to determine through an examination of the pleadings, court opinions if any, and the record of the criminal trial which questions were "'distinctly put in issue and directly determined' in the criminal prosecution." 98/

In many instances, however, the Government may be able to use the exact same pleadings in the civil case as in the criminal case. In such a case, it should not require much, if any, scrutiny of the record to determine that the defendant is estopped in the civil case.

While collateral estoppel is a powerful tool for the Government in civil RICO actions, it does not work in the other direction. Thus, even though a defendant has been

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98/ Securities and Exchange Commission v. Everest Management Corp., 466 F. Supp. 167, 173 (S.D.N.Y. 1979). See also Chisholm v. Defense Logistics Agency, 656 F.2d 42, 48 (3d Cir. 1981) ("court must examine the record of the criminal proceeding, including the pleadings, evidence, jury instructions and other relevant matters in order to determine specifically what issues were decided"); De Cavalcante v. Commissioner of Internal Revenue, 620 F.2d 23, 28 n.10 (3d Cir. 1980) (after examining entire record and taking testimony from prosecutor, court found no collateral estoppel effect); United States v. Podell, 572 F.2d 31, 36 (2d Cir. 1978) (court found collateral estoppel effect from trial record, including defendant's eventual guilty plea, which was "clearly delineated," particularly because defendant struck portions of indictment to which he did not want to plead guilty).

acquitted of a charge in a criminal prosecution, the Government is not estopped from including that charge as a predicate act in a subsequent civil RICO suit, because the acquittal established only that the Government did not prove the charge beyond a reasonable doubt. The Government still may be able to prove the charge by a preponderance of the evidence. 99/

A doctrine that is related to collateral estoppel is res judicata. Under this doctrine, "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." 100/ Unlike collateral estoppel, res judicata is primarily a defensive doctrine, and only comes into play when the suit sought to be barred is based on the same cause of action as the first suit. The first action must be civil; res judicata does not apply between criminal and civil actions. Therefore, res judicata will not arise as a defense to a

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99/ See Chisholm v. Defense Logistics Agency, 656 F.2d 42, 48 n.11 (3d Cir. 1981); Securities and Exchange Commission v. Dimensional Entertainment Corp., 493 F. Supp. 1270, 1277 (S.D.N.Y. 1980). See also United States v. Ianniello, 824 F.2d 203, 208 (2d Cir. 1987) (upholding equitable relief in government RICO action against person who had been acquitted of criminal RICO charge, noting that convictions of his co-defendants helped prove his inability to prevent criminal conduct in the business).

It also should be noted that the Supreme Court has expressly held that a defendant need not have been previously convicted of RICO or predicate acts before a civil RICO suit can be brought against him. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

100/ Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).

government RICO suit that follows a RICO prosecution.

7. Fifth Amendment Issues

Because government civil RICO suits are likely to involve persons who have been or might be targets of criminal investigations, such suits are likely to give rise to issues concerning the fifth amendment privilege against self incrimination. The privilege is fully applicable in a civil proceeding, including discovery proceedings, if the information in question may subject the witness or party to criminal liability. 101/ However, unlike the situation in criminal proceedings, in a civil suit the court may draw adverse inferences against a party who invokes the privilege in the face of probative evidence offered against them. 102/

Beyond seeking adverse inferences from a refusal to respond to questions, the Government has another option. The Government can seek a compulsion order under 18 U.S.C. § 6001, et seq. Such an order grants the witness or party

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101/ See, e.g., United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

102/ See Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976); United States v. Ianniello, 824 F.2d 203, 208 (2d Cir. 1987) (government RICO suit); Brink's Inc. v. City of New York, 717 F.2d 700, 707-10 (2d Cir. 1983); United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 306 (D. N.J. 1984) (government RICO suit), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986). However, assertion of the fifth amendment, without more, does not constitute a sufficient admission to result in judgment for the plaintiff on the pleadings. National Acceptance Co. v. Bathalter, 705 F.2d 924, 932 (7th Cir. 1983).

immunity from having the compelled testimony used against him in any criminal case (except one for perjury, false statements, or failing to comply with the order). 103/ However, the immunized testimony still can be used against the person in a civil proceeding, 104/ including the very proceeding for which the use-immunity order is obtained. 105/

C. General Civil RICO Issues--Substantive

As noted earlier, there are not very many substantive legal issues that particularly concern civil RICO. The substantive issues generally concern the RICO offenses in 18 U.S.C. § 1962, which are discussed in the Criminal Division's manual on RICO prosecutions. However, there are several substantive RICO issues that may arise in government civil RICO suits in ways that merit some discussion here.

1. Aiding and Abetting

In criminal prosecutions, there is no question that persons who aid and abet an offense are chargeable as principals just as if they personally committed the offense. 106/ Thus, if a criminal defendant aids and abets the

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103/ Although the immunity provisions are most often used in connection with criminal proceedings, they are available in connection with civil proceedings as well. See United States v. Mahler, 567 F. Supp. 82 (M.D. Pa. 1983).

104/ See, e.g., United States v. Kates, 419 F. Supp. 846 (E.D. Pa. 1976).

105/ See United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir. 1974) (government RICO suit), cert. denied, 420 U.S. 925 (1975).

106/ See 18 U.S.C. § 2.

commission of two or more proper acts of racketeering activity, he can be charged under RICO, provided the other elements of the offense are present. 107/

It would seem to follow logically from this result that a civil defendant can be held liable for a RICO violation on the basis of aiding and abetting two or more predicate acts. This should follow because the violation of Section 1962 may be established through proof of the elements of the RICO offense under the standard doctrines of criminal law. There is no evident reason why the aiding-and-abetting doctrine of 18 U.S.C. § 2 should not be applicable in a civil RICO action to establish the underlying violation of Section 1962.

The courts have held that the aiding-and-abetting doctrine applies, although not without some discussion. Thus, one court held that the doctrine is applicable in civil RICO cases not through the operation of 18 U.S.C. § 2, but, rather, on the basis of the "civil common law doctrine of aiding and abetting." 108/ Other courts apparently have relied on 18 U.S.C. § 2 as the basis for aiding-and-abetting liability in a civil RICO action. 109/ In ruling on

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107/ See, e.g., United States v. Cauble, 706 F.2d 1322, 1339-40 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).

108/ Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1357 (3d Cir. 1987).

109/ E.g., Armco Industrial Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 485-86 (5th Cir. 1986); Laterza v. American Broadcasting Co., 581 F. Supp. 408, 412 (S.D.N.Y. 1984).

private treble-damages claims, the courts have shown a tendency to apply the doctrine rather narrowly and strictly, ensuring that liability is not lightly imposed on defendants who merely are aware of illegal acts or supervise those who commit them. Thus, in one case the court said that, to prove a defendant aided and abetted the commission of mail fraud violations, the plaintiff must prove that the defendant "was associated with the mailing of the bogus invoices, participated in it as something that he wished to bring about, and sought by his actions to make it succeed." And, there must be evidence that the defendant "shared in the criminal intent of the principals" and "committed an overt act designed to aid in the success of the venture." In this case, although the defendant "became aware of the bogus invoices and did nothing to reveal their existence, this awareness and inaction did not establish liability; the conduct amounted at most to nothing more than 'mere negative acquiescence.'" 110/

By contrast, in the leading decision in a RICO action brought by the United States, the court had little trouble finding union officials liable through an aiding-and-abetting theory, in that they acquiesced in the commission of predicate acts by others. The court noted:

110/ Armco Industrial Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 485-86 (5th Cir. 1986). See also Laterza v. American Broadcasting Co. 581 F. Supp. 408, 412 (S.D.N.Y. 1984) (complaint failed to allege in sufficient detail how each defendant aided and abetted predicate acts).

> Anthony Provenzano's pension payments, which represented a Hobbs Act extortion, extended through 1981. Each Executive Board member, by not objecting to these payments which did not benefit the union, necessarily aided and abetted in the extortion. 111/

Evidently, there are some differences in the courts' approaches to varying factual situations. It appears that some courts may still be reaching for ways to limit the perceived overuse and abuse of civil RICO by private plaintiffs. On the other hand, it may be that courts ruling on government suits may be more inclined to invoke, expressly or by implication, the "liberal-construction" clause of RICO, and apply theories of liability liberally in order to protect public interests.

2. Respondeat Superior

Another theory of liability that has been controversial in private RICO actions is the theory of respondeat superior, which holds that an employer is liable for the acts of its employees committed within the scope of their employment or with apparent authority of the employer. 112/ Some private RICO plaintiffs have attempted to rely on this theory against corporate defendants that are also alleged to be the enterprise in an underlying violation of 18 U.S.C. §

111/ United States v. Local 560, International Brotherhood of Teamsters, 780 F.2d 267, 288 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986). The court also expressly held that 18 U.S.C. § 2 applies to RICO predicate acts. Id. at 288 n.25.

112/ See, e.g., Continental Data Systems, Inc. v. Exxon Corp., 638 F. Supp. 432, 439 (E.D. Pa. 1986).

1962(c). Because most courts hold that the defendant and the enterprise cannot be the same entity for a Section 1962(c) offense, 113/ the plaintiff may name the enterprise's individual employees as defendants, and then attempt to recover against the corporation through the respondeat superior theory. Most courts have rejected this approach, holding that respondeat superior is not applicable for a Section 1962(c) charge in a civil RICO action. 114/ However, because courts generally have held that the defendant can be the same as the enterprise for purposes of a claim based on 18 U.S.C. § 1962(a), the respondeat superior doctrine has been held to be applicable in such cases. 115/

Some courts have looked to the broad purpose of RICO and found authority in general principles of agency to impose liability through respondeat superior regardless of the RICO subsection involved. In one RICO case, based on Section 1962(c) and (d), the district court held that a corporation could be held liable for the racketeering acts

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113/ See the discussion of this issue in Section IV(F)(1), infra.

114/ See, e.g., Luthi v. Tonka Corp., 815 F.2d 1229, 1230 (8th Cir. 1987); Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1359 (3d Cir. 1987); Schofield v. First Commodity Corp., 793 F.2d 28, 32-34 (1st Cir. 1986); Banque Worms v. Luis A. Duque Pena E Hijos, Ltda., 652 F. Supp. 770, 773 (S.D.N.Y. 1986); Gaudette v. Panos, 644 F. Supp. 826, 841 (D. Mass. 1986); Continental Data Systems, Inc. v. Exxon Corp., 638 F. Supp. 432, 439-40 (E.D. Pa. 1986).

115/ See, e.g., Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1361 (3d Cir. 1987).

of its officers "under the agency rule that principals are 'liable when their agents act with apparent authority.'" 116/ The court found "nothing in RICO or its legislative history which would suggest that the normal rules of agency law should not apply to the civil liability created by the statute," 117/ and said that "application of the doctrines of apparent authority and respondeat superior will, at least, in most instances, further the statutory goals." 118/

It is the view of the Criminal Division that the doctrine of respondeat superior clearly can further the remedial goals of RICO in some instances. Thus, where high-level corporate officers fraudulently cause the corporation to supply the Government with substandard products, the corporation, as well as the officers, should be held liable because its agents conducted the corporation's affairs through a pattern of racketeering activity. Although this theory has been rejected by most courts in connection with private damages suits, it is still worth pursuing in

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116/ Bernstein v. IDT Corp., 582 F. Supp. 1079, 1083 (D. Del. 1984) (quoting American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556, 565-66 (1982)).

117/ Id.

118/ Id. at 1083-84. See also Morley v. Cohen, 610 F. Supp. 798, 811 (D. Md. 1985) ("a corporation or partnership can be held liable under RICO for the acts of its agents and/or representatives committed within the scope of their authority"). See generally Blakey, The Civil RICO Fraud Action in Context: Reflections on Bennett v. Berg, 58 Notre Dame L. Rev. 237, 286-325 (1982).

circuits that have not yet ruled on it, and in the Eleventh Circuit, which has held that, in such circumstances, the corporation can be held criminally accountable under RICO. 119/ And, as discussed above, the theory of respondeat superior should be available in most, if not all, courts for any claim based on Section 1962(a) or (b), or conspiracy to violate either of those provisions.

3. Intracorporate Conspiracy

Another issue concerning the liability of corporations and their officers is whether a corporation and its officers can be found liable of conspiring with each other to violate RICO--that is, whether a corporation and one or more of its officers can successfully be charged as defendants in a civil RICO action based on a Section 1962(d) charge.

The courts are divided on this issue. Several district courts have ruled that, in a civil RICO action, under a general rule of civil conspiracy law, a corporation cannot be found to have conspired with its employees. 120/ However, at least one court has noted distinctions between criminal and civil cases on this issue, suggesting the possibility that this restriction might not be applicable in the context of a suit by the Government in the public

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119/ United States v. Hartley, 678 F.2d 901 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983).

120/ E.g., McIntyre's Mini Computer v. Creative Synergy Corp., 644 F. Supp. 580, 585 (E.D. Mich. 1986); McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1510-12 (D.N.J. 1985); Yancoski v. E.F. Hutton & Co., 581 F. Supp. 88, 97 (E.D. Pa. 1983); Landmark Savings & Loan v. Rhoades, 527 F. Supp. 206, 209 (E.D. Mich. 1981).

interest. 121/ Other courts have concluded that a conspiracy charge involving a corporation and its employees is available in a civil RICO action. 122/ As an alternative ground for upholding such a conspiracy charge at the pleading stage, one court noted that the complaint alleged that the conspiracy involved the corporation, its employees, "and others." 123/

Although there is a lack of appellate-level guidance on this issue, it appears to be appropriate for the Government to include allegations of intracorporate conspiracy in civil RICO actions in suitable cases.

4. Unincorporated Association as Defendant

Another issue arising from the legal existence of the civil RICO defendant is whether the Government can successfully sue an unincorporated association under 18

121/ See McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1511-12 (D.N.J. 1985) (noting distinction between criminal case and case where RICO is "being utilized in order to obtain treble damages not otherwise available under ERISA").

122/ E.g., Pandick, Inc. v. Rooney, 632 F. Supp. 1430, 1435-36 (N.D. Ill. 1986) (such a result furthers remedial purpose of RICO; relying in part on Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384, 402-03 & n.22 (7th Cir. 1984), aff'd, 105 S. Ct. 3291 (1985)); Callan v. State Chemical Manufacturing Co., 584 F. Supp. 619, 623 (E.D. Pa. 1984); Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1307 n.9 (D. Colo. 1984); Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1241 (S.D.N.Y. 1983).

123/ Callan v. State Chemical Manufacturing Co., 584 F. Supp. 619, 623 (E.D. Pa. 1984). But see McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1510-12 (D.N.J. 1985) (requiring that complaint name any other co-conspirators).

U.S.C. § 1964--that is, whether an unincorporated association is liable to suit and, if so, whether it can be a "person" within the meaning of 18 U.S.C. § 1961(3). This issue is most likely to arise in the context of a suit for injunctive relief against a criminal group, such as an organized crime "family." 124/

An unincorporated association is generally defined as "a body of persons acting together and using certain methods for prosecuting a special purpose or common enterprise." Motta v. Samuel Weiser, Inc., 768 F.2d 481, 485 (1st Cir.), cert. denied, 106 S. Ct. 596 (1985). The term "association" has been defined as a "term used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise." Hecht v. Malley, 265 U.S. 144 (1924). Under this standard, a variety of organizations have been held to be unincorporated associations. See Barr v. United Methodist Church, 90 Cal. App. 3d 259, 153 Cal. Rptr. 322 (1979) (holding that the United Methodist Church was an unincorporated association which could sue or be sued); Heifetz v. Rockaway Point Volunteer Fire Department, 124 N.Y.S.2d 257, 260 (1953), aff'd, 126 N.Y.S.2d 604 (1953) (volunteer fire department); Associated Students of the University of California at Riverside v. Kleindienst, 60

124/ See, e.g., United States v. Bonanno Organized Crime Family of La Cosa Nostra, No. CV-87-2974 (E.D.N.Y. filed Aug. 26, 1987).

F.R.D. 65, 67 (C.D. Cal. 1973) (student body organization).

In Kay v. Bruno, 605 F. Supp. 767 (D.N.H. 1985), the court held that the New Hampshire Democratic Party was an unincorporated association. The court found that the common understanding of most citizens of New Hampshire was that there was in existence a New Hampshire Democratic Party, commonly referred to and contributed to as such, which met regularly in convention. Id. at 771 n.3. Under these definitions and holdings, it appears that a group such as an organized crime "family" would be recognized by a court as an unincorporated association.

At common law, an unincorporated association had no capacity to sue or be sued. See Puerto Rico v. Russell & Co., 288 U.S. 476 (1933). However, two exceptions to this rule have developed. First, an unincorporated association may sue or be sued if the law of the forum state recognizes such capacity. Project Basic Tenants Union v. Rhode Island Housing, 636 F. Supp. 1453, 1457 (D.R.I. 1986). Secondly, Rule 17 of the Federal Rules of Civil Procedure provides that a partnership or other unincorporated association "may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States." It would appear that a lawsuit under the federal RICO statute would come within the latter exception.

Once it is determined that the association is capable of being sued, it must be determined whether it can be held

liable as a "person" that can violate RICO, under 18 U.S.C. § 1961(3). Each subsection of Section 1962 makes it unlawful for any "person" to engage in the prohibited activity. Section 1961(3) states that the term "person" includes "any individual or entity capable of holding a legal or beneficial interest in property." In one criminal case construing the term "person," the court noted in dictum that a division of a corporation could not be a "person" for RICO purposes because it was not an individual or a legal entity. United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983). However, the definition of "person" in the statute uses the word "includes" rather than "means." This usage, as well as the liberal construction clause found in Section 904(a) of Title IX of the Organized Crime Control Act of 1970 (Public Law 91-452, enacting RICO), could be construed as indicating that the definition is a broad, expansive one. Further support for this broad interpretation can be found in the general rules of statutory construction set forth in 1 U.S.C. § 1, where the word "person" is defined to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."

Section 1961(3) includes any entity capable of holding a legal or beneficial interest in property. An unincorporated association is not generally recognized as an entity capable of owning property. See Moffat Tunnel League

v. United States, 289 U.S. 113 (1933). But this rule is not absolute. Courts may determine that ownership vests in the individuals who comprise the organization. Thus, in Byam v. Bickford, 140 Mass. 31, 2 N.E. 687 (1885), real property was permitted to vest in an unincorporated association's members because all of the members could be ascertained. In contrast, where membership is not fixed and new members are continually being added and lost, such vesting has not been allowed. State v. Sunbeam Rebekah Lodge No. 180, 169 Or. 253, 127 P.2d 726 (1942); Motta v. Samuel Weiser, Inc., 768 F.2d 481, 486 (1st Cir.), cert. denied, 106 S. Ct. 596 (1985).

As of this writing, the Criminal Division has taken the position that an unincorporated association, such as an organized crime "family," can be sued under civil RICO in an appropriate case. 125/

D. Issues Specific to Treble-Damages Suits

This subsection of the Manual addresses certain substantive issues that are particularly likely to arise in suits by the United States for treble damages under 18 U.S.C. § 1964(c).

125/ Defendants in such cases may raise arguments based on the first amendment right to association. However, that right is not absolute, especially when the association is for criminal purposes. See, e.g., Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972); Hotel and Restaurant Employees & Bartenders International Union Local 54 v. Read, 597 F. Supp. 1431, 1446-47 (D.N.J. 1984).

1. Definition of "Person"

Section 1964(c) permits "[a]ny person injured in his business or property by reason of a violation of Section 1962" to sue and recover treble damages and the cost of the suit, including reasonable attorney's fees. The statute does not make it clear whether the United States is a "person" that is entitled to sue under this provision. The United States was held not to be a "person" for purposes of an antitrust statute 126/ that was the model for this aspect of RICO. 127/ However, the legislative history of RICO indicates that Congress did not intend restrictive antitrust precedents to apply. 128/ In view of the broad remedial purposes of RICO, the Department of Justice has taken the position that the United States is a "person" for purposes of Section 1964(c). The one court to consider this issue has upheld the Department's position. 129/

126/ Sherman Act, ch. 647, § 7, 26 Stat. 209 (1890), amended by Clayton Act, ch. 323, § 4, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 15 (1982)).

127/ United States v. Cooper Corp., 312 U.S. 600 (1941).

128/ See 115 Cong. Rec. 9567 (1969) (remarks of Sen. McClellan): "There is . . . no intention here of importing the great complexity of anti-trust law enforcement into this field . . . . Nor do I mean to limit the remedies available to those which have already been established [in the area of anti-trust]." See also Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 Notre Dame L. Rev. 237, 263 (1982).

129/ United States v. Barnette, No. 85-754-CIV-J-16 (M.D. Fla. Sept. 5, 1985) (denying without opinion a motion to dismiss a civil RICO complaint on this and other grounds).

2. Standing under Section 1964(c)

Section 1964(c) confers standing in treble-damages RICO suits upon "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . ." Some aspects of this language are clear. In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), the Supreme Court's leading pronouncement to date on civil RICO, the Court laid to rest the requirement of a special "racketeering injury" in treble-damages suits based on violations of 18 U.S.C. § 1962(c). In the case under review in Sedima, the Second Circuit, like several other courts, had formulated a requirement that the plaintiff have sustained an "injury . . . caused by an activity which RICO was designed to deter." 130/ The Supreme Court found this requirement difficult to pinpoint, but rejected it flatly, holding, in view of RICO's broad remedial purpose as reflected in the legislative history, that it is sufficient that the plaintiff allege and prove an injury flowing from the commission of the predicate acts. 131/

Thus, there is no requirement of alleging or proving any sort of special "RICO-like" injury, characterized by anti-competitive effect or the like. It is sufficient to establish the elements of the offense and an injury flowing from the predicate acts themselves. Once a proper pattern of racketeering activity has been established, the plaintiff

130/ 473 U.S. at 485, 493-94.

131/ Id. at 495-97.

need not show that he was injured by all of the predicate acts, or even by two or more of them; it is enough that he was injured by any one or more of the acts in the pattern. 132/ However, in the case of a damages suit based on a violation of 18 U.S.C. § 1962(a), some courts have held that the plaintiff must establish an injury flowing from the investment of income derived from racketeering activity. 133/ Other courts, however, have held that it is sufficient to prove that the plaintiff was injured by the predicate acts themselves, and that the defendant used or invested the proceeds of the predicate acts in the enterprise. 134/ Because the Supreme Court in Sedima was considering only a claim based on a violation of Section 1962(c), this issue is unresolved for the present.

Another important standing question is whether a government entity has standing to sue as parens patriae to recover treble damages under 18 U.S.C. § 1964(c) on behalf of its citizens who have been injured by a RICO violation. The courts addressing this issue so far have held that a state does not have standing to maintain such a suit to recover damages on behalf of individual citizens, although

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132/ Marshall & Ilsley Trust Co. v. Leone, 819 F.2d 806, 809-10 (7th Cir. 1987).

133/ See, e.g., Vereins-Und Westbank AG v. Carter, 639 F. Supp. 620, 624 (S.D.N.Y. 1986); Heritage Insurance Co. v. First National Bank, 629 F. Supp. 1412, 1417 (N.D. Ill. 1986).

134/ See, e.g., Louisiana Power & Light Co. v. United Gas Pipe Line, 642 F. Supp. 781, 805-07 (E.D. La. 1986).

the state "undoubtedly" could recover "for an injury to a quasi-sovereign interest of the state itself--for example, an injury to the general economy of the state." Even in that situation, it is not clear "whether the RICO statute authorize[s] recovery for that harm." 135/

On the other hand, if the injury stemming from a RICO violation is such that the Government itself suffers a financial loss, only the Government has standing to sue for damages under RICO; individual taxpayers do not, even though their taxes have been raised as a result of the injury. 136/ Similarly, in the private context, a shareholder does not have standing to sue individually for an injury to the corporation. 137/ And, in the securities context, only actual purchasers and sellers have standing to recover damages for acts involving securities fraud, regardless of whether the acts are based on Title 15 securities violations or Title 18 mail fraud or wire fraud violations. 138/

135/ New York by Abrams v. Seneci, 817 F.2d 1015 (2d Cir. 1987). See also Illinois v. Life of Mid-America Insurance Co., 805 F.2d 763 (7th Cir. 1986) (Illinois attorney general lacked standing to recover for injury to consumers who purchased fraudulent tax shelters).

136/ See Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985).

137/ See, e.g., Roeder v. Alpha Industries, Inc., 814 F.2d 22, 29-30 (1st Cir. 1987); Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849 (2d Cir.), cert. denied, 107 S.Ct 579 (1986).

138/ See International Data Bank v. Zepkin, 812 F.2d 149 (4th Cir. 1987).

E. Issues Specific to Injunctive Actions

1. Right to Jury Trial

Under the seventh amendment to the Constitution, every party in a suit "at common law" has a right to a trial by jury. 139/ Thus, the parties in a treble-damages action under 18 U.S.C. § 1964(c) may be able to insist on a jury trial, if this is determined to be an action at common law. In view of the fact that the action results in an assessment of treble damages as a penalty, it appears certain that this would be considered an action at common law for this purpose. 140/ However, a suit for injunctive relief under 18 U.S.C. § 1964(a) and (b) clearly is not an action at law, but an action at equity; consequently, the parties are not entitled to a trial by jury. 141/ An action for disgorgement or restitution should be considered an equitable action, with no right to a jury trial, as long as no penalty is being sought. 142/

139/ The seventh amendment provides, in part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

See also Fed. R. Civ. P. 38.

140/ See Tull v. United States, 107 S. Ct. 1831, 1838 (1987).

141/ See Katchen v. Landy, 382 U.S. 323, 336-38 (1965); In re Evangelist, 760 F.2d 27, 29 (1st Cir. 1985); United States v. Ferro Corp., 627 F. Supp. 508, 509 (M.D. La. 1986).

142/ See Securities & Exchange Commission v. Commonwealth Chemical Securities, Inc., 574 F.2d 90, 94-97 (2d Cir. 1978).

If a government RICO action contains claims for both equitable relief and treble damages, the defendant is entitled to a jury trial on the damages claims and on the issues common to both claims, but is not entitled to a jury trial on the equitable claims. 143/ If the action includes legal issues on which the right to a jury trial applies, the defendant is entitled to have any factual issues common to both the legal and equitable claims submitted to the jury prior to the court's determination of the equitable claims. 144/

2. Types of Equitable Relief

Section 1964(a) of RICO, the provision that empowers the district courts to "prevent and restrain violations of section 1962," sets forth a long, but non-exhaustive list of equitable remedies the court may grant. 145/ Congress

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143/ See, e.g., Tull v. United States, 107 S. Ct. 1831, 1839 (1987); Dairy Queen v. Wood, 369 U.S. 469 (1962); United States v. M.C.C. of Florida, Inc., 772 F.2d 1501, 1506 (11th Cir. 1985); United States v. Ferro Corp., 627 F. Supp. 508, 509-10 (M.D. La. 1986).

144/ See, e.g., Roscello v. Southwest Airlines Co., 726 F.2d 217, 221 (5th Cir. 1984); United States v. Ferro Corp., 627 F. Supp. 508, 509-10 (M.D. La. 1986)

145/ 18 U.S.C. § 1964(a) provides:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which

intended that these remedies be remedial, rather than punitive, with the purpose of "free[ing] the channels of commerce from predatory activities." 146/ Section 1964(a) clearly confers general equitable powers upon the district courts. 147/ When the court's general equitable jurisdiction is invoked, "the court possesses the necessary power to fashion an appropriate remedy." 148/ The equitable powers of the federal courts are extremely broad and flexible, particularly in cases where government agencies bring actions to enforce public rights:

> The Supreme Court has repeatedly emphasized the broad equitable powers of the federal courts to shape equitable remedies to the necessities of particular cases, especially where a federal agency seeks enforcement in the public interest. 149/

The traditional equity power permits the court to issue a wide variety of orders that are designed to correct the problem at hand and restore the status quo. One treatise on

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> affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

146/ S. Rep. No. 91-97, 91st Cong., 1st Sess. 81 (1969).

147/ See United States v. Cappetto, 502 F.2d 1351, 1357-58 (7th Cir. 1974) ("The relief authorized by that section is remedial and not punitive and is of a type traditionally granted by courts of equity."), cert. denied, 420 U.S. 925 (1975).

148/ Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972).

149/ Securities and Exchange Commission v. Wencke, 622 F.2d 1363, 1371 (9th Cir. 1980) (footnote omitted). See also Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

equity states that there are ten broad categories of equitable remedies: declarative; restorative; preventive; specific performance; reformation, correction, and re-execution; rescission or cancellation; pecuniary compensation; accounting; conferring or removing official status; and establishing or destroying personal status. 150/ Within this broad framework, the federal courts have fashioned an almost infinite range of equitable remedies. For example, in the antitrust field, courts have issued orders of divestiture, 151/ injunctions against engaging in certain activities, 152/ and many others. 153/ In the securities- and commodities-regulation fields, courts have issued orders appointing receivers, 154/ orders requiring disgorgement of monies received through fraudulent securities or commodities dealings, 155/ orders appointing independent members to a corporation's board of directors,

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150/ S. Symons, Pomeroy on Equity §§ 108-12 (5th ed. 1941).

151/ E.g., United States v. du Pont & Co., 366 U.S. 316 (1961). See United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

152/ E.g., United States v. Swift & Co., 286 U.S. 106 (1932).

153/ See generally E. Kintner, 5 Federal Antitrust Law § 401.1, et seq. (1984).

154/ E.g., Securities and Exchange Commission v. Wencke, 577 F.2d 619 (9th Cir.), cert. denied, 439 U.S. 964 (1978).

155/ E.g., Commodity Futures Trading Commission v. British American Commodity Options Corp., 788 F.2d 92 (2d Cir.), cert. denied, 107 S. Ct. 186 (1986).

156/ orders temporarily freezing a defendant's assets in order to preserve them during the litigation, 157/ and many other types of relief. 158/ In the few government injunctive actions brought under RICO, courts have granted broad equitable relief in cases involving labor unions 159/ and a restaurant 160/ that were infiltrated by criminal elements, and against a gambling business that was illegal in itself. 161/

Thus, there really is no limit on the relief the district court may grant, as long as that relief is equitable in nature and is designed to correct or remedy a problem, rather than to punish wrongdoers. 162/ The court

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156/ See Mathews, Effective Defense of SEC Investigations: Laying the Foundation for Successful Disposition of Subsequent Civil, Administrative and Criminal Proceedings, 24 Emory L.J. 567, 625 n.193 (1975).

157/ E.g., Securities and Exchange Commission v. American Board of Trade, Inc., 645 F. Supp. 1047, 1049-50 (S.D.N.Y. 1986).

158/ See generally Mathews, Effective Defense of SEC Investigations: Laying the Foundation for Successful Disposition of Subsequent Civil, Administrative and Criminal Proceedings, 24 Emory L.J. 567, 625-27 (1975).

159/ United States v. Local 560, International Brotherhood of Teamsters, 780 F.2d 267 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986); United States v. Local 6A, Cement and Concrete Workers, Laborers International Union, 663 F. Supp. 192 (S.D.N.Y. 1986). For a description of the relief granted in these cases, see Appendix A, infra.

160/ United States v. Ianniello, 824 F.2d 203 (2d Cir. 1987).

161/ United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

162/ See S. Rep. No. 91-617, 91st Cong., 1st Sess. 81

may not impose any punitive measures, such as imprisonment, fines, punitive damages, or forfeiture. Aside from those limitations, however, the Government and the court may seek to fashion creative remedies that are designed to correct the problem at its roots.

3. Standards for Granting Permanent Injunctive Relief

The next question to be addressed is what showing the United States must make in order to obtain a permanent 163/ injunction under 18 U.S.C. § 1964(a). The operative language of this provision in this context is that the district courts have jurisdiction "to prevent and restrain violations of Section 1962 . . . ." This language strongly implies that Section 1964(a) is aimed primarily at preventing ongoing or future violations of RICO, rather than providing sanctions against persons who violated RICO in the past, but are not likely to violate it in the future. In practical terms, a RICO injunctive action will be directed at persons who have violated RICO in the past and are either

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(1969):

> [I]t must be emphasized that these remedies are not exclusive, and that Title IX [RICO] seeks essentially an economic, not a punitive goal. However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, but there is no intent to visit punishment on any individual; the purpose is civil.

163/ A final injunction, once granted, normally is permanent unless limited by its own terms. See, e.g., Swift & Co. v. United States, 276 U.S. 311 (1928). However, it may be modified on motion under Fed. R. Civ. P. 60(b). See 4 A. Bromberg & L. Lowenfels, Securities Fraud & Commodities Fraud, § 13.2(1585), p. 13:127 (1986).

presently violating it or are likely to do so in the future. Theoretically, there could be a case in which the Government has learned through surveillance or intelligence sources of an impending RICO violation that calls for immediate injunctive relief rather than, or in addition to, criminal investigation and prosecution. It appears, however, that such cases would be quite rare; 164/ most actions under Section 1964(a) will involve past and future conduct.

Although civil RICO litigation has not yet firmly established the standards for obtaining permanent injunctive relief under Section 1964(a), the standards appear to be fairly clear in light of the law that has developed in connection with other government equitable actions. The few government RICO cases to discuss the standards for equitable relief have relied on the general principles developed in analogous areas, such as securities regulation and antitrust. Thus, in the Local 560 case, the district court concluded that "future violations of 18 U.S.C. § 1962(b), (c) and (d) are likely to occur, thereby resulting in irreparable harm to the membership of Local 560, its contract employers, and the public." 165/ In United States

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164/ For example, the Government might learn through electronic surveillance or reliable witnesses that an organized crime group was about to take over a legitimate corporation through a vote that would be corrupted by acts of extortion. In such a case, the Government might seek injunctive relief to postpone the elections and appoint a temporary receiver in order to forestall the threatened violation of 18 U.S.C. § 1962(b).

165/ United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 337 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied,

v. Cappetto, 166/ an early civil RICO action by the Government, the court noted in dictum the standards for granting relief under Section 1964(a), based on a variety of cases involving equitable remedies:

> Whether equitable relief is appropriate depends, as it does in other cases in equity, on whether a preponderance of the evidence shows a likelihood that the defendants will commit wrongful acts in the future, a likelihood which is frequently established by inferences drawn from past conduct. 167/

The cases from other areas provide further guidance with respect to the proper standard. In one of the cases relied on by the district court in the Local 560 case, the Second Circuit noted: "The critical question for a district court in deciding whether to issue a permanent injunction in view of past violations is whether there is a reasonable likelihood that the wrong will be repeated." 168/ The cases also note that proof of past violations gives rise to an inference of future violations, as was noted by the court in Cappetto. 169/ However, another court has noted that "'[p]ast wrongs are not enough for the grant of an injunction'; an injunction will issue only if the wrongs are

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106 S. Ct. 2247 (1986). The court cited cases from securities regulation and other fields for this standard.

166/ 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

167/ Id. at 1358.

168/ Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972).

169/ Id.; see Securities and Exchange Commission v. Penn Central Co., 425 F. Supp. 593, 596-97 (E.D. Pa. 1976).

ongoing or likely to recur." 170/

Thus, there must be more than proof of past violations, even though those violations give rise to some inference of future violations. One district court set forth a helpful list of factors that bear on the likelihood of future violations. Those factors include:

> (1) the nature of the past violations, including the number, seriousness and novelty of the transgressions, the motive and intent of the perpetrators, and the time elapsed since the violations were committed . . . ; (2) whether defendants have admitted their guilt or continue to maintain their past conduct was blameless . . . ; (3) whether defendants discontinued the wrongful activity only at the threat of an investigation or after the filing of a complaint . . . ; (4) the sincerity of defendants' assurances that they will not violate the . . . laws in the future . . . and (5) defendants' opportunity to commit further violations 171/

These factors are applicable to equitable actions in general; it is clear that the district court in the Local 560 case, although not analyzing the factors in detail, applied several of them in reaching its determination that injunctive relief was required. For example, because of the past "resilience" of the core criminal group that controlled the union, the court concluded that the group and its

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170/ Federal Trade Commission v. Evans, 775 F.2d 1084, 1087 (9th Cir. 1985) (quoting Enrico's, Inc. v. Rice, 730 F.2d 1250, 1253 (9th Cir. 1984)).

171/ Securities and Exchange Commission v. Penn Central Co., 425 F. Supp. 593, 597 (E.D. Pa. 1976). See also 4 A. Bromberg & L. Lowenfels, Securities Fraud & Commodities Fraud, § 13.2(1582)(2), pp. 13:115-13:120 (1986).

associates would continue to violate the law. 172/ In addition, the court noted that the union's current executive board had "done nothing whatsoever to devise and implement procedures and safeguards which might reasonably be expected to discourage or detect similar future abuses . . . ." 173/ These factors, among others, led to the conclusion that the past violations would continue in the future unless the "conditions within Local 560 which spawned and nurtured the events of the last twenty-two years are dramatically altered." 174/

The factors set forth above are not exclusive; the main inquiry is whether it can be inferred from all the available evidence that future violations are likely to occur unless remedial action is taken through the court's equitable powers.

Two other points should be made in discussing the standards for granting permanent injunctions and other equitable relief. First, although, as noted earlier, the district court in the Local 560 case concluded that future violations of RICO would result in "irreparable harm" to the public and certain groups, such a finding is not a prerequisite for granting permanent injunctive relief in a

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172/ United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 319 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986).

173/ Id. at 320.

174/ Id. at 319.

RICO action brought by the Government. In the Cappetto case, the Seventh Circuit expressly held that Congress intended Section 1964 to provide for injunctive relief "without any requirement of a showing of irreparable injury other than that injury to the public which Congress found to be inherent in the conduct made unlawful by Section 1962." 175/ The court also noted that there is no requirement of showing the inadequacy of available remedies at law. 176/ Other courts have held that showings of irreparable harm and inadequacy of legal remedies, which may be required of private plaintiffs in equity, will not be required for suits brought by government agencies under statutes providing specifically for relief in the public interest. 177/

Second, in a case in which the Government can establish past violations of RICO but no likelihood of future violations, it may be possible in an appropriate case to obtain equitable relief other than injunctive relief, such as disgorgement or restitution, 178/ or a freeze of

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175/ United States v. Cappetto, 502 F.2d 1351, 1358-59 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975). Accord United States v. Ianniello, No. 86 Civ. 1552 (S.D.N.Y. Apr. 16, 1986), slip op. at 17.

176/ United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

177/ See, e.g., Securities and Exchange Commission v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975).

178/ See, e.g., Securities and Exchange Commission v. Penn Central Co., 425 F. Supp. 593, 598-99 (E.D. Pa. 1976).

assets. 179/ Thus, even where there is little or no danger of future violations, it may be worthwhile to consider seeking ancillary equitable remedies other than an injunction.

4. Standards for Granting Preliminary Injunctions and Temporary Restraining Orders

Under 18 U.S.C. § 1964(b), a district court is specifically empowered to "at any time enter such restraining orders or prohibitions, or take such other actions . . . as it shall deem proper." There has not been much discussion in the cases of the standards for issuing preliminary injunctions or temporary restraining orders in government RICO actions, although preliminary relief has been granted in some instances. 180/

In cases involving the granting of preliminary injunctions under the court's equitable powers, the standards are quite stringent. The granting of a preliminary injunction is committed to the discretion of the district court, and the exercise of that discretion is given considerable deference on appeal. 181/ The traditional standards for issuing a preliminary injunction in the normal

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179/ See, e.g., Federal Trade Commission v. Evans, 775 F.2d 1084, 1088 (9th Cir. 1985).

180/ See United States v. Ianniello, 824 F.2d 203 (2d Cir. 1987); United States v. Local 6A, Cement and Concrete Workers, Laborers International Union, 663 F. Supp. 192 (S.D.N.Y. 1986); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

181/ See, e.g., United States v. Price, 688 F.2d 204, 210 (3d Cir. 1982).

context arising under the Federal Rules of Civil Procedure 182/ are fairly well settled. 183/ According to one commentator, the four most important factors governing the issuance of preliminary injunctions are:

> (1) the significance of the threat of irreparable harm to plaintiff if the injunction is not granted;
> (2) the state of the balance between this harm and the injury that granting the injunction would inflict on defendant;
> (3) the probability that the plaintiff will succeed on the merits; and
> (4) the public interest. 184/

However, when the Government sues to enforce a public right or interest under a statute that expressly authorizes preliminary injunctive relief, these equitable standards may not apply. 185/ Thus, in considering whether to issue

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182/ Certain procedural matters concerning the issuance of preliminary injunctions and temporary restraining orders are set forth in Fed. R. Civ. P. 65.

183/ For a discussion of the standards for granting preliminary injunctive relief in the antitrust area, see 5 E. Kintner, Federal Antitrust Law §§ 34.20-39.22 (1984).

184/ 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948, at 430-31 (1973). See also Federal Trade Commission v. Evans, 775 F.2d 1084, 1088 (9th Cir. 1985); United States v. Price, 523 F. Supp. 1055, 1066-67 (D.N.J. 1981), aff'd, 688 F.2d 204 (3d Cir. 1982).

185/ See, e.g., United States v. Spectro Foods Corp., 544 F.2d 1175, 1181 (3d Cir. 1976) (no need to show irreparable injury in action for preliminary injunction under 21 U.S.C. § 332(a) involving violations of the Food, Drug and Cosmetic Act); United States v. Price, 523 F. Supp. 1055, 1067 (D.N.J. 1981) ("A showing of irreparable injury is, perhaps, unnecessary to enjoin the commission of a specific statutory violation, when the statute explicitly provides for injunctive relief"), aff'd, 688 F.2d 204 (3d Cir. 1982); Hunt v. Securities and Exchange Commission, 520 F. Supp. 580, 609 (N.D. Tex. 1981); Securities and Exchange Commission v. Globus International, Ltd., 320 F. Supp. 158, 160 (S.D.N.Y.

preliminary injunctive relief involving a labor union, one district court noted:

> While a civil RICO action by definition is not excluded from equitable principles, this is a virtually unprecedented civil RICO action brought by the Government to remove union officers . . . . Whatever the rules may be in other cases, even in other RICO cases, they provide little guidance in a sui generis case such as this one. 186/

However, it appears that the district courts will not give undue weight to the fact that the action is authorized by statute. For example, in a civil RICO action in which the Government sought the preliminary relief of a receiver pendente lite for a restaurant corrupted by criminal activity, the court examined closely the evidence supporting the need for such relief, noting that "section 1964 cannot be read to do away entirely with those limitations courts of equity have traditionally imposed upon their more drastic remedies." 187/

With respect to temporary restraining orders (TROs), there is little specific guidance in the statute or the case

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1970) (standards of "public interest," rather than Rule 65 standards, govern issuance of "statutory" preliminary injunction); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948 (1973). But see Federal Trade Commission v. Evans, 775 F.2d 1084, 1088 (9th Cir. 1985).

186/ United States v. Local 6A, Cement and Concrete Workers, Laborers International Union, 663 F. Supp. 192, 195-96 (S.D.N.Y. 1986). See also United States v. Cappetto, 502 F.2d 1351, 1358-59 (7th Cir. 1974) (no need for showing of irreparable harm in suit to restrain RICO violations), cert. denied, 420 U.S. 925 (1975).

187/ United States v. Ianniello, No. 86 Civ. 1552 (S.D.N.Y. Apr. 16, 1986), slip op. at 6.

law. Section 1964(b) does specifically mention the court's power to issue "restraining orders"; the entry of such orders probably would be governed by Fed. R. Civ. P. 65(b). Obviously, a TRO should only be sought in an extraordinary situation. Under the normal standards for the issuance of such orders, the Government probably would have to show that irreparable harm would result without the order; that success on the merits of the injunctive action was probable; that the potential harm to the Government from not granting the order outweighed the potential harm to the defendant if the order were entered; and that granting the order would be in the public interest. 188/ These stringent standards apparently apply in actions brought by the Government as well as in actions brought by private parties. 189/ In an appropriate case, however, the need for immediate relief may justify seeking this extraordinary remedy.

5. Obtaining Equitable Relief Against Non-Defendants and Non-Violators

When an organization, such as a labor union or a business, is infiltrated and corrupted by entrenched criminal elements, it may not be sufficient for the

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188/ See, e.g., United States v. Phillips, 527 F. Supp. 1340, 1343 (N.D. Ill. 1981). See generally 11 C. Wright & A. Miller, Federal Practice and Procedure § 2951 (1973).

189/ See United States v. Phillips, 527 F. Supp. 1340 (N.D. Ill. 1981); United States v. Winstead, 421 F. Supp. 295 (N.D. Ill. 1976) (denying motion for TRO against gambling operation for failure to show the operation was still continuing).

Government to obtain injunctive and other equitable relief only against those defendants who can be proved to have violated RICO. 190/ Rather, it may be necessary to obtain relief against persons who are not named as defendants in the civil RICO action, and, in some cases, against persons who, although they may be named as defendants in the action, cannot be shown to have committed a RICO violation. In appropriate circumstances, such relief appears to be available.

As a hypothetical example, assume that the Government seeks injunctive and other equitable relief under civil RICO against an organized crime group that has dominated and controlled a labor union for some years. Besides members of the organized crime group, the complaint names as defendants several members of the union's executive board, including some persons who can be proved to have committed, or otherwise to be liable for the commission of, two or more racketeering acts that are part of a pattern of racketeering activity for purposes of 18 U.S.C. § 1962(c). The complaint also names the remaining members of the executive board, who were recently appointed to fill vacancies and cannot be proved to be liable for the commission of any racketeering acts, and, thus, cannot be shown to have violated 18 U.S.C.

190/ For this discussion, it is assumed that the Government would be unable to prove a RICO violation against these persons even under theories of liability such as respondeat superior or aiding and abetting. See the discussion of these theories in Section IV(C), supra.

§ 1962. 191/ The question, then, is whether the district court has the power to order injunctive and other equitable relief against the executive board members who cannot be shown to have violated RICO.

In the first place, the terms of the statute can be read to permit such broad relief. Section 1964(a) empowers the court to issue orders directed to "any person"; the language is not limited to persons who have violated Section 1962. In addition, the court is empowered to order "dissolution or reorganization of any enterprise," not just an enterprise with a particular nexus to racketeering activity. However, the last words of Section 1964(a) require the court, in issuing orders of dissolution or reorganization, to make "due provision for the rights of innocent persons," thus implying that the orders should affect only non-"innocent" persons. Thus, the language of the statute does not provide definitive guidance with respect to the availability of injunctions against persons who have not violated 18 U.S.C. § 1962.

It is necessary, then, to turn to a discussion of general principles of equity, as set forth in statutory form and by the courts. There is considerable authority for the proposition that district courts have the power to issue

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191/ These facts obviously are similar to those of the Local 560 case, which is discussed throughout this Manual. However, the courts in that case found that all members of the executive board aided and abetted the RICO violations or predicate acts, so the question presented by the hypothetical situation was not reached.

orders granting injunctive and other equitable relief against persons who were not named as defendants in the action, and even, in some instances, against persons who were not involved in the statutory violation or other activity that gave rise to the suit. The granting of injunctions by federal courts is generally governed by Fed. R. Civ. P. 65(d), which provides, in pertinent part:

> Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Thus, under the terms of this rule, an injunction against certain members of the executive board could not bind other members who were not named as defendants in the action unless those other members were found to be in some sort of privity with the enjoined defendants--for example, as agents or co-participants in enjoined activities. See, e.g., Waffenschmidt v. MacKay, 763 F.2d 711, 717 (5th Cir. 1985), cert. denied, 106 S. Ct. 794 (1986). Some courts have found non-defendants to be in privity with defendants for purposes of Rule 65(d). See, e.g., United States v. Hall, 472 F.2d 261 (5th Cir. 1972) (injunction against causing disturbances at or near school being desegregated held to cover an outside demonstrator who was not a defendant but who was served with the order); NAACP, Jefferson County Branch v. Brock, 619 F. Supp. 846, 852 (D.D.C. 1985) (discussing precedents and concluding that court had power to issue

injunction binding on non-parties, but declining to do so).

On the other hand, federal courts clearly do not have unbounded power to issue injunctions against non-parties. The Supreme Court has stated:

> The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.

Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13 (1945). See also Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832-33 (2d Cir. 1930), where Judge Learned Hand set forth principles that have been cited in several more recent cases:

> . . . [N]o court can make a decree which will bind any one but a party; a court of equity . . . cannot lawfully enjoin the world at large, no matter how broadly it words its decree . . . . Thus, the only occasion when a person not a party may be punished [for contempt], is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. This means that the respondent must either abet the defendant, or must be legally identified with him.

Cf. United States v. Ambrosio, 575 F. Supp. 546, 548 (E.D.N.Y. 1983) (relying in part on Alemite in refusing to grant RICO forfeiture temporary restraining order against a party who was not charged in the RICO count).

In the hypothetical situation, it is likely that the Government could show that the executive board members who did not personally violate RICO were "agents" of the RICO defendants for purposes of Rule 65(d). Consequently, an injunction against the defendants and their agents and

others in active concert with them, or controlled by them, arguably would be binding against the non-defendant executive board members. 192/

However, it may be possible to avoid the question whether a non-party can be bound by an injunction, if all proposed targets of the injunction are included as defendants in the injunctive action, even though some of them cannot be shown to have violated RICO. The issue then becomes whether a non-violator of the statute in question can be enjoined in a suit under that statute. One relatively recent case provides fairly strong support for this theory of relief. In United States v. Coca-Cola Bottling Company, 575 F.2d 222 (9th Cir.), cert. denied, 439 U.S. 959 (1978), the court upheld the granting of an injunction against an anti-competitive merger under Section 7 of the Clayton Act, an antitrust statute which was a model for the civil provisions of RICO. In Coca-Cola Bottling, the court held that the equitable remedy of rescission was available to nullify the illegal acquisition, even though one class of parties to the acquisition, the sellers, could not violate the Clayton Act prohibition, which is directed only against buyers, not sellers. The court noted that the equity powers of federal courts are very broad, particularly

192/ See Thompson v. Freeman, 648 F.2d 1144, 1147 (8th Cir. 1981) ("Whether a defendant may evade an injunctive order through the actions of a non-party 'ordinarily presents a question of fact requiring examination of the circumstances of each case as it arises'" (quoting Crane Boom Life Guard Co. v. Saf-T-Boom Corp., 362 F.2d 317, 322 (8th Cir. 1966))).

when equity jurisdiction has been invoked to enforce federal statutory prohibitions. 575 F.2d at 228. On balance, the court found the relief sought by the Government to be justified, even though it affected some persons that did not, and, indeed, could not violate the statutory prohibition. The court concluded its discussion of that issue with a good statement of the proper approach to such situations:

> We are mindful that the equity power of the courts is not unbounded. Each decree must be tested on review to determine whether the district court has abused its discretion or whether the dictates of due process have been infringed. The fact that sellers in § 7 cases are not technical violators of the law is itself a strong equity consideration against rescission. Normally relief should be molded, if possible, which does not adversely affect the interests of nonviolators. Nevertheless, if effective implementation of public policy cannot be decreed without adversely involving third parties, courts in equity may, within limits, involve such parties in the relief to be granted.

575 F.2d at 230. See also Federal Trade Commission v. Southwest Sunsites, Inc., 665 F.2d 711, 718 (5th Cir.), cert. denied, 456 U.S. 973 (1982), where the court held that a statutory grant of jurisdiction to the Government to obtain equitable relief for violations of federal statutes "carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it." The court went on to quote an often-quoted passage from the Supreme Court:

> The court may act so as to adjust and reconcile competing claims and so as to accord

> full justice to all the real parties in interest; if necessary, persons not orginally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. Camp v. Boyd, 229 U.S. 530, 551-552 [33 S. Ct. 785, 793, 57 L. Ed. 1317]. 193/

In the particular circumstances presented by the hypothetical situation, it is very likely that the court would appoint a receiver to handle the affairs of the union until proper elections could be held. In that case, the Government could rely on cases holding that the court has power to issue injunctive orders "where necessary to protect [a] federal receivership." 194/ In any event, because of the broad power of federal courts to issue orders necessary to render their injunctions effective, there is strong

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193/ 665 F.2d at 718 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 397-98 (1946)). See also Federal Trade Commission v. Standard Education Society, 302 U.S. 112, 120 (1937) (upholding broad reach of Federal Trade Commission injunction as necessary for "fully effective" relief); Sebrone v. Federal Trade Commission, 135 F.2d 676, 678 (7th Cir. 1943) (upholding Federal Trade Commission injunction that included persons who were not shown to have participated in misconduct).

194/ See, e.g., Securities and Exchange Commission v. Wencke, 622 F.2d 1363, 1370 (4th Cir. 1980). See also Pittsburgh-Des Moines Steel Co. v. United Steelworkers of America, AFL-CIO, 633 F.2d 302, 307 (3d Cir. 1980) ("[T]here must be authority to issue injunctive relief even against third parties where such relief is necessary, or perhaps merely helpful, in effectuating the relief against the [liable party] . . . . The basis for such relief against a third party is not culpability, but practical necessity").

precedent for the issuance of orders that bind non-parties, including persons who have not violated RICO, when the circumstances warrant. 195/ Of course, if possible, it is preferable to name as defendants and as RICO violators all persons against whom relief will be sought.

F. Selected Substantive RICO Issues

This section of the Manual will discuss briefly a few issues that arise in connection with proving the underlying violation of RICO under 18 U.S.C. § 1962. These issues are addressed in more detail in the Criminal Division's manual on RICO prosecutions; they are mentioned here briefly because they have arisen with some frequency in civil RICO litigation.

1. Enterprise Same as Defendant

Of the circuits that have ruled on this issue, all but one have held that a RICO "person" cannot be charged with conducting his (or its) own affairs through a pattern of racketeering activity -- for example, if a corporation is alleged to be the enterprise for purposes of a violation of 18 U.S.C. § 1962(c), then that corporation may not be charged as a defendant in that RICO count. 196/

195/ This approach is further supported by the similarity of the language and purpose of the Clayton Act to RICO, and by precedents calling for broad interpretations of RICO to effectuate its remedial purposes. E.g., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985); United States v. Neapolitan, 791 F.2d 489, 495 (7th Cir.), cert. denied, 107 S. Ct. 422 (1986).

196/ See, e.g., Entre Computer Centers, Inc. v. FMG of Kansas City, Inc., 819 F.2d 1279 (4th Cir. 1987); Bishop v. Corbitt, 802 F.2d 122 (5th Cir. 1986); Schofield v.

If it appears necessary or desirable to bring a RICO action against a corporation that is also alleged to be the RICO enterprise, there are two suggested ways of avoiding this adverse case law. First, if the facts permit, the corporation can be charged as both a defendant and the enterprise in a claim based on a violation of 18 U.S.C. § 1962(a), involving the use or investment of racketeering proceeds in an enterprise. Several courts have held that the defendant and the enterprise can be the same for purposes of a Section 1962(a) violation (or, according to some courts, a Section 1962(b) violation), although they cannot be for purposes of a Section 1962(c) violation. 197/

Another way to avoid the "defendant-same-as-enterprise" issue is to allege that the corporate defendant is part of a

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First Commodity Corp., 793 F.2d 28 (1st Cir. 1986); United States v. Benny, 786 F.2d 1410 (9th Cir.), cert. denied, 107 S. Ct. 668 (1986); Masi v. Ford City Bank and Trust Co., 779 F.2d 397 (7th Cir. 1985); Bennett v. United States Trust Co., 770 F.2d 308 (2d Cir. 1985), cert. denied, 106 S. Ct. 800 (1986); B.F. Hirsch, Inc. v. Enright Refining Co., 751 F.2d 628 (3d Cir. 1984); Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), rev'd in part, aff'd in part, 710 F.2d 1361 (8th Cir.), cert. denied, 464 U.S. 1008 (1983). But see United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) (corporate enterprise can also be defendant in Section 1962(c) charge).

197/ E.g., Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393 (9th Cir. 1986); Schofield v. First Commodity Corp., 793 F.2d 28, 31-32 (1st Cir. 1986); Masi v. Ford City Bank and Trust Co., 779 F.2d 397 (7th Cir. 1985); Vietnam Veterans of America, Inc. v. Guerdon Industries, Inc., 644 F. Supp. 951, 955-57 (D. Del. 1986); Louisiana Power and Light Co. v. United Gas Pipeline Co., 642 F. Supp. 781 (E.D. La. 1981). Contra H.J. Inc. v. Northwestern Bell Telephone Co., 653 F. Supp. 908 (D. Minn. 1987); Rush v. Oppenheimer & Co., 628 F. Supp. 1188, 1197 (S.D.N.Y. 1985).

group of entities (and, perhaps, individuals) associated in fact; thus, the defendant is not exactly the same as the enterprise, even though the defendant is part of the enterprise. This type of allegation has been approved by some courts, 198/ but has been rejected by others. 199/

2. Single Episode Issue

As the number of private civil RICO suits has grown in recent years, the courts have explored various ways to cut down on the numbers of so-called "garden-variety" suits, or suits that seem to involve commercial matters rather than real "racketeering activity." Some of these restrictions have been rejected by the Supreme Court, 200/ and others have been rejected by courts of appeals. 201/ One other issue, which is more broadly applicable than the "defendant-as-enterprise" issue discussed above, has taken on considerable prominence as a stumbling block for many private civil actions. Since the Supreme Court's decision in Sedima, many courts have relied on a footnote in that

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198/ E.g., Cullen v. Margiotta, 811 F.2d 698 (2d Cir. 1987); Rockwell Graphic Systems, Inc. v. Dev Industries, Inc., No. 84 C 6746 (N.D. Ill. Feb. 17, 1987).

199/ E.g., Entre Computer Centers, Inc. v. FMG of Kansas City, Inc., 819 F.2d 1279 (4th Cir. 1987).

200/ See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) (rejecting requirements of prior criminal conviction and special "racketeering injury").

201/ See, e.g., Plains Resources, Inc. v. Gable, 782 F.2d 883 (10th Cir. 1986) (no need to allege or prove connection to organized crime). Accord United States v. Hunt, 749 F.2d 1078 (4th Cir. 1984), cert. denied, 105 S. Ct. 3479 (1985); Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984).

opinion to hold that the pattern of racketeering activity for a RICO violation under 18 U.S.C. § 1962(c) must consist of acts that exhibit "continuity plus relationship." 202/ However, the courts of appeals are not in agreement with respect to the proper interpretation of the "single episode" requirement. Some courts have announced fairly strict tests, while others have not imposed stringent requirements for the pattern of racketeering activity. The standards as of this writing do not appear to be completely stable or predictable; accordingly, it is advisable to check the latest decisions in the circuit where a case will be brought. 203/

202/ See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985).

203/ See, e.g., Condict v. Condict, 826 F.2d 923 (10th Cir. 1987); Sun Savings & Loan Assoc. v. Dierdorff, 825 F.2d 187 (9th Cir. 1987); Petro-Tech, Inc. v. Western Co., 824 F.2d 1349 (3d Cir. 1987); Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46 (2d Cir. 1987); Marshall & Ilsley Trust Co. v. Leone, 819 F.2d 806 (7th Cir. 1987); California Architectural Building Products v. Franciscan Ceramics, 818 F.2d 1466 (9th Cir. 1987); Montesano v. Seafirst Commercial Corp., 818 F.2d 809 (5th Cir. 1987); Roeder v. Alpha Industries, Inc., 814 F.2d 22 (1st Cir. 1987); International Data Bank v. Zepkin, 812 F.2d 149 (4th Cir. 1987); Marks v. Pannell Kerr Forster, 811 F.2d 1108 (7th Cir. 1987); Elliott v. Chicago Motor Club Insurance, 809 F.2d 347 (7th Cir. 1986); United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986); Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393 (9th Cir. 1986); Deviries v. Prudential-Bache Securities, Inc., 805 F.2d 326 (8th Cir. 1986); Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986); Lipin Enterprises, Inc. v. Lee, 803 F.2d 322 (7th Cir. 1986); Holmberg v. Morrisette, 800 F.2d 205 (8th Cir. 1986), cert. denied, 107 S. Ct. 1953 (1987); Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, 785 F.2d 1274 (5th Cir. 1986); Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986); Bank of America National Trust & Savings Assoc. v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986).

For most cases brought by the Government, this issue should not be a matter of great concern, because the complaint must be reviewed and approved by the Organized Crime and Racketeering Section, which has a long-standing policy of requiring that the pattern of racketeering activity not contain multiple predicate acts arising out of what is essentially the same episode or transaction. However, defendants often raise the issue, and it is necessary to keep abreast of the latest decisions, which, as can be seen from the last footnote, have been multiplying rapidly.

3. Preemption By Specific Statutes

Another argument made occasionally by civil and criminal RICO defendants is that the use of RICO is improper where predicate acts such as mail fraud and wire fraud are charged in connection with conduct that is covered by a more specific statute. The defendants may argue that the general statute, which is a RICO predicate, should not be used when a more specific statute is available. Such arguments usually have not succeeded in the criminal context, 204/ and

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204/ See, e.g., United States v. Busher, 817 F.2d 1409 (9th Cir. 1987) (mail fraud involving fraudulent tax returns); United States v. Computer Sciences Corp., 689 F.2d 1181, 1186-88 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983) (mail and wire fraud for conduct covered by False Claims Act); United States v. Boffa, 688 F.2d 919, 931-33 (3d Cir. 1982), cert. denied, 460 U.S. 1022 (1983) (mail fraud for conduct covered by labor statutes); United States v. Hartley, 678 F.2d 961, 990 n.50 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) (mail fraud and False Claims Act); United States v. Weatherspoon, 581 F.2d 595, 599-600 (7th Cir. 1978) (mail fraud for conduct also covered by false statements

at least one court has rejected such an argument in a civil RICO case brought by the Government. 205/ However, at least one court has upheld such an argument in connection with a private civil RICO suit. 206/ Thus, there is some possibility that courts will use this issue as another way to limit the number of "garden-variety" private civil RICO suits. If they do, these decisions could have unfortunate consequences for the Government's ability to bring civil RICO actions in areas where other statutes apply.

G. Issues Not Generally Applicable to Government Suits

This section of the Manual will discuss briefly a few issues that have arisen in connection with private civil RICO litigation, but that do not appear to be likely to arise in connection with RICO actions brought by the Federal Government. Government attorneys should at least be aware of these issues because analogous issues might arise in government suits.

1. Availability of Equitable Relief to Private Plaintiffs

The only civil RICO action expressly available to

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statute); United States v. Standard Drywall Corp., 617 F. Supp. 1283 (E.D.N.Y. 1985).

205/ See United States v. Local 560, International Brotherhood of Teamsters, 780 F.2d 267, 282-83 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986)(Hobbs Act predicates involving extortion of union members' rights were not preempted by labor statutes).

206/ See Chicago District Council of Carpenters Pension Fund v. Juell, No. 84 C 7467 (N.D. Ill. June 30, 1987) (mail and wire fraud predicates involving unfair labor practices were preempted by federal labor statutes).

private persons is the action for treble damages under 18 U.S.C. § 1964(c). Although some courts and commentators have indicated that private plaintiffs can also obtain equitable relief under RICO, 207/ the stronger view appears to be that they cannot. 208/

2. Arbitrability of RICO Actions

In Shearson/American Express Inc. v. McMahon, 209/ the Supreme Court held that RICO actions under 18 U.S.C. § 1964(c) are subject to arbitration clauses, such as those found in some brokerage agreements. Thus, claims subject to such a clause must be submitted for arbitration, and a RICO suit, therefore, may not be possible.

3. In Pari Delicto Defense

In the context of a private suit for treble damages, one court has ruled that the common-law defense of in pari delicto, which bars recovery by wrongdoers, 210/ is not

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207/ See, e.g., Chambers Development Co. v. Browning-Ferris Industries, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984); Aetna Casualty and Surety Co. v. Liebowitz, 570 F. Supp. 908, 909-10 (E.D.N.Y. 1983), aff'd on other grounds, 730 F.2d 905, 909 (2d Cir. 1984); RICO and the Antitrust Laws, 52 ABA Antitrust L.J. 300, 375-76 (1983).

208/ See Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 107 S. Ct. 1336 (1987); Vietnam Veterans of America, Inc. v. Guerdon Industries, Inc., 644 F. Supp. 951, 960-61 (D. Del. 1986); Volckmann v. Edwards, 642 F. Supp. 109 (N.D. Cal. 1986). See also Trane Co. v. O'Connor Securities, 718 F.2d 26, 28-29 (2d Cir. 1983); Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983); Kaushal v. State Bank, 556 F. Supp. 576 (N.D. Ill. 1983).

209/ 107 S. Ct. 2232 (1987).

210/ The doctrine has been defined as being "that a plaintiff who has participated in wrongdoing cannot recover when he suffers injury as a result of his

available as a defense in such a RICO suit. The court looked to antitrust law for analogous precedent, and held that the fact that the plaintiff may have unclean hands should not bar the action, in view of "RICO's broad anti-racketeering policies." 211/

V. Special Problems and Issues for Government Civil RICO Actions

A. Prior or Parallel Criminal Proceedings

In some instances, a government RICO suit may be initiated when there have been no related criminal proceedings, and no criminal proceedings are contemplated. More often, however, because of the nature of RICO, it is to be expected that there will be some interplay or overlap between criminal and civil matters when a RICO suit is brought. This section of the Manual addresses the legal and practical issues raised under those circumstances.

Clearly, there is no constitutional requirement prohibiting the Government from litigating civil and criminal claims at the same time. 212/ Courts have recognized the Government's legitimate need to have dual prosecutions, and are loath to require the Government to "forego a criminal prosecution in order to obtain civil

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wrongdoing." First Beverages, Inc. v. Royal Crown Cola Co., 612 F.2d 1164, 1172 (9th Cir.), cert. denied, 447 U.S. 924 (1980).

211/ In re National Mortgage Equity Corporation Mortgage Pool Certificates Securities Litigation, 636 F. Supp. 1138, 1156 (C.D. Cal. 1986).

212/ 2 S. Beale and W. Bryson, Grand Jury Law & Practice § 801, at 2 (1986).

relief to which it is entitled." 213/

1. Federal Rule of Criminal Procedure 6(e)

Federal Rule of Criminal Procedure 6(e) ("Rule 6(e)") provides a "General Rule of Secrecy," 214/ and prohibits government attorneys from disclosing matters occurring before the grand jury except as authorized by the rule. 215/ This section is designed to provide government attorneys with an introduction to possible Rule 6(e) problems arising in connection with civil RICO suits. If a potential issue arises, the litigator should check the applicable circuit law and the Department's publication,

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213/ Id. at 6.

214/ In United States v. John Doe, Inc. I, 107 S. Ct. 1656, 1661 n.5 (1987), the Supreme Court, quoting from United States v. Rose, 215 F.2d 617, 628-29 (3rd Cir. 1954), listed the following reasons for grand jury secrecy:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

215/ See United States v. John Doe, Inc. I, 107 S. Ct. 1656, 1659 (1987); Department of Justice, Office of Legal Policy, Guide on Rule 6(e) after Sells and Baggot (January 1984) at 4 [hereinafter Rule 6(e) Guide].

Guide on Rule 6(e) after Sells and Baggot (January 1984) ("Rule 6(e) Guide"). 216/

There are certain disclosure restrictions after a grand jury has been impanelled under Federal Rule of Criminal Procedure 6(e). Only disclosure of "matters occurring before the grand jury" is prohibited. Not everything relative to a criminal investigation constitutes matters occurring before a grand jury. The following checklist is provided as a general guide. However, government attorneys should be sure to check the case law in their district before reviewing any material which may be considered grand jury material. 217/

Grand Jury Materials

1. Grand Jury witness identities.

2. Substance of witness testimony:

a. Any statement by a witness which is read, verbatim, by another into the grand jury record.

b. Any statement given in lieu of grand jury testimony.

c. Any statement procured solely by means of a grand jury subpoena, including information given to an agent or prosecutor immediately before, and debriefings immediately after, a grand jury appearance

d. Transcripts of witness testimony.

3. Deliberations and questions of jurors; grand jury minutes.

216/ The manual is somewhat outdated because of the Supreme Court's decision in United States v. John Doe, Inc. I, 107 S. Ct. 1656 (1987). However, it is useful for analysis of the issues unaffected by Doe.

217/ See generally Rule 6(e) Guide, supra note 215.

4. Documents produced through issuance of a grand jury subpoena, or marked as grand jury exhibits. (However, if the very same documents or copies thereof, are obtained by another means [e.g., voluntary surrender, warrant, RICO civil investigative demand], they are not considered grand jury materials).

5. Any information which reveals the strategy or direction of the grand jury's investigation, such as an inventory of all documents subpoenaed.

NOT Grand Jury Materials

1. Any statement given to any law enforcement agent, federal or local, at any time, with the exceptions noted above. This includes all FBI reports of interviews ("302's").

2. Any document, even if subpoenaed by a grand jury, if the document is sought for its intrinsic value in furtherance of a lawful investigation rather than to learn what took place in the grand jury.

3. All documents pertaining to court-ordered and consensual electronic surveillance. (However, some of these materials may be covered by other restrictions on disclosure. See Section V(F), infra.)

4. Trial record, and any other material already disclosed in open court (e.g., pursuant to a plea bargain or sentencing).

5. Any information not originally obtained in response to a grand jury subpoena, even though later brought before the grand jury (e.g., physical evidence obtained pursuant to a warrant).

Gray Areas:

1. Prosecution memoranda ("pros memos"): Insofar as these reflect the results of an FBI investigation only, they are investigatory materials not protected by Rule 6(e). If they contain any summary of, or reference to, grand jury material, this information is protected by Rule 6(e) and cannot be disclosed without a court order.

2. Interoffice FBI teletypes, Organized Crime and Racketeering Section daily reports of case activity: As with pros memos, if these contain any grand jury materials, such as summaries of witness testimony, that information is protected.

3. Agents' case synopses: As above, if these contain grand jury materials, that information is protected.

4. Interviews with prosecutors and criminal case agents: As long as no grand jury materials are discussed, interviews with agents and prosecutors who participated in grand jury investigations are not prohibited by Rule 6(e). Prior to any interview or telephone conversations, the interviewee must be advised that the interviewer is investigating the matter in the civil context and that Rule 6(e) restrictions are applicable. A careful record of such advice should be kept.

5. Agency file: There almost certainly will be grand jury material in a complete agency file. Therefore, no civil attorney should have access to the grand jury portion of agency files. Contents of a file must be redacted by agency personnel in order to exclude any grand jury information prior to release of the file to a civil attorney.

Government prosecutors who participated in a grand jury proceeding related to the civil proceeding are not precluded from participating in the civil proceeding, and may continue to have access to material that was disclosed to them in the grand jury. 218/ Such continued access is not considered disclosure of Rule 6(e) material. The prosecutor may not discuss grand jury material with other government attorneys or agents involved in the civil proceeding. However, it is not improper to give advice or opinions based on knowledge of grand jury proceedings, as long as no information is actually disclosed. 219/

A civil attorney who desires to obtain grand jury

218/ United States v. John Doe, Inc. I, 107 S. Ct. 1656, 1660 (1987).

219/ See In re Grand Jury Investigation (Lance), 610 F.2d 202, 217 (5th Cir. 1980).

material for use in a civil proceeding may make a motion in the district court where the grand jury was convened for disclosure under Rule 6(e)(3)(C)(i). 220/ Disclosure will

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220/ When the prosecution is ready to file a motion for disclosure under Rule 6(e), the following documents should be prepared:

1. Motion to Disclose.

The motion itself is fairly simple. A model motion is provided in S. Beale and W. Bryson, Grand Jury Law and Practice § 7.20 (1986). The Department's Office of Legal Policy recommends that, in addition to names of specific persons to whom disclosure will be made, phrasing be included in both the motion and the order prepared for the court's signature to the effect that disclosure will be made to "such other attorneys and legal support personnel who may be assigned to the case." Rule 6(e) Guide, supra note 215, at 79. This wording will account for changes in personnel over time and eliminate the necessity of returning to court for a modification of the order if a new person is assigned to the investigation.

2. Order for Disclosure.

The order which is prepared for the court's signature should be drafted and submitted, but modified in accord with the wishes of the court, which may include very limited disclosure provisions, and be accompanied by the issuance of protective orders.

3. Memorandum of Points and Authorities.

The district court must be persuaded as to the prosecution's need for disclosure of grand jury materials. To that end, persuasive points and authorities covering Rule 6(e) generally, the nature of the case (both [1] as its goals match the RICO statute and guidelines in existing case law and [2] as its factual basis requires supplementation with grand jury materials), and particularized need standards, must be submitted with the motion.

> [T]he government should be required to demonstrate its bona fides prior to obtaining a Rule 6(e) . . . order. This showing is particularly important where the grand jury fails to return an indictment. In such a case, the likelihood of improper use of the grand jury process is substantially greater and an evidentiary hearing . . . [which may be ex

not be permitted unless the district court enters an appropriate order. Such motions should be filed ex parte so as to preserve grand jury secrecy. 221/ In order to obtain a Rule 6(e) order, the material must be sought preliminarily to or in connection with a judicial proceeding. 222/ Further, the government attorney must show a "particularized need" for the material. "Particularized need" is shown where there is a "[need] to avoid a possible injustice in another judicial proceeding, ... the need for disclosure is greater than the need for continued secrecy, and . . .

> parte] might be necessary before disclosure is ordered.

In re Grand Jury Subpoenas, April, 1978, at Baltimore, 581 F.2d 1103, 1110 (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979) (citations omitted).

221/ See Rule 6(e) Guide, supra note 215, at 31-32. The Senate "contemplated that the judicial hearing in connection with an application for a court order by the government under [Rule 6(e)] should be ex parte so as to preserve to the maximum extent possible, grand jury secrecy." S. Rep. No. 354, 95th Cong., 1st Sess. 8, reprinted in 1977 U.S. Code Cong. & Admin. News 523-27. The district courts nonetheless have discretion to require adversary hearings on Rule 6(e) motions for disclosure. See In re Grand Jury Proceedings (Miller Brewing Co.), 687 F.2d 1079, 1087-88 (7th Cir. 1982).

222/ Rule 6(e)(3)(C)(i). In United States v. Baggot, 463 U.S. 476 (1983), the Court held that a civil tax audit was not "preliminary to" a judicial proceeding. In so holding, the Court promulgated a two-part test. First, Rule 6(e)(3)(C)(i) "contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated." Id. at 480. The emphasis is on the actual use of the material, and the primary purpose of disclosure must be "to assist in preparation or conduct of a judicial proceeding." Id. Second, litigation must be more than a remote contingency, although the Court declined to define how firm the decision to litigate must be. Id. at 482 & n.6.

[the] request is structured to cover only the material needed." 223/ The court will allow disclosure to the extent of the particularized need shown.

In applying this test, factors considered are how the material will be used, 224/ whether the party seeking disclosure could obtain the material from a different source, 225/ whether or not the grand jury investigation is still pending, 226/ the type of information at issue, 227/ and whether there may be further criminal trials.

223/ Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979).

224/ United States v. Procter & Gamble, 356 U.S. 677, 682 (1958).

225/ In this vein, the Government's access to the documents through a civil investigative demand ("CID"), see Section V(B), infra, may weigh against a court's entering a disclosure order. However, in United States v. John Doe, Inc. I, 107 S. Ct. 1656 (1987), the Court did not consider the Antitrust Division's broad discovery powers under its CID authority to abrogate the need for a Rule 6(e)(3)(C)(i) disclosure, although the Second Circuit did. United States v. John Doe, Inc. I, 774 F.2d 34, 39 (2d Cir. 1985), rev'd, 107 S. Ct. 1656 (1987). The Supreme Court explained:

> While the possibility of obtaining information from alternative sources is certainly an important factor, we believe that the Court of Appeals exaggerated its significance in this case. Even if we assume that all of the relevant material could have been obtained through the civil discovery tools available to the Government, our precedents do not establish a per se rule against disclosure. Rather, we have repeatedly stressed that wide discretion must be afforded to district court judges in evaluating whether disclosure is appropriate.

107 S. Ct. at 1664 (citations and footnote omitted).

226/ United States v. Socony-Vacuum, 310 U.S. 150, 233-34 (1940).

227/ See In re Grand Jury Proceedings (Miller Brewing

228/ There are additional particularized need considerations where the Government is the party seeking disclosure, such as the public interest served, less risk of improper disclosure, burden of duplicating the grand jury investigation, and any separate legitimate rights the Government may have to the materials. 229/ Further, the Government may have to show less of a particularized need where the complaint has not yet been filed as the materials would be used before discovery begins rather than as a substitute for discovery. 230/

In lieu of a Rule 6(e) motion, the Civil Division has suggested that one way to reduce the risk of having evidence declared grand jury materials, and then having a motion for disclosure denied, is to file a motion under the authority of SEC v. Dresser Industries, Inc., 628 F.2d 1368 (D.C. Cir. 1980) and United States v. Interstate Dress Carriers, 280 F.2d 52 (2d Cir. 1960), explaining which documentary materials are not subject to Rule 6(e) and may be used for the civil case without an order. In some jurisdictions it may be advisable to first establish an independent right to

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Co.), 687 F.2d 1079, 1092-93 (7th Cir. 1982), aff'd on reh'g, 717 F.2d 1136 (7th Cir. 1983); In re Barker, 741 F.2d 250, 255 (9th Cir. 1984).

228/ See United States v. Fischbach & Moore, Inc., 776 F.2d 839, 845 (9th Cir. 1985).

229/ United States v. Sells Engineering, Inc., 463 U.S. 418, 445 (1983).

230/ See United States v. John Doe, Inc. I, 107 S. Ct. 1656, 1663 (1987).

the documents. (RICO civil investigative demands may be used for this.) Although this motion would relate to corporate records, the government attorney can inform the court that interviews taken outside the grand jury are also being reviewed. Finally, the Government can ask the court to include in the release of materials any audit work done on the business records (if the audit work did not rely on grand jury testimony and was not ordered by the grand jury) on the ground that the audit work is only a summary of the documents themselves. The Dresser motion could be filed simultaneously with a Rule 6(e) disclosure motion in order to illustrate a particularized need for information otherwise unavailable. In other words, a Dresser motion may be a formalized way to demonstrate both exhaustion of other means of discovery and good faith on the part of the Government.

2. Other Obstacles

Besides Rule 6(e), there are other obstacles the government attorney may encounter when a civil investigation is accompanied by a prior or parallel criminal proceeding. A civil defendant may argue that the Government used the grand jury for civil purposes and therefore the defense should be given equal access to the materials. A grand jury may not be used for the sole purpose of preparing a civil case. 231/ However, as long as the grand jury is used for

231/ See United States v. Procter & Gamble Co., 356 U.S. 677 (1957). In Procter & Gamble, the Court stated that if the Government had used the grand jury proceeding "to elicit evidence in a civil case" then the Government

conducting a criminal investigation, there is no reason why the evidence could not be used in a civil case. 232/ As long as there is a realistic prospect of a criminal prosecution, a civil defendant is not entitled to disclosure of grand jury material. 233/

Second, civil defendants may argue that the existence of parallel civil and criminal proceedings places an impermissible burden on them in that they are "forced to choose between unpalatable alternatives in determining whether to invoke their privilege against compulsory self-incrimination." 234/ Courts have generally held that the adverse inference drawn from a defendant's invocation of the fifth amendment in a civil suit is not a sufficient burden so as to make parallel criminal and civil proceedings violative of any constitutional privilege against self-incrimination. 235/

Third, a civil defendant may claim that the Government was using the civil case in order to gain evidence for a criminal case. 236/ Courts have found the Government to

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would be violating the "policy of the law." Id. at 683-84.

232/ Id. at 684.

233/ 2 S. Beale & W. Bryson, Grand Jury Law & Practice § 801, at 11 (1986) (citing United States v. Pennsalt Chemicals Corp., 260 F. Supp. 171, 180-82 (E.D. Pa. 1966)).

234/ 2 S. Beale & W. Bryson, Grand Jury Law & Practice § 801, at 14 (1986).

235/ Id. at 15. See cases cited at 17 n.9.

236/ After an indictment is returned, the Government's

abuse a civil proceeding in the above manner, and such tactics have led to a stay of the civil proceeding. 237/ The civil attorney should be careful not to use civil proceedings in order to gather evidence for a criminal proceeding.

When a court finds that the existence of parallel criminal and civil proceedings is unfair to a defendant, the typical remedy granted is a stay of the civil proceedings. In general, courts will "balance the harm that delay would cause the civil parties against the difficulties that the parallel proceedings pose to the complaining party in the criminal case." 238/ For example, courts are reluctant to grant stays where equitable relief is sought, but are amenable to granting stays where the party is seeking a money judgment.

B. Civil Investigative Demands

The Attorney General (as defined in the RICO statute) 239/ is authorized, pursuant to 18 U.S.C. § 1968, to issue

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discovery is restricted. On the other hand, criminal defendants may file civil suits in order to "discover" the Government's criminal case. See id. at 18-20. For a discussion of discovery by defendants and relevant government privileges, see Section VII(G)(5), infra.

237/ See 2 S. Beale & W. Bryson, Grand Jury Law & Practice § 801, at 20. This has happened on only a few occasions.

238/ Id. at 26.

239/ The "Attorney General" is defined under 18 U.S.C. § 1961(10) to include "the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so

and cause to be served a civil investigative demand (CID) on any person or enterprise believed to be in possession of materials relevant to any civil or criminal RICO investigation. 240/ In a sense, the CID is the civil counterpart to the grand jury subpoena. However, the CID is less powerful in that it can seek only documents, not testimony, and it is subject to more possible avenues of challenge than a grand jury subpoena.

The RICO CID provisions were modeled after the CID provisions under the antitrust laws, 15 U.S.C. §§ 1311-1314. 241/ Because the case law under 18 U.S.C § 1968 is non-existent, 242/ this Manual will rely on the analogous antitrust case law interpreting 15 U.S.C. §§ 1311-1314 for assistance in construing the RICO CID provisions.

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designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law." To date, no designations of other agencies have taken place under this provision.

240/ 18 U.S.C. § 1968(a). The person served need not be a potential target of the investigation. See National Electrical Manufacturers Ass'n v. United States Department of Justice, 1987-2 Trade Cas. (CCH) ¶ 67,699 (August 27, 1987). The use of CIDs is contemplated for civil investigations, although it is clear from the statutory language that CIDs may also be utilized prior to instituting a criminal proceeding.

241/ See H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 58 (1970).

242/ As of the date of the publication of this Manual, there has not been a CID issued under the authority of this section.

The government attorney should ensure that a CID does not contravene any other statutes or departmental regulations. For example, an antitrust CID cannot be issued to an attorney for information relating to representation of a client unless the Assistant Attorney General finds that certain conditions are met. 243/ Also, no CID can be issued to a reporter or news media organization except as permitted by 28 C.F.R. § 50.10. Lastly, CIDs may not be used to obtain customer transaction records from a financial institution without complying with the Right to Financial Privacy Act of 1978. 244/

1. Issuing the CID

The Attorney General may issue a CID under Section 1968(a) when there is "reason to believe" 245/ that any person or enterprise may have documents relevant to a racketeering investigation. 246/ The statute defines

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243/ See United States Attorneys' Manual § 9-2.161(a).

244/ 12 U.S.C. §§ 3401-3422. See United States Attorneys' Manual § 9.4-842-844.

245/ See, e.g., Australia/Eastern U.S.A. Shipping Conference v. United States, 1982-1 Trade Cas. ¶ 64,721 at 74,064 (D.D.C. 1981) (Government argued that it was not required to have probable cause in order to investigate with CID; court did not reach issue). Although the question of what constitutes reasonable belief has not been litigated with regard to the antitrust CID provision, it can best be described as some basis on which to believe that the recipient has the relevant material.

246/ See 18 U.S.C. § 1961(8). A racketeering investigation is defined as "any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any

documents to include recordings as well as books and papers. 247/ The CID should be signed by the Attorney General, as the term is defined under 18 U.S.C. § 1961(10). 248/ In practice, the authorizing individuals designated probably would be the Chief and Deputy Chiefs of the Organized Crime and Racketeering Section. One of those individuals would sign the CID after the required review. 249/ The submitting attorney should allow three weeks for review of the CID. The CID must:

> 1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;
>
> 2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;
>
> 3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and
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> 4) identify the custodian to whom such material shall be made available. 250/

The information in (1), (3), and (4) can be provided in a standard cover page that attaches a list of documents

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case or proceeding arising under this chapter."

247/ 18 U.S.C. § 1961(9).

248/ See 18 U.S.C. § 1968(a) (Attorney General may issue a CID in writing).

249/ See United States Attorneys' Manual § 9-110.320 (required review by Organized Crime and Racketeering Section).

250/ 18 U.S.C. § 1968(b).

demanded under the CID. A sample CID, primarily based on the Antitrust Division's format, is provided in Appendix B.

The nature of the conduct, under (1) above, need only be generally described. In Petition of Gold Bond Stamp Co., 221 F. Supp. 391, 397 (D. Minn. 1963), aff'd, 325 F.2d 1018 (8th Cir. 1964), the court rejected a challenge to an antitrust CID, and held that the nature of the conduct being investigated could be set forth in general terms. The test, the court explained, was whether the description of the nature of the conduct being investigated was "sufficient to inform adequately the person being investigated and sufficient to determine the relevancy of the documents demanded for inspection." 251/

Although there is no case law regarding what constitutes a "reasonable period of time" (under (3), above) in which to comply with the CID, it seems prudent to judge the reasonableness of the period on a case-by-case basis.

251/ 221 F. Supp. at 397. Since the Gold Bond decision, only six CIDs have been challenged because of alleged inadequacies in the description of the investigation. In each instance, the Gold Bond decision was followed and the descriptions were found to be satisfactory. See Lightning Rod Manufacturers Association v. Staal, 339 F.2d 346, 347 (7th Cir. 1964); Hyster Company v. United States, 338 F.2d 183 (9th Cir. 1954); Material Handling Institute, Inc. v. McLaren, 426 F.2d 90 (3d Cir.), cert. denied, 400 U.S. 826 (1970); Finnell v. United States Department of Justice, 535 F. Supp. 410 (D. Kan. 1982); First Multiple Listing Service v. Shenefield, 1980-81 Trade Cas. ¶ 63,661 (N.D. Ga. 1980); Petition of Emprise Corp., 344 F. Supp. 319, 322-23 (W.D.N.Y. 1972). In Gold Bond, the CID described the subject of the investigation as "[r]estrictive practices and acquisitions involving the dispensing, supplying, sale or furnishing of trading stamps and the purchase and sale of goods and services in connection therewith." 221 F. Supp. at 397.

The return date should depend on the approximate number of documents called for by the CID and the relative difficulty of the search. Further, the government attorney may want to review case law analyzing what is a reasonable time to return a grand jury subpoena in the circuit. Finally, the CID must identify the custodian for the documents. The custodian is appointed by the Attorney General. See infra Section 6 for a discussion of the custodian's duties and responsibilities.

2. Content

The CID must adequately describe, with "definiteness and certainty," the class of documents sought to be produced. 252/ The "demand may not set forth requirements which would be unreasonable, or seek information which would be privileged from disclosure if contained in a subpena duces tecum before a grand jury." 253/

There have been only a few challenges to CIDs in the

252/ 18 U.S.C. § 1968(b)(2). The legislative history states that the CID should "fairly identify the documents being demanded." H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 58, reprinted in 1970 U.S. Code Cong. & Admin. News 4035.

253/ 18 U.S.C. § 1968(c). The legislative history expands on the term "unreasonable" by also proscribing the seeking of "information which would [be] privileged from disclosure." H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 58, reprinted in 1970 U.S. Code Cong. & Admin. News 4035. Applicable grand jury subpoena case law may also be consulted to determine whether the description of documents sought meets the statutory standard and whether the return date is a reasonable one. For authority on the standards applicable to grand jury subpoenas, see 2 C. Wright & A. Miller, Federal Practice & Procedure §§ 271-79 (1982); 8 Moore's Federal Practice ¶ 17.11 (1983).

antitrust context based on alleged inadequacies in the description of the investigation. 254/ None of the courts required dismissal of the CID, although the district court in Multiple Listing Service v. Shenefield, 1980-1 Trade Cas. (CCH) ¶ 63,661 (N.D. Ga. 1980), enforced the CID only after certain modifications were made by both the Department of Justice and the court. The court reasoned that, absent such modifications, the financial burden on the recipient would be too great. Id. at 17,551.

3. Possible Objections to CIDs

Case law regarding validity of grand jury subpoenas should be referred to in analyzing whether a particular CID request, or the CID itself, could be successfully challenged. 255/ As a practical matter, the CID recipient may either refuse to respond to the CID or challenge the CID in court. See Section V(B)(7), infra. Besides challenges based on the content or format of the CID, a CID may be successfully challenged if the Government issued it in bad faith -- e.g., for the purpose of intimidating a witness or for political reasons, 256/ or if the Department does not have jurisdiction to conduct the investigation. 257/ Other

254/ See note 251, supra, for a listing of these cases.

255/ See note 253, supra, for authority on standards applicable to grand jury subpoenas.

256/ See Chattanooga Pharmaceutical Ass'n v. United States Dept. of Justice, 358 F.2d 864 (6th Cir. 1966); Petition of Cleveland Trust, 1972 Trade Cas. (CCH) ¶ 73,991 at 92,122 (N.D. Ohio 1969).

257/ See Australia/Eastern U.S.A. Shipping Conference v. United States, 1982-1 Trade Cas. (CCH) ¶ 64,721, at

challenges may become evident as the RICO CID is put to use. 258/

4. Purpose and Use of the CID

The CID is designed to be an investigative tool. Because it is issued prior to the filing of a complaint, it allows a civil investigation to continue without being involved in "full-blown litigation." 259/

The standard for issuance of a CID is "reason to believe" that the recipient possesses information relevant to a racketeering investigation. This standard has not been defined under the Act and has not been addressed under the analogous antitrust case law. In any event, it is a standard requiring a quantum of evidence less than a probable cause standard.

74,064 (D.D.C. 1981) (no clear antitrust exemption from alleged illegal conduct and therefore CID recipient must comply); Amateur Softball Ass'n of America v. United States, 467 F.2d 312 (10th Cir. 1972) (recipients alleged that they were not engaged in commerce; court refused to decide issue at CID stage).

258/ There is no provision within the CID statute which makes the Federal Rules of Civil Procedure applicable, see antitrust provision, 15 U.S.C. § 1312(c)(1)(B) and 15 U.S.C. § 1314. However, the legislative history provides that the "subsection in the antitrust laws (15 U.S.C.§ 1314(e)) which refers to the applicability of the Federal Rules of Civil Procedure, is unnecessary since rule 1 makes the civil rules applicable in this situation." H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 59, reprinted in 1970 U.S. Code Cong. & Admin. News 4035. Thus, it appears that CID recipients may base challenges on the Federal Rules of Civil Procedure in addition to challenges which may be brought against grand jury subpoenas.

259/ Associated Container Transp. (Australia) Ltd. v. United States, 502 F. Supp. 505, 510 (S.D.N.Y. 1980).

Materials submitted in response to a CID are privileged from disclosure, except for certain statutory exemptions. If the civil investigation uncovers evidence of criminal violations, the information can be presented to a grand jury. Also, the document custodian may make CID materials available to government attorneys for use in a court or grand jury proceeding which involves racketeering activity. 260/ It is clear that CID material can be used for a criminal grand jury investigation, and there is no requirement that CID authority cease upon the commencement of a criminal investigation. 261/

A CID can be served upon any person or enterprise believed to have possession, custody, or control of relevant documents. The CID power enables the Government to obtain documents from individuals or companies which are not targets of the investigation. Under the civil discovery rules, see Section VII(G), infra, a non-party's documents are not discoverable. Therefore, use of a CID clearly permits a government attorney to obtain more information than is normally available under civil discovery.

260/ 18 U.S.C. § 1968(f)(4).

261/ Under 18 U.S.C. § 1968(f)(4), the document custodian may deliver CID materials to any attorney for the United States designated to appear before any court or grand jury. The Antitrust Division's CID authority, however, ceases when the CID uncovers evidence of criminal violations necessitating investigation by a grand jury. H.R. Rep. No. 94-1343, 94th Cong., 2d Sess. 11, reprinted in 1976 U.S. Code Cong. & Admin. News 2603.

5. Service of the CID

The CID, and any petitions filed in relation to the CID (see Section V(B)(7), infra) may be served upon a person (as defined by 18 U.S.C. § 1961(3)) by delivery of an executed copy to the specified person, to the person's authorized agent, or to the person's principal office or place of business. Service can also be made by certified or registered mail to the person's principal office or place of business. 262/ Any individual may serve the CID. 263/

Proof of service of the CID when it is mailed is verified by the return post office receipt of delivery. If an individual delivers the CID, proof of service is provided by a verified return that the person served the CID.

6. Custodian

The Attorney General (as defined in 18 U.S.C. § 1961(10)) is required to appoint a "racketeering investigator" to serve as document custodian. 264/ A "racketeering investigator" is defined under the Act as "any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter." 265/ The Attorney General may

262/ 18 U.S.C. § 1968(d).

263/ See 18 U.S.C. § 1968(e)("by the individual serving any such demand"). The antitrust CID statute limits the class of people who can serve the CID to antitrust investigators, United States Marshals, and Deputy United States Marshals.

264/ 18 U.S.C. § 1968(f)(1).

265/ 18 U.S.C. § 1961(7).

appoint additional racketeering investigators as necessary to serve as deputies and assist the document custodian. 266/ A custodian should be designated for each CID that is issued; in practice, it is likely that the same person will be the custodian for every CID in a given investigation.

The Antitrust Division's general practice is to appoint a section chief to serve as custodian, and one or two of the attorneys assigned to the case as deputy custodians. The reasoning behind the appointment of a senior Division official is that the custodian should be relatively permanent because notice of a replacement custodian must be submitted to the producing party if the original document custodian dies, becomes disabled, is separated from service, or is relieved from responsibility. 267/ Therefore, the United States Attorney, First Assistant United States Attorney, Strike Force Attorney-in-Charge, or other person at a comparable level should be listed as document custodian, with one or more of the attorneys assigned to the matter serving as deputy custodians.

The document custodian is charged with responsibility for the documents. He or she is authorized to copy the documents for official use and, absent consent of the person who produced the material, is prohibited from disclosing the documents to anyone other than the Attorney General, the person who produced the material, or the person's authorized

266/ 18 U.S.C. § 1968(f)(1).

267/ 18 U.S.C. § 1968(f)(7).

representative. 268/ The custodian may make the documents available to any attorney for the United States for use in a court or grand jury proceeding involving the United States. 269/

At the close of the racketeering investigation or any case or proceeding arising out of such investigation, the custodian is required to return all submitted documents other than those in control of a court or grand jury to the person who produced them. 270/ If after a reasonable time no case or proceeding has been instituted after analysis and examination of the evidence, the person who submitted the documents is entitled to their return upon a written request to the document custodian. 271/ The Government is only required to return the submitted documents, and need not turn over copies made from the submitted documents. 272/

7. Submission of Documents

The person receiving a CID is required to make the requested material available to the custodian for inspection and copying or reproduction at the person's principal place of business on the return date specified in the CID. 273/

268/ 18 U.S.C. § 1968(f)(3).

269/ 18 U.S.C. § 1968(f)(4).

270/ 18 U.S.C. § 1968(f)(5).

271/ 18 U.S.C. § 1968(f)(6).

272/ See 18 U.S.C. § 1968(f)(5) & (6) ("other than copies thereof").

273/ 18 U.S.C. § 1968(f)(2).

The document custodian and the CID recipient can, in writing, designate another date and/or place than the date and place specified in the CID for return of the documents, and may also agree that copies be submitted in lieu of originals. 274/

A government attorney may consider requesting the CID recipient to certify in writing the adequacy of the document search.

A recipient objecting to a CID can either refuse to respond to the CID 275/ or file a petition to modify or set aside the CID. 276/ If the person refuses to comply, the Attorney General may petition a district court to enforce the CID. The petition may be filed in any judicial district in which the person resides, is found, or transacts business, except where (1) the person transacts business in more than one district, and therefore the petition must be filed in the district in which the person maintains a

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274/ Id. There is no provision setting forth the amount the Government would pay for copying. However, because it may be more expensive for the government attorney to view and copy documents at the CID recipient's place of business, it may be economical to reimburse the recipient for reproduction and shipping. There is no authority requiring CID recipients to be reimbursed for the actual cost of the search, and government attorneys should not enter into any agreements with regard to such reimbursement. See Finnell v. United States Dept. of Justice, 535 F. Supp. 410, 415 (D. Kan. 1982)(CID recipients sought to be reimbursed for cost of search; court found they had not substantiated claim without discussing whether Antitrust Division would be required to reimburse them).

275/ 18 U.S.C. § 1968(g).

276/ 18 U.S.C. § 1968(h).

principal place of business, or (2) the parties agree that the Attorney General will file the enforcement petition in another district in which the person transacts business.

Alternatively, the person to whom the CID is directed may file a petition seeking modification or setting aside of the CID. 277/ The petition must state the grounds for objecting to the CID, which may include failure to comply with the statutory requirements or constitutional, legal, or privilege challenges. 278/ The petition must be filed and served on the document custodian within 20 days after service of the CID and before the specified return date. It should be filed in the judicial district within which the person resides, is found, or transacts business. 279/ During the pendency of the petition, the time allowed for compliance with the CID is stayed.

C. Automated Litigation Support

Automated litigation support is a very broad description for computerized assistance with the most time-consuming and burdensome aspects of civil litigation. Specifically, large-scale litigation may require the indexing and retrieving of massive amounts of documentary

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277/ 18 U.S.C. § 1968(h). If the CID recipient objects to only part of CID, the government attorney may be able to compel the recipient to comply with the unobjectionable parts. See H.R. Rep. No. 94-1344, 84th Cong., 2d Sess. 11, reprinted in 1976 U.S. Code Cong. & Admin. News 2608.

278/ 18 U.S.C. § 1968(h).

279/ Id.

evidence. In addition, it may necessitate a tracking system to monitor discovery requests and responses, allocation of manpower, and calendaring and docketing. Handling these functions with computers, rather than manually, is becoming a requisite for litigating complex and sophisticated cases, both in the public sector and in the private sector. 280/

Functions of Automated Systems

A. Document Control

1. Types of Systems

Generically, automated document control systems are of two types: full text retrieval and key-word. For example, computerized legal research systems such as JURIS, LEXIS, and WESTLAW store the full text of cases, and search the full text according to parameters supplied by the user. The computer will print out a copy of the case. In contrast, imagine a system which contains only short case annotations, with "key-words" such as the name of the statute construed, the issues discussed (e.g., "constructive possession"), the parties, and the citation, which guides the user to the published decision. The latter is a rough example of a "key-word" system. 281/

280/ A complete description and discussion focused on private sector use of automated systems can be found in D. Siemer & D. Land, Wilmer, Cutler & Pickering Manual on Litigation Support Databases (1987). The Justice Department has automated major litigation dealing with WPSS, asbestos and other cases. Its budget for automated document control systems was $20 million for fiscal year 1987.

281/ The FBI ISIS (Investigative Support Information System) is a modified key-word type of system.

With regard to documents at issue in civil litigation, a full text retrieval system would store the text of a memo, letter, or other document in its entirety, while a key-word system would store only descriptors of the document, such as the author, the recipient, the subject matter, the date, and the file location. The full text retrieval system, if attached to a printer, can electronically reproduce a hard copy of the document. The key-word system simply refers the user to a document in his or her files.

The decision to use either type of system, or a combination of both types, is based on the number and type of documents which are at issue in a case. A case with a large number of standard documents (e.g., checks, invoices, and other transactional records) may be a prime candidate for the key-word system, while a case based on lengthy narrative evidence (e.g., trial transcripts, investigative reports, and extended correspondence), which is likely to be the subject of extensive discovery requests, may benefit from full text retrieval treatment. Determinations will always take into account case strategies and budget limitations.

2. Setting Up a System

Depending on the number of documents to be indexed, stored, and manipulated, document control can be accomplished through use of a commercially available personal computer program such as dBase III, can be "customized" in-house, or can be contracted out. It should

be noted that an automated system can never substitute for a good manual filing system, but will extend and facilitate the ability to manipulate, and vastly reduce the time needed to gain access to, properly filed documents. In fact, a well-organized manual retrieval system is a prerequisite to automation.

3. Uses of a Document Control System

In large "paper cases," the most important use of a system is tracking documents produced in discovery. This use is magnified in importance in cases with a large number of defendants, whose separate counsel may be requesting (and producing) different sets of documents at different times over the life of the case. Documents produced by non-defendant third parties (e.g., banks and employers) also must be tracked.

The Government as plaintiff must be aware of when discovery requests are due and which agency or person must be contacted in order to comply. An automated system would note, for example, the date a production request was made, by whom it was made, who is responding for the Government, and on what date the request was met. If the materials requested were not produced because a privilege was raised, that fact would be noted. Because the computer would be able to categorize production requests, a list could be generated of all materials requested but not produced due to invocation of a specific privilege, e.g., the Government's confidential informer privilege.

If a full text retrieval system is used, documents can be reproduced directly in multiple copies in answer to defendants' discovery requests. Instead of laboriously hand-searching case files, photocopying valuable originals, re-filing originals, collating documents, and making a written list of what was sent, a computer does the work, using considerably less time, reducing damage and loss of documents, and making a record as it works.

Other uses for document control systems are 1) as a primary information source for drafting answers to interrogatories, 2) as a means by which to construct a chronology of defendant activity, 3) to prepare to take depositions (by calling up relevant documentary evidence), 4) preparing government witnesses for depositions (by retrieving and reviewing with them the body of documentary evidence pertinent to their testimony), and 5) tracking the uses made of specific exhibits (such as affidavits or charts which have been attached to various motions and other pleadings).

B. Pleadings Files

The full text of all pleadings in one case may be entered into a computerized data base. This type of system is valuable as a "brief bank," allows immediate access to the opponents' pleadings, and can be used to track other aspects of the case, such as when defendants were added, dropped or settled out (through checking the caption field). Such "word processing-like" functions as keeping an up-to-

date distribution list (through proof of service records) also can be appended to such a system.

C. Docketing and Calendar Control

For very large cases with appearances in more than one court (e.g., for purposes of litigating a protective order) or a large number of defendants with separate counsel, it will be necessary to computerize dates for discovery deadlines, court appearances, notices, and other requirements of normal civil litigation practice. Commercial programs such as DOCKET may be run on office microcomputers, or other available software may be adapted in-house to meet the needs of the attorneys conducting the case.

Automating docketing, "tickler" files, and the like have the side benefit of providing information necessary for manpower allocation. Attorneys may be able to avoid internal scheduling conflicts (such as a need to argue a motion out of town two days before response to a large set of interrogatories is due) if a schedule of upcoming dates is generated and distributed to staff periodically.

D. When Automation Is Necessary

In general, any big "paper case," or any case with more than a dozen defendants, is a candidate for automation. The following factors should be considered in deciding whether to use an automated litigation support system:

1. Number of pages of discovery materials expected to be generated. A rule of thumb followed in the private

sector is that any case generating more than 25,000 documents in discovery should be automated. 282/ If the documents are at all lengthy, the threshold number should be revised downward.

In a civil RICO case which already has been criminally prosecuted, typical public access and discoverable documents might include a trial transcript (at 250 pages per volume), separate FBI files on the case and on each defendant, witness, or other named in the case (at 250 pages per filed inch), any additional discoverable matter in the criminal prosecutors' files, and transcripts of Title IIIs and consensual recordings. Depending on the nature of the case, the number of documents at issue could easily exceed the threshold stated above.

2. Capabilities of Opposing Counsel

In a complex civil RICO case with high stakes, it is likely that defendants will hire sophisticated legal counsel. If defense counsel has an automated document control system, the Government must be prepared to match the defendants' efforts. Attempting to conduct discovery with a manual system when the opponent is automated is like using one manual typewriter when the opponent has a word processing system.

3. Available Staff

The discovery aspect of most fully automated cases can

282/ See Lisker, How Four Firms Took the Computer Plunge, Calif. Law., Oct. 1987, at 32, 69.

be run by attorneys assisted by a small number of paralegals. The less "automated" a case is, the more manpower, in terms of attorney time and paralegal time, the case will absorb. Every case will differ as to how much discovery production is required, and each staff person will differ in level of skills and pace at which he or she is able to work. The only constant is that a properly constructed and well-run automated system can perform and keep track of repetitive, tedious tasks infinitely faster than paralegals and attorneys.

4. Vulnerability to Sanctions Under Fed. R. Civ. P. 37

Although the Government as plaintiff may be able to manage with a manual document-control system in a very large case, if it does use such a system there is some risk that the court will not grant extensions of time for compliance with defendants' requests for production. Sanctions for failure to comply with discovery requests are available under Fed. R. Civ. P. 37.

The Government has the same amount of time to respond to defendants' discovery requests as any other plaintiff, on whom is placed the burden of moving the case forward. Failure to respond appropriately could result in the imposition of serious sanctions. See, e.g., Kahn v. Secretary of Health, Education and Welfare, 53 F.R.D. 241 (D.C. Mass. 1971) (government agents must comply with district court's discovery order or be subject to sanctions); Donovan v. Gingerbread House, Inc., 106 F.R.D.

57 (D.C. Colo. 1985) (suit by plaintiff Secretary of Labor dismissed for Government's failure to provide discovery ordered by the court).

D. Consent Decrees

In a civil RICO case, a consent decree is a formalized, court-approved agreement between the Government as plaintiff and one or more defendants, wherein defendants consent to certain relief requested by the Government in exchange for the Government's promise to cease litigating the case (or some part thereof) against defendants. Ideally, the Government seeks the whole of the relief requested in its complaint. In return, the defendants, although forced to accept an outcome as if the Government had won at trial, save the time, expense and embarrassment of litigating a losing cause to the bitter end. The Government may make a settlement offer more palatable by requesting less than total relief. Obtaining a consent decree can be a highly efficient and effective way to dispose of part or all of a civil RICO case.

While the content and form of each consent decree are within the discretion of the attorneys in charge of the case, a number of potential problems should be noted:

1. Consultation with other jurisdictions.

Civil RICO defendants may be doing business and/or be under investigation in more than one federal district. Before finalizing any consent decree which limits in any way the Federal Government's ability to prosecute or to litigate

against any "consenting" defendant, the attorneys in charge of the case should consult with federal investigative agencies, and with United States Attorneys' Offices in districts where a defendant has resided, has been investigated, or has a residence or business. Consultation with state law enforcement authorities should take place where appropriate.

2. Preservation of Constitutional Rights

No civil RICO consent decree has been litigated on the basis that the agreement infringed the defendant's constitutional rights. Therefore, no case law exists governing what is and what is not infringement. However, to avoid any potential for adverse decisions, it is suggested that consent decree language dealing with such matters as prohibiting defendants from associating with other persons be drawn as narrowly as possible. For example, a defendant who agrees that he will not associate with certain of his relatives may later choose to challenge the decree, based in part on infringement of his First Amendment rights of association. Other constitutional rights may come into play, depending upon the nature of the case (e.g., right to make contracts, right to counsel, etc.).

3. Enforcement

Just as private sector attorneys draw up contracts and leases with the consequences of breach in mind, government attorneys drafting civil RICO consent decrees must keep in mind how events will play out should defendants breach the

agreement approved by the court. First, how will the defendants' behavior be monitored? (FBI surveillance? Periodic reporting by defendants themselves? A "hands-off" policy until defendants are apprehended again conducting the same racket?) Second, if defendants violate a decree, is civil contempt or criminal contempt adjudication to be sought? Which office will pursue these contempt cases? And third, is enforcement of the decree against all defendants worth the time and resources it will require?

E. Contempt Proceedings to Enforce Civil Judgments

Contempt of court is a willful disregard of the authority of a court. 283/ There are two types of contempt--criminal contempt under Federal Rule of Criminal Procedure 42 and civil contempt, which is governed by the Federal Rules of Civil Procedure. The Supreme Court has noted that "[t]he traditional distinction between civil and criminal contempt has been the difference between refusing to do what has been ordered (civil) and doing what has been prohibited (criminal)." 284/ Although the same type of sanctions may be imposed, civil contempt is "remedial in

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283/ United States v. United Mine Workers, 330 U.S. 258, 303 (1946). The substantive elements of contempt are contained in numerous federal statutes, most notably the general contempt statute, 18 U.S.C. § 401. Specifically, Section 401 authorizes the court to punish by contempt any "disobedience or resistance to its lawful writ, process, order, rule, decree, or command." See also 18 U.S.C. § 402 (contempts constituting crimes) and 28 U.S.C. § 703 (punishment of witness for contempt).

284/ Gompers v. Buck Stove & Range Co., 221 U.S. 418, 449 (1911).

nature and intended to coerce" the defendant to act, 285/ while criminal contempt is punitive and "imposed for the purpose of vindicating the authority of the court." 286/ The same conduct can result in both civil and criminal contempt citations. 287/ Although a criminal contempt action would be the most likely course for violation of a civil judgment, the prosecutor should also be aware that a civil contempt proceeding is available, especially if a corporation or other non-natural entity is the subject of the proceeding and the prosecutor desires compliance with the decree rather than punishment.

1. Criminal Contempt

Criminal contempt is a "public wrong which is punishable by fine or imprisonment or both." 288/ The procedure to be followed when charging criminal contempt is provided under Federal Rule of Criminal Procedure 42. Under Rule 42(a), a judge may punish a criminal contempt summarily if the "judge certifies that he saw or heard the contempt and that it was committed in the actual presence of the court." 289/ Alternatively, the alleged contemnor must be

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285/ C. Wright, Federal Practice & Procedure § 704 (1982).

286/ United States v. United Mine Workers, 330 U.S. 258, 302 (1946).

287/ For example, the Supreme Court in United States v. United Mine Workers in effect let stand a punitive (criminal) and nonpunitive, coercive (civil) fine in a single proceeding. 330 U.S. 258 (1946).

288/ Bloom v. Illinois, 391 U.S. 194, 201 (1968).

289/ Fed. R. Crim. P. 42(a). This is known as a

given notice, which notice "shall state the time and place of [the] hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such." 290/ The notice can either be in writing or given orally by a judge in open court in the presence of the defendant. 291/ The prosecutor can proceed by indictment 292/ or information. 293/

Although Rule 42(b) provides the defendant with a right to a jury trial "in any case in which an act of Congress provides," 294/ the Supreme Court has limited the

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"direct" contempt. This subsection is not dealt with in this Manual because it is unlikely that it will be used when pursuing a decree violation, as such violation will most likely occur outside the court's presence. For a good discussion of Rule 42(a), see generally 3 C. Wright, Federal Practice & Procedure §§ 707-708 (1982).

290/ Fed. R. Crim. P. 42(b). "Describe it as such" means to inform the individual that the contempt charged is criminal, as opposed to civil. However, the Supreme Court has suggested that this part of the rule is not to be applied rigorously, and a proceeding could be regarded as a criminal contempt proceeding even through it was not described as criminal under Rule 42. United States v. United Mine Workers of America, 330 U.S. 258, 297-98 (1947).

291/ J. Moore, 8B Moore's Federal Practice, ¶ 42.04[2] at 42-41 (2d ed. 1987).

292/ See United States v. Williams, 622 F.2d 830, 837-38 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981); United States v. Eichhorst, 544 F.2d 1383 (7th Cir. 1976).

293/ See United States v. Dean Rubber Mfg. Co., 71 F. Supp. 96 (W.D. Mo. 1946).

294/ See, e.g., 18 U.S.C. §§ 3691, 3692; 42 U.S.C. § 1995.

defendant's right to a jury trial for alleged criminal contempt to non-petty offenses. 295/ Under 18 U.S.C. § 1(3), (repealed as of November 1, 1987) a petty offense is one in which the maximum penalty does not exceed six months, and a fine of $5,000 for an individual and $10,000 for a corporation. Under the new sentencing guidelines, 296/ a petty offense is defined as a class B misdemeanor (maximum incarceration of six months or less but more than thirty days), a class C misdemeanor (thirty days or less but no more than five days), or an infraction (five days or less, or if no incarceration is authorized). 297/ Thus, existing Supreme Court case law supporting the six-month term of imprisonment as the proper division between petty and serious offenses will most likely remain intact. 298/

A judge may be disqualified from presiding at the trial or hearing of a contempt charge, except with the defendant's consent, "if the contempt charge involves disrespect to or criticism of a judge." 299/ Thus, where the contempt is

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295/ Bloom v. Illinois, 391 U.S. 194 (1968).

296/ The guidelines apply to crimes committed after November 1, 1987. See 18 U.S.C. §§ 3551-3581. Section 3559 lists the classifications of offenses which are not classified in the section defining it.

297/ See Pub. L. No. 100-185, 101 Stat. 1279 § 19 (Dec. 11, 1987) ("petty offense" defined); 18 U.S.C. § 3579 (1987).

298/ Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974).

299/ Fed. R. Crim. P. 42(b); United States v. Rylander, 714 F.2d 996, 1004 (9th Cir. 1983), cert. denied, 467 U.S. 1209 (1984). There is no similar provision under Fed. Rule Crim. P. 42(a), basically because subsection (a) envisions a necessity to act quickly and summarily.

personal to the judge, unless there is a need for the judge to act summarily under Fed. R. Crim. P. 42(a), the judge should be disqualified and another judge should try the contempt charge under Fed. R. Crim. P. 42(b). Under the general contempt statute, a contemnor may be punished by fine or imprisonment, but not both. 300/ A criminal contempt ruling is valid even if the underlying order which the contemnor violated was later found to be void for lack of jurisdiction or unconstitutional. 301/ The one exception is where there was "no opportunity for effective review of the order before it was violated." 302/ A criminal contempt order is a final judgment and is appealable. 303/

2. Civil Contempt

A contempt is considered to be a civil contempt "when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." 304/ Thus, the purpose of a

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300/ 18 U.S.C. § 401; In re Bradley, 318 U.S. 50 (1943). Many of the specific contempt statutes do fix the maximum term of imprisonment and fine.

301/ United States v. United Mine Workers, 330 U.S. 258, 293 (1947); 3 C. Wright, Federal Practice & Procedure § 702, at 814 (1982).

302/ Id. at 815.

303/ Nye v. United States, 313 U.S. 33 (1941). If a judgment contains both convictions for civil and criminal contempt, it is treated as a criminal contempt for appeal purposes.

304/ McCrone v. United States, 307 U.S. 61, 64 (1939).

civil contempt proceeding would be to force the defendant to conform with the provisions of the civil judgment. The Government need only prove that the defendant violated the judgment by clear and convincing evidence, rather than beyond a reasonable doubt.

The civil contempt proceeding is instituted through a two-step process. First, it is necessary to file a motion for an order to show cause. If this motion is granted, the court holds a hearing at which the party against whom the motion was directed must show why he should not be held in civil contempt. 305/ Parties of record to a judgment or decree are subject to the court's jurisdiction since the civil contempt charges are considered a continuation of the original proceeding. 306/ If the person sought to be charged was not a party and not already within the court's jurisdiction, service of process under the Federal Rules of Civil Procedure should be made in order to bring the person within the court's jurisdiction. 307/ There is no requirement for a jury trial where civil contempt is charged, unless a statute so provides. 308/

A contempt order seeking compliance with a judgment can

305/ C. Wright & A. Miller, Federal Practice & Procedure § 2960, at 588 (1982).

306/ Leman v. Krentler-Arnold-Hinge Last Co., 284 U.S. 448 (1932).

307/ See C. Wright & A. Miller, Federal Practice & Procedure § 2960, at 589 (1982).

308/ See Shillitani v. United States, 384 U.S. 364 (1966).

take many forms. The civil contempt order should be designed to force the defendant into doing what he was ordered to do. Thus, the defendant carries the "keys to his prison." 309/

F. Use of Title III Surveillance Information

One of the most important investigative tools available to the Government for criminal investigations is court-authorized electronic surveillance, which is permitted under the strict procedures set forth in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 310/ more commonly known as "Title III." In enacting the RICO statute, Congress intended that the fruits of electronic surveillance obtained under Title III be used in government civil RICO actions. 311/ This accords with Congress' more general purpose of "strengthening the legal tools in the evidence gathering process . . . to deal with the unlawful activities of those engaged in organized crime." 312/ However, the procedural requirements surrounding the use of Title III materials are complicated and strict; the government attorney must carefully adhere to them. A

309/ Passmore Williamson's Case, 26 Pa. 9, 24 (1855).

310/ Title III, as amended, is codified at 18 U.S.C. §§ 2510-21.

311/ S. Rep. No. 91-617, 91st Cong., 1st Sess. 161 (1969); National Broadcasting Co. v. United States Dep't of Justice, 735 F.2d 51, 54 (D.C. Cir. 1984) (dictum).

312/ Statement of Findings and Purpose of Title IV, Pub. L. 91-452, § 1, 84 Stat. 941 (1970), codified at 18 U.S.C. following § 1961.

general discussion of these requirements, insofar as they apply to government civil RICO actions, follows. 313/

1. Sealing Orders

The government attorney seeking to review Title III surveillance information should first ascertain whether the materials in question are under seal, and if they are, obtain an unsealing order. Title III requires that applications, orders, and tapes of court-authorized electronic surveillances be sealed by the district court upon expiration of the warrant. 314/ Custody of the sealed materials shall be "wherever the court directs"; 315/ generally, the materials are kept by the investigating agency which undertook the surveillance. Applications and orders may be unsealed only upon a showing of "good cause." 316/ Title III is silent on the showing necessary to obtain the unsealing of tapes; presumably, it is no weightier than the "good cause" necessary to unseal applications and orders. 317/ Although failure to seek an unsealing order

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313/ A detailed discussion of the provisions of Title III is obviously beyond the scope of this Manual. In this regard, see J. Carr, The Law of Electronic Surveillance (1986).

314/ 18 U.S.C. § 2518(8)(a) (tapes), (b) (applications and orders).

315/ Id.

316/ 18 U.S.C. § 2518(8)(b).

317/ See, e.g., United States v. Florea, 541 F.2d 568, 575 (6th Cir. 1976)(unsealing of tapes proper where law enforcement official desired to make copies), cert. denied, 430 U.S. 945 (1975).

generally will not result in suppression of the Title III materials, 318/ such conduct is punishable by contempt. 319/ Title III does, however, permit the Government to make duplicate recordings for use in other law enforcement investigations without court order. 320/

2. Disclosure Orders

a. Pre-Filing Stage

Title III limits the dissemination of electronic surveillance information to the circumstances specifically enumerated in 18 U.S.C. § 2517. Section 2517(1) permits an "investigative or law enforcement officer" to obtain disclosure of court-authorized electronic surveillance information without court order, when appropriate to the proper performance of his duties. Only a few courts have construed § 2517(1), 321/ and those cases provide little guidance in this area. A close reading of the legislative

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318/ United States v. Caggiano, 667 F.2d 1176, 1179 (5th Cir. 1982) (noncompliance with sealing requirement of 18 U.S.C. § 2518(8)(b) does not require suppression absent showing of prejudice); United States v. Hyde, 574 F.2d 856, 870 (5th Cir. 1978) (failure to seek court approval before unsealing recordings did not require suppression).

319/ 18 U.S.C § 2518(8)(c).

320/ 18 U.S.C. § 2518(8)(a).

321/ See United States v. Ianelli, 477 F.2d 999 (3d Cir. 1973) (Section 2517(1) permitted Justice Department attorneys to disclose Title III materials to IRS agents for use in gambling prosecution), aff'd, 420 U.S. 770 (1975); Matter of Electronic Surveillance, 596 F. Supp. 991 (E.D. Mich. 1984) (Section 2517(1) authorized United States Attorney to release electronic surveillance information to grievance administrator of state bar commission for use in attorney disciplinary investigation).

history of § 2517, however, shows that Congress intended that government attorneys be able, at least during the pre-filing or investigative stage of a civil RICO case, to make full use of duplicate Title III surveillance information without a court order of disclosure. 322/ Thus, although not a statutory requirement, in light of the paucity of case law in this area, the government attorney preparing a civil RICO case should obtain a court order of disclosure before reviewing Title III information, especially if the original surveillance materials have never before been made public.

b. Post-filing Stage

Title III authorizes the disclosure of electronic surveillance information in civil proceedings only upon court order. 323/ Before issuing a disclosure order in a civil case, the district judge must find that the original wiretap warrant was lawfully obtained, was sought in good faith and not as a subterfuge search, and that the communication was incidentally intercepted. 324/ Failure

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322/ S. Rep. No. 617, 91st Cong., 1st Sess. at 161 (1969).

323/ 18 U.S.C. § 2517(5) (intercepts relating to an offense other than that specified in the original surveillance warrant may only be disclosed upon court order). Such an order should always be obtained in a civil RICO action, since Title III arguably authorizes electronic surveillance only to gather evidence of specified criminal offenses, and not to collect evidence of civil violations. See 18 U.S.C. § 2516.

324/ United States v. Marion, 535 F.2d 697, 700 (2d Cir. 1976); United States v. Brodson, 528 F.2d 214, 215 (7th Cir. 1975).

to apply for such an order has resulted in suppression of the intercepts, 325/ although more recent authority is to the contrary. 326/ In any event, a government attorney seeking to use court-authorized intercepted conversations in civil RICO litigation should always first obtain a court order of disclosure, if only to avoid the specter of civil liability. 327/ Also, the approval of the Assistant Attorney General for the Criminal Division should be obtained prior to using Title III information in connection with civil litigation, in order to avoid compromising ongoing criminal investigations or proceedings. 328/

3. Discovery of Title III Surveillance Information

Of course, once the Government has initiated a civil RICO action, Title III materials, like other documents and tangible things in the Government's possession, can become discoverable to the defense. 329/ However, there are

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325/ Id.

326/ Resha v. United States, 767 F.2d 285 (6th Cir. 1985) (Title III mandates suppression only of evidence unlawfully intercepted, not unlawfully disclosed; intercepts disclosed to grand jury in violation of 18 U.S.C. § 2517(5) not subject to suppression), cert. denied, 106 S. Ct. 1458 (1986); United States v. Cardall, 773 F.2d 1128 (10th Cir. 1985) (same).

327/ 18 U.S.C. § 2520 (bad faith disclosure of electronic surveillance information in violation of Title III subjects government official to civil liability).

328/ United States Attorneys' Manual § 9-7.560 (May 9, 1984).

329/ The scope of discovery in civil cases is governed in the first instance by Fed. R. Civ. P. 26(b)(1). Generally, parties may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the case.

various grounds for resisting discovery of Title III materials sought by the defense.

First, as stated earlier, 330/ Title III requires that applications, orders and tapes of court-authorized electronic surveillances be sealed by the district court upon expiration of the warrant, and that such materials be unsealed only upon a showing of "good cause." A government attorney bringing a civil RICO action has no greater access to sealed materials than does any other litigant--each must obtain an unsealing order before viewing the materials. In a civil RICO action, the government attorney should resist discovery of Title III materials under seal on the ground that he cannot produce them without violating a court order. Instead, the defendant requesting the Title III information should be required to go to the issuing judge to make the "good cause" showing necessary to obtain an unsealing order.

Second, Title III imposes strict limitations upon the ability of private parties to obtain access to electronic surveillance materials. 331/ These limitations are

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330/ See Section V(F)(1), supra.

331/ See National Broadcasting Co. v. United States Dep't of Justice, 735 F.2d 51 (2d Cir. 1984) (in libel action brought by private party against television network, district court properly refused to compel Government to divulge Title III materials; "turning Title III into a general civil discovery mechanism would simply ignore the privacy rights of those whose conversations were overheard . . . this was not the intention of Congress."); see also United States v. Dorfman, 690 F.2d 1230, 1233 (7th Cir. 1982); Dowd v. Calabrese, 101 F.R.D. 427, 434-35 (D.D.C. 1984).

premised upon Congress' overarching desire to protect the privacy of oral and wire communications. 332/ In confronting this issue in cases between private parties, the courts have rejected arguments that Title III creates a general civil discovery mechanism, and have instead left it to the Government to decide whether wiretap material should be released. 333/ Thus, in the face of discovery requests for Title III materials, the government attorney should argue that the Government is entitled to substantial deference in determining which Title III materials should be disclosed to the defense, and should move aggressively for protective orders in the face of such requests.

Third, since the Federal Rules of Civil Procedure exempt privileged matters from discovery, 334/ the Government may, under appropriate circumstances, assert various law enforcement privileges in opposing discovery requests for Title III materials in civil RICO cases. The law enforcement privilege enables the Government to refuse to disclose matters that would tend to reveal law enforcement investigative techniques or sources. 335/ The

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332/ Gelbard v. United States, 408 U.S. 41, 48 (1972).

333/ National Broadcasting Co. v. United States Dep't of Justice, 735 F.2d 51, 54 (2d Cir. 1984); accord County of Oakland v. City of Detroit, 610 F. Supp. 364, 367-68 (E.D. Mich. 1984).

334/ See Fed. R. Civ. P. 26(b)(1).

335/ See, e.g., Freidman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341-42 (D.C. Cir. 1984); Black v. Sheraton Corp. of America, 564 F.2d 531, 545-46 (D.C. Cir. 1977).

informer's privilege permits the Government to withhold from disclosure the identity of an informer, as well as confidential communications whose disclosure would tend to reveal the informer's identity. 336/ The government attorney bringing a civil RICO action should vigorously assert these privileges where appropriate to resist the disclosure of Title III materials to the defense. 337/

VI. Obtaining Approval to File a Civil RICO Suit

A. Approval Requirement

Before filing a civil complaint containing a claim under 18 U.S.C. § 1964, issuing a civil investigative demand under 18 U.S.C. § 1968, or in any other way initiating a civil RICO action, a United States Attorney or other government attorney must obtain formal approval from the Organized Crime and Racketeering Section of the Criminal Division. The guidelines for obtaining this approval are set forth in the United States Attorneys' Manual at Section 9-110.100, et seq. 338/ When the RICO guidelines were

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336/ See Roviaro v. United States, 353 U.S. 53 (1957); In re United States, 565 F.2d 19 (2d Cir. 1977), cert. denied, 436 U.S. 962 (1978).

337/ It should be emphasized that asserting a governmental procedure involves a two-step procedure. Initially, when faced with a request for materials or information of a privileged nature, the government attorney files objections in case of written discovery requests, or makes oral objections in the case of depositions. The burden then shifts to the defense under Fed. R. Civ. P. 37 to file a motion to compel disclosure of the privileged material. In response, the privilege is formally asserted through the filing of an affidavit. Depending on the privilege involved, the affidavit may have to be executed by an Assistant Attorney General or by the Attorney General.

originally issued, the Government was not making much use of the civil RICO provisions. As a consequence, the guidelines are oriented to legal and policy issues arising in criminal prosecutions. The guidelines are largely applicable to civil actions, because all civil suits must be based on an underlying violation of the criminal provisions in 18 U.S.C. § 1962(c). However, there are additional factors governing approval of civil actions that are not addressed in the United States Attorneys' Manual guidelines. Some of those factors are addressed here. It should be noted, however, that the discussions in this Manual are informal and do not represent official Department of Justice Policy. They also are subject to change. For appropriate policy guidance, any government attorney contemplating a civil RICO action should contact the Organized Crime and Racketeering Section well in advance of the proposed filing date or date of issuing the first civil investigative demand.

B. Policy Considerations

Civil RICO, like criminal RICO, should not be used lightly. The Department's judicious and restrained use of RICO has been a significant factor in fending off attacks by groups who might like to see the statute's provisions sharply diluted. In his dissent in the Sedima case, Justice

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338/ These guidelines were promulgated by the Assistant Attorney General for the Criminal Division, who has supervisory authority over all civil RICO proceedings in which the United States is the plaintiff, under 28 C.F.R. § 0.55(s). The guidelines also govern approval of all criminal RICO prosecutions by the United States.

Marshall, who would have imposed sharp restrictions on the use of RICO by private plaintiffs, made a point of noting that the Department of Justice exercises strict control over the use of RICO. He also noted:

> Congress was well aware of the restraining influence of prosecutorial discretion when it enacted the criminal RICO provisions. It chose to confer broad statutory authority on the Executive fully expecting that this authority would be used only in cases in which it was warranted. 339/

In the civil context, because of the strong controversy surrounding the alleged overuse of the statute by private plaintiffs, 340/ it is extremely important that the Government not abuse the statute by using it in situations in which its use is not necessary. In particular, a treble-damages claim should not be "tacked on" to a suit involving what is really a commercial dispute in order to increase the prospects of settlement. The treble-damages provision should be preserved for cases involving criminal activity that has caused significant financial injury to government interests.

With respect to actions for injunctive and other equitable relief, such actions should only be undertaken when a substantial benefit to the Government will result if the action is successful. Thus, although it is possible to

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339/ Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 503 (1985) (Marshall, J., dissenting).

340/ See, e.g., Lacovara & Aronow, The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO, 21 New Eng. L. Rev. 1 (1986).

obtain an injunction against members of a purely criminal group, 341/ it is not advisable to bring such an action unless it is clear that the injunctive relief will be meaningful. For example, it may be well worthwhile to enjoin members of a criminal group from having dealings with a labor union or other legitimate organization, 342/ but it may not be worthwhile to enjoin a criminal group from committing further crimes. In the former case, there would be no other way to achieve the desired result of permanently separating the criminal influence from the union or business. In the latter case, however, the injunction would be meaningless unless it were enforced by criminal prosecutions for contempt, which would be no more effective than criminal prosecution for whatever further crimes the enjoined defendants committed.

Another policy question to be considered is when, if ever, it is advisable to bring a civil RICO action ab initio, rather than as a follow-up to a criminal prosecution for RICO, for RICO predicate offenses, or for other offenses. There is no legal requirement that the defendant have been convicted of any offense before the civil RICO suit is brought. 343/ There are, however, some advantages

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341/ See United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

342/ See, e.g., United States v. Local 560, International Brotherhood of Teamsters, 780 F.2d 267 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986).

343/ Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

to the Government if the defendant has previously been convicted of related conduct. The Government has the benefit of collateral estoppel, much of the evidence is already available, 344/ and criminal defendants may be immunized to obtain their testimony, because the prosecution has already taken place. In fact, all of the civil RICO actions brought by the Department of Justice since 1982 were preceded by criminal convictions of some or all of the conduct involved in the civil action.

However, in appropriate cases, the Organized Crime and Racketeering Section will consider approving civil RICO actions that were not preceded by any related criminal convictions. The use of civil RICO by the Government is still in its infancy. Civil investigative demands have not been used as yet. As the experience of government attorneys with the various issues grows, it may be that civil RICO suits brought ab initio will come to be an important part of the Department's enforcement program.

C. Drafting

As is the case for RICO indictments, the Organized Crime and Racketeering Section carefully reviews all civil RICO complaints to ensure that the drafting is legally sufficient and consistent with Criminal Division policy. In most cases, the Organized Crime and Racketeering Section will require some modifications to the complaint before it

344/ Of course, the limitations imposed by Fed. R. Crim. P. 6(e) and other provisions must be taken into account. See Section V(A), supra.

is approved for filing.

Many drafting issues are treated elsewhere in this Manual and in the Criminal Division's manual on criminal RICO. For example, fraud must be pleaded with particularity, 345/ the defendant cannot be the same as the enterprise in most cases, 346/ and a pattern of racketeering activity should not be based on multiple acts that arise from a single criminal episode. In general, as noted earlier, the portions of a civil RICO complaint that allege the underlying violation(s) of 18 U.S.C. § 1962 should be as detailed as a RICO indictment, insofar as possible.

There are some aspects of civil RICO drafting that are not present in drafting indictments. For example, in many cases the Government will rely on prior convictions of some defendants to establish some of the predicate offenses or a RICO violation. In the view of the Organized Crime and Racketeering Section, it is preferable to plead these offenses just as they were pleaded in the indictment that led to the convictions. Using identical language will simplify the application of collateral estoppel. 347/ If numerous prior convictions are involved, it may be advisable to attach the prior indictment to the complaint as an exhibit, and incorporate the pertinent acts by reference

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345/ See Section IV(B)(4), supra.

346/ See Section IV(F)(1), supra.

347/ See Section IV(B)(6), supra.

into the complaint at the appropriate points. However, even in that case, it is advisable to include at least a brief description of each incorporated act in the body of the complaint, so the court and other readers will not have to flip back and forth to the exhibit in order to determine exactly what acts constitute the pattern of racketeering activity.

Because of the small number of government civil RICO suits filed to date, it is to be expected that Criminal Division policy with respect to drafting and other issues will evolve considerably in the future. For the latest policy guidance, it is strongly urged that government attorneys contact the Organized Crime and Racketeering Section in Washington in an early stage of the process of planning any action under civil RICO.

D. Approval Procedure

The formal procedure for seeking approval of a civil RICO complaint or civil investigative demand is set forth in the United States Attorneys' Manual at Section 9-110.100, *et seq.* A complete draft of the proposed filing should be sent to the Chief of the Organized Crime and Racketeering Section in Washington, D.C., at least 15 working days before the target date; sooner, if complex issues are involved. The draft must be accompanied by a memorandum setting forth a summary of the facts, an explanation of the need for using RICO, and a complete discussion of all legal issues and practical problems raised by the proposal. The submitting

attorneys will be contacted by the staff of the Organized Crime and Racketeering Section to discuss any necessary modifications or other issues raised by the proposal. Once the complaint is filed, the attorneys handling the case should keep the Organized Crime and Racketeering Section informed of all noteworthy developments in the action, and should submit court-stamped copies of all major pleadings. The Organized Crime and Racketeering Section maintains a central file of such pleadings, which are available for use by other government attorneys who are planning to bring similar cases.

VII. Overview of Federal Civil Procedure

Introduction

For experienced criminal prosecutors with no civil background, meeting the procedural demands of a fully litigated civil RICO suit will be a significant and time-consuming learning experience. For experienced government civil practitioners, there will be a few new twists in a civil RICO case. This section of the Manual does not begin to describe the whole of civil procedure knowledge required to successfully litigate a civil RICO case. Instead, it highlights the major civil rules and procedural strategies that the Government will work with throughout the course of the lawsuit. Government attorneys also should take particular notice of any limitations or extra responsibilities placed on civil litigants by local rules of court within each federal district.

A. The Complaint

A civil action is commenced by filing a complaint with the court. 348/ The general rules governing the form and content of a complaint are found in Rule 8 of the Federal Rules of Civil Procedure. Rule 8(a) sets out three basic elements which must be included in a complaint:

1. a short and plain statement of the grounds upon which the court's jurisdiction depends;

2. a short and plain statement of the claim showing that the pleader is entitled to relief; and

3. a demand for judgment for the relief to which he deems himself entitled.

The first requirement of Rule 8(a), the statement of the basis of the court's jurisdiction, need only be a short statement describing the statutory basis of the court's jurisdiction. 349/ The bulk of the complaint will be in the second part, which is the statement of the Government's claim. In this section, the Government must allege the basis of the RICO violation(s) committed by the defendants. Under Rule 8(e)(2), a party may set forth two or more statements of a claim alternately, regardless of inconsistency, and whether based on legal or equitable grounds. The claims can be set forth in one count or in multiple counts. Thus, a civil RICO complaint may allege claims based on violations of § 1962(a), (b), and (c), as

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348/ Fed. R. Civ. P. 3.

349/ See Section IV(B)(1), supra, for a discussion of subject matter jurisdiction in government civil RICO cases.

well as conspiracies under § 1962(d) to violate each of those sections.

The pleadings in a civil complaint are subject to the mandate in Rule 8(e)(1) that "[e]ach averment of a pleading shall be simple, concise, and direct." The rationale underlying this liberal "notice pleading" standard is twofold. First, the drafters of the Federal Rules wanted to eliminate technical common law pleading requirements. Second, it is expected that the allegations in a complaint will be developed through the discovery process because the plaintiff may not otherwise have access to the evidence that he anticipates will support the allegations.

While government complaints in civil RICO cases should be "concise and direct," the Organized Crime and Racketeering Section requires a fair amount of detail and specificity. This requirement is due in part to the nature of a civil RICO complaint, which is in effect a hybrid containing both civil and criminal aspects. A RICO complaint, while a civil action, is based on a violation of the criminal RICO provisions. Therefore, a certain amount of specificity and detail will be required. Additionally, in cases which involve allegations of fraud, Fed. R. Civ. P. 9(b) requires that the circumstances constituting fraud "shall be stated with particularity." Therefore, civil RICO complaints should include a clear exposition of all of the elements of a RICO claim. 350/

350/ See Section IV, supra, for a discussion of the substantive requirements of a civil RICO claim.

The third item to be included in the complaint is the nature of the relief requested. Relief in the alternative or of several different types may be requested. This section of the complaint should specify the kind of relief that the Government is seeking, whether it be an injunction, dissolution, disgorgement, or monetary damages. This section requires careful consideration, because a request for monetary damages may entitle the defendant to a jury trial.

When drafting a civil RICO complaint, the government attorney should be sure to keep in mind the requirements of Rule 11, which states in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The rule specifies that if an abuse occurs, the court, upon motion or sua sponte, may order appropriate sanctions. Rule 11 has been the topic of much discussion in the area of private civil RICO litigation because non-meritorious civil RICO claims are sometimes added to civil suits solely for strategic reasons, such as to avoid state court backlogs or to raise the threat of treble damages. 351/ The temptation

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351/ See, e.g., Roddy, Civil RICO and Rule 11, 5 RICO L. Rep. 631 (May 1987).

to file a civil RICO case when it is not warranted or to include allegations which are not sufficiently grounded in fact can be very strong. Therefore, special care should be taken to avoid RICO allegations which may be vulnerable to a Rule 11 motion.

Consistent with the liberal pleading policy of the federal rules, the rules also have a liberal policy toward the amendment of complaints. A motion to amend is governed by Rule 15(a), which states that leave to amend "shall be freely given when justice so requires." 352/ Rule 15(a) does not enumerate the particular purposes for which an amendment may be sought; it simply provides a basic policy statement and a procedural framework to be followed by a party desiring to amend its pleading. 353/ Amendments under Rule 15(a) may seek to change the nature or theory of a claim, 354/ to state additional claims, 355/ to elect

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352/ A party may also amend its pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, a party may so amend it at any time within 20 days after it is served. See Fed. R. Civ. P. 15(a).

353/ Although Rule 15(a) does not expressly state that an amendment must contain only matters that occurred within a particular time period, Rule 15(d) provides that any "transactions or occurrences or events which have happened since the date of the pleading" should be set forth in a supplemental pleading. Thus, impliedly, an amended pleading only should relate to matters that have taken place prior to the date of the earlier pleading. See Wright and Miller, Federal Practice and Procedure, § 1473 (1971).

354/ See, e.g., Foman v. Davis, 371 U.S. 178 (1962).

a different remedy then the one originally requested, 356/ or to add, 357/ substitute, 358/ or drop parties to the action. 359/

The liberal pleading policy of Rule 15(a) reinforces one of the basic policies of the federal rules--that pleadings are not an end in themselves but are only a means to assist in the presentation of a case to enable it to be decided on the merits. 360/ However, the liberal amendment policy does not mean that a court will give leave to amend in every instance. The text of Rule 15(a) makes it clear that a court is not to grant permission to amend automatically; rather, an amendment is proper only "when justice so requires." In Foman v. Davis, 371 U.S. 178 (1962), the Supreme Court enunciated several factors a court might consider in deciding whether to grant leave to amend. Among these factors are undue delay, bad faith, or dilatory motive on the part of the movant or undue prejudice to the opposing party. 371 U.S. at 182. Among these factors,

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355/ See, e.g., Jenn-Air Prods. Co. v. Penn Ventilator, Inc., 283 F. Supp. 591 (E.D. Pa. 1968).

356/ See, e.g., United States v. Hougham, 364 U.S. 310 (1960).

357/ See, e.g., Holiday Publishing Company v. Gregg, 330 F. Supp. 1326 (S.D.N.Y. 1971).

358/ Cunegin v. Zayre Dept. Store, 437 F. Supp. 100 (E.D. Wis. 1977).

359/ See, e.g., City Bank v. Glenn Const. Corp., 68 F.R.D. 511 (D. Haw. 1975).

360/ Foman v. Davis, 371 U.S. 178, 182 (1962).

prejudice is probably the most important. In determining whether the threat of prejudice is sufficient to deny leave, the court should consider what effect the grant or denial of leave will have on both parties. The court should inquire into the hardship to the movant if leave to amend is denied, the reasons for the movant's failure to plead the material earlier, and the injustice resulting to the non-movant if leave is granted. 361/ The delay of the movant in seeking leave, without resulting prejudice or obvious dilatory intent, does not in itself warrant denial of leave. 362/ A motion for leave, however, should be made as soon as possible after the necessity for altering the pleading becomes apparent, because the risk of substantial prejudice increases with the passage of time.

B. Personal Jurisdiction and Service of Process

A federal court obtains personal jurisdiction over a defendant if it is able to serve process on him. 363/ Rule 4 governs the subject of personal jurisdiction in federal civil practice and governs the service of process 364/ in

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361/ Forstman v. Culp, 114 F.R.D. 83, 87 (M.D.N.C. 1987).

362/ FDIC v. Kerr, 650 F. Supp. 1356, 1363 (W.D.N.C. 1986).

363/ 2 Moore's Federal Practice § 4.02[3] at 4-67 (1987).

364/ The "Process" that captions Rule 4 embraces more than just the summons. "Process" has variable meanings, but the one applicable here is any paper whereby a person is subjected to a court's jurisdiction or otherwise made to comply with its demands. As such, it includes executions, orders of attachments, and subpoenas, as well as the summons. However, unless otherwise stated, all

all its particulars, including its form, method of service, place of service, amenability to service, time of service, and other legal requirements. While a complete discussion of personal juridiction is beyond the scope of this Manual, there are several important issues that should be recognized in this important area.

1. Serving the Summons

Sections (c) and (d) of Rule 4 set forth the procedure for serving a summons. The most effective means of serving a summons is by personally handing it to the defendant. Rule 4 also provides for service by mail. However, this method will only be successful if the defendant acknowledges receipt. If the defendant fails to acknowledge receiving the mailed summons, the burden falls back to the plaintiff to effect service by some other method. The basic problem that will arise in this context is the inability to serve an elusive defendant. If a party cannot be served, the court has no personal jurisdiction over him and even a default judgment cannot be obtained.

2. Personal Jurisdiction

Assuming that the defendant can be properly served with a summons, service is effective only when two requirements are met: (1) a federal statute must authorize the service of process; and (2) the exercise of personal jurisdiction must not contravene any constitutionally protected right of

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references to "process" herein will refer solely to the summons.

the defendant. Butcher's Union Local No. 498 v. SDC Investment, Inc., 788 F.2d 535, 538 (9th Cir. 1986). Rule 4(f) sets the territorial limits within which service of process may be made upon a party. Rule 4(f) provides in pertinent part:

> All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of the state.

In a civil RICO case in which service is effected within the territorial limits of the state in which the district court is held, the assertion of personal jurisdiction over a defendant will usually be uncomplicated. Ordinarily, in cases where service on a non-resident defendant cannot be effected within the state, the plaintiff would have to rely on the state law governing "long-arm jurisdiction." 365/ However, Section 1965(b) of the RICO statute provides for service of process outside the federal court's district when it is shown that "the ends of justice require that other parties residing in any other district be brought before the court."

The nationwide service of process provision, then, comes into play only when there is a showing that the ends of justice require it. While there is not a great deal of

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365/ See Fed. R. Civ. P. 4(e). Note also that Rule 4(f) permits service of a summons to be made anywhere within a 100-mile radius of the courthouse, even if that distance involves crossing a state line (as long as it does not go outside of the United States).

case law construing what kind of a showing is required here, several recent cases have had occasion to discuss this provision. The courts that have discussed it have emphasized that one factor that would strongly militate in favor of such a finding is whether there is no single district in which venue would ordinarily be proper. 366/ The rationale for allowing nationwide service of process is to avoid a "jurisdictional gap" in which no single court could obtain jurisidiction in personam over all of the defendants. 367/ The "ends of justice" provision furthers the congressional purpose of "eradicat[ing] organized crime in this country" by enabling plaintiffs "to bring all members of a nationwide RICO conspiracy before a court in a single trial," without unnecessarily sacrificing any

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366/ See, e.g., Butcher's Union Local No. 498 v. SDC Investment, Inc., 788 F.2d 535, 539 (9th Cir. 1986); Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1290 (E.D. Wis. 1985); Soltex Polymer Corp. v. Fortex Industries, Inc., 590 F. Supp. 1453, 1459 (E.D.N.Y. 1984); Shulton, Inc., v. Optel Corp., No. 85-2925 (D.N.J. Sept. 29, 1986) (available in 4 RICO L. Rep. 800 (1986)).

367/ The rationale here is the same as that used to support the "co-conspirator theory of venue" often applied in multi-defendant securities cases. Under this theory, where an action is brought against multiple defendants alleging a common scheme of acts or transactions in violation of securities statutes, if venue is established for any of the defendants in the forum district it is proper as to all defendants, even in the absence of any contacts by some of the defendants with that district. See, e.g., Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1317 (9th Cir. 1985); Wright, Miller & Cooper, Federal Jurisdiction and Procedure § 3824 (1976). However, at least one court has specifically rejected the co-conspiratorial theory of venue. See Payne v. Marketing Showcase, Inc., 602 F. Supp. 656, 659 (N.D. Ill. 1985).

defendant's interest in having the action litigated in a forum convenient to it. Butchers Union Local No. 498 v. SDC Investment, Inc., 788 F.2d 535, 539 (9th Cir. 1986). 368/

It should be noted that a showing establishing satisfaction of the "ends of justice" requirement need not be made prior to service on out-of-state defendants. At least two district courts have held that service will be deemed adequate under Section 1965(b) nunc pro tunc upon a declaration that the "ends of justice" requirement had been satisfied. See Shulton, Inc. v. Optel Corp., No. 85-2925 (D.N.J. Sept. 29, 1986); Soltex Polymer Corp. v. Fortex Industries, Inc., 590 F. Supp. 1453, 1459 n.2 (E.D.N.Y 1984).

While the RICO Act authorizes nationwide service of process in civil RICO actions, it does not authorize service in a foreign country. Because effective service of process is a prerequisite to the exercise of jurisdiction, "any

368/ At least one court has interpreted the "ends of justice" provision to require a showing that "there is no district having greater contacts with plaintiff's claims [than the forum] in which as much or more of the entire controversy could be litigated." Bernstein v. IDT Corp., 582 F. Supp. 1079, 1088 (D. Del. 1984). However, this holding is in conflict with at least one prior decision in the same district. See Farmers Bank v. Bell Mortgage Corp, 577 F. Supp. 34, 35 (D. Del. 1978). Additionally, another court has found that the "ends of justice" militated for keeping a case in the district where there was not proper venue as to all defendants, even though there was a forum where venue would be proper as to all defendants under § 1965(a), because the case was already several months old. The court found that the resulting harm to the plaintiff from transferring the case would far outweigh the difficulties imposed on the defendants by keeping it in the present forum. See Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1290 (E.D. Wis. 1985).

foreign party against whom a RICO claim is asserted must be served with process in the United States." Nordic Bank PLC v. Trend Group, Ltd., 619 F. Supp. 542, 564 (S.D.N.Y. 1985) (motions to dismiss civil RICO action based upon plaintiff's failure to serve process upon European defendants in this country granted). Accord Hodgdon v. Needham-Skyles Oil Co., 556 F. Supp. 75, 77 (D.D.C. 1982).

3. Due Process Considerations

In order to effect valid service of process, it must also be shown that the exercise of personal jurisdiction does not contravene any constitutionally protected rights of the defendant. In International Shoe Co. v. Washington, 326 U.S. 310 (1945), the Supreme Court set forth the "minimum contacts" doctrine to be applied in determining whether due process will be afforded to defendants where a court asserts in personam juridiction over them. International Shoe and its progeny have required some "contacts, ties or relations" with the forum state in order to confer in personam jurisdiction over a defendant. The cases flowing from International Shoe, however, deal with a state court's jurisdiction over a nonresident defendant, generally by use of a state long-arm statute. Similarly, when a federal district court is sitting in diversity it is well settled that due process requires that the defendant have some "contacts, ties or relations" with the forum state in order to confer on that court personal jurisdiction over the defendant. See, e.g., Securities Investor Protection Corp.

v. Vigman, 764 F.2d 1309, 1315 (9th Cir. 1985).

In contrast to the above situations, 18 U.S.C. § 1965(b) authorizes nationwide service of process. Where such nationwide service of process is authorized, a federal court's jurisdiction is co-extensive with the boundaries of the United States, and due process requires only that a defendant in a federal suit have minimum contacts with the United States, not any particular state. See, e.g., Federal Trade Commission v. Jim Walters Corp., 651 F.2d 251, 256 (5th Cir. 1981); Clement v. Pehar, 575 F. Supp. 436, 438 (N.D. Ga. 1983). Therefore, Section 1965, when applicable, obviates the need to inquire into the applicability of the forum state's long-arm statute to the various defendants, or whether each defendant has sufficient "minimum contacts" with the forum state to satisfy the due process requirements of the Fourteenth Amendment. Of course, if it is not sufficiently established that the ends of justice require nationwide service, the traditional showing of "minimum contacts" will be required to obtain personal jurisdiction over nonresident defendants.

C. Venue

In order for a district court to hear a case, it must not only have personal jurisdiction over the parties, but also venue. In distinguishing between the principles of jurisdiction and venue, it should be noted that jurisdiction is the power to adjudicate, while venue, which relates to the place where judicial authority may be exercised, is

intended for the convenience of the litigants. Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1313 (9th Cir. 1985). The general venue statute for a case involving a federal question is found at 28 U.S.C. § 1391(b), which provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

This section is supplemented by Section 1391(c), which provides that a corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and that such district shall be regarded as the residence of such corporation for venue purposes.

Section 1965(a) of Title 18, the venue provision for civil RICO, is broader than the general venue provision, in that it provides that a person may be sued for a RICO violation in any district in which such person "resides, is found, has an agent, or transacts his affairs." However, even though the RICO venue provision is broader than the general venue provision, there may be occasions where it is necessary to resort to Section 1391(b). For example, the preferred forum for a civil RICO case may be the district where the claim arose, pursuant to Section 1391(b), even though none of the defendants reside, can be found, or transact business there. Miller Brewing Co. v. Landau, 616

F. Supp. 1285 (E.D. Wis. 1985). 369/ In such cases, courts have held that civil RICO plaintiffs may rely on the general venue provisions of Section 1391, notwithstanding the specific venue provisions within the civil RICO statute. Miller, supra, 616 F. Supp. at 1291. 370/ Therefore, venue in civil RICO cases can be based on Section 1391(b) of Title 28 or Section 1965(a) of Title 18. Furthermore, if venue is properly laid in the forum district as to at least one plaintiff and there is no district where venue is proper as to all defendants, the court may exercise jurisdiction over the remaining defendants if it finds that the ends of justice require such an exercise of jurisdiction. 371/

The venue provisions of Section 1965(a) were modeled after the provisions of the antitrust laws. The Clayton Act, which was adopted in 1914, contains two venue provisions applicable to all private antitrust actions.

369/ For a good discussion of this area, see Roddy & Craig, Jurisdiction, Venue and Service of Process in Civil RICO Actions, 6 RICO L. Rep. 387 (Sept. 1987).

370/ The court in Miller stated that it would have found proper venue and jurisdiction under the "ends of justice" provision of Section 1964(b), but instead relied upon Section 1391(b) after finding that the claim arguably arose in that district. The court discussed the case where the conduct occurred in two or more districts and it cannot be definitively determined where the claim "arose." The court concluded that in a case in which it is not clear that the case arose in only one specific district, the plaintiff may choose between those two (or conceivably even more) districts that with "approximately equal plausibility . . . may be assigned as the locus of the claim." 616 F. Supp. at 1291 (quoting Leroy v. Great Western United Corp., 443 U.S. 173 (1979)).

371/ See Section IV(B)(2), supra.

Section 4 of that statute allows suit "in the district in which the defendant resides or is found or has an agent." 15 U.S.C. § 15. Section 12 of the Clayton Act further provides that an antitrust action against a corporation may be brought in the district where the corporation is an inhabitant or any district wherein it transacts business. 15 U.S.C. § 22. Therefore, in considering venue in civil RICO cases, relevant precedent may be found in antitrust cases. There have been several cases, however, where the venue provisions of the civil RICO statute have been construed.

1. "Resides"

The first phrase of Section 1965(a) is apparently derived from the word "resides" in Section 4 and the word "inhabitant" in Section 12 of the Clayton Act. 372/ Under Section 12, a corporation is an inhabitant of the state of its incorporation. Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 127-28 (D.N.H. 1975). Therefore, it may be concluded that venue as to individual civil RICO defendants may be laid in the district where they maintain their domicile. See 15 Wright, Miller & Cooper, Federal Practice and Procedure § 3805 (1986). For corporations, venue under this provision will turn on the place of incorporation. Word v. Barnette, Inc., 648 F. Supp. 936,

372/ The word "inhabitant" in Section 12 is synonymous with the word "resides" in Section 4. Aro Manufacturing Co. v. Automobile Body Research Corp., 352 F.2d 400, 404 (1st Cir. 1965), cert. denied, 383 U.S. 947 (1966).

939 (E.D. Va. 1986) (bank which was incorporated in Virginia would be regarded as "residing" there for purposes of Section 1965(a) venue).

2. "Found"

The requirements of the second clause of Section 1965(a) ("any district in which such person . . . is found") may be fulfilled if a corporate defendant is present in the district by its officers and agents carrying on the business of the entity. Sunray Enterprises v. David C. Bouza & Associates, Inc., 606 F. Supp. 116, 119 (S.D.N.Y. 1984) (attendance at an occasional trade fair insufficient for corporate defendant to be "found" in New York); Van Schaick v. Church of Scientology of California, 535 F. Supp. 1125, 1132 (D. Mass. 1982).

3. "Has an Agent"

The meaning of the third clause ("any district in which such person . . . has an agent") has apparently not yet been litigated in a civil RICO case. However, cases decided under Section 4 of the Clayton Act, which contains identical language, suggest that the courts look primarily at the amount of control exercised by the alleged principal as well as "the extent to which the public is led to believe that it is dealing with the principal when it deals with the supposed agent" in determining whether the defendant has an agent present in the district. 15 Wright, Miller & Cooper, Federal Practice and Procedure § 3818 (1986).

4. "Transacts His Affairs"

The fourth venue clause of Section 1965(a) ("any district in which such person . . . transacts his affairs") is apparently derived from the phrase "transacts business" contained in Section 12 of the Clayton Act. A corporation will be deemed to have met this test if it carries on business of "a substantial and continuous character" within the district. DeMoss v. First Artists Production Co., 571 F. Supp. 409, 411 (N.D. Ohio 1983), appeal dismissed, 734 F. 2d 14 (6th Cir. 1984). Similarly, for purposes of § 1965(a), a person also "transacts his affairs" within a particular district when he regularly conducts business of a substantial and continuous character within that district. Dody v. Brown, 659 F. Supp. 541, 545 (W.D. Mo. 1987); Hodgdon v. Needham-Skyles Oil Co., 556 F. Supp. 75, 78 (D.D.C. 1982). The determination of whether the defendant's business contacts with the district are sufficient to meet the threshold of "transacting his affairs" will depend on the specific facts of each case. 373/

D. Default Judgments

Default judgments against civil RICO defendants are governed by the provisions of Fed. R. Civ. P. 55, as limited by Fed. R. Civ. P. 54(c). Rule 55 provides that when a defendant fails to respond to a complaint or otherwise

373/ For a collection of cases discussing this standard, see Roddy & Craig, Jurisdiction, Venue and Service of Process in Civil RICO Actions, 6 RICO L. Rep. 387, 395-97 (Sept. 1987).

defend the case and that fact is made known to the court, a default judgment may be entered against the party. However, it should be noted that:

> Defaults are not favored, particularly when the case presents issues of fact, and doubts are to be resolved in favor of a trial on the merits . . . the extreme sanction of a default judgment must remain a weapon of last, rather than first, resort.

Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981).

A civil RICO defendant is most likely to default if there has been a prior criminal proceeding resulting in a guilty verdict. If he is estopped under 18 U.S.C. § 1964(d) from re-litigating his participation in certain racketeering acts, he may be incarcerated and may not want to expend legal fees to appear in an action which will not be decided in his favor.

Failure to appear may be grounds for a default judgment provided certain conditions precedent are met. First, service must be perfected under Fed. R. Civ. P. 4 and 5(a). For those civil RICO defendants expected to default, personal service is necessary.

> Rule 4, and Rule 5(a) as it applies to parties in default for failure to appear, reflect a policy that a defendant should receive notice of all claims for relief upon which a court may enter judgment against him. Formal personal service impresses upon a defendant that judicial process has been invoked to effect a coercive remedy against him.

Varnes v. Local 91, Glass Bottle Blowers, 674 F.2d 1365, 1368 (11th Cir. 1982). Second, allegations in the complaint

must be sufficiently specific to put a defendant on notice as to his liability. This level of specificity may be obtained by tracking criminal indictment-type language (while complying with the Fed. R. Civ. P. 8(a)(1) "short and plain statement" requirement), or through other means. For example, a set of requests for admission (Fed. R. Civ. P. 36) sent out with the complaint could ask a defendant to admit prior convictions of predicate crimes. If the defendant fails to respond and the requests are deemed admitted, the admissions, along with judgment and conviction orders for the crimes in question, provide a full and unassailable record upon which a judge can declare a default.

Defaults can be entered for reasons other than a failure to appear. However,

> [i]t is clear that default judgments should not be entered because of technical errors. [citation omitted] But when a defendant's actions or inactions amount to willful misconduct, gross neglect, or other extreme and unusual behavior, a default judgment is appropriate and even necessary to ensure the functioning of the judicial process. A defendant cannot be permitted to 'avoid or delay a plaintiff's right to judicial resolution of a dispute by ignoring the proceeding.'

Frank Keevan & Son v. Callier Steel Pipe & Tube Inc., 107 F.R.D. 665, 670 (S.D. Fla. 1985), (quoting C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2693 (1983)). Defaults due to a failure to comply completely with discovery requests are disfavored.

> In the discovery context, entry of a default judgment requires a showing of willful intransigence to discovery that is so compelling as to justify the presumption of liability. [citation omitted] This presumption arises where a party purposely fails to comply with a court order directing discovery.

Payne v. Howard, 75 F.R.D. 465, 472 (D.D.C. 1977). Repeated incomplete compliance may merit a request for sanctions under Fed. R. Civ. P. 37, however. It should be noted that asserting a fifth amendment privilege in response to interrogatories or at a deposition in a civil RICO case is neither "willful intransigence" nor sanctionable. At most, a negative inference as to the unanswered question may be drawn. See United States v. Ianniello, 824 F.2d 203 (1987).

E. "Staging" the Case

In a few cases, it may be desirable strategy to "stage" a civil RICO case by amending the original complaint at a later date to include additional defendants or additional predicate crimes. Amendments and supplemental pleadings are governed by Fed. R. Civ. P. 15.

When potential civil RICO defendants break down into two or more distinct groups, such as previously convicted and unconvicted persons or natural and non-natural persons, it may be advantageous to proceed against one group first to obtain certain admissions, discoverable evidence, or summary judgments to use against the second group, whose liability may be more difficult to establish. For example, in certain instances, it may be strategically advantageous to file

against all criminally estopped defendants first, file for summary judgments, and then amend to include non-estopped defendants. On the other hand, it may be procedurally more efficient to include all defendants in the original complaint and file a motion for partial summary judgment against the convicted defendants under the provisions of Fed. R. Civ. P. 56(a). This course may be less risky than the former, because, in general, once the defendant files an answer to the complaint, the complaint may not be amended except with leave of court or consent of the defendant.

Rule 15(d) allows supplementation of the pleadings with events which have occurred since the date of filing. However, for additional predicate crimes which pre-date the filing of the complaint, and which are revealed during the course of discovery on the original complaint, it will be necessary to amend.

F. Expedition of Actions

Section 1966 of RICO provides for expedition of civil actions initiated by the United States provided that the Attorney General certifies to the court that the action is of general public importance. A 1984 amendment to Section 1966 eliminated the sentence, "In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof." Therefore, today "expedition" does not necessarily save time. It merely "queues" the case on a specific judge's calendar. Certain case strategies then may

be adjusted to accommodate the requirements and proclivities of the judge assigned. For civil RICO cases which are expected to be especially time-consuming or high-profile, consideration should be given to informing the Chief Judge of the federal district some weeks before filing so that he or she can plan accordingly.

G. Discovery

1. Introduction

In any fully litigated civil RICO case, discovery matters will consume 80-90% of the litigators' time. As with most civil cases, it is likely that few civil RICO cases will go all the way to trial. Therefore, after initial case preparation, the entire focus of proof of allegations and development of defenses is within the scope of the rules governing federal civil discovery.

The scope of discovery in civil proceedings is governed by Rule 26(b), Fed. R. Civ. P., 374/ which envisions generally unrestricted access to sources of information

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374/ Rule 26(b) states in pertinent part that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

relevant to the subject matter of the action. See, e.g., Democratic National Committee v. McCord, 356 F. Supp. 1394, 1396 (D.D.C. 1973). The United States Supreme Court has stated that the civil discovery rules are to be construed broadly:

> [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.

Hickman v. Taylor, 329 U.S. 495, 507-08 (1947). As a general matter all materials in the possession and control of plaintiff United States will be discoverable to the extent that they contain "any matter that bears upon, or that reasonably could lead to other matter that could bear upon, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).

It is important to note that, when the United States is plaintiff, artfully drafted discovery requests from defendants will ask for discovery which requires a response covering all agencies and departments having pertinent files. It is the responsibility of the attorney representing the United States to assure compliance with all defendants' discovery requests. For example, in a contention interrogatory a defendant might ask for each and every document and source of information supporting the

allegation that the defendant traveled to a foreign country, purchased weapons, and smuggled them back into the United States for the purpose of trading them for drugs. Defendant might be entitled to any non-privileged information held by the Drug Enforcement Administration, the FBI, the State Department, U.S. Customs, BATF, or the CIA, including any local law enforcement agency information in the possession of the Federal Government. In a case such as this, the government attorney handling the civil RICO case must be prepared to show reasonable diligence in responding.

While the broad scope of discovery presents certain response problems for the Government, it also provides opportunities for the Government to obtain a range of documents and materials from defendants which might not be available to criminal prosecutors without a specific subpoena. For example, the Government might require defendants to produce pertinent personal datebooks, calendars, and other categories of personal papers under Fed. R. Civ. P. 34 by claiming that these materials may lead to relevant evidence.

2. Discovery Plan

Just as no football coach would begin a game without a "game plan," plotting strategy and assessing and attempting to deal with the opponent's strengths and weaknesses, no attorney representing the Government in a civil RICO suit should commence suit without a discovery plan. A discovery plan not only maps a strategy for proving the allegations in

the complaint, but enables the Government to plan the efficient allocation of attorney and support staff manpower. In addition, a plan should take into account "defensive discovery" (see the discussion of discovery limitations in Section VII(G)(5), infra).

Courts supervising sizable civil cases will set time limits on discovery. A pre-filing discovery plan can anticipate these limits, and can be adjusted to conform to the actual limits when known. Within the time allotted, using discovery tools described in Fed. R. Civ. P. 26(a), 375/ and allocating available manpower (including contractor and automated support where applicable), attorneys in charge of a civil RICO case should be able to determine what actions need to be taken to "prove up" issues and allegations. In addition to focusing the issues of the case, commitment to a plan provides for a series of short term goals to be achieved over months of discovery, and prevents "frolic and diversion" or overcommitment of manpower to one part of the case to the detriment of another. It can also be helpful in predicting and

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375/ Fed. R. Civ. P. 26(a) provides:

> (a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions ; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

justifying the need to petition the court for extensions or for compelling responses, if that becomes necessary.

In summary, the discovery plan facilitates the management of the most time-consuming and potentially confusing aspects of a civil RICO case. As much thought should be given to the drafting of this essential strategic tool as to the drafting of the complaint.

3. The Tools of Discovery

The federal rules offer a complete set of tools for the discovery of facts. They include: (1) deposition; 376/ (2) interrogatories to the parties; 377/ (3) production of documents; 378/ and (4) requests for admissions. 379/ A party seeking discovery is not required to elect which tool he will use. Each is designed for a different purpose, and a party may use the tool or tools which fit the particular situation.

a. Depositions

A deposition is a statement of a witness out of court but under oath, by a party who has given notice to all other parties so that they can be present to cross-examine the deponent. The rules provide that "after commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination."

376/ Fed. R. Civ. P. 28-31.

377/ Fed. R. Civ. P. 33.

378/ Fed. R. Civ. P. 34.

379/ Fed. R. Civ. P. 36.

380/ The mechanics for taking the deposition are simple. The party desiring to take the deposition is merely required to given written notice to all other parties of the time and place for taking the deposition and the names of the witnesses to be examined. If the person to be deposed is not a party, the witness must be directed to appear for deposition by a subpoena, unless he or she agrees voluntarily to appear. 381/ If the witnesses are to produce documents or things in their possession, these must be designated and demanded by a subpoena duces tecum. 382/

b. Interrogatories to Parties

Rule 33 allows any party to serve upon any other party written interrogatories to be answered by the party served. The scope of discovery under this device is as broad as it is under the deposition procedure, but the device is restricted to the parties to the action, and cannot be employed in the case of a witness who is not a party. Interrogatories have the advantage of being far less expensive than depositions, and although this device lacks the flexibility of the oral deposition, it is often useful to pave the way for more economical and effective use of the

380/ Fed. R. Civ. P. 30(a). Leave of court is normally not required unless the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint. However, leave of court is not even required in that situation if a defendant has served a notice is given as provided in Rule 30(b)(2).

381/ Fed. R. Civ. P. 30(b)(1).

382/ Fed. R. Civ. P. 45(b).

deposition procedure and for the disclosure of documents. Answers to interrogatories must be returned within 30 days. Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection must be stated in lieu of an answer. If there is an objection, the party seeking the information may then apply to the court for a ruling on the objections and request an order compelling answers pursuant to Rule 37(a). When an interrogatory calls for information contained in the respondent's business records, the burden of searching through the records may be imposed on the proponent by giving him or her an opportunity to examine and copy the records. 383/

c. Production of Documents

Rule 34 permits a party to obtain inspection of physical objects, including documents and data compilations in a computer, by serving on another party a request to produce such materials for inspection and copying. The request must set forth the items to be inspected "either by individual item or by category, and describe each item with reasonable particularity." 384/ If the party seeking discovery lacks information sufficient to make the specification, this information must be obtained through

383/ Fed. R. Civ. P. 33(c). The rule further states that the respondent must specify the applicable records in sufficient detail to permit the interrogating party to locate and identify, as readily as can the party served, the records from which the answer may be ascertained.

384/ Fed. R. Civ. P. 34(b).

preliminary use of other discovery devices such as depositions or interrogatories to a party. The rule also permits copying of documents or data compilations, and permits entry upon designated land or other property for the purpose of inspection. The discovery request must specify the proposed "time, place, and manner of making the inspection and performing the related acts." 385/ The documents or things to be inspected must be in the possession, custody or control of the party upon whom the request is served. As in the case of interrogatories, if the respondent objects to any item, he must state the reason for the objection and the matter will be decided by the court.

d. Requests for Admissions

Rule 36 is not really a discovery tool but a device to force admissions in order to narrow the issues and to eliminate the necessity of proof at trial. 386/ Under this rule, a party may serve any other party with a written request to admit specified facts or the genuineness of specified documents. The matters of which admission may be requested include "statements or opinions of fact or the application of law to fact." 387/ The request may be filed without leave of court any time after the commencement of the action. Each matter of which admission is requested

385/ Fed. R. Civ. P. 34(b).

386/ See M. Green, Basic Civil Procedure 158 (1979).

387/ Fed. R. Civ. P. 36(a).

will be deemed admitted unless the adversary within 30 days files either (1) a statement denying it specifically or (2) a statement giving "in detail the reasons why he cannot truthfully admit or deny the matter" or (3) written objections to the propriety of the requests. 388/ The responding party may not deny a matter on the ground that it lacks information concerning the matter unless it also states that it has made a reasonable inquiry but remains unable to admit or deny the matter. Nor is the responding party permitted to avoid answering on the ground that the issue is central or "ultimate" in the litigation or that it believes the issue is in genuine dispute.

If the requested admission is admitted or not denied, it is conclusively established, but only for the purpose of the pending action; it may not be used against the party in any other proceeding. If an objection is made, it is determined by the court, whereupon the respondent must answer or not according to the court's ruling. If the matter is not admitted and the proponent must prove it at trial, the proponent may be awarded "the reasonable expenses incurred in making that proof, including reasonable attorney's fees." 389/ The rule can be valuable in forcing formal admissions of facts about which there can be no question, frequently laying the foundation for a motion for

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388/ Id.

389/ Fed. R. Civ. P. 37(c).

summary judgment. 390/

4. Pre-filing "Discovery"

Defendants or third parties who anticipate a government-initiated civil RICO suit can, at any time, engage in pre-filing "discovery" by requesting documents under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended. FOIA requests also can be made at any time during the pendency of the suit. 391/

There are other tools with which to conduct pre-filing discovery. Fed. R. Civ. P. 27 allows perpetuation of testimony prior to the filing of a civil suit, provided that all "expected adverse parties" are duly noticed. While eliminating any element of surprise concerning the filing of a suit, perpetuation of testimony under Rule 27 allows the Government to depose witnesses critical to the case who are elderly or in bad health.

In addition, the Government may collect information before filing through use of a civil investigative demand, 392/ although this technique will also disclose much about the nature of the case prior to filing.

390/ See, e.g., Donovan v. Carls Drug Co., Inc., 703 F.2d 650, 651 (2d Cir. 1983); O'Bryant v. Allstate Ins. Co., 107 F.R.D. 45, 48 (D. Conn. 1985).

391/ See, e.g., National Labor Relations Board v. Sears Roebuck & Co., 421 U.S. 132, 143 n.10 (1975) (rights under the FOIA are neither increased nor decreased by existence of litigation in which the information at issue might be discoverable).

392/ See Section V(B), supra.

5. Limitations on Discovery

The scope of discovery, although very broad, is not without its limitations. First, the trial court has wide discretion in determining the scope and effect of discovery. 393/ Second, discovery is limited by Rule 26 to that which is "relevant to the subject matter involved in the pending action." Third, access to grand jury materials is allowed only in accordance with Rule 6(e) of the Federal Rules of Criminal Procedure. 394/

Finally, the discovery rules do not permit discovery of "privileged" matter. However, the federal rules provide no definition of the applicable privileges. The framework for determining whether or not material is privileged and therefore not subject to discovery is provided by Federal Rule of Evidence 501. That rule establishes that except as provided by the Constitution, act of Congress or rules of federal courts, the privilege of a person is governed by the principles of the common law as interpreted by the courts of the United States. 395/

393/ See, e.g., Amex, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1505 (11th Cir. 1985).

394/ See Section V(A)(1), supra, for a discussion of the effect of Fed. R. Crim. P. 6(e) in civil RICO lawsuits.

395/ Fed. R. Evid. 501. However, in civil actions if an element of a claim or a defense is determined according to state law, the rule provides that the privilege of the witness should be determined in accordance with state law as well. While this rule would seem to create problems in civil RICO litigation where predicate acts are often established by reference to state law, the overriding federal nature of the RICO claim may avoid this problem. See Buffone, Discovery in Civil RICO Litigation, 3 RICO L. Rep. 168, 170 (Feb. 1986). As a general proposition,

The Government can refuse access to documents sought in litigation on three grounds: statutes allowing or requiring that specified material be kept confidential; various privileges available to any litigant, such as the attorney-client and work product privileges; and certain privileges available only to it--the so-called "governmental" privileges. 396/ These governmental privileges are necessary to protect the ability of the Executive Branch to discharge its duties under the Constitution. There are two primary governmental privileges which may be invoked by the Government in civil RICO cases. 397/

a. Informer's Privilege

The general rule regarding the informer's privilege was set forth by the Supreme Court in Roviaro v. United States, 355 U.S. 53 (1957). This privilege allows the Government to withhold the identity of persons who furnish information about violations of the law to officers charged with law enforcement. 398/ Long recognized at common law, the

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if federal claims are present along with claims presenting state law questions, a federal rule favoring admissibility overrides the state law privilege. See Wm. T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100 (3d Cir. 1982).

396/ For a listing of governmental privileges, see Association for Women in Science v. Califano, 566 F.2d 339, 343 (D.C. Cir. 1977).

397/ For a discussion of these and additional governmental privileges, see U.S. Dept. of Justice, Advocacy Skills: Discovery (The Legal Education Institute, October 1987).

398/ The privilege also protects the names of persons who render assistance to law enforcement officers. See Black v. Sheraton Corp. of America 47 F.R.D. 263, 265

informer's privilege serves important individual and societal interests in protecting the anonymity of citizens who cooperate in law enforcement. 399/ The informer's privilege ordinarily applies only to the identity of the informer and not to his communications as such. However, if disclosure of the contents of the statement would tend to disclose the identity of the informant, the communication itself should come within the privilege. 400/

The informer's privilege is a qualified privilege, which is subject to being overridden in the event of a sufficient showing of need for disclosure. Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to a litigant, or is essential to a fair determination of a cause, the privilege may give way. Thus, the Government must show that its interest in effective law enforcement outweighs the litigant's need for the information. 401/

(D.D.C. 1969) (persons who assisted Government in eavesdropping were informers); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932) (person who gave officer key to premises containing illegal liquor was an informer); 8 Wright & Miller, Federal Practice & Procedure, § 2019 at 155 (1970).

399/ See, e.g., United States v. Tucker, 386 F.2d 206, 213 (2d Cir. 1987).

400/ See, e.g., Roviaro v. United States, 353 U.S. 53, 60 (1957); 8 Wigmore, Evidence § 2374 at 765 (McNaughton rev. 1961).

401/ United States v. Roviaro, 353 U.S. 57, 60-61 (1957). See also In re Attorney General, 596 F.2d 58, 64, 66-67 (2d Cir. 1979); In re United States, 565 F.2d 19, 24 (2d Cir. 1977), cert. denied, 436 U.S. 962 (1978).

The Government can assert the informer's privilege in both civil and criminal cases. 402/ In fact, the informer's privilege is stronger in civil cases than in criminal cases. 403/ Recognizing that the informer's privilege prevails over all but the most compelling claims of a civil litigant, at least two federal courts have reversed decisions in which the district court dismissed a civil complaint brought by the Government because it had not produced informer information. In both cases, the Government was seeking equitable relief under a civil statute. In Mitchell v. Roma, 265 F.2d 633 (3d Cir. 1959), the Government sued for injunctive relief under the Fair Labor Standards Act. The Government in Mitchell produced extensive discovery, including names of 85 persons with knowledge relevant to the subject matter of the action but refused to identify informers or provide their communications. The district court's order of sanctions under Rule 37(b) was overturned by the Third Circuit. Similarly, in United States v. Carey, 272 F.2d 492 (5th Cir. 1969), the Fifth Circuit reversed the district court's dismissal of a civil forfeiture action for failure to provide informer information and ordered the trial court to declare the seized property forfeited.

402/ In re United States, 565 F.2d 19, 22 (2d Cir. 1977), cert. denied, 436 U.S. 962 (1978); Wirtz v. Continental Finance & Loan Co., 326 F.2d 561, 563 (5th Cir. 1964).

403/ Secretary of Labor v. Superior Care, Inc., 107 F.R.D. 395, 397 (E.D.N.Y. 1985).

To overcome the informer's privilege, the party seeking disclosure has the burden of establishing that the information sought is both relevant and essential to the presentation of the party's case. 404/ This burden is not met by mere speculation that identification might possibly be of some assistance. 405/ Disclosure should not be directed simply to permit a fishing expedition or to gratify the moving party's curiosity or vengeance, but only after the trial court has made a determination that the need for disclosure outweighs the need for secrecy. 406/ In a civil case, the court's denial of discovery based on the informer's privilege will be overturned only if it is an abuse of discretion and has resulted in substantial prejudice. 407/

b. Investigatory Files Privilege

The Government has a qualified privilege to prevent public disclosure of investigative files and related material prepared in the course of an ongoing criminal

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404/ Cullen v. Margiotta, 811 F.2d 698, 715-16 (2d Cir. 1987); In re United States, 565 F.2d 19, 22-23 (2d Cir. 1977), cert. denied, 436 U.S. 962 (1978) (to obtain informer communications, the defendant must prove that they are "essential to a fair determination of the issues in the case"); United States v. Prueitt, 540 F.2d 995, 1004 (9th Cir. 1976), cert. denied, 429 U.S. 1063 (1977).

405/ Secretary of Labor v. Superior Care, Inc., 107 F.R.D. 395, 397 (E.D.N.Y. 1985).

406/ In re United States, 565 F.2d 19, 23 (2d Cir. 1977), cert. denied, 436 U.S. 962 (1978).

407/ See Ghandi v. Police Dept. of City of Detroit, 747 F.2d 388, 354 (6th Cir. 1984).

investigation. 408/ This privilege is necessary to protect the law enforcement process. Disclosure of investigatory files would undercut the Government's efforts to prosecute criminals by disclosing investigative techniques, forewarning suspects of the investigation, deterring witnesses from coming forward, and prematurely revealing the facts of the Government's case. In addition, disclosure could prejudice the rights of those under investigation. To invoke the privilege, the responsible official in the department must lodge a formal claim of privilege, after actual personal consideration, and must specify with particularity the information for which protection is sought and explain why the information falls within the scope of the privilege. 409/

The investigatory files privilege is qualified and thus can be overcome if a litigant's need is great enough. 410/ Moreover, once an investigation is closed, the files generally are no longer privileged. 411/ Even if the investigation has not been formally closed, the privilege "will expire upon the lapse of a reasonable time." 412/

408/ See, e.g., Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977); Jabara v. Kelley, 75 F.R.D. 475 (E.D. Mich. 1977).

409/ United States v. Winner, 641 F.2d 825, 831 (10th Cir. 1981); Pentarelli Limousine, Inc. v. City of Chicago, 652 F. Supp. 1428, 1431 (N.D. Ill. 1987).

410/ Kinoy v. Mitchell, 67 F.R.D. 1, 11 (S.D.N.Y. 1975).

411/ Jabara v. Kelley, 75 F.R.D. 475, 493 (E.D. Mich. 1977).

412/ Brown v. Thompson, 430 F.2d 1214, 1215 (5th Cir.

Information contained in the files which is covered by another privilege, however, may still be withheld. Thus, the names of informants and the recommendations of investigators can usually be kept secret even after the investigation has ended.

c. Deliberative Processes Privilege

The Government also may assert a privilege to protect opinions, recommendations, and advice generated in the process of formulating policies and making decisions--the so-called "deliberative processes" of the Government. The privilege rests in part on the same need for uninhibited communication that underlies the attorney-client privilege. 413/ As the Supreme Court has said, disclosure of intra-agency deliberations and advice is injurious to the Government's consultative function because it would tend to inhibit the frank and candid discussion that is necessary for effective operation of government. 414/ This privilege applies to intra-governmental documents which reflect advisory opinions, recommendations and deliberations constituting part of a process by which governmental

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1970); Capital Vending Co., Inc. v. Baker, 35 F.R.D. 510, 511 (D.D.C. 1964) ("the Department of Justice may not retain documents indefinitely and keep them from disclosure on a statement that the investigation is still continuing").

413/ See Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 n.17 (D.D.C. 1986), aff'd on opinion below, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967).

414/ NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-51 (1975).

decisions and policies are formulated. 415/

The deliberative processes privilege is a qualified privilege. 416/ In determining whether to recognize the privilege, a court must balance the public interest in protecting the information against the litigant's need for it. 417/ The court may weigh such factors as the relevance of the information sought, its availability elsewhere, the nature of the case, the degree to which disclosure would hinder the Government's ability to hold frank discussions about contemplated policy, and the extent to which protective orders may ameliorate any potential harm caused by disclosure. 418/ If the Government can demonstrate that its interest in secrecy outweighs the litigant's need, however, a claim of deliberative process privilege should be accepted by a court.

One important derivative of this privilege is a policy that the Government is not necessarily required to produce senior officials for deposition. In the absence of extraordinary circumstances, an agency official is generally not required to submit to an oral discovery deposition in connection with civil litigation. 419/ This rule is

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415/ See Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, supra note 413, 40 F.R.D. at 324.

416/ United States v. American Tel. and Tel. Co., 524 F. Supp. 1381, 1386 n.14 (D.D.C. 1981).

417/ United States v. Nixon, 418 U.S. 683 (1974).

418/ United States v. American Tel. and Tel. Co., 524 F. Supp. 1381, 1386 n.14 (D.D.C. 1981).

419/ Community Federal Savings & Loan v. FHLBB, 96

established to relieve agency decision makers from the burdensomeness of discovery, to allow them to spend their valuable time on the performance of official functions, and to protect them from inquiries into the mental processes of agency decision-making. 420/ Considering the volume of litigation to which the Government is a party, a failure to place reasonable limits upon private litigants' access to responsible government officials as sources of routine pre-trial discovery would result in a severe disruption of the Government's primary function. 421/ As a result, the oral deposition of a high government official will not be allowed, unless the party wishing the deposition shows that it is necessary to prevent injustice. 422/

6. Protective Orders

Rule 26 of the Federal Rules of Civil Procedure provides a district court with broad authority to limit discovery. Rule 26(c) authorizes a court, upon a showing of "good cause," to issue a protective order restricting either the scope of discovery or the use of discovered materials. Protective orders can be obtained in order to shield government officials from depositions, 423/ to prevent

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F.R.D. 619, 621 (D.D.C. 1983).

420/ United States v. Morgan, 313 U.S. 409, 422 (1941); Cornejo v. Landon, 524 F. Supp. 118 (N.D. Ill. 1981).

421/ Capital Vending Co. v. Baker, 36 F.R.D. 45 (D.D.C. 1964).

422/ Id.

423/ See, e.g., Community Federal Savings & Loan v. FHLBB, 96 F.R.D. 619 (D.D.C. 1983).

disclosure of discovery materials to the general public or to specific third parties, 424/ to set a time and place for deposing a witness, 425/ to limit the number of interrogatories, 426/ or to stay discovery completely pending a decision on a dispositive motion 427/ or a related proceeding. 428/ A motion for a protective order may be filed in the court in which the action is pending, or, for matters relating to a deposition, in the court in the district where the deposition is to be taken. Under Rule 26(c), a court may issue any order which justice requires to protect a party or person from "annoyance, embarrassment, oppression, or undue burden or expense."

In addition to Rule 26(c), there are other rules which can be invoked to limit the scope of discovery. Under Rule 30(d), a party (or deponent) may apply to the court to terminate the deposition if the examination is being conducted in bad faith or in such manner as "unreasonably to

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424/ See, e.g., Reliance Ins. Co. v. Barron's, 428 F. Supp. 200 (S.D.N.Y. 1977).

425/ See, e.g., Detweiler Bros., Inc. v. John Graham & Co., 412 F. Supp. 416, 422 (E.D. Wash. 1976).

426/ See, e.g., Jones v. Holy Cross Hospital Silver Springs, Inc., 64 F.R.D. 586, 591 (D. Md. 1974).

427/ See, e.g., Brennan v. Local Union No. 639, International Brotherhood of Teamsters, 494 F.2d 1092, 1100 (D.C. Cir. 1974).

428/ See, e.g., Econo-Car Int'l. v. Antilles Car Rentals, Inc., 61 F.R.D. 8, 10 (D.V.I. 1973) (protective order staying discovery on merits of grievance granted pending resolution of action to compel arbitration).

annoy, embarrass, or oppress the deponent or party." Rule 26(b)(1) authorizes the court to limit the frequency or extent of use of discovery if it determines that the discovery sought is unreasonably cumulative, duplicate, burdensome or expensive. Moreover, if excessive, unnecessary or improper discovery is sought, sanctions may be available under Rule 26(g) or Rule 37(a)(6).

H. Summary Judgment

In general, summary judgment is governed by Fed. R. Civ. P. 56. Granting a motion for summary judgment requires that the court find no triable issue of fact. Summary judgment differs from "judgment on the pleadings" in that affidavits and other evidentiary materials outside the pleadings are submitted in support of the motion. See Fed. R. Civ. P. 56(e).

Summary disposition is available in equitable actions, 429/ and therefore may be requested in a civil RICO suit brought to obtain equitable relief, as well as in a RICO treble-damages suit. In addition, Fed. R. Civ. P. 56(a) allows parties to seek summary judgment "upon all or any part" of their claims.

Offensive use of summary judgment by the Government as plaintiff in a civil RICO case is most likely to occur when one or more defendants are estopped from contesting criminal

429/ Booth v. Barber Transportation Co., 256 F.2d 927, 931 (8th Cir. 1958); Huntington Palisades Property Owners Corp. v. Metropolitan Finance Corp., 180 F.2d 132 (9th Cir. 1950), cert. denied, 339 U.S. 980, reh'g denied, 340 U.S. 847 (1950).

convictions pursuant to 18 U.S.C. § 1964(d). For example, a motion for summary judgment against Defendant X, who was previously convicted of three crimes in a criminal RICO pattern of racketeering, would refer to the articulation of these crimes in the civil complaint, state the legal basis for moving for summary judgment [section 1964(d)], and attach a certified copy of Defendant X's order of judgment and conviction. Because the "J and C" order may not be sufficiently specific concerning Defendant X's crimes, a copy of the indictment, along with a transcript of the plea proffer or a copy of the special jury verdict form, if available, should be appended to the motion.

APPENDIX A: Civil RICO Suits Filed by the United States

As of the time this Manual was written, the Government had filed thirteen civil RICO actions. */ Following are brief descriptions of these suits, listed in chronological order:

1. United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

The United States sued several individuals under 18 U.S.C. § 1964(a) and (b), alleging that they had violated 18 U.S.C. § 1962(b), (c), and (d) in connection with their acquiring control of, and conducting the affairs of, an illegal gambling business. The complaint sought preliminary and permanent injunctions restraining the defendants and those acting in concert with them from operating the business; divestiture of one defendant's interest in a building used for the illegal business; disclosure of the identities of other persons involved in the business; and an order directing each defendant to submit sworn quarterly reports to the United States for the next ten years stating his sources of income and other information bearing on his compliance with the injunction. The district court entered a default judgment against defendants for refusing to obey

*/ This figure does not include several suits filed by quasi-governmental entities, such as the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation. See, e.g., Federal Deposit Ins. Corp. v. Hardin, 608 F. Supp. 348 (E.D. Tenn. 1985). In addition, the Government filed one or more civil RICO suits in the 1970s that did not produce significant results and did not lead to reported decisions.

discovery orders; issued a preliminary injunction against the illegal gambling activities; and held the defendants in contempt for refusing to obey discovery orders. The Seventh Circuit affirmed, holding that the orders were properly entered under the law of RICO and equitable relief.

2. United States v. Winstead, 421 F. Supp. 295 (N.D. Ill. 1976).

The Government moved for a temporary restraining order under Section 1964 to enjoin the defendants from conducting an illegal "policy wheel" gambling operation. The district court denied the motion, holding that surveillance evidence from six months before was insufficient to support an inference that the illegal activity was continuing.

3. United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y 1977).

The Government sued several officers and other persons associated with the International Production, Service & Sales Employees Union, alleging that they had embezzled monies from the union and its locals and funds in violation of Section 1962(c). The Government sought orders enjoining the defendants from engaging in any union activities; divesting the defendants of their interests in this union and any other union or other labor organization; and directing the defendants to submit information to the court as needed to effectuate the relief. The district court dismissed the action, holding that the alleged embezzlements were not sufficiently related to the affairs of the enterprise for purposes of the underlying violation of

Section 1962(c).

4. United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986).

The United States sued five members of a criminal enterprise, the seven executive board members of Teamsters Local 560, and the local and its funds, alleging that the members of the criminal group, aided and abetted by the executive board members, had violated RICO through acts of extortion and murder that intimidated the membership and deprived it of its statutory rights under the labor laws. Some defendants agreed to consent orders prior to trial. After a bench trial with 51 days of testimony, the district court granted the equitable relief requested by the Government, enjoining two remaining members of the criminal group from having any future contacts with Local 560, and removing the entire executive board in favor of a court-appointed trustee, to continue until "reasonably free supervised elections can be held." The court retained jurisdiction over Local 560 as a "nominal defendant in order to effectuate the equitable relief" ordered. The court stayed the relief pending appeal.

Following affirmance by the Third Circuit in 1985 and denial of certiorari by the Supreme Court, the district court appointed a trustee. Subsequently, in 1987, the court replaced the first trustee with a second one, who was still in place as of February 1988.

5. United States v. Barnette, No. 85-754-CIV-J-16

(M.D. Fla. filed May 16, 1985).

The Government sued several individuals and three companies under 18 U.S.C. § 1964(c) to recover treble damages of more than $47 million in connection with their defrauding the Department of Defense by fraudulently inflating the charges to the Army under laundry contracts. The defendants were previously convicted in a criminal RICO prosecution arising from the same conduct. The complaint seeks damages of three times the excessive profits, which amounted to more than $15 million.

The complaint also seeks equitable relief, including divestment of the defendants' interests in certain companies and an order barring the defendants from doing business with the Government. In addition to the RICO claims for treble damages and injunctive relief, the complaint seeks relief based on several other grounds, including the False Claims Act, 31 U.S.C. § 3729, et seq., breach of contract, unjust enrichment, and payment by mistake.

On September 5, 1985, the district court denied without opinion a motion to dismiss the complaint; one of the grounds for the motion was that the United States is not a "person" entitled to recover treble damages under 18 U.S.C. § 1964(c). The case was still in litigation as of October 1987.

6. United States v. Ianniello, 824 F.2d 203 (2d Cir. 1987).

The Government sued several individuals for equitable relief under 18 U.S.C. § 1964(a) and (b) in February 1986,

seeking to enjoin the individuals from participating in the restaurant business and to divest them of their holdings in any bars or restaurants. Two of the individuals had been convicted of RICO or other charges involving the skimming of receipts from several New York restaurants they owned or operated. One individual had been granted a motion for judgment of acquittal in the criminal trial.

Some of the requested equitable relief, including detailed financial reporting requirements regarding one restaurant, was agreed to in a consent order. The main issues left to be resolved in the civil case were whether a receiver should be appointed to conduct the business of Umberto's Clam House during the pendency of the action, and whether Alfred Ianniello should be restrained from continuing as night manager at Umberto's. In April 1986, the district court declined to appoint a temporary receiver, finding that the Government had not yet brought forward sufficient evidence to justify that harsh remedy, despite the criminal convictions. However, the court did enjoin Alfred Ianniello from working at Umberto's, based on his criminal conviction.

The Government then hired an expert to conduct an investigation to determine whether skimming still was continuing at Umberto's. In discovery depositions, three individual defendants invoked the fifth amendment. After a hearing, the court granted the Government's application for a receiver <u>pendente lite</u>, rejecting the defendants' request

for a full evidentiary hearing. The court based its decision on the record in the criminal trial, the testimony of the expert, and the adverse inferences to be drawn from the defendants' invocation of the fifth amendment. The receiver was given "sole and exclusive control over the affairs" of the restaurant, but he was not given power to fire employees and was not given title to the restaurant. The Second Circuit affirmed the district court's orders appointing the receiver and imposing costs of the receivership on the Government "in the first instance."

7. United States v. Egal Shasho, et al., No. CV-86-1667 (E.D.N.Y. 1986).

The Government sued numerous individuals for treble damages in connection with a scheme through which the defendants defrauded the Federal Crime Insurance Program of the Federal Emergency Management Agency (FEMA). The complaint alleges that wholesalers provided store owners with fictitious invoices for purchases of merchandise, and that store owners used these invoices to submit burglary-loss claims to insurance companies with the cooperation of some corrupt insurance adjusters. Many of the defendants were previously convicted of criminal charges arising from the same scheme. In addition to RICO, the complaint seeks recovery under the False Claims Act and common-law fraud. This suit was still in the discovery stage as of October 1987.

8. United States v. Local 6A, Cement and Concrete Workers, Laborers International Union, 663 F. Supp. 192 (S.D.N.Y. 1986).

The Government sued the union, its executive board, various union officials, and members of the Colombo organized crime family, seeking orders barring the Colombo family members from participating in union affairs or in the construction industry; barring union defendants from acting on behalf of the union; and appointing one or more trustees to supervise the affairs of the union. The suit was filed as a follow-up to the criminal prosecution of United States v. Persico, No. 84 CR 809 (S.D.N.Y.), in which two of the Colombo family defendants were convicted of violating RICO in connection with an ongoing pattern of extortion in the construction industry. The court granted preliminary relief without a hearing against the two defendants who had been convicted in the Persico case. Subsequently, on March 18, 1987, the court entered a consent judgment against the union defendants, enjoining them from participating in union affairs, with some exception. The court also appointed a monitor who is empowered to oversee the operation of the union, but who lacks the broad powers of the Local 560 trustee. The court has ordered staggered elections, to begin in 1988. The monitor is to remain in overall control until 1990.

9. United States v. Jay Turoff, et al. No. CV-87-1324 (E.D.N.Y. April 29, 1987).

The United States Attorney in Brooklyn brought this civil RICO suit on behalf of the National Credit Union

Administration. It charges four defendants with defrauding a federally insured credit union in Brooklyn of § $1.2 million. The defendants, who have been convicted of criminal charges, owned Compumeter, Inc., through which they paid bribes to secure the rights to install electronic meters in New York City taxicabs. The investigation of these bribes eventually uncovered extensive corruption throughout New York City's transportation agencies. The civil case was in the discovery stage as of October 1987.

10. United States v. Bartholomew Rivieccio, et al., No. CV-86-1441 (E.D.N.Y. October 16, 1987).

The United States Attorney in Brooklyn filed another civil RICO suit, under § 1962(a), (c) and (d), on behalf of the National Credit Union Administration ("NCUA"). The complaint alleges that eight individuals and twenty corporations were involved in a fraudulent scheme over a five year period to defraud Hyfin Credit Union ("Hyfin") and its members. This is the second civil RICO action to result from the collapse of Hyfin. (See Turoff, supra). The complaint alleges that three individual defendants, who were officials employed by Hyfin, solicited and accepted interests in real estate companies controlled by the remaining individual defendants in return for the fraudulent transfer of Hyfin's assets to those companies. The corporate defendants allegedly were the vehicles used by certain defendants to effect the bribes paid to Hyfin officials, in the form of shares of the corporation. The fraudulent transfers were disguised as loans to certain

defendants, or to fictitious persons, but they were actually used to make real estate investments at no risk to the defendants. The Government alleges that one of the corporations, Bart Development & Construction Corp., performed contracting work on the properties and received substantial amounts of Hyfin funds.

Hyfin lost $12 million as a result of this fraud and had to be closed by the NCUA, allegedly as a result of this and other fraudulent activity.

The Government is seeking treble damages of $36 million, divestiture of defendant Rivieccio's interest in defendant Bart Development's Construction Corp. and an injunction prohibiting him from engaging in any enterprise involved in real property development, and dissolution of Bart Development's Construction Corp. The complaint further requests that the court impose constructive trusts on all of the real properties purchased by defendants through their racketeering activity, as well as the proceeds and profits of such properties.

11. United States v. Bonanno Family of La Cosa Nostra, No. CV-87-2974 (E.D.N.Y. filed Aug. 26, 1987; consent Judgment with Local 814, its executive board and related funds, Ignatius Bracco and Vito Gentile, E.D.N.Y. October 8, 1987).

On August 26, 1987, the United States Attorney for the Eastern District of New York filed a civil RICO suit against the Bonanno La Cosa Nostra (LCN) crime family and its members, as well as Teamsters Local 814, its major officers, its executive board, and its related funds. The criminal

activity alleged as the basis for civil relief under RICO consists of 205 separate acts of racketeering activity, including gambling, narcotics trafficking, extortion, loansharking, theft from interstate shipments, and labor racketeering.

The complaint seeks to enjoin the Bonanno Family defendants from associating together for any business or commercial purpose, from "making" new members or associates of the Family, and from participating in any manner in the conduct of the affairs of the Family. The Government had not previously used RICO to seek such sweeping injunctive relief against an LCN family or its members. The rationale for doing so is that the order, if granted by the court, can be swiftly enforced by criminal contempt proceedings that can lead to fines and incarceration for any violation.

In addition to the broad relief sought against the LCN defendants, the complaint seeks a wide variety of more traditional relief, including injunctions against specified unlawful conduct, the appointment of one or more trustees to discharge all duties and responsibilities of the executive board of Local 814, and treble damages under 18 U.S.C. § 1964(c) for schemes that inflated the costs of contracts for moving several government offices.

Many of the allegations in the complaint are based on prior criminal prosecutions, primarily United States v. Philip Rastelli, et al., No. 85 CR. 354 (E.D.N.Y.), a major RICO prosecution in which the Criminal Division's Brooklyn

Strike Force obtained the convictions of several top-ranking Bonanno Family members, Local 814 officials, and others in October 1986.

12. United States v. Local 359, United Seafood Workers, No. 87 Civ. 7351 (S.D.N.Y filed October 15, 1987).

The United States Attorney for the Southern District of New York filed a civil RICO suit against members of the Genovese organized crime family, union officials, and others in connection with the operation of the Fulton Fish Market in New York City. The complaint is designed to remove the Genovese Family's control over the operations of the Fulton Fish Market and Local 359, which the Genovese Family has controlled since the 1930's. The Fulton Fish Market, located in the lower Manhattan section of New York City, provides the majority of the fresh seafood in the New York metropolitan area, amounting to approximately one billion pounds per year. Local 359 has members employed by companies operating at or out of the Fulton Fish Market.

The complaint alleges that the Genovese Family, certain of its members, and officers of Local 359, United Seafood Workers, Smoked Fish and Cannery Union, United Food and Commercial Workers Union, AFL-CIO, CLC (Local 359) are conducting, and conspiring to conduct, a pattern of racketeering activity based on predicate acts including theft from interstate shipments, extortionate credit transactions, interference with commerce by extortion, illegal gambling businesses, illegal labor payments, wire fraud and state law murder. The proposed complaint follows

a 1981 RICO prosecution in which Carmine and Peter Romano and others were ultimately convicted on all counts in connection with labor-racketeering activities involving the Fulton Fish Market.

The relief sought includes injunctions against future RICO violations; divestiture of the Genovese Family members' businesses that are related to the Fulton Fish Market; an injunction against Genovese Family members, associates, and all present defendants prohibiting their re-entry into the commercial seafood industry; removal of union officials from office and appointment of a trustee; and appointment of administrators to direct the operation of the Fulton Fish Market.

13. United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, No. 87-7718 (E.D. Pa. filed Dec. 2, 1987)

On December 2, 1987, the United States Attorney for the Eastern District of Pennsylvania filed a civil RICO suit against Stephen Traitz, Jr., Business Manager of Locals 30 and 30B, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association (Roofers Union), and other persons affiliated with the locals. The civil suit was filed immediately upon the criminal RICO convictions of Traitz and others for conducting the affairs of the Roofers Union through a pattern of racketeering activity. The evidence in the criminal case established that virtually the entire leadership of the Roofers Union was engaged in a wide variety of criminal activity. For example, owners of

roofing companies within Local 30's jurisdiction were routinely called into the union office and threatened with violence if they did not make payments to the union. In addition, numerous judges and other public officials in the Philadelphia area were bribed by Traitz with money that was generated by kickbacks received from the law firm that provided legal services under the union's prepaid legal plan.

The civil RICO complaint, which includes some allegations beyond those established in the criminal trial, seeks to enjoin the convicted defendants from participating in the affairs of the union, and requests that a trustee be appointed by the court to oversee the union's affairs until elections of new officers can be held.

APPENDIX B

Sample Civil Investigative Demand

[drafted to seek records from a financial institution] */

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*/ Note that the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-22, may apply where a financial institution is sent a CID for customer records. For a discussion of the requirements of the Act, see USAM §§ 9-4.800 - 9-4.890.

CIVIL INVESTIGATIVE DEMAND
UNITED STATES DEPARTMENT OF JUSTICE

CRIMINAL DIVISION
WASHINGTON, D.C. 20530

To _____
_____
_____
_____

This civil investigative demand is issued pursuant to 18 U.S.C. § 1968, in the course of a racketeering investigation, to determine whether there is, has been, or may be a violation of

_____

by conduct, activities or proposed action of the following nature:

_____
_____
_____

You are required by this demand to produce all documentary material described in the attached schedule that is in your possession, custody or control, and to make it available at your address indicated above for inspection and copying or reproduction by a custodian named below. Such production shall occur on the _____ day of _____, 19 _____ at _____ a.m. p.m.

The production of documentary material in response to this demand must be made under a sworn certificate, in the form printed on the reverse side of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production.

For the purposes of this investigation, the following are designated as the custodian and deputy custodian(s) to whom the documentary material shall be made available:

_____
_____
_____

Inquiries concerning compliance should be directed to

_____
_____

Issued at Washington, D.C., this ____ day of _____, 19_____.

_____
[Signature]

_____
[Title]

Form of Certificate of Compliance */

I/We do hereby certify that all of the documentary material required by Civil Investigative Demand No. _____ which is in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to a custodian named therein.

Any documentary material otherwise responsive to this demand which has been withheld from production under a claim of privilege or otherwise has been identified as required therein.

_____
Signature

_____
Title

Sworn to before me this _____ day of _____, 19 ____.

_____
Notary Public

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*/ In the event that more than one person is responsible for producing the documentary material called for by this demand, the certificate shall identify the specific numbered items for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided for in 28 U.S.C. § 1746.

SCHEDULE

Definitions

As used herein:

1. "And" and "or" are terms of inclusion and not of exclusion, and should be construed either disjunctively or conjunctively as necessary to bring within the scope of this schedule any document or information that might otherwise be construed to be outside its scope. The term "each" includes "every" and vice versa. The terms "a," "an," and "any" include "all," and "all" includes "a," "an," and "any." All of these terms should be construed as necessary to bring within the scope of this schedule any document or information that might otherwise be construed to be outside its scope.

2. "Document" means any written, recorded, or graphic material of any kind, whether prepared by your company or by any other person, that is in the possession, custody, or control of your company. The term includes but is not limited to agreements; contracts; letters; telegrams; inter-office communications; memoranda; reports; records; instructions; specifications; notes; notebooks; scrapbooks; diaries; plans; drawings; sketches; blueprints; diagrams; photographs; photocopies; charts; graphs; drafts; minutes of meetings, conferences, and telephone or other conversations or communications; invoices; purchase orders; bills of lading; publications; transcripts of telephone

conversations; ledgers; financial statements; microfilm; microfiche; tape or disc recordings; and computer print-outs. It also includes electronically stored data from which information can be obtained either directly or by translation through detection devices or readers; any such document is to be produced in a reasonably legible and usable form. The term "document" includes the original document (or a copy thereof if the original is not available) and all copies which differ in any respect from the original, including but not limited to any notation, underlining, marking, or information not on the original.

3. "Identify" means (a) with respect to a natural person, to state the person's full name, employer, current job title, business address and telephone number, and residential address and telephone number; and (b) with respect to any other person, to state its full name and principal address and telephone number.

4. "Person" means any natural person, corporation, firm, company, sole proprietorship, partnership, joint venture, association, or other business or legal entity.

5. "Relate to" or "relating to" means discussing, describing, referring to, reflecting, containing, analyzing, studying, reporting on, commenting on, evidencing, constituting, setting forth, considering, recommending, concerning or pertaining to, in whole or in part.

6. "You" or "your company" means (a) [name of financial institution], its predecessors, successors,

groups, subsidiaries, divisions, and affiliates, and (b) present and former officers, directors, employees, agents and other persons acting on behalf of it or its predecessors, successors, groups, subsidiaries, divisions or affiliates, including but not limited to consultants, attorneys, or other agents having possession, custody, or control of documents or information called for by this Civil Investigative Demand.

7. The singular form of a noun or pronoun shall be considered to include within its meaning the plural form of the noun or pronoun so used, and vice versa.

Instructions

1. Unless otherwise specified, (a) the documents requested are documents prepared, written, sent, dated, received or in effect at any time between January 1, 1981, and the date of your company's compliance with this Civil Investigative Demand, and (b) the information requested is for the period between January 1, 1981, and the date of your company's compliance with this Civil Investigative Demand. Unless otherwise specified, any data shall be provided separately for each calendar year, and the data for January 1, 1988, to the date of your compliance with this request shall be provided separately for each month.

2. In responding to the requests for information in this Civil Investigative Demand, preface each answer by restating the specification and number to which the answer is addressed.

3. If you are unable to answer a request for information fully, or if precise information cannot be supplied, (i) submit your best estimate or judgment, so identified, and set out the source or basis of the estimate or judgment, and (ii) provide such information available to you as comes closest to providing the information requested and explain why your answer is incomplete. Where incomplete answers, estimates or judgments are submitted, and your company knows of or has reason to believe that there are other sources of more complete or accurate information, identify or describe those other sources of information.

4. If any portion of any document is responsive to any documentary request, then the entire document must be produced. Documents produced pursuant to this Civil Investigative Demand shall be produced in the order in which they appear in your files, and shall not be shuffled or otherwise rearranged. Documents that in their original condition were stapled, clipped, or otherwise fastened together shall be produced in such form. Please mark each page with the initials of your company and number each page consecutively beginning with "1." These marks should be placed at the lower right-hand corner of each page, but should not be so placed as to obscure any information on the

document. We request that you place all documents produced in file folders or other enclosures bearing your name or its abbreviation. We further request that you advise us in writing, as to each document produced, the number of the request to which it is responsive.

5. If you have any questions regarding the scope, meaning, or intent of these requests for documents or information, contact [Attorney name, phone number, and address].

6. This Civil Investigative Demand for information is made without our prior knowledge of what documents exist at your company or the form in which information is kept. We do not intend to impose any unnecessary burden on your company. Therefore, after you have reviewed each request and determined what documents and information are available, the form in which they are available, and the extent of the search required to comply, we are prepared to discuss any problem you may have that will avoid unnecessary burden in complying with each request.

7. For each document withheld under a claim of privilege, submit a sworn or certified statement from your counsel or one of your employees in which you identify the document by author, addressee, date, number of pages, and subject matter; specify the nature and basis of the claimed privilege and the specification of this Civil Investigative Demand to which the document is responsive; and identify each person to whom the document was sent, and each person

to whom the document or its contents, or any part thereof, was disclosed.

If you refuse to provide an answer to any specification pursuant to any claim of privilege, submit a sworn or certified statement from your counsel or one of your employees setting forth the nature and basis for the privilege claimed.

Information and Documentary Materials Requested

Any and all documents relative to all accounts, transactions, and dealings with, for, or on behalf of, or under the control of the persons listed on Attachment A, in those names, or under whatever designation entered, including but not limited to the following:

1. Savings Accounts
   a. signature card
   b. monthly (or quarterly, etc.) account statements, and ledger sheets
   c. deposit tickets and individual deposit items
   d. withdrawal slips, credit/debit memos
   e. interest statements (Forms 1099, etc.)

2. Checking Accounts
   a. signature card
   b. monthly (or quarterly, etc.) account statements, and ledger sheets
   c. cancelled checks (both sides)
   d. deposit tickets, and individual deposit items, and credit/debit memos

3. Certificates of Deposit
   a. signature card
   b. statements of account and ledger sheets
   c. interest statements (Forms 1099, etc.)
   d. deposit items and withdrawal items

4. Credit Cards (BankAmericard, Visa, MasterCharge, etc.)
   a. applications
   b. account statements (monthly, quarterly, etc.)
   c. purchase slips and charges on account

5. All loans, including but not limited to personal installment, signature (passbook), auto, and chattel loan accounts
   a. loan applications and credit reports
   b. financial statements
   c. closing statements
   d. payment ledgers
   e. cancelled checks for proceeds of loan
   f. record of collateral utilized

6. Notes (30, 60, 90-day, etc.)
   a. loan applications and credit reports
   b. financial statements
   c. closing statements
   d. payment ledgers

7. Mortgage Accounts
   a. loan applications and credit reports
   b. financial statements
   c. closing statements
   d. payment ledgers

8. Safe Deposit Boxes
   a. contracts and signature cards
   b. records of access

9. Certified, Cashier's and Bank Checks

10. Bank Money Orders, Personal Money Orders

11. Trust Accounts
   a. signature cards
   b. trust agreements
   c. checks for distribution from trust account
   d. deposits to account
   e. statements of income and transactions

12. Correspondence

13. Credit and Debit Memos

14. Individual Retirement Accounts (IRA) and similar accounts
   a. signature card
   b. IRA (or similar) contract/agreement
   c. monthly (or quarterly, etc.) account statements and ledger sheets
   d. deposit tickets and individual deposit items
   e. withdrawal slips, penalty (or similar) notices
   f. interest/earnings statements
   g. elections, designations as to year of deduction

15. Ready Money Accounts

16. Records in regards to investment counseling and/or brokerage services provided

17. Teller proof sheets

18. Letters of credit issued and received

19. Currency transaction reports

20. Records of wire transfers both:

    1. domestic and
    2. international

with any of the persons listed in Attachment A, individually or with others, as either:

1. sender or
2. receiver

or by any agent, employee, or nominee acting on their behalf, specifically including:

a. customer orders and instructions, signature cards and authorizations

b. correspondence, notes and memoranda, and letters of credit

c. tape recordings of telephone orders

d. hard copy wire transfers sent or received, wire transfer orders, records of transmittal or receipt, and terminal sheets

e. records of source or disposition of wired funds, account charged or credited, method of payment, cash receipt, (microfilm) copy of check received, credit memos, debit memos, charge or credit slips, deposit slips, withdrawal slips, statements of account

f. work-copies and call-in sheets

g. customer-signed slips, account authorizations, and telephone order authorizations

Attachment A

[list names of persons or entities whose records you are seeking]

APPENDIX C

Sample Summons and Complaint for Injunctive Relief

AO 440 (Rev. 5/85) Summons in a Civil Action

86 Cv. 4819

JUDGE BRODERICK

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

LOCAL 6A, CEMENT AND CONCRETE WORKERS
Laborers International Union of
North America,
EXECUTIVE BOARD OF LOCAL 6A, CEMENT AND
CONCRETE WORKERS, Laborers International
Union of North America,
RALPH SCOPO, JR., President, ET AL.,

Defendants.

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

TO: (Name and Address of Defendant)

See attached rider.

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

RUDOLPH W. GIULIANI
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
ATTN: Randy M. Mastro
Robert L. Ullmann

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

19 JUN 1986

JUN 19 1986

RAYMOND F. BURGHARDT, CLERK

CLERK

DATE

Theresa Garner Keeling

BY DEPUTY CLERK

Received OCRS-WA S-7
6-23-86

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

Plaintiff, :

- v -

:

LOCAL 6A, CEMENT AND CONCRETE WORKERS,
Laborers International Union :
of North America,

EXECUTIVE BOARD OF LOCAL 6A, CEMENT AND :
CONCRETE WORKERS, Laborers International
Union of North America, :
RALPH SCOPO, JR., President,
JOSEPH SCOPO, Vice-President, :
CARMINE MONTALBANO, Secretary-Treasurer,
RUDOLPH NAPOLITANO, Business Manager : COMPLAINT
ANTHONY NAPOLITANO, JERRY MICELI,
SAL CASCIO, JAMES STURIANO, PETER VITALE : 86 Civ.
ANTHONY GUGLUIZZA, THOMAS MAZZA, Officers

DISTRICT COUNCIL OF CEMENT AND CONCRETE :
WORKERS, Laborers International Union
of North America, :

EXECUTIVE BOARD OF THE DISTRICT COUNCIL
OF CEMENT AND CONCRETE WORKERS, Laborors :
International Union Of North America,
LOUIS GAETA, President and Business :
Manager,
THOMAS HENNESSY, Vice-President, :
CARMINE MONTALBANO, Secretary-Treasurer,
JOSEPH SCOPO, Sergeant-at-Arms, :
FRANK BELLINO, RUDOLPH NAPOLITANO,
ED KELLY, CHRISTOPHER FURNARI, JR., :
RICHARD TOMASZEWSKI, EUGENE McCARTHY,
Officers, :
RALPH SCOPO, JR., THOMAS MEDERA,
MAURICE FOLEY, Auditors, :

THE COLOMBO ORGANIZED CRIME FAMILY
OF LA COSA NOSTRA, :
CARMINE PERSICO, a/k/a "The Snake,"
a/k/a "Junior," Boss, :
GENNARO LANGELLA, a/k/a
"Gerry Lang", Acting Boss, :
DOMINIC MONTEMARANO, a/k/a "Donny Shacks",
Capo, :
RALPH SCOPO, "Made" Member,

Defendants. :

- -x

The United States of America, by its attorney, Rudolph W. Giuliani, United States Attorney for the Southern District of New York, alleges for its Complaint herein as follows:

JURISDICTION

1. Jurisdiction in this action is predicated upon Title 18, United States Code, Section 1964(a); Title 28, United States Code, Section 1345; and Title 28, United States Code, Section 1331.

VENUE

2. Venue for this action is predicated upon Title 18, United States Code, Section 1965, and Title 28, United States Code, Section 1391.

PARTIES

3. Plaintiff United States of America is a sovereign and body politic.

4. Defendant Local 6A, Cement and Concrete Workers Union, Laborers International Union of North America (hereinafter, "Local 6A"), located at 91-31 Queens Boulevard, Elmhurst, Queens, New York, was and is a labor organization engaged in an industry affecting interstate commerce within the meaning of 29 U.S.C. §§ 152 and 402, in that it has represented and would admit to membership persons employed by various construction companies which were or are engaged in interstate commerce.

5. Defendant Executive Board of Local 6A is the governing body of Local 6A. Local 6A's current Executive Board members and officers, who are joined herein as defendants, are believed to be:

(a) Defendant Ralph Scopo, Jr., who has been the President of Local 6A since approximately February 1981. Prior to that time, he was employed by and associated with Local 6A in various other official capacities. He is the son of defendant Ralph Scopo and the brother of defendant Joseph Scopo.

(b) Defendant Joseph Scopo, who has been the Vice-President of Local 6A since at least January 1982. Prior to that time, he was employed by and associated with Local 6A in various other official capacities. He is the son of defendant Ralph Scopo and the brother of defendant Ralph Scopo, Jr.

(c) Defendant Carmine Montalbano, who has been the Secretary-Treasurer of Local 6A since at least January 1982. Prior to that time, he was employed by and associated with Local 6A in various other official capacities.

(d) Defendant Rudolph Napolitano, who has been the Business Manager of Local 6A since approximately 1977. Prior to that time, he was employed by and associated with Local 6A in various other official capacities. He is related to defendant Anthony Napolitano.

(e) Defendant Anthony Napolitano, who has been a member of the Executive Board of Local 6A since approximately 1980. Prior to that time, he was

employed by and associated with Local 6A in various other official capacities. He is related to defendant Rudolph Napolitano.

(f) Defendant Jerry Miceli, who has been a member of the Executive Board since at least January 1982.

(g) Defendant Sal Cascio, who has been a member of the Executive Board of Local 6A since at least January 1982.

(h) Defendant James Sturiano, who has been a member of the Executive Board of Local 6A since at least January 1982. Prior to that time, he was employed by and associated with Local 6A in various other official capacities.

(i) Defendant Peter Vitale, who has been a member of the Executive Board of Local 6A since at least January 1982.

(j) Defendant Anthony Gugluizza, who has been a member of the Executive Board of Local 6A since at least January 1982. Prior to that time, he was employed by and associated with Local 6A in various other official capacities.

(k) Defendant Thomas Mazza, who has been a member of the Executive Board of Local 6A since at least January 1982. Prior to that time, he was also employed by and associated with Local 6A in various other official capacities.

6. Defendant District Council, Cement and Concrete Workers, Laborers International Union of North America (hereinafter, the "District Council"), located at 91-31 Queens Boulevard, Elmhurst, Queens, New York, was and is a labor organization engaged in an industry affecting interstate commerce, within the meaning of 29 U.S.C. §§ 152 and 402, in that it has represented and would admit to membership persons employed by various construction companies which were or are engaged in interstate commerce. The District Council consists of, and oversees the operations of, four affiliated unions: Local 6A, Local 18A, Local 20, and Local 1175, Cement and Concrete Workers, Laborers International Union of North America ("LIUNA").

7. Defendant Executive Board of the District Council is the governing body of the District Council. The District Council's current Executive Board members, officers and auditors, who are joined herein as defendants, are believed to be:

(a) Defendant Louis Gaeta, who has been the President and Business Manager of the District Council since at least May 1985. Prior to that time, he was employed by and associated with the District Council in various other official capacities. He has also been employed by and associated with Local 20 in various official capacities.

(b) Defendant Thomas Hennessy, who has been the Vice-President of the District Council since approximately 1979. Prior to that time, he was

employed by and associated with the District Council in various other official capacities. He has also been employed by and associated with Local 18A in various official capacities.

(c) Carmine Montalbano, who has been the Secretary-Treasurer of the District Council since at least May 1985. His employment by and association with Local 6A is described above.

(d) Defendant Joseph Scopo, who has been the Sergeant-at-Arms of the District Council since approximately 1979. His employment by and association with Local 6A is described above.

(e) Defendant Frank Bellino, who has been a member of the Executive Board of the District Council since approximately 1979. He has also been employed by and associated with Local 20 in various official capacities.

(f) Defendant Richard Tomaszewski, who has been a member of the Executive Board of the District Council since approximately 1981.

(g) Defendant Rudolph Napolitano, who has been a member of the Executive Board of the District Council since approximately 1979. His employment by and association with Local 6A is described above.

(h) Defendant Ed Kelly, who has been a member of the Executive Board of the District Council since approximately 1983. He has also been employed by and associated with Local 18A in various official capacities.

(i) Defendant Christopher Furnari, Jr., who has been a member of the Executive Board of the District Council since at least 1984. He has also been employed by and associated with Local 20 in various official capacities.

(j) Defendant Eugene McCarthy, who has been a member of the Executive Board of the District Council since approximately 1983. He has also been employed by and associated with Local 18A in various official capacities.

(k) Ralph Scopo, Jr., who has been an Auditor of the District Council since at least January 1982. His employment by and association with Local 6A is described above.

(l) Thomas Medera, who has been an Auditor of the District Council since at least 1984.

(m) Maurice Foley, who has been an Auditor of the District Council since at least 1984. He has also been employed by and associated with Local 18A in various official capacities.

8. Defendant Colombo Organized Crime Family of La Cosa Nostra (hereinafter, the "Colombo Family") has been an organized criminal group or enterprise which has operated in New York and other parts of the United States.

(a) The Colombo Family has operated through entities known as "Crews." Each "Crew" has had as its leader a person known as a "Capo" or Captain and has been composed of "made" members, sometimes known as "Soldiers," and associates, sometimes referred to as "connected." In charge of these "Crews" and "Capos" has been a leader known as a "Boss." He often has had a second in command known as an "Underboss." When a "Boss" has been imprisoned, one of the "Capos" of the Colombo Family has served as "Boss" and has sometimes been known as "Acting Boss." The Colombo Family has been part of a nationwide criminal organization known by various names, including the "Mafia" and "La Cosa Nostra," which has operated throughout the United States through entities known as "Families."

(b) The "Bosses" and "Capos" of the Colombo Family have supervised and protected the criminal activities of the members and associates. In return, the "Bosses" and "Capos" have received a part of the illegal earnings of the members and associates who have reported to them.

(c) The Colombo Family has threatened and assaulted people to induce fear in those with whom they have done business.

(d) The Colombo Family has used its control of various labor unions, including Local 6A, to demand and receive payoffs from employers of union members in exchange for labor peace and to steal money from the unions. Among the illegal ways in which the Colombo Family has used its control of labor unions have been the following:

(1) The Colombo Family defendants and their co-racketeers have extorted money from construction companies and builders, in part, by threatening to withhold and by withholding union workers from construction projects; and

(2) The Colombo Family defendants and their co-racketeers have exercised control over and influenced the decisions of the Executive Boards of Local 6A and the District Council and have extorted and attempted to extort cash payments from construction companies.

9. Defendant Carmine Persico, a/k/a "The Snake," a/k/a "Junior," has served at times relevant hereto as the Boss of the Colombo Family.

10. Defendant Gennaro Langella, a/k/a "Gerry Lang", has served at times relevant hereto as a Capo, Underboss and Acting Boss of the Colombo Family.

11. Defendant Dominic Montemarano, a/k/a "Donny Shacks", has served at times relevant hereto as a Capo in the Colombo Family.

12. Defendant Ralph Scopo has been at times relevant hereto a "made" member of the Colombo Family. He was the President and Business Manager of defendant District Council from approximately 1979 to approximately early 1985. At various times, he was also employed by and associated with Local 6A as one of its officers. He is the father of defendants Ralph Scopo, Jr., and Joseph Scopo.

STATEMENT OF CLAIMS

13. At all times relevant hereto, Local 6A and the District Council have collectively constituted an enterprise (hereinafter, the "Local 6A/District Council Enterprise"), as defined in Title 18, United States Code, Section 1961(4), which enterprise has been engaged in and the activities of which have affected interstate commerce. As such the Local 6A/District Council Enterprise has been a captive labor organization, which has been infiltrated, dominated and exploited by the Colombo Family in the manner and means described below.

I. First Claim for Relief: Violation of 18 U.S.C. § 1962(c)

14. From the 1970's to the present, in the Southern District of New York and elsewhere, defendants Carmine Persico, Gennaro Langella, Dominic Montemarano, Ralph Scopo, Louis Gaeta, Rudolph Napolitano, Anthony Gugluizza, Christopher Furnari, Jr., Peter Vitale, Ralph Scopo, Jr., Joseph Scopo, Frank Bellino, Carmine Montalbano and others have unlawfully, willfully and knowingly conducted and participated, directly and indirectly, in the conduct of the affairs of the Local 6A/District Council Enterprise, which has been engaged in and the activities of which have affected interstate commerce, through the commission of a pattern of racketeering activity as set forth below, in violation of Title 18, United States Code, Section 1962(c).

15. From the 1970's to the present, the Colombo Family has organized and controlled a scheme of extortion involving New York concrete contractors. The Colombo Family has enforced the rules of this scheme by threatening disobedient contractors with labor problems, stoppage of concrete deliveries and other punishment. In return, payoffs ranging up to 1% or more of the amount of each concrete pouring contract have been extorted by the Colombo Family from these contractors. Certain of those payments were made directly to defendant Ralph Scopo while he served as President and Business Manager of the District Council.

16. It has further been part of this pattern of racketeering activity that, on or about the dates specified below and on other dates, in the Southern District of New York and elsewhere, defendants Carmine Persico, Gennaro Langella, Dominic

Montemarano, Ralph Scopo and others, together with, at various times, certain members of the Executive Boards of Local 6A and the District Council, including defendants Louis Gaeta, Rudolph Napolitano, Anthony Gugluizza, Christopher Furnari, Jr., Peter Vitale, Ralph Scopo, Jr., Joseph Scopo, Frank Bellino and Carmine Montalbano, have unlawfully, willfully and knowingly obtained and attempted to obtain property, to wit, money in the approximate amounts specified below and other money and other things of value, by extortion, from and with the consent of the concrete construction companies specified below and other concrete construction companies, which companies have been engaged in interstate commerce, and with the consent of their officers, employees and representatives, which consent has been induced by the wrongful use of actual and threatened force, violence and fear of economic harm, and thereby have unlawfully obstructed, delayed, and affected interstate commerce, in violation of Title 18, United States Code, Sections 1951 and 2:

APPROXIMATE DATES	CONSTRUCTION COMPANY	APPROXIMATE AMOUNT
1981 to April 1984	Pile Foundation Company	$18,000
November 1983 to May 1984	Retsam Contracting Corporation	$ 6,700
December 1983 to July 1984	Alicer Contracting Company	$ 6,000
1982 to 1984	DeGaetano & Vozzi Construction Company	$55,000
October 1982 to March 1984	All-Boro Paving Company	$24,300
January 1983 to September 1984	Cedric Construction Company	$25,000

June 1984	Hempstead Concrete Corporation	$ 700
December 1983 to April 1984	Falco Construction Corporation	$ 4,000
November 1983 to March 1984	Daval Construction Company	$ 2,000
1981 to 1984	Technical Concrete Construction Corporation	$1,400,000

17. It has further been a part of this pattern of racketeering activity that, on or about the dates specified below and on other dates, in the Southern District of New York and elsewhere, defendant Ralph Scopo, President and Business Manager of the District Council, being a representative and officer of a labor organization which represents and would admit to membership the employees of the concrete construction companies specified below and of other concrete construction companies, who are employed in an industry affecting commerce, aided and abetted by defendants Carmine Persico, Gennaro Langella, Dominic Montemarano and others, together with, at various times, certain members of the Executive Boards of Local 6A and the District Council, including defendants Louis Gaeta, Rudolph Napolitano, Anthony Gugluizza, Christopher Furnari, Jr., Peter Vitale, Ralph Scopo, Jr., Joseph Scopo, Frank Bellino and Carmine Montalbano, have unlawfully, willfully and knowingly requested, demanded, received and accepted, and agreed to receive and accept payments, loans, deliveries of money and other things of value from concrete construction companies, examples of which are specified below, in violation of Title 29, United States Code, Section 186(b) and Title 18, United States Code, Section 2:

APPROXIMATE DATES	CONSTRUCTION COMPANY	APPROXIMATE AMOUNT
1981 to April 1984	Pile Foundation Company	$ 18,000
November 1983 to May 1984	Retsam Contracting Corporation	$ 6,700
December 1983 to July 1984	Alicer Contracting Company	$ 6,000
1982 to 1984	DeGaetano & Vozzi Construction Company	$ 55,000
October 1982 to March 1984	All-Boro Paving Company	$ 24,300
January 1983 to September 1984	Cedric Construction Company	$ 25,000
June 1984	Hempstead Concrete Corporation	$ 700
December 1983 to April 1984	Falco Construction Corporation	$ 4,000
November 1983 to March 1984	Daval Construction Company	$ 2,000
1981 to 1984	Technical Concrete Construction Corporation	$1,400,000

18. On or about April 5, 1985, a grand jury in the Southern District of New York indicted defendants Carmine Persico, Gennaro Langella, Dominic Montemarano, Ralph Scopo and others, and charged them with, among other crimes, certain of the racketeering acts and crimes set forth in ¶¶ 14-17 above, in United States v. Persico, S84 Cr. 809. A true copy of that superseding indictment is attached as Exhibit A to this Complaint. A true copy of that indictment, as submitted in redacted form to the jury in the Persico case, is attached as Exhibit B to this Complaint.

19. On June 13, 1986, a jury convicted defendants Carmine Persico and Gennaro Langella of committing certain of the racketeering acts and crimes set forth in ¶¶ 14-17 and 33-36 herein. A true copy of the jury's special verdict is attached as Exhibit C to this Complaint.

20. Defendants Dominic Montemarano and Ralph Scopo have yet to stand trial on those criminal charges.

21. It has further been part of this pattern of racketeering activity that on several occasions from at least 1984 to the present, in the Southern District of New York and elsewhere, defendant Ralph Scopo, Jr., while an official of Local 6A and the District Council, has unlawfully, willfully, and knowingly affected and attempted to affect interstate commerce and the movement of articles and commodities in such commerce by extortion -- that is, by obtaining and attempting to obtain property, to wit: money and other things of value, from and with the consent of Hempstead Concrete, which consent has been induced by the wrongful use of actual and threatened force, violence and fear of economic harm, in violation of Title 18, United States Code, Section 1951.

22. It has further been part of this pattern of racketeering activity that on several occasions from at least 1984 to the present, in the Southern District of New York and elsewhere, defendant Joseph Scopo, while an official of Local 6A and the District Council, has unlawfully, willfully, and knowingly affected and attempted to affect interstate commerce and the

movement of articles and commodities in such commerce by extortion -- that is, by obtaining and attempting to obtain property, to wit: money and other things of value, from and with the consent of Edward Barbaro Construction, Inc., Alicer Construction and All-Boro Paving Company, which consent has been induced by the wrongful use of actual and threatened force, violence and fear of economic harm, in violation of Title 18, United States Code, Section 1951.

23. It has further been part of this pattern of racketeering activity that on several occasions from at least 1984 to the present, in the Southern District of New York and elsewhere, defendant Louis Gaeta, while an official of the District Council, has unlawfully, willfully, and knowingly affected and attempted to affect interstate commerce and the movement of articles and commodities in such commerce by extortion -- that is, by obtaining and attempting to obtain property, to wit: money and other things of value, from and with the consent of Paddock Pool Company, which consent has been induced by the wrongful use of actual and threatened force, violence and fear of economic harm, in violation of Title 18, United States Code, Section 1951.

24. It has further been part of this pattern of racketeering activity that on several occasions from at least 1984 to the present, in the Southern District of New York and elsewhere, defendant Rudolph Napolitano, while an official of Local 6A and the District Council, has unlawfully, willfully, and knowingly affected and attempted to affect interstate commerce

and the movement of articles and commodities in such commerce by extortion -- that is, by obtaining and attempting to obtain property, to wit: money and other things of value, from and with the consent of Technical Concrete Construction Corporation, Anthony Concrete, and other concrete construction companies, which consent has been induced by the wrongful use of actual and threatened force, violence and fear of economic harm, in violation of Title 18, United States Code, Section 1951.

25. It has further been part of this pattern of racketeering activity that on several occasions from at least 1983 to the present, in the Southern District of New York and elsewhere, defendant Anthony Gugluizza, while an official of Local 6A, has unlawfully, willfully, and knowingly affected and attempted to affect interstate commerce and the movement of articles and commodities in such commerce by extortion -- that is, by obtaining and attempting to obtain property, to wit: money in the form of "no-show" payments for his son-in-law and other things of value, from and with the consent of Hempstead Concrete Co., which consent has been induced by the wrongful use of actual and threatened force, violence and fear of economic harm, in violation of Title 18, United States Code, Section 1951.

26. It has further been part of this pattern of racketeering activity that on several occasions from at least 1983 to the present, in the Southern District of New York and elsewhere, defendant Christopher Furnari, Jr., while an official of the District Council, unlawfully, willfully, and knowingly did

affect and attempt to affect interstate commerce and the movement of articles and commodities in such commerce by extortion -- that is, by obtaining and attempting to obtain property, to wit: money in the form of "no-show" payments and other things of value, from and with the consent of Technical Concrete Construction Company, which consent has been induced by the wrongful use of actual and threatened force, violence and fear of economic harm, in violation of Title 18, United States Code, Section 1951.

27. It has further been part of this pattern of racketeering activity that on several occasions from at least 1983 to the present, in the Southern District of New York and elsewhere, defendant Peter Vitale, while an official of Local 6A, has unlawfully, willfully, and knowingly affected and attempted to affect interstate commerce and the movement of articles and commodities in such commerce by extortion -- that is, by obtaining and attempting to obtain property, to wit: money in the form of "no-show" payments and other things of value, from and with the consent of Technical Concrete Construction Company, which consent has been induced by the wrongful use of actual and threatened force, violence and fear of ecomonic harm, in violation of Title 18, United States Code, Section 1951.

28. It has further been part of the pattern of racketeering activity that on several occasions from at least 1983 to the present, in the Southern District of New York and elsewhere, defendant Frank Bellino, while an official of the District Council, and Carmine Montalbano, while an official of

Local 6A and the District Council, have each unlawfully, willfully, and knowingly affected and attempted to affect interstate commerce and the movement of articles and commodities in such commerce by extortion -- that is, by obtaining and attempting to obtain property, to wit: money and other things of value, from and with the consent of one or more concrete construction companies, which consent has been induced by the wrongful use of actual and threatened force, violence and fear of ecomonic harm, in violation of Title 18, United States Code, Section 1951.

29. It has further been part of this pattern of racketeering activity that from January 1, 1983, through December 31, 1983, in the Southern District of New York and elsewhere, defendants Ralph Scopo, Jr. and Carmine Montalbano, while officers and employees of Local 6A and the District Council, labor organizations engaged in an industry affecting commerce as defined by Sections 402(i) and (j) of Title 29, United States Code, unlawfully, willfully and knowingly did embezzle, steal, obstruct, and convert to their own use the sum of at least $1,400, of the moneys and funds of Local 6A and the District Council, in violation of Title 29, United States Code, Section 501(c), and Title 18, United States Code, Section 2.

30. It has further been part of this pattern of racketeering activity that from January 1, 1984, through December 31, 1984, in the Southern District of New York and elsewhere, defendants Ralph Scopo, Jr., and Carmine Montalbano, while officers and employees of Local 6A and the District Council,

labor organizations engaged in an industry affecting commerce as defined by Sections 402(i) and (j) of Title 29, United States Code, unlawfully, willfully and knowingly did embezzle, steal, obstruct, and convert to their own use of sum of at least $1,500, of the moneys and funds of Local 6A, and the District Council, in violation of Title 29, United States Code, Section 501(c), and Title 18, United States Code, Section 2.

31. It has further been part of this pattern of racketeering activity that the Colombo Family and others have forced and attempted to force contractors to hire no-show employees, who are given union membership and union health benefits and put on job payrolls even though they do no work. The checks paid to no-show employees go to the members of the racketeering enterprise as part of the spoils of their racketeering activity. The no-show employees have received union benefits, to the detriment of legitimate union members who have to contribute part of their salaries to support the union's benefit funds.

32. It has further been part of this pattern of racketeering activity that the Colombo Family and others have arranged for friends and relatives to bypass union seniority systems to get jobs, to the detriment of the union membership otherwise subject to that seniority system, and have arranged for contractors who have made the demanded payments to employ cheap non-union labor and to reduce their contributions to employee benefit funds, again to the detriment of union members.

II. Second Claim for Relief:
Conspiracy to Violate § 1962(c)

33. From the 1970's to the present, in the Southern District of New York and elsewhere, defendants Carmine Persico, Gennaro Langella, Dominic Montemarano, Ralph Scopo, Louis Gaeta, Rudolph Napolitano, Anthony Gugluizza, Christopher Furnari, Jr., Peter Vitale, Ralph Scopo, Jr., Joseph Scopo, Frank Bellino, Carmine Montalbano and others, being persons employed by and associated with the Local 6A/District Council Enterprise, which has been engaged in and the activities of which have affected interstate commerce, have unlawfully, willfully and knowingly combined, conspired, confederated, and agreed together and with each other to commit an offense against the United States, to wit: to violate Title 18, United States Code, Section 1962(c), that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of the Local 6A/ District Council Enterprise through a pattern of racketeering activity, in violation of Title 18, United States Code, Section 1962(c).

34. It has been part of the conspiracy that these defendants would use their positions within and influence over Local 6A and the District Council to control the affairs of Local 6A and the District Council in order to make money through extortion and through the theft of union funds.

35. It has further been a part of the conspiracy that these defendants would and did commit acts of racketeering activity, as specified in ¶¶ 14-32 above.

36. It has further been a part of the conspiracy that each defendant has agreed to participate in the affairs of the Local 6A/District Council Enterprise and has further agreed that at least two acts of racketeering activity enumerated above would be committed.

III. Third Claim for Relief:
Violation of 18 U.S.C. § 1962(b)

37. From the 1970's to the present, in the Southern District of New York and elsewhere, defendants Carmine Persico, Gennaro Langella, Dominic Montemarano, Ralph Scopo, Ralph Scopo, Jr., Joseph Scopo, Carmine Montalbano, Rudolph Napolitano, Peter Vitale, Anthony Gugluizza, Louis Gaeta, Christopher Furnari, Jr., Thomas Hennessy, Ed Kelly, Richard Tomaszewski, Eugene McCarthy, Frank Bellino and others, have unlawfully, willfully and knowingly acquired and maintained, directly and indirectly, an interest in and control of the Local 6A/District Council Enterprise through a pattern of racketeering activity, as set forth below, in violation of 18 U.S.C. §1962(b).

38. It has been a part of this pattern of racketeering activity that the defendants named in ¶14 above committed acts of racketeering as set forth in ¶¶14-32 above, which paragraphs are realleged herein.

39. It has further been a part of this pattern of racketeering activity that the defendants named in ¶37 above unlawfully and knowingly did obstruct, delay, and affect and did attempt to obstruct, delay and affect, commerce and the movement

of articles and commodities in commerce by extortion, as these terms are defined in Section 1951 of Title 18, United States Code, in that they obtained and attempted to obtain property in the form of the right of labor organization members to free speech and democratic participation in internal union affairs as guaranteed by the provisions of Section 411 of Title 29, United States Code, which rights the defendants obtained and attempted to obtain from the members of Local 6A and those local unions which are part of the District Council, with their consent, induced by the wrongful use of actual and threatened force, violence and fear, including fear of physicial and economic injury, that is, the defendants did create and attempt to create a climate of intimidation and fear which demonstrated that the District Council and Local 6A were under the control of, and acting on behalf of, the Colombo Family.

40. This use of force, violence and fear included the following racketeering acts:

(a) The defendants named in ¶ 14 committed the acts alleged in ¶¶ 14-32 above, which paragraphs are realleged herein.

(b) In or about the Spring of 1985, at which time defendant Ralph Scopo retired as President of the District Council, the defendant members of the Executive Board of the District Council named in ¶ 37 above, caused the District Council to give defendant Ralph Scopo severance pay of more than $200,000, the entire severance pay fund of the District Council, notwithstanding that on or about October 23, 1984, Ralph Scopo

was indicted in the case of United States v. Carmine Persico, et al., 84 Cr. 809, wherein it was alleged by the Grand Jury that defendant Ralph Scopo was associated with the Colombo Family, and that on or about February 25, 1985, Ralph Scopo was indicted in the case of United States v. Anthony Salerno, et al., 85 Cr. 139 (RO), wherein it was alleged by the Grand Jury that defendant Ralph Scopo was associated with the Colombo Family and an enterprise known and described as the "Commission" of La Cosa Nostra, consisting of the ranking members of each of the five New York La Cosa Nostra Families.

(c) In or about the Spring of 1985, at which time Ralph Scopo retired as President of the District Council, the members of the Executive Board of the District Council named in ¶ 37 above caused the District Council to give defendant Ralph Scopo a Cadillac automobile which belonged to the District Council, notwithstanding that defendant Ralph Scopo was under two federal indictments.

(d) In or about the Spring of 1985, defendant Louis Gaeta was selected by the District Council to replace defendant Ralph Scopo, notwithstanding that defendant Louis Gaeta was a close associate of defendant Ralph Scopo, who was then under two federal indictments.

(e) In or about mid-1984, defendant Ralph Scopo, Jr. and others beat up a union member for making disparaging remark about Ralph Scopo and the union leadership.

(f) In or about early 1986, defendant Peter Vitale participated in the beating and stabbing of a union shop steward.

IV. Fourth Claim for Relief:
Conspiracy to Violate § 1962(b)

41. From the 1970's to the present, in the Southern District of New York and elsewhere, defendants Carmine Persico, Gennaro Langella, Dominic Montemarano, Ralph Scopo, Ralph Scopo, Jr., Joseph Scopo, Carmine Montalbano, Rudolph Napolitano, Peter Vitale, Anthony Gugluizza, Frank Bellino, Louis Gaeta, Thomas Hennessy, Ed Kelly, Richard Tomaszewski, Eugene McCarthy, Christopher Furnari, Jr., and others, being persons employed by and associated with the Local 6A/District Council Enterprise, which was engaged in and the activities of which affected interstate commerce, have unlawfully, knowingly and willfully combined, conspired, confederated, and agreed together and with each other to commit an offense against the United States, to wit: to violate Title 18, United States Code, Section 1962(b), that is, to acquire and maintain, directly and indirectly, an interest in the Local 6A/District Council Enterprise through a pattern of racketeering activity, consisting of the systematic use of extortion as described in ¶¶ 14-32 and ¶¶ 37-40 above, all in violation of Title 18, United States Code, Section 1962(d).

42. It has been a part of the conspiracy that these defendants would and did commit acts of racketeering activity, as specified in ¶¶14-32 and ¶¶37-40 above.

V. Present Status of the Unions

43. The current union officers and auditors of Local 6A and the District Council named herein have failed to prevent the Colombo Family's control over and corruption of Local 6A and the District Council. Indeed, the current union officers have allowed Local 6A and the District Council to become captive labor organizations of the Colombo Family and others. The defendants named in ¶14 and ¶37 above have abrogated their responsibility and fiduciary duty to the union membership and aided and abetted violations of Title 18, United States Code, § 1962, by allowing the Colombo Family and others to control and corrupt Local 6A and the District Council. The remaining officers and auditors named as defendants herein have also abrogated their fiduciary duty to the union membership and may have aided and abetted violations of 18 U.S.C. § 1962. These additional defendants are named herein because, in light of these defendants' actions and failure to act, it is necessary for this Court to remove all current officers and appoint one or more trustees to oversee the operations of Local 6A and the District Council.

44. These violations of Title 18, United States Code, Section 1962, as well as numerous other criminal and civil laws, have occurred and will continue to occur in connection with this racketeering enterprise.

45. Local 6A and the District Council have been and will continue to be captive labor organizations of the Colombo Family and others unless and until this Court orders the relief requested below.

DEMAND FOR RELIEF

WHEREFORE, the United States of America alleges that Local 6A and the District Council have been and continue to be captive labor organizations, which the Colombo Family has controlled and dominated through fear and intimidation and has exploited through fraud and corruption; that the Colombo Family has victimized the individual union members and the concrete construction industry as a whole by virtue of its control over Local 6A and the District Council; that this victimization has taken the form of multiple violations of Section 1962 of Title 18 of the United States Code; and that the violations of Section 1962 will continue (resulting in irreparable injury to those victimized by such violations) unless and until this Court divests the defendants associated with the Colombo Family, those working with them and those under their control (including present and past members of the Executive Boards of Local 6A and the District Council). In order to end the aforesaid violations of Section 1962 of Title 18 of the United States Code, the United States of America requests, pursuant to Section 1964 of Title 18 of the United States Code, the following relief:

(a) That this Court issue a preliminary injunction which will do the following:

(1) Enjoin and restrain defendants Carmine Persico, Gennaro Langella, Dominic Montemarano, Ralph Scopo and all other persons in active concert or participation with them in the affairs of the Colombo Family, from participating in any way in the affairs of Local 6A, the District Council or any other labor organization or employee benefit plan, as defined in Title 29 of the United States Code, from having any dealings, directly or indirectly, with any officer, auditor or employee of Local 6A, the District Council or any other labor organization about any matter which relates directly or indirectly to the affairs of Local 6A, the District Council or any other labor organization, and from in any way participating in, or profiting from, any concrete construction business in the Southern District of New York or elsewhere;

(2) Enjoin and restrain the current Executive Board members and Auditors of Local 6A -- including defendants Ralph Scopo, Jr., Joseph Scopo, Carmine Montalbano, Rudolph Napolitano, Jerry Miceli, Sal Cascio, James Sturiano, Peter Vitale, Anthony Gugluizza and Thomas Mazza -- from taking or causing to be taken any action for or on behalf of defendant Local 6A;

(3) Enjoin and restrain the current Executive Board members and Auditors of the District Council -- including defendants Louis Gaeta, Thomas Hennessy, Frank Bellino, Carmine Montalbano, Christopher Furnari, Jr., Joseph Scopo, Richard Tomaszewski, Eugene McCarthy, Ed Kelly, Thomas Medera, Maurice Foley and Ralph Scopo, Jr. -- from taking or causing to be taken any action for or on behalf of defendant District Council;

(4) Appoint one or more trustees, pendente lite, to discharge all duties and responsibilities of the Executive Boards and Auditors of Local 6A and the District Council, including but not limited to the following:

(A) To protect the rights of the members of Local 6A and the District Council, consistent with the provisions of Title 29 of the United States Code and the constitution and by-laws of Local 6A and the District Council;

(B) To administer and supervise the daily affairs of Local 6A and the District Council;

(C) To remove and/or appoint new employees and officials to oversee the administrative functions of Local 6A and the District Council, including but not limited to auditors and business agents;

(D) To administer, conserve and obtain an accounting of the assets of Local 6A, the District Council, and any associated or affiliated Benefit Plan;

(E) To seek recovery of any and all assets of Local 6A, the District Council and any associated or affiliated Benefit Plan that may have been dissipated or otherwise misappropriated due to malfeasance, misfeasance or nonfeasance;

(F) To withhold the payment of any and all funds, salaries or benefits of whatever kind or description from any claimant who may have defrauded or seeks to defraud Local 6A, the District Council or any associated or affiliated Benefit Plan or who otherwise has misappropriated or is about to misappropriate any assets thereof until the completion of the aforesaid accounting and the

resolution of any claims instituted against any individual or entity by or on behalf of Local 6A, the District Council, or any associated or affiliated Benefit Plan;

(G) To retain legal counsel and to employ accountants, consultants and experts to assist in the proper discharge of the aforesaid duties;

(H) To expend the funds of Local 6A and the District Council for all expenses which are reasonable and necessary in order to execute the mandate of this Court;

(I) To apply to this Court for such assistance as may be necessary and appropriate in order to carry out the mandate of the Court; and

(J) To furnish this Court with a complete report concerning the financial stability of Local 6A and the District Council, as well as the status of the members' rights under Sections 157 and 411 of Title 29 of the United States Code and their entitlements under the various contracts with employers;

(5) Enjoin and restrain the members, officers and employees of Local 6A, the District Council, and the administrators, beneficiaries and employees of any associated or affiliated Benefit Plan from any interference with the said trustee(s) in the execution of their duties as aforesaid;

(6) Appoint one or more trustees, pendente lite, to administer any associated or affiliated Benefit Plan in which it is determined that one or more of the defendants have asserted improper control or influence; and

(7) Grant the United States of America such further preliminary relief as may be necessary and proper in order to prevent, pendente lite, a continuation of the violations of Section 1962 involving control over and exploitation of Local 6A and the District Council by the Colombo Family.

(b) That, following the submission and review of the trustee(s)' report, this Court order the trustee(s), with such assistance from the Department of Labor and the Department of Justice as may be necessary, to conduct general elections in order to elect officers for the Executive

Boards of Local 6A and the District Council, respectively, the said elections to be structured in such a way as to ensure that the nomination, primary and final selection processes will not be vulnerable to forms of intimidation and will reflect the decision of the union members who are found to be eligible to vote.

(c) That, following the said elections, unless the preliminary injunction is extended upon a showing of good cause, this Court issue a permanent injunction prohibiting all of the defendants herein and all persons in active concert or participation with them in the affairs of the Colombo Family from participating in or having any future dealings of any nature whatsoever, with any officer, agent, representative or employee of Local 6A or the District Council or any other labor organization, about any matter which relates directly or indirectly to the affairs of Local 6A, the District Council or any other labor organization, and from owning, operating or participating in any way in, or profiting from, any concrete construction business in the Southern District of New York or elsewhere.

(d) That this Court award the United States of America the costs of this suit, together with such other and further relief as may be necessary and appropriate to prevent and

restrain future violations of Section 1962 and to end the control over, and exploitation of, Local 6A and the District Council by the Colombo Family.

Dated: New York, New York

June 18, 1986

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APPENDIX D

Sample Complaint for Treble Damages

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff, v. LARRY D. BARNETTE, THOMAS F. GIBBS, KATHLEEN C. BARNETTE, LEO J. BARNETTE, MURRAY SENTNER, ALLIED MANAGEMENT CORPORATION, JOBS EMPLOYMENT TEMPORARY SERVICES, INC. (J.E.T.S.), JETS SERVICES, INC., WORLD MANAGEMENT SERVICES, INC., OLD DOMINION CORPORATION, S.A. OF PANAMA, MARKHAM CORPORATION, S.A., HAMILTON INSURANCE CO., LTD., OLD DOMINION INSURANCE CO. OF FLORIDA, and JETS VENTURE CAPITAL CORPORATION, Defendants.	Civil Action No. _____

COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF

Plaintiff, the United States of America, by its undersigned attorneys, brings this action and for its complaint alleges as follows:

A. Defendants

1. Defendant Allied Management Corporation ("Allied"), doing business through its two subsidiaries, Job Employment

Temporary Services, Inc. ("J.E.T.S. Inc.") and JETS Services, Inc., is a Delaware corporation with its principal place of business in Jacksonville, Florida, within the jurisdiction of this Court.

2. Defendant J.E.T.S., Inc., is a Florida corporation and a wholly owned subsidiary of Allied and is subject to the jurisdiction of this Court. Defendant J.E.T.S., Inc. was licensed to do business in the Federal Republic of Germany as JETS Waescherei, GmbH ("JETS Waescherei").

3. Defendant JETS Services, Inc., is a Florida corporation and a wholly owned subsidiary of Allied, and is subject to the jurisdiction of this Court.

4. Defendant Larry D. Barnette was an officer, director, and majority stockholder of Allied and resides within the jurisdiction of this Court.

5. Defendant Thomas F. Gibbs was an officer, director, and a minority stockholder of Allied, and resides within the jurisdiction of this Court.

6. Defendant Kathleen C. Barnette was a director of Allied and resides within the jurisdiction of this Court.

7. Defendant Leo J. Barnette was an employee of Allied and resides within the jurisdiction of this Court.

8. Defendant Murray Sentner was employed by the United States Army as the contracting officer with respect to contract DAJA 37-77-C-0019. His duties included soliciting competitive

bids for Army contracts, reviewing the bids received, assuring performance of contracts, and negotiating the price and terms of Army contracts and their extensions. Murray Sentner transacted business within the jurisdiction of this Court.

9. Defendant World Management Services, Inc. is a Florida corporation incorporated in May 1977 and is subject to the jurisdiction of this Court.

10. Defendant Old Dominion Insurance Corporation, S.A., formerly known as Old Dominion Corporation, S.A., is a Panama corporation acquired by Larry D. Barnette in early 1977. It conducted business, including meetings of its board of directors, within the State of Florida and is subject to the jurisdiction of this Court.

11. Defendant Markham Corporation, S.A. is a Panama corporation acquired by Larry D. Barnette in January 1977. It owned Hamilton Insurance Company, Ltd. and conducted business in the State of Florida and is subject to the jurisdiction of this Court.

12. Defendant Hamilton Insurance Company, Ltd. is a Gibraltar company incorporated on February 18, 1977. It is wholly owned by Markham Corporation, S.A. Hamilton Insurance Company, Ltd. ostensibly wrote millions of dollars of insurance for Allied and Allied's subsidiaries and affiliates in connection with performance of government contracts. Hamilton Insurance

Co., Inc., conducted business in the State of Florida and is subject to the jurisdiction of this Court.

13. Defendant Old Dominion Insurance Company is a Florida corporation formed in April 1981 and is subject to the jurisdiction of this Court.

14. Defendant JETS Venture Capital Corporation is a Florida corporation incorporated on or about September 6, 1978, and licensed by the United States Small Business Administration ("SBA") as a Minority Enterprise Small Business Investment Company ("MESBIC"), and is subject to the jurisdiction of this Court.

B. Other Entities

15. KVV Kraftfahrzeuvermietungs-und Vervaltungs, GmbH ("KVV") was a German corporation formed on September 11, 1980. Defendant Leo J. Barnette was the majority owner. KVV ostensibly leased trucks and other equipment to Allied and Allied's subsidiaries and affiliates for use in the performance of government contracts.

16. JETS Waescherei, was a German corporation and wholly owned subsidiary of J.E.T.S., Inc. JETS Waescherei was used by Allied and J.E.T.S., Inc. to perform government contracts, including DAJA 37-77-C-0019.

17. B & B Investments is a Florida joint venture formed and owned by defendants Larry D. Barnette (95%) and Leo J. Barnette (5%).

18. Welborn Support Services, Inc. was incorporated in Florida in about April 1979 and bid upon government contracts.

19. Alpha Services, Inc. was incorporated in Florida on July 15, 1979, and bid upon government contracts.

20. J.A.C. Management was incorporated in Florida on July 15, 1980, and bid upon government contracts.

C. Alter Ego Allegation

21. Allied, J.E.T.S., Inc., JETS Services, Inc., World Management Services, Inc., Old Dominion Insurance Corporation, S.A. of Panama, Markham Corporation, S.A., Hamilton Insurance Company, Ltd., KVV, JETS Waescherei, B&B Investments, Welborn Support Services, Alpha Services, Inc., J.A.C. Management, Old Dominion Insurance Company of Florida, and JETS Venture Capital Corporation are and, at all times material to this complaint, were alter egos of one another and of Larry D. Barnette.

D. The Government Agencies and Programs

22. In order to obtain the services for operating laundry, food, maintenance, and other facilities at Government installations, plaintiff solicited competitive bids for service contracts, awarded such contracts, and negotiated extensions of some of such contracts.

23. The Truth in Negotiations Act, 10 U.S.C. § 2306(f), governs certain government contracts awarded or extended by negotiation and requires the contractor to submit cost and

pricing data and to certify that such data are accurate, complete and current as of the date of certification. The cost and pricing data are provided to agencies of the Department of Defense on a "Form DD 633" accompanied by the certification.

24. The Small Business Act, as amended, 15 U.S.C. §631 et seq., and the Small Business Investment Act, as amended, 15 U.S.C. §661 et seq., administered by the Small Business Administration ("SBA"), establish the following:

a. a program in which a certain number of Government contracts were to be set aside for competitive bidding by small business concerns ("Set-Aside Program"); and

b. a program in which certain eligible individuals and entities were licensed as Minority Enterprise Small Business Investment Companies to make loans on behalf of the SBA to independent small business concerns owned by socially or economically disadvantaged individuals ("MESBIC Program").

25. Pursuant to those statutes, SBA is responsible for:

a. establishing size standards for, and monitoring compliance with, the Set-Aside Program, certifying business concerns as eligible for the Set-Aside Program, and adjudicating disputes concerning eligibility; and

b. providing MESBICs with matching funds to make loans in accordance with the MESBIC Program.

Count 1

[RICO Treble Damage Claim]

26. This is an action against defendants Larry D. Barnette, Thomas F. Gibbs, Allied, J.E.T.S., and JETS Services, Inc. for treble damages pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(b) and (c).

27. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345 and 18 U.S.C. § 1964.

28. Plaintiff realleges and incorporates by reference paragraphs 1 through 25 of this Complaint as though fully set forth herein.

29. Beginning in or about July 1976, defendants Larry D. Barnette, Thomas F. Gibbs, and Allied Management Corporation, doing business as J.E.T.S., Inc., and JETS Services, Inc., being employed by and associated with an enterprise engaged in and the activities of which affected interstate and foreign commerce, willfully and knowingly did conduct and participate, directly and indirectly, in the conduct of the affairs of such enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

30. The enterprise whose affairs were conducted through a pattern of racketeering activity was, at all times material hereto, an association in fact made up of corporations, individuals and legal entities as defined in 18 U.S.C. § 1961(4). Said enterprise was made up of Larry D. Barnette; Thomas F.

Gibbs; Allied Management Corporation, its subsidiaries, affiliates and assigns, including but not limited to, J.E.T.S., Inc.; JETS Services, Inc.; JETS Waescherei GmbH; Old Dominion Corporation, S.A. (now known as Old Dominion Insurance Company, S.A.); Markham Corporation, S.A.; and Hamilton Insurance Company, Ltd.; B & B Investments; World Management Services, Inc.; JETS Venture Capital Corporation; and Alpha Services, Inc.

31. The pattern of racketeering activity engaged in by the defendants, as defined in 18 U.S.C. §§ 1961(1)(B) and (5), consisted of the following:

a. acts of mail fraud in violation of 18 U.S.C. § 1341, and those specific acts of mail fraud alleged in Counts 2 through 6, inclusive, of the Indictment in United States v. Barnette et. al., Case No. 83-131-Cr.-J-14 (M.D.Fla. 1983), the allegations of which are hereby incorporated by reference as though fully set forth herein;

b. acts of the interstate transportation of stolen property in violation of 18 U.S.C. § 2314, and those specific acts of interstate transportation of stolen property alleged in Counts 13 and 14 of the aforementioned Indictment, the allegations of which are hereby incorporated by reference as though fully set forth herein.

c. acts of bribery in violation of 18 U.S.C. § 201(b), and those specific acts of bribery alleged in Counts 15 and 17 of the aforementioned Indictment, the allegations of which

are hereby incorporated by reference as though fully set forth herein.

32. On August 30, 1983, a Federal Grand Jury for the Middle District of Florida, returned Indictment No. 83-131-Cr.-J-14 against Larry D. Barnette, Thomas F. Gibbs, Leo J. Barnette, Murray Sentner, Allied Management Corporation and others. A copy of that Indictment is attached hereto as Exhibit A. The allegations of that Indictment are hereby incorporated by reference as though set forth in full herein. Certain of the defendants were convicted of various Counts in that Indictment after a trial in this Court. A copy of the Judgment and Probation Commitment Orders are attached hereto as Exhibit B. Pursuant to 18 U.S.C. § 1964(d), the final judgments or decrees rendered in favor of the United States on the RICO Count in that proceeding estop the defendants from denying the allegations of the instant Count.

33. By reason of defendants' violation of 18 U.S.C. § 1962(c), as described above, plaintiff was injured in its business and property in the amount of at least $15,750,153.

WHEREFORE, plaintiff demands judgment in its favor and against the defendants, jointly and severally, in the amount of $47,250,459 (which is threefold the amount of damages) together with the cost of suit, including a reasonable attorney's fee, and such other and further relief as the Court deems just and equitable.

Count 2

[RICO Injunctive Claim]

34. This is an action against defendants Larry D. Barnette, Thomas F. Gibbs, Allied, J.E.T.S., and JETS Services, Inc. for injunctive relief pursuant to the RICO statute, 18 U.S.C. § 1964(a) and (b).

35. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345 and 18 U.S.C. § 1964.

36. Plaintiff realleges and incorporates by reference paragraphs 1 through 33 of this complaint as though fully set forth herein.

37. In order to prevent and restrain the violation of 18 U.S.C. § 1962 set forth above, and further violations of that statute by defendants and others acting on their behalf, which in the absence of injunctive relief are likely to recur, plaintiff is entitled to an injunction.

WHEREFORE, plaintiff demands an injunction:

a. Dissolving or reorganizing the enterprise, and its constituent companies, including, but not limited to, Allied, J.E.T.S., Inc. and JETS Services, Inc.; and

b. Ordering Larry D. Barnette, Leo J. Barnette, Thomas F. Gibbs, Allied, J.E.T.S., Inc., and JETS Services, Inc. to divest themselves of their interests, direct or indirect, in the enterprise and its constituent companies, and to resign their

positions as directors, officers, employees and agents of that enterprise, and those constituent companies; and

c. Ordering Larry D. Barnette, Leo J. Barnette, Thomas F. Gibbs, Allied, J.E.T.S., Inc., and JETS Services, Inc., not to exercise any further control or direction over, or involvement in, the affairs of the enterprise or its constituent companies, either directly or indirectly; and

d. Prohibiting, for a reasonable period of time, Larry D. Barnette, Leo J. Barnette, Thomas F. Gibbs, Allied, J.E.T.S., Inc. and JETS Services, Inc., the enterprise, and its constituent companies, from bidding upon, receiving, entering and operating any contracts with the Government of the United States or any of its departments or agencies, either in their own names or through other individuals or entities; and

e. Containing such other and further provisions as the Court may deem necessary to prevent and restrain the violation of 18 U.S.C. § 1962.

Count 3

[Claim Under False Claims Act,
31 U.S.C. §§ 3729-3731]

38. This is an action against defendants Larry D. Barnette, Kathleen C. Barnette, Leo J. Barnette, Thomas F. Gibbs, Murray Sentner, Allied, J.E.T.S., Inc., JETS Services, Inc., Old Dominion Insurance Corporation, S.A. of Panama, World Management Services, Inc., Markham Corporation, S.A., and Hamilton Insurance

Co., Ltd., for double damages and forfeitures pursuant to the False Claims Act, 31 U.S.C. §§ 3729-3731.

39. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345 and 31 U.S.C. § 3730.

40. Plaintiff realleges and incorporates by reference paragraphs 1 through 37 and 86 through 89 of this Complaint as though fully set forth herein.

41. The defendants were not, at any time material to this complaint, members of the Armed Forces of the United States.

42. In 1976, the United States Army awarded by competitive bidding a contract to provide laundry service at Army bases in the Federal Republic of Germany. The primary term of the contract, DAJA 37-77-C-0019, ran from January 1, 1977, through September 30, 1977, with options for two one-year extensions. The contract price was bid and paid in Deutsch Marks ("DM"), the currency of the Federal Republic of Germany. The contract was awarded to Allied in the name of J.E.T.S, Inc., licensed to do business in the Federal Republic of Germany as JETS Waescherei. The contract price for the primary term of nine months was 14,554,350 DM or approximately $5,892,449.

43. The Army elected to exercise its option for the year starting October 1, 1977. The price for the first option year was negotiated with J.E.T.S., Inc. pursuant to the Truth in Negotiations Act, 10 U.S.C. § 2306(f).

44. On or about September 23, 1977, J.E.T.S., Inc. submitted to the Army cost and pricing data on a Form DD-633 and certified that such data was accurate, complete, and current as of the date of certification when, in fact, as defendants then knew, such certification was false or fraudulent by reason of the fact that the data was greatly in excess of J.E.T.S., Inc.'s true and actual costs and prices for purchased supplies, direct labor, general and administrative expenses, profits or fees, and other costs.

45. Based upon the false or fraudulent certification of cost and pricing data, the Army agreed to pay 24,056,500 DM, or approximately $10,643,972, for the option year beginning October 1, 1977.

46. Thereafter, defendants presented or caused to be presented to an officer or employee of the Government or to a member of the Armed Forces, claims for payment under the first option year for contract DAJA 37-77-C-0019 which claims were known by them to be false or fraudulent in that the claims were inflated by reason of the conduct specified above. Those false or fraudulent claims are set forth in Schedule A attached hereto and incorporated by reference herein.

47. The Army elected to exercise the option for the year beginning October 1, 1978. The price for this option year was negotiated with Allied pursuant to the Truth in Negotiations Act, supra.

48. On or about May 8, 1978, J.E.T.S., Inc. submitted to the Army cost and pricing data on a Form DD 633 and certified that such data was accurate, complete, and current as of the date of certification when, in fact, as defendants then knew, such certification was false or fraudulent by reason of the fact that the data was greatly in excess of J.E.T.S., Inc.'s true and actual costs and prices for purchased supplies, direct labor, general and administrative expenses, profits or fees, and other costs.

49. Based upon the false or fraudulent certification of cost and pricing data, the Army agreed to pay 24,967,383 DM or approximately $12,061,538, for the option year beginning October 1, 1978.

50. Thereafter, defendants presented or caused to be presented to an officer or employee of the Government or to a member of the Armed Forces claims for payment under the second option year for contract DAJA 37-77-C-0019 which claims were known by them to be false of fraudulent in that the claims were inflated by reason of the conduct specified above. Those false or fraudulent claims are set forth in Schedule A attached hereto and incorporated by reference herein.

51. In about early 1979, the Army decided to extend by negotiation contract DAJA 37-77-C-0019. The price of this extension year was negotiated with J.E.T.S., Inc. on a sole source basis pursuant to the Truth in Negotiations Act, supra.

52. On or about May 10, 1979, defendants submitted to the Army a Form DD-633 which was false or fraudulent because the data thereon was greatly in excess of J.E.T.S., Inc.'s true and accurate costs and prices for purchased supplies, direct labor, general and administrative expense, profits, fees, and other costs as more fully set forth in Count Seven of the Indictment in United States v. Larry D. Barnette, et al., supra, the allegations of which are incorporated by reference as though fully set forth herein.

53. On or about May 11, 1979, defendants submitted to the Army cost and pricing data on a Form DD-633 and certified that such data was accurate, complete, and current as of the date of certification when, in fact, the defendants then knew that such certification was false or fraudulent because the data was greatly in excess of J.E.T.S., Inc.'s true and accurate costs and prices.

54. On or about June 27, 1979, defendants submitted to the Army a Form DD-633 which was false or fraudulent because the data thereon was greatly in excess of J.E.T.S., Inc.'s true and accurate costs and prices for purchased supplies, direct labor, general and administrative expenses, profits, fees, and other costs as more fully set forth in Count Eight of the Indictment in United States v. Larry D. Barnette et al., supra, the allegations of which are incorporated by reference as though fully set forth herein.

55. Based upon the false or fraudulent certifications of cost and pricing data dated May 10, May 11, and June 27, 1979, the Army agreed to pay 25,611,211 DM or approximately $11,433,576 for the extension year beginning October 1, 1979.

56. Thereafter, defendants presented or caused to be presented to an officer or employee of the Government or to a member of the Armed Forces claims for payment under the extension of contract DAJA 37-77-C-0019 which claims were known by them to be false or fraudulent in that the claims were inflated by reason of the conduct specified above. Those false or fraudulent claims are set forth in Schedule A attached hereto and incorporated by reference herein.

57. In or about the Fall of 1980, the Army decided to extend by negotiation contract DAJA 37-77-C-0019. The price for this extension was negotiated with J.E.T.S., Inc., pursuant to the Truth in Negotiations Act, supra.

58. On or about September 19, 1980, defendants submitted to the Army a Form DD-633, which was false or fraudulent because the data thereon was greatly in excess of J.E.T.S., Inc.'s true and accurate costs and prices for purchased supplies, direct labor, general and administrative expenses, profits, fees, and other costs as more fully set forth in Count Nine of the Indictment in United States v. Larry D. Barnette, et al. supra, the allegations of which are incorporated by reference as though fully set forth herein.

59. Based upon the false or fraudulent certification of cost and pricing data dated September 19, 1980, the Army agreed to pay 9,509,500 DM as subsequently adjusted to 9,304,500 DM or approximately $4,130,144, for the extension beginning September 5, 1980.

60. Thereafter, defendants presented or caused to be presented to an officer or employee of the Government or to a member of the Armed Forces claims for payment under the extension of contract 37-77-C-0019, which claims were known by them to be false or fraudulent in that the claims were inflated by reason of the conduct specified above. Those false or fraudulent claims are set forth in Schedule A attached hereto and incorporated by reference herein.

61. As a result, plaintiff was damaged by the total amount that each of the false or fraudulent claims for payment were inflated.

WHEREFORE, plaintiff demands judgment in its favor and against the defendants, jointly and severally, for double the amount of plaintiff's damages plus such civil penalties as are allowable by law together with the the costs of this civil action and such other and further relief as the Court deems just and equitable.

Count 4

[Claim for False Claims Act Conspiracy
31 U.S.C. §§ 3729-3731]

62. This is an action against defendants Larry D. Barnette, Kathleen C. Barnette, Leo J. Barnette, Thomas F. Gibbs, Murray Sentner, Allied, J.E.T.S., JETS Services, Inc., Old Dominion Insurance Corporation, S.A. of Panama, World Management Services, Markham Corporation, S.A., and Hamilton Insurance Co., Ltd. for conspiracy in violation of the False Claims Act, 31 U.S.C. §§ 3729(3).

63. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345 and 31 U.S.C. § 3730.

64. Plaintiff realleges and incorporates by reference paragraphs 1 through 61 and 86 through 89 of this Complaint as though fully set forth herein.

65. From on or about July 1976, defendants Larry D. Barnette, Kathleen C. Barnette, Leo J. Barnette, Thomas F. Gibbs, Murray Sentner, Allied, J.E.T.S., JETS Service, Inc., Old Dominion Insurance Corporation, S.A. of Panama, World Management Services, Markham Corporation, S.A., and Hamilton Insurance Co., Ltd. did conspire to defraud the Government of the United States by getting false or fraudulent claims allowed or paid, which claims were the requests for payments in connection with contract DAJA 37-77-C-0019 set forth in Schedule A, which is attached

hereto and incorporated by reference as though set forth fully herein.

66. The claims were false and fraudulent for the reasons set forth above.

67. As a result, plaintiff was damaged in the amount of $15,750,153.

WHEREFORE, plaintiff demands judgment in its favor and against the defendants, jointly and severally, for double the amount of plaintiff's damages plus such civil penalties as are allowable by law together with the costs of this civil action and such other and further relief as the Court deems just and equitable.

Count 5

[Breach of Contract]

68. This is an action against Allied, J.E.T.S., Inc., JETS Services, Inc. for breach of contract DAJA 37-77-C-0019 and its modifications and extensions.

69. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345.

70. Plaintiff realleges and incorporates by reference paragraphs 1 through 67 and 86 through 90 of this Complaint as though fully set forth herein.

71. By reason of the foregoing conduct, defendants breached their contract with the Army. As a result, plaintiff suffered damages in the amount of $15,750,153.

WHEREFORE, plaintiff demands judgment in its favor and against the defendants, jointly and severally, for the amount of plaintiff's damages together with the costs of this civil action and such other and further relief as the Court deems just and equitable.

Count 6

[Unjust Enrichment]

72. This is an action for unjust enrichment against Larry D. Barnette, Kathleen C. Barnette, Thomas F. Gibbs, Leo J. Barnette, Allied, J.E.T.S., JETS Services, Inc., World Management Services, Inc., Old Dominion Insurance Corporation, S.A. of Panama, Markham Corporation, S.A., Hamilton Insurance Co, Ltd, Old Dominion Insurance Co. of Florida, and JETS Venture Capital Corporation.

73. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345.

74. Plaintiff realleges and incorporates by reference paragraphs 1 through 71 and 86-90 of this Complaint as though fully set forth herein.

75. Defendants received approximately $15,750,153 in payments representing excessive and inflated profits with respect to contract DAJA 37-77-C-0019 and its modifications and extensions to which defendants were not entitled.

76. Beginning in or about July, 1978, and continuing to in or about June, 1980, defendants and others bid upon and obtained

Government contracts set-aside for small businesses upon which defendants were ineligible to bid and which defendants were ineligible to obtain. Such contracts are set forth in Schedule B, which is attached hereto and incorporated by reference herein as though set forth in full.

77. Defendants were unjustly enriched by at least $2,391,156, the total amount of the profits earned on the contracts as set forth in Schedule B.

78. By reason of the foregoing, the defendants were unjustly enriched in the amount of $18,141,309 which consists of the sum of $15,750,153 plus $2,391,156, the net profits obtained with respect to the contracts identified in Schedule B.

WHEREFORE, plaintiff demands judgment in its favor and against the defendants, jointly and severally, for the amount by which defendants were unjustly enriched, i.e. $18,141,309, together with the costs of this civil action and such other and further relief as the Court deems just and equitable.

Count 7

[Payment By Mistake]

79. This is an action against Larry D. Barnette, Kathleen C. Barnette, Thomas F. Gibbs, Leo J. Barnette, Allied, J.E.T.S., JETS Services, Inc., World Management Services, Inc., Old Dominion Insurance Corporation, S.A. of Panama, Markham Corporation, S.A., Hamilton Insurance Co., Ltd., Old Dominion Insurance

Co. of Florida and JETS Venture Capital Corporation to recover monies paid by mistake.

80. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345.

81. Plaintiff realleges and incorporates by reference paragraphs 1 through 78 and 86 through 90 of this Complaint as though fully set forth herein.

82. By reason of the foregoing, plaintiff paid approximately $15,750,153 to the defendants with regard to contract DAJA 37-77-C-0019 and its modifications and extensions plus approximately $2,391,156 with respect to the contracts identified in Schedule B in the mistaken belief that defendants were entitled to such payments when in truth and in fact defendants were not so entitled.

WHEREFORE, plaintiff demands judgment in its favor and against the defendants, jointly and severally, in the amount defendants were paid by mistake, i.e., $18,141,309 together with the costs of this civil action and such other and further relief as the Court deems just and equitable.

Count 8

[Contract Annulment]

83. This is an action for annulment of contract against Allied, J.E.T.S., and JETS Services, Inc.

84. The Court for jurisdiction over this pursuant to 28 U.S.C. § 1345.

85. Plaintiff realleges and incorporates by reference paragraphs 1 through 82 of this Complaint as though fully set forth herein.

86. In early 1978, defendant Larry D. Barnette told defendant Murray Sentner, the Army's contracting officer for contract DAJA 37-77-C-0019, that Barnette might employ Sentner upon Sentner's retirement from Government employment.

87. In consideration of the possibility of prospective employment by Larry D. Barnette and other consideration, Murray Sentner took the following actions which benefitted the defendants and were in conflict with his fiduciary duty to the Army: (a) in the Spring of 1978, he waived a DCAA audit evaluation of the cost and pricing proposal for the option year beginning October 1, 1978; (b) in September 1978, he agreed to pay J.E.T.S., Inc. the full price proposed in its falsely or fraudulently certified DD-633 dated May 8, 1978; (c) in about May 1979, he disclosed to Larry D. Barnette the Army's confidential "fair cost estimate," which indicated that the current contract price was grossly inflated and that the proposed contract price for the year beginning October 1, 1979, was unjustified; (d) in the Summer of 1979, he prevented DCAA from conducting an effective audit evaluation of the price proposal for the contract year beginning October 1, 1979; (e) in June, 1979, he agreed to pay J.E.T.S., Inc., the full price proposed in its falsely or fraudulently certified DD-633 dated May 10, 1979, as amended for

minor adjustments on May 11, 1979, and June 27, 1979; (f) in the Spring 1980, he attempted to obtain approval for an additional sole source extension for J.E.T.S., Inc., beginning October 1, 1980, and attempted to insert a bid and performance bond requirement that would have favored the incumbent contractor, J.E.T.S., Inc., restricted competition, and compromised the competitive contracting process; and (g) in the Fall of 1980, he attempted again to obtain approval for an additional sole source extension for J.E.T.S., Inc., beginning October 1, 1980.

88. In the Fall of 1979, Murray Sentner traveled to Jacksonville, Florida, to commence negotiations to formalize his prospective employment agreement with defendant Larry D. Barnette. Their agreement was reduced to writing and executed on or about February 22, 1980. That agreement, as formalized, was contingent upon the defendants' receipt of business in future years, which requirement defendant Larry D. Barnette told Murray Sentner could be satisfied by defendants' being awarded future extensions or renewals of contract DAJA 37-77-C-0019 or new contracts for performance of the laundry services.

89. Throughout the period from early 1978 through April 1981, Murray Sentner continued in his position as the Army's contracting officer, and acted, with respect to contract DAJA 37-77-C-0019, to the benefit of defendants and in conflict with his fiduciary duty to the Army.

90. From on or about August 30, 1978, until in or about March, 1981, at Jacksonville, Florida, in the Middle District of Florida, and elsewhere, Larry D. Barnette, Thomas F. Gibbs, and Allied doing business as J.E.T.S., Inc., and JETS Services, Inc., did corruptly give, offer and promise things of value, namely, meals, sexual favors, forgiveness of a debt, loans and money, to Hugh Roberts III, an employee of the Defense Contracts Administration Service Management Area (DCASMA), Department of Defense, a department of the United States, with intent to influence him in his official acts concerning the auditing of government contractors and the dissemination of non-public information, and to influence such public official to commit and aid in committing, colluding in, and allowing the commission of a fraud on the United States.

91. The defendants obtained modifications and extensions of contract DAJA 37-77-C-0019 as a result of the conflict of interest on the part of government officials including the contracting officer, Murray Sentner, and an official of DCASMA, Hugh Roberts, III.

92. As a result, the modifications and extensions, are subject to annulment, and the plaintiff is entitled to recover the gross amount paid pursuant thereto, i.e., approximately $50,525,279.

WHEREFORE, plaintiff demands and prays the judgment be entered in its favor in the amount of plaintiff's payments on the

modification and extensions, to contract DAJA 37-77-C-0019 together with the costs of this civil action and such other and further relied as the Court deems just and equitable.

Respectfully submitted,

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Acting Assistant Attorney General

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United States Attorney

_____
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Department of Justice
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Dated: _____

Schedule A
Invoices Submitted to the
Army On Contract
DAJA 37-77-C-0019 For Its
Extensions For The Period 10/1/79 Through 3/31/81

Invoice No.	Date	Plant/Other	Amount (DM)
Part I - FY 1978 - MOD 25:			
10-1	11/1/77	Augsburg	221,347.25
10-2	11/1/77	Bad Kreuznach	190,733,37
10-3	11/1/77	Frankfurt	418,896.13
10-4	11/1/77	Kaiserslautern	307,665.50
10-5	11/1/77	Mannheim	225,592.00
10-6	11/1/77	Nuernberg	283,223.12
10-7	11/1/77	Wuerzburg	317,651.00
11-1	12/1/77	Augsburg	227,004.25
11-2	12/1/77	Bad Kreuznach	196,390.33
11-3	12/1/77	Frankfurt	424,554.17
11-4	12/1/77	Kaiserslautern	313,322.50
11-5	12/1/77	Mannheim	231,249.00
11-6	12/1/77	Nuernberg	288,880.08
11-7	12/1/77	Wuerzburg	323,308.00
12-1	1/1/78	Augsburg	227,004.25
12-2	1/1/78	Bad Kreuznach	196,390.33
12-3	1/1/78	Frankfurt	424,554.17
12-4	1/1/78	Kaiserslautern	313,322.50
12-5	1/1/78	Mannheim	231,249.00
12-6	1/1/78	Nuernberg	290,382.83
12-7	1/1/78	Wuerzburg	323,308.00
2-1	2/1/78	Augsburg	227,004.25
2-2	2/1/78	Bad Kreuznach	196,390.33
2-3	2/1/78	Frankfurt	424,554.17
2-4	2/1/78	Kaiserslautern	313,322.50
2-5	2/1/78	Mannheim	231,249.00
1-6	2/1/78	Nuernberg	288,880.08
2-7	2/1/78	Wuerzburg	328,308.00
3-1	3/1/78	Augsburg	227,004.25
3-2	3/1/78	Bad Kreuzhach	196,390.33
3-3	3/1/78	Frankfurt	424,554.17
3-4	3/1/78	Kaiserslautern	313,249.00
3-5	3/1/78	Mannheim	231,249.00
3-6	3/1/78	Nuernberg	288,880.08
3-7	3/1/78	Wuerzburg	323,308.00
3a-1	4/1/78	Augsburg	227,004.25
3a-2	4/1/78	Bad Kreuznach	196,390.33
3a-3	4/1/78	Frankfurt	424,554,17
3a-4	4/1/78	Kaiserslautern	313,322.50
3a-5	4/1/78	Mannheim	231,249.00
3a-6	4/1/78	Nuernberg	288,880.08

3a-7	4/1/78	Wuerzburg	323,308.00
4-1	5/1/78	Augsburg	227,004.25
4-2	5/1/78	Bad Kreuznach	196,240.33
4-3	5/1/78	Frankfurt	424,554.17
4-4	5/1/78	Kaiserslautern	313,322.50
4-5	5/1/78	Mannheim	230,749.00
4-6	5/1/78	Nuernberg	288,880.08
4-7	5/1/78	Wuerzburg	323,308.00
5-1	6/1/78	Augsburg	227,004.25
5-2	6/1/78	Bad Kreuznach	196,140.33
5-3	6/1/78	Frankfurt	424,554.17
5-4	6/1/78	Kaiserslautern	313,322.50
5-5	6/1/78	Mannheim	230,749.00
5-6	6/1/78	Nuernberg	288,880.08
5-7	6/1/78	Wuerzburg	323,308.00
6-1	7/1/78	Augsburg	227,004.25
6-2	7/1/78	Bad Kreuznach	196,140.33
6-3	7/1/78	Frankfurt	424,554.17
6-4	7/1/78	Kaiserslautern	313,322.50
6-5	7/1/78	Mannheim	230,749.00
6-6	7/1/78	Nuernberg	288,880.08
6-7	7/1/78	Wuerzburg	323,308.00
7-1	8/1/78	Augsburg	227,004.25
7-2	8/1/78	Bad Kreuznach	196,140.33
7-3	8/1/78	Frankfurt	431,773.67
7-4	8/1/78	Kaiserslautern	313,322.50
7-5	8/1/78	Mannheim	230,749.00
7-6	8/1/78	Nuernberg	288,880.08
7-7	8/1/78	Wuerzburg	323,308.08
8-1	9/1/78	Augsburg	227,004.25
8-2	9/1/78	Bad Kreuznach	196,140.33
8-3	9/1/78	Frankfurt	429,367.17
8-4	9/1/78	Kaiserslautern	313,322.50
8-5	9/1/78	Mannheim	230,749.00
8-6	9/1/78	Nuernberg	288,880.08
8-7	9/1/78	Wuerzburg	323,308.00
9-1	10/1/78	Augsburg	227,004.25
9-2	10/1/78	Bad Kreuznach	196,140.33
9-3	10/1/78	Frankfurt	429,367.17
9-4	10/1/78	Kaiserslautern	313,322.50
9-5	10/1/78	Mannheim	230,749.00
9-6	10/1/78	Nuernberg	288,880.08
9-7	10/1/78	Wuerzburg	322,682.22

TOTAL Of 84 Invoices in Part I.

Part II - FY 1979 - MOD 35:

10-1	11/1/78	Augsburg	235,594.14
10-2	11/1/78	Bad Kreuznach	203,755.67
10-3	11/1/78	Frankfurt	440,196.64

10-4	11/1/78	Kaiserslautern	324,365.12
10-5	11/1/78	Mannheim	240,008.68
10-6	11/1/78	Nuernberg	299,945.00
10-7	11/1/78	Wuerzburg	335,594.14
11-1	12/1/78	Augsburg	235,594.14
11-2	12/1/78	Bad Kreuznach	203,755.67
11-3	12/1/78	Frankfurt	450,562.64
11-4	12/1/78	Kaiserslautern	325,365.12
11-5	12/1/78	Mannheim	240,008.68
11-6	12/1/78	Nuernberg	299,945.00
11-7	12/1/78	Wuerzburg	335,750.00
12-1	1/1/79	Augsburg	235,594.14
12-2	1/1/79	Bad Kreuznach	203,755.67
12-3	1/1/79	Frankfurt	445,379.64
12-4	1/1/79	Kaiserslautern	324,915.15
12-5	1/1/79	Mannheim	240,008.68
12-6	1/1/79	Nuernberg	299,945.00
12-7	1/1/79	Wuerzburg	335,750.00
1-1	2/1/79	Augsburg.(FY 1979)	235,594.14
1-2	2/1/79	Bad Kreuznach	203,755.67
1-3	2/1/79	Frankfurt	445,379,64
1-4	2/1/79	Kaiserslantern	325,365.12
1-5	2/1/79	Mannheim	240,008.68
1-6	2/1/79	Nurnberg	299,945,00
1-7	2/1/79	Wuerzburg	335,750.00
2-1	3/1/79	Augsburg	235,594,14
1-2	3/1/79	Bad Kreuznach	203,755.67
1-3	3/1/79	Frankfurt	445,379.64
1-4	3/1/79	Kaiserslautern	325,365.12
2-5	3/1/79	Mannheim	240,008.68
2-6	3/1/79	Nurnberg	299,945.00
2-7	3/1/79	Wuerzburg	335,750.00
3-1	4/1/79	Augsburg	235,594.14
3-2	4/1/79	Bad Kreuznach	203,755.67
3-3	4/1/79	Frankfurt	445,379.64
3-4	4/1/79	Kaiserslautern	325,365.12
3-5	4/1/79	Mannheim	240,008.68
3-6	4/1/79	Nurnberg	299,750.00
3-7	4/1/79	Wuerzburg	335,750.00
4-1	5/1/79	Augsburg	235,594.14
4-2	5/1/79	Bad Kreuznack	203,755.67
4-3	5/1/79	Frankfurt	445,379.64
4-4	5/1/79	Kaiserslautern	325,365.12
4-5	5/1/79	Mannheim	240,008.68
6-6	5/1/79	Nurnberg	299,945.00
4-7	5/1/79	Wuerzburg	335,750.00
5-1	6/1/79	Augsburg	235,594.14
5-2	6/1/79	Bad Kreuznach	203,755.67
5-3	6/1/79	Frankfurt	445,379.64
5-4	6/1/79	Kaiserslautern	325,365.12
5-5	6/1/79	Mannheim	240,008.68

5-6	6/1/79	Nurnberg	299,945.00
5-7	6/1/79	Wuerzburg	335,750.00
6-1	7/1/79	Augsburg	235,594.14
6-2	7/1/79	Bad Kreuznach	203,755.67
6-3	7/1/79	Frankfurt	445,379.64
6-4	7/1/79	Kaiserslautern	325,365.12
6-5	7/1/79	Mannheim	240,008.68
6-6	7/1/79	Nuernberg	299,945.00
6-7	7/1/79	Wuerzburg	335,750.00
7-1	8/1/79	Augsburg	235,594.14
7-2	8/1/79	Bad Kreuznach	203,755.67
7-3	8/1/79	Frankfurt	445,379.64
7-4	8/1/79	Kaiserslautern	325,365.12
7-5	8/1/79	Mannheim	240,008.68
7-6	8/1/79	Nuernberg	299,945.00
7-7	8/1/79	Wuerzburg	335,750.00
8-1	9/1/79	Augsburg	235,594.14
8-2	9/1/79	Bad Kreuznach	203,755.67
8-3	9/1/79	Frankfurt	445,379.64
8-4	9/1/79	Kaiserslautern	325,365.12
8-5	9/1/79	Mannheim	240,008.68
8-6	9/1/79	Nuernberg	299,945.00
8-7	9/1/79	Wuerzburg	335,750.00
9-1	10/1/79	Augsburg	235,594.87
9-2	10/1/79	Bad Kreuznach	203,755.67
9-3	10/1/79	Frankfurt	445,379.64
9-4	10/1/79	Kaiserslautern	324,881.33
9-5	10/1/79	Mannheim	240,008.68
9-6	10/1/79	Nurnberg	299,945.00
9-7	10/1/79	Wuerzburg	335,750.00

TOTAL of 84 Invoices in Part II

Part III - FY 1980 - MOD 56:

10-1	11/1/79	Augsburg	240,680.75
10-2	11/1/79	Bad Kreuznach	208,064.92
10-3	11/1/79	Frankfurt	405,467.00
10-4	11/1/79	Kaiserslautern	560,898.25
10-6	11/1/79	Nuernberg	305,968.17
10-7	11/1/79	Wuerzburg	325,800.42
10-4A	11/1/79	Kaiserslautern	25,904.00
11-1	12/1/79	Augsburg	240,680.75
11-2	12/1/79	Bad Kreuznach	208,064.92
11-3	12/1/79	Frankfurt	449,878.00
11-4	12/1/79	Kaiserslautern	545,898.25
11-6	12/1/79	Nuernberg	305,968.17
11-7	12/1/79	Wuerzburg	342,873.42
11-4A	12/1/79	Kaiserslautern	25,904.00
12-1	1/1/80	Augsburg	240,680.75
12-2	1/1/80	Bad Kreuznach	208,064.92

12-3	1/1/80	Frankfurt	434,878.00
12-4	1/1/80	Kaiserslautern	560,898.25
12-6	1/1/80	Nuernberg	305,968.17
12-7	1/1/80	Wuerzburg	342,873.42
12-4A	1/1/80	Kaiserslautern	25,904.00
1-1	2/1/80	Augsburg	240,680.75
1-2	2/1/80	Bad Kreuznach	208,064.92
1-3	2/1/80	Frankfurt	449,878.00
1-4	2/1/80	Kaiserslautern	560,898.25
1-6	2/1/80	Nuernberg	305,968.17
1-7	2/1/80	Wuerzburg	342,873.42
1-4A	2/1/80	Kaiserslautern	25,904.00
2-1	3/1/80	Augsburg	240,680.75
2-2	3/1/80	Bad Kreuznach	208,064.92
2-3	3/1/80	Frankfurt	449,878.00
2-4	3/1/80	Kaiserslautern	560,898.25
2-6	3/1/80	Nuernberg	305,968.17
2-7	3/1/80	Wuerzburg	342,873.42
2-4A	3/19/80	Kaiserslautern	25,904.00
3-1	4/1/80	Augsburg	240,680.75
3-2	4/1/80	Bad Kreuznach	208,064.92
3-3	4/1/80	Frankfurt	449,878.00
3-4	4/1/80	Kaiserslautern	560,898.25
3-6	4/1/80	Nuernberg	305,968.17
3-7	4/1/80	Wuerzburg	342,873.42
3-4A	4/1/80	Kaiserslautern	25,904.00
4-1	5/1/80	Augsburg	240,680.75
4-4A	4/1/80	Kaiserslautern	25,904.00
4-2	5/1/80	Bad Kreuznach	208,064.92
4-3	5/1/80	Frankfurt	447,102.00
4-4	5/1/80	Kaiserslautern	560,898.25
4-6	5/1/80	Nuernberg	305,968.17
4-7	5/1/80	Wuerzburg	342,873.42
5-1	6/1/80	Augsburg	240,680.75
5-2	6/1/80	Bad Kreuznach	208,064.92
5-3	6/1/80	Frankfurt	454,356.77
5-4			
5-6	6/1/80	Nuernberg	305,968.17
5-7	6/1/80	Wuerzburg	342,873.42
5-4A			
6-1	7/1/80	Augsburg	240,680.75
6-2	7/1/80	Bad Kreuznach	208,064.92
6-3	7/1/80	Frankfurt	452,506.77
6-4	7/1/80	Kaiserslautern	560,898.25
6-6	7/1/80	Nuernberg	305,968.17
6-7	7/1/80	Wuerzburg	360,454.75
6-4A	7/1/80	Kaiserslautern	25,904.00
7-1	8/1/80	Augsburg	240,680.75
7-2	8/1/80	Bad Kreuznach	208,064.92
7-3	8/1/80	Frankfurt	454,356.77
7-4	8/1/80	Kaiserslautern	560,898.25

7-6	8/1/80	Nuernberg	305,968.17
7-7	8/1/80	Wuerzburg	360,454.75
7-4A	8/1/80	Kaiserslautern	25,904.00
8-1	9/1/80	Augsburg	240,680.75
8-2	9/1/80	Bad Kreuznach	208,064.92
8-3	9/1/80	Frankfurt	454,356.77
8-4	9/1/80	Kaiserslautern	560,898.25
8-6	9/1/80	Nuernberg	305,968.17
8-7	9/1/80	Wuerzburg	360,454.75
8-4A	9/1/80	Kaiserslautern	25,904.00
9-1	10/1/80	Augsburg	240,680.75
9-2	10/1/80	Bad Kreuznach	208,064.92
9-3	10/1/80	Frankfurt	454,356.77
9-4	10/1/80	Kaiserslautern	560,898.25
9-6	10/1/80	Nuernburg	305,968.17
9-7	10/1/80	Wuerzburg	360,454.75
9-4A	10/1/80	Kaiserslautern	25,904.00

TOTAL of 84 Invoices in Part III

Part IV - FY 1981 (6 months) - Mode 89:

10-1	11/1/80	Augsburg	254,964.50
10-2	11/1/80	Bad Kreuznach	179,417.33
10-3	11/1/80	Frankfurt	320,844.00
10-4	11/1/80	Kaiserslautern	430,309.50
10-7	11/1/80	Wuerzburg	396,606.33
11-1	12/1/80	Augsburg	257,749.50
11-2	12/1/80	Bad Kreuznach	179,417.33
11-3	12/1/80	Frankfurt	320,844.00
11-4	12/1/80	Kaiserslautern	430,309.50
11-7	12/1/80	Wuerzburg	397,059.43
12-1	1/1/81	Augsburg	262,646.50
12-2	1/1/81	Bad Kreuznach	179,417.33
12-3	1/1/81	Frankfurt	320,844.00
12-4	1/1/81	Kaiserslautern	422,296.50
12-7	1/1/81	Wuerzburg	400,157.33
1-1	2/1/81	Augsburg	262,646.50
1-2	2/1/81	Bad Kreuznach	179,417.33
1-3	2/1/81	Frankfurt	319,456.50
1-4	2/1/81	Kaiserslautern	430,309.50
1-7	2/1/81	Wuerzburg	404,890.00
2-1	3/1/81	Augsburg	238,274.50
2-2	3/1/81	Bad Kreuznach	168,138.33
2-3	3/1/81	Frankfurt	300,344.00
2-4	3/1/81	Kaiserslautern	403,659.00

2-7	3/1/81	Wuerzburg	405,846.00
3-1	4/1/81	Augsburg	252,328.50
3-2	4/1/81	Bad Kreuznach	168,146.33
3-3	4/1/81	Frankfurt	300,344.00
3-4	4/1/81	Kaiserslautern	403,659.50
3-7	4/1/81	Wuerzburg	91,358,00

TOTAL of 84 Invoices in Part IV

TOTAL of 282 Invoices on Schedule A

Schedule B

SBA Set-Aside Contracts Allied was Ineligible to Receive

Date of Bid	Location of Contract	Type	Net Profit
7/17/78	Rodman Naval Air Station Panama Canal Zone N00612-78-C-0465	Mess Attendant	106,370
2/27/79	U.S. Dept. of Agriculture Forest Service Juneau, Alaska 5301024-00022	Food Service	17,248
6/29/79	Blytheville Air Force Base Arkansas F03601-79-C-0020	Food Service	102,454
7/12/79	Homestead Air Force Base Florida F08621-79-C-0034	Food Service	9,352
8/3/79	Wurtsmith Air Force Base Michigan F20603-79-C-0024	Food Service	112,737
8/8/79	Ft. Amador Panama Canal Zone N00612-77-C-0596	Food Service	98,825
8/29/79	Merchant Marine Academy Kings Point, New York MA80-SAC-0001	Food Service	156,947
5/27/80	Port Facility Cape Canaveral, Florida N00167-80-R-0103	Food Service	29,414
5/29/80	Naval Submarine Base Kings Bay, Georgia N62467-80-C-0277	Base Maintenance	1,591,659
6/12/80	McConnell Air Force Base Kansas F4614-80-C-0020	Food Service	48,000

Date of Bid	Location of Contract	Type	Net Profit
6/18/80	Sheppard Air Force Base Texas F41612-81-D-0111	Facilities Maintenance	118,150
		TOTAL	$2,391,156

APPENDIX E

Sample Discovery Requests

RMM:jik
5/516/2C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :
Plaintiff,
- v - :

LOCAL 6A, CEMENT AND CONCRETE WORKERS, :
Laborers International Union
of North America, :
EXECUTIVE BOARD OF LOCAL 6A, CEMENT AND
CONCRETE WORKERS, Laborers International :
Union of North America,
RALPH SCOPO, JR., President, :
JOSEPH SCOPO, Vice-President,
CARMINE MONTALBANO, Secretary-Treasurer, :
RUDOLPH NAPOLITANO, Business Manager,
ANTHONY NAPOLITANO, JERRY MICELI, :
SAL CASCIO, JAMES STURIANO, PETER VITALE,
TONY GUGLUIZZA, THOMAS MAZZA, Officers, :
DISTRICT COUNCIL OF CEMENT AND CONCRETE
WORKERS, Laborers International Union :
of North America,
EXECUTIVE BOARD OF THE DISTRICT COUNCIL :
OF CEMENT AND CONCRETE WORKERS, Laborers
International Union Of North America, :
LOUIS GAETA, President and Business
Manager, :
THOMAS HENNESSY, Vice-President,
CARMINE MONTALBANO, Secretary-Treasurer, :
JOSEPH SCOPO, Sergeant-at-Arms,
FRANK BELLINO, RUDOLPH NAPOLITANO, :
ED KELLY, CHRISTOPHER FURNARI, JR.,
RICHARD TOMASZEWSKI, EUGENE McCARTHY, :
Officers, and
RALPH SCOPO, JR., THOMAS MEDERA, :
MAURICE FOLEY, Auditors,
THE COLOMBO ORGANIZED CRIME FAMILY :
OF LA COSA NOSTRA,
CARMINE PERSICO, a/k/a "The Snake," :
a/k/a "Junior," Boss,
GENNARO LANGELLA, a/k/a :
"Gerry Lang", Acting Boss,
DOMINIC MONTEMARANO, a/k/a "Donny Shacks", :
Capo,
RALPH SCOPO, "Made" Member, :

Defendants. :

- -x

PLAINTIFF'S FIRST SET OF INTERROGATORIES AND DOCUMENT REQUEST TO ALL DEFENDANTS

86 Civ. 4819 (VLB)

RMM:jik
5/516/2C

S I R S:

PLEASE TAKE NOTICE that plaintiff United States of America by its attorney, Rudolph W. Giuliani, United States Attorney for the Southern District of New York, pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure, hereby requests that you answer under oath the following written interrogatories and requests for documents, separately and fully in writing, within forty-five days of this date. The answers hereto should include all information known up to the date of the verification thereof.

PLEASE TAKE FURTHER NOTICE that each interrogatory and each subpart of each interrogatory shall be accorded a separate answer. Each answer shall first set forth verbatim the interrogatory to which it is responsive and shall indicate the name of the defendant to whom the answer is attributable. Interrogatories or subparts thereof shall not be combined for the purpose of supplying a common answer. The answer to an interrogatory or a subpart should not be supplied by referring to the answer to another interrogatory or subpart thereof unless the interrogatory or subpart referred to supplies a complete and accurate answer to the interrogatory or subpart being answered.

PLEASE TAKE FURTHER NOTICE THAT these interrogatories and request for documents are continuing and you should promptly supply by way of supplemental answers any and all additional responsive information or documents that may become known prior to the trial of this action.

RMM:jik
5/516/2C

INSTRUCTIONS

(a) Whenever there is a request to describe a document, set forth: (1) its date and place of execution; (2) its author and/or signatories; (3) its title, if any; (4) the type of document (e.g., letter, memorandum); (5) its substance; (6) its addressee(s) and all other persons receiving copies; and (7) its location.

(b) Whenever there is a request to identify a person, set forth:

(1) his or her full name;

(2) his or her present or last known home and business address and home business telephone number;

(3) his or her present employer and position; and

(4) the nature of his or her knowledge or information.

DEFINITIONS

For the purposes of these interrogatories and this request for documents the following definitions should be used:

A. The term "you" or "your" means any one or more of the defendants in this action or any agent, representative or person acting on behalf of any one or more of the defendants in this action.

B. The term "document" means the original and every copy, regardless or origin or location, of any book, pamphlet, file, investigative report, bank record, periodical, letter, memorandum, schedule, telegram, report, record, study, hand-written note, working paper, chart paper, graph, index, tape, disc, computer printout, data sheet or data processing card, or any other written, recorded, transcribed, punched, taped, filmed or graphic matter, however produced or reproduced, to which you have or have had access.

C. The term "person" means any individual, organization or corporation.

D. The terms "relevant to", "relating to" "relationship" mean any connection whatsoever, direct or indirect.

INTERROGATORIES

1. State the names, locations, addresses and telephone numbers of any persons with knowledge or information relevant to the subject matter of the action, including, but not limited to, all persons whom you intend to call as witnesses at trial (and so identify them) if this action goes to trial; all persons who at any time from 1978 to the present have been members of the Colombo Organized Crime Family of La Cosa Nostra or any other organized crime family of La Cosa Nostra, and who have in any way participated in or profited from the cement construction industry in the Metropolitan New York area; and all persons who at any time from 1978 to the present have been officers, auditors or trustees of, employers of members of, or

suppliers of any goods or services to, Local 6A, Cement and Concrete Workers, Laborers International Union of North America ("Local 6A"), the District Council of Cement and Concrete Workers, Laborers International Union of North America (the "District Council") or any employee benefit plan directly or indirectly controlled by or affiliated with Local 6A or the District Council ("associated Benefit Plan").

2. Identify and describe the custodian, location and general description of all documents, including pertinent employment, business and union or employee benefit plan records, and any other physical evidence which are relevant to the subject matter of this action, indicating which of these you intend to offer into evidence at trial if this action goes to trial.

REQUEST FOR DOCUMENTS

You are hereby requested to produce for inspection and copying, within forty-five days of this date at Room 524, United States Courthouse Annex, One St. Andrew's Plaza, New York, New York, all documents, or your copies thereof, in the event that the originals are not in your possession or under your control, which are relevant to the subject matter of this action, including, but not limited to, the following:

1. All documents which you intend to offer into evidence at trial if this action goes to trial.

2. All documents relating to any remuneration of any kind which you have obtained, directly or indirectly, from Local 6A, the District Council or any associated Benefit Plan, or from any person who is or was an officer, auditor, employee, member

or beneficiary of Local 6A, the District Council or any associated Benefit Plan, or from any person who supplied any goods or services to or employed members of Local 6A, the District Council or any associated Benefit Plan.

3. All documents relating to any involvement on your part, direct or indirect, with the business affairs of Local 6A, the District Council or any associated Benefit Plan.

4. All documents relating to any communication involving the business affairs of Local 6A, the District Council or any associated Benefit Plan, including, but not limited to all minutes of any meeting of executive board members, auditor or trustees of Local 6A, the District Council or any associated Benefit Plan, and all records reflecting any communication pertaining to the business affairs of Local 6A, the District Council, any associated benefit plan or any person who supplied any goods or services to, or employed any members of, Local 6A, the District Council or any associated Benefit Plan.

5. All union and employee benefit fund records of Local 6A, the District Council or any associated Benefit Plan.

6. All documents relating to any association with or membership in the Colombo Organized Crime Family of La Cosa Nostra of any defendant, including yourself.

7. All of your banking records, including, but not limited to, cancelled checks, checking account records and savings account records, made on or after January 1, 1978.

RMM:jik
5/516/2C

8. All documents relating to your net worth from January 1, 1978 to the present, including, but not limited to, tax returns, salary information, investment records and financial statements.

Dated New York, New York

June 18, 1986

RUDOLPH W. GIULIANI
United States Attorney for the
Southern District of New York
Attorney for Plaintiff
United States of America

By: _____
ROBERT L. ULLMANN
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-1977

TO: ALL DEFENDANTS
(See attached rider)

RLU:ns
4/90

DEFENDANTS IN UNITED STATES V. LOCAL 6A, ET. AL.

86 Civ.

DEFENDANT

LOCAL 6A, CEMENT AND CONCRETE WORKERS
Laborers Int'l Union of North America
91-31 Queens Boulevard, 2d Floor
Elmhurst, New York 11373

RALPH SCOPO, Jr.
26 Olive Street
Farmingville, New York 11738

JOSEPH SCOPO
1378 East 72nd Street
Brooklyn, New York 11236

CARMINE MONTALBANO
1028 Polk Ave.
Franklin Square, New York 11010

RUDOLPH NAPOLITANO
54 Sampson Avenue
Staten Island, New York 10308

ANTHONY NAPOLITANO
636 East 88th Street
Brooklyn, New York 11236

JERRY MICELI
415 Woolley Avenue
Staten Island, New York 10314

SALVATORE CASCIO
758 Leverett Avenue
Staten Island, New York 10312

JAMES STURIANO
3 Mount Marcy Avenue
Farmingville, New York 11738

PETER VITALE
71 Shotwell Avenue
Staten Island, New York 10312

RLU:ns
4/90

ANTHONY S. GUGLUIZZA
7924 10th Avenue
Brooklyn, New York 11215

THOMAS MAZZA
6 Paerdegat #14
Brooklyn, New York 11236

DISTRICT COUNCIL OF CEMENT & CONCRETE WORKERS
Laborer's Int'l Union of North America
91-31 Queens Boulevard, 6th Floor
Elmhurst, New York 11373

LOUIS GAETA
834 West End Ave.
New York, New York 10025

THOMAS HENNESSY
2340 University Ave.
New York, New York

FRANK BELLINO
219 Cortelyou Avenue
Staten Island, New York 10312

EDWARD KELLY
95-25 81st Street
Queens, New York

CHRISTOPHER FURNARI, JR.
2069 East 66th Street
Brooklyn, New York 11234

RICHARD TOMASZEWSKI
11 Silver Street
Elmont, New York 14813

EUGENE McCARTHY
91-31 Queens Boulevard, 6th Floor
Elmhurst, New York 11373

THOMAS MEDERA
3 Canterberry Lane
Wappingers Falls, New York 12590

MAURICE FOLEY
91-31 Queens Boulevard, 6th Floor
Elmhurst, New York 11373

RLU:ns
4/90

CARMINE PERSICO
Metropolitan Correctional Center
150 Park Row
New York, New York 10007

GENNARO LANGELLA
Metropolitan Correctional Center
150 Park Row
New York, New York 10007

DOMINIC MONTEMARANO
1140 79th Street
Brooklyn, New York 11228

RALPH SCOPO
159-15 91st Street
Howard Beach, New York 11414

RMM:cr
JW-2861/2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :
Plaintiff,
- v - :

LOCAL 6A, CEMENT AND CONCRETE WORKERS, :
Laborers International Union
of North America, :
EXECUTIVE BOARD OF LOCAL 6A, CEMENT AND
CONCRETE WORKERS, Laborers International :
Union of North America,
RALPH SCOPO, JR., President, :
JOSEPH SCOPO, Vice-President,
CARMINE MONTALBANO, Secretary-Treasurer, :
RUDOLPH NAPOLITANO, Business Manager,
ANTHONY NAPOLITANO, JERRY MICELI, :
SAL CASCIO, JAMES STURIANO, PETER VITALE,
TONY GUGLUIZZA, THOMAS MAZZA, Officers, :
DISTRICT COUNCIL OF CEMENT AND CONCRETE
WORKERS, Laborers International Union :
of North America,
EXECUTIVE BOARD OF THE DISTRICT COUNCIL :
OF CEMENT AND CONCRETE WORKERS, Laborers
International Union Of North America, :
LOUIS GAETA, President and Business
Manager, :
THOMAS HENNESSY, Vice-President,
CARMINE MONTALBANO, Secretary-Treasurer, :
JOSEPH SCOPO, Sergeant-at-Arms,
FRANK BELLINO, RUDOLPH NAPOLITANO, :
ED KELLY, CHRISTOPHER FURNARI, JR.,
RICHARD TOMASZEWSKI, EUGENE McCARTHY, :
Officers, and
RALPH SCOPO, JR., THOMAS MEDERA, :
MAURICE FOLEY, Auditors,
THE COLOMBO ORGANIZED CRIME FAMILY :
OF LA COSA NOSTRA,
CARMINE PERSICO, a/k/a "The Snake," :
a/k/a "Junior," Boss,
GENNARO LANGELLA, a/k/a :
"Gerry Lang", Acting Boss,
DOMINIC MONTEMARANO, a/k/a "Donny Shacks", :
Capo,
RALPH SCOPO, "Made" Member, :

Defendants. :

- -x

PLAINTIFF'S SECOND
DOCUMENT REQUEST
TO ALL DEFENDANTS

86 Civ. 4819 (VLB)

RMM:cr
JW-2861/2

S I R S:

PLEASE TAKE NOTICE that plaintiff United States of America by its attorney, Rudolph W. Giuliani, United States Attorney for the Southern District of New York, pursuant to Rule 34 of the Federal Rules of Civil Procedure, hereby requests that you answer under oath the following requests for documents, separately and fully in writing, by August 15, 1986. The answers hereto should include all information known up to the date of the verification thereof.

PLEASE TAKE FURTHER NOTICE THAT this request for documents is continuing and you should promptly supply by way of supplemental answers all additional responsive information or documents that may become known prior to the trial of this action.

INSTRUCTIONS

A. Whenever there is a request to describe a document, set forth: (1) its date and place of execution; (2) its author and/or signatories; (3) its title, if any; (4) the type of document (e.g., letter memorandum); (5) its substance; (6) its addressee(s) and all other persons receiving copies; and (7) its location.

B. Whenever there is a request to identify a person, set forth:

(1) his or her full name;

(2) his or her present or last known home and business address and home business telephone number;

(3) his or her present employer and position; and

(4) the nature of his or her knowledge or information.

C. Each defendant must respond separately to this request so that it is apparent which defendant produced each document. This same instruction applies to plaintiff's first document request.

DEFINITIONS

For the purposes of this request for documents the following definitions should be used:

A. The term "you" or "your" means any one or more of the defendants in this action or any agent, representative or person acting on behalf of any one or more of the defendants in this action.

B. The term "document" means the original and every copy, regardless or origin or location, of any book, pamphlet, file, investigative report, bank record, periodical, letter, memorandum, schedule, telegram, report, record, study, hand-

written note, working paper, chart paper, graph, index, tape, disc, computer printout, data sheet or data processing card, or any other written, recorded, transcribed, punched, taped, filmed or graphic matter, however produced or reproduced, to which you have or have had access.

C. The terms "relevant to", and "relating to" "relationship" mean any connection whatsoever, direct or indirect.

REQUEST FOR DOCUMENTS

You are hereby requested to produce for inspection and copying, by August 15, 1986 at Room 524, United States Courthouse Annex, One St. Andrew's Plaza, New York, New York, all documents, or your copies thereof, in the event that the originals are not in your possession or under your control, which are relevant to the subject matter of this action, including, but not limited to, the following:

1. All documents relating in any way to Carmine Persico.

2. All documents relating to any communications with Carmine Persico.

3. All documents relating in any way to Gennaro Langella.

4. All documents relating to any communications with Gennaro Langella.

5. All documents relating in any way to Dominic Montemarano.

6. All documents relating to any communications with Dominic Montemarano.

7. All documents relating in any way to Ralph Scopo.

8. All documents relating to any communications with Ralph Scopo.

9. All documents relating in any way to Paul Castellano.

10. All documents relating to any communications with Paul Castellano.

11. All documents relating in any way to Aniello Dellacroce.

12. All documents relating to any communications with Aniello Dellacroce.

13. All documents relating in any way to Anthony Salerno.

14. All documents relating to any communcations with Anthony Salerno.

15. All documents relating in any way to John Gotti.

16. All documents relating to any communications with John Gotti.

17. All documents relating in any way to Antonio Corallo.

18. All documents relating to any communications with Antonio Corallo.

19. All documents relating in any way to Salvatore Santoro.

20. All documents relating to any communications with Salvatore Santoro.

21. All documents relating in any way to Christopher Furnari.

22. All documents relating to any communications with Christopher Furnari.

23. All documents relating in any way to Louis Foceri.

24. All documents relating to any communications with Louis Foceri.

25. All documents relating in any way to Angelo Ruggiero.

26. All documents relating to any communications with Angelo Ruggiero.

27. All documents relating in any way to Robert Cervone.

28. All documents relating to any communications with Robert Cervone.

29. All documents relating in any way to Gene Gotti.

30. All documents relating to any communications with Gene Gotti.

31. All documents relating in any way to Frank Guidici.

32. All documents relating to any communications with Frank Guidici.

33. All documents relating to any communications with Ralph Scopo, Jr.

34. All documents relating to any communications with Ralph Scopo, Jr.

35. All documents relating in any way to Joseph Scopo.

36. All documents relating to any communications with Joseph Scopo.

37. All documents relating in any way to Carmine Montalbano.

38. All documents relating to any communications with Carmine Montalbano.

39. All documents relating in any way to Rudolph Napolitano.

40. All documents relating to any communications with Rudolph Napolitano.

41. All documents relating in any way to Anthony Napolitano.

42. All documents relating to any communications with Anthony Napolitano.

43. All documents relating in any way to Jerry Miceli.

44. All documents relating to any communications with Jerry Miceli.

45. All documents relating in any way to Sal Cascio.

46. All documents relating to any communications with Sal Cascio.

47. All documents relating in any way to James Sturiano.

48. All documents relating to any communications with James Sturiano.

49. All documents relating in any way to Anthony Gugluizza.

50. All documents relating to any communications with Anthony Gugluizza.

51. All documents relating in any way to Thomas Mazza.

52. All documents relating to any communications with Thomas Mazza.

53. All documents relating in any way to Raimondo Graziano.

54. All documents relating to any communications with Raimondo Graziano.

55. All documents relating in any way to Peter Vitale.

56. All documents relating to any communications with Peter Vitale.

57. All documents relating in any way to Louis Gaeta.

58. All documents relating to any communications with Louis Gaeta.

59. All documents relating in any way to Thomas Hennessy.

60. All documents relating to any communications with Thomas Hennessy.

61. All documents relating in any way to Christopher Furnari, Jr.

62. All documents relating to any communications with Christopher Furnari, Jr.

63. All documents relating in any way to Richard Tomaszewski.

64. All documents relating to any communications with Richard Tomaszewski.

65. All documents relating in any way to Eugene McCarthy.

66. All documents relating to any communications with Eugene McCarthy.

67. All documents relating in any way to Thomas Medera.

68. All documents relating to any communications with Thomas Medera.

69.. All documents relating in any way to Maurice Foley.

70. All documents relating to any communications with Maurice Foley.

71. All documents relating in any way to Alex Costaldi.

72.. All documents relating to any communications with Alex Costaldi.

73. All documents relating in any way to Joseph Frangipane.

74. All documents relating to any communications with Joseph Frangipane.

75. All documents relating in any way to Michael Tierney.

76. All documents relating to any communications with Michael Tierney.

77. All documents relating in any way to Frank Bellino.

78. All documents relating to any communications with Frank Bellino.

79. All documents relating in any way to Ed Kelly.

80. All documents relating to any communications with Ed Kelly.

81. All documents relating in any way to Local 6A.

82. All documents relating in any way to the Executive Board of Local 6A.

83. All documents relating in any way to the District Council.

84. All documents relating in any way to the Executive Board of the District Council.

85. All documents relating in any way to the concrete construction industry.

86. All documents relating to any communications with any contractors, employers or employees in the concrete construction industry.

87. All documents relating in any way to Pile Foundation Company.

88. All documents relating to any communications with any representatives or employees of Pile Foundation Company.

89. All documents relating in any way to Retsam Contracting Corporation.

90. All documents relating to any communications with any representatives or employees of Retsam Contracting Corporation.

91. All documents relating in any way to Alicer Contracting Company.

92. All documents relating to any communications with any representatives or employees of Alicer Contracting Company.

93. All documents relating in any way to DeGaetano & Vozzi Construction Company.

94. All documents relating to any communications with any representatives or employees of DeGaetano & Vozzi Construction Company.

95. All documents relating in any way to All-Boro Paving Company.

96. All documents relating to any communications with any representatives or employees of All-Boro Paving Company.

97. All documents relating in any way to Cedric Construction Company.

98. All documents relating to any communications with any representative or employees of Cedric Construction Company.

99. All documents relating in any way to Hempstead Concrete Corporation.

100. All documents relating to any communications with any representatives or employees of Hempstead Concrete Corporation.

101. All documents relating in any way to Falco Construction Corporation.

102. All documents relating to any communications with any representatives or employees of Falco Construction Corporation.

103. All documents relating in any way to Daval Construction Company.

104. All documents relating to any communications with any representatives or employees of Daval Construction Company.

105. All documents relating in any way to Technical Concrete Corporation.

106. All documents relating to any communications with any representatives or employees of Technical Concrete Corporation.

107. All documents relating in any way to XLO Concrete Corporation.

108. All documents relating to any communications with any representatives or employees of XLO Concrete Corporation.

109. All documents relating in any way to Century-Maxim Construction Corporation.

110. All documents relating to any communications with any representatives or employees of Century-Maxim Corporation.

111. All documents relating in any way to Cedar Park Concrete Corporation.

112. All documents relating to any communications with any representatives or employees of Cedar Park Concrete Corporation.

113. All documents relating in any way to Northberry Concrete Corporation.

114. All documents relating to any communications with any representatives or employees of Northberry Concrete Corporation.

115. All documents relating in any way to G & G Concrete Corporation.

116. All documents relating to any communications with any representatives of G & G Concrete Corporation.

117. All documents relating in any way to S & A Concrete Company, Inc., a/k/a "S & A Structures, Inc."

118. All documents relating to any communications with any representatives or employees of S & A Concrete Company, Inc., a/k/a "S & A Structures, Inc."

119. All documents relating in any way to Paddock Construction, Inc.

120. All documents relating to any communications with any representatives or employees of Paddock Construction, Inc.

121. All documents relating in any way to Anthony Concrete.

122. All documents relating to any communications with any representatives or employees of Anthony Concrete.

123. All documents relating in any way to Edward Barbaro Construction, Inc.

124. All documents relating to any communications with any representatives or employees of Edward Barbaro Construction, Inc.

125. All documents relating to persons who have been officers, auditors, trustees, members, employees or beneficiaries of Local 6A, the District Council or any associated Benefit Plan at any point from 1970 to the present.

126. All documents relating to any remuneration or any monies or any other things of value which any past or present officer, auditor, trustee, employee, member or beneficiary of Local 6A, the District Council or any associated Benefit Plan has received from Local 6A, the District Council, any associated Benefit Plan or any concrete contractor or concrete construction company from 1970 to the present.

127. All documents relating to any union business expenses or claims for reimbursement of union business expenses

of any past or present officers, auditors, trustees, employees, members or beneficiaries of Local 6A, the District Council or any associated Benefit Plan from 1970 to the present.

128. All documents relating to any meetings (including all minutes of any meetings) of Executive Board members, officers, auditors, trustees, members, employees or beneficiaries of Local 6A, the District Council or any associated Benefit Plan from 1970 to the present.

129. All documents relating to the election or selection of the past or present officers, auditors or trustees of Local 6A, the District Council or any associated Benefit Plan from 1960 to the present.

130. All constitutions, bylaws or other governing rules or regulations of Local 6A, the District Council or any associated Benefit Plan in effect at any point from 1960 to the present.

131. All documents relating to the employment of past or present members of Local 6A or the District Council on concrete construction jobs, including all records which reflect the union members on particular jobs, the dates on which those union members were present at the worksite and the salaries which they received for those jobs, from 1970 to the present.

132. All documents relating to any union or employee benefit funds of Local 6A, the District Council or any associated Benefit Plan from 1970 to the present.

133. All documents relating to the payment of union dues and payments into union or employee benefit funds of Local 6A, the District Council or any associated Benefit Plan from 1970 to the prsent.

134. All bank records of Local 6A, the District Council or any associated Benefit Plan from 1970 to the present.

135. All documents, books and records relating to any business transactions, assets, finances, or expenses of Local 6A, the District Council or any associated Benefit Plan from 1970 to the present.

136. All documents relating in any way to any of the allegations in the Complaint in this action.

137. All documents relating to the severance bonuses which Ralph Scopo received when he resigned as President and Business Manager of the District Council.

138. All documents relating to any other severance bonuses which other past or present officers, auditors or trustees of Local 6A, the District Council or any associated Benefit Plan have received upon their resignation or retirement at any point from 1960 to the present.

139. All documents relating to any severance plan of Local 6A, the District Council or any associated Benefit Plan in existence at any point from 1960 to the present.

140. All documents relating to any prior criminal arrest or conviction records of any past or present officers, auditors, trustees, members, employees or beneficiaries of Local 6A, the District Council or any associated Benefit Plan.

141. All documents relating in any way to any formal or informal complaint against or criticism of any past or present officers, auditors, employees or members of Local 6A or the District Council by union members or others from 1960 to the present.

142. All documents relating to any prior lawsuits in which Local 6A, the District Council or any of their past or present officers, auditors, employees or members have been involved from 1960 to the present.

143. All documents relating in any way to any formal or informal complaint against or criticism of any past or present officers, auditors, trustees, administrators, attorneys, accountants, employees or beneficiaries of any associated Benefit Plan of Local 6A or the District Council.

144. All documents relating to any prior lawsuits in which any associated Benefit Plan of Local 6A or the District Council or any of the Benefit Plan's past or present officers, auditors, trustees, administrators, attorneys, accountants, employees or beneficiaries have been involved from 1960 to the present.

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145. All documents relating in any way to any physical injury or threat of physical injury to or by any officers, auditors, members or employees of Local 6A or the District Council from 1960 to the present.

Dated: New York, New York

July 16, 1986

RUDOLPH W. GIULIANI
United States Attorney for the
Southern District of New York
Attorney for the Plaintiff
United States of America

By: Randy M. Mastro
RANDY M. MASTRO
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007
Telephone.: (212) 791-1993

TO: All Defense Counsel of Record
Gennaro Langella
Dominic Montemarano

APPENDIX F

Sample Consent Decrees

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
MAR 18 1987
S.D. OF N.Y.

- x

UNITED STATES OF AMERICA,

Plaintiff,

- v -

LOCAL 6A, et al.,

Defendants.

- x

JUDGMENT (ON CONSENT)
AGAINST DEFENDANT LOUIS FOCERI

86 Civ. 4819 (VLB)

WHEREAS plaintiff United States of America commenced this action on June 19, 1986, by filing a Summons and Complaint seeking equitable relief, including the appointment of a trustee to oversee the operations of Local 6A, Cement and Concrete Workers, Laborers International Union of North America (hereinafter, "Local 6A"), and the District Council of Cement and Concrete Workers, Laborers International Union of North America (hereinafter, the "District Council"), and injunctive relief against individual defendants, including defendant Louis Foceri, pursuant to the civil remedies provisions of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1962; and

WHEREAS the Summons and Complaint, the Amended Complaint and the Second Amended Complaint have been duly served;

It is hereby

ORDERED AND ADJUDGED that:

1. This Court has jurisdiction over the subject matter

of the action and has personal jurisdiction over defendant Louis Foceri.

2. Defendant Louis Foceri is permanently enjoined from ever again:

(a) participating in any way in the affairs of Local 6A, Cement and Concrete Workers, Laborers International Union of North America ("Local 6A"), the District Council of Cement and Concrete Workers, Laborers International Union of North America (the "District Council"), or any other labor organization or employee benefit plan, as defined in Title 29 of the United States Code;

(b) having any dealings with any officer, auditor or employee of Local 6A, the District Council or any other labor organization or employee benefit plan, about any matter which relates, directly or indirectly, to the affairs of Local 6A, the District Council or any other labor organization; and

(c) participating in any way in, or profiting from, any concrete construction business in the Southern District of New York or elsewhere.

3. Nothing herein shall be construed as affecting accrued or vested pension benefits or allocated severance benefits for defendant Louis Foceri, nor shall this judgment be construed as affecting Mr. Foceri's right to continue to participate in any insurance plan.

Dated: New York, New York

March 18, 1987

VINCENT L. BRODERICK
United States District Judge

CONSENTED TO:

RUDOLPH W. GIULIANI
United States Attorney for the
Southern District of New York
Attorney for Plaintiff United
States of America

By: _____
RANDY M. MASTRO
Assistant United States Attorney

RICHARD WARE LEVITT
Attorney for Defendant
Louis Foceri

By: _____
Richard Ware Levitt

By: _____
Louis Foceri

designees to such Funds the actions to be taken or already taken by the Board of Trustees of the affiliated Funds in accordance with the powers conferred in paragraph 8 hereof; and

WHEREAS, nothing contained herein shall authorize the forfeiture from any individual defendant of such union membership as is necessary to ensure his eligibility to receive present and future benefits and payments in accordance with paragraph 14 hereof; and

WHEREAS, nothing contained herein shall require or allow the defendants or the Trustee to act inconsistently with, or in nonconformance with, the Constitution of the Laborers International Union of North America, the Laborers Uniform District Council Constitution, or The Laborers Uniform Local Constitution in force and effect as of the date of entry of this judgment (hereinafter collectively referred to as "the Constitutions") or any federal labor statute, except as ordered by the Court;

NOW, THEREFORE, it is hereby ordered and adjudged in settlement of this action that:

1. This Court has jurisdiction over the subject matter of the action and has personal jurisdiction over the parties.

ONGOING STATUS OF THE INDIVIDUAL UNION DEFENDANTS

2. Defendants Ralph Scopo, Jr., Frank Bellino, Rudolph Napolitano and Carmine Montalbano are hereby permanently enjoined from seeking or holding any position as an officer, agent, representative, employee or laborer of Locals 6A, 18A, 20, and 1175, the District Council, the Laborers International Union of North America ("LIUNA"), any other local that is or hereafter becomes a part of

this union, or any affiliated Fund (including but not limited to the positions of Business Manager, President, Vice President, Secretary Treasurer, Officer, Executive Board member, Trustee, Business Agent, Shop Steward, union laborer and District Council designee on the Board of Trustees of any affiliated Fund), and from attending any Local 6A, 18A, 20, 1175, District Council or LIUNA meeting, and from voting in any Local 6A, 18A, 20, 1175, District Council or LIUNA election, and from participating in the control, management, governance, administration, internal operations or internal affairs of Local 6A, 18A, 20, 1175, the District Council, the Laborers International Union of North America, any other local that is or hereafter becomes a part of this union, or any affiliated Fund.

3. Subject to the qualification described below, defendants Joseph Scopo and Louis Gaeta are hereby permanently enjoined from seeking or holding any position as an officer, agent, representative, employee or laborer of Locals 6A, 18A, 20, and 1175, the District Council, the Laborers International Union of North America, any other local that is or hereafter becomes a part of this union, or any affiliated Fund (including but not limited to the position of Business Manager, President, Vice President, Secretary Treasurer, Officer, Executive Board member, Trustee, Business Agent, Shop Steward, union laborer and District Council designee on the Board of Trustees of any affiliated Fund), and from attending any Local 6A, 18A, 20, 1175, District Council or LIUNA meeting, and from voting in any Local 6A, 18A, 20, 1175, District Council or LIUNA election, and from participating in the control, management,

governance, administration, internal operations or internal affairs of Locals 6A, 18A, 20, 1175, the District Council, the Laborers International Union of North America, any other local that is or hereafter becomes a part of this union, or any affiliated Fund; provided, however, that after the date of entry of this judgment defendants Joseph Scopo and Louis Gaeta are eligible to work as union laborers until April 30, 1987, or such time as they find new employment, whichever occurs first.

4. Defendants Anthony Gugluizza, Peter Vitale, and Raimondo Graziano are hereby permanently enjoined from seeking or holding any position as an officer, agent, representative, or employee of Locals 6A, 18A, 20, and 1175, the District Council, the Laborers International Union of North America, any other local that is or hereafter becomes a part of this union, or any affiliated Fund (including but not limited to the positions of Business Manager, President, Vice President, Secretary-Treasurer, Officer, Executive Board member, Trustee, Business Agent, Shop Steward and District Council designee on the Board of Trustees of any affiliated Fund) or from participating in the control, management, governance, administration, internal operations or internal affairs of Locals 6A, 18A, 20, 1175, the District Council, the Laborers International Union of North America, any other local that is or hereafter becomes a part of this union, or any affiliated Fund; provided that each such defendant may serve as a union laborer in Local 6A or any other local of this union. Defendants Anthony Gugluizza, Peter Vitale, and Raimondo Graziano are hereby further permanently enjoined from attending any

Local 6A, 18A, 20, 1175, District Council or LIUNA meetings, and from voting in any Local 6A, 18A, 20, 1175, District Council or LIUNA elections.

5. Defendants Joseph Frangipane, Richard Tomaszewski and Christopher Furnari, Jr., are hereby permanently enjoined from seeking or holding any office, position or employment at, or from participating in the control, management, governance, administration, internal operations or internal affairs of Local 6A, the District Council or the Board of Trustees of any affiliated Fund. Defendants Joseph Frangipane, Richard Tomaszewski and Christopher Furnari, Jr., are hereby further permanently enjoined from attending any Local 6A or District Council meetings and from voting in any Local 6A or District Council elections.

6. From the date of entry of this judgment to the date of union elections to be held in 1990 under the supervision and control of the Trustee described in paragraph 8 hereof, defendants Thomas Hennessy, Ed Kelly and Jerry Miceli are hereby enjoined from seeking or holding any office, position or employment at, or from participating in any way in the control, management, governance, administration, internal operations or internal affairs of Local 6A, the District Council or the Board of Trustees of any affiliated Fund, except that defendant Jerry Miceli may serve as a Local 6A shop steward, subject to the powers of the Trustee as set forth in paragraph 8 herein. From the date of this Judgment until commencement of the 1990 election, defendants Thomas Hennessy, Ed Kelly and Jerry Miceli are hereby further enjoined from attending any Local 6A or District

Council meetings and from voting in any Local 6A or District Council elections. Nothing contained in this consent judgment shall preclude defendants Thomas Hennessy, Ed Kelly and Jerry Miceli from standing for election as an officer of Local 6A, any other local of this union, and to the District Council in the election to be held in 1990 and all elections thereafter, and from taking all lawful steps consistent with such candidacy.

7. From the date of entry of this judgment to the date of union elections to be held in 1987 under the supervision and control of the Trustee described in paragraph 8 hereof, defendants Anthony Napolitano, Sal Cascio, James Sturiano, Thomas Massa, Eugene McCarthy, Alex Costaldi, Michael Tierney, Thomas Madera and Maurice Foley may remain as officers of Local 6A and/or the District Council, subject to the powers of the Trustee as set forth in paragraph 8 hereof. Nothing contained in this consent judgment shall preclude each of the above from standing for election as an officer of Local 6A, any other local of this union, and the District Council in the election to be held in 1987, and all elections thereafter, subject to the powers of the Trustee described in paragraph 8 herein.

ROLE OF THE TRUSTEE

8. The Court shall appoint a Trustee to oversee the operations of Local 6A and the District Council. From the date of the Trustee's appointment to immediately following the union elections to be held in 1990 as described below, the Trustee shall be vested with the following authority:

(a) REMOVAL AUTHORITY -- The Trustee shall be empowered to remove from his or her position any officer, supervisor, agent, representative or employee of Local 6A or the District Council (including but not limited to the Business Manager, President, Vice President, Secretary-Treasurer, Officers, Executive Board members, Trustees, Business Agents, Shop Stewards, and District Council designees on the Board of Trustees of any affiliated Fund), and any person or firm retained by Local 6A or the District Council to perform services on behalf of Local 6A or the District Council, whenever the Trustee reasonably believes that the person or firm (i) has engaged in conduct which constitutes or furthers an act of racketeering or malfeasance, or (ii) has knowingly associated with any member or associate of the Colombo Organized Crime Family of La Cosa Nostra, the Genovese Organized Crime Family of La Cosa Nostra, the Gambino Organized Crime Family of La Cosa Nostra, the Lucchese Organized Crime Family of La Cosa Nostra, the Bonanno Organized Crime Family of La Cosa Nostra, the Commission of La Cosa Nostra, any other Organized Crime Family of La Cosa Nostra, any other criminal group or persons otherwise enjoined from participating in union affairs; or (iii) has violated any of the terms of this Judgment; provided further that association with the persons described in paragraphs 4, 5, and 6 hereof in the ordinary and regular course of union business shall not be

cause for removal. The Trustee's removal power shall also extend to Joseph Scopo and Louis Gaeta in their capacity as laborers for the same cause described above.

(1) From the date of entry of this judgment to immediately following the union elections to be held in the latter half of 1987, the Trustee shall be empowered to remove from his or her position any business agent or shop steward of Local 6A, or any District Council designee on the Board of Trustees of any affiliated Fund, whenever the Trustee in good faith believes that the person to be removed has acted contrary to the best interests of the union.

(2) As to defendants Anthony Napolitano, Sal Cascio, James Sturiano, Thomas Massa, Eugene McCarthy, Alex Costaldi, Michael Tierney, Thomas Madera and Maurice Foley, the Trustee's removal authority, if exercised, shall be based only (i) on some fact or circumstance other than any specific allegation set forth in the Complaint, Amended Complaint, Second Amended Complaint, affidavits or memoranda filed in this action, or (ii) on some act or acts of proscribed association as described above, occurring after the date of entry of this Judgment.

(3) From the date of entry of this judgment to immediately following the union elections to be held in the latter half of 1987, Anthony Napolitano, Sal

Cascio, Thomas Massa and James Sturiano (the "remaining 6A officers") shall occupy the positions of President, Vice President, Secretary-Treasurer and Business Manager of Local 6A, as they see fit, and shall function as the Executive Board of Local 6A, subject to the removal power of the Trustee as set forth in paragraph 8 hereof. If, during this period, the remaining 6A officers determine that additional officers are required to adequately perform the functions of the Executive Board of Local 6A, the remaining 6A officers may request the Trustee to appoint additional officers, and the remaining 6A officers may recommend specific persons to the Trustee for appointment as such additional officers. The Trustee shall be empowered to determine, and shall have the sole authority to determine, whether there is a need to appoint any additional officers for Local 6A and, if so, to appoint such officers; provided, however, that the Trustee may not appoint any such additional officer to a position occupied by any of the remaining 6A officers.

In any case where the Trustee exercises removal authority, the removal shall take place immediately. The Trustee, upon request of the officers of Local 6A or the District Council, shall, within three (3) days, advise those officers of the reason for any such removal. For a period

of up to fourteen (14) days after the Trustee's decision, the union officers shall have the right to seek review of the Trustee's decision by this Court.

(b) EXPENDITURES VETO -- The Trustee shall be empowered to veto any expenditure of union funds or gift of union property approved by any officers, agents, representatives or employees of Local 6A or the District Council whenever the Trustee reasonably believes that such expenditure or gift constitutes or furthers an act of racketeering or malfeasance. In any case where the Trustee exercises veto authority over a proposed union expenditure or gift, the expenditure or gift shall not be made. The Trustee, upon request of the officers of Local 6A or the District Council, shall, within three (3) days, advise those officers of the reasons for any such veto. For a period of up to fourteen (14) days after the Trustee's decision, the union officers shall have the right to seek review by this Court of the Trustee's decision. Consistent with his or her availability and the union's need to act in timely fashion, the Trustee may prescribe any reasonable mechanism or procedure to provide for his or her review of the expenditure or proposed expenditure of union funds or gifts of union property, and every officer, agent, representative or employee of Local 6A or the District Council shall comply with such mechanism and procedure.

(c) CONTRACT REVIEW -- The Trustee shall be empowered to prevent any officer, agent, representative, or employee of Local 6A or the District Council from entering into any contract on behalf of Local 6A or the District Council, except as excluded below, whenever the Trustee reasonably believes that such contract or proposed contract constitutes or furthers an act of racketeering or malfeasance. In any case where the Trustee exercises veto authority over a proposed contract, the contract shall not be executed. The Trustee, upon request of the officers of Local 6A or the District Council, shall, within three (3) days, advise those officers of the reasons for any such veto. For a period of up to fourteen (14) days after the Trustee's decision, the union officers shall have the right to seek review by this Court of the Trustee's decision. This veto authority does not extend to the Collective Bargaining Agreement with the Cement League, scheduled to be renegotiated by June 30, 1987, or to any other collective bargaining agreement that might thereafter be negotiated, or to any Agreement Book executed by and between the District Council and any contractor to the extent such is in strict compliance with the terms of the collective bargaining agreement, scheduled to be renegotiated by June 30, 1987, or any other collective bargaining agreement that might thereafter be negotiated.

(d) SOLICITATION OF NEW MEMBERS -- In accordance with the Constitutions and federal labor law, the Trustee shall have the right to solicit applications for new members of Local 6A. Any reasonable expenses incurred in connection with such solicitations (including advertising and mailing expenses) are to be borne by Local 6A. The Trustee shall be solely responsible for determining whether an applicant is accepted for union membership to Local 6A and shall have the right to reject an applicant for union membership whenever the Trustee reasonably believes that the applicant (i) engaged in past conduct which constituted or furthered an act of racketeering or malfeasance, or (ii) knowingly associated with any member or associate of the Colombo Organized Crime Family of La Cosa Nostra, The Genovese Organized Crime Family of La Cosa Nostra, the Gambino Organized Crime Family of La Cosa Nostra, The Bonanno Organized Crime Family of La Cosa Nostra, the Commission of La Cosa Nostra, any other Organized Crime Family of La Cosa Nostra, or any other criminal group or persons otherwise enjoined from participating in union affairs.

(e) REVIEW AUTHORITY -- In those areas in which the Trustee may not exercise removal or veto authority, the Trustee nevertheless is empowered to review all proposed actions to be taken by, on behalf of, or by representatives of, Local 6A or the District Council. Consistent with his

or her availability and the unions' need to act in timely fashion, the Trustee may prescribe any reasonable mechanism or procedure to implement this review, and every officer, agent, representative or employee of Local 6A or the District Council shall comply with such mechanism and procedure. To the extent that the action has not already been consummated prior to his or her review, the Trustee shall have the right to block or to stay a proposed action for a period of 72 hours, whenever the Trustee reasonably believes that the action constitutes or furthers an act of racketeering or malfeasance. During the 72 hour stay period, the Trustee shall have the right to seek review by this Court, including an application for an order to bar the action. In cases where the Trustee has not stayed an action, the Trustee shall have the right to seek appropriate review by this Court of the action in timely fashion, including an application for an order to bar the action.

(f) ACCESS TO INFORMATION -- The Trustee shall have the authority to take whatever steps are reasonable, lawful and necessary to insure that the Trustee is fully informed about activities at Local 6A and the District Council so that the Trustee can prevent acts of racketeering at Local 6A and the District Council. The Trustee shall have complete access to all of the books and records of Local 6A and the District Council. The Trustee shall further have the authority to attend all meetings of Local 6A or the

District Council or to invite anyone of his or her choosing to attend such meetings. The Trustee shall further have the authority to visit and to inspect any job site at which members of Locals 6A, 18A, 20 and 1175 are working as laborers or eligible to work as laborers. The Trustee shall further have the right upon notice to take and compel sworn depositions of any officer, member or employee of Local 6A or any officer or employee of the District Council. The Trustee shall have the authority to take and compel sworn depositions of third-party agents of Local 6A or the District Council, upon notice and application for cause made to this Court. The Trustee shall further have the authority to have an independent auditor (selected by the Trustee and paid by Local 6A and/or the District Council) perform an audit once a year of the books and records of Local 6A and the District Council. The Trustee shall be provided with office space at the Local 6A and District Council offices.

(g) REPORTS TO MEMBERSHIP -- The Trustee shall be empowered to distribute materials to the membership of Locals 6A, 18A, 20 and 1175 about the Trustee's activities whenever the Trustee wishes. Distribution of these materials shall be effected in a cost-effective manner, and the reasonable cost of distribution of these materials shall be borne by Local 6A and the District Council.

(h) BENEFIT FUND -- Once a month, the District Council designees on the Board of Trustees of any affiliated Fund are to report to the Trustee in a manner to be prescribed by the Trustee to apprise the Trustee of actions to be taken or actions already taken by the Board of Trustees of the Affiliated Fund.

(i) 1987 ELECTIONS -- At some point during the latter half of 1987, the Trustee shall conduct new elections for officers of Local 6A and the District Council. The Trustee shall have final authority to conduct these elections in whatever manner the Trustee deems appropriate, provided that any procedure or mechanism adopted by the Trustee is consistent with federal labor laws. In advance of the elections, the Trustee shall have the right to distribute materials about the elections to the membership of Local 6A and the constituent locals of the District Council. Distribution of these materials shall be effected in a cost-effective manner, and the reasonable cost of distribution of these materials shall be borne by Local 6A and the District Council. The Trustee shall also supervise the balloting process and certify the election results. The Trustee shall not be bound by the election procedures currently followed by Local 6A and the District Council, except insofar as such procedures are necessary to comply with federal labor laws. However, in conducting the District Council's elections, the Trustee will permit each

local (6A, 18A, 20 and 1175) to elect its own officers and delegates directly to the District Council, in accordance with the proportion of such officers and delegates presently on the District Council. The precise date of the elections shall be left to the Trustee's discretion. Defendants Anthony Napolitano, Sal Cascio, James Sturiano, Thomas Massa, Eugene McCarthy, Alex Costaldi, Michael Tierney, Thomas Madera and Maurice Foley shall stand for re-election at that time or else relinquish their Local 6A and/or District Council officerships immediately after the 1987 elections.

(j) 1990 ELECTIONS -- At some point during the latter half of 1990, the Trustee shall conduct elections for officers of Local 6A and the District Council. In conducting those 1990 elections, the Trustee shall have the same duties and powers described in subparagraph (i) above. The precise date of the 1990 elections shall be left to the Trustee's discretion.

(k) REPORTS TO THE COURT -- The Trustee shall report to the Court whenever the Trustee sees fit but, in any event, shall file with the Court a written report every three months about the Trustee's activities. A copy of all reports to the Court by the Trustee shall be served on plaintiff United States of America and the officers of Local 6A and the District Council.

(l) HIRING AUTHORITY -- Upon prior approval by the Court, after application to the Court, including the submission of a budget and cost estimates for such services, the Trustee shall have the authority to employ accountants, consultants, experts, investigators or any other personnel necessary to assist in the proper discharge of the Trustee's duties. Such personnel shall be paid by Local 6A and the District Council in direct proportion to their time and expenses incurred with respect to each respective union. Further, each union must bear these costs only to the extent that payment of such costs will not threaten the fiscal solvency of the union; provided that the officers of Local 6A and the District Council shall be obligated to take reasonable steps to budget for the expenses and compensation of the Trustee and any designees or persons hired by the Trustee.

(m) DESIGNEES -- The Trustee shall have the right to designate persons of the Trustee's choosing to act on the Trustee's behalf in performing any of the Trustee's duties, as outlined in subparagraphs (a) - (k) above. Whenever the Trustee wishes to designate a person to act on the Trustee's behalf, the Trustee shall give prior notice of the designation to plaintiff United States of America and the officers of Local 6A and the District Council, and those parties shall then have the right, within ten (10) days of receipt of notice, to seek review by this Court of

the designation, which shall take effect ten (10) days after receipt of notice.

(n) COMPENSATION AND EXPENSES -- The compensation and expenses of the Trustee (and any designees or persons hired by the Trustee) shall be paid by Local 6A and the District Council in the following manner: The Trustee shall personally file with the Court (and serve on plaintiff United States of America and the officers of Local 6A and the District Council) an application, including a fully itemized bill, with supporting materials, for the Trustee's services and expenses once every three months. The union officers shall then have seven (7) business days following receipt of the above in which to contest the bill before the Court. If the union officers fail to contest the Trustee's bill within that seven-day period, Local 6A and the District Council shall be obligated to pay the bill in direct proportion to the time and expenses incurred by the Trustee with respect to each respective union. Further, each union must bear these costs only to the extent that payment of such costs will not threaten the fiscal solvency of the union; provided that the officers of Local 6A and the District Council shall be obligated to take reasonable steps to budget for the expenses and compensation of the Trustee and any designees or persons hired by the Trustee.

(o) APPLICATIONS TO THE COURT -- Subject to paragraph 12 hereof, the Trustee may make any application to

the Court that the Trustee deems warranted. Upon making any application to the Court, the Trustee shall give prior notice to plaintiff United States of America and the officers of Local 6A and the District Council and shall serve any submissions filed with the Court on plaintiff United States of America and the officers of Local 6A and the District Council.

(p) TERM OF OFFICE -- Absent subsequent order of this Court extending the Trustee's term of office for cause, the Trustee's term of office shall expire immediately after the union elections in 1990.

9. Local 6A and the District Council shall purchase a policy of insurance in an appropriate amount to protect Local 6A, the District Council, the Trustee and persons acting on behalf of Local 6A, the District Council and the Trustee from personal liability for any of their actions on behalf of Local 6A, the District Council and the Trustee. If such insurance is not available, or if Local 6A and the District Council so elect, Local 6A and the District Council shall indemnify the Trustee and persons acting on behalf of the Trustee from any liability for conduct taken pursuant to this agreement. In addition, the Trustee and any persons designated or hired by the Trustee to act on behalf of the Trustee shall enjoy whatever exemptions from personal liability may exist under the law for union officers.

10. During the term of office of the Trustee, the officers of Local 6A and the District Council shall retain the right

to hire independent legal counsel to provide consultation and representation with respect to this litigation, to negotiate with the Trustee and to challenge the decisions and applications of the Trustee, and may use union funds to pay for such legal consultation and representation. The Trustee's removal powers and veto over union expenditures shall not apply to such legal consultation and representation.

GENERAL PROVISIONS

11. Nothing herein shall compel, or empower the Trustee to compel, any increase in the amount of dues checkoff from that amount presently withheld by contractors and remitted to the District Council ($.50 per hour worked by members of Local 6A, Local 18A, and Local 20). The distribution of the dues so collected by the District Council shall be made in accordance with the following proportions: 30% each to Locals 6A, 18A and 20, and 10% to the District Council.

12. The Trustee shall be bound by each provision of this Judgment and may not modify or amend or seek to modify or amend any provision in material respect without consent of the United States Department of Justice and the officers of Local 6A and the District Council (to the extent each respective union would be affected by the proposed modification or amendment). Nothing in this paragraph shall otherwise be construed as limiting the nature of the reports or applications the Trustee can make to the Court pursuant to paragraphs 8(k), 8(o) and 18 hereof.

13. During the term of the Trustee, the United States Department of Justice and any persons acting on its behalf shall be

authorized to review the books and records of Local 6A and the District Council once every six months, to hire an independent auditor to perform an audit of the books and records of Local 6A and the District Council once a year, and to visit and to inspect at any time job sites at which members of Locals 6A, 18A, 20 and 1175 are employed or are eligible for employment. Any costs or expenses incurred pursuant to this authorization shall be borne by the Department of Justice.

14. Nothing herein shall be construed as affecting accrued or vested pension benefits or allocated severance benefits for any of the union defendants. However, nothing herein shall preclude the United States Department of Labor from taking appropriate action in regard to the pension or severance rights of any of the union defendants in reliance on federal pension or labor laws.

15. The union defendants, as well as future union officers, representatives, members and employees of Local 6A and the District Council, are hereby permanently enjoined from extorting or soliciting monies or other things of value from employers, except solicitations of payments due and owing the District Council's welfare or pension funds pursuant to remitted dues or otherwise in accordance with the federal labor laws or collective bargaining agreements, and from receiving money or other things of value from employees (except as authorized by federal labor laws), and from extorting the rights of union members, and from embezzling or stealing union funds, and from threatening to use and using physical violence to intimidate employers and union members, and from

threatening to effect and effecting work stoppages or supply disruptions to intimidate employers and union members (except as authorized by federal labor laws or collective bargaining agreements), and from engaging in any acts of racketeering, and from knowingly associating with any member or associate of the Colombo Organized Crime Family of La Cosa Nostra, the Genovese Organized Crime Family of La Cosa Nostra, the Gambino Organized Crime Family of La Cosa Nostra, the Lucchese Organized Crime Family of La Cosa Nostra, the Bonanno Organized Crime Family of La Cosa Nostra, the Commission of La Cosa Nostra, any other Organized Crime Families of La Cosa Nostra or any other criminal group, or any person otherwise enjoined from participating in union affairs.

16. To the extent that such evidence would be otherwise admissible under the Federal Rules of Evidence, nothing herein shall be construed as a waiver by the United States of America or the United States Department of Labor of an offer of proof of any allegation contained in the Complaint, Amended Complaint, Second Amended Complaint, affidavits or memoranda filed in this action, in any subsequent proceeding which might lawfully be brought.

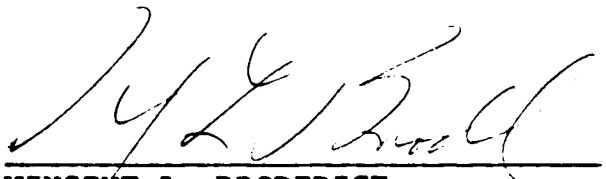
17. Nothing herein confers or creates, or is intended to confer or create, any enforceable right, claim or benefit on the part of any person or entity other than the parties hereto and the Trustee.

18. This Court shall retain jurisdiction to supervise the activities of the Trustee and to entertain any future applications by the Trustee or the parties. This Court shall have exclusive

jurisdiction to decide any and all issues relating to the Trustee's authority or conduct pursuant to this Judgment.

19. As used herein, the term, "knowingly associate," shall have the same meaning as that ascribed to that term in the context of federal parole revocation proceedings.

DATED: New York, New York
March 18, 1987



VINCENT L. BRODERICK
United States District Judge

CONSENTED TO:

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